

The Timely Resolution of Mutual Agreement Procedure Disputes – Secrets of Success?

In this article, the author considers the secrets of success regarding the timely resolution of mutual agreement procedure disputes via an examination of key factors exhibited by countries that have received OECD awards for this specific achievement.

“The importance of effective and efficient (i.e. timely) dispute resolution cannot be overstated.”¹

1. Introduction

1.1. The role of the mutual agreement procedure in tax treaties

The importance of the timely resolution of mutual agreement procedure (MAP) cases has long been recognized as a key feature of an efficient treaty dispute resolution mechanism. The MAP has been defined by the OECD as:

A means through which tax administrations consult to resolve disputes regarding the application of double tax conventions. 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.²

Under both the OECD Model and UN Model,³ taxpayers can request MAP assistance, irrespective of the domestic remedies provided for by the contracting states to a relevant tax treaty, where they have been subject to taxation that is not in accordance with the provisions of the tax treaty. In most cases, this means that the taxpayer is potentially subject to double taxation.

International double taxation has been defined by the OECD as arising:

when comparable taxes are imposed in two or more states on the same taxpayer in respect of the same taxable income or capital, e.g. where income is taxable in the source country and in the country of residence of the recipient of such income.⁴

One of the key functions of a tax treaty is to alleviate international double taxation.⁵ According to the OECD Model, the harmful effects of this:

on the exchange of goods and services and movements of capital, technology and persons are so well known that it is scarcely necessary to stress the importance of removing the obstacles that double taxation presents to the development of economic relations between countries.⁶

In similar fashion, the UN Model, which focuses on furthering the development aims of developing countries by providing legal and fiscal certainty, “forms part of the continuing international efforts aimed at eliminating double taxation.”⁷ The harmful effects of double taxation have been stated by the UN to be of particular concern to developing countries as:

The growth of investment flows between countries depends to a large extent on the prevailing investment climate. The prevention or elimination of international double taxation in respect of the same income – the effects of which are harmful to the exchange of goods and services and to the movement of capital and persons – constitutes a significant component of such a climate.⁸

In examining the role of tax treaties in facilitating foreign direct investment (FDI) in developing countries, Lang and Owens (2014) have emphasized the certainty provided to taxpayers that are multinational enterprises (MNEs) by double tax agreements not only with regard to the tax

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1. J.P. Owens, Mandatory Tax Arbitration: The Next Frontier Issue, 46 *Intertax*, 8/9, p. 610 (2018).
2. OECD *Glossary of Tax Terms*, available at www.oecd.org/ctp/glossaryoftaxterms.htm (accessed 3 Apr. 2023) [hereinafter *Glossary of Tax Terms*].

3. OECD *Model Tax Convention on Income and on Capital* art. 25 (21 Nov. 2017), *Treaties & Models IBFD, (Full Version)* also available at <http://dx.doi.org/10.1787/g2g972ee-en> (accessed 3 Apr. 2023) and UN *Model Double Taxation Convention between Developed and Developing Countries* art. 25 (1 Jan. 2021), *Treaties & Models IBFD* refer to the MAP provisions.
4. OECD, *Glossary of Tax Terms*, *supra* n. 2.
5. R. Deutsch, R.M. Arkwright & D. Chiew, *Principles and Practice of Double Taxation Agreements* para. 1.1.4. (BNA International 2008).
6. Introduction, para. 1 OECD *Model (2017) (Full Version)*.
7. Introduction, para. 1 UN *Model (2021)*.
8. *Id.*, at para. 5.

treatment of transactions, but also in relation to the clear administrative procedures provided, such as the availability of the MAP in the event of a dispute.⁹

The role of the MAP as a treaty dispute mechanism for the elimination of international double taxation in respect of taxpayers covered by the tax treaty should not be underestimated. Where a double taxation dispute remains unresolved, trust in the certainty, fairness and integrity of the international tax system is eroded, to the detriment of all stakeholders, whether in developed or developing countries. The free flow of global trade and investment is impeded by the inherent unfairness of taxing the same cross-border transaction or income twice. Accordingly, taxpayers and tax administrations alike have a vested interest in countering double taxation.

1.2. The importance of resolving MAP disputes expeditiously

Almost 40 years ago, the OECD Committee on Fiscal Affairs (CFA), the main forum for the OECD's discussions on both international and domestic tax issues, policy and administration, commented that: "An important difficulty in practice with the mutual agreement procedure seems to arise from... the amount of time taken generally before agreement is reached".¹⁰ At that time the OECD CFA concluded that there was no way of compelling the competent authorities (the treaty country representatives charged with dealing with a dispute arising from the application and/or interpretation of a tax treaty)¹¹ to reach a decision by a certain time, although there might be some scope for facilitating agreement and for speeding up the process.¹² In fact, as the competent authorities are only instructed to "endeavour" to resolve the case by mutual agreement under article 25 of the OECD Model and the UN Model (i.e. there is no compulsion to reach an agreement at all), some cases remain perpetually unresolved.

As problems with the resolution of MAP disputes persisted into the 21st century, the OECD published its Manual on Effective Mutual Agreement Procedures (MEMAP)^{13,14} in

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9. M. Lang & J.P. Owens, *The Role of Tax Treaties in Facilitating Development and Protecting the Tax Base*, WU International Taxation Research Paper Series No. 2014-03, V. The relevance of tax treaties for developing and emerging economies (A) Introduction, 30. Lang & Owens, *supra* state that there have been a number of empirical studies that attempt to determine the effect of tax treaties on FDI flows into developing countries, noting that there appears to be no consensus. Lang & Owens, *supra*, at p. 35, conclude that: "All studies acknowledge the difficulty in isolating the influence of treaties from other variables such as the economic and political environment. Surveys of business, however, do suggest that MNEs look both at the existence of a treaty and its provisions when making a decision on where to locate and that other things being equal, they will favour a country that has a good treaty network."
 10. OECD, *Transfer Pricing and Multinational Enterprises: Three Taxation Issues* ch. 4, para. 80 (1984), available at <http://dx.doi.org/10.1787/9789264167803-en> (accessed 3 Apr. 2023) [hereinafter *Transfer Pricing and Multinational Enterprises*].
 11. OECD, *Glossary of Tax Terms*, *supra* n. 2.
 12. OECD, *Transfer Pricing and Multinational Enterprises*, *supra* n. 10, ch. 4, at para. 71.
 13. OECD, *Improving the Process for Resolving International Tax Disputes* Preface (OECD 2004), version released for public comment on 27 July 2004.
 14. OECD, *Manual on Effective Mutual Agreement Procedures (MEMAP)* para. 3.9 (OECD 2007), Primary Sources IBFD [hereinafter MEMAP].

February 2007, as "part of a broader project to improve the functioning of existing international tax dispute procedures". Although the question of any compulsion to resolve MAP disputes within a certain timeframe did not arise as part of this project, a recommended timeline of two years (24 months) was proposed, as most competent authorities attempted to resolve a case within this time. The MEMAP acknowledged that timelines may be extended or contracted, depending on the facts and circumstances of a particular MAP case, with a complex case possibly exceeding this resolution time.¹⁵

With the advent of the OECD's Base Erosion and Profit Shifting (BEPS) Action Plan (the "BEPS Action Plan")¹⁶ in 2013, 15 Actions were devised to address weaknesses in the international tax rules:

to tackle tax avoidance, improve the coherence of international tax rules, ensure a more transparent tax environment and address the tax challenges arising from the digitalisation of the economy.¹⁷

One of these 15 measures was Action 14, entitled "Making Dispute Resolution Mechanisms More Effective", with one of the key issues being improving MAP resolution timelines. In this regard, the OECD currently acknowledges that despite the widespread existence of the MAP provision in tax treaties, "further effort is needed to ensure that access to MAP is available and that MAP cases are resolved within a reasonable timeframe and implemented quickly".¹⁸

Through the adoption of the Final Report on Action 14, published in 2015, countries agreed to change their approach to treaty dispute resolution through the adoption of a minimum standard the implementation of which would be monitored according to a peer-based mechanism. Countries agreed to be assessed in a two-stage process: at Stage 1 a country would be reviewed to evaluate whether it had complied with all the elements of the Action 14 Minimum Standard, and to identify any deficiencies, and Stage 2 would monitor and review measures taken to address the deficiencies identified at Stage 1 of the peer review.

The minimum standard would, inter alia, ensure "that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner".¹⁹ Resolving these cases within a given timeframe would mean that a measure of tax certainty would be provided to both taxpayers and tax administrations.

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15. *Id.* See also Annex I.
 16. OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD 2013), Primary Sources IBFD, also available at <http://dx.doi.org/10.1787/9789264202719-en> (accessed 3 Apr. 2023).
 17. OECD, *International collaboration to end tax avoidance* (OECD 2021) (web page) www.oecd.org/tax/beps/ (accessed 3 Apr. 2023).
 18. OECD, *Action 14 Mutual Agreement Procedure* (web page), available at www.oecd.org/tax/beps/beps-actions/action14/ (accessed 2 Mar. 2023) [hereinafter *Action 14 Mutual Agreement Procedure*].
 19. OECD, *Action 14 Final Report 2015 – Making Dispute Resolution Mechanisms More Effective* Executive Summary, p. 9. (OECD 2015), Primary Sources IBFD, also available at <http://dx.doi.org/10.1787/9789264241633-en> (3 Apr. 2023) [hereinafter *Action 14 Final Report* (2015)].

Element 1.3 of the Action 14 Minimum Standard states that not only should countries commit to a timely resolution of MAP cases, but, echoing the MEMAP, they should seek to resolve cases within an average timeframe of 24 months. Furthermore, a country's progress towards meeting this timeframe would be subject to periodic review on the basis of statistics supplied in accordance with an agreed reporting framework to be developed in coordination with the OECD's Forum on Tax Administration's (FTA's) MAP Forum (the "OECD FTA MAP Forum").²⁰

As the CFA is the key global body for setting international tax standards, its membership was opened up to interested countries and jurisdictions in 2016 to establish the Inclusive Framework on BEPS, currently totalling 142 countries.²¹ A prerequisite to joining the Inclusive Framework was a commitment to the comprehensive BEPS Package of 15 Actions, and to pay an annual BEPS Member fee.²² These interested countries and jurisdictions have subsequently worked with OECD member countries and G20 members to review and monitor the minimum standards for the entire BEPS package, including those under Action 14.

In October 2016, the OECD published the peer review documents for Action 14, including a MAP Statistics Reporting Framework.²³ This framework describes how pre-2016 MAP cases and post-2015 MAP cases are to be reported, the latter being MAP cases received by a competent authority from a taxpayer on or after 1 January 2016.²⁴ The definitions of terms and the rules for counting MAP cases in both of these categories is also provided by the agreed framework, thereby facilitating a harmonized approach to MAP reporting:

The MAP Statistics Reporting Framework reflects a collaborative approach for the resolution of MAP cases through the adoption of common timeline for both competent authorities to resolve MAP cases. With effect from reporting period 2016, Members will report MAP statistics based on common definitions of terms, common rules on counting of MAP cases; and common reporting of MAP outcomes based on different categories of outcomes.²⁵

This article examines the trajectory of MAP statistics since the inauguration of the OECD MAP Statistics Reporting Framework, focusing on the efficient resolution of MAP disputes (*see* section 2.). Drawing on the new MAP awards data, it considers the jurisdictions that have conclusively experienced success in managing tax treaty controversies in a timely way (*see* section 3.). In section 3., the article also analyses the factors that many or all of these juris-

dictions share in relation to their MAP programmes and draw conclusions on the impact of these factors on MAP resolution times. The article's conclusions are then set out (*see* section 4.).

2. The Trajectory of MAP Statistics since 2016

2.1. The introduction of the annual OECD Tax Certainty Day

The OECD first began compiling annual statistics on MAP caseloads of all the OECD member countries and of partner economies that agreed to provide such statistics in 2006.²⁶ These statistics were considerably expanded after 2016, when the members of the newly formed Inclusive Framework began reporting their MAP statistics under the agreed MAP Statistics Reporting Framework. The MAP statistics for 2016, released in November 2017, covered the 65 jurisdictions of the new Inclusive Framework,²⁷ and the MAP statistics for 2017, released in October 2018, covered the 87 jurisdictions of the rapidly expanding Inclusive Framework.²⁸

In recognition of the benefits of maintaining and enhancing tax certainty as a key "for promoting the investment, jobs and growth for the future",²⁹ the OECD FTA organized the first OECD Tax Certainty Day on 16 September 2019 in Paris. This event would bring together 53 advanced and emerging national tax administrations, 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".³⁰

At this event, the MAP statistics for 2018 were released, covering the now 89-member Inclusive Framework jurisdictions. The report examined the total MAP caseload for these combined jurisdictions, including the start inventory on 1 January 2018, the number of MAP cases started and closed during the year and the end inventory on 31 December 2018. Cases were divided into "transfer pricing" cases, which took on average 33 months to resolve, and "other" cases, which took on average 14 months to resolve. It was decided that the agreed reporting framework would make a distinction between "transfer pricing"³¹ cases (attribution and/or allocation cases), where the taxpayer's MAP request relates to either the

20. Id., at Element 1.3 and Element 1.5.

21. See OECD, *Members of the OECD/G20 Inclusive Framework on BEPS* Updated, December 2022, available at www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf (accessed 3 Apr. 2023).

22. OECD, *Background Brief Inclusive Framework on BEPS* Executive Summary, p. 5 (OECD 2017), available at www.oecd.org/tax/beps/background-brief-inclusive-framework-on-beps.pdf (3 Apr. 2023).

23. OECD, *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2016).

24. Id., MAP Statistics Reporting Framework III: MAP Statistics Reporting and Publication, at para. 15.

25. Id., II. MAP Process, at para. 8.

26. OECD, *Mutual Agreement Procedure Statistics 2006-2014* (OECD), available at www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm (accessed 3 Apr. 2023).

27. OECD, *Mutual Agreement Procedure Statistics for 2016* (web page) (OECD 2017), available at www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2016.htm (accessed 3 Apr. 2023).

28. OECD, *Mutual Agreement Procedure Statistics for 2017* (web page) (OECD), available at www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2017.htm (accessed 3 Apr. 2023).

29. *OECD Tax Certainty Day – 16 September 2019* (web page) (OECD 2019), available at www.oecd.org/tax/oecd-tax-certainty-day-16-september-2019.htm (accessed 3 Apr. 2023).

30. Id.

31. "A transfer price is the price charged by a company for goods, services or intangible property to a subsidiary or other related company. Abusive transfer pricing occurs when income and expenses are improperly allocated for the purpose of reducing taxable income." See OECD, *Glossary of Tax Terms*, *supra* n. 2.

attribution of profits to a permanent establishment (PE)³² referred to in article 7 of the OECD Model or the determination of profits between associated enterprises, referred to in article 9, and “other” cases, i.e. any MAP case that is not an attribution and/or allocation case.

MAP Statistics on caseload and inventory had now become available for each jurisdiction covered, including the average time each jurisdiction took to close a MAP case. For the first time, a jurisdiction’s MAP performance could be compared with another jurisdiction by means of an interactive comparative tool.³³

The second OECD Tax Certainty Day was held on 18 November 2020, against the backdrop of the economic effects of the COVID-19 pandemic, with the 2019 MAP statistics covering 105 jurisdictions, as more countries elected to join the Inclusive Framework.³⁴ Once again the number of MAP cases was increasing, with about seven MAP cases being started every day in 2019, with the number nearly doubling since 2016. MAP inventories were also increasing in a majority of jurisdictions, despite more cases being closed by competent authorities. With regard to the target timeframe to resolve disputes, “other” cases met the target by taking on average 22 months to conclude, but transfer pricing cases took 31 months on average to resolve, and, therefore, failed to meet the 24-month goal.³⁵

2.2. The introduction of the annual OECD MAP awards

The second OECD Tax Certainty Day introduced a new innovation. The MAP Awards were presented in recognition of the achievements of particular revenue authorities. Seven awards were bestowed in relation to four categories of achievements, with Category 1 awards relating to the average time to close MAP cases.³⁶ These awards effec-

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32. PE is a term “used in double taxation agreement (although it may also be used in national tax legislation) to refer to a situation where a non-resident entrepreneur is taxable in a country; that is, an enterprise in one country will not be liable to the income tax of the other country unless it has a “permanent establishment” thorough which it conducts business in that other country. Even if it has a PE, the income to be taxed will only be to the extent that it is “attributable” to the PE.” See OECD, *Glossary of Tax Terms*, supra n. 2.
33. OECD *Mutual Agreement Procedure Statistics for 2018* (web page) (OECD 2019), available at www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2018.htm (accessed 3 Apr. 2023).
34. *OECD releases 2019 MAP statistics and calls for stakeholder input on the BEPS Action 14 review on Tax Certainty Day*, 18 November 2020 (web page), available at www.oecd.org/tax/oecd-releases-2019-map-statistics-and-calls-for-stakeholder-input-on-the-beps-action-14-review-on-tax-certainty-day.htm (accessed 3 Apr. 2023).
35. Id.
36. OECD, *Mutual Agreement Procedure 2019 Awards* (OECD), available at www.oecd.org/tax/dispute/mutual-agreement-procedure-2019-awards.htm (accessed 21 Nov. 2022). The four categories were as follows: Category 1 – Average time to close MAP cases, encompassing Award 1 for transfer pricing cases, and Award 2 for other cases; Category 2 – Age of Inventory, Award 3; Category 3 – Caseload Management, Award 4 for Large Inventory (Jurisdictions with more than 100 cases left in 2019 end inventory), and Award 5 for Medium Inventory (Jurisdictions with more than 20 cases but fewer than 100 cases left in 2019 end inventory); and Category 4 – Cooperation, Award 6: Pairs of jurisdictions with more than 20 transfer pricing cases to resolve in 2019 (start inventory + cases started), and Award 7: Pairs of jurisdictions

tively notified the world of the importance of resolving treaty disputes swiftly.

There were two awards in this category. Award 1 was for transfer prices cases, with the methodology being the shortest average time to close MAP cases, in months, for transfer pricing cases received before or after 1 January 2016 (or 1 January of the year of joining the Inclusive Framework). Cases received before 1 January 2016, or 1 January of the year of joining, were counted according to each jurisdiction’s own methodology, while new cases used an agreed methodology using a common start date.

Jurisdictions closing more than 50 transfer pricing cases in 2019 were eligible for the Award 1 prize, with Japan and the United Kingdom emerging as joint winners, taking approximately 21 months to resolve cases. A similar methodology was employed for Category 1 Award 2, which related to “other” cases: the shortest average time to close MAP cases, in months, was scrutinized. In relation to “other” cases, jurisdictions that closed more than 20 “other” cases in 2019 were eligible for the Award 2 prize, and the winner was the United Kingdom, taking approximately six months on average to reach a resolution. In 2020, the United Kingdom emerged as a leadership nation in relation to the timely resolution of MAP disputes, resolving both transfer pricing and “other” cases swiftly.

The introduction of these inaugural MAP awards highlighted which countries were achieving the best MAP outcomes. It also provided an incentive for competent authorities to strive to meet the average target timeframe.

The third Tax Certainty Day was held on 22 November 2021, with the 2020 MAP statistics now covering 118 jurisdictions, as the membership of the Inclusive Framework continued to grow.³⁷ Access to the MAP had been available throughout the pandemic, with competent authorities facilitating this process by allowing taxpayers to file MAP requests digitally where previously this had not been possible.

Once again, the number of transfer pricing cases continued to rise, while the number of “other” cases decreased slightly when compared to the 2019 statistics. A slight decrease in the number of cases closed was attributed to the COVID-19 pandemic, although it was noted that:

Competent authorities were still able to close a significant number of cases in 2020, because they adapted to the changing landscape and replaced physical meetings with other forms of communication, including digital meetings, and prioritised simpler cases.³⁸

Around 75% of MAP cases concluded in 2020 fully resolved the issue for both transfer pricing and other cases, which meant that 25% were not fully resolved.

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- with more than 20 other MAP cases to resolve in 2019 (start inventory + cases started).
37. OECD, *New mutual agreement procedure statistics on the resolution of international tax disputes released on OECD Tax Certainty Day*, 22 November 2021 (web page), available at www.oecd.org/tax/beps/new-mutual-agreement-procedure-statistics-on-the-resolution-of-international-tax-disputes-released-on-oecd-tax-certainty-day.htm (accessed 3 Apr. 2023).
38. Id.

In relation to the critical issue of resolving MAP disputes within a 24-month timeframe, transfer pricing cases took longer overall to resolve in 2020, now taking approximately 35 months, while “other” cases were being more speedily resolved, taking on average 18 months. Certain delays in resolving disputes were attributed to the effects of the COVID-19 crisis, especially for more complex MAP cases, with the quality of communication with certain treaty partners being adversely affected.

The 2020 MAP Awards were now expanded to include eight awards in relation to five categories of achievement. The new category contained an award for most improved jurisdiction, looking at the jurisdiction with the greatest increases in number of cases closed with unilateral relief or full agreement, with an increase for both transfer pricing and other cases.³⁹

Switzerland was the 2020 winner of Category 1, Award 1 for closing its transfer pricing cases in approximately 20 months. Award 2 for closing “other” cases swiftly went to Australia, closing cases in approximately six months.

The fourth and latest Tax Certainty Day was held on 22 November 2022, with the 2021 MAP statistics covering 127 jurisdictions, as yet more countries joined the Inclusive Framework.⁴⁰ It was noted that significantly more transfer pricing and “other” cases were closed in 2021, which was attributed to:

the greater use of virtual meetings, the prioritisation of simpler cases and greater collaboration to solve common issues collectively that could be applied across multiple MAP cases.⁴¹

There are clearly benefits to greater collaboration for streamlining MAP cases and to uniformly resolving commonly occurring issues. The MEMAP had emphasized the need for competent authorities to take a consistent, unified approach to MAP cases. It had also warned against taking a position on issues that is influenced by revenue-seeking for a jurisdiction:

As part of a principled approach to MAP cases, competent authorities should be consistent and reciprocal in the positions they take and not change position on an issue from case to case, depending on which side of the issue produces the most revenue. Although a principled approach is paramount, where an agreement is not otherwise achievable, both competent authorities should look for appropriate opportunities for compromise in order to eliminate double taxation.⁴²

Increasing the frequency of virtual meetings would also be beneficial if they assist in facilitating collaboration. However, the prioritization of simpler cases may reflect an inclination to focus on issues that can be quickly resolved,

and to shelve more complex cases to achieve the 24-month target. This may not necessarily be the optimal pathway to improving the MAP function overall, as knowing that less straightforward cases would be relegated behind simpler cases may dissuade taxpayers with complex issues from utilizing the MAP. Overall resolution timeframes would be extended under this approach, and taxpayers with complex issues could face ongoing uncertainty. The comment has also been made to the effect that: “Action 14’s 24-month timeframe is a laudable goal, but it can also incentivise prioritising newer cases and letting older ones linger”.⁴³

The prioritization of newer or simpler cases may be contrasted with the concept of using a “triage” process in relation to tax disputes. Triage is a medical term, defined as:

a system whereby patients are evaluated and categorized according to the seriousness of their injuries or illnesses with a view to prioritizing treatment and other resources.⁴⁴

In relation to tax disputes, “triage” has been interpreted as referring to a system where matters can be escalated to staff “sufficiently senior or with the appropriate technical skills to resolve the dispute quickly and effectively”.⁴⁵ In this respect, it should be noted that applying such a system to disputes would not necessarily mean concentrating on larger taxpayers, as being caught up in a tax dispute may be quickly fatal in the case of a new or expanding business.⁴⁶ It is submitted that applying the principle of triage would be a fairer and more effective methodology for resolving all treaty disputes in the longer term, and would increase confidence in treaty dispute mechanisms.

The MEMAP also endorsed dealing swiftly with problematic MAP cases:

The early identification of problematic cases is crucial to concluding these cases in a reasonable period of time. Once identified, a specific case plan that addresses the critical issues can be developed and monitored. Allocating sufficient resources and experienced personnel to the most contentious cases may also improve the results in these cases.⁴⁷

In this regard, it should be noted that not all taxpayers that have experienced taxation that is not in accordance with the provisions of a tax treaty seek to resolve this issue under the MAP. In 2019, a Transfer Pricing and International Tax survey recording over 700 responses from senior tax and transfer pricing executives representing the Americas, Asia-Pacific and Europe revealed that these executives had little confidence in the MAP, with only 15% rating:

39. OECD, *2020 Mutual Agreement Procedure Awards* (web page) (OECD), available at <https://www.oecd.org/tax/dispute/mutual-agreement-procedure-awards-2020.htm> (accessed 3 Apr. 2023).

40. *OECD releases new mutual agreement procedure statistics and country awards on the resolution of international tax disputes*, 22 November 2022 (web page), available at www.oecd.org/tax/dispute/oecd-releases-new-mutual-agreement-procedure-statistics-and-country-awards-on-the-resolution-of-international-tax-disputes.htm (accessed 3 Apr. 2023) [hereinafter *OECD releases new mutual agreement procedure statistics and country awards on the resolution of international tax disputes*, 22 November 2022].

41. *Id.*

42. OECD, *MEMAP*, *supra* n. 14, at para. 1.3.1. Best Practice No. 3: Principled approach to resolution of cases.

43. M. Martin & T. Bettge, *Tax certainty: The march goes on*, Intl. Tax Rev. (16 Dec. 2021), available at www.internationaltaxreview.com/article/2a6aa1s2uhuklcp4lq80/tax-certainty-the-march-goes-on (accessed 3 Apr. 2023).

44. See the *Oxford Reference* definition of “triage”, available at www.oxfordreference.com/view/10.1093/oi/authority.20110803105644153#:~:text=n.,prioritizing%20treatment%20and%20other%20resources (accessed 3 Apr. 2023).

45. AU: The Parliament of the Commonwealth of Australia, Tax disputes, House of Representatives Standing Committee on Tax and Revenue, March 2015, Canberra, Recommendation 14.

46. *Id.*, at ch. 6. The governance framework, para. 6.105.

47. OECD, *MEMAP*, *supra* n. 14, at para. 3.5.1.

their confidence in the effectiveness of the process as either high (14%) or very high (1%) – with even lower scores for efficiency (including required resources and time to completion).⁴⁸

The lack of faith in this treaty dispute resolution tool was such that 20% of respondents stated that although they were experiencing double taxation, they had decided not to pursue a MAP action. Significantly, the main reason provided for not pursuing this relief was that they expected the process to be too lengthy.⁴⁹ Ensuring the timely resolution of MAP disputes is clearly necessary in raising the efficiency and effectiveness profile of treaty dispute resolution.

At the 2022 OECD Tax Certainty Day, jurisdictions noted that an increase in the number of MAP staff with greater experience was being reflected in the ability to resolve more cases.⁵⁰ Increasing not only the number of MAP personnel, but also retaining staff with an in-depth understanding of treaty dispute issues is undoubtedly a strategic development in the more efficient resolution of MAP cases.

The MEMAP had emphasized previously that the availability of sufficient skilled personnel would have a fundamental impact on the ability of a jurisdiction to operate an effective MAP program:

A competent authority sufficiently staffed at an appropriate level to address typical or anticipated workload will greatly enhance the efficient resolution of issues and cases. In addition to the appropriate number of staff, the appropriate skill set to address the issues at hand (for example, transfer pricing or treaty interpretation issues) would improve not only the qualitative output but also the efficacy of a MAP program.⁵¹

Accordingly, an increase in MAP resources is certainly a welcome development.

Fewer transfer pricing cases were opened in 2021, although there were an increasing number of “other” cases, and around 75% of all MAPs concluded fully resolved the issue. However, MAP cases still took a long time to resolve, with transfer pricing cases taking approximately 32 months while “other” cases took 21 months.⁵²

The end of 2021 saw an increase in MAP engagement with treaty partners. Specifically, the hybrid approach of the resumption of face-to-face meetings interspersed with virtual meetings, allowing jurisdictions to expedite MAP resolutions swiftly.

The Category 1 MAP award for the efforts by a competent authority to close transfer pricing cases in the shortest time went to Spain, closing cases on average within a

highly efficient 19.6-month timeframe in over 50 cases, the best result achieved in this category so far:⁵³

This award recognizes that Spain is the country in the world that has spent the least average time resolving its transfer pricing disputes. This, in relation to all the cases that our country concluded in 2021, which reached the record number of 142. And taking into account, in addition, that the result of the majority of those cases was positive; that is, they concluded with the elimination of double taxation.⁵⁴

The Category 2 MAP award winner was Ireland, closing more than 20 “other” cases within a five-month timeframe.⁵⁵ It is of significance that these were the swiftest MAP case resolution times since the MAP awards were inaugurated in 2020. This evidences the fact that competent authorities are taking the requirement to resolve MAP cases timeously very seriously, and are taking additional steps to ensure swifter dispute resolution.

3. The Countries Involved in the MAP Awards: The Secrets of Their Success

3.1. Introductory remarks

Although strenuous efforts have been made to facilitate swifter MAP processing times, it still takes a long time for MAP cases to reach a resolution. The latest statistics for 2021 reveal that on average, transfer pricing cases took an average of 32.5 months to resolve, while “other” cases took on average 20.7 months.⁵⁶

The MAP Awards for the timely resolution of MAP disputes over the last few years reveal that certain countries are making a concerted effort to resolve these controversies swiftly. How are these award-winning countries, namely Australia, Ireland, Japan, Spain, Switzerland and the United Kingdom, achieving this success? In examining the MAP process in these countries, certain significant factors would appear to be having an ongoing beneficial effect on the timely resolution of MAP cases. Interestingly, many of these factors were endorsed by the MEMAP over a decade ago. Where appropriate, the MEMAP is considered, therefore, in relation to these factors, along with peer review reports and current commentary from competent authority personnel in these countries.

3.2. Including arbitration in the MAP article of tax treaties

Action 14 of the BEPS Action Plan sought to address obstacles that prevent countries from resolving treaty dis-

48. EY, *How profound change, transparency and controversy are reshaping a critical business function 2019 Transfer Pricing and International Tax Survey*, p. 24.

49. Id.

50. OECD releases new mutual agreement procedure statistics and country awards on the resolution of international tax disputes, 22 November 2022, *supra* n. 40.

51. OECD, MEMAP, *supra* n. 14, at para. 5.2.

52. OECD releases new mutual agreement procedure statistics and country awards on the resolution of international tax disputes, 22 November 2022, *supra* n. 40.

53. OECD, *2021 Mutual Agreement Procedure Awards* (web page) (OECD), available at www.oecd.org/tax/dispute/mutual-agreement-procedure-awards.htm (accessed 19 Dec. 2022) [hereinafter *2021 Mutual Agreement Procedure Awards*].

54. ES: *Agencia Tributaria*, The Tax Agency’s handling of transfer pricing amicus curiae procedures 27 February 2023, available at https://sede.agenciatributaria.gob.es/Sede/en_gb/normativa-criterios-interpretativos/analisis/La_gestion_de_la_Agencia_Tributaria_en_los_procedimientos_amistosos_sobre_precios_de_transferencia.html (accessed 3 Apr. 2023) [hereinafter *Tax Agency’s handling of transfer pricing amicus curiae procedures*].

55. OECD, *2021 Mutual Agreement Procedure Awards*, *supra* n. 53.

56. OECD, *2021 Mutual Agreement Procedure Statistics* (web page) (OECD), available at www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm (accessed 3 Apr. 2023).

putes, including the absence of arbitration provisions in most tax treaties.⁵⁷ All six award-winning countries have a history of including arbitration clauses in the MAP article of their tax treaties, and they have further demonstrated a commitment to improving their dispute resolution mechanisms as signatories to the arbitration provisions included in the OECD's "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (the "Multilateral Instrument", or MLI)⁵⁸ of BEPS Action 15.⁵⁹ Furthermore, the MLI has been ratified and has entered into force in these six jurisdictions.⁶⁰

Having a mandatory arbitration clause in a tax treaty allows taxpayers to achieve a resolution of their treaty disputes, as the process is activated where competent authorities have endeavoured to resolve the case but fail to agree. The advantage to taxpayers is that "forcing the competent authorities to agree through arbitration provides taxpayers with certainty and will often eliminate double taxation to the benefit of taxpayers".⁶¹ Owens (2018) has commented that "it is clear that arbitration is "prophylactic" in nature i.e. it aims to ensure that cases are resolved through MAP to avoid having to move into arbitration".⁶² Hay (2009), a former competent authority of the United Kingdom, once famously referred to this process as "the nuclear deterrent", while other competent authorities have described it as the "alternative dispute resolution of last resort".⁶³ The consensus view appears to be that having a mandatory binding arbitration clause in a tax treaty will encourage the timely resolution of MAP cases.

Luis Ramón Jones Rodríguez, the Head of the International Tax Office, and Ascension Maldonado, MAP, AEAT, have confirmed that arbitration provisions in Spanish tax treaties had a salutary effect on MAP timelines. They commented that taking the step to progress a MAP dispute to arbitration after struggling to reach a mutual agreement with a treaty party was a carefully considered decision for the AEAT. They were aware that progressing to arbitration would involve a burden on fiscal resources, and were aware of the need to use these resources wisely. If the amount in question was relatively small, it would not make good economic sense to go to arbitration. Here, it would be more pragmatic and strategic to reach an agreement with the treaty partner, even where this might involve a greater concession than originally anticipated.

57. OECD, *Action 14 Final Report* (2015), *supra* n. 19, Introduction, at p. 11.
 58. OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017), Treaties & Models IBFD [hereinafter *Multilateral Instrument*, or MLI].
 59. OECD, *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting Status*, Status as of 16 December 2022 (OECD), available at www.oecd.org/tax/treaties/beeps-ml-signatories-and-parties.pdf (accessed 3 Apr. 2023).
 60. *Id.*
 61. B.J. Arnold, *The Scope of Arbitration under Tax Treaties*, in *International Arbitration in Tax Matters* (M. Lang et al. eds., IBFD 2016) para. 5.2.2., Books IBFD.
 62. Owens, *supra* n. 1, at p. 611.
 63. *Tax Analysts Roundtable on Alternative Dispute Resolution Process National Press Club Washington, D.C.* Friday, June 19, 2009, 24, Doc 2009-14496.

Dominic Vines, Delegated Competent Authority Team Leader at His Majesty's Revenue & Customs (HMRC) and Ahmed Dar, International Tax Specialist at HMRC concurred that the existence of an arbitration clause in tax treaties constituted a lever to persuade competent authorities to conclude a MAP dispute timeously. They commented that HMRC took the Article 25 obligations to resolve MAP cases of "taxation not in accordance with the provisions of this Convention" very seriously, especially the good faith requirement to endeavour to resolve the case in a fair and objective manner, which implied a certain flexibility of approach, rather than a rigid stance. Vines and Dar agreed that utilizing the MAP arbitration procedure was resource-intensive, and that the possibility of unilateral relief as part of the first stage of MAP should always be examined first. They expressed the view that it was helpful to have treaty arbitration tied to an international standard, as international commitments to time constraints are important.

From the Swiss perspective, Christoph Studer, Deputy Head of Section, Member of the Swiss Competent Authority Team, stated that the mere fact that both competent authority teams in a MAP dispute were aware of the possibility that a case could proceed to arbitration was of assistance in speedily resolving such cases.

3.3. Providing excellent MAP guidance for taxpayers

Providing excellent MAP guidance clearly facilitates the swifter processing of MAP cases, as taxpayers can access all the information they require timeously on a user-friendly basis. Such guidance needs to be regularly updated to ensure currency. The MEMAP advocated the transparency and simplicity of procedures for accessing and using the MAP, and recommended as a best practice that:

Competent authorities should, where appropriate, formulate and publicise domestic rules, guidelines and procedures concerning use of the MAP, and OECD Member countries should ensure that their country profiles on the OECD website including references to this information are kept up to date.⁶⁴

It further recommended that formalities should be kept to a minimum.⁶⁵ Ault (2013) has also stated unequivocally that "[f]or the MAP to function most effectively, it should be as transparent and accessible to the taxpayer as possible".⁶⁶

Special mention should be made of the clear and comprehensive MAP guidance provided by the AEAT. Spain has been assiduous in issuing rules, guidelines and procedures on the MAP process, with explanations on how

64. OECD, *MEMAP*, *supra* n. 14, at Best Practice No. 4, Transparency and simplicity of procedures for accessing and using the MAP, para. 14.
 65. *Id.*
 66. H. Ault, *Dispute Resolution: the Mutual Agreement Procedure, Papers on Selected Topics in Administration of Tax Treaties for Developing Countries* Paper No. 8-A, May 2013, para. 3.1 and UN, *Developing guidelines and procedures for taxpayer access to a MAP* para. 92 [hereinafter UN Guide].

it conducts that process in practice in *Real Decreto* (Royal Decree) 1974/2008 of 3 November 2008.⁶⁷

The 62-page non-official English version of the Guide to Mutual Agreement Procedures was last updated on 30 January 2023.⁶⁸ This Guide makes it clear that it “is not intended to replace the applicable legislation, but only to facilitate its understanding”.⁶⁹ The Guide is written in a user-friendly style, setting out information with the aim of assisting taxpayers, rather than simply conveying technical detail, and formalities are kept to a minimum, in line with the MEMAP and Ault recommendations.

It clearly sets out the following three types of MAP, depending on the applicable legislation, being those conducted under: (i) the applicable tax treaty; (ii) the EU Arbitration Convention (90/436),⁷⁰ and (iii) the Council Directive (EU) 2017/1852 of 10 October 2017.^{71,72} The Guide explains that in relation to transfer pricing and PE issues, competence solely and exclusively belongs to the Spanish Tax Agency/AEAT, while in all other cases, the *Dirección General de Tributos* (General Directorate for Taxation, or DGT), should be contacted.⁷³

A unique feature of the Spanish MAP guidance is that clear examples of different types of MAP cases are provided, along with a wealth of useful information, including the possibility of multilateral MAPs. Such information is particularly relevant to providing improved tax certainty to taxpayers, as emphasized by the OECD FTA MAP Forum in their 2019 Santiago Communique,⁷⁴ and demonstrated by the release of the OECD’s Manual on the Handling of Multilateral Mutual Agreement Procedures and Advance Pricing Arrangements in February 2023.⁷⁵

Japan’s 31-page English version of the MAP guidance has also been updated recently in June 2022.⁷⁶ The func-

tion of this guidance is to complement the Commissioner’s Directive on the Mutual Agreement Procedure,⁷⁷ and specifically refers to the recommendations of the BEPS Final Report on Action 14 to provide clear MAP guidance to taxpayers. The guidance is written in a “Question and Answer” format. The emphasis is on assisting taxpayers:

Basically the Q&A contains the same information as is included in the MAP guidance, but is written in easy-to-read language and in addition also contains information on the steps to be taken by taxpayers once a MAP agreement is reached between Japan’s competent authority and the other competent authority concerned.⁷⁸

The United Kingdom’s MAP guidance is also detailed and comprehensive. There is a Statement of Practice of 2018 relating to the MAP,⁷⁹ including MAP arbitration, and also an International Manual on Transfer Pricing, updated on 13 February 2023, which contains further information on the MAP,⁸⁰ including Multilateral Applications and Multi-Year Applications. Ireland has issued 21 pages of MAP guidance, which was last updated in December 2021.⁸¹ Switzerland’s factsheet on the MAP was updated in January 2023, but is comparatively short at five pages.⁸² It is available in German, French, Italian and English. Australia’s MAP guidance is available on the Australian Taxation Office (ATO) website.⁸³ Comprehensive guidance

67. ES: *Real Decreto* (Royal Decree) 1974/2008 of 3 November 2008. See also OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Spain (Stage 2): Inclusive Framework on BEPS: Action 14*, OECD/G20 Base Erosion and Profit Shifting Project para. 128 (OECD 2020), available at <https://doi.org/10.1787/8f4792bc-en> (accessed 3 Apr. 2023) [hereinafter *MAP Peer Review Report, Spain (Stage 2)*].

68. ES: *Agencia Tributaria*, Guide to Mutual Agreement Procedures, (web page), available at https://sede.agenciatributaria.gob.es/Sede/en_gb/ayuda/manuales-videos-folleto/manuales-practicos/guia-procedimientos-amistosos.html (accessed 3 Apr. 2023) [hereinafter *Guide to Mutual Agreement Procedures*].

69. *Id.*, at p. 1.

70. Convention 90/436/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, OJ C 160 (2005), Primary Sources IBFD [hereinafter *EU Arbitration Convention (90/436)*].

71. Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, Primary Sources IBFD.

72. *Agencia Tributaria*, Guide to Mutual Agreement Procedures, *supra* n. 68, at pp. 4-5.

73. *Id.*, at pp. 8-9.

74. OECD, *2019 FTA Santiago Communique* (OECD), available at www.oecd.org/tax/forum-on-tax-administration/events/forum-on-tax-administration-communique-2019.pdf (accessed 3 Apr. 2023).

75. OECD, *Manual on the Handling of Multilateral Mutual Agreement Procedures and Advance Pricing Arrangements*, OECD Forum on Tax Administration (OECD 2023), available at <https://doi.org/10.1787/f0cad7f3-en> (accessed 3 Apr. 2023).

76. JP: Office of the Mutual Agreement Procedure National Tax Agency, *Guidance for Taxpayers on the Mutual Agreement Procedure (Q&A)*, June 2022, available at www.nta.go.jp/english/03.pdf (accessed 3 Apr. 2023).

77. JP: Commissioner’s Directive on the Mutual Agreement Procedure (Administrative Guidelines), Document ID: Office of Mutual Agreement Procedures 1-11 International Operations Division 1-3 Taxation Management Division 9-5 Individual Taxation Division 8-5 Property Taxation Division 7-23 Corporation Taxation Division 9-4 Revenue Management and Processing Division 3-4 Collection Division 5-5 Large Enterprise Examination Division 12-32 Date: 25 June 2001 (The latest amendment: 4 February 2022) To: Regional Commissioners, Regional Taxation Bureaus Regional Commissioner, Okinawa Regional Taxation Office From: Commissioner, National Tax Agency, available at www.nta.go.jp/english/00.pdf (www.nta.go.jp/english/03.pdf) (accessed 3 Apr. 2023). This document is a translation of the original Japanese-language Directive. The Japanese original is the official text.

78. OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Japan (Stage 2): Inclusive Framework on BEPS: Action 14*, OECD/G20 Base Erosion and Profit Shifting Project para. 131 (OECD 2021), available at <https://doi.org/10.1787/e3d454fd-en> (accessed 3 Apr. 2023) [hereinafter *MAP Peer Review Report, Japan (Stage 2)*].

79. UK: HMRC, Policy paper, Statement of Practice 1 (2018), Published 20 February 2018, Mutual Agreement Procedure (MAP), available at www.gov.uk/government/publications/statement-of-practice-1-2018/statement-of-practice-1-2018 (accessed 3 Apr. 2023).

80. UK: HMRC Internal Manual, International Manual, Published 9 April 2016, Updated: 29 March 2023, available at www.gov.uk/hmrc-international-manuals/international-manual/intm423010 (accessed 3 Apr. 2023) [hereinafter *HMRC International Manual*].

81. IE: Guidelines for requesting Mutual Agreement Procedure (“MAP”) assistance in Ireland, Part 35-02-08 Document updated December 2021, available at www.revenue.ie/en/tax-professionals/tm/income-tax-capital-gains-tax-corporation-tax/part-35/35-02-08.pdf (accessed 3 Apr. 2023) [hereinafter *Guidelines for requesting Mutual Agreement Procedure (“MAP”) assistance in Ireland*].

82. CH: Federal Department of Finance FDF State Secretariat for International Finance SIF Tax Division State Secretariat for International Finance SIF Bundesgasse 3, CH-3003 Bern www.sif.admin.ch/41-12.1 \ COO Mutual agreement procedure, January 2023, available at www.sif.admin.ch/sif/en/home/bilateral-relations/tax-agreements/double-taxation-agreements/mutual-agreement-procedure.html (accessed 3 Apr. 2023).

83. AU: ATO Mutual agreement procedure (web page), available at www.ato.gov.au/Business/International-tax-for-business/In-detail/Mutual-agreement-procedure/ (accessed 3 Apr. 2023) [hereinafter *ATO Mutual agreement procedure*].

is provided, including MAP requests involving multiple jurisdictions.

3.4. Swifter case processing through taxpayer participation in the MAP process

While MAP discussions are traditionally viewed as a government-to-government process in which there is generally no direct taxpayer involvement, the MEMAP acknowledged that taxpayer participation and effort will have “a considerable effect on the time it takes to complete a case MEMAP”.⁸⁴ Without proper information and documentation provided by the taxpayer, competent authorities may be unable to resolve MAP disputes expeditiously. Consequently:

It is generally desirable for taxpayers to be given every reasonable opportunity to present the relevant facts and arguments to the competent authorities both in writing and orally.⁸⁵

The MEMAP recommended that, as a best practice, particularly in the case of fact-intensive, unusual or complex MAP disputes, it may be valuable for the taxpayer to present simultaneously to both competent authorities involved.⁸⁶

BEPS Action 14 also provided the option that:

Competent authorities could also agree as to when taxpayers would be permitted to make presentations to the competent authorities to clarify – and facilitate a shared understanding of – the relevant facts and issues.⁸⁷

The OECD’s FTA’s Multilateral Strategic Plan on Mutual Agreement Procedures (the “FTA Multilateral Strategic Plan”) has identified interaction with taxpayers as an area of process improvement, stating that it will “discuss ways to enhance and streamline the taxpayer’s involvement in case resolution”.⁸⁸ Perrou (2019) has identified the fact that a taxpayer “does not have any concrete rights as far as the procedure is concerned, other than the right to initiate it”, being a gap in the protection of the taxpayer rights in the treaty dispute resolution mechanism directly relating to the right to a fair trial. That author has called for an enhancement of the level of taxpayer participation.⁸⁹

Taxpayers in the United Kingdom have reported that the competent authority encouraged them to participate in the

process “such as substantiating positions with facts and figures as well as providing views on how the case should be resolved”.⁹⁰ A unique feature of the UK competent authority is that taxpayers have commented favourably in a MAP Per Review Report that they promote “open relationships with them prior to and during the MAP process”.⁹¹ HMRC specifically provides in its internal manual on the MAP for competent authorities to invite taxpayers to present additional information and clarification to assist in developing a common understanding of the facts of a particular case where they consider such participation useful.⁹² Vines and Dar have commented that the United Kingdom was agreeable to taxpayer presentations to both competent authorities, as this was a resource-efficient way to ensure they both received the same information.

Similarly, in relation to the taxpayer role in the MAP, Ireland provides that “where appropriate, taxpayers may be invited to make a presentation before the Competent Authorities to ensure a common understanding of the facts of a particular case”.⁹³ The Australian MAP guidance goes a step further, in providing that:

If the CAs in both jurisdictions agree, you may present arguments in support of your case to both jointly. If they do not agree, the Australian CA will give you an opportunity to present your arguments to the Australian CA.⁹⁴

3.5. A peer-endorsed pragmatic approach to dispute resolution by competent authorities

In examining competent authority perspectives on MAP disputes, the MEMAP commented that practical and pragmatic solutions to contentious MAP cases were regularly the result of compromise and concessions made by the parties involved, with a holistic approach being routinely used.⁹⁵ A key characteristic demonstrated by competent authority personnel in award-winning countries is a pragmatic approach to dispute resolution under the MAP. Significantly, the adoption of this outlook, i.e. “solving problems in a practical and sensible way rather than by having fixed ideas or theories”,⁹⁶ is a characteristic substantiated by the OECD, and by the peers of these countries in the MAP process.

In this context, the OECD states that, in relation to the UK competent authority it “uses a pragmatic approach to resolve MAP cases in an effective and efficient man-

84. OECD, MEMAP, *supra* n. 14, at para. 3.3.1. Providing information to the competent authorities.

85. *Id.*, at para. 3.3.2. Contributing to the MAP discussions.

86. *Id.*, at Best Practice No. 13: Taxpayer presentations to competent authorities.

87. OECD, *Public Discussion Draft BEPS Action 14: Make Dispute Resolution Mechanisms More Effective*, 18 December 2014 – 16 January 2015, *Option 21* – Improve competent authority co-operation, transparency and working relationships (OECD 2015), Primary Sources IBFD [hereinafter *Public Discussion Draft BEPS Action 14*].

88. OECD, Forum on Tax Administration Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous MAP Improvement, Relationships and Posture, para. 21 (OECD 2014), available at www.oecd.org/tax/forum-on-tax-administration/publications-and-products/map-strategic-plan.pdf (accessed 3 Apr. 2023), adopted at the Ninth Meeting of the Forum on Tax Administration 23-24 October 2014, Dublin, Ireland [hereinafter Forum on Tax Administration Multilateral Strategic Plan on Mutual Agreement Procedures].

89. K. Perrou, *Taxpayer Rights and Taxpayer Participation in Procedures Under the Dispute Resolution Directive*, 47 *Intertax* 8/9, pp. 715 and 716 (2019).

90. 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 para. 215 (OECD 2019), available at <https://doi.org/10.1787/33e2bf3d-en> (accessed 3 Apr. 2023) [hereinafter *MAP Peer Review Report, United Kingdom (Stage 2)*].

91. *Id.*

92. HMRC International Manual, *supra* n. 80.

93. Guidelines for requesting Mutual Agreement Procedure (“MAP”) assistance in Ireland, *supra* n. 81, at para. 2.2.2 Analysis of a MAP request and taxpayer role.

94. ATO Mutual Agreement Procedure, *supra* n. 83.

95. OECD, MEMAP, *supra* n. 14, at para. 3.6.

96. *Oxford Learners Dictionaries’* definition of the term “pragmatic: (web page), available at www.oxfordlearnersdictionaries.com/definition/american_english/pragmatic#:~:text=adjective,-adjective,pragmatic%20approach%20to%20management%20problems (accessed 3 Apr. 2023).

ner”,⁹⁷ while it describes the competent authorities of Switzerland,⁹⁸ Japan⁹⁹ and Ireland¹⁰⁰ as adopting the same approach. Australia is described as taking a “cooperative approach to resolve MAP cases”.¹⁰¹ In peer reviews, a peer of the United Kingdom specifically mentioned “appreciating and sharing their pragmatic orientation to resolve such cases”,¹⁰² while a peer of Japan has offered similar praise.¹⁰³

Generally, all of Ireland’s peers contributing to its peer reviews have indicated having “a good relationship with Ireland’s competent authority with regard to MAP”,¹⁰⁴ with almost all these peers reporting on Ireland’s “ease of contact and good cooperation in resolving disputes”.¹⁰⁵ Anthony Crewe, a Director in Transfer Pricing at Grant Thornton, Ireland, emphasized that the Irish tax authority was focused on being pragmatic and trying to be reasonable. He stated that Ireland had a rapidly growing economy, and was reliant on FDI and, therefore, was strategically aware that business confidence was linked to tax certainty. It was in Ireland’s best interests to make decisions both quickly and pragmatically.

The view from Spain is that:

it is necessary to always keep in mind the objective of MAPs: to eliminate double taxation, which means that the competent authorities have to reconcile the defense of technical arguments with the necessary pragmatism and flexibility, in order to maintain positions that allow agreements to be reached.¹⁰⁶

3.6. A fully independent, well-resourced and well-trained competent authority division

The MEMAP recommended that competent authorities remain largely independent from the field staff who were directly or even indirectly involved in the initial adjustment, in order to enhance the level of objectivity in MAP disputes. The field staff should not take part in the competent authority discussions, but, with the agreement of the competent authorities they might be asked to consult

97. OECD, *MAP Peer Review Report, United Kingdom (Stage 2)*, *supra* n. 90, at p. 11.

98. OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Switzerland (Stage 2): Inclusive Framework on BEPS: Action 14*, OECD/G20 Base Erosion and Profit Shifting Project, p. 11 (OECD 2019), available at <https://doi.org/10.1787/77ab98a6-en> (accessed 3 Apr. 2023) [hereinafter *MAP Peer Review Report, Switzerland (Stage 2)*].

99. OECD, *MAP Peer Review Report, Japan (Stage 2)*, *supra* n. 78.

100. OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Ireland (Stage 2): Inclusive Framework on BEPS: Action 14*, OECD/G20 Base Erosion and Profit Shifting Project p. 10 (OECD 2021), available at <https://doi.org/10.1787/e0c46317-en> (accessed 3 Apr. 2023) [hereinafter *MAP Peer Review Report, Ireland (Stage 2)*].

101. 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 Executive Summary p. 10 (OECD 2021), available at <https://doi.org/10.1787/da7fc990-en> (accessed 3 Apr. 2023) [hereinafter *MAP Peer Review Report, Australia (Stage 2)*].

102. OECD, *MAP Peer Review Report, United Kingdom (Stage 2)*, *supra* n. 90, at para. 219.

103. OECD, *MAP Peer Review Report, Japan (Stage 2)*, *supra* n. 78, at para. 240.

104. OECD, *MAP Peer Review Report, Ireland (Stage 2)*, *supra* n. 100, Introduction, at p. 14.

105. *Id.*

106. *Agencia Tributaria*, The Tax Agency’s handling of transfer pricing amicus curiae procedures, *supra* n. 54.

in relation to case details and answer factual queries.¹⁰⁷ Accordingly, the MEMAP recommended as a best practice that competent authorities maintain a level of autonomy from a tax administration’s audit function to enhance independence.¹⁰⁸

Ault also recommended the independence of the MAP and audit assessment functions:

It is important that the MAP function be independent and objective, with a focus on applying the convention and relieving international double taxation. This requires a somewhat different “mind-set” from an auditor whose principal job focus and relation to the taxpayer tend to be somewhat different. The criteria for assessing a successful MAP function should be in terms of the time to resolve cases, and the achievement of principled and objective outcomes and not, for example, the amount of revenue collected.¹⁰⁹

It should be noted that Ault highlighted the timely resolution of MAP cases as a prime indicator of success, along with principled and objective outcomes.

Moreover, it is no coincidence that the OECD has commented favourably on the independence of countries that have won awards for closing MAP awards timeously. The United Kingdom is commended for the fact that its competent authority operates fully independently from the audit function of the tax authorities,¹¹⁰ as is also the case in Switzerland,¹¹¹ Japan,¹¹² Ireland¹¹³ and Australia.¹¹⁴

In Spain, the Director of the Audit Department is officially assigned the competent authority function and formally entrusted with competence to enter into MAP agreements. Audits in Spain are conducted at the level of the regional and local tax offices, which operate fully independently from the Director of the Audit Department. The Director is not involved in the approval process of audits nor is the Director directly involved in the adjustment that is subject to the MAP proceedings.¹¹⁵

In relation to BEPS Action 14, the OECD has emphasized that the effectiveness of the MAP might not only be undermined where the competent authority is not sufficiently independent or evaluated on the basis of inappropriate performance indicators, but also where they are not provided with adequate resources.¹¹⁶ The MEMAP tied a competent authority’s ability to carry out MAP responsibilities in a timely, effective and efficient manner to having

107. OECD, MEMAP, *supra* n. 14, at para. 5.2. Structuring the Competent Authority Function.

108. *Id.*, at Best Practice No. 23: Independence and resources of a competent authority.

109. Ault, *supra* n. 66, at para. 3.4 Separation of the MAP and audit functions. (UN Guide, *supra* n. 66, at para. 62).

110. OECD, *MAP Peer Review Report, United Kingdom (Stage 2)*, *supra* n. 90, Executive Summary, at p. 11.

111. OECD, *MAP Peer Review Report, Switzerland (Stage 2)*, *supra* n. 98, Executive Summary, at p. 11.

112. OECD, *MAP Peer Review Report, Japan (Stage 2)*, *supra* n. 78, Introduction, at p. 10.

113. OECD, *MAP Peer Review Report, Ireland (Stage 2)*, *supra* n. 100, Introduction, at p. 10.

114. OECD, *MAP Peer Review Report, Australia (Stage 2)*, *supra* n. 101, Executive Summary, at p. 10.

115. OECD, *MAP Peer Review Report, Spain (Stage 2)*, *supra* n. 67, at para. 249.

116. OECD, *Public Discussion Draft BEPS Action 14*, *supra* n. 87, at para.12.

“sufficient resources, including qualified personnel, funding, training, and other program needs”.¹¹⁷ Having a well-funded competent authority is also likely to enhance independence and autonomy, enabling its mandate to be carried out:

without becoming overly reliant upon other areas of a tax administration which do not share the competent authorities’ primary objective, namely relieving double taxation.¹¹⁸

The BEPS Action 14 Minimum Standard for the resolution of treaty-related disputes provides that “Jurisdictions should ensure that adequate resources are provided to the MAP function”.¹¹⁹ Apart from being completely independent from the audit function, an attribute shared by the competent authority function of the award-winning countries is that they are well-resourced and well-trained. This is in line with the MEMAP recommendation regarding skill sets required by a competent authority to improve the efficacy of a MAP program.¹²⁰ The FTA Multilateral Strategic Plan concedes the importance of maintaining appropriate staffing levels to meet MAP workload demand. It also emphasizes that steps should be taken to train staff adequately to develop and enhance expertise, and to ensure that personnel practices do not result in the frequent turnover of staff.¹²¹

Jones and Maldonado stressed the advantages of having a specialist, well-staffed area to deal with transfer pricing cases. There is the International Tax Office, a directorate within the AEAT that is responsible for dealing with MAP attribution and/or allocation issues, while “other” MAP cases are dealt with by the DGT (a directorate within the Spanish *Ministerio de Hacienda y Función Pública* (Ministry of Finance)). They commented that, before this tax specialization for transfer pricing cases was instituted, there had been tension between generalists and specialists. This new specialization has resulted in a MAP team that understands international commitments, that MAPs do not create precedents, and that there can be no perfect and/or exact answer, ensuring a pragmatic and flexible attitude. Nine full-time equivalent (FTE) staff members deal with transfer pricing cases, and they undergo a six-month training course, including training on performing a comparability analysis, the valuation of intangibles, cash pooling and loan valuations. Continuous training on current international tax issues is also reported to be provided to the International Tax Office.¹²²

The UK competent authority function is also divided into specialist teams. There is a Transfer Pricing Team dealing with transfer pricing and profit attribution to PEs (a team

of approximately 30 people, although these have policy functions as well as a MAP function), a Tax Treaty Team dealing with issues such as corporate residence and withholding tax (17 individuals, 12 involved in developing and maintaining policy, while five people handle MAP cases independently of the members providing policy), and a specialized personal tax team (four people with responsibility for, inter alia, handling MAP cases).¹²³ Training is considered to be very important, with personnel generally having great experience in dealing with international tax issues (such as being an auditor with knowledge of dealing with transfer pricing issues). Less experienced personnel follow an internal training programme, and are supervised and trained by experienced colleagues.¹²⁴

Ireland’s competent authority is delegated within the tax administration to the International Tax Division, and the following two teams are responsible for handling MAP cases: (i) the Transfer Pricing Branch consisting of 15 people (dealing with attribution/allocation case and Advance Pricing Agreements (APAs)); and (ii) the Tax Treaties Branch, consisting of four people (dealing with “other” MAP cases).¹²⁵ Both teams “have significant experience in the areas of transfer pricing, international tax, economics, law and accountancy”.¹²⁶ While internal training is provided, there is also the possibility of attending external training.¹²⁷

The competent authority function in Japan is performed by the Office of Mutual Agreement Procedures, which has the competence to deal with both attribution and/or allocation cases and “other” cases.¹²⁸ The MAP office is organized into eleven sections, nine of which are involved in handling MAP and APA cases.¹²⁹ Again, there is an emphasis on training, with employees of the MAP office being provided with training on both basic knowledge on international tax issues as well as advanced expertise by the National Tax College.¹³⁰ Japan’s focus on implementing a well-resourced competent authority division is reflected in the fact that the number of MAP staff more than doubled between 2007 and 2019 to 2020.¹³¹

In Australia, the competent authority function is assigned to the Commissioner of Taxation, with this function being delegated to the ATO. There is an APA/MAP Program Management Unit (PMU) within the Public Groups and International (PGI) of the ATO to manage the competent authority function, staffed by 12 people, three of whom are authorized to exercise the competent authority function.¹³² There is also a “competent authority network” of

117. OECD, *MEMAP*, *supra* n. 14, at Best Practice No. 23: Independence and resources of a competent authority.
 118. *Id.*
 119. OECD, *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project C. Resolution of MAP cases – Elements of the minimum standard, para. 16, C.3 (OECD 2023).
 120. OECD, *MEMAP*, *supra* n. 14, at para. 5.2. Structuring the Competent Authority Function.
 121. *Forum on Tax Administration Multilateral Strategic Plan on Mutual Agreement Procedures*, *supra* n. 88.
 122. OECD, *MAP Peer Review Report, Spain (Stage 2)*, *supra* n. 67, at para. 206.

123. OECD, *MAP Peer Review Report, United Kingdom (Stage 2)*, *supra* n. 90, at para. 197.
 124. *Id.*, at para. 198.
 125. OECD, *MAP Peer Review Report, Ireland (Stage 2)*, *supra* n. 100, at para. 187.
 126. *Id.*, at para. 188.
 127. *Id.*
 128. OECD, *MAP Peer Review Report, Japan (Stage 2)*, *supra* n. 78, at para. 202.
 129. *Id.*, at para. 203.
 130. *Id.*, at para. 205.
 131. *Id.*, at para. 204.
 132. OECD, *MAP Peer Review Report, Australia (Stage 2)*, *supra* n. 101, at para. 204.

14 staff empowered to act as the competent authority. Training is provided to new staff, and, significantly, from 2015 onwards, conferences are organized with advisory firms and academics “to solicit input regarding the work of the PMU and to consider where improvements could be made”.¹³³ These conferences provide valuable objective external feedback.

Switzerland’s competent authority function is delegated to the State Secretariat for International Finance, responsible for dealing with MAPs and APAs.¹³⁴ There are two teams, one dealing with attribution and/or allocation cases and APAs (nine persons) and a second team handling “other” MAP cases (seven persons), as well as negotiating tax treaties. Studer, a Member of the Swiss Competent Authority Team regarding transfer pricing cases, commented that although the team was well organized, more resources were required. This is in line with a comment from a peer that although Switzerland’s competent authority has shown great efforts in finding ways to resolve a MAP and has adequate resources in place for the MAP function, “the number of cases per case handler is high”.¹³⁵

3.7. Positive, collaborative peer relationships between competent authorities

The MEMAP stated that the competent authority function requires sufficient human resources in the form of skilled personnel, in addition to financial resources to pay for translations and travel and/or accommodation costs for face-to-face meetings with other competent authorities.¹³⁶ Other resources, such as access to company databases, industry data and foreign laws were also necessary for obligations under the tax treaty to be met, but it was human resources which were likely “to have the most fundamental impact on the Contracting State’s ability to operate an effective MAP program”.¹³⁷

Ultimately, the MAP function takes place between people undertaking the role of competent authority, and the OECD’s FTA Multilateral Strategic Plan acknowledges the critical role that relationships and posture play in ensuring the timely resolution of MAP cases:

The success of mutual agreement procedures critically depends on strong, collegial relationships, grounded in mutual trust, between and among competent authorities around the world.¹³⁸

In relation to this posture, the FTA Multilateral Strategic Plan has this to say:

Relationships based on mutual trust should encourage competent authorities to adopt the appropriate posture at the MAP table, a posture based on bona fide behaviour that facilitates the achievement of principled solutions as quickly as possible. Interactions between competent authorities should result in principle-based resolution processes in which mutual satisfaction is

achieved and not in tactic-laden negotiation processes in which winners and losers are identified. Practices such as withholding information, ignoring principles to achieve highly favourable results, or delaying or avoiding attempts to find mutually acceptable solutions should have no place at the MAP table.¹³⁹

There is strong support from the award-winning competent authorities for positive, collaborative relationships being a key factor in the timely resolution of MAP cases. In relation to Ireland, Aisling Dooley, formerly of the Tax Treaties Branch, International Tax Division, commented that:

The key to Ireland’s success in the swift resolution of other cases can be attributed to our strong collaborative working relationships with our treaty partners, ensuring the Irish Competent Authority is well-resourced and the dedication and commitment of the team to resolve MAP cases in a timely manner.¹⁴⁰

Crewe referred to Ireland’s competent authority being highly motivated to be seen as a good collaborative partner in the international commercial sphere, and, therefore, being very responsive, pragmatic and speedy in MAP dealings (and exercising the renowned Irish charm!). These comments are supported by ten of Ireland’s peers commenting on their productive relationship with Ireland, considering its competent authority “professional, competent, and very easy to get in contact with”.¹⁴¹

In relation to the resolution of MAP cases, many peers reported positive experiences with Switzerland’s competent authority, with one peer mentioning the ability to work collaboratively to reach solutions in a practical and principled manner being a benefit. This peer also referred to Switzerland’s competent authority demonstrating flexibility and creativity in addressing challenging technical and procedural issues.¹⁴²

Australia’s peers have also commented favourably on the positive and constructive experience they have had with the competent authority, some finding its staff to be “competent, productive, flexible, efficient and cooperative”.¹⁴³ Ms Gloria Cassimatis, Director, APA/MAP PMU, commented that “It is primarily the collaborative teamwork that is exhibited both internally and with our counter treaty partners that allow us to run our cases smoothly”, and noting that a factor contributing to Australia’s success is that it takes “a fair and reasonable approach when engaging with our treaty partners to resolve double taxation”.¹⁴⁴

Peers have commented on their good working relationship with the UK competent authority, whether their MAP caseload with them is large or small. The competent authority is responsive to communication, and the officers responsible for handling MAP cases are easily identifiable as contact details are provided to the competent authorities of treaty partners. All peers reported that:

133. Id., at para. 206.

134. OECD, *MAP Peer Review Report, Switzerland (Stage 2)*, supra n. 98, at para. 184.

135. Id., at para. 202.

136. OECD, *MEMAP*, supra n. 14, at para. 5.2. Structuring the Competent Authority Function.

137. Id.

138. *Forum on Tax Administration Multilateral Strategic Plan on Mutual Agreement Procedures*, supra n. 88, at para. 15.

139. Id., at para. 16.

140. E-mail to the author of 9 December 2022.

141. OECD, *MAP Peer Review Report, Ireland (Stage 2)*, supra n. 100, at para. 201.

142. OECD, *MAP Peer Review Report, Switzerland (Stage 2)*, supra n. 98, at para. 202.

143. OECD, *MAP Peer Review Report, Australia (Stage 2)*, supra n. 101, at para. 223.

144. E-mail to the author of 16 December 2022.

the United Kingdom's competent authority is co-operative, constructive and solution-oriented, and also has the intent to resolve cases in a timely, effective and principled manner. This even when from a formal or material perspective differences of views exist on how to resolve a MAP case.¹⁴⁵

Peers have also been generally positive about the cooperative nature of Japan's competent authority, in relation to the resolution of MAP cases.¹⁴⁶ Mr Nobuhiro Tsunoda, former Director of the Office of Mutual Agreement Procedures at the National Tax Agency, has commented that the most important reason for Japan's MAP success is in its relationship with the United States competent authority, as they have a long history of MAP and bilateral APA discussions, and the two authorities understand each other very well. Another MAP expert from Japan has emphasized that peer relationships vary from country to country, but Japan has established a good understanding with Australia and the United States. Japan's competent authority was described by a peer as "very responsive in its communications and extremely cooperative to deal with", while another referred to "very competent, very efficient and solution-oriented".¹⁴⁷

Peers with an extensive MAP relationship with Spain have provided mixed input on their experience with Spain in the resolution of MAP cases, although most input was positive.¹⁴⁸ It is interesting to note that negative input related mainly to delays and lack of sufficient meetings, and date back to 2020. As Spain achieved the shortest turnaround time to date for any jurisdiction resolving over 50 transfer pricing cases by the end of 2021, it is worth noting the current attitude to resolving MAP cases. From the point of view of Spain's competent authority:

Amicable procedures are processed and negotiated by people, so the human element is essential. The training and specialization of the team of friendly procedures in Spain and the good understanding with the teams of other Administrations allows reaching agreements in very reasonable terms.¹⁴⁹

It was further emphasized how important it was to have the right people, with the right experience, knowledge and attitude on the team. Competent authority staff have to be good at meeting with other people, to be flexible and have the ability to create a climate of trust. Without the right people, it would not be possible to close cases in the future, as the MAP team often dealt with difficult cases where the positions of the respective competent authorities could be far apart. The necessity of support for the competent authority function was highlighted, along the need to "take care of the team".

3.8. The need for frequent meetings between competent authorities

The MEMAP originally advocated for face-to-face meetings, as these "may allow for a more open discussion and collegial approach and perhaps a more relaxed environment",¹⁵⁰ which, in turn, would facilitate a more unified and mutually satisfactory approach to problem solving. Meeting in person indicated a commitment on the part of competent authorities leading to MAP timelines being actively progressed. In seeking to ensure that cases are resolved once they are in the MAP, in relation to BEPS Action 14, the OECD also recommended a commitment to face-to-face meetings between competent authorities, as these would assist in advancing a case "by triggering bilateral focus and preparation".¹⁵¹

The ability to hold frequent meetings with competent authority counterparts in treaty jurisdictions is inextricably linked to tax authorities having access to sufficient resources. During the COVID-19 pandemic, physical meetings were replaced with other forms of communication, including digital meetings. However, many award-winning competent authorities now emphasize the importance of face-to-face meetings.

The Japanese competent authority has always expressed a strong preference for face-to-face meetings, with the National Tax Authority (NTA) clearly stating that:

the Competent Authorities recognize that face-to-face conferences are often the most useful means by which to resolve a MAP case, and should conduct face-to-face conferences involving their analysts whenever possible and practical.¹⁵²

In this context, a peer recently emphasized:

that although most cases it has with Japan are complex with substantial amounts at stake, for all cases a solution can be found during face-to-face meetings, albeit that for some cases two meetings are necessary.¹⁵³

Peers have reported favourably on the frequency of meetings with the United Kingdom's competent authority, with one reporting that in addition to two face-to-face meetings, in which a certain number of MAP cases were discussed and closed with agreement "the respective competent authorities are in constant contact with each other by email and conference calls, inter alia to prepare for coming meetings".¹⁵⁴ Another peer with a strong MAP relationship with the United Kingdom stated that it "particularly valued the high volume of communications via (encrypted) emails, teleconferencing and face-to-face meetings",¹⁵⁵ as it was of the view that this helps to achieve

145. OECD, *MAP Peer Review Report, United Kingdom (Stage 2)*, *supra* n. 90, at para. 212.

146. OECD, *MAP Peer Review Report, Japan (Stage 2)*, *supra* n. 78, at paras. 230 to 232.

147. *Id.*, at para. 240.

148. OECD, *MAP Peer Review Report, Spain (Stage 2)*, *supra* n. 67, at para. 222.

149. *Agencia Tributaria*, The Tax Agency's handling of transfer pricing amicus curiae procedures, *supra* n. 54.

150. OECD, *MEMAP*, *supra* n. 14, at Best Practice No. 15: Face-to-face meetings between competent authorities.

151. OECD, *Public Discussion Draft BEPS Action 14*, *supra* n. 87, at Option 21.

152. NTA, *MAP Operational Guidance for Member Countries of the Pacific Association of Tax Administrators (PATA)*, Section 4 Evaluation and Negotiation of a MAP case, para. 9, available at www.nta.go.jp/english/taxes/others/02.htm (accessed 3 Apr. 2023).

153. OECD, *MAP Peer Review Report, Japan (Stage 2)*, *supra* n. 78, at para. 240.

154. OECD, *MAP Peer Review Report, United Kingdom (Stage 2)*, *supra* n. 90, at para. 218.

155. *Id.*

a timely resolution of MAP cases. Vines and Dar stated that there had been recent pressure to reinvigorate face-to-face meetings, which had now been restored. There was still a place for virtual meetings to progress MAP issues, but these often culminated in face-to-face meetings where the issues were actually resolved.

Peers have also pointed out the ease of setting up face-to-face meetings with Ireland's competent authority to resolve MAP cases.¹⁵⁶ While peers were generally positive about meetings with Australia's competent authority, a few offered suggestions for improvement. Two expressed a desire for more frequent communication, with one suggesting that timeliness would be improved by both jurisdictions making every effort to increase the frequency of teleconferences, due to time differences. Australia's geographical position was acknowledged by the other peer, who noted that more face-to-face meetings would assist in swifter MAP resolutions, stating that "the high costs and time requirements involved with especially long-distance travel pose a challenge to such efforts".¹⁵⁷

Competent authorities being in different time zones can present a challenge to MAP meetings. With regard to Switzerland, a peer has suggested that both jurisdictions alleviate this challenge by increasing "the frequency of teleconferences to supplement face-to-face meetings... to further improve upon the timeframes for resolving MAP cases".¹⁵⁸ Another peer competent authority indicated its willingness to finding ways to foster consistent, direct communications with Switzerland's competent authority to strive towards even greater efficiency in resolving MAP cases.¹⁵⁹ Studer also emphasized the importance of having face-to-face meetings with competent authorities, stating that online meetings were not the same, especially where complex issues were involved.

Peers for whom Spain is an important MAP partner reported contacts with Spain's competent authority to be easy, frequent, and involve "a mix of correspondence, such as letters, e-mails, conference calls and face-to-face meetings".¹⁶⁰ Face-to-face meetings are scheduled regularly, at least once or twice a year. These meetings are praised for their positive outcomes, with one peer remarking that:

in June 2017 a face-to-face meeting was organised, during which eight cases were discussed, resulting in two cases being resolved with full elimination of double taxation.¹⁶¹

This is borne out by current commentary from Spain's competent authority on this issue:

The negotiating rounds are planned more than a year in advance, holding one or even two annual meetings with our main partners: the European countries and the United States. Since the end of 2021 they are back in person. As a result of the pandemic,

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156. OECD, *MAP Peer Review Report, Ireland (Stage 2)*, *supra* n. 100, at para. 202.
157. OECD, *MAP Peer Review Report, Australia (Stage 2)*, *supra* n. 101, at para. 223.
158. OECD, *MAP Peer Review Report, Switzerland (Stage 2)*, *supra* n. 98, at para. 204.
159. *Id.*
160. OECD, *MAP Peer Review Report, Spain (Stage 2)*, *supra* n. 67, at para. 223.
161. *Id.*

videoconference meetings have become widespread, allowing, in some cases, to replace the face-to-face meetings and, at other times, to prepare them or close "fringes".¹⁶²

Jones and Maldonado pointed out that videoconferences were very important for preliminary meetings, but it was also essential that face-to-face meetings continue, as these create a relationship built on trust, which accelerates positive outcomes for MAP case resolution.

It should be noted that Spain has reported that its competent authority is paid travelling expenses to conduct face-to-face meetings with other competent authorities where necessary, and there have never been budget constraints that limited conducting face-to-face meetings.¹⁶³ A strategic focus on resourcing face-to-face meetings has undoubtedly contributed to Spain's enviable world record in resolving transfer pricing disputes timeously.

4. Conclusions

Many of the award-winning countries have demonstrated a marked improvement in their MAP dispute resolution times since they were peer reviewed under Stage 2 of BEPS Action 14, indicating their recognition of the value to both tax administrations and taxpayers of resolving MAP cases in 24 months or less, and their determination to meet this Action 14 Minimum Standard. The fact that Inclusive Framework countries were subject to MAP peer review, and will continue to be subject to this process, is clearly having a positive result on MAP outcomes.¹⁶⁴ The MAP peer review process can be regarded as exerting peer pressure on countries to meet this agreed targeted timeframe. It is worth noting in this regard that:

Peer pressure does not take the form of legally binding acts, as sanctions or other enforcement mechanisms. Instead, it is a means of soft persuasion which can become an important driving force to stimulate the state to change, achieve goals and meet standards.¹⁶⁵

The 2021 MAP awards reflect the swiftest MAP resolution times for transfer pricing cases, with Spain taking on average a 19.6-month timeframe to resolve over 50 cases.¹⁶⁶ This represents a considerable improvement, as in 2017 and 2018 completion times for such cases by the Spanish competent authority took 34.42 months and 31.04 months on average respectively.¹⁶⁷ Peers had voiced criticism at this time as to the length of time taken by the

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162. *Agencia Tributaria*, The Tax Agency's handling of transfer pricing amicus curiae procedures, *supra* n. 54.
163. OECD, *MAP Peer Review Report, Spain (Stage 2)*, *supra* n. 67, at para. 208.
164. The OECD has stated that: "Following the conclusion of the initial peer review process in 2022, a continued monitoring process has started whereby all Inclusive Framework member jurisdictions will be subject to continued monitoring: jurisdictions that have "meaningful MAP experience" would undergo a full peer review process from 2024 once every four years and those that do not would undergo a two-stage simplified peer review process from 2023". See OECD, *Action 14 Mutual Agreement Procedure*, *supra* n. 18.
165. F. Pagani, *Peer Review as a Tool for Co-Operation and Change*, 11 *Afr. Sec. Rev.* 4, p. 16 (2002).
166. OECD, *2021 Mutual Agreement Procedure Awards*, *supra* n. 53.
167. OECD, *MAP Peer Review Report, Spain (Stage 2)*, *supra* n. 67, at para. 217.

competent authority to resolve MAP cases.¹⁶⁸ In a remarkable turnaround, the average time taken by Spain's competent authority to close over 50 transfer pricing cases fell by approximately 43% between 2017 and 2021, an impressive improvement on processing times.

In a similar vein, Ireland's 2021 average MAP resolution time for "other" cases is currently the swiftest to date, closing more than 20 of these cases within a five-month timeframe.¹⁶⁹ However, the 2018 MAP statistics reveal that Ireland took on average 38.37 months to resolve "other" cases for that year. It is of course necessary to bear in mind that average MAP completion times may fluctuate from year to year, especially if there are complex or outlier cases, or a sharp increase or fall in caseload, but it would appear that a general trend towards a reduction in completion times can be observed.

The six award-winning countries for MAP completion times have all demonstrated innovative approaches to resolving treaty disputes on an ongoing basis, and a dedication to continuous improvement of MAP completion times, providing taxpayers in these jurisdictions with greater certainty. Vines and Dar confirmed the UK competent authority's holistic commitment to other time-friendly innovations such as granting protective MAP requests, which protect the taxpayer against missing time limits.¹⁷⁰ Such a claim may protect taxpayer rights, keeping any applicable periods of limitations open until a claim is resolved or withdrawn. Likewise, the ATO advises taxpayers that:

If you want to pursue domestic remedies in either jurisdiction but are concerned about exceeding the time limits for presenting a MAP case, you can lodge a protective MAP request.¹⁷¹

Jones and Maldonado advised that certainty is provided to taxpayers by inviting them, very often, to enter into an APA at the resolution of a MAP case, thereby using the outcome of the MAP process to provide ongoing certainty to taxpayers. Spain's competent authority resources were consequently utilized in a strategic way, endorsing the so-called "360-degree treatment of MAP cases". Vines and Dar stated that the UK competent authority was also

168. Id., at para. 192.

169. OECD, *2021 Mutual Agreement Procedure Awards*, supra n. 53.

170. HMRC Internal Manual, published 9 April 2016, updated 29 March 2023 INTM423050 - Transfer Pricing: Methodologies: Mutual Agreement Procedure: The MAP process continued, Protective MAP Requests, provides, available at www.gov.uk/hmrc-internal-manuals/international-manual/intm423050 (accessed 3 Apr. 2023): "As the UK Competent Authority will admit a case into MAP prior to first notification, it may be that at the time the case is presented it is not certain that a transfer pricing adjustment will be made or that double taxation will arise. In particular, it may not be possible to gauge the quantum of profits that might be subject to double taxation. In such cases, the UK Competent Authority may well defer MAP discussions with the Competent Authority of the treaty partner until it becomes clear that such discussions are likely to prove meaningful and effective in avoiding double taxation."

171. ATO, Mutual agreement procedure, Interaction of other dispute resolution processes with the MAP process, available at www.ato.gov.au/business/international-tax-for-business/in-detail/mutual-agreement-procedure/ (accessed 3 Apr. 2023) provides that if the request meets the requirements of MAP, the ATO will accept the MAP request and advise the other jurisdiction of the request. Competent authority negotiations will then be deferred until the taxpayer informs them that they would like the case to progress.

sympathetic to using a successful MAP resolution as a springboard into considering an APA for future years.

Studer said that Switzerland strategically used competent authority resources to roll a successful MAP into an APA, and often these were negotiated at the same time, although there is no formal Swiss APA programme.¹⁷² These innovations all contribute to effective and efficient treaty dispute resolution.

While many jurisdictions remain on the fence with regard to including mandatory binding arbitration in the MAP article of their tax treaties, Owens has commented that:

there are signs that the international community now accepts that in today's economic environment, more needs to be done to provide greater tax certainty to both business and government and that some form of arbitration may be one way to achieve this.¹⁷³

Mandatory binding arbitration not only provides certainty, but also appears to have a beneficial influence on MAP timelines.

Providing clear, up-to-date, comprehensive MAP guidance, ideally in multiple languages, is valuable in ensuring a more efficient MAP process. It may be strategic, from the perspective of obtaining a timely MAP resolution, for this guidance to outline the competent authority position on the extent of taxpayer participation in the process. Such participation may include the ability to make presentations to both competent authorities, as well as the encouragement of the provision of taxpayer proposals for the resolution of the MAP case. This may be of benefit in allowing competent authorities to swiftly reach a common understanding of the issues at hand.

In addition, the important role played by independent, well-resourced and well-trained competent authorities maintaining a pragmatic approach to dispute resolution in collaborative peer relationships through frequent meetings cannot be over-emphasized. Both the OECD and the UN have highlighted the need for the development and maintenance of good personal relationships with foreign competent authorities in facilitating the dispute resolution process, with the UN noting that:

The dialogue between competent authorities, and ultimately the resolution of MAP cases, will be greatly facilitated if both sides show flexibility, fairness, openness and the ability to appreciate their counterpart's point of view, which are key ingredients for developing a relationship based on trust.¹⁷⁴

The OECD's FTA Multilateral Strategic Plan places the MAP "at the very heart of the global tax environment",¹⁷⁵ and maintains a commitment to process improvements,

172. OECD, *Switzerland Transfer Pricing Country Profile* (July 2021), *Administrative Approaches to Avoiding and Resolving Disputes* (OECD 2021), available at www.oecd.org/tax/transfer-pricing/transfer-pricing-country-profile-switzerland.pdf (accessed 3 Apr. 2023) states that: "Switzerland does not have a formal APA programme in place but it is authorised to enter into bilateral or multilateral APAs on the basis of the MAP provision in the applicable tax treaty".

173. Owens, supra n. 1, at p. 618.

174. *United Nations Handbook on the Avoidance and Resolution of Tax Disputes* Chapter 4 The Mutual Agreement Procedure, para. 193 (UN 2021).

175. *Forum on Tax Administration Multilateral Strategic Plan on Mutual Agreement Procedures*, supra n. 88, at para. 4.

vowing to “seek and pursue new multilateral initiatives to streamline and enhance processes to expedite MAP case resolution”.¹⁷⁶ There can be no doubt that the timely resolution of MAP cases is a key feature of this controversy management mechanism, and that the award-winning jurisdictions have made significant efforts in this regard, collegially sharing the secrets of their success.

Finally, the FTA Multilateral Strategic Plan refers to the importance of the responsibilities of individual compe-

176. Id., at para.18

tent authorities in the global tax environment, but it also underscores that a corollary of the symbiotic essence of the MAP is that it cannot succeed without interdependent harmonious collaborative competent authority relationships. In other words:

Tax conventions charge competent authorities with responsibility individually, but competent authorities must act in concert to address the problems they face together.¹⁷⁷

177. Id., at para. 30.



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