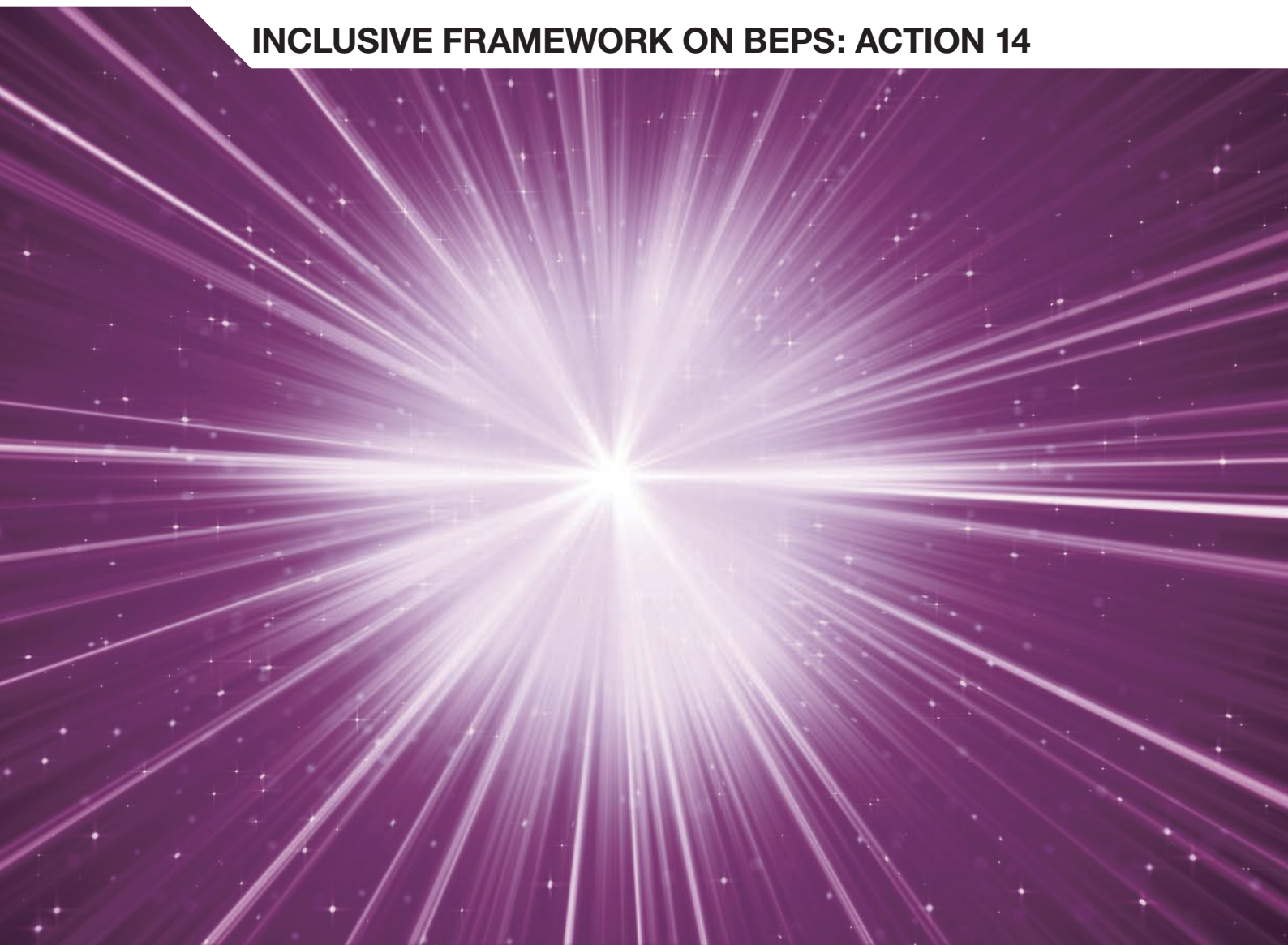


**OECD/G20 Base Erosion and Profit Shifting  
Project**



# **Making Dispute Resolution More Effective – MAP Peer Review Report, United States (Stage 2)**

**INCLUSIVE FRAMEWORK ON BEPS: ACTION 14**





OECD/G20 Base Erosion and Profit Shifting Project

**Making Dispute  
Resolution More Effective  
– MAP Peer Review  
Report, United States  
(Stage 2)**

INCLUSIVE FRAMEWORK ON BEPS: ACTION 14

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## *Foreword*

The integration of national economies and markets has increased substantially in recent years, putting a strain on the international tax rules, which were designed more than a century ago. Weaknesses in the current rules create opportunities for base erosion and profit shifting (BEPS), requiring bold moves by policy makers to restore confidence in the system and ensure that profits are taxed where economic activities take place and value is created.

Following the release of the report *Addressing Base Erosion and Profit Shifting* in February 2013, OECD and G20 countries adopted a 15-point Action Plan to address BEPS in September 2013. The Action Plan identified 15 actions along three key pillars: introducing coherence in the domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency as well as certainty.

After two years of work, measures in response to the 15 actions were delivered to G20 Leaders in Antalya in November 2015. All the different outputs, including those delivered in an interim form in 2014, were consolidated into a comprehensive package. The BEPS package of measures represents the first substantial renovation of the international tax rules in almost a century. Once the new measures become applicable, it is expected that profits will be reported where the economic activities that generate them are carried out and where value is created. BEPS planning strategies that rely on outdated rules or on poorly co-ordinated domestic measures will be rendered ineffective.

Implementation is now the focus of this work. The BEPS package is designed to be implemented via changes in domestic law and practices, and in tax treaties. With the negotiation of a multilateral instrument (MLI) having been finalised in 2016 to facilitate the implementation of the treaty related BEPS measures, over 85 jurisdictions are covered by the MLI. The entry into force of the MLI on 1 July 2018 paves the way for swift implementation of the treaty related measures. OECD and G20 countries also agreed to continue to work together to ensure a consistent and co-ordinated implementation of the BEPS recommendations and to make the project more inclusive. Globalisation requires that global solutions and a global dialogue be established which go beyond OECD and G20 countries.

A better understanding of how the BEPS recommendations are implemented in practice could reduce misunderstandings and disputes between governments. Greater focus on implementation and tax administration should therefore be mutually beneficial to governments and business. Proposed improvements to data and analysis will help support ongoing evaluation of the quantitative impact of BEPS, as well as evaluating the impact of the countermeasures developed under the BEPS Project.

As a result, the OECD established the Inclusive Framework on BEPS, bringing all interested and committed countries and jurisdictions on an equal footing in the Committee on Fiscal Affairs and all its subsidiary bodies. The Inclusive Framework, which already

has more than 125 members, is monitoring and peer reviewing the implementation of the minimum standards as well as completing the work on standard setting to address BEPS issues. In addition to BEPS members, other international organisations and regional tax bodies are involved in the work of the Inclusive Framework, which also consults business and the civil society on its different work streams.

This report was approved by the Inclusive Framework on BEPS on 8 May 2019 and prepared for publication by the OECD Secretariat.

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*Abbreviations and acronyms*

<b>APA</b>	Advance Pricing Arrangement
<b>FTA</b>	Forum on Tax Administration
<b>MAP</b>	Mutual Agreement Procedure
<b>OECD</b>	Organisation for Economic Co-operation and Development



## Executive summary

The United States has a relatively large tax treaty network with over 50 tax treaties. It has an established MAP programme and has long-standing and large experience in resolving MAP cases. It has a very large MAP inventory, with a very large number of new cases submitted each year and almost 1 000 cases pending on 31 December 2017. Of these cases, almost 70% concern attribution/allocation cases. The outcome of the stage 1 peer review process was that overall the United States met most of the elements of the Action 14 Minimum Standard. Where it has deficiencies, the United States worked to address some of them, which has been monitored in stage 2 of the process. In this respect, the United States has solved some of the identified deficiencies.

All of the United States' tax treaties contain a provision relating to MAP. Those treaties generally follow paragraphs 1 through 3 of Article 25 of the OECD Model Tax Convention (OECD, 2017). Its treaty network is largely consistent with the requirements of the Action 14 Minimum Standard, whereby under 11 of these treaties taxpayers are already allowed to submit a MAP request to the competent authorities of either state in line with the new text of Article 25(1), first sentence, of the OECD Model Tax Convention, as amended by the Action 14 Final Report (OECD, 2015). However, not all treaties are consistent with the requirements of the Action 14 Minimum Standard, as:

- Approximately 33% of its treaties neither contain a provision stating that mutual agreements shall be implemented notwithstanding any time limits in domestic law (which is required under Article 25(2), second sentence) nor the alternative provisions for Article 9(1) and Article 7(2) to set a time limit for making transfer pricing adjustments.
- Approximately 25% of its treaties do not contain the equivalent of 25(2), first sentence, of the OECD Model Tax Convention, as, for example, the part of the sentence relating to providing for unilateral relief prior to the referral of the case to the bilateral phase of the MAP is missing.
- Approximately 25% of its treaties do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention stating that the competent authorities may consult together for the elimination of double taxation for cases not provided for in the tax treaty.

In order to be fully compliant with all four key areas of an effective dispute resolution mechanism under the Action 14 Minimum Standard, the United States needs to amend and update a certain number of its tax treaties. In this respect, the United States reported that it intends to implement the required elements under this standard in all its tax treaties and that it would conduct any ongoing or future negotiations with current or prospective treaty partners with a view to be compliant with the Action 14 Minimum Standard. The United States, however, has not put a plan in place to that effect and no actions were taken to bring, where necessary, the relevant treaties in line with the requirements of this standard. Taking this into account, negotiations need to be initiated without further delay for a considerable number of treaties to ensure compliance with this part of the Action 14 Minimum Standard.

The United States meets the Action 14 Minimum Standard concerning the prevention of disputes. It has in place a bilateral APA programme. This APA programme also enables taxpayers to request roll-back of bilateral APAs and such roll-backs are granted in practice.

The United States also meets the requirements regarding the availability and access to MAP under the Action 14 Minimum Standard. It provides access to MAP in all eligible cases. Furthermore, it has in place a documented notification and consultation process for those situations in which its competent authority considers the objection raised by taxpayers in a MAP request as not justified. It also has in place an internal statutory or administrative dispute settlement/resolution process that is independent from the audit and examination function and that can only be accessed through a request by the taxpayer. Where cases are resolved through that process access to MAP may be limited in the United States. In addition, the United States has extensive, clear and comprehensive guidance on the availability of MAP and on how it applies this procedure in practice. This guidance also specifies the effects of the internal statutory or administrative dispute settlement/resolution process on MAP, which is also clarified in the public guidance on this process.

Concerning the average time needed to close MAP cases, the MAP statistics for the United States for the years 2016-17 are as follows:

2016-17	Opening Inventory 1/1/2016	Cases started	Cases closed	End Inventory 31/12/2017	Average time to close cases (in months)*
Attribution/allocation cases	716	333	373	676	27.22
Other cases	256	155	104	307	27.00
<b>Total</b>	972	588	467	983	27.17

\*The average time taken for resolving MAP cases for post-2015 cases follows the MAP Statistics Reporting Framework. For computing the average time taken for resolving pre-2016 MAP cases, the United States used as a start date the date when the MAP request was received or notification was given by the other competent authority and as the end date the date of the closing letter to the taxpayer, or, where the case was only initiated with the treaty partner, the date of the closing letter to the other competent authority.

The number of cases the United States closed in 2016 or 2017 is approximately 79% of the number of all cases started in those years. Its MAP inventory as per 31 December 2017 almost slightly increased as compared to its inventory as per 1 January 2016. During these years, MAP cases were not closed on average within a timeframe of 24 months (which is the pursued average for closing MAP cases received on or after 1 January 2016), as the average time necessary was 27.17 months, which is almost the same average for both attribution/allocation cases and other cases. In the stage 1 peer review report, the United States was recommended to ensure that the available resources for the MAP function are adequately used in order to resolve MAP cases in a timely, effective and efficient manner. While recently the United States has taken several steps to increase the number of closed MAP cases and to reduce the average time needed to close such cases, and while the average time needed to close cases has decreased from 30.87 months to 27.12 months, the average is nevertheless above the pursued average of 24 months. In that regard, it should continue improving internal working procedures in order to make more adequate use of its available resources, such to be able to resolve MAP cases in a timely, efficient and effective manner. Furthermore, given the increase in the number of other MAP cases with around 20%, additional resources may be needed to cope with this increase and to ensure that these cases are resolved in a timely, effective and efficient manner.

Furthermore, the United States meets all of the other requirements under the Action 14 Minimum Standard in relation to the resolution of MAP cases. The United States' competent authority operates fully independently from the audit function of the tax authorities and adopts a pragmatic approach to resolve MAP cases in an effective and efficient manner. Its organisation is adequate and the performance indicators used are appropriate to perform the MAP function.

Lastly, the United States also meets the Action 14 Minimum Standard as regards the implementation of MAP agreements. The United States monitors implementation and no issues have surfaced throughout the peer review process.

## *References*

OECD (2017), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, <https://doi.org/10.1787/g2g972ee-en>.

OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264241633-en>.



## *Introduction*

### **Available mechanisms in the United States to resolve tax treaty-related disputes**

The United States has entered into 60 tax treaties on income (and/or capital), 58 of which are in force.<sup>1</sup> These 60 treaties apply to 68 jurisdictions.<sup>2</sup> All 60 treaties provide for a mutual agreement procedure for resolving disputes on the interpretation and application of the provisions of the tax treaty. In addition, four of these 60 treaties provide for a mandatory and binding arbitration procedure as a final stage to the mutual agreement procedure.<sup>3</sup> Furthermore, the United States has signed amendments to three existing treaties to incorporate a mandatory and binding arbitration procedure in the MAP article, although these amendments are not yet in force.<sup>4</sup>

Under the tax treaties the United States has entered into, the Secretary of the Treasury, or his delegate, is designated as the competent authority. The competent authority function with respect to the mutual agreement procedure is, pursuant to Delegation Order 4-12 (Rev. 3) of 7 September 2016, delegated to the Commissioner Large Business and International Division (“**LB&I**”) of the Internal Revenue Service (“**IRS**”).<sup>5</sup> In the United States the competent authority’s MAP function is performed by the following teams:<sup>6</sup>

- a. *Advance Pricing and Mutual Agreement Program (“APMA”)*: this team has primary responsibility for cases arising under the business profits and associated enterprises articles of the United States’ tax treaties. The APMA team also holds responsibility to handle requests for unilateral, bilateral or multilateral APAs.
- b. *Treaty Assistance and Interpretation Team (“TAIT”)*: this team has primary responsibility for cases concerning all other articles included in the United States’ tax treaties (i.e. residence status, application of the Limitation on Benefits article).<sup>7</sup> The TAIT team also holds responsibility for cases arising under tax treaties that concern estate and gift taxes.

The United States’ competent authority currently employs approximately 110 technical persons, of which approximately 85 work in the APMA team and 25 in the TAIT team.

The governance and administration of the mutual agreement procedure in the United States is published in Rev. Proc. 2015-40 (“**MAP guidance**”), which is available at:

<https://www.irs.gov/pub/irs-drop/rp-15-40.pdf>

### **Developments in the United States since 1 January 2017**

#### ***Developments relating to the tax treaty network***

In the stage 1 peer review report of the United States it is reflected that the United States signed new treaties with Hungary (2010), Chile (2010), Poland (2013) and Vietnam (2015), and amendments to existing treaties with Japan (2013), Luxembourg (2009),

Spain (2013), and Switzerland (2009). None of these treaties and amendments have yet entered into force. The amending protocols entered into with Japan, Spain, and Switzerland would incorporate a mandatory and binding arbitration provision to resolve MAP disputes under those treaties. With respect to these treaties and amendments, the United States reported that in January 2017 it officially reintroduced the tax treaties with Chile, Hungary and Poland to the Senate for ratification. When the Senate will not act by the end of 2018, a second reintroduction will be made in January 2019. The United States further reported that once progress is being made with respect to these treaties, it will be considered what further steps will be taken with respect to the tax treaty with Viet Nam.

Further to the above, the United States reported that it is still in the process of evaluating how to implement the changes reflected in Article 25 of the US Model Tax Convention with a view to bring tax treaties in line with the relevant elements of the Action 14 Minimum Standard. In that regard, it also reported that it continues to study what modifications to existing treaties are appropriate in light of that standard and that it works internally on a plan that will take into account any changes to its tax treaties that are appropriate, including those necessary to bring treaties in line with the Action 14 Minimum Standard.

### ***Other developments***

The United States reported several developments regarding the Action 14 Minimum Standard. These concern:

- an update to APA guidance to include a draft APA
- the documentation of its notification/consultation process to be applied in those situations where the objection raised by a taxpayer in its MAP request is considered not to be justified
- changes to its domestic inventory management system to ensure an accurate reporting of MAP statistics, changes to standard correspondence templates
- A further review of each aspect of case development, negotiation practices and administrative procedures within the competent authority to ensure they facilitate the efficient, effective and timely resolution of MAP cases. Furthermore, there were specific developments at the level of the APMA and TAIT teams, such as promoting the use of “reference sets” of comparables for attribution/allocation cases with treaty partners, internal trainings on the MAP process and working with stakeholders within the IRS on the streamlining of fact-intensive cases. In addition, the United States’ competent authority also worked to improve their electronic case correspondence review and approval procedures and made more frequent use of communications via encrypted emails.
- Introduction of more detailed instructions by the TAIT team to the IRS for the implementation of MAP agreements, such to ensure a more timely implementation of these agreements.

## **Basis for the peer review process**

### ***Outline of the peer review process***

The peer review process entails an evaluation of the United States’ implementation of the Action 14 Minimum Standard through an analysis of its legal and administrative framework relating to the mutual agreement procedure, as governed by its tax treaties, domestic legislation and regulations, as well as its MAP programme guidance and the practical



application of that framework. The review process performed is desk-based and conducted through specific questionnaires completed by the United States, its peers and taxpayers.

The process consists of two stages: a peer review process (stage 1) and a peer monitoring process (stage 2). In stage 1, the United States' implementation of the Action 14 Minimum Standard as outlined above is evaluated, which has been reflected in a peer review report that has been adopted by the BEPS Inclusive Framework on 5 September 2017. This report identifies the strengths and shortcomings of the United States in relation to the implementation of this standard and provides for recommendations on how these shortcomings should be addressed. The stage 1 report is published on the website of the OECD.<sup>8</sup> Stage 2 is launched within one year upon the adoption of the peer review report by the BEPS Inclusive Framework through an update report by the United States. In this update report, the United States reflected (i) what steps it has already taken, or are to be taken, to address any of the shortcomings identified in the peer review report and (ii) any plans or changes to its legislative and/or administrative framework concerning the implementation of the Action 14 Minimum Standard. The update report forms the basis for the completion of the peer review process, which is reflected in the update to the stage 1 peer review report.

### ***Outline of the treaty analysis***

For the purpose of this report, in assessing whether the United States is compliant with the elements of the Action 14 Minimum Standard that relate to a specific treaty provision, the newly negotiated treaties or the treaties as modified by a protocol, as described above, were taken into account, even if it concerned a modification or replacement of an existing treaty currently in force. Furthermore, the treaty analysis also takes into account the treaty with the former USSR that the United States continues to apply to nine jurisdictions: Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. As it concerns one tax treaty that is applicable to multiple jurisdictions, this treaty is only counted as one treaty for this purpose. Reference is made to Annex A for the overview of the United States' tax treaties regarding the mutual agreement procedure.

### ***Timing of the process and input received by peers and taxpayers***

Stage 1 of the peer review process for the United States was launched on 5 December 2016, with the sending of questionnaires to the United States and its peers. The FTA MAP Forum has approved the stage 1 peer review report of the United States in May 2017, with the subsequent approval by the BEPS Inclusive Framework on 5 September 2017. On 5 September 2018, the United States submitted its update report, which initiated stage 2 of the process.

The questionnaires for the peer review process were sent to the United States and the peers on 5 December 2016. While the commitment to the Action 14 Minimum Standard only starts from 1 January 2016, the United States opted to provide information on the period starting as from 1 January 2014 and requested peer input relating to this period. The period for evaluating the United States' implementation of this standard ranges from 1 January 2016 up to 31 December 2016 and formed the basis for the stage 1 peer review report. The period of review for stage 2 started on 1 January 2017 and depicts all developments as from that date until 31 August 2018. In addition to its assessment on the compliance with the Action 14 Minimum Standard, the United States also addressed best practices<sup>9</sup> asked for peer input on best practices.

In total 20 peers provided input during stage 1: Australia, Belgium, Canada, People's Republic of China, Denmark, France, Germany, India, Ireland, Italy, Japan, Korea,

Mexico, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland and the United Kingdom. These peers represent 95% of post-2015 MAP cases in the United States’ inventory started in 2016. Input was also received from taxpayers during stage 1. During stage 2 the same peers provided input on the update report of the United States, as also Austria and Portugal. For this stage, these peers represent approximately 93% of post-2015 MAP cases in the United States’ inventory that started in 2016 or 2017.<sup>10</sup> Broadly all peers indicated having good working relationships with the United States with regard to MAP, some of them emphasising the joint effort put forth to successfully resolve disputes. Specifically with respect to stage 2, nearly all peers that provided input reported that the update report of the United States fully reflects the experiences these peers have had with the United States since 1 January 2017 and/or that there was no addition to previous input given. A few peers, however, reflected additional input or new experiences, which are reflected throughout this document under the elements where they have relevance.

### ***Input by the United States and cooperation throughout the process***

During stage 1, the United States provided extensive answers in its questionnaire, which was submitted on time. The United States was very responsive in the course of the drafting of the peer review report by responding timely and comprehensively to requests for additional information, and provided further clarity where necessary. In addition, the United States provided the following information:

- MAP profile<sup>11</sup>
- MAP statistics<sup>12</sup> according to the MAP Statistics Reporting Framework (see below).

Finally, the United States is an active member of the FTA MAP Forum and currently serves as its chair. It has shown good co-operation during the peer review process. Furthermore, the United States provided detailed peer input and made constructive suggestions on how to improve the process with the concerned assessed jurisdictions. The United States also provided peer input on the best practices<sup>13</sup> for a number of jurisdictions that asked for it.

Concerning stage 2 of the process, the United States submitted its update report on time and the information included therein was extensive. The United States was very co-operative during stage 2 and the finalisation of the peer review process.

## **Overview of MAP caseload in the United States**

The analysis of the United States’ MAP caseload for stage 1 relates to the period starting on January 2016 and ending on 31 December 2016. For stage 2 the period ranges from 1 January 2017 to 31 December 2017. Both periods are taken into account in this report for analysing the MAP statistics of the United States. The analysis of the United States MAP caseload relates to the period starting on 1 January 2016 and ending 31 December 2017 (the “**Statistics Reporting Period**”). According to the statistics provided by the United States, its MAP caseload during this period was as follows:

2016-17	Opening Inventory 1/1/2016	Cases started	Cases Closed	End Inventory 31/12/2017
Attribution/allocation cases	716	333	373	676
Other cases	256	155	104	307
Total	972	488	477	983

## General outline of the peer review report

This report includes an evaluation of the United States’ implementation of the Action 14 Minimum Standard. The report comprises the following four sections:

- A. Preventing disputes
- B. Availability and access to MAP
- C. Resolution of MAP cases
- D. Implementation of MAP agreements.

Each of these sections is divided into elements of the Action 14 Minimum Standard, as described in the terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective (“**Terms of Reference**”).<sup>14</sup> Apart from analysing the United States’ legal framework and its administrative practice, the report also incorporates peer input and responses to such input by the United States, both during stage 1 and stage 2. Furthermore, the report depicts the changes adopted and plans shared by the United States to implement elements of the Action 14 Minimum Standard where relevant. The conclusion of each element identifies areas for improvement (if any) and provides for recommendations how the specific area for improvement should be addressed.

The basis of this report forms the outcome of the stage 1 peer review process, which has identified in each element areas for improvement (if any) and provides for recommendations how the specific area for improvement should be addressed. Following the outcome of the peer monitoring process of stage 2, each of the elements have been updated with a recent development section to reflect any actions taken or changes made on how recommendations have been addressed, or to reflect other changes in the legal and administrative framework of the United States relating to the implementation of the Action 14 Minimum Standard. Where it concerns changes to MAP guidance or statistics, these changes are reflected in the analysis sections of the elements, which include a general description of the changes in the recent development sections.

The objective of Action 14 Minimum Standard is to make dispute resolution mechanisms more effective and concerns a continuous effort. Where recommendations have been fully implemented, this has been reflected and the conclusion section of the relevant element has been modified accordingly, but the United States should continue to act in accordance with a given element of the Action 14 Minimum Standard, even if there is no area for improvement and recommendation for this specific element.

## Notes

1. Most US income tax treaties are available at: <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/treaties.aspx>. Annex A includes an overview of the United States’ tax treaties with respect to the mutual agreement procedure.
2. The United States continues to apply the 1973 treaty with the former USSR to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan.

3. This concerns treaties with Belgium, Canada, France and Germany. See element C.6 of this report for a discussion. Reference is made to Annex A for the overview of the United States' tax treaties that include an arbitration clause.
4. This concerns treaties with Japan, Spain and Switzerland.
5. Available at: [https://www.irs.gov/pub/foia/ig/spder/do\\_4\\_12\\_rev\\_3.pdf](https://www.irs.gov/pub/foia/ig/spder/do_4_12_rev_3.pdf). The delegation order sets out in detail which government department holds competence to perform the competent authority function under the tax treaties the United States entered into. Reference is also made to section 2.01 of the United States' MAP guidance as set out in Rev. Proc. 2015-40, which provides an outdated definition of the term "competent authority". Rev. Proc. 2015-40 was issued before the reorganisation of the LB&I in February 2016 and the issuance of Delegation Order 4-12 (Rev. 3). The United States reported that the definition of the term "competent authority" will be updated in any successor revenue procedures.
6. See also section 2.01 of the United States' MAP guidance as set out in Rev. Proc. 2015-40.
7. If the case under review concerns the existence of a permanent establishment, both the APMA and the TAIT team can handle such case. Both teams will co-ordinate and collaborate on such cases as well as on any other case as appropriate.
8. Available at: [www.oecd.org/tax/beps/making-dispute-resolution-more-effective-map-peer-review-report-united-states-stage-1-9789264282698-en.htm](http://www.oecd.org/tax/beps/making-dispute-resolution-more-effective-map-peer-review-report-united-states-stage-1-9789264282698-en.htm).
9. This report is accompanied by a document addressing the implementation of best practices which can be accessed on the OECD website: <http://oe.cd/bepsaction14>.
10. The breakdown of treaty partners on a jurisdiction-by-jurisdiction basis is only available for post-2015 cases under the MAP Statistics Reporting Framework.
11. Available at: [www.oecd.org/tax/dispute/United-States-Dispute-Resolution-Profile.pdf](http://www.oecd.org/tax/dispute/United-States-Dispute-Resolution-Profile.pdf).
12. The 2016 and 2017 MAP statistics of the United States are included in Annex B and C of this report.
13. This report is accompanied by a document addressing the implementation of best practices which can be accessed on the OECD website: <http://oe.cd/bepsaction14>.
14. Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective (CTPA/CFA/NOE2(2016)45/REV1).

## *Part A*

### Preventing disputes

#### [A.1] **Include Article 25(3), first sentence, of the OECD Model Tax Convention in tax treaties**

Jurisdictions should ensure that their tax treaties contain a provision which requires the competent authority of their jurisdiction to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of their tax treaties.

1. Cases may arise concerning the interpretation or the application of tax treaties that do not necessarily relate to individual cases, but are more of a general nature. Inclusion of the first sentence of Article 25(3) of the OECD Model Tax Convention (OECD, 2017a) in tax treaties invites and authorises competent authorities to solve these cases, which may avoid submission of MAP requests and/or future disputes from arising, and which may reinforce the consistent bilateral application of tax treaties.

#### *Current situation of the United States' tax treaties*

2. Out of the United States' 60 tax treaties, 54 contain a provision equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention requiring their competent authority to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the tax treaty.<sup>1</sup> Of the remaining six tax treaties, two do not contain such equivalent and four treaties do contain a provision that is based on Article 25(3), first sentence, of the OECD Model Tax Convention, but are not considered to be an equivalent thereof, because the word “interpretation” is not contained.<sup>2</sup>

3. For those tax treaties that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention, the United States reported that it does not view this as preventing it from concluding a competent authority agreement of a general nature with its treaty partner to clarify the application or the interpretation of the tax treaty. It further mentioned that it has entered into several MAP agreements of a general nature concerning the application or interpretation of a tax treaty, and that it routinely proposes such agreements to ensure a consistent and transparent application and interpretation of its tax treaties.

4. Some peers noted that they are either conducting negotiations with the United States or envisaging such negotiations with a view to be compliant with the relevant elements of the Action 14 Minimum Standard.

### *Recent developments*

5. As is described in the Introduction, the United States reported that it is still in the process of evaluating what modifications to its tax treaties are necessary in order to bring them in line with the Action 14 Minimum Standard, and that it is working internally on a plan in relation thereto. Apart from this evaluation, the United States has neither conducted treaty negotiations nor initiated these with a view to bring, where necessary, its tax treaties in line with the Action 14 Minimum Standard. This also regards those six tax treaties that do not contain a provision equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention.

### *Peer input*

6. Of the peers that provided input during stage 2, four repeated their previous input that their treaty with the United States is already in line with the requirements under the Action 14 Minimum Standard. Furthermore, one peer reported it is currently in negotiations with the United States on the replacement of the existing treaty, which will be in conformity with the requirements under the Action 14 Minimum Standard. Three other peers mentioned that there have not been any contacts with the United States to bring the treaty in line with this standard. With respect to these four peers, however, the applicable tax treaty is already in line with the requirements under element A.1.

### *Anticipated modifications*

7. The United States did not indicate it anticipates any modifications, other than that it intends to seek to include a provision equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention in all of its future tax treaties.

### *Conclusion*

	Areas for improvement	Recommendations
[A.1]	Seven out of 60 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention. For these seven treaties no actions have been taken nor are any actions planned to be taken.	The United States should without further delay request via bilateral negotiations the inclusion of the equivalent of Article 25(3), first sentence, of the OECD Model Tax in six of the seven tax treaties that do not contain such provision. Specifically with respect to the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan, the United States should, once it enters into negotiations with the jurisdictions for which it applies the treaty, request the inclusion of the required provision.

## **[A.2] Provide roll-back of bilateral APAs in appropriate cases**

Jurisdictions with bilateral advance pricing arrangement (“APA”) programmes should provide for the roll-back of APAs in appropriate cases, subject to the applicable time limits (such as statutes of limitation for assessment) where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances on audit.

8. An APA is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustment thereto, critical assumptions as to future events) for the determination of the transfer pricing for

those transactions over a fixed period of time.<sup>3</sup> The methodology to be applied prospectively under a bilateral or multilateral APA may be relevant in determining the treatment of comparable controlled transactions in previous filed years. The “roll-back” of an APA to these previous filed years may be helpful to prevent or resolve potential transfer pricing disputes.

### *The United States’ APA programme*

9. The United States reported it has implemented a bilateral APA programme and has run such programme since the 1990s, under which it is allowed to enter into unilateral, bilateral and multilateral APAs. The IRS established the APMA team in 2012, which brought together its MAP and APA programme into a single division. The United States further reported its APA programme is available for transfer pricing issues and for issues where transfer pricing principles may be relevant. This applies both to issues which are ongoing in nature or have already arisen.

10. The United States has issued guidance specifically on its APA programme in Rev. Proc. 2015-41 (“**APA guidance**”).<sup>4</sup> This guidance sets out in detail what APAs are, when and by whom they can be applied for, for what issues APAs can be obtained, how the process for obtaining an APA functions in the United States, what information is to be included in a request for an APA, which government institution is responsible for handling APA requests, the legal effects of APAs and the circumstances in which APAs may be renewed. The appendix to this guidance further includes instructions and requirements on preparing and filing of an APA request in the United States.

11. With respect to timelines for filing of an APA request, section 3.03 of its APA guidance stipulates that the United States normally expects that such a request is filed early enough that the term of an APA can include at least five prospective tax years (see paragraph 12 below). Specifically regarding bilateral and multilateral APAs, the United States – as set out in section 3.03(2)(b) of its APA guidance – requires that taxpayers file a request no later than 60 days after a corresponding APA request has been filed with the foreign competent authority(ies).<sup>5</sup> If taxpayers do not comply with this requirement, then the first year for which an APA is request is submitted is considered a “roll-back” year (see below). In addition, if taxpayers miss the 60-day deadline by more than one year, the first two or more years for which the request is submitted shall be considered roll-back fiscal years.

### *Roll-back of bilateral APAs*

12. The United States reported that it generally applies APAs to prospective fiscal years, but may apply APAs to previous fiscal years, or roll-back years, after co-ordinating and collaborating with other offices within the IRS. Typically, the term of application is three to five years, but the United States may, as appropriate, enter into APAs for periods ranging as long as six to ten years, and sometimes longer periods.

13. The United States further reported that a roll-back will be provided upon request by taxpayers and subsequently approved by the APMA team. In appropriate circumstances, the APMA team may require that a taxpayer accept a roll-back as a condition of obtaining an APA. When a roll-back is involved, the APMA team will co-ordinate and collaborate with other offices within the IRS. The term of an APA concluded with a roll-back will include both the roll-back and prospective fiscal years.

14. In section 2.02(4)(c) of its APA guidance the United States has set out its general policy for granting roll-back of APAs. In general, the United States considers APA requests and MAP cases as being interconnected and strives to obtain a substantive and procedural consistency between both processes for the purposes of providing tax certainty to taxpayers and the IRS. Therefore, if a MAP agreement also holds relevance to prospective fiscal years, the United States may encourage taxpayers to file an APA request for these years as well.<sup>6</sup> Vice versa, if an issue covered in an APA holds relevance to previous (closed) fiscal years that have not yet been audited, taxpayers may request for a roll-back of an APA. Section 3.03(2) of the United States' APA guidance includes further information on when years are considered prospective years versus roll-back years. The fiscal years that have not yet concluded and for which an APA is requested, are considered prospective APA years. Fiscal years that have ended when the APA is requested are considered roll-back years. When requesting a coverage of an APA to these roll-back years, taxpayers are required to provide the following information in their APA request:

- a list of the proposed roll-back years
- a demonstration of the proposed covered method(s) to all proposed roll-back years, thereby using the actual data, if available
- a waiver of ex parte communication.<sup>7</sup>

15. Specifically with respect to granting roll-back of bilateral APAs, section 5 of its APAs guidance sets out the policy of the United States on such allowance. Application of an APA to roll-back years is possible if the United States would agree to accept such fiscal year to be discussed in a MAP. In section 5.04 it is further specified that the APMA team will generally not agree to cover closed fiscal years in an APA, except if such closed fiscal year would be accepted to be discussed under the MAP provision and to the extent the applicable tax treaty allows the MAP agreement to be implemented for the respective fiscal year.

### ***Recent developments***

16. In the APA guidance of the United States it is described that taxpayers should include in their request for an APA a draft of the APA to be concluded between the IRS and the taxpayer, for which a template APA should be used. In May 2018 the IRS released a revised template, including an example how taxpayers can complete such template.<sup>8</sup> The United States reported that through this update, taxpayers are required to propose the terms for their APAs and how those terms are raised and evaluated in negotiations between the relevant competent authorities. It further provides for standardised languages to be used in signed APAs. According to the United States, the updated template will improve the efficiency of the APA process and also will enhance consistency in the administration to the APA programme.

### ***Practical application of roll-back of bilateral APAs***

#### *Period 1 January 2014-31 December 2016 (stage 1)*

17. All peers that provided input generally mentioned that they negotiate and conclude bilateral APAs with the United States. Not all peers, however, reported having experience with roll-back of such bilateral APAs for the years under review or in general. In total 12 of the 20 peers that provided input reported they have experiences with the United States regarding roll-back of bilateral APAs. Their experience point out that roll-back of bilateral



APAs is possible in appropriate cases and that the United States is willing to enter into discussions hereon. These peers further reported positive working experiences with the United States in the process of effectively providing for roll-back of APAs. One peer in particular noted that it was confident that roll-back would be provided once an agreement on the APAs would be reached.

18. In practice, for years 2014-16, the United States indicated that the APMA team received 105 requests for roll-back of bilateral APAs (32 in 2014, 34 in 2015 and 39 in 2016), none of which were rejected. As of 31 December 2016, 89 of these requests are still pending.

19. Peers reported that since 1 January 2014 taxpayers have in approximately 20 cases requested for roll-back of their bilateral APAs in which the United States is a signatory party. These peers, however, have not specified in how many cases such roll-back was granted or will be granted.

*Period 1 January 2017-31 August 2018 (stage 2)*

20. The United States reported that since 1 January 2017 it received 64 requests for roll-backs of bilateral APAs. Of these 64 requests, one was granted and one was withdrawn. The remaining 62 are still pending. Furthermore, the United States reported that with respect to the 105 requests for roll-back that it received in the period 2014-16, 22 were granted, 29 were withdrawn by taxpayers and 54 requests are still pending as per 31 August 2018.

21. Most peers that provided input during stage 1 stated in stage 2 that the update report provided by the United States fully reflects their experience with the United States since 1 January 2017 and/or there are no additions to the previous input given. Furthermore, four peers specifically provided input relating to element A.2. Two of these peers mentioned that they did not receive a request for roll-back since 1 January 2017 concerning the United States, whereas one mentioned that it did not receive any request for bilateral APAs since that date. The fourth peer mentioned that since 1 January 2017 it received one roll-back request concerning the United States.

***Anticipated modifications***

22. The United States did not indicate that it anticipates any modifications in relation to element A.2.

***Conclusion***

	Areas for improvement	Recommendations
[A.2]	-	-

## Notes

1. These six treaties concern the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan.
2. In the stage 1 peer review report, reference was made to two treaties. Following the peer review process of other assessed jurisdictions, another four other treaties were identified that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention. Consequently, the number of treaties not containing this equivalent is six instead of two.
3. This description of an APA based on the definition of an APA in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD, 2017b).
4. Available at: <https://www.irs.gov/pub/irs-drop/rp-15-41.pdf>. Further guidance on the United States' APA programme is also available at: <https://www.irs.gov/businesses/corporations/apma>.
5. A corresponding request is considered by the United States as a substantive filing with the other competent authority(ies) concerned and not the mere filing of a notice of intent to file such substantive request.
6. Reference is made to section 5.01 of the United States' MAP guidance for a discussion of the possibility to roll-on a MAP agreement to future years by means of an APA.
7. Reference is made to section 1.03 and Exhibit 4 of the appendix to the United States' APA guidance. This section stipulates that the APA request that concerns roll-back years should include a waiver of the taxpayer's right to be present during communications between IRS Appeals and members of the APA team.
8. Available at: <https://www.irs.gov/businesses/corporations/new-advance-pricing-agreement-apa-under-rev-proc-2015-41-2015-35-irb-263>.

## Reference

- OECD (2017a), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, <https://doi.org/10.1787/g2g972ee-en>.
- OECD (2017b), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris, <https://dx.doi.org/10.1787/tpg-2017-en>.

## *Part B*

### **Availability and access to MAP**

#### **[B.1] Include Article 25(1) of the OECD Model Tax Convention in tax treaties**

Jurisdictions should ensure that their tax treaties contain a MAP provision which provides that when the taxpayer considers that the actions of one or both of the Contracting Parties result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty, the taxpayer, may irrespective of the remedies provided by the domestic law of those Contracting Parties, make a request for MAP assistance, and that the taxpayer can present the request within a period of no less than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty.

23. For resolving cases of taxation not in accordance with the provisions of the tax treaty, it is necessary that tax treaties include a provision allowing taxpayers to request a mutual agreement procedure and that this procedure can be requested irrespective of the remedies provided by the domestic law of the treaty partners. In addition, to provide certainty to taxpayers and competent authorities on the availability of the mutual agreement procedure, a minimum period of three years for submission of a MAP request, beginning on the date of the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty, is the baseline.

#### ***Current situation of the United States' tax treaties***

##### *Inclusion of Article 25(1), first sentence of the OECD Model Tax Convention*

24. Out of the United States' 60 tax treaties, 11 treaties contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2017) as amended by the Action 14 Final Report (OECD, 2015b), allowing taxpayers to submit a MAP request to the competent authority of either state when they consider that the actions of one or both of the treaty partners result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty and that can be requested irrespective of the remedies provided by domestic law of either state.<sup>1</sup> Furthermore, 42 treaties contain a provision equivalent to Article 25(1), first sentence, of the 2015 OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of that report.<sup>2</sup>

25. The seven remaining tax treaties can be categorised as follows:

Provision	Number of tax treaties
A variation to Article 25(1), first sentence, of the 2015 OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report, whereby the taxpayer cannot submit a MAP request irrespective of the remedies provided by the domestic laws of the Contracting States.	2*
A variation to Article 25(1), first sentence, of the 2015 OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report, whereby the taxpayer can only submit a MAP request to the competent authorities of the contracting state of which they are resident and/or citizen.	4
A variation to Article 25(1), first sentence, of the 2015 OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report, whereby the taxpayer can only submit a MAP request in cases of double taxation contrary to the provisions of the tax treaty and whereby the taxpayer cannot submit a MAP request irrespective of the remedies provided by the domestic laws of the Contracting States.	1

\*One of these treaties, however, allows the submission of the MAP request to the competent authorities of either contracting state, but the text of that provision is not equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention.

26. With respect to the two treaties in the first row of the table and the one treaty in the last row of the table, all three are considered not to contain a provision that is equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention.

27. With respect to the four treaties in the second row of the table that only allow taxpayers to submit a MAP request to their state of residence or citizenship, these are for the following reasons considered to be in line with this part of element B.1:

- in one treaty the non-discrimination clause covers US citizens which are residents of the United States for treaty purposes
- in three treaties the non-discrimination clause does not cover nationals but “citizens”, which is extended specifically to a resident of the other contracting state.

*Inclusion of Article 25(1), second sentence of the OECD Model Tax Convention*

28. Out of the United States’ 60 tax treaties, 20 contain a provision allowing taxpayers to submit a MAP request within a period of three years from the first notification of the action resulting in taxation not in accordance with the provisions of the particular tax treaty, which wording is equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention.

29. The remaining 40 treaties that do not contain such provision can be categorised as follows:

Filing periods	Number of tax treaties
Filing period more than 3 years for a MAP request	4
No filing period for a MAP request	36

30. With respect to the four treaties identified above the time limit for filing a MAP request is four years (one treaty) or five years (three treaties).

*Peer input*

31. Some peers noted that they are either conducting negotiations with the United States or envisaging such negotiations with a view to be compliant with the relevant elements of the Action 14 Minimum Standard. One peer particularly reported that under its tax treaty with the United States a different timeframe is established for taxpayers to have access to MAP. In this respect, and in order to avoid doubts arising from the interpretation of this particular treaty, this peer mentioned that the United States' competent authority recently has sent a proposal for a Memorandum of Understanding regarding the timeframe for access to MAP under the tax treaty. Although this particular tax treaty does not include a time limit for filing a MAP request and is considered compliant with element B.1, the United States clarified that the first sentence of the MAP article includes a time limitation that the United States seeks to reciprocally interpret in a manner that would ensure greater access to MAP.

***Practical application****Article 25(1), first sentence, of the OECD Model Tax Convention*

32. As noted in paragraph 24 above, in all but three of the United States' tax treaties taxpayers can file a MAP request irrespective of domestic remedies. In this respect, the United States reported that access to MAP is available regardless of whether for the relevant case under review domestic available remedies are still pending. Section 6.05 of its MAP guidance stipulates that in cases where a taxpayer has submitted a MAP request with respect to a fiscal year for which domestic remedies are pending, the United States' competent authority is authorised to accept, or continue to consider, the MAP request after consulting with the Associate Chief Counsel (International). Where in the United States the issue under dispute is already been decided on via domestic available judicial and administrative remedies, taxpayers can still validly request for MAP assistance. The United States' competent authority, however, will only seek correlative relief from the other competent authority concerned and will not deviate from the decision following domestic judicial and administrative remedies.

33. One peer reported that the United States requested taxpayers to submit a MAP request in the United States even though they were resident in the other jurisdiction and while the tax treaty requires taxpayers to submit the request in the state of residence. According to this peer, this requirement is not compliant with the tax treaty and taxpayers may not be aware of it. As such process can delay cases to be effectively discussed in MAP, this peer suggests deleting such requirement to improve the functioning of the MAP process, which was also echoed by other peers. The United States responded that, in transfer pricing cases, its MAP guidance requires the US resident participant in a controlled transaction to file a complete MAP request with the United States' competent authority. The United States also responded that it has largely applied this requirement in a practical manner, recognising the burden it could place upon taxpayers in individual cases. In general, the United States not only believes this requirement is necessary for handling the volume and complexity of the MAP cases it receives, but it also believes the rule gives clear direction to taxpayers about the information necessary to effectively discuss the case and, where the case is subject to arbitration, helps ensure an earlier "commencement date" (generally the earliest date on which the information necessary to undertake substantive consideration of a MAP has been received by both competent authorities). However, the United States reported it is considering reviewing its current practice. The view of the United States was adhered to by another peer.

***Article 25(1), second sentence, of the OECD Model Tax Convention***

34. For the 36 tax treaties mentioned in paragraphs 28-29 above that do not contain a filing period for MAP requests, the United States reported that there are under its domestic law no time limits after which it would not take such request into consideration. In fact, the US Model Tax Convention, which is the baseline text used by the US Treasury Department when it negotiates tax treaties, does not include a time limit for filing a MAP request.

35. Furthermore, section 3.04 of the United States' MAP guidance sets forth that taxpayers are encouraged to file a competent authority request when an issue that is eligible under MAP arises, or is likely to arise. It also notes that certain US tax treaties may apply specific time limits for filing MAP requests and that the expiration of time limits in the United States' or in the treaty partner domestic legislation will not prevent the consideration of a MAP request by its competent authority under the conditions that: (i) the specific tax treaty permits the waiver of domestic time limits for implementing MAP agreements; and (ii) the requirements under that specific treaty have been met.

***Recent developments***

36. As is described in the Introduction, the United States reported that it is still in the process of evaluating what modifications to its tax treaties are necessary in order to bring them in line with the Action 14 Minimum Standard, and that it is working internally on a plan in relation thereto. Apart from this evaluation, the United States has neither conducted treaty negotiations nor initiated these with a view to bring, where necessary, its tax treaties in line with the Action 14 Minimum Standard. This also regards those tax treaties that do not contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention.

37. With respect to the practice as set out in paragraph 32 above, the United States reported it has given a follow-up to its intention to review its practice that in a transfer pricing case, a US resident taxpayer is also required to file a MAP request where such a request was already filed at the level of the treaty partner. In this respect, the United States mentioned that where a taxpayer has duly filed a MAP request at the level of the treaty partner, but not a complete MAP request with the US competent authority, it will accept to discuss the case in MAP. This, however, under the condition that appropriate procedures are put in place, or when they are in place that they are improved, to ensure that the US competent authority (i) will be timely notified of the submission of a MAP request and (ii) has sufficient information to effectively and efficiently analyse and determine its position in such case, in particular when it concerns an adjustment made at the level of the treaty partner.

38. Four peers responded to the update presented by the United States. One of these peers mentioned that in its experience the United States' competent authority seems to require that for transfer pricing cases a MAP request has to be submitted in the United States as well, following which it appears not to be possible to initiate MAP discussions if the request was only filed with the peer's competent authority. Another peer stated that it has in the past experienced a situation whereby the United States' competent authority did not accept a case into the MAP process, while a valid request was submitted with the peer's competent authority. This peer therefore expressed that it is pleased to know that the United States has changed its practice and also that it is confident that future MAP cases can be dealt with by the respective competent authorities. This input was echoed by another peer, who mentioned it has taken notice of the United States' policy clarification, which would not create adverse effects for taxpayers. However, in the peer's view this policy will

continue to create additional efforts before cases can be resolved. In that regard, this peer specifically suggested that it would be useful to reflect in the MAP profile of the United States the policy as set out above. In addition, in the peer's view it would be useful to clarify that even though the applicable tax treaty in transfer pricing cases only requires the filing of a MAP request in the state of residence of the taxpayer that submitted the request, the United States still requires additional information to be presented at the level of its competent authority.

39. Lastly, one peer mentioned that in April 2018 its competent authority via email sent a notification letter along with a copy of the decision to accept a transfer pricing case into the MAP process to the United States' competent authority. No response was received, but during the planning of a face-to-face meeting, the United States' competent authority stated that it had not received a MAP request for this particular case. A further investigation on the matter clarified that while the relevant emails and documents were received and forwarded, the United States' competent authority could not access them due to the fact that, based on internal administrative procedures, no MAP request was filed in the United States by a US resident taxpayer. In this respect, the peer suggested that the United States' competent authority accepts notifications like the ones the peer sent and that they in their response state which competent authority has to contact the taxpayer concerning the correct filing of a MAP request in the United States.

40. Concerning the update to the tax treaties and in relation to element B.1, of the peers that provided input during stage 2, four repeated their previous input that their treaty with the United States is already in line with the requirements under the Action 14 Minimum Standard. Furthermore, one peer reported it is currently in negotiations with the United States on the replacement of the existing treaty, which will be in conformity with the requirements under the Action 14 Minimum Standard. Three other peers mentioned that there have not been any contacts with the United States to bring the treaty in line with this standard. With respect to these four peers, however, the applicable tax treaty is already in line with the requirements under element B.1.

### *Anticipated modifications*

41. The United States indicated that there are not any anticipated modifications for element B.1, other than that it intends to seek to include a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention in all of its future tax treaties.

### *Conclusion*

	Areas for improvement	Recommendations
[B.1]	Three out of 60 tax treaties do not contain a provision that is the equivalent of Article 25(1), first sentence of the OECD Model Tax Convention, either as it read prior to the adoption of the final report on Action 14 or as amended by that final report. For these three treaties no actions have been taken nor are any actions planned to be taken.	The United States should without further delay request via bilateral negotiations the inclusion of the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention in those three treaties that do not contain such provision. This concerns a provision that is equivalent to Article 25(1), first sentence of the OECD Model Tax Convention either: <ul style="list-style-type: none"> <li>a. As amended in the final report of Action 14; or</li> <li>b. As it read prior to the adoption of final report of Action 14.</li> </ul>

## **[B.2] Allow submission of MAP requests to the competent authority of either treaty partner, or, alternatively, introduce a bilateral consultation or notification process**

Jurisdictions should ensure that either (i) their tax treaties contain a provision which provides that the taxpayer can make a request for MAP assistance to the competent authority of either Contracting Party, or (ii) where the treaty does not permit a MAP request to be made to either Contracting Party and the competent authority who received the MAP request from the taxpayer does not consider the taxpayer's objection to be justified, the competent authority should implement a bilateral consultation or notification process which allows the other competent authority to provide its views on the case (such consultation shall not be interpreted as consultation as to how to resolve the case).

42. In order to ensure that all competent authorities concerned are aware of MAP requests submitted, for a proper consideration of the request by them and to ensure that taxpayers have effective access to MAP in eligible cases, it is essential that all tax treaties include a provision that either allows taxpayers to submit a MAP request to the competent authority:

- i. of either treaty partner; or in the absence of such provision
- ii. where it is a resident, or to the competent authority of the state of which they are a national if their cases come under the non-discrimination article. In such cases, jurisdictions should have in place a bilateral consultation or notification process where a competent authority considers the objection raised by the taxpayer in a MAP request as being not justified.

### ***Domestic bilateral consultation or notification process in place***

43. As discussed under element B.1, out of the United States' 60 tax treaties, 11 contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention as amended by the Action 14 final report, allowing taxpayers to submit a MAP request to the competent authority of either treaty partner.

44. For the 49 tax treaties that do not contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention as amended by the Action 14 final report, the United States reported that in practice its competent authority does notify and consult its treaty partners when access to MAP is denied or when it considers the objection raised in a MAP request not to be justified. In this respect, section 7.02 of its MAP guidance states that the United States will, before taking the decision to decline a MAP request, notify and (where appropriate) consult with the other competent authority concerned.

### ***Recent developments***

45. The United States reported it has in 2017 documented the steps to be taken by its competent authority personnel when they consider that the objection raised by the taxpayer in its MAP request is not justified. The relevant document explains the MAP Statistics Reporting Framework, what data needs to be documented under that framework and for which steps in the MAP process other competent authorities are to be notified. Furthermore, a specific section addresses the situation where a MAP request might be considered to present that an objection that is not justified. It is there stated that in such a situation, the other competent authority needs to be notified, with a deviation between cases where the underlying adjustment was made in the United States or at the level of the treaty partner. It also states that in appropriate cases a consultation process can be initiated. In addition, the document specifies in what situations an objection is to be considered not justified.



### ***Practical application***

#### *Period 1 January 2014-31 December 2016 (stage 1)*

46. The United States reported that in the period 1 January 2014-31 December 2016 in two cases the objection raised in a MAP request was considered as not justified. The 2016 MAP statistics submitted by the United States also show that in 2016 two cases were closed with the outcome “objection not justified”. For these two cases, however, its competent authority has not notified the relevant treaty partners. In the first case (which concerned a pre-2016 case), this was because that particular treaty does allow the submission of a MAP request in either contracting state. The MAP request in the second case concerned an objection to taxation in the other contracting state as being not in accordance with the tax treaty. The United States reported that its competent authority considered this taxation actually to be in accordance with the treaty and therefore judged the objection raised by the taxpayer in its MAP request as not being justified. It, however, did not notify the other competent authority concerned, because it was not aware that notification was also necessary in such a situation.

47. All peers that provided input indicated not being aware of any cases for which the United States’ competent authority in the period 1 January 2014-31 December 2016 considered the objection raised in a MAP request as not justified. They also reported not having been consulted/notified in such cases. One peer further noted that it would strongly welcome that the United States implements a bilateral consultation or notification process when the United States’ competent authority does not consider the taxpayer’s objection raised in the MAP request to be justified. This peer noted that under its treaty with the United States it does neither receive such notifications nor was it consulted. Another peer, however, mentioned that such notification was actually provided for where the United States’ competent authority considered the objection raised in a MAP request as being not justified.

#### *Period 1 January 2017-31 August 2018 (stage 2)*

48. The United States reported that since 1 January 2017 its competent authority decided in three cases that the objection raised by taxpayers in their MAP request was not justified. This concerns two cases in 2017 and one in 2018. With respect to these cases, the United States mentioned that in two cases its competent authority notified the relevant treaty partners, while in the third case, the relevant treaty partner was consulted after which the final determination was made that the objection raised in the MAP request was indeed not justified. While from the 2017 statistics submitted by the United States it follows that in five cases the outcome reported is “objection not justified”, in only three of such cases it was the United States’ competent authority that made this decision.

49. Concerning the three cases for which the United States’ competent authority considered the objection raised in a MAP request as not justified, all three relevant peers provided input and confirmed they were notified/consulted for the specific case. The remaining peers that provided input during stage 1 also indicated that since 1 January 2017 they are not being aware of any cases for which the United States’ competent authority considered the objection raised in a MAP request as not justified. These peers also reported not having been consulted/notified in such cases.

*Anticipated modifications*

50. The United States did not indicate that it anticipates any modifications in relation to element B.2.

*Conclusion*

	Areas for improvement	Recommendations
[B.2]	-	-

**[B.3] Provide access to MAP in transfer pricing cases**

Jurisdictions should provide access to MAP in transfer pricing cases.

51. Where two or more tax administrations take different positions on what constitutes arm's length conditions for specific transactions between associated enterprises, economic double taxation may occur. Not granting access to MAP with respect to a treaty partner's transfer pricing adjustment, with a view to eliminating the economic double taxation that may arise from such adjustment, will likely frustrate the main objective of tax treaties. Countries should thus provide access to MAP in transfer pricing cases.

*Legal and administrative framework*

52. Out of the United States' 60 tax treaties, 40 contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention requiring their state to make a correlative adjustment in case a transfer pricing adjustment is imposed by the other treaty partner. Furthermore, in nine tax treaties such a provision is not contained.<sup>3</sup> The remaining 11 treaties contain a provision that is based on Article 9(2) of the OECD Model Tax Convention. These provisions are not considered being equivalent to Article 9(2), because they use different or additional wording. This concerns:

- In eight treaties a provision for making corresponding adjustments is contained, but not all wording used in Article 9(2) of the OECD Model Tax Conventions is reflected (i.e. the reference to the arm's length principle and/or the possibility of consultation<sup>4</sup>).
- In two treaties a corresponding adjustment is only to be made through the mutual agreement procedure.
- In one treaty a provision for making corresponding adjustments is contained, but not all element of Article 9(2) of the OECD Model Tax Conventions are included (i.e. the reference to the arm's length principle and/or the possibility of consultation) and there is a time-limit for making these adjustments. This time-limit, however, can be waived.

53. Access to MAP should be provided in transfer pricing cases regardless of whether the equivalent of Article 9(2) is contained in the United States' tax treaties and irrespective of whether its domestic legislation enables the granting of corresponding adjustments. In accordance with element B.3, as translated from the Action 14 Minimum Standard, the United States indicated that it will always provide access to MAP for transfer pricing cases and is willing to make corresponding adjustments, regardless of whether the equivalent of Article 9(2) of the OECD Model Tax Convention is contained in its tax treaties. In

section 2.01(2) and (3) of its MAP guidance it is specifically noted that the APMA team within the IRS holds primary responsibility for handling MAP requests relating to transfer pricing.

54. The United States indicated that its MAP guidance reflects the view of the United States' competent authority, which is that US tax treaties require the competent authority to provide access to MAP consistent with all aspects of the Action 14 Minimum Standard unless the treaty text specifically prohibits such access. If this is not specifically addressed in the tax treaty, the United States' competent authority construes the MAP article to allow taxpayers broad access to MAP and including transfer pricing cases.

### *Recent developments*

55. There are no recent developments for element B.3.

### *Practical application*

#### Period 1 January 2014-31 December 2016 (stage 1)

56. The United States reported that in the period 1 January 2014-31 December 2016 it has not denied access to MAP on the basis that the case concerned a transfer pricing case.

57. All peers that provided input indicated not being aware of denial of access to MAP by the United States in the period 1 January 2014-31 December 2016 on the basis that the case concerned was a transfer pricing case. Also taxpayers reported that the United States has not denied access to MAP in such situation during this period.

#### Period 1 January 2017-31 August 2018 (stage 2)

58. The United States reported that since 1 January 2017 it has also not denied access to MAP on the basis that the case concerned a transfer pricing case.

59. All peers that provided input during stage 1 stated in stage 2 that the update report provided by the United States fully reflects their experience with the United States since 1 January 2017 and/or there are no additions to the previous input given. In addition, one of them clarified that no MAP cases were initiated with the United States since that date.

### *Anticipated modifications*

60. The United States did not indicate that it anticipates any modifications in relation to element B.3.

### *Conclusion*

	Areas for improvement	Recommendations
[B.3]	-	-

#### **[B.4] Provide access to MAP in relation to the application of anti-abuse provisions**

Jurisdictions should provide access to MAP in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment as to whether the conditions for the application of a treaty anti-abuse provision have been met or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty.

61. There is no general rule denying access to MAP in cases of perceived abuse. In order to protect taxpayers from arbitrary application of anti-abuse provisions in tax treaties and in order to ensure that competent authorities have a common understanding on such application, it is important that taxpayers have access to MAP if they consider the interpretation and/or application of a treaty anti-abuse provision as being incorrect. Subsequently, to avoid cases in which the application of domestic anti-abuse legislation is in conflict with the provisions of a tax treaty, it is also important that taxpayers have access to MAP in such cases.

##### ***Legal and administrative framework***

62. None of the United States' 60 tax treaties allows competent authorities to restrict access to MAP for cases when a treaty anti-abuse provision applies or when there is a disagreement between the taxpayer and the tax authorities as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty. In addition, also the domestic law and/or administrative processes of the United States does not include a provision allowing their competent authority to limit access to the MAP for cases in which there is a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty.

63. The United States reported that it considers cases relating to the application of a treaty anti-abuse provision and cases concerning the question whether the application of a domestic anti-abuse provision is in conflict with the provision of a tax treaty are covered within the scope of the MAP. Furthermore, it indicated that its MAP guidance reflects the view of the United States' competent authority, which is that US tax treaties require it to provide access to MAP consistent with all aspects of the Action 14 Minimum Standard unless the treaty text specifically prohibits such access. If this is not specifically addressed in the tax treaty, the United States' competent authority construes the MAP article to allow taxpayers broad access to MAP. The MAP guidance of the United States, however, does not include information on whether taxpayers have access to MAP in cases concerning the application of treaty or domestic anti-abuse provisions.

##### ***Recent developments***

64. There are no recent developments for element B.4.

##### ***Practical application***

###### ***Period 1 January 2014-31 December 2016 (stage 1)***

65. The United States reported that in the period 1 January 2014-31 December 2016 it has not denied access to MAP in cases in which there was a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a treaty anti-abuse provision have been met, or as to whether the application of a domestic

law anti-abuse provision is in conflict with the provisions of a tax treaty. However, it also reported that its competent authority does not separately track MAP requests relating to the application of domestic or treaty anti-abuse provisions. In that regard, it has no record of having received any MAP request relating to the application of such provisions.

66. All peers that provided input indicated not being aware of denial of access to MAP by the United States in relation to the application of treaty and/or domestic anti-abuse provisions in the period 1 January 2014-31 December 2016. Also taxpayers reported that the United States has not denied access to MAP in such situations during this period.

67. One peer made a remark in relation to access to MAP with respect to the discretionary granting of treaty benefits under the limitations on benefits (“LOB”) article in its tax treaty with the United States. This peer stated its understanding that section 3.06(2)(e) of the United States’ MAP guidance determines that treaty benefits, which can be granted on a discretionary basis, are not provided to taxpayers if: (i) no or minimal tax is imposed on the item of income in both countries involved, or (ii) where the request for discretionary granting of treaty benefits is solely based on the fact that the taxpayer is a direct/indirect subsidiary of a public trade company resident in a third country. This peer pointed out that this policy bears the risk that in such cases access to MAP will not be granted and that this may come into conflict with the requirements under element B.4. The United States responded to this input and stated that the discretionary ability for a competent authority to grant treaty benefits for which a taxpayer is not otherwise entitled does not concern a treaty anti-abuse provision. The United States also observed that section 3.06(2)(e) of its MAP guidance does not operate as an outright prohibition of a favourable discretionary determination in the above-discussed circumstances, but rather states that benefits “ordinarily” will not be granted in these circumstances. The United States further responded that because it concerns a discretionary decision-power to grant treaty benefits, which are not applicable under the general application of the LOB-article, not granting of benefits in such a situation cannot come into conflict with element B.4. In other words, a taxpayer that requests a discretionary granting of treaty benefits under the relevant LOB-article acknowledges that it does not qualify under the pertinent objective test(s) of that article and thus is not entitled to the particular treaty benefits requested. Consequently, a denial of the discretionary granting of treaty benefits does not result in the denial of any treaty benefits for which the taxpayer would otherwise be entitled. In addition, the United States noted that all questions relating to the interpretation or application of such LOB-article, and disputed by the taxpayer because it believes it is entitled to treaty benefits by meeting the requirements of the LOB-article (absent a discretionary granting of treaty benefits), are eligible for MAP discussions.

68. The clarification provided by the United States points out that there is no limitation of access to the MAP in cases where the application of an anti-abuse provision in tax treaties is challenged by taxpayers. However, the United States’ MAP guidance is not univocally clear on this point.

#### *Period 1 January 2017-31 August 2018 (stage 2)*

69. The United States reported that since 1 January 2017 it has also not denied access to MAP in cases in which there was a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a treaty anti-abuse provision have been met, or as to whether the application of a domestic law anti-abuse provision is conflict with the provisions of a tax treaty. However, as noted above the United States does not separately track MAP requests relating to the application of domestic or treaty anti-abuse provisions. In that regard, it has no record of having received any MAP request

relating to the application of such provisions, other than for one case in 2018. This case concerned the application of domestic anti-conduit legislation at the level of the treaty partner. After an analysis of the case, the United States' competent authority came to the conclusion that the objection raised by the taxpayer was considered not to be justified. This conclusion, however, did not pertain to the application of anti-abuse provisions.

70. All peers that provided input during stage 1 stated in stage 2 that the update report provided by the United States fully reflects their experience with the United States since 1 January 2017 and/or there are no additions to the previous input given. In addition, one of them clarified that no MAP cases were initiated with the United States since that date.

### *Anticipated modifications*

71. The United States did not indicate that it anticipates any modifications in relation to element B.4.

### *Conclusion*

	Areas for improvement	Recommendations
[B.4]	-	-

## **[B.5] Provide access to MAP in cases of audit settlements**

Jurisdictions should not deny access to MAP in cases where there is an audit settlement between tax authorities and taxpayers. If jurisdictions have an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer, jurisdictions may limit access to the MAP with respect to the matters resolved through that process.

72. An audit settlement procedure can be valuable to taxpayers by providing certainty on their tax position. Nevertheless, as double taxation may not be fully eliminated by agreeing on such settlements, taxpayers should have access to the MAP in such cases, unless they were already resolved via an administrative or a statutory disputes settlement/resolution process that functions independent from the audit and examination function and which is only accessible through a request by taxpayers.

### *Legal and administrative framework*

#### *Audit settlements*

73. The United States reported that under its domestic law it is possible that taxpayers and the tax administration enter into a settlement agreement during the course of or after ending of an audit. In this respect, sections 1.01(5) and 6.01 of its MAP guidance sets out that in case taxpayers enter into such settlement with the IRS, the United States' competent authority will not reject a MAP request on the grounds that taxpayers entered into a settlement agreement.<sup>5</sup> However, in sections 1.01(5) and 6.03(2) it is elaborated that where a taxpayer enters into a closing agreement within the IRS examination function, the United States' competent authority will endeavour only to obtain a correlative adjustment at the level of the treaty partner. It will not undertake any actions that would change the

determination of taxable income that is reflected in the audit settlement. Although the United States allows access to the MAP in case of audit settlements, double taxation may thus not always be eliminated in MAP in such cases.

#### *Administrative or statutory dispute settlement/resolution process*

74. The United States further reported it has in place an administrative/statutory dispute settlement/resolution process. Within the IRS there is an appeals office, which is responsible for administrative appeals and which procedure can be initiated by taxpayers. This appeals office operates independently from the IRS' audit and examination function and has the authority to resolve disputes based on its assessment of the dispute.<sup>6</sup> In relation to the MAP process, section 6.04(1) of its MAP guidance stipulates that the United States' competent authority will deny access to MAP to taxpayers who opt to contest an IRS-initiated adjustment through this appeals office rather than presenting the case to the competent authority within the time limits set forth in the United States' MAP guidance. The United States' MAP guidance also addresses in section 6.04(4) that if a taxpayer submits a MAP request to the competent authority, the taxpayer retains its right to present its case to the administrative appeals office if the issue is not resolved through the MAP process. The United States clarified that these rules are intended to encourage taxpayers to seek relief of double taxation through the MAP before entering into an audit settlement. This to ensure that competent authorities have flexibility to resolve double taxation fully through the MAP process. Element B.10 further discusses this guidance.

#### *Recent developments*

75. There are no recent developments for element B.5.

#### *Practical application*

##### *Period 1 January 2014-31 December 2016 (stage 1)*

76. The United States reported that it has in the period 1 January 2014-31 December 2016 not denied access to MAP for cases where the issue presented by the taxpayer in a MAP request has already been resolved through an audit settlement between the taxpayer and the IRS. Furthermore, the United States has in the period 1 January 2014-31 December 2016 also not denied access to the MAP for cases where the issue presented by the taxpayer has already been resolved through its administrative/statutory dispute settlement or resolution process that operates independently from the audit and examination functions.

77. All peers that provided input indicated not being aware of denial of access to the MAP by the United States in the period 1 January 2014-31 December 2016 in cases where there was already an audit settlement between the taxpayer and the IRS, or where issues were resolved via an administrative or a statutory dispute or resolution settlement process. Also taxpayers reported that the United States has not denied access to MAP in such situations. One peer, however, noted that, although the United States provides access to MAP, double taxation may not always be resolved in case a taxpayer has entered into an audit settlement with the IRS. This is because the United States' competent authority will in such circumstances only present the case to the other competent authority concerned for correlative relief.

*Period 1 January 2017-31 August 2018 (stage 2)*

78. The United States reported that since 1 January 2017 it has also not denied access to the MAP for cases where the issue presented by the taxpayer has already been resolved through an audit settlement between the taxpayer and the IRS. Furthermore, the United States has since 1 January 2017 also not denied access to the MAP for cases where the issue presented by the taxpayer has already been resolved through its administrative/statutory dispute settlement or resolution process that operates independently from the audit and examination functions.

79. All peers that provided input during stage 1 stated in stage 2 that the update report provided by the United States fully reflects their experience with the United States since 1 January 2017 and/or there are no additions to the previous input given. In addition, one of them clarified that no MAP cases were initiated with the United States since that date.

***Anticipated modifications***

80. The United States did not indicate that it anticipates any modifications in relation to element B.5.

***Conclusion***

	Areas for improvement	Recommendations
[B.5]	-	-

**[B.6] Provide access to MAP if required information is submitted**

Jurisdictions should not limit access to MAP based on the argument that insufficient information was provided if the taxpayer has provided the required information based on the rules, guidelines and procedures made available to taxpayers on access to and the use of MAP.

81. To resolve cases where there is taxation not in accordance with the provisions of the tax treaty it is important that competent authorities do not limit access to MAP when taxpayers have complied with the information and documentation requirements as provided in the jurisdiction's guidance relating hereto. Access to MAP will be facilitated when such required information and documentation is made publicly available.

***Legal framework on access to MAP and information to be submitted***

82. The information and documentation that the United States requires taxpayers include in a request for MAP assistance are discussed under element B.8.

83. The United States reported that upon receipt of a MAP request, its competent authority will analyse the request and determine whether additional information is necessary to support the request. If so, its competent authority will request additional information and documentation within a reasonable timeframe after the date of receipt of the MAP request. In this respect, taxpayers are given a reasonable timeframe to provide such information and/or documentation. The United States clarified that the actual timeframe is left to the discretion of the case handlers and managers based on the facts and circumstances of the case (e.g. the complexity and difficulty in obtaining the information, the documentation requested and timing of the next meeting/communication with the other competent authority concerned in the case under review). Where taxpayers do not provide the requested



information and/or documentation within a reasonable timeframe, the United States reported its competent authority will take appropriate, incremental actions and, if needed, inform the taxpayer that the MAP process will be discontinued if he does not provide the information within a given timeframe. If the taxpayer does not co-operate, the United States' competent authority may decide to close the case.

84. Further to the above, the United States has specified in section 7.01 of its MAP guidance that it will acknowledge receipt of a MAP request to taxpayers and indicate therein whether the request is complete and is accepted. Under section 7.02 and the appendix of its MAP guidance it is clarified that the United States' competent authority is allowed to deny access to MAP if taxpayers fail to provide all substantive information necessary for a consideration of the MAP request, as specified in sections 3.05 and Appendix of its MAP guidance. It, however, is particularly mentioned that the allowance to deny access to MAP for incomplete requests does not imply that access to MAP will be denied if taxpayers did not include in their initial MAP request all information that is required.

### ***Recent developments***

85. There are no recent developments for element B.6.

### ***Practical application***

#### *Period 1 January 2014-31 December 2016 (stage 1)*

86. According to the United States it provides access to MAP in all cases where taxpayers have complied with the information or documentation required by its competent authority and as set out in its MAP guidance. In this respect, the United States reported that it has in the period 1 January 2014-31 December 2016 not limited access to MAP on the grounds that information in the MAP request was not the information or documentation required by its competent authority.

87. All peers that provided input indicated not being aware of a limitation of access to MAP by the United States in the period 1 January 2014-31 December 2016 in situations where taxpayers complied with information and documentation requirements set out in the MAP guidance. Also taxpayers reported that the United States has not denied access to MAP in such situation.

#### *Period 1 January 2017-31 August 2018 (stage 2)*

88. The United States reported that since 1 January 2017 it has also not limited access to MAP on the grounds that information in the MAP request was not the information or documentation required by its competent authority.

89. All peers that provided input during stage 1 stated in stage 2 that the update report provided by the United States fully reflects their experience with the United States since 1 January 2017 and/or there are no additions to the previous input given. In addition, one of them clarified that no MAP cases were initiated with the United States since that date.

### ***Anticipated modifications***

90. The United States did not indicate that it anticipates any modifications in relation to element B.6.

### *Conclusion*

	Areas for improvement	Recommendations
[B.6]	-	-

### **[B.7] Include Article 25(3), second sentence, of the OECD Model Tax Convention in tax treaties**

Jurisdictions should ensure that their tax treaties contain a provision under which competent authorities may consult together for the elimination of double taxation in cases not provided for in their tax treaties.

91. For ensuring that tax treaties operate effectively and in order for competent authorities to be able to respond quickly to unanticipated situations, it is useful that tax treaties include the second sentence of Article 25(3) of the OECD Model Tax Convention, enabling them to consult together for the elimination of double taxation in cases not provided for by these treaties.

#### *Current situation of the United States' tax treaties*

92. Out of the United States' 60 tax treaties, 46 contain a provision equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention allowing their competent authority to consult together for the elimination of double taxation in cases not provided for in their tax treaties. The remaining 14 treaties do not contain a provision that is based on, or equivalent to, Article 25(3), second sentence, of the OECD Model Tax Convention.<sup>7</sup>

93. Some peers noted that they are either conducting negotiations with the United States or envisaging such negotiations with a view to be compliant with the relevant elements of the Action 14 Minimum Standard.

#### *Recent developments*

94. As is described in the Introduction, the United States reported that it is still in the process of evaluating what modifications to its tax treaties are necessary in order to bring them in line with the Action 14 Minimum Standard, and that it is working internally on a plan in relation thereto. Apart from this evaluation, the United States has neither conducted treaty negotiations nor initiated these with a view to bring, where necessary, its tax treaties in line with the Action 14 Minimum Standard. This also regards those tax treaties that do not contain a provision equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention.

95. Of the peers that provided input during stage 2, four repeated their previous input that their treaty with the United States is already in line with the requirements under the Action 14 Minimum Standard. Furthermore, one peer reported it is currently in negotiations with the United States on the replacement of the existing treaty, which will be in conformity with the requirements under the Action 14 Minimum Standard. Three other peers mentioned that there have not been any contacts with the United States to bring the treaty in line with this standard. These latter peers regard treaty partners for which the applicable tax treaty is not in line with the requirements under element B.7.

### *Anticipated modifications*

96. The United States indicated that there are not any anticipated modifications, other than that it intends to seek to include a provision equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention in all of its future tax treaties.

### *Conclusion*

	Areas for improvement	Recommendations
[B.7]	14 out of 60 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention. For these 14 treaties no actions have been taken nor are any actions planned to be taken.	<p>The United States should without further delay request via bilateral negotiations the inclusion of the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, in 13 of the 14 treaties that do not contain such provision.</p> <p>Specifically with respect to the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan, the United States should, once it enters into negotiations with the jurisdictions for which it applies the treaty, request the inclusion of the required provision.</p>

## **[B.8] Publish clear and comprehensive MAP guidance**

Jurisdictions should publish clear rules, guidelines and procedures on access to and use of the MAP and include the specific information and documentation that should be submitted in a taxpayer's request for MAP assistance.

97. Information on a jurisdiction's MAP regime facilitates the timely initiation and resolution of MAP cases. Clear rules, guidelines and procedures on access to and use of the MAP are essential for making taxpayers and other stakeholders aware of how a jurisdiction's MAP regime functions. In addition, to ensure that a MAP request is received and will be reviewed by the competent authority in a timely manner, it is important that a jurisdiction's MAP guidance clearly and comprehensively explains how a taxpayer can make a MAP request and what information and documentation should be included in such request.

### *The United States' MAP guidance*

98. The United States has issued rules, guidelines and procedures relating to the MAP function are included in Rev. Proc. 2015-40 ("MAP guidance"). This guidance is available at:

<https://www.irs.gov/pub/irs-drop/rp-15-40.pdf>

99. The United States' MAP guidance sets out in detail the use of the MAP under the tax treaties the United States entered into and also describes the approach of the United States on using arbitration where MAP does not lead to the elimination of double taxation. More specifically, its MAP guidance contains information on:

- a. general outline of the MAP function under tax treaties in general and the availability of MAP under the tax treaties the United States entered into
- b. performance of the competent authority function in the United States and contact information of this competent authority

- c. scope of application of the MAP process (e.g. for which cases taxpayers can and cannot request competent authority assistance)
  - d. procedures for submission of MAP requests by taxpayers, including the manner and form in which the taxpayer should submit its MAP request, as also the usage of pre-filing procedures
  - e. relationship with domestic available remedies (both domestic court cases, the internal IRS appeals procedure and the simultaneous appeals procedure) and the APA programme
  - f. how the MAP functions in terms of timing, the role of the competent authorities and the rights and role of taxpayers
  - g. instances where access to MAP may be denied
  - h. time limits for filing of a MAP request
  - i. the specific information and documentation that should be included in a MAP request (see further below)
  - j. Availability of MAP in relation to the Accelerated Competent Authority Procedure<sup>8</sup> (“ACAP”), secondary adjustments and ancillary issues, such as the application of domestic legislation regarding penalties, fines and interest
  - k. the possibility to file a small case MAP request<sup>9</sup>
  - l. implementation of MAP agreements, including the right for taxpayers to accept or reject these agreements
  - m. information on availability of arbitration and the functioning of the arbitration procedure under tax treaties
  - n. filing of protective claims to ensure that domestic law regulations do not constrain the implementation of MAP agreements
  - o. consideration of interest and penalties in a MAP.
100. The above-described MAP guidance of the United States includes detailed information on the availability and the use of the MAP process and how its competent authority conducts the process in practice. This guidance includes the information that the FTA MAP Forum agreed should be included in a jurisdiction’s MAP guidance, which concerns: (i) contact information of the competent authority or the office in charge of MAP cases and (ii) the manner and form in which the taxpayer should submit its MAP request.<sup>10</sup> Although the United States’ MAP guidance is comprehensive, one subject is not specifically addressed. This concerns a specification on whether the MAP is available in cases of multilateral disputes and the process how MAP agreements are implemented in terms of steps to be taken and timing of these steps, including any actions to be taken by taxpayers (if any).

*Information and documentation to be included in a MAP request*

101. The United States’ MAP guidance enumerates in section 3.05 in what form a MAP request should be submitted and what information needs to be included in such request. The appendix to this MAP guidance sets out in detail the required information and documentation for MAP requests, and the order in which it should be presented. In addition, this appendix also contains information and instructions on other administrative matters relating to the submission of a MAP request. Section 1 of the appendix lists the instructions and requirements for all competent authority requests, whereas sections 2 and 3 concern MAP requests filed with the APMA team respectively the TAIT team.

102. To facilitate the review of a MAP request by competent authorities and to have more consistency in the required content of MAP requests, the FTA MAP Forum agreed on guidance that jurisdictions could use in their domestic guidance on what information and documentation taxpayers need to include in a request for MAP assistance.<sup>11</sup> In this respect, the requirements in the United States on what on what information and documentation should be included in a MAP request are checked in the following list:

- identity of the taxpayer(s) covered in the MAP request
- the basis for the request (the nature of the action giving rise to, or expected to give rise to, taxation not in accordance with the convention)
- facts of the case
- analysis of the issue(s) requested to be resolved via MAP
- whether the MAP request was also submitted to the competent authority of the other treaty partner
- whether the MAP request was also submitted to another authority under another instrument that provides for a mechanism to resolve treaty-related disputes
- whether the issue(s) involved were dealt with previously
- a statement confirming that all information and documentation provided in the MAP request is accurate and that the taxpayer will assist the competent authority in its resolution of the issue(s) presented in the MAP request by furnishing any other information or documentation required by the competent authority in a timely manner.

103. With respect to the availability of arbitration, the United States has agreed with Belgium, Canada, France, Germany, Japan, Spain and Switzerland on specific rules. These rules define that taxpayers must provide information in their MAP request in accordance with the domestic rules of each jurisdiction, as a prerequisite for cases to become eligible for arbitration after the expiration of the specific deadline for the mutual agreement procedure.<sup>12</sup>

104. One peer provided input on element B.8. It considered that the United States' MAP guidance contains helpful information on how it conducts the MAP. This peer used this guidance when conducting MAPs with the United States and considered it to be informative. In addition, taxpayers also indicated that the guidance issued by the United States sets out the information to be included in a MAP request in a clear manner, but suggested that the section dealing with arbitration could provide more guidance on how and when cases are eligible for arbitration.

### ***Recent developments***

105. There are no recent developments for element B.8.

### ***Anticipated modifications***

106. The United States indicated that certain structural changes in the relevant divisions and offices of its competent authority, among other changes, since the release of the update to its MAP guidance in 2015, are being reviewed for a possible update. There is, however, no specific timeline set for such update. Apart from this, the United States did not indicate that it anticipates any modifications in relation to element B.8.

**Conclusion**

	Areas for improvement	Recommendations
[B.8]	-	-

**[B.9] Make MAP guidance available and easily accessible and publish MAP profile**

Jurisdictions should take appropriate measures to make rules, guidelines and procedures on access to and use of the MAP available and easily accessible to the public and should publish their jurisdiction MAP profiles on a shared public platform pursuant to the agreed template.

107. The public availability and accessibility of a jurisdiction’s MAP guidance increases public awareness on access to and the use of the MAP in that jurisdiction. Publishing MAP profiles on a shared public platform further promotes the transparency and dissemination of the MAP programme.<sup>13</sup>

108. The MAP guidance of the United States is published and can be found at:

<https://www.irs.gov/pub/irs-drop/rp-15-40.pdf>

109. As regards its accessibility, it is easily found on the government website of the IRS. For example, a search for “double taxation” on this website is directed towards the relevant webpage where the public guidance on MAP can be found. Furthermore, for each tax treaty the United States has entered into a unilateral technical explanation to the tax treaty is provided for, which is also available on the website of the IRS.<sup>14</sup>

**MAP profile**

110. The MAP profile of the United States is published on the website of the OECD.<sup>15</sup> This MAP profile is complete and often with detailed information. This profile includes external links which provide extra information and guidance. This profile was updated in May 2017.

**Recent developments**

111. There are no recent developments for element B.9.

**Anticipated modifications**

112. The United States did not indicate that it anticipates any modifications in relation to element B.9.

**Conclusion**

	Areas for improvement	Recommendations
[B.9]	-	-

## [B.10] Clarify in MAP guidance that audit settlements do not preclude access to MAP

Jurisdictions should clarify in their MAP guidance that audit settlements between tax authorities and taxpayers do not preclude access to MAP. If jurisdictions have an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer, and jurisdictions limit access to the MAP with respect to the matters resolved through that process, jurisdictions should notify their treaty partners of such administrative or statutory processes and should expressly address the effects of those processes with respect to the MAP in their public guidance on such processes and in their public MAP programme guidance.

113. As explained under element B.5 an audit settlement can be valuable to taxpayers by providing certainty to them on their tax position. Nevertheless, as double taxation may not be fully eliminated by agreeing with such settlements, it is important that a jurisdiction's MAP guidance clarifies that in case of audit settlement taxpayers have access to the MAP. In addition, for providing clarity on the relationship between administrative or statutory dispute settlement or resolution processes and the MAP (if any), it is critical that both the public guidance on such processes and the public MAP programme guidance address the effects of those processes, if any. Finally, as the MAP represents a collaborative approach between treaty partners, it is helpful that treaty partners are notified of each other's MAP programme and limitations thereto, particularly in relation to the previous mentioned processes.

### *MAP and audit settlements in the MAP guidance*

114. As previously discussed under element B.5, the United States' MAP guidance includes in sections 1.01(5), 6.01 and 6.03 an explanation of the relationship between access to the MAP and audit settlements. This guidance clarifies that taxpayers have access to MAP in cases where they entered into an audit settlement with the IRS' examination function. In sections 1.01(5) and 6.03(2) it is elaborated that where a taxpayer enters into a closing agreement within the IRS examination function, the United States' competent authority will endeavour only to obtain a correlative adjustment at the level of the applicable treaty partner. It will not undertake any actions that would change the determination of taxable income that is reflected in the audit settlement.

115. All peers that provided input reported no issues regarding the public availability of information relating to access to MAP and audit settlements in the United States. One peer, however, referred to section 6.03(2) of the United States' MAP guidance and pointed out that this policy may, as noted in paragraph 72 under element B.5, jeopardise the elimination of double taxation in cases where the taxpayer entered into a settlement agreement with the IRS.

### *MAP and other administrative or statutory dispute settlement/resolution processes in available guidance*

116. As previously discussed under element B.5, the United States has a statutory/administrative dispute settlement/resolution process in place that is independent from the audit and examination function and that can only be accessed through a request by the taxpayer as an alternative to, and in some ways in conjunction with, the MAP process.

117. Section 6.04(1) of its MAP guidance explains that the United States' competent authority will deny access to MAP for those issues in which taxpayers opted to challenge

an IRS-initiated adjustment through this process instead of presenting them to the United States' competent authority according to the procedures and deadlines set forth in its MAP guidance. Section 6.04 of its MAP guidance further details the rules that apply when taxpayers opt for an internal administrative appeal with the IRS appeals office and its interrelation with the availability of MAP for those issues settled through that process. In section 6.04(3) it is further specified that the United States' competent authority will require that the MAP request severs, or separates out, issues that are to be submitted for competent authority assistance from those that would remain under review by the IRS appeals office. In other words, only those issues that are not under review by the IRS appeals office can be dealt with in a MAP. If, however, the IRS appeals process concludes without resolving the issue and the issue is then resolved by a judicial decision, then, consistent with its treatment of other cases resolved through US judicial remedies, the United States reported its competent authority will provide access to MAP, but will endeavour only to obtain a correlative relief from the other competent authority concerned.

118. Furthermore, the United States has included information on the internal administrative appeal with the IRS appeals office in the IRS Internal Revenue Manual. This manual can be found at: [https://www.irs.gov/irm/part8/irm\\_08-007-003.html#d0e1133](https://www.irs.gov/irm/part8/irm_08-007-003.html#d0e1133). Section 8.7.3.7 of this manual includes specific information on how the administrative appeals interrelate with the mutual agreement procedure under tax treaties the United States entered into.

### ***Notification of treaty partners of existing administrative or statutory dispute settlement/resolution processes***

119. The United States reported that all treaty partners were notified of the existence of its statutory/administrative dispute settlement/resolution process and its consequences for MAP, because this process is identified and described in the United States' MAP guidance and MAP profile, both of which are publicly available. All 19 peers that provided input on the United States' compliance with the Action 14 Minimum Standard, however, reported that they were not notified of the existence of such process in the United States. Two peers indicated that they only learned from the existence of this process via the information included in the United States' MAP profile as published on the website of the OECD, whereas one peer indicated that such information is not available in this MAP profile. Furthermore, a fourth peer reported that they only learned of the process due to the fact that the existence of such process was brought to its attention in a specific MAP case.

120. While the United States did not separately notify their treaty partners of the existence of its statutory/administrative dispute settlement/resolution process by means of a formal letter, the United States includes detailed information on this process in its MAP profile, with a reference to its domestic MAP guidance in which the process is outlined in detail. This is considered to be in line with the requirement under element B.10.

### ***Recent developments***

121. There are no recent developments for element B.10.

### ***Anticipated modifications***

122. The United States did not indicate that it anticipates any modifications in relation to element B.10.



## Conclusion

	Areas for improvement	Recommendations
[B.10]	-	-

## Notes

- One of the 11 treaties allows the submission of a MAP request to the competent authority for either treaty partner only for cases concerning the attribution of profits to permanent establishments. For simplicity purposes, this treaty was considered as having the equivalent of Article 25(1), first sentence, of the 2015 OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report. This treaty has in column 3 of Annex A been qualified with O/E.
- These 42 treaties include the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan.
- These nine treaties include the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan.
- It is noted that for one treaty, the unilateral technical explanation by the United States mentions that competent authorities are under the MAP article authorised to consult, if necessary, to resolve any differences in the application of the provisions of paragraphs 1 and 2 of Article 9.
- In the United States taxpayers may sign a so-called Form 870 concerning *Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment*. Signing this form by taxpayers, however, does not preclude access to MAP.
- In addition, the United States reported that IRS and the competent authority have established a simultaneous appeals procedure, pursuant to which taxpayers may request that the United States' competent authority aligns with the IRS appeals office before it presents its position on a MAP case to the competent authority of its treaty partner. The process is an optional aspect of the MAP process and its application has to be requested by taxpayers prior to or within 60 days after filing a MAP request. In this simultaneous appeals procedure the United States' competent authority, the IRS appeals office and taxpayers working toward the position of the United States regarding the US initiated adjustment that is eventually presented to the competent authority of its treaty partner. Section 6.04 of the United States' MAP guidance includes detailed rules how this process functions. The outcome of this process is neither binding on the United States' competent authority nor on the IRS appeals office or taxpayers. In addition, the outcome does not limit taxpayers' access to MAP. See in this regard section 6.04(2)(ii) of the United States' MAP guidance.
- These 14 treaties include the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan.
- The ACAP concerns the possibility to extend a MAP agreement to future fiscal years for which taxpayers have filed tax returns. Reference is made to section 4.01 of the United States' MAP guidance for information hereon.

9. A small case MAP request can be submitted if the sum of the adjustment, either in the United States or in the other jurisdiction involved, does not exceed the threshold of USD 1 million for individuals or USD 5 million for corporations/partnerships. Such small case MAP request cannot be made for cases concerning: (i) taxpayer-initiated adjustments, (ii) requests for discretionary granting of benefits under the limitation of benefits (LOB) article and (iii) pension plan request filed by persons other than individuals. Reference is made to section 5 of the United States' MAP guidance for an overview.
10. Available at: [www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf](http://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf).
11. Ibid.
12. Available at: <https://www.irs.gov/businesses/international-businesses/mandatory-arbitration-with-germany-belgium-and-canada>.
13. The shared public platform can be found at: [www.oecd.org/ctp/dispute/country-map-profiles.htm](http://www.oecd.org/ctp/dispute/country-map-profiles.htm).
14. Available at: <https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z> and <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/treaties.aspx>.
15. Available at: [www.oecd.org/tax/dispute/United-States-Dispute-Resolution-Profile.pdf](http://www.oecd.org/tax/dispute/United-States-Dispute-Resolution-Profile.pdf).

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- OECD (2015a), *Model Tax Convention on Income and on Capital 2014 (Full Version)*, OECD Publishing, Paris, <https://dx.doi.org/10.1787/9789264239081-en>.
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## *Part C*

### Resolution of MAP cases

#### [C.1] **Include Article 25(2), first sentence, of the OECD Model Tax Convention in tax treaties**

Jurisdictions should ensure that their tax treaties contain a provision which requires that the competent authority who receives a MAP request from the taxpayer, shall endeavour, if the objection from the taxpayer appears to be justified and the competent authority is not itself able to arrive at a satisfactory solution, to resolve the MAP case by mutual agreement with the competent authority of the other Contracting Party, with a view to the avoidance of taxation which is not in accordance with the tax treaty.

123. It is of critical importance that in addition to allowing taxpayers to request for a MAP, tax treaties also include the first sentence of Article 25(2) of the OECD Model Tax Convention (OECD, 2017), which obliges competent authorities, in situations where the objection raised by taxpayers are considered justified and where cases cannot be unilaterally resolved, to enter into discussions with each other to resolve cases of taxation not in accordance with the provisions of a tax treaty.

#### *Current situation of the United States' tax treaties*

124. Out of the United States' 60 tax treaties, 46 contain a provision equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention requiring its competent authority to endeavour – when the objection raised is considered justified and no unilateral solution is possible – to resolve by mutual agreement with the competent authority of the other treaty partner the MAP case with a view to the avoidance of taxation which is not in accordance with the tax treaty. For the remaining 14 treaties, the following analysis is made:

- In 13 treaties a provision is contained requiring the competent authority to which the request was submitted, when the claim made by taxpayers is considered to have merit, to strive to reach agreement with the competent authority of the other contracting state. These 13 treaties are considered not having the full equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention, as specifically the language regarding the possibility of a unilateral satisfactory solution is not contained.<sup>1</sup> The United States reported, however, that it considers that the absence of such wording in these treaties does not preclude its competent authority from providing a unilaterally satisfactory solution if possible and that it will provide for such relief where appropriate.

- In one treaty a provision that is based on Article 25(2), first sentence, of the OECD Model Tax Convention is contained, but this provision also includes additional wording setting a condition for the provision to apply. This condition consists of a notification from the competent authority that received the MAP request to the competent authority of the other state within a time limit of four and a half years from the due date or the date of filing the return in that other state, whichever is later. As such an obligation may prevent cases from being effectively dealt with in MAP, the is therefore considered as not having the full equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention.

125. Some peers noted that they are either conducting negotiations with the United States or envisaging such negotiations with a view to be compliant with the relevant elements of the Action 14 Minimum Standard.

### ***Recent developments***

126. As is described in the Introduction, the United States reported that it is still in the process of evaluating what modifications to its tax treaties are necessary in order to bring them in line with the Action 14 Minimum Standard, and that it is working internally on a plan in relation thereto. Apart from this evaluation, the United States has neither conducted treaty negotiations nor initiated these with a view to bring, where necessary, its tax treaties in line with the Action 14 Minimum Standard. This also regards those tax treaties that do not contain a provision equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention.

127. Of the peers that provided input during stage 2, four repeated their previous input that their treaty with the United States is already in line with the requirements under the Action 14 Minimum Standard. Furthermore, one peer reported it is currently in negotiations with the United States on the replacement of the existing treaty, which will be in conformity with the requirements under the Action 14 Minimum Standard. Two other peers mentioned that there have not been any contacts with the United States to bring the treaty in line with this standard. Lastly, one peer mentioned that while there have not been any contacts with the United States with a view to bring the treaty in line with the requirements under element C.1, both jurisdictions have been discussing the interpretation of the MAP article. One of the two peers mentioned above and the last peer regard treaty partners for which the applicable tax treaty is not in line with the requirements under element C.1.

### ***Anticipated modifications***

128. The United States indicated that there are not any anticipated modifications, other than that it intends to seek to include a provision equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention in all of its future tax treaties.

## Conclusion

	Areas for improvement	Recommendations
[C.1]	14 out of 60 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention. For these 14 treaties no actions have been taken nor are any actions planned to be taken.	The United States should without further delay request via bilateral negotiations the inclusion of the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention in 13 of the 14 treaties that do not contain such provision.  Specifically with respect to the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan, the United States should, once it enters into negotiations with the jurisdictions for which it applies the treaty, request the inclusion of the required provision.

### [C.2] Seek to resolve MAP cases within a 24-month average timeframe

Jurisdictions should seek to resolve MAP cases within an average time frame of 24 months. This time frame applies to both jurisdictions (i.e. the jurisdiction which receives the MAP request from the taxpayer and its treaty partner).

129. As double taxation creates uncertainties and leads to costs for both taxpayers and jurisdictions, and as the resolution of MAP cases may also avoid (potential) similar issues for future years concerning the same taxpayers, it is important that MAP cases are resolved swiftly. A period of 24 months is considered as an appropriate time period to resolve MAP cases on average.

### Reporting of MAP statistics

130. The United States reported it annually publishes MAP statistics on the website of the IRS, starting as of 2011.<sup>2</sup> These statistics include: (i) MAP requests received, (ii) MAP cases resolved, (iii) the number of pending cases, as per year end, (iv) average time needed to resolve MAP cases and (v) specifically for MAP cases handled by the APMA team (attribution/allocation cases); how cases were resolved (double taxation fully eliminated, partially eliminated, etc.). Statistics relating to MAP are also published on the website of the OECD as of 2007.<sup>3</sup>

131. The FTA MAP Forum has agreed on rules for reporting of MAP statistics (“**MAP Statistics Reporting Framework**”) for MAP requests submitted on or after 1 January 2016 (“**post-2015 cases**”). Also, for MAP requests submitted prior to that date (“**pre-2016 cases**”), the FTA MAP Forum agreed to report MAP statistics on the basis of an agreed template. The United States provided their MAP statistics pursuant to the MAP Statistics Reporting Framework within the given deadline, including all cases involving the United States and of which its competent authority was aware. The statistics discussed below include both post-2015 and pre-2016 cases and the full statistics are attached to this report as Annex B and C respectively and should be considered jointly for an understanding of the MAP caseload of the United States.<sup>4</sup>

132. With respect to post-2015 cases, the United States reported having reached out to all its MAP partners with a view to have their MAP statistics matching. For the year 2016, the United States indicated that the reported statistics have been reconciled with its MAP partners except for two that did not respond to its outreach. For the year 2017, the United

States also indicated that it reached out to its MAP partners on several occasions to match the statistics, but that despite repeated efforts, it did not receive a final confirmation on the MAP statistics for attribution/allocation cases with five treaty partners.

133. A number of peers provided input on the matching of MAP statistics with the United States. Most of these peers mentioned that they were able to match their statistics. One peer thereby stressed that contacts for statistical purposes were fruitful, and another mentioned the matching exercise was done via various instances, such as mail, fax and face-to-face meetings. A third peer noted that it has successfully worked jointly on matching the MAP statistics. Furthermore, one peer also noted that it managed to match its statistics with the United States, although it also experienced delays in receiving responses. This input was also echoed by another peer, who mentioned that it encountered difficulties in matching the statistics with the United States for the year 2017, which was caused by a late response by the United States' competent authority. During the course of a meeting of the FTA MAP Forum in June 2018, both jurisdictions could eventually match their MAP statistics. To avoid potential difficulties in matching the MAP statistics in future years, the peer reported that it has agreed with the United States to match their statistics during face-to-face meetings. In that regard, for 2018 the peer noted that all cases received before 30 September 2018 have already been matched.

134. Based on the information provided by the United States' MAP partners, its post-2015 MAP statistics for 2016 and 2017 actually match those of its treaty partners as reported by the latter.

### ***Monitoring of MAP statistics***

135. The United States reported it uses an internal inventory management system to monitor and manages its MAP caseload with all treaty partners. In this respect, section 12.03 of the United States' MAP guidance notes that its competent authority is not responsible for informing the other competent authority concerned on the receipt of a MAP request.

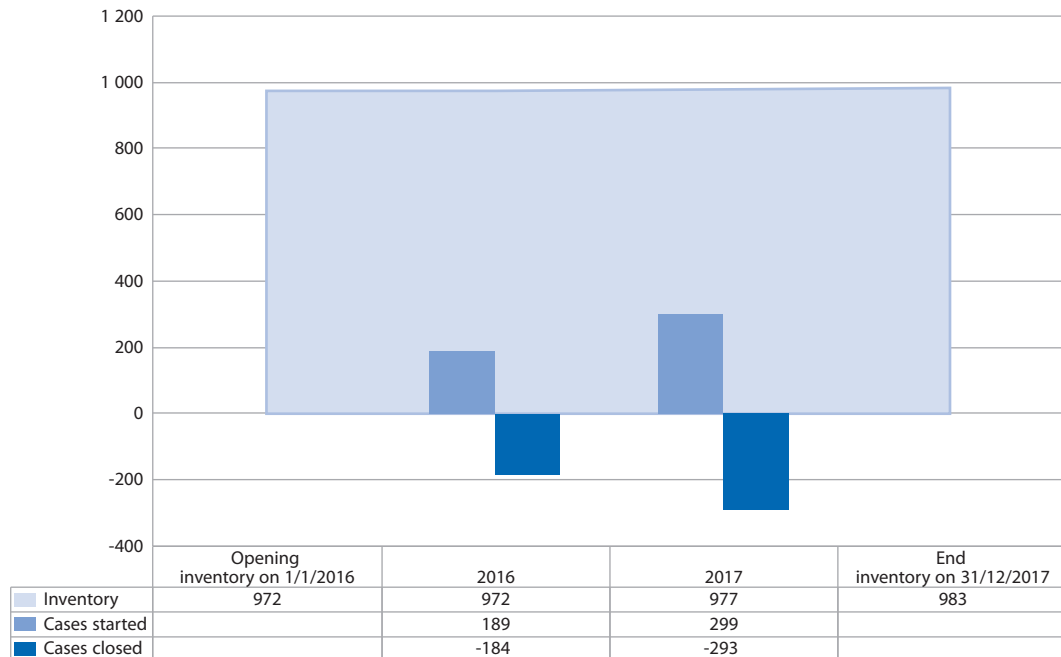
136. One peer provided input hereon and noted that the United States' competent authority does not inform them of MAP requests submitted, which according to this peer should be the case with a view to having matching MAP caseloads amongst jurisdictions. Another peer reported that it jointly works with the United States' competent authority to align their MAP caseload and the status of MAP requests submitted so as to avoid mismatches between the competent authorities. In a response, the United States reported that it uses an internal inventory management system to monitor and manage its MAP caseload with all treaty partners. The United States reported that it welcomes discussions with treaty partners on how best to share information and update another to most effectively manage respective bilateral MAP caseloads. The United States further reported that it is also beginning to implement procedures to confirm dates relevant to the MAP Statistics Reporting Framework, for example by including its understanding of the MAP start date in notification and acknowledgment letters.

### ***Analysis of the United States' MAP caseload***

137. The analysis of the United States' MAP caseload relates to the period starting on 1 January 2016 and ending on 31 December 2017.

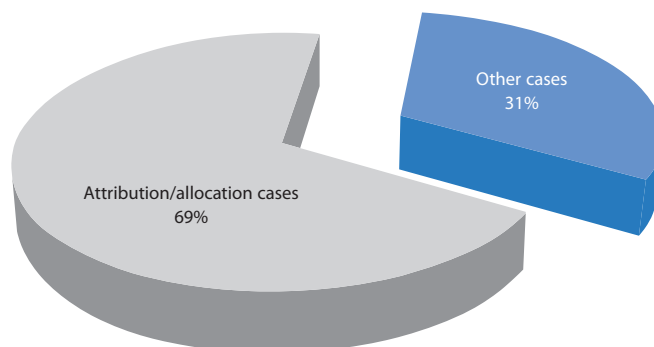
138. The following graph shows the evolution of the United States' MAP caseload over the Statistics Reporting Period.

Figure C.1. Evolution of the United States' MAP caseload



139. At the beginning of the Statistics Reporting Period the United States had 972 pending MAP cases, of which 716 concerned attribution/allocation cases and 256 other cases.<sup>5</sup> At the end of the Statistics Reporting Period, the United States had 983 MAP cases in its inventory, 676 of which are attribution/allocation cases and 307 other cases.<sup>6</sup> Consequently, the United States' pending MAP cases have remained roughly the same during the Statistics Reporting Period. However, while the number of pending attribution/allocation cases has decreased by 6%, the number of pending other cases has increased by 20%. The breakdown of the end inventory can be shown as follows:

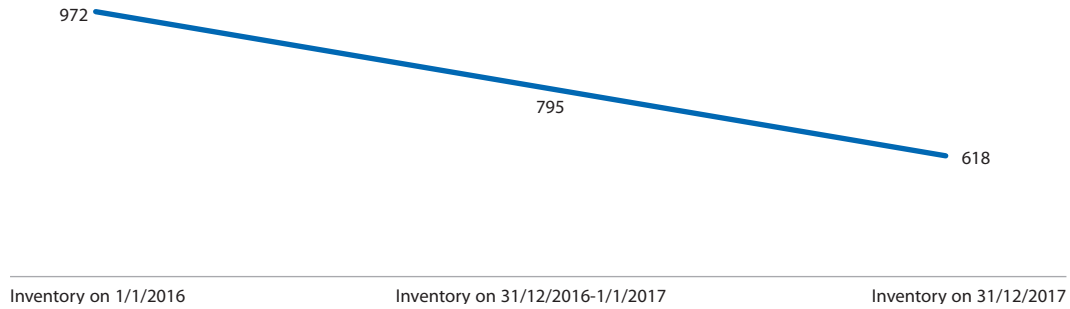
Figure C.2. End inventory on 31 December 2017 (983 cases)



*Pre-2016 cases*

140. The following graph shows the evolution of the United States’ pre-2016 MAP cases over the Statistics Reporting Period.

Figure C.3. Evolution of the United States’ MAP inventory Pre-2016 cases



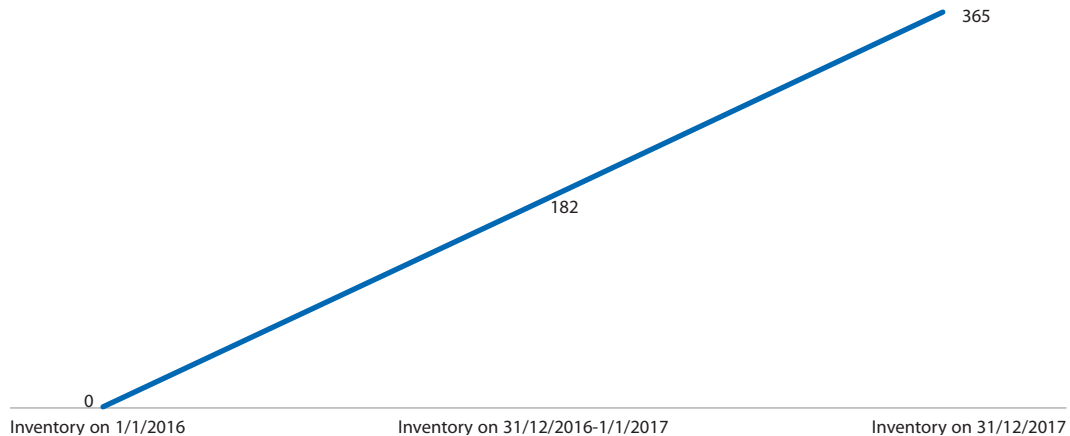
141. At the beginning of the Statistics Reporting Period, the United States’ MAP inventory of pre-2016 MAP cases consisted of 972 cases, 716 of which were attribution/allocation cases and 256 other cases. At the end of the Statistics Reporting Period the total inventory of pre-2016 cases had decreased to 618 cases, consisting of 429 attribution/allocation cases and 189 other cases. The decrease in the number of pre-2016 MAP cases is shown in the table below.

	Evolution of total MAP caseload in 2016	Evolution of total MAP caseload in 2017	Cumulative evolution of total MAP caseload over the two years (2016+2017)
Attribution/allocation cases	-20%	-25%	-40%
Other cases	-14%	-14%	-26%

*Post-2015 cases*

142. The following graph shows the evolution of the United States’ post-2015 MAP cases over the Statistics Reporting Period.

Figure C.4. Evolution of the United States’ MAP inventory Post-2015 cases





143. In total, 488 MAP cases started during the Statistics Reporting Period, 333 of which concerned attribution/allocation cases and 155 other cases. At the end of this period the total number of post-2015 cases in the inventory was 365 cases, consisting of 247 attribution/allocation cases and 118 other cases. Conclusively, the United States closed 123 post-2015 cases during the Statistics Reporting Period, of which 123 were attribution/allocation cases and 37 were other cases. The total number of closed cases represent 37% of the total number of post-2015 cases that started during the Statistics Reporting Period.

144. The number of post-2015 cases closed as compared to the number of post-2015 cases started during the Statistics Reporting Period is shown in the table below.

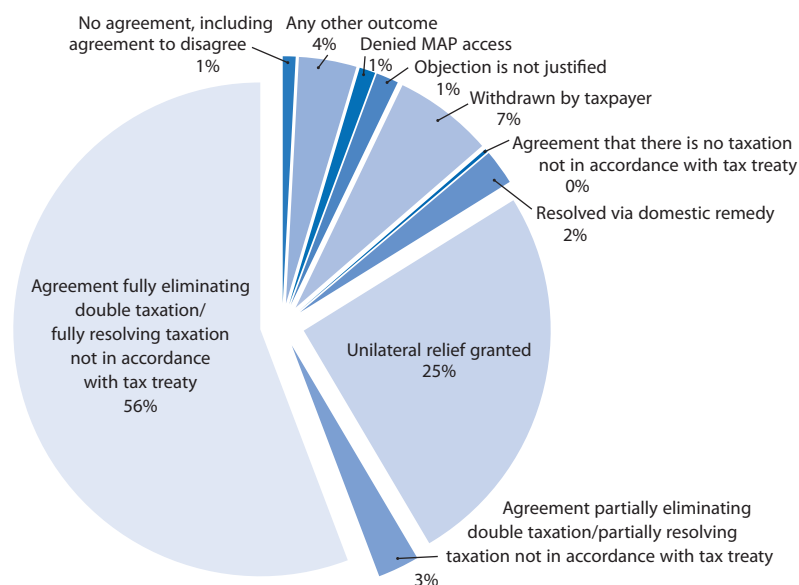
	% of cases closed in 2016 compared to cases started in 2016	% of cases closed in 2017 compared to cases started in 2017	Cumulative % of cases closed compared to cases started over the two years (2016+2017)
Attribution/allocation cases	2%	43%	26%
Other cases	8%	32%	24%

### *Overview of cases closed during the Statistics Reporting Period*

#### *Reported outcomes*

145. During the Statistics Reporting Period the United States in total closed 477 MAP cases, for which the following outcomes were reported:

Figure C.5. Cases closed during the Statistics Reporting Period (477 cases)



146. This chart shows that during the Statistics Reporting Period, 266 out of 477 cases were closed through an agreement that fully eliminated double taxation or fully resolved taxation not in accordance with the tax treaty.

*Reported outcomes for attribution/allocation cases*

147. In total, 373 attribution/allocation cases were closed during the Statistics Reporting Period. The main reported outcomes for these cases are:

- agreement fully eliminating double taxation/fully resolving taxation not in accordance with the tax treaty (57%)
- unilateral relief granted (29%)
- withdrawn by taxpayer (4%)
- any other outcome (4%).

*Reported outcomes for other cases*

148. In total, 104 other cases were closed during the Statistics Reporting Period. The main reported outcomes for these cases are:

- agreement fully eliminating double taxation/fully resolving taxation not in accordance with the tax treaty (51%)
- withdrawn by taxpayer (14%)
- unilateral relief granted (11%)
- resolved via domestic remedy (8%).

*Average timeframe needed to resolve MAP cases**All cases closed during the Statistics Reporting Period*

149. The average time needed to close MAP cases during the Statistics Reporting Period was 27.17 months. This average can be broken down as follows:

	Number of cases	Start date to End date (in months)
Attribution/Allocation cases	373	27.22
Other cases	104	27.00
All cases	477	27.17

*Pre-2016 cases*

150. For pre-2016 cases the United States reported that on average it needed 33.88 months to close attribution/allocation cases and 38.74 months to close other cases. This resulted in an average time needed of 34.80 months to close pre-2016 cases. For the purpose of computing the average time needed to resolve pre-2016 cases, the United States used:

- *start date*: the date when the MAP request was received or notification was given by the other competent authority
- *end date*: the date of the closing letter to the taxpayer, or, where the case was only initiated with the treaty partner, the date of the closing letter to the other competent authority.

### Post-2015 cases

151. As a preliminary remark, it should be noted that the period for assessing post-2015 MAP statistics only comprises 24 months.

152. For post-2015 cases, the United States reported that on average it needed 4.99 months to close 86 attribution/allocation cases and 5.75 months to close 37 other cases. This resulted in an average time needed of 5.22 months to close 123 post-2015 cases.

### *Peer input*

153. All peers that provided input to the United States' compliance with the minimum standard report a good working relationship with the competent authority of the United States, which is further discussed under element C.3 below. This concerns both jurisdictions that have a large MAP inventory with the United States and jurisdictions with a relatively modest MAP caseload with the United States. Peers reported that contacts with the competent authority of the United States are easy and that they are solution-oriented. Peers further indicated that cases are generally resolved within a reasonable period, although not all cases are resolved within the targeted 24-month period. Some peers, particularly those with whom the United States has a large MAP inventory, noted that they do not experience any impediments in the timely resolution of MAP cases. These peers in fact appreciated the efforts made by the United States' competent authority to resolve cases within a certain timeframe.

### ***Recent developments***

154. The United States reported it has made targeted changes to enhance its current inventory management system with a view to ensure an accurate reporting of its MAP statistics. In a broader sense, its competent authority is seeking to migrate its entire MAP inventory (both concerning attribution/allocation cases) to a common platform to enhance the ability to manage MAP cases and to maintain accurate date for the reporting of MAP statistics under the Action 14 Minimum Standard. Additionally, the United States reported its competent authority has updated its standardised correspondence templates to include a request from treaty partners for confirmation of items to be recorded for statistical purposes (dates, outcomes and average times) under that minimum standard. It also mentioned that, although it is not required under its MAP guidance, as a matter of practice, the United States' competent authority consistently provides its treaty partners with notification letters for MAP requests received.

155. Further to the above, under element C.2 in the stage 1 peer review report the United States was recommended to seek to resolve the remaining 95% of its post-2015 MAP cases that were pending on 31 December 2016 (168 cases) within a timeframe that results in an average timeframe of 24 months for all post-2015 cases. In this respect, the United States reported that its competent authority continues to develop and improve internal processes to more efficiently resolve MAP cases. The United States also reported that it will continue to actively promote frequent and robust communications with treaty partners in order to facilitate reaching the goal under the Action 14 Minimum Standard of resolving MAP cases within an average of 24 months.

156. As follows from the MAP statistics discussed above, the United States has during 2016 and 2017 not closed its MAP cases within the pursued average of 24 months, as the average for both years combined was 27.17 months. In 2016 it closed approximately 4% of the post-2015 cases started in that year. By the end of 2017, the United States closed in total 25% of the post-2015 cases that started in 2016 and 2017.

157. All peers that provided input during stage 1 stated in stage 2 that the update report provided by the United States fully reflects their experience with the United States since 1 January 2017 and/or there are no additions to the previous input given. Specific input on the resolution of MAP cases will be further discussed under element C.3.

### *Anticipated modifications*

158. As will be mentioned under element C.6, the United States has committed to provide for mandatory binding MAP arbitration in its bilateral tax treaties as a mechanism to provide that treaty-related disputes will be resolved within a specified timeframe.

### *Conclusion*

	Areas for improvement	Recommendations
[C.2]	-	-

## **[C.3] Provide adequate resources to the MAP function**

Jurisdictions should ensure that adequate resources are provided to the MAP function.

159. Adequate resources, including personnel, funding and training, are necessary to properly perform the competent authority function and to ensure that MAP cases are resolved in a timely, efficient and effective manner.

### *Description of the United States' competent authority*

160. Under the tax treaties the United States has entered into, the Secretary of the Treasury, or his delegate, is designated as the competent authority. The competent authority function with respect to the mutual agreement procedure is, pursuant to Delegation Order 4-12 (Rev. 3) of 7 September 2016, delegated to the Commissioner Large Business and International Division (“**LB&I**”) of the Internal Revenue Services (“**IRS**”). In the United States the competent authority’s MAP function is performed by the following teams:

- a. *Advance Pricing and Mutual Agreement Program (“APMA”)*: this team has primary responsibility for cases arising under the business profits and associated enterprises articles of the United States’ tax treaties. The APMA team also holds responsibility to handle requests for unilateral, bilateral or multilateral APAs.
- b. *Treaty Assistance and Interpretation Team (“TAIT”)*: this team has primary responsibility for cases concerning all other articles included in the United States’ tax treaties (i.e. residence status, application of the Limitation on Benefits article).<sup>7</sup> The TAIT team also holds responsibility for cases arising under tax treaties that concern estate and gift taxes.

161. The United States reported that the personnel working in the APMA and TAIT teams are generally fully dedicated to dispute resolution. The personnel also provides supporting work within the IRS and to the Treasury Department. For example, the TAIT team supports the team that conducts treaty negotiations, as this has a relation with the application and interpretation of tax treaties. Furthermore, the United States clarified that both teams may also provide support when drafting internal procedures, such as MAP or APA guidance.

162. The United States' competent authority currently employs approximately 110 technical persons, of which approximately 85 work in the APMA team. According to the United States, its extensive MAP experience has ensured that its personnel working in the competent authority have thorough expertise to assist in resolving tax treaty related disputes. It thereby noted that its competent authority consistently looks for opportunities to build internal procedures and mechanisms to support both the APMA and TAIT teams to prevent disputes from arising, to ensure access to MAP where disputes do arise, to timely resolve cases once they are in the MAP and to implement all MAP agreements once reached. Specifically with respect to managing its increasing MAP inventory, the United States' competent authority indicated that it fostered positive treaty relationships and ensured on-going communications and dialogue with its treaty partners.

163. The United States reported that, as a matter of policy, it strives to enter into memoranda of understanding and general competent authority arrangements with treaty partners to address recurring issues that may reduce further potential cases and disputes. The website of the United States' includes an extensive list of these Memoranda of Understanding and competent authority arrangements.<sup>8</sup> The United States, as an example hereof, referred to the recently concluded (October 2016) memorandum of understanding with Mexico.<sup>9</sup> This agreement regards United States' taxpayers that conduct certain business activities in Mexico (maquiladora operations) and ensures that they will not be exposed to double taxation if they enter into a unilateral APA with the Mexican tax authorities on the bases of the terms agreed between the competent authorities of Mexico and the United States. From the perspective of the United States the terms agreed in such unilateral APA are considered at arm's length. In the view of the United States, these kinds of memoranda of understanding may reduce disputes from arising and also the potential MAP caseload of the United States, by which it can devote the available resources to solving MAP cases. This arrangement has been remarkably successful. More than 600 unilateral APAs have been reached with maquiladoras of US taxpayers, providing taxpayers and Mexico's and the United States' governments with certainty and reprieve from costly and time-consuming audits and potential MAP and even bilateral APA cases. One peer mentioned in this regard that it has engaged with the United States to address questions on interpreting and applying their tax treaty with a view to agree on a common approach and to reduce future disputes. In practice this has in some instances indeed prevented disputes from arising.

164. The United States has also entered into certain competent authority arrangements specifically relating to the mutual agreement procedure. Two such arrangements are with the Netherlands<sup>10</sup> and the United Kingdom<sup>11</sup> and set out certain principles and practices to be followed in presenting and discussing MAP cases. The United States expressed its willingness to pursue such common understandings on best practices with other treaty partners in order to continuously improve the MAP process.

### ***Monitoring mechanism***

165. The United States indicated that it constantly assesses workloads, the extent to which additional resources are needed in its MAP function, and its ability to request increased resources based on available budget or reallocate resources across the division. In terms of funding of its competent authority, the United States reported that there has been generally sufficient budget available for travelling and conducting face-to-face meetings.

### *Recent developments*

166. In its stage 1 peer review report, under element C.3, it was concluded that the United States in 2016 has not resolved its MAP cases within the pursued average of 24 months. While the available resources at the level of its competent authority are sufficient in light of its MAP inventory, the risk was identified that due to an average completion time of 30.87 months the available resources are not adequately used. For this reason, the United States was recommended to ensure that the available resources are adequately used in order to resolve MAP cases in a timely, efficient and effective manner.

167. In view of this recommendation, the United States reported its competent authority has reviewed, and continues to review, each aspect of its case development, negotiation practices and administrative procedures to ensure they facilitate the efficient, effective and timely resolution of MAP cases. In this respect, the United States also referred to the migration of its MAP inventory and management system, which it believes it will make the MAP process to proceed more efficiently. In addition, the United States reported its competent authority anticipates hiring additional staff before 30 September 2019 at the case handler level. The United States further referred to other specific developments at the level of the APMA and TAIT teams, which are part of its competent authority's efforts towards continuously working to improve their electronic case correspondence review and approval procedures, as well as making more frequently use of communications via encrypted emails. Specifically relating to actions taken by each team, the following was reported:

- APMA team:
  - A significant portion of APMA's APA/MAP inventory includes US subsidiaries of foreign companies that perform wholesale distribution functions within the United States. To increase the efficiency in determining the arm's length pricing for such benchmarkable transactions, the APMA team developed reference sets of companies. From these reference sets APMA analysts can draw companies that are suitable to serve as comparables given the particular facts and circumstances of the US distributor's business (e.g. companies having robust financial data and fulsome descriptions of the functions they perform, the assets they employ, and the risks they assume in their businesses). The United States reported that the APMA team has outlined this reference set concept with certain treaty partners with whom it has significant United States-inbound MAP or APA case activity in an effort to resolve these cases in a more timely and efficient manner and provide greater certainty for taxpayers. In addition, consistent with principles underlying "global awareness" of the examination function, the United States reported that plans are being set for the IRS's examination function to be trained in the use of these reference sets. This implies that they serve as a resource available to an examiner to be consulted if it is appropriate in light of the facts and circumstances they see before them in a given case. The United States clarified that in this setting the reference sets would provide information relevant for at least initial risk assessment purposes and, as appropriate, as a starting point for purposes of developing a transfer pricing adjustment, which would then be fully developed according to examination protocols. Using this set would provide the APMA team with an immediate point of reference to quickly make an initial assessment to determine whether the adjustment is justified in principle and amount.
  - In addition, the APMA team continues to have a large number of MAP and bilateral APA cases with India's competent authority, which primarily involves

software development services and information technology enabled services that are performed by Indian subsidiaries for the benefit of their US parent companies. Similar in motivation to the landmark “framework” agreement reached with India’s competent authority, the United States reported that the APMA team has worked with India to develop a suitable “reference” set of companies in the hopes that dialogue and collaboration on refining the set will lead to a mutually agreeable set from which comparables for MAP and APA cases can systematically be drawn.

- Lastly, as noted in paragraph 162 above, the APMA team has continued discussions with their counterparts within Mexico’s competent authority to renew the understanding they reached in 2016 regarding benchmarking for maquiladoras of US parent companies consistent with arm’s length principles. Under this unprecedented arrangement, Mexico’s competent authority has entered into unilateral APAs with maquiladoras based upon a transfer pricing framework that the United States’ and Mexico’s competent authorities have agreed in advance will produce arm’s length results. This ensured that the terms of the unilateral APAs would not give rise to concerns about double taxation, while at the same time obviating the need for the taxpayers and governments to enter into bilateral APAs. The United States reported that to date Mexico’s competent authority has entered into more than 600 unilateral APAs with maquiladoras of US companies. Upon having confirmed that the first set of years to which the framework was applied produced arm’s length results, the United States mentioned that the APMA team believes it is in the interest of both governments to renew the framework, with appropriate refinements, for a new term.
- TAIT team: case analysts within the team have in September 2017 received internal advanced training in tax treaty matters. Furthermore, the TAIT team has generally been working with stakeholders within the IRS on the streamlining of fact-intensive cases.

168. Further to the above, the stage 1 peer review report of the United States reflects suggestions for improvement made by its peers (reflected in paragraphs 178 and 182 below), which related to enhancing the communication between the competent authorities. In the anticipated modifications section, the United States indicated it is exploring and implementing greater use of electronic communications to make communications with treaty partners more efficient, while ensuring applicable data security requirements are met. In follow-up hereto, the United States reported that where encrypted software is compatible, its competent authority is able to share and receive documentation and other information with treaty partners through secured emails.

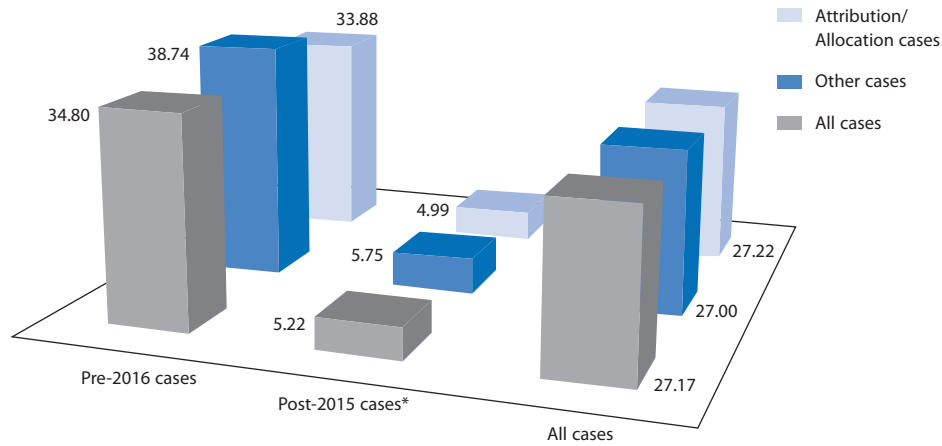
169. Lastly, the United States also reported it is actively participating with seven other jurisdictions in and helping to lead the Forum on Tax Administration’s International Compliance Assurance Programme (ICAP), which may contribute to the prevention of disputes.

### ***Practical application***

#### ***MAP statistics***

170. As discussed under element C.2, in 2016 and 2017 the United States has not closed its MAP cases during the Statistics Reporting Period within the pursued 24-month average, as the average is 27.17 months. This both concerns attribution/allocation cases and can be shown by the following graph.

Figure C.6. Average time (in months)



\*Note that post-2015 cases only concern cases started and closed during 2016 or 2017.

171. The average time to close MAP cases for 2016 and 2017 can be broken down as follows:

	2016	2017
Attribution/Allocation cases	31.61	24.43
Other cases	28.65	26.02
All cases	30.99	24.78

172. The United States reported that there are a variety of reasons why cases were on average not resolved within the 24-month timeframe. It indicated that although resources for the competent authority function might partly explain the overstep of the 24-month average, lengthy resolution of cases are commonly attributable to other reasons, such as delays in correspondence (e.g. sending and receiving position papers), communication difficulties, fundamental differences with treaty partners on points of law or their application to facts, or difficulties in reaching a principled resolution with certain treaty partners.

173. The stage 1 peer review report of the United States analysed the 2016 statistics and showed an average of 30.87 months. It was on that basis concluded that it did not close MAP cases within the pursued average of 24 months and for that reason the United States was recommended to make more adequate use of the available resources in order to be able to resolve MAP cases in a timely, efficient and effective manner.

174. With the final submission of the 2016 statistics, however, the average time to resolve MAP cases was slightly modified, which numbers are shown in the above table.<sup>12</sup> The 2017 statistics show that the United States decreased the average completion time of MAP cases to 24.78 months, resulting in an average for both years of 27.17 months. However, also in 2017 the average completion time was above 24 months, while its MAP inventory remained roughly the same since 1 January 2016. This can be shown as follows:



2016+2017	Opening inventory on 1/1/2016	Cases started	Cases closed	End inventory on 31/12/2016/ Start inventory on 01/01/2017	Cases started	Cases closed	End inventory on 31/12/2017	Evolution of total MAP caseload over the two years (2016+2017)
Attribution/ allocation cases	716	138	145	709	195	228	676	-6%
Other cases	256	51	39	268	104	65	307	20%
Total	972	189	184	977	299	293	983	1%

175. The increase in the number of other MAP cases with 20% (51 cases) indicates that more resources may be necessary to cope with this increase and to ensure that for future MAP cases the United States will be able to resolve them within the pursued average of 24 months.

### *Peer input*

#### Period 1 January 2014-31 December 2016 (stage 1)

176. As mentioned under element C.2, all peers that provided input report a good working relationship with the competent authority of the United States and that it is an important MAP partner for their jurisdictions. This concerns both peers that have a large MAP inventory with the United States and peers with which there is a relatively modest MAP caseload with the United States. Furthermore, all peers that provided input indicated that the contacts with the United States' competent authority are easy and frequent. Methods of communication generally used are mail, e-mail, fax and telephone. One peer particularly noted that the United States' competent authority is very responsive to communications, that there is a constructive and positive co-operation to resolve MAP cases and that it is willing to discuss and conduct negotiations via teleconferencing.

177. With respect to contacting the United States' competent authority peers generally reported that it is considered easily accessible and no problems were reported as regards contacting them. For example, one peer noted that it enjoyed a co-operative and professional relationship with the United States' competent authority to settle MAP cases, whereby technology and personnel is exchanged between the two states. In addition, this peer reported that there is open communication between their competent authorities, whereby they are aware which persons to contact. Another peer noted that the organisational structure of the United States' competent authority has been explained to them and is considered as a clear division of competence by subject areas. This peer also noted that it is easy to identify the contact details of the persons responsible for a particular MAP case. In this regard it is noted that the relevant contact details of the United States' competent authority are made available in its MAP guidance. Apart from these positive experiences, one peer noted that it experienced miscommunication with the United States' competent authority, as the peer's competent authority was not promptly notified of changes in the team handling MAP cases with them. Another peer noted that it experienced some difficulties in obtaining a response from the United States' competent authority to official letters sent by its own competent authority, but it was not further specified what difficulties it concerned and whether and how these were resolved.

178. Other peers, however, reported that United States' policy and practices regarding the timely resolution of MAP cases can be improved. For example, one peer noted that in some cases the United States' competent authority sent questionnaires to obtain information, which

information could also be obtained under United States' domestic legislation at the level of the taxpayer. Doing so would in this peer's view speed up proceedings. The United States responded to this input by stating that its competent authority considers whether information is available through internal channels before sending questions to its treaty partners. However, when the taxpayer is resident in the other jurisdiction and has not been under examination in the United States, it is unlikely that the United States would have facts and circumstances information relevant to, for example, a residency tie-breaker determination. In these types of cases, the United States agrees that it is more efficient to obtain the information from the taxpayer directly. But if a MAP is initiated by the other competent authority, it is this competent authority that has the primary contact with the taxpayer. Moreover, the United States' competent authority might not have contact details of this taxpayer and there might also be a language barrier in obtaining this information directly from this taxpayer.

179. Another peer reported that the communication process and resolving of MAP cases with the United States may be slowed down due to the confidentiality requirements in place in the United States, which requires that taxpayer identification data can only be exchanged by mail or fax. This peer therefore suggested that to be able to resolve cases more quickly, documents including confidential information are also to be send via encrypted e-mails. From input by other peers it follows that such secured exchange of documents is actually used and facilitates efficient communication between the competent authorities. In this respect, one peer in particular noted that it has agreed with the United States' competent authority on a data exchange set, allowing for quick and secure electronic communications. In addition, another peer mentioned that in some cases it experienced delays in receiving a communication from the United States' competent authority that a MAP case was submitted. This peer therefore suggested enhancing the response and communication time to prevent delays in solving MAP cases within the average of 24-months.

180. Last, a peer mentioned that the United States' competent authority requires legal persons to submit a MAP request in the state where they are incorporated, whereas the treaty in force clearly requires such submission in the state of residence and which requirement may delay the time to resolve the case (see for a discussion also element B.1). The United States indicated that in transfer pricing cases its MAP guidance requires the associated enterprise resident in the United States, and party to the controlled transaction, to file a complete MAP request with the United States' competent authority. The United States also indicated that it has largely applied this requirement in a practical manner, recognising the burden it could place on taxpayers in individual cases. In general, the United States not only believes this requirement is necessary for handling the volume and complexity of the MAP cases it receives, but also believes the rule gives clear direction to taxpayers about the information necessary to effectively discuss the case. Furthermore, where the relevant tax treaty includes an arbitration provision, the United States has agreed with its treaty partners that taxpayers must – as a prerequisite for cases to become eligible for arbitration after the expiration of the specific deadline for the mutual agreement procedure – provide information in their MAP request that is required by the respective domestic rules of each jurisdiction.

181. On the material side of handling MAP cases, all peers reported that the United States is co-operative, constructive and solution-oriented and has the intent to resolve MAP cases in a timely, effective and principled manner. One peer particularly noted that a substantial amount of disputes have been resolved in 2016 and that both competent authorities showed a high degree of understanding each other's views on the technical issues of the cases concerned. Furthermore, another peer noted that staff in charge of MAP in the United States is well-trained to handle MAP cases. A third peer noted that the United States'

competent authority takes a pragmatic approach when an audit by the IRS results in multiple exposures and whereby the covered transactions with some jurisdictions concern only small amounts. Some peers, however, noted that although the United States uses strict requirements on the content of MAP respectively APA requests, its competent authority is flexible and co-operative once cases are in the MAP and negotiations have started.

182. The United States mentioned that its competent authority regularly schedules face-to-face meetings with other competent authorities for settling disputes. The frequency of these meetings depends on the size and nature of the MAP caseload with the relevant treaty partner.<sup>13</sup> Most peers reported holding such face-to-face meetings once or twice a year. For all treaty partners, the United States reported its competent authority meets with its counterparts as needed to ensure that cases progress efficiently.

183. Peers generally reported no items for improvement regarding providing adequate resources for the MAP function. Some peers specifically mentioned that they consider that in the United States there are sufficient resources available to conduct the MAP function. Two other peers also made suggestions for improving the functioning of the United States' competent authority and speeding up resolution of cases, namely: (i) to make more use of video conferencing for discussing cases and (ii) that personnel could be more pro-active in exploring ways to resolve cases prior to face-to-face meetings. Another peer, with whom the United States entered into the previous discussed administrative agreement (see paragraph 157), mentioned that they strive to conduct face-to-face meetings bi-annually, but do not always succeed in doing so. To enhance communication, this peer suggested making more frequent use of conference calls or videoconferencing, or arranging alternative venues for meetings, for example in Paris during the course of OECD meetings. Finally, one peer also noted that in its view the internal processes in the United States for management oversight/sign-offs of competent authority decisions seem to be unduly extensive. According to this peer these processes can be improved in the United States. Another suggestion made by this peer is that the United States' competent authority could make MAP proceedings more efficient by sharing their reports on the case.

#### Period 1 January 2017-31 December 2017 (stage 2)

184. Most peers that provided input during stage 1 stated in stage 2 that the update report provided by the United States fully reflects their experience with the United States since 1 January 2017 and/or there are no additions to the previous input given. Eight peers provided specific input on their experiences with the United States concerning the resolution of MAP cases since that date. One of these seven peers mentioned that there was no change in the excellent relationship with the United States' competent authority. Similar input was given by another peer, who noted that since 1 January 2017 it continues to have a positive and good working relationship with the competent authority of the United States with respect to the timely resolution of MAP cases. A third peer also confirmed this and mentioned that the United States' competent authority responds to requests in a timely manner, whereby cases are resolved efficiently. This peer, however, also mentioned that one pre-2016 case is still pending, for which there has not yet been a substantive discussion on the case. Another peer did not provide specific input on its experiences with the United States since 1 January 2017, but noted that it resolved already several MAP cases since that date and that the pending cases are progressing in due form.

185. Furthermore, one peer mentioned that its experiences with the United States has been positive in many ways and it considered the United States' competent authority as pro-active and engaged. It further mentioned that its MAP cases with the United States were resolved in a timely manner. Although for one case, relating to the residence status

of a taxpayer, it took the United States' competent authority almost a year to provide a position on the case. The peer believed that this was due to the complexity of the particular case. In its experience, the position of the United States that was ultimately submitted was comprehensive and well-evidenced, following which the case could be quickly resolved afterwards. This peer concluded that in its view the United States has sufficient resources to manage the competent authority function, as also that the quality of the position papers shows that staff in charge of MAP cases with this peer have appropriate skills, training and experience. Another peer mentioned that there has recently been a significant improvement in the relationship between this peer's competent authority and that of the United States, particularly concerning the close co-operation in the resolution of MAP cases.

186. In addition, one peer mentioned that since 1 January 2017 its competent authority has noted an average of six months between the moment a MAP agreement is reached and the moment a closing letter is received from the United States' competent authority. The peer specified that in its understanding this delay is due to an internal review process, for which it suggests that considerations are being given to add resources at this stage. Apart from this particular point, the peer mentioned that it continues to have a good treaty relationship with the United States and that it has not encountered any issues concerning the resolution of MAP cases.

187. Lastly, one peer stated that the increase of encrypted emails, conference calls and face-to-face meetings has facilitated a greater co-operation between their competent authorities. In general terms this has enabled a timely resolution of MAP cases, although in two cases responses by the United States' competent authority have been outstanding for a considerable period. This peer on an overall basis considers that it has a strong, transparent and constructive MAP relationship with the United States. It also mentioned it welcomed the recent suggestions by the TAIT team with respect to other MAP cases, concerning suggestions of improvements within the procedures to provide MAP assistances on an unilateral level, without having recourse to the bilateral phase in simple cases.

### *Anticipated modifications*

188. The United States indicated that it is currently investigating a pilot that will facilitate sending of messages and documents to treaty partners and taxpayers through a secure, internet-based platform. Additionally, the United States' competent authority has more frequently been using conference calls and video conferencing in between face-to-face meetings with its treaty partners to discuss inventory status, to share information, to continue negotiations for pending cases and to decrease the time needed to resolve a case.

### *Conclusion*

	Areas for improvement	Recommendations
[C.3]	<p>As the MAP caseload relating to other cases has increased substantially since 1 January 2016, this indicates that the competent authority may not be adequately resourced to cope with this increase, while no specific actions have been taken to address this in the meantime.</p> <p>Furthermore, as MAP cases were resolved in 27.17 months on average, there may be a risk that post-2015 cases are not resolved within the average of 24 months, which is the pursued average for resolving MAP cases received on or after 1 January 2016, although several actions were taken to make more adequate use of its available resources.</p>	<p>The United States should continue to closely monitor whether it has adequate resources in place to ensure that future MAP cases are resolved in a timely, efficient and effective manner. Where needed, it should devote additional resources to cope with the significant increase in the number of other MAP cases.</p> <p>In addition, while already steps have been taken, the United States should continue improving internal working procedures in order to make more adequate use of its available resources, such as to be able to resolve MAP cases in a timely, efficient and effective manner.</p>

#### [C.4] **Ensure staff in charge of MAP has the authority to resolve cases in accordance with the applicable tax treaty**

Jurisdictions should ensure that the staff in charge of MAP processes have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty, in particular without being dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy that the jurisdictions would like to see reflected in future amendments to the treaty.

189. Ensuring that staff in charge of MAP can and will resolve cases, absent any approval/direction by the tax administration personnel directly involved in the adjustment at issue and absent any policy considerations, contributes to a principled and consistent approach to MAP cases.

#### *Functioning of staff in charge of MAP*

190. The United States reported that staff in charge of MAP holds the obligation to administer and apply tax legislation in a fair and equitable manner, thereby protecting taxpayers' rights and also to treat taxpayers with honesty, integrity and respect. For each case that is handled through MAP, staff in charge of MAP are obliged to consider and take into account the relevant facts of the case under review, economic analyses, treaty provisions and additional applicable laws for determining how each individual case can be resolved in a principled manner. The United States further reported that when resolving MAP cases, staff in charge of MAP must co-operate with the IRS examination department for securing the necessary extensions of the United States' domestic statute of limitations for the period a MAP case is pending. Furthermore, staff in charge of MAP generally also might consult with the IRS examination department for verifying or gathering the necessary facts for the case under review.<sup>14</sup> In addition, staff in charge of MAP is required to consult with the IRS Office of Associate Chief Counsel International on certain interpretation matters for ensuring consistency and quality with the tax policy of the United States.

191. With respect to conducting the MAP process and entering into MAP agreements, the United States reported that staff in charge of MAP is subject to managerial and executive review. Rules relating hereto are set out in IRS Delegation Order 4-12 (Rev.3), which is available on the website of the IRS. In this order it is detailed that the United States' competent authority is allowed to enter into competent authority agreements under tax treaties entered into by the United States.

192. Within the United States' competent authority the TAIT team reports to the Director of Treaty Administration and APMA team reports to the APMA Director. The Director of Treaty Administration and the APMA Director both report to the Director of Treaty and Transfer Pricing Operations Practice Area within the IRS' Large Business and International Division. Concerning the resolution of MAP cases, the United States stated that its competent authority function operates independently from the tax administration personnel that made the adjustments at issue in a MAP case and has the authority to resolve MAP cases. There is neither a (formal) system in place to ask approval for any MAP agreements other than within the competent authority nor a process for negotiating MAP agreements that would be influenced by policy considerations.

193. Further to the above, the United States reported that personnel conducting MAP negotiations have the authority to enter into tentative agreements, which are subject to executive approval within the United States' competent authority.

***Recent developments***

194. There are no recent developments for element C.4.

***Practical application******Period 1 January 2014-31 December 2016 (stage 1)***

195. Peers that provided input generally reported no impediments by the United States to properly perform its MAP function, absent from approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy. One peer specifically mentioned that they are not aware of any facts indicating that the MAP agreements negotiated by staff in charge of the MAP in the United States are dependent on the approval of the tax authorities outside the office of the United States' competent authority.

196. However, another peer reported experiences that tentative agreements reached between the competent authorities do not always result in a final MAP agreement due to the fact that the tentative agreement is internally challenged in the United States (i.e. due to the fact that the team assigned to the case was changed). This peer therefore suggested that tentative MAP agreements could only be challenged by the head of the United States' competent authority. The United States acknowledged some past confusion on this issue and clarified that, per its current protocols, tentative MAP agreements are internally reviewed and confirmed. They are only subject to challenge by the United States' competent authority and by the director of the applicable office delegated such responsibilities on behalf of the United States' competent authority.

***Period 1 January 2017-31 August 2018 (stage 2)***

197. All peers that provided input during stage 1 stated in stage 2 that the update report provided by the United States fully reflects their experience with the United States since 1 January 2017 and/or there are no additions to the previous input given.

***Anticipated modifications***

198. The United States did not indicate that it anticipates any modifications in relation to element C.4.

***Conclusion***

	Areas for improvement	Recommendations
[C.4]	-	-

**[C.5] Use appropriate performance indicators for the MAP function**

Jurisdictions should not use performance indicators for their competent authority functions and staff in charge of MAP processes based on the amount of sustained audit adjustments or maintaining tax revenue.

199. For ensuring that each case is considered on its individual merits and will be resolved in a principled and consistent manner, it is essential that any performance indicators for the competent authority function and the staff in charge of MAP processes are appropriate and not based on the amount of sustained audit adjustments or aim at maintaining a certain amount of tax revenue.

### *Performance indicators used by the United States*

200. The United States reported it does not set targets for the staff in charge of MAP in terms of amounts of sustained audit adjustments or tax revenue maintained. In addition, the performance of the staff in charge of MAP is also not based on the amount of sustained audit adjustments or the maintenance of tax revenue, or the specific results of MAP discussions. In fact, United States reported its domestic legislation prohibits using quantitative criteria for evaluating the performance of staff in charge of MAP, such as number of cases closed or amount of the tax assessed, or production quotas goals.<sup>15</sup> In general, and in line with the remarks made under element C.3, the United States reported that personnel working in the United States' competent authority are evaluated on critical job elements for their position and whether, consistent with the person's official responsibilities, he or she administers the tax laws fairly and equitably, protects taxpayers' rights, and treats taxpayers ethically with honesty, integrity, and respect. More specifically, personnel in charge of MAP processes are given annual performance appraisals and mid-year progress reports. The United States specified that it thereby evaluates the performance of staff in charge of MAP through using the following qualitative criteria:

- workplace interaction and environment
- workgroup involvement
- issue identification and resolution
- technical knowledge
- verbal communication/listening, written communication and interaction
- accuracy of the work
- research and analysis
- security, privacy, disclosure and administration
- planning and scheduling
- workload management and time utilisation.

201. The Final Report on Action 14 (OECD, 2015) includes examples for performance indicators that are considered appropriate. These are:

- number of MAP cases resolved
- consistency (i.e. a treaty should be applied in a principled and consistent manner to MAP cases involving the same facts and similarly-situated taxpayers)
- time taken to resolve a MAP case (recognising that the time taken to resolve a MAP case may vary according to its complexity and that matters not under the control of a competent authority may have a significant impact on the time needed to resolve a case).

202. Other than consistency, which aligns with the obligation of IRS personnel to administer the tax laws fairly and equitably, the United States indicated that it does not use any of these performance indicators to evaluate its staff in charge of MAP processes.

### ***Recent developments***

203. There are no recent developments for element C.5.

### ***Practical application***

#### *Period 1 January 2014-31 December 2016 (stage 1)*

204. Peers that provided input reported not being aware of the use of performance indicators by the United States that are based on the amount of sustained audit adjustments or maintaining a certain amount of tax revenue. More generally, as discussed under element C.3, all peers reported that the United States is co-operative, constructive and solution-oriented and has the intent to resolve MAP cases in a timely, effective and principled manner.

#### *Period 1 January 2017-31 August 2018 (stage 2)*

205. All peers that provided input during stage 1 stated in stage 2 that the update report provided by the United States fully reflects their experience with the United States since 1 January 2017 and/or there are no additions to the previous input given.

### ***Anticipated modifications***

206. The United States did not indicate that it anticipates any modifications in relation to element C.5.

### ***Conclusion***

	Areas for improvement	Recommendations
[C.5]	-	-

## **[C.6] Provide transparency with respect to the position on MAP arbitration**

Jurisdictions should provide transparency with respect to their positions on MAP arbitration.

207. The inclusion of an arbitration provision in tax treaties may help ensure that MAP cases are resolved within a certain timeframe, which provides certainty to both taxpayers and competent authorities. In order to have full clarity on whether arbitration as a final stage in the MAP process can and will be available in jurisdictions it is important that jurisdictions are transparent on their position on MAP arbitration.

### ***Position on MAP arbitration***

208. Under the domestic law of the United States there are no limitations for including MAP arbitration in its tax treaties. Inclusion of MAP arbitration is part of its tax treaty policy and the US Model Tax Convention includes a mandatory and binding arbitration procedure as a final stage in the MAP process, which provides for last-best-offer type



of arbitration (also known as baseball arbitration). In section 10 of its MAP guidance the United States has set out the basic rules and issues relating to conducting the arbitration procedure.

### ***Recent developments***

209. There are no recent developments for element C.6.

### ***Practical application***

210. The United States has incorporated an arbitration provision in 12 tax treaties as a final stage to the MAP. These arbitration provisions can be classified as follows:

- Seven treaties contain a mandatory and binding arbitration provision. For three of these treaties, the arbitration provision is included in a protocol to the tax treaty, which have not been ratified. As such, these provisions have not yet entered into force.
- Five treaties contain a voluntary and binding arbitration. Five of these six treaties are not yet effective, as these only take effect upon the exchange of notes between the contracting states, which so far have not been exchanged.

211. With respect to the above-mentioned mandatory and binding arbitration provisions, the United States has entered into protocols, memoranda of understanding and competent authority arrangements to detail the rules to be applied during the arbitration procedure.<sup>16</sup> Such rules are also agreed on under two of the six treaties that provide for a voluntary and binding arbitration procedure.

212. One peer provided input and considered the last-best-offer type of arbitration under its treaty with the United States as working well, since it leads to more reasonable positions taken by their competent authorities, which also contributed that disputes can be resolved without needing arbitration.

### ***Anticipated modifications***

213. The United States did not indicate that it anticipates any modifications in relation to element C.6.

### ***Conclusion***

	Areas for improvement	Recommendations
[C.6]	-	-

## Notes

1. These 13 treaties include the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan.
2. Available at: <https://www.irs.gov/businesses/corporations/annual-competent-authority-statistics>. These statistics are up to fiscal year 2015.
3. Available at: [www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm](http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm). These statistics are up to 2017.
4. For post-2015 cases, if the number of MAP cases in the United States' inventory at the beginning of the Reporting Period plus the number of MAP cases started during the Reporting Period was more than five, United States' reports its MAP caseload on a jurisdiction-by-jurisdiction basis. This rule applies for each type of cases (attribution/allocation cases and other cases).
5. The United States reported that for pre-2016 and post-2015 cases it follows the MAP Statistics Reporting Framework for determining whether a case is considered an attribution/allocation case. Annex D of the MAP Statistics Reporting Framework defines such case as: "a MAP case where the taxpayer's MAP request relates to (i) the attribution of profits to a permanent establishment (see e.g. Article 7 of the OECD Model Tax Convention); or (ii) the determination of profits between associated enterprises (see e.g. Article 9 of the OECD Model Tax Convention), which is also known as a transfer pricing MAP case".
6. In the stage 1 peer review report of the United States, the reported number of pending MAP cases as per 31 December 2016 was 936 cases, consisting of 672 attribution/allocation cases and 264 other cases. With the submission of the 2017 MAP statistics the number of MAP cases was revised to 977 cases, consisting of 709 attribution/allocation cases and 268 other cases. The difference is caused by 40 more MAP cases started in 2016 and one case less resolved. The corrected figures are taken into account in this version of the peer review report. Reference is made to Annex B for an overview.
7. If the case under review concerns the existence of a permanent establishment, both the APMA and the TAIT team can handle such case. Both teams will co-ordinate and collaborate on such cases as well as on any other case as appropriate.
8. Available at: <https://www.irs.gov/individuals/international-taxpayers/competent-authority-agreements>.
9. Available at: <https://www.irs.gov/uac/newsroom/irs-announces-position-on-unilateral-apa-applications-involving-maquiladoras>. Maquiladoras generally operate in Mexico as contract manufacturers of foreign multinationals.
10. Administrative Arrangements for the Implementation of the Mutual Agreement Procedure (Article 29) of the Convention Between the Kingdom of the Netherlands and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains (signed on 18 December 1992, as amended by Protocols). Available at: <https://www.irs.gov/pub/irs-news/ir-03-116.pdf>.
11. See Administrative Arrangements for the Implementation of the Mutual Agreement Procedure (Article 25) of the Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains (signed on 31 December 1975, as amended by Protocols). Available at: <https://www.irs.gov/pub/irs-news/ir-00-79.pdf>.
12. The initial reported MAP statistics by the United States for 2016 showed an average time to close MAP cases of 30.87 months. This concerned an average of 31.61 months for attribution/allocation cases and 28.18 months for other cases.

13. See in this respect also section 2.06 of the MAP guidance of the United States, which stipulates that its competent authority schedules face-to-face meetings with the competent authorities of its treaty partners.
14. See section 4.60.2.4 of the Internal Revenue Manual, which sets out the role of the IRS in the preparation of a report to determine the position of the United States' competent authority in MAP. This manual is available at: [https://www.irs.gov/irm/part4/irm\\_04-060-002.html](https://www.irs.gov/irm/part4/irm_04-060-002.html).
15. The United States refers to such criteria as *Records of Tax Enforcement Results (ROTTER)*.
16. Available at: <https://www.irs.gov/businesses/international-businesses/mandatory-tax-treaty-arbitration>.

## *References*

- OECD (2017), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, <https://doi.org/10.1787/g2g972ee-en>.
- OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://dx.doi.org/10.1787/9789264241633-en>.



## *Part D*

### **Implementation of MAP agreements**

#### **[D.1] Implement all MAP agreements**

Jurisdictions should implement any agreement reached in MAP discussions, including by making appropriate adjustments to the tax assessed in transfer pricing cases.

214. In order to provide full certainty to taxpayers and the jurisdictions, it is essential that all MAP agreements are implemented by the competent authorities concerned.

#### ***Legal framework to implement MAP agreements***

215. The United States reported it implements all MAP agreements reached, provided that taxpayer accepted the agreement. MAP agreements are thereby implemented notwithstanding domestic time limits, unless such time limits are not waived under the applicable tax treaty. In such situation, implementation of a MAP agreement is subject to statute of limitations under domestic law, which may prevent the IRS from implementing a MAP agreement that requires an upward adjustment to the tax liability in the United States. To avoid that MAP agreements cannot be implemented due to domestic statute of limitations and to protect taxpayers' rights on a refund of taxes or on a potential credit, the United States allows taxpayers to file protective MAP claims. Section 11 of its MAP guidance details the rules and requirements for the filing of such protective claims.

216. The United States reported that once its competent authority enters into a MAP agreement with the other competent authority concerned, the tentative agreement reached is communicated to the taxpayer for consideration along with any explanation of all steps taxpayers may need to take to have the agreement implemented. In section 9.02 of the United States' MAP guidance it is stipulated that taxpayers have the opportunity to either accept or reject the agreement reached.<sup>1</sup> This both applies to agreements reached through MAP or following the application of an arbitration procedure under the relevant tax treaty as a final stage to the MAP process. In case taxpayers accept the MAP agreement, the United States' competent authority subsequently will, as detailed in section 9.04 of its MAP guidance, instruct the IRS to implement such agreement by means of a letter and a disposition memorandum to the appropriate IRS office or service centre. This letter explains the details of the agreement reached and instructs the recipient to implement the MAP agreement as described in the disposition memorandum. That office or service centre is subsequently required to implement the MAP agreement. If, however, taxpayers reject the MAP agreement, the United States' competent authority will close the case. Taxpayers may then pursue domestic remedies, if still available. Section 9.02 of the MAP guidance allows the United States' competent authority to deem that a taxpayer did not accept a

MAP agreement if they do not timely give their consent. It, however, is not specified within what timeframe such consent should be given.

### ***Recent developments***

217. The United States reported that in order to assist the IRS in the implementation of MAP agreements reached by the TAIT team, the team now provides more detailed instructions in the closing documents of the case, which specify the particular forms and line items that must be completed by the taxpayer (for cases concerning individuals this also concerns a specification of the office with which the forms should be filed). Where it concerns a MAP case that was initiated with the United States' competent authority, the instructions are communicated directly to the taxpayer. Where it concerns a MAP case that was initiated at the level of the treaty partner, the competent authority will be better be informed.

### ***Practical application***

#### *Period 1 January 2014-31 December 2016 (stage 1)*

218. The United States reported that all MAP agreements, once accepted by taxpayers, have been (or will be) implemented and that it is not aware of any MAP agreements that were not implemented in the period 1 January 2014-31 December 2016. It, however, has no mechanism in place to keep track on whether all MAP agreements reached are actually implemented.

219. Peers that provided input indicated not being aware of MAP agreements that were not implemented by the United States. Two peers specifically mentioned that the United States' competent authority is very efficient in implementing MAP agreements. One peer, however, noted that at the time of its input two MAP agreements reached in July 2016 had not been implemented due to the tentative status of the agreement in the United States. For one case, closing procedures have since been initiated. For the second case the United States responded that, due to highly unusual circumstances that arose after negotiations but before exchanging letters of agreement, the United States re-evaluated the case. The United States will provide a formal written explanation to the peer stating its reasons to enter into further negotiations after a tentative agreement already had been reached.

#### *Period 1 January 2017-31 August 2018 (stage 2)*

220. The United States reported that all MAP agreements that were reached on or after 1 January 2017, once accepted by taxpayers, have been (or will be) implemented and that there were no cases where such agreements were not implemented.

221. With respect to the issue brought forward by the peer during stage 1 of the peer review process, as is reflected above, the United States reported it has presented the peer's competent authority the reasons for its request to further negotiate a tentative MAP agreement that was reached during face-to-face negotiations in 2017. This explanation was that the tentative agreement might not lead to a full elimination of double taxation, despite their competent authorities' intention to achieve this. The United States further explained that thereafter its competent authority and that of its peers agreed on a practical way to address this situation without changing the underlying substantive agreement. The taxpayer was subsequently informed and given instructions on the documentation needed for the IRS to implement the agreement, as well as a contact within the IRS to expedite the processing of amending tax returns.

222. All peers that provided input during stage 1 stated in stage 2 that the update report provided by the United States fully reflects their experience with the United States since 1 January 2017 and/or there are no additions to the previous input given. One peer reported it welcomed the recent initiative by the TAIT team to provide detailed instructions within their closing documentation for the implementation of MAP agreements. This peer considered such instructions to be useful for taxpayers. It furthermore mentioned it would be worth monitoring the outcome of this initiative, such to guard against a negative impact on the delays in implementing MAP agreements.

### *Anticipated modifications*

223. The United States did not indicate that it anticipates any modifications in relation to element D.1.

### *Conclusion*

	Areas for improvement	Recommendations
[D.1]	-	-

## **[D.2] Implement all MAP agreements on a timely basis**

Agreements reached by competent authorities through the MAP process should be implemented on a timely basis.

224. Delay of implementation of MAP agreements may lead to adverse financial consequences for both taxpayers and competent authorities. To avoid this and to increase certainty for all parties involved, it is important that the implementation of any MAP agreement is not obstructed by procedural and/or statutory delays in the jurisdictions concerned.

### *Theoretical timeframe for implementing mutual agreements*

225. The United States reported that in its domestic legislation and/or administrative framework there is no timeframe for implementation of mutual agreements reached. This regards both the situation in which the MAP agreement leads to additional tax to be paid or to a refund of tax in the United States. Furthermore, the United States' MAP guidance does not include information in relation hereto.

### *Recent developments*

226. As is described under element D.1, the United States has improved its process for the implementation of MAP agreements reached by the TAIT team. The United States mentioned that this improvement was inter alia introduced to ensure that MAP agreements are timely implemented. Furthermore, the United States also reported that its competent authority has introduced bi-annual meetings with the IRS processing counterparts that are responsible for implementing MAP agreements for cases concerning natural persons to address and resolve systematic issues that arise in the implementation process of said agreements.

### ***Practical application***

#### *Period 1 January 2014-31 December 2016 (stage 1)*

227. The United States reported that all MAP agreements in the period 1 January 2014-31 December 2016, once accepted by taxpayers, have been (or will be) implemented and that no cases of noticeable delays have occurred.

228. Peers that provided input did in general not indicate experiencing any problems with the United States regarding the implementation of MAP agreements on a timely basis in the period 1 January 2014-31 December 2016. Two peers specifically mentioned that the United States' competent authority is very efficient in implementing MAP agreements. However, three peers raised particular issues regarding the timely implementation of MAP agreements. One peer noted that implementation of MAP agreements may take substantial time in the United States due to formal administrative and policy regulations. Another peer noted that implementation of MAP agreements by the TAIT team can be delayed due to the fact that implementation is dependent on the – time-consuming and complicated – procedure for non-residents to obtain a Tax Identification Number. The third peer reported that in its view the internal processes in the United States for management oversight/sign-offs of competent authority decisions seem to be unduly extensive, which can delay timely implementation of MAP agreements. Furthermore, one taxpayer provided input and mentioned that implementation of MAP agreements appear to be long.

#### *Period 1 January 2017-31 August 2018 (stage 2)*

229. The United States reported that all MAP agreements that were reached on or after 1 January 2017, once accepted by taxpayers, have been (or will be) implemented on a timely basis. With respect to the peer input given during stage 1 on the implementation of MAP agreements by the TAIT team, reference is made to the recent developments section of this element and of element D.1, which reflects the steps the United States has taken to ensure a timely implementation of such agreements.

230. Almost all peers that provided input during stage 1 stated in stage 2 that the update report provided by the United States fully reflects their experience with the United States since 1 January 2017 and/or there are no additions to the previous input given. One peer mentioned that all MAP agreements its competent authority has reached with the United States' competent authority have been timely implemented. Furthermore, another peer mentioned that with respect to the four MAP agreements it entered into with the United States, no delays have been faced regarding their implementation. Two peers, however, voiced different experiences. One of these peers mentioned it has experienced certain delays in the implementation of MAP agreements due to certain internal processes that are under review. This, however, was due to delay at the level of its own competent authority, not that of the United States. This peer further clarified that it is working on solving the kind of issues that causes delay in implementation. The other peer mentioned it has experienced delays in the implementation of MAP agreements by the United States. While the responses from the United States' competent authority was considered to be timely, in the peer's understanding delays occur at the level of the local tax office, as they are responsible for the actual implementation and therefore is time-consuming.

### ***Anticipated modifications***

231. The United States did not indicate that it anticipates any modifications in relation to element D.2.



### Conclusion

	Areas for improvement	Recommendations
[D.2]	-	-

#### [D.3] Include Article 25(2), second sentence, of the OECD Model Tax Convention in tax treaties or alternative provisions in Article 9(1) and Article 7(2)

Jurisdictions should either (i) provide in their tax treaties that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law, or (ii) be willing to accept alternative treaty provisions that limit the time during which a Contracting Party may make an adjustment pursuant to Article 9(1) or Article 7(2), in order to avoid late adjustments with respect to which MAP relief will not be available.

232. In order to provide full certainty to taxpayers it is essential that the implementation of MAP agreements is not obstructed by any time limits in the domestic law of the jurisdictions concerned. Such certainty can be provided by either including the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) in tax treaties, or alternatively, setting a time limit in Article 9(1) and Article 7(2) for making adjustments to avoid that late adjustments obstruct granting of MAP relief.

#### *Legal framework and current situation of the United States' tax treaties*

233. As discussed under element D.1, the United States has under its domestic legislation a statute of limitation for claiming of refunds. This statute of limitation, however, is overruled if a tax treaty includes a provision equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention, stipulating that MAP agreements are implemented notwithstanding any time limits in the jurisdiction's domestic legislation. Furthermore, the United States reported it did not reserve in the Commentary to Article 25 of the OECD Model Convention the right not to incorporate the second sentence of Article 25(2) in its tax treaties. In fact, the US Model Tax Convention, which is the baseline text used by the US Treasury Department when it negotiates income tax treaties, includes a provision equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention.

234. Out of the United States' 60 tax treaties, 41 contain a provision equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law. For the remaining 19 treaties, the following analysis is made:

- Three treaties do not contain a provision concerning the implementation of MAP agreements.<sup>2</sup>
- Five treaties contain a provision on the implementation of MAP agreements, but these treaties do not include wording on the implementation of MAP agreements notwithstanding any time limits in the domestic law of the contracting states.<sup>3</sup> These five treaties therefore are considered not having the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention
- Seven treaties contain a variation to the provision of Article 25(2), second sentence, of the OECD Model Tax Convention whereby the actual implementation of a MAP agreement is dependent on the notification of a MAP request to the other competent authority involved within a certain term. These seven treaties therefore are considered not to be a full equivalent of Article 25(2), second sentence.

- One treaty includes a variation to the provision of Article 25(2), second sentence, of the OECD Model Tax Convention where the actual implementation of a MAP agreement is dependent on the notification of a MAP request to the other competent authority involved within a certain term. This treaty therefore is considered not having the full equivalent of the second sentence.
- Three treaties include the equivalent provision to Article 25(2), second sentence, of the OECD Model Tax Convention, but also requires that domestic statute of limitations are interrupted or are supplemented with the wording: except such limitations as apply for the purposes of giving effect to such agreement. Although the United States reported it does not use a statute of limitations for implementing MAP agreements and interprets this provision as not limiting the implementation of MAP agreements, such statute of limitation may be in existence in the domestic legislation of the treaty partner. These three treaties therefore are considered not having the full equivalent of the second sentence.

235. With respect to the three treaties referred to in the first bullet, while one of these three treaties does not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention and has no timeframe for submission of MAP requests, the United States' unilateral technical explanation to that treaty addresses that the treaty partner will apply a ten-year notification period under the treaty. In other words, the treaty partner will only provide for relief of double taxation following a MAP agreement, where the relevant MAP request was submitted within this ten-year period. For that reason the United States also uses a ten-year notification period for submissions of MAP requests. This, however, only regards whether or not access to MAP shall be granted. The United States clarified that where the MAP request was filed within the ten-year period, it will implement all MAP agreements reached with this treaty partner regardless of any domestic statute of limitations.

236. Some peers noted that they are either conducting negotiations with the United States or envisaging such negotiations with a view to be compliant with the relevant elements of the Action 14 Minimum Standard.

### ***Recent developments***

237. As is described in the Introduction, the United States reported that it is still in the process of evaluating what modifications to its tax treaties are necessary in order to bring them in line with the Action 14 Minimum Standard, and that it is working internally on a plan in relation thereto. Apart from this evaluation, the United States has neither conducted treaty negotiations nor initiated these with a view to bring, where necessary, its tax treaties in line with the Action 14 Minimum Standard. This also regards those tax treaties that do not contain a provision equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention.

238. Of the peers that provided input during stage 2, four repeated their previous input that their treaty with the United States is already in line with the requirements under the Action 14 Minimum Standard. Furthermore, one peer reported it is currently in negotiations with the United States on the replacement of the existing treaty, which will be in conformity with the requirements under the Action 14 Minimum Standard. Two other peers mentioned that there have not been any contacts with the United States to bring the treaty in line with this standard. Lastly, one peer mentioned that while there have not been any contacts with the United States with a view to bring the treaty in line with the requirements under element D.3, both jurisdictions have been discussing the interpretation

of the MAP article. One of the two peers mentioned above and the last peer regard treaty partners for which the applicable tax treaty is not in line with the requirements under element D.3.

### *Anticipated modifications*

239. The United States indicated that there are not any anticipated modifications, other than that it intends to seek to include a provision equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention in all of its future tax treaties.

### *Conclusion*

	Areas for Improvement	Recommendations
[D.3]	19 out of 60 tax treaties contain neither a provision that is equivalent to Article 25(2), second sentence of the OECD Model Tax Convention, nor the alternative provisions for Article 9(1) and Article 7(2). For these 19 treaties no actions have been taken nor are any actions planned to be taken.	<p>The United States should without further delay request via bilateral negotiations the inclusion of the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, or be willing to accept the alternatives provisions for Article 9(1) and Article 7(2) in 18 of the 19 treaties that do not contain such provision.</p> <p>Specifically with respect to the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. For this treaty, the United States should, once it enters into negotiations with the jurisdictions for which it applies the treaty, request the inclusion of the required provision or be willing to accept the inclusion of both alternative provisions.</p>

## Notes

1. In section 9.03 of the MAP guidance it is further clarified that if a MAP agreement concerns multiple issues, taxpayers have the possibility not to accept all issues agreed on.
2. These three treaties include the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan.
3. It is noted that for these some of these treaties, the unilateral technical explanation by the United States mentions that a refund of taxes or a tax credit following a MAP agreement shall be granted notwithstanding procedural barriers otherwise existing in the laws of the contracting states. As this, however, is not included in the treaty and the technical explanation is not binding on both contracting states, there is no general obligation for both competent authorities to implement MAP agreements notwithstanding domestic time limits.

## *Reference*

OECD (2017), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, <https://doi.org/10.1787/g2g972ee-en>.

## Summary

	Areas for Improvement	Recommendations
<b>Part A: Preventing disputes</b>		
[A.1]	Seven out of 60 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention. For these seven treaties no actions have been taken nor are any actions planned to be taken.	<p>The United States should without further delay request via bilateral negotiations the inclusion of the equivalent of Article 25(3), first sentence, of the OECD Model Tax in six of the seven tax treaties that do not contain such provision.</p> <p>Specifically with respect to the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan, the United States should, once it enters into negotiations with the jurisdictions for which it applies the treaty, request the inclusion of the required provision.</p>
[A.2]	-	-
<b>Part B: Availability and access to MAP</b>		
[B.1]	Three out of 60 tax treaties do not contain a provision that is the equivalent of Article 25(1), first sentence of the 2015 OECD Model Tax Convention, either as it read prior to the adoption of the final report on Action 14 or as amended by that final report. For these three treaties no actions have been taken nor are any actions planned to be taken.	<p>The United States should without further delay request via bilateral negotiations the inclusion of the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention in those three treaties that do not contain such provision. This concerns a provision that is equivalent to Article 25(1), first sentence of the OECD Model Tax Convention either:</p> <p>a. As amended in the final report of Action 14; or</p> <p>b. As it read prior to the adoption of final report of Action 14.</p>
[B.2]	-	-
[B.3]	-	-
[B.4]	-	-
[B.5]	-	-
[B.6]	-	-
[B.7]	14 out of 60 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention. For these 14 treaties no actions have been taken nor are any actions planned to be taken.	<p>The United States should without further delay request via bilateral negotiations the inclusion of the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, In 13 of the 14 treaties that do not contain such provision.</p> <p>Specifically with respect to the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan, the United States should, once it enters into negotiations with the jurisdictions for which it applies the treaty, request the inclusion of the required provision.</p>

	Areas for Improvement	Recommendations
[B.8]	-	-
[B.9]	-	-
[B.10]	-	-
<b>Part C: Resolution of MAP cases</b>		
[C.1]	14 out of 60 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention. For these 14 treaties no actions have been taken nor are any actions planned to be taken.	The United States should without further delay request via bilateral negotiations the inclusion of the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention in 13 of the 14 treaties that do not contain such provision.  Specifically with respect to the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan, the United States should, once it enters into negotiations with the jurisdictions for which it applies the treaty, request the inclusion of the required provision.
[C.2]	-	-
[C.3]	As the MAP caseload relating to other cases has increased substantially since 1 January 2016, this indicates that the competent authority may not be adequately resourced to cope with this increase, while no specific actions have been taken to address this in the meantime.  Furthermore, as MAP cases were resolved in 27.17 months on average, there may be a risk that post-2015 cases are not resolved within the average of 24 months, which is the pursued average for resolving MAP cases received on or after 1 January 2016, although several actions were taken to make more adequate use of its available resources.	The United States should continue to closely monitor whether it has adequate resources in place to ensure that future MAP cases are resolved in a timely, efficient and effective manner. Where needed, it should devote additional resources to cope with the significant increase in the number of other MAP cases.  In addition, while already steps have been taken, the United States should continue improving internal working procedures in order to make more adequate use of its available resources, such to be able to resolve MAP cases in a timely, efficient and effective manner.
[C.4]	-	-
[C.5]	-	-
[C.6]	-	-
<b>Part D: Implementation of MAP agreements</b>		
[D.1]	-	-
[D.2]	-	-
[D.3]	19 out of 60 tax treaties contain neither a provision that is equivalent to Article 25(2), second sentence of the OECD Model Tax Convention, nor the alternative provisions for Article 9(1) and Article 7(2). For these 19 treaties no actions have been taken nor are any actions planned to be taken.	The United States should without further delay request via bilateral negotiations the inclusion of the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, or be willing to accept the alternatives provisions for Article 9(1) and Article 7(2) in 18 of the 19 treaties that do not contain such provision.  Specifically with respect to the treaty with the former USSR that the United States continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. For this treaty, the United States should, once it enters into negotiations with the jurisdictions for which it applies the treaty, request the inclusion of the required provision or be willing to accept the inclusion of both alternative provisions.

## Annex A

### Tax treaty network of the United States

		Article 25(1) of the OECD Model Tax Convention ("MTC")		Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration	
		B.1		B.3	B.4	C.1	D.3	A.1	B.7	C.6	
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	
Treaty partner	DTC in force?	Is Art. 25(1), first sentence included?  If yes, submission to either competent authority (new Art. 25(1), first sentence)	Is Art. 25(1), second sentence included?  If no, please state reasons	Is Art. 9(2) included?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law?  If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Is Art. 25(2) first sentence included?	Is Art. 25(2) second sentence included?  If no, alternative provision in Art. 7 & 9 OECD MTC?	Is Art. 25(3) first sentence included?	Is Art. 25(3) second sentence included?	Inclusion arbitration provision?	
	Y = yes N = signed pending ratification	E = yes, either CAs O = yes, only one CA N = No	Y = yes i = no, no such provision ii = no, different period iii = no, starting point for computing the 3 year period is different iv = no, other reasons	if ii, specify period	Y = yes i = no, but access will be given to TP cases ii = no and access will not be given to TP cases	Y = yes i = no and such cases will be accepted for MAP ii = no but such cases will not be accepted for MAP	Y = yes N = no	Y = yes i = no, but have Art. 7 equivalent ii = no, but have Art. 9 equivalent iii = no, but have both Art. 7 & 9 equivalent N = no and no equivalent of Art. 7 and 9	Y = yes N = no	Y = yes N = no	Y = yes N = no
Armenia	Y	O	i	N/A	i	i	N	N	N	N	N
Australia	Y	O	Y	N/A	Y	i	N	Y	Y	N	N
Austria	Y	O	i	N/A	Y	i	Y	Y	Y	Y	N
Azerbaijan	Y	O	i	N/A	i	i	N	N	N	N	N

		Article 25(1) of the OECD Model Tax Convention ("MTC")			Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration
		B.1			B.3	B.4	C.1	D.3	A.1	B.7	C.6
Column 1	Column 2	Column 3	Column 4		Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11
Treaty partner	DTC in force?	Is Art. 25(1), first sentence included?  If yes, submission to either competent authority (new Art. 25(1), first sentence)	Is Art. 25(1), second sentence included?  If no, please state reasons		Is Art. 9(2) included?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law?  If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Is Art. 25(2) first sentence included?	Is Art. 25(2) second sentence included?  If no, alternative provision in Art. 7 & 9 OECD MTC?	Is Art. 25(3) first sentence included?	Is Art. 25(3) second sentence included?	Inclusion arbitration provision?
Bangladesh	Y	E	i	N/A	Y	i	Y	Y	Y	Y	N
Barbados	Y	O	i	N/A	Y	i	Y	Y	Y	Y	N
Belarus	Y	O	i	N/A	i	i	N	N	N	N	N
Belgium	Y	E	Y	N/A	Y	i	Y	Y	Y	N	Y
Bulgaria	Y	E	i	N/A	Y	i	Y	Y	Y	Y	N
Canada	Y	O	i	N/A	i	i	Y	N	Y	Y	Y
Chile	N	O	Y	N/A	Y	i	Y	Y	Y	N	N
China (Peoples Republic of)	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Cyprus <sup>a</sup>	Y	O	i	N/A	i	i	N	Y	Y	Y	N
Czech Republic	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Denmark	Y	O	i	N/A	Y	i	Y	Y	Y	Y	N
Egypt	Y	O	i	N/A	i	i	N	Y	Y	N	N
Estonia	Y	E	Y	N/A	Y	i	Y	Y	Y	Y	N
Finland	Y	O	i	N/A	Y	i	Y	N	Y	Y	N
France	Y	O	Y	N/A	i	i	Y	Y	Y	Y	Y
Georgia	Y	O	i	N/A	i	i	N	N	N	N	N



		Article 25(1) of the OECD Model Tax Convention ("MTC")			Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration
		B.1			B.3	B.4	C.1	D.3	A.1	B.7	C.6
Column 1	Column 2	Column 3	Column 4		Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11
Treaty partner	DTC in force?	Is Art. 25(1), first sentence included?  If yes, submission to either competent authority (new Art. 25(1), first sentence)	Is Art. 25(1), second sentence included?  If no, please state reasons		Is Art. 9(2) included?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law?  If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Is Art. 25(2) first sentence included?	Is Art. 25(2) second sentence included?  If no, alternative provision in Art. 7 & 9 OECD MTC?	Is Art. 25(3) first sentence included?	Is Art. 25(3) second sentence included?	Inclusion arbitration provision?
Germany	Y	O	ii	4-years	Y	i	Y	Y	Y	Y	Y
Greece	Y	N	i	N/A	i	i	N	N	Y	N	N
Hungary	N	O	i	N/A	Y	i	Y	N	Y	Y	N
Iceland	Y	E	i	N/A	Y	i	Y	Y	Y	Y	N
India	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Indonesia	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Ireland	Y	E	i	N/A	Y	i	Y	Y	Y	Y	Y
Israel	Y	O	i	N/A	i	i	N	Y	N	N	N
Italy	Y	O	Y	N/A	i	i	Y	Y	Y	Y	Y
Jamaica	Y	O/E	i	N/A	i	i	Y	N	Y	Y	N
Japan	Y	O	Y	N/A	i	i	Y	N	Y	Y	Y
Kazakhstan	Y	O	i	N/A	Y	i	Y	Y	Y	Y	Y
Korea	Y	O	i	N/A	i	i	N	N	N	N	N
Kyrgyzstan	Y	O	i	N/A	i	i	N	N	N	N	N
Latvia	Y	E	Y	N/A	Y	i	Y	Y	Y	Y	N
Lithuania	Y	E	Y	N/A	Y	i	Y	Y	Y	Y	N
Luxembourg	Y	O	i	N/A	Y	i	Y	Y	Y	Y	N
Malta	Y	E	i	N/A	Y	i	Y	Y	Y	Y	N

		Article 25(1) of the OECD Model Tax Convention ("MTC")			Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration
		B.1			B.3	B.4	C.1	D.3	A.1	B.7	C.6
Column 1	Column 2	Column 3	Column 4		Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11
Treaty partner	DTC in force?	Is Art. 25(1), first sentence included?  If yes, submission to either competent authority (new Art. 25(1), first sentence)	Is Art. 25(1), second sentence included?  If no, please state reasons		Is Art. 9(2) included?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law?  If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Is Art. 25(2) first sentence included?	Is Art. 25(2) second sentence included?  If no, alternative provision in Art. 7 & 9 OECD MTC?	Is Art. 25(3) first sentence included?	Is Art. 25(3) second sentence included?	Inclusion arbitration provision?
Mexico	Y	O	i	N/A	i	i	N	N	Y	Y	Y
Moldova	Y	O	i	N/A	i	i	N	N	N	N	N
Morocco	Y	O	i	N/A	i	i	N	Y	Y	N	N
Netherlands	Y	O	i	N/A	Y	i	Y	N	Y	Y	Y
New Zealand	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Norway	Y	O	i	N/A	i	i	N	Y	N	N	N
Pakistan	Y	N	i	N/A	i	i	N	N	N	N	N
Philippines	Y	O	i	N/A	i	i	N	N	Y	N	N
Poland	N	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Portugal	Y	O	ii	5-years	Y	i	Y	Y	Y	Y	N
Romania	Y	O	i	N/A	i	i	N	N	N	N	N
Russia	Y	O	i	N/A	i	i	Y	Y	Y	Y	N
Slovak Republic	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	N
Slovenia	Y	O	ii	5-years	Y	i	Y	Y	Y	Y	N
South Africa	Y	E	Y	N/A	Y	i	Y	Y	Y	Y	N
Spain	Y	O	ii	5-years	Y	i	Y	Y	Y	Y	Y
Sri Lanka	Y	O	i	N/A	Y	i	Y	Y	Y	Y	N
Sweden	Y	O	i	N/A	Y	i	Y	Y	Y	Y	N

		Article 25(1) of the OECD Model Tax Convention ("MTC")			Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration
		B.1			B.3	B.4	C.1	D.3	A.1	B.7	C.6
Column 1	Column 2	Column 3	Column 4		Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11
Treaty partner	DTC in force?	Is Art. 25(1), first sentence included?  If yes, submission to either competent authority (new Art. 25(1), first sentence)	Is Art. 25(1), second sentence included?  If no, please state reasons		Is Art. 9(2) included?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law?  If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Is Art. 25(2) first sentence included?	Is Art. 25(2) second sentence included?  If no, alternative provision in Art. 7 & 9 OECD MTC?	Is Art. 25(3) first sentence included?	Is Art. 25(3) second sentence included?	Inclusion arbitration provision?
Switzerland	Y	O	i	N/A	i	i	Y	N	Y	Y	Y
Tajikistan	Y	O	i	N/A	i	i	N	N	N	N	N
Thailand	Y	O	Y	N/A	Y	i	Y	N	Y	Y	N
Trinidad and Tobago	Y	N	i	N/A	i	i	N	N	Y	N	N
Tunisia	Y	O	i	N/A	Y	i	Y	Y	Y	Y	N
Turkey	Y	O	i	N/A	Y	i	Y	N	Y	Y	N
Turkmenistan	Y	O	i	N/A	i	i	N	N	N	N	N
Ukraine	Y	O	i	N/A	Y	i	Y	Y	Y	Y	N
United Kingdom	Y	O	Y	N/A	Y	i	Y	N	Y	Y	N
Uzbekistan	Y	O	i	N/A	i	i	N	N	N	N	N
Venezuela	Y	E	i	N/A	Y	i	Y	N	Y	Y	N
Viet Nam	N	O	Y	N/A	Y	i	Y	Y	N	Y	N

*Note:* a. Footnote by Turkey: The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of United Nations, Turkey shall preserve its position concerning the “Cyprus” issue.

Footnote by all the European Union Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

## Annex B

### MAP Statistics pre-2016 cases

Category of cases	No. of pre-2016 cases in MAP inventory on 1 January 2016	Number of pre-2016 cases closed during the reporting period by outcome										No. of pre-2016 cases remaining in on MAP inventory on 31 December 2016	Average time taken (in months) for closing pre-2016 cases during the reporting period
		Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty	Agreement that there is no taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14
Attribution/ Allocation	716	0	0	6	20	0	100	5	0	0	11	574	32.20
Others	256	0	1	3	7	5	17	0	0	0	2	221	31.53
Total	972	0	1	9	27	5	117	5	0	0	13	795	32.07

Category of cases	No. of pre-2016 cases in MAP inventory on 1 January 2017	Number of pre-2016 cases closed during the reporting period by outcome										No. of pre-2016 cases remaining in on MAP inventory on 31 December 2017	Average time taken (in months) for closing pre-2016 cases during the reporting period
		Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty	Agreement that there is no taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14
Attribution/ Allocation	574	0	0	5	45	0	87	6	0	2	0	429	35.53
Others	221	0	0	2	1	2	22	2	1	2	0	189	46.63
Total	795	0	0	7	46	2	109	8	1	4	0	618	37.54

## Annex C

### MAP Statistics post-2015 cases

Category of cases	No. of post-2015 cases in MAP inventory on 1 January 2016	No. of post-2015 cases started during the reporting period	Number of post-2015 cases closed during the reporting period by outcome										No. of post-2015 cases remaining in on MAP inventory on 31 December 2016	Average time taken (in months) for closing post-2015 cases during the reporting period
			Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty	Agreement that there is no taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
Attribution/ Allocation	0	138	0	0	1	0	0	2	0	0	0	0	135	3.86
Others	0	51	0	1	2	0	0	1	0	0	0	0	47	3.43
Total	0	189	0	1	3	0	0	3	0	0	0	0	182	3.61

*Note:* The post-2015 MAP statistics are different from the published version of the 2016 MAP statistics for the United States as some cases that started in 2016 were inadvertently not included by the United States and its treaty partners in statistical reporting for 2016.

Category of cases	No. of post-2015 cases in MAP inventory on 1 January 2017	No. of post-2015 cases started during the reporting period	Number of post-2015 cases closed during the reporting period by outcome										No. of post-2015 cases remaining in on MAP inventory on 31 December 2017	Average time taken (in months) for closing post-2015 cases during the reporting period
			Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty	Agreement that there is no taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
Attribution/ Allocation	135	195	2	0	4	45	3	24	0	0	0	5	247	5.03
Others	47	104	3	5	8	3	1	13	0	0	0	0	118	6.03
Total	182	299	5	5	12	48	4	37	0	0	0	5	365	5.31



## *Glossary*

<b>ACAP</b>	Accelerated Competent Authority Procedure
<b>Action 14 Minimum Standard</b>	The minimum standard as agreed upon in the final report on Action 14: Making Dispute Mechanisms More Effective
<b>APMA</b>	Advance Pricing and Mutual Agreement Program
<b>APA guidance</b>	Rev. Proc. 2015-41
<b>MAP guidance</b>	Rev. Proc. 2015-40
<b>IRS</b>	Internal Revenue Service
<b>LB&amp;I</b>	Large Business and International Division
<b>LOB article</b>	Limitations on benefits article
<b>MAP Statistics Reporting Framework</b>	Rules for reporting of MAP statistics as agreed by the FTA MAP Forum
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OECD Model Tax Convention</b>	OECD Model Tax Convention on Income and on Capital as it read on 21 November 2017
<b>Pre-2016 cases</b>	MAP cases in a competent authority’s inventory that are pending resolution on 31 December 2015
<b>Post-2015 cases</b>	MAP cases that are received by a competent authority from the taxpayer on or after 1 January 2016
<b>Statistics Reporting Period</b>	Period for reporting MAP statistics that started on 1 January 2016 and ended on 31 December 2017
<b>TAIT</b>	Treaty Assistance and Interpretation Team
<b>Terms of Reference</b>	Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective (CTPA/CFA/NOE2 (2016) 45/REV1)
<b>US Model Tax Convention</b>	United States Model Income Tax Convention as it read on 17 February 2016





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## OECD/G20 Base Erosion and Profit Shifting Project

# Making Dispute Resolution More Effective – MAP Peer Review Report, United States (Stage 2)

## INCLUSIVE FRAMEWORK ON BEPS: ACTION 14

Under Action 14, countries have committed to implement a minimum standard to strengthen the effectiveness and efficiency of the mutual agreement procedure (MAP). The MAP is included in Article 25 of the OECD Model Tax Convention and commits countries to endeavour to resolve disputes related to the interpretation and application of tax treaties. The Action 14 Minimum Standard has been translated into specific terms of reference and a methodology for the peer review and monitoring process. The minimum standard is complemented by a set of best practices.

The peer review process is conducted in two stages. Stage 1 assesses countries against the terms of reference of the minimum standard according to an agreed schedule of review. Stage 2 focuses on monitoring the follow-up of any recommendations resulting from jurisdictions' stage 1 peer review report. This report reflects the outcome of the stage 2 peer monitoring of the implementation of the Action 14 Minimum Standard by the United States, which is accompanied by a document addressing the implementation of best practices which can be accessed on the OECD website.

Consult this publication on line at <https://doi.org/10.1787/305147e9-en>.

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