

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



Making Dispute Resolution More Effective – MAP Peer Review Report, South Africa (Stage 1)

INCLUSIVE FRAMEWORK ON BEPS: ACTION 14

OECD/G20 Base Erosion and Profit Shifting Project

Making Dispute Resolution More Effective – MAP Peer Review Report, South Africa (Stage 1)

INCLUSIVE FRAMEWORK ON BEPS: ACTION 14

This document, as well as any data and any map included herein, are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

Please cite this publication as:

OECD (2019), *Making Dispute Resolution More Effective – MAP Peer Review Report, South Africa (Stage 1): Inclusive Framework on BEPS: Action 14*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/3f820b8e-en>.

ISBN 978-92-64-32924-9 (print)

ISBN 978-92-64-94404-6 (pdf)

OECD/G20 Base Erosion and Profit Shifting Project

ISSN 2313-2604 (print)

ISSN 2313-2612 (online)

Photo credits: © ninog-Fotolia.com.

Corrigenda to OECD publications may be found on line at: www.oecd.org/about/publishing/corrigenda.htm.

© OECD 2019

You can copy, download or print OECD content for your own use, and you can include excerpts from OECD publications, databases and multimedia products in your own documents, presentations, blogs, websites and teaching materials, provided that suitable acknowledgement of OECD as source and copyright owner is given. All requests for public or commercial use and translation rights should be submitted to rights@oecd.org. Requests for permission to photocopy portions of this material for public or commercial use shall be addressed directly to the Copyright Clearance Center (CCC) at info@copyright.com or the Centre français d'exploitation du droit de copie (CFC) at contact@cfcopies.com.

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.

Table of contents

Abbreviations and acronyms	7
Executive summary	9
References	11
Introduction	13
Part A. Preventing disputes	17
[A.1] Include Article 25(3), first sentence, of the OECD Model Tax Convention in tax treaties	17
[A.2] Provide roll-back of bilateral APAs in appropriate cases	19
References	20
Part B. Availability and access to MAP	21
[B.1] Include Article 25(1) of the OECD Model Tax Convention in tax treaties	21
[B.2] Allow submission of MAP requests to the competent authority of either treaty partner, or, alternatively, introduce a bilateral consultation or notification process	27
[B.3] Provide access to MAP in transfer pricing cases	28
[B.4] Provide access to MAP in relation to the application of anti-abuse provisions	31
[B.5] Provide access to MAP in cases of audit settlements	32
[B.6] Provide access to MAP if required information is submitted	33
[B.7] Include Article 25(3), second sentence, of the OECD Model Tax Convention in tax treaties	34
[B.8] Publish clear and comprehensive MAP guidance	36
[B.9] Make MAP guidance available and easily accessible and publish MAP profile	39
[B.10] Clarify in MAP guidance that audit settlements do not preclude access to MAP	40
References	43
Part C. Resolution of MAP cases	45
[C.1] Include Article 25(2), first sentence, of the OECD Model Tax Convention in tax treaties	45
[C.2] Seek to resolve MAP cases within a 24-month average timeframe	47
[C.3] Provide adequate resources to the MAP function	52
[C.4] Ensure staff in charge of MAP has the authority to resolve cases in accordance with the applicable tax treaty	55
[C.5] Use appropriate performance indicators for the MAP function	57
[C.6] Provide transparency with respect to the position on MAP arbitration	58
References	59
Part D. Implementation of MAP agreements	61
[D.1] Implement all MAP agreements	61

[D.2] Implement all MAP agreements on a timely basis	62
[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)	63
Reference	66
Summary	67
Annex A. Tax treaty network of South Africa	73
Annex B. MAP Statistics Pre 2016 cases	80
Annex C. MAP Statistics Reporting Post-2015 cases	81
Glossary	82
Figures	
Figure C.1 Evolution of South Africa’s MAP caseload	48
Figure C.2 End inventory on 31 December 2017 (28 cases)	48
Figure C.3 Evolution of South Africa’s MAP inventory Pre-2016 cases	49
Figure C.4 Evolution of South Africa’s MAP inventory Post-2015 cases	49
Figure C.5 Cases closed during the Statistics Reporting Period (9 cases)	50
Figure C.6 Average time (in months) to close cases in 2016 or 2017	54

Abbreviations and acronyms

APA	Advance Pricing Arrangement
BEPS	Base Erosion and Profit Shifting
FTA	Forum on Tax Administration
G20	Group of twenty
MAP	Mutual Agreement Procedure
OECD	Organisation for Economic Co-operation and Development

Executive summary

South Africa has an extensive tax treaty network with 80 tax treaties. South Africa has an established MAP programme and has modest experience with resolving MAP cases. It has a small MAP inventory, with a small number of new cases submitted each year and almost 30 cases pending on 31 December 2017. Of these cases, 43% concern allocation/attribution cases. Overall South Africa meets the majority of the elements of the Action 14 Minimum Standard. Where it has deficiencies, South Africa is working to address most of them.

All but three of South Africa's tax treaties contain a provision relating to MAP. Those treaties mostly follow paragraphs 1 through 3 of Article 25 of the *Model Tax Convention on Income and Capital 2017* (OECD, 2017). Its treaty network is largely consistent with the requirements of the Action 14 Minimum Standard, except mainly for the fact that:

- Almost 25% of its tax 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
- More than 10% of its tax treaties do not contain the equivalent of Article 25(3), second sentence of the OECD Model Tax Convention (OECD, 2015) 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, South Africa needs to amend and update a certain number of its tax treaties. In this respect, South Africa signed the Multilateral Instrument, through which a number of its tax treaties will potentially be modified to fulfil the requirements under the Action 14 Minimum Standard. Where treaties will not be modified, upon entry into force of this Multilateral Instrument for the treaties concerned, South Africa reported that it intends to update all of its tax treaties via bilateral negotiations to be compliant with the requirements under the Action 14 Minimum Standard and that it prioritises the treaties that contain major deficiencies, along with those under which a significant number of MAP cases is pending.

As South Africa has no bilateral APA programme in place, there were no specific elements to assess regarding the prevention of disputes.

South Africa meets most of the requirements regarding the availability and access to MAP under the Action 14 Minimum Standard. It provides access to MAP in all eligible cases, although it has since 1 January 2016 not received any MAP request concerning cases where anti-abuse provisions are applied. Furthermore, South Africa does not have in place a documented bilateral consultation process for those situations in which its competent authority considers the objection raised by taxpayers in a MAP request as not

justified. South Africa also has clear and comprehensive guidance on the availability of MAP and how it applies this procedure in practice. In addition, South Africa has in place an administrative dispute settlement/resolution process that is independent from the audit and examination functions and which can only be accessed through a request from the taxpayer. Taxpayers will not be granted access to MAP if a settlement is reached through this process. While the effects of this process on MAP are clarified in South Africa's MAP guidance, they are not addressed in the public guidance on this process.

Concerning the average time needed to close MAP cases, the MAP statistics for South Africa for the period 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	10	3	1	12	17.29
Other cases	9	15	8	16	20.02
Total	19	18	9	28	19.72

*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, South Africa used as a start date the date of the receipt of the MAP request from the taxpayer or other competent authority and as the end date the date of the mutual agreement with the other competent authority.

The number of cases South Africa closed in 2016 or 2017 is half less than the number of all new cases started in those years. Its MAP inventory as per 31 December 2017 increased as compared to its inventory as per 1 January 2016. During these years, MAP cases were 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 19.72 months. However, its MAP inventory increased by almost 50% between 1 January 2016 and 31 December 2017. This indicates that additional resources specifically dedicated the resolution of MAP cases may be necessary to achieve a reduction of its MAP inventory.

Furthermore, South Africa meets almost all of the other requirements under the Action 14 Minimum Standard in relation to the resolution of MAP cases. South Africa's 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. However, the envisaged measures to ensure that its competent authority operates independently from the tax administration personnel directly involved in the adjustment at issue are not yet documented.

Lastly, South Africa also meets the Action 14 Minimum Standard as regards the implementation of MAP agreements. In addition, South Africa monitors the implementation of MAP agreements. Finally, even though South Africa has a domestic statute of limitation for implementation of MAP agreements, for which there is a risk that such agreements cannot be implemented where the applicable tax treaty does not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, no issues have surfaced throughout the process.

References

- OECD (2015), *Model Tax Convention on Income and on Capital 2014 (Full Version)*, OECD Publishing, Paris, <https://dx.doi.org/10.1787/9789264239081-en>.
- OECD (2017), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, <https://dx.doi.org/10.1787/g2g972ee-en>.

Introduction

Available mechanisms in South Africa to resolve tax treaty-related disputes

South Africa has entered into 80 tax treaties on income (and/or capital), 78 of which are in force.¹ These 80 treaties are being applied to 81 jurisdictions.² All but three of these treaties provide for a mutual agreement procedure for resolving disputes on the interpretation and application of the provisions of the tax treaty. In addition, three of the 80 treaties provide for an arbitration procedure as a final stage to the mutual agreement procedure.³

In South Africa, the competent authority function to conduct MAP resides with the Commissioner for the South African Revenue Service (“SARS”). The competent authority of South Africa currently employs approximately six employees, three of whom are involved in MAP cases on a day-to-day basis. One of them handles attribution/allocation cases while the other two are responsible for other cases. All of the team members also deal with other tasks.

South Africa issued guidance on the governance and administration of the mutual agreement procedure (“MAP”) in July 2018, which is available at (in English):

www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-IT-G24%20-%20Guide%20on%20Mutual%20Agreement%20Procedures.pdf

Recent developments in South Africa

South Africa reported it is currently conducting tax treaty negotiations with several jurisdictions. South Africa recently signed new treaties with Gabon, Germany and Sudan, which have not yet entered into force. In this respect, South Africa reported that it already ratified these treaties and that its treaty partners have not yet ratified them, which clarifies why they are not yet in force.

Furthermore, on 7 June 2017, South Africa signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“**Multilateral Instrument**”), to adopt, where necessary, modifications to the MAP article under its tax treaties with a view to be compliant with the Action 14 Minimum Standard in respect of all the relevant tax treaties.

Where treaties will not be modified by the Multilateral Instrument, South Africa reported that it strives updating them through future bilateral negotiations. In this respect, South Africa reported that it prioritises the treaties that contain major deficiencies, along with those under which a significant number of MAP cases is pending. South Africa reported that it will also use the opportunity that may arise when it wishes to renegotiate other articles of the treaty to amend the MAP provision so that it is in line with the Action 14 Minimum Standard. With the signing of the Multilateral Instrument, South Africa also submitted its list of notifications and reservations to that instrument.⁴

In relation to the Action 14 Minimum Standard, South Africa reserved, pursuant to Article 16(5)(a), the right not to apply Article 16(1) of the Multilateral Instrument (concerning the mutual agreement procedure) that modifies existing treaties to allow the submission of a MAP request to the competent authorities of either contracting state.⁵ This reservation is in line with the requirements of the Action 14 Minimum Standard.

Basis for the peer review process

The peer review process entails an evaluation of South Africa’s 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 (if any) and the practical application of that framework. The review process performed is desk-based and conducted through specific questionnaires completed by South Africa, its peers and taxpayers. The questionnaires for the peer review process were sent to South Africa and the peers on 31 August 2018.

The period for evaluating South Africa’s implementation of the Action 14 Minimum Standard ranges from 1 January 2016 to 31 August 2018 (“**Review Period**”). Furthermore, this report may depict some recent developments that have occurred after the Review Period, which at this stage will not impact the assessment of South Africa’s implementation of this minimum standard. In the update of this report, being stage 2 of the peer review process, these recent developments will be taken into account in the assessment and, if necessary, the conclusions contained in this report will be amended accordingly.

For the purpose of this report and the statistics below, in assessing whether South Africa 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 a replacement of an existing treaty. Furthermore, the treaty analysis also takes into account the treaty formerly entered into with the United Kingdom for those jurisdictions to which these treaties are still being applied by South Africa. As it concerns the same 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 South Africa’s tax treaties regarding the mutual agreement procedure.

In total 11 peers provided input: Australia, Belgium, Botswana, Germany, Italy, Mauritius, New Zealand, Norway, Switzerland, Turkey and the United Kingdom. Out of these 11 peers, nine had MAP cases with South Africa that started on or after 1 January 2016. These nine peers represent almost 90% of post-2015 MAP cases in South Africa’s inventory that started in 2016 or 2017. Generally, almost all peers indicated having little experience with South Africa, some of them emphasising the good working relationship they have with South Africa.

South Africa provided extensive answers in its questionnaire, which was submitted on time. South Africa 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, South Africa provided the following information:

- MAP profile⁶
- MAP statistics⁷ according to the MAP Statistics Reporting Framework (see below).

Finally, South Africa is an active member of the FTA MAP Forum and has shown good co-operation during the peer review process. South Africa provided peer input on some assessed jurisdictions.

Overview of MAP caseload in South Africa

The analysis of South Africa’s MAP caseload relates to the period starting on 1 January 2016 and ending on 31 December 2017 (“**Statistics Reporting Period**”). According to the statistics provided by South Africa, its MAP caseload during this period was as follows:

General outline of the peer review report

2016-17	Opening inventory 1/1/2016	Cases started	Cases closed	End inventory 31/12/2017
Attribution/allocation cases	10	3	1	12
Other cases	9	15	8	16
Total	19	18	9	28

This report includes an evaluation of South Africa’s 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**”).⁸ Apart from analysing South Africa’s legal framework and its administrative practice, the report also incorporates peer input and responses to such input by South Africa. Furthermore, the report depicts the changes adopted and plans shared by South Africa 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 objective of the Action 14 Minimum Standard is to make dispute resolution mechanisms more effective and concerns a continuous effort. Therefore, this peer review report includes recommendations that South Africa continues to act in accordance with a given element of the Action 14 Minimum Standard, even if there is no area for improvement for this specific element.

Notes

1. The tax treaties South Africa has entered into are available at: www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/default.aspx. The treaties that are signed but have not yet entered into force are with Gabon, Germany and Sudan. The newly negotiated treaty with Germany will replace the existing treaty of 1973, once entered into force. For that reason the newly negotiated treaty is taken into account in the treaty analysis. Reference is made to Annex A for the overview of South Africa's tax treaties.
2. The 1946 treaty entered into with the United Kingdom is still being applied to Grenada and Sierra Leone.
3. This concerns the treaties with Canada, the Netherlands and Switzerland. Reference is made to Annex A for the overview of South Africa's tax treaties.
4. Available at: www.oecd.org/tax/treaties/beps-mli-position-south-africa.pdf
5. *Ibid.* This reservation on Article 16 – Mutual Agreement Procedure reads: “Pursuant to Article 16(5)(a) of the Convention, the Republic of South Africa reserves the right for the first sentence of Article 16(1) not to apply to its Covered Tax Agreements on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the competent authority of either Contracting Jurisdiction), where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, that person may present the case to the competent authority of the Contracting Jurisdiction of which the person is a resident or, if the case presented by that person comes under a provision of a Covered Tax Agreement relating to non-discrimination based on nationality, to that of the Contracting Jurisdiction of which that person is a national; and the competent authority of that Contracting Jurisdiction will implement a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction for cases in which the competent authority to which the mutual agreement procedure case was presented does not consider the taxpayer's objection to be justified”.
6. Available at www.oecd.org/tax/dispute/South-Africa-Dispute-Resolution-Profile.pdf
7. The MAP statistics of South Africa are included in Annexes B and C of this report.
8. Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective. Available at: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf

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 South Africa's tax treaties

2. Out of South Africa's 80 tax treaties, 76 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.¹ Out of the remaining four treaties, three do not contain any MAP provision.² The remaining treaty misses the word "interpretation". For this reason, four treaties do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention.

3. South Africa reported that irrespective of whether the applicable treaty contains a provision equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention, it would not be obstructed from entering into a MAP agreement of a general nature insofar as the treaty contains a provision based on this sentence, which is only the case for one treaty as mentioned previously.

Anticipated modifications

Multilateral Instrument

4. South Africa signed the Multilateral Instrument. Article 16(4)(c)(i) of that instrument stipulates that Article 16(3), first sentence – containing the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(3), first sentence, of the OECD Model Tax

Convention. In other words, in the absence of this equivalent, Article 16(4)(c)(i) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified, pursuant to Article 16(6)(d)(i), the depositary that this treaty does not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention.

5. In regard of the four tax treaties identified above that are considered not to contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention, South Africa listed one of them as a covered tax agreement under the Multilateral Instrument but did not make, pursuant to Article 16(6)(d)(i), a notification that it does not contain a provision described in Article 16(4)(c)(i). Therefore, at this stage, none of the four tax treaties identified above will be modified by the Multilateral Instrument upon its entry into force for these treaties to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention. In this respect, South Africa expressed its intention to modify its notifications and include one of the relevant treaties in the list of covered tax agreements. If this treaty is listed as a covered tax agreement by South Africa and if South Africa makes the relevant notifications, it would be modified by the Multilateral Instrument upon its entry into force for this treaty to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention as the relevant treaty partner also made the relevant notifications.

Bilateral modifications

6. South Africa further reported that for the tax treaties that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention will not be modified by the Multilateral Instrument, it intends to update them via bilateral negotiations with a view to be compliant with element A.1. In this respect, South Africa reported that it prioritises the treaties that contain major deficiencies, along with those under which a significant number of MAP cases is pending. South Africa reported that it will also use the opportunity that may arise when it wishes to renegotiate other articles of the treaty to amend the MAP provision so that it is in line with the Action 14 Minimum Standard. In addition, South Africa reported it will seek to include Article 25(3), first sentence, of the OECD Model Tax Convention in all of its future tax treaties.

Peer input

7. For the four treaties identified that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention, the relevant peers did not provide input.

Conclusion

	Areas for improvement	Recommendations
[A.1]	Four out of 80 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention. None of them is expected to be modified by the Multilateral Instrument.	As the four treaties that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention will not be modified via the Multilateral Instrument, South Africa should follow up on its stated intention to modify its notifications in order for one treaty to be modified by the Multilateral Instrument and should request for two others the inclusion of the required provision via bilateral negotiations in accordance with its plan.

	Areas for improvement	Recommendations
[A.1]		Specifically with respect to the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, it should, once it enters into negotiations with the jurisdictions to which it applies that treaty, request the inclusion of the required provision. In addition, South Africa should maintain its stated intention to include the required provision in all future tax treaties.

[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.³ 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.

South Africa’s APA programme

9. South Africa reported it is not authorised to enter into bilateral APAs and has not implemented an APA programme.

Roll-back of bilateral APAs

10. South Africa reported since it does not have any APA programme in place, it is also not possible to obtain a roll-back of bilateral APAs.

Practical application of roll-back of bilateral APAs

11. One peer reported that even though South Africa’s domestic law does not provide for an APA programme, it experienced that South Africa’s competent authority was willing to enter into a bilateral APA based on the MAP provision of their treaty. South Africa clarified that the case referred to by the relevant peer was a quasi-APA that was underpinned by the normal MAP process. South Africa further explained that this case arose from a particular set of circumstances that are unlikely to be repeated in practice. While South Africa reiterated that bilateral APAs are not available in South Africa, it specified that the learnings from this process will, however, inform its decision making as to whether APAs will be offered in the future.

12. All the peers that provided input on this element reported not having received any request for a roll-back of bilateral APAs.

Anticipated modifications

13. South Africa indicated that it does not anticipate any modifications in relation to element A.2.

Conclusion

	Areas for improvement	Recommendations
[A.2]	-	-

Notes

1. These 76 treaties include the treaty recently signed with Germany (2008) that is not yet in force and which will replace, once entered into force, the existing treaty of 1973.
2. These three treaties include the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone.
3. This description of an APA based on the definition of an APA in the OECD Transfer Pricing Guidelines (OECD, 2017b) for Multinational Enterprises and Tax Administrations.

References

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

OECD (2017b), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, <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.

14. 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 South Africa's tax treaties

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

15. Out of South Africa's 80 tax treaties, 64 contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2017a) as it read prior to the adoption of the *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report* (Action 14 Final Report (OECD, 2015a)), allowing taxpayers to submit a MAP request to the competent authority of the state in which they are resident 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.¹ One tax treaty contains a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015b), as changed by the Action 14 Final Report and allowing taxpayers to submit a MAP request to the competent authority of either state.

16. Out of the remaining 15 treaties, three do not contain any MAP provision.² The remaining 12 treaties can be categorised as follows:

Provision	Number of tax treaties
A variation of Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report, whereby the taxpayer can submit a MAP request irrespective of domestic available remedies, but whereby pursuant to a protocol provision the taxpayer is also required to initiate these remedies when submitting a MAP request.	1
A variation of Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report, whereby taxpayers can only submit a MAP request to the competent authority of the contracting state of which they are resident.	11

17. The treaty mentioned in the first row of the table above allows taxpayers to submit a MAP request irrespective of domestic available remedies. However, the protocol to this treaty limits such submission, as it requires that a domestic remedy should first be initiated before a case can be dealt with in MAP. The provision incorporated in the protocol to this treaty reads:

With respect to Article 25, an adjustment of taxes pursuant to that Article may be made only prior to the final determination of such taxes. It is further understood that, the preceding sentence means that invoking the mutual agreement procedure does not relieve a taxpayer of the obligation to initiate the procedure of domestic law for solving tax disputes.

18. As pursuant to this provision a domestic procedure has to be initiated concomitantly to the initiation of the mutual agreement procedure, a MAP request can in practice thus not be submitted irrespective of the remedies provided by the domestic law. This tax treaty is therefore also considered not to be in line with this part of element B.1.

19. The remaining 11 treaties mentioned above are considered not to have the full equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report, since taxpayers are not allowed to submit a MAP request in the state of which they are a national where the case comes under the non-discrimination article. However, for the following reasons nine of those 11 treaties are considered to be in line with this part of element B.1:

- The relevant tax treaty does not contain a non-discrimination provision and only applies to residents of one of the states (one treaty).
- The non-discrimination provision of the relevant tax treaty only covers nationals that are resident of one of the contracting states. Therefore, it is logical to only allow for the submission of MAP requests to the state of which the taxpayer is a resident (eight treaties).

20. For the remaining two treaties, the non-discrimination provision is almost identical to Article 24(1) of the OECD Model Tax Convention and applies both to nationals that are and are not resident of one of the contracting states. The omission of the full text of Article 25(1), first sentence, of the OECD Model Tax Convention is therefore not clarified by the absence of or a limited scope of the non-discrimination provision, following which these two treaties are not in line with this part of element B.1.

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

21. Out of South Africa’s 80 tax treaties, 67 contain a provision equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention allowing taxpayers to submit a MAP 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 relevant tax treaty.³

22. The remaining 13 tax treaties that do not contain such equivalent can be categorised as follows:

Provision	Number of tax treaties
No MAP provision*	3
No filing period for a MAP request	3
Filing period less than 3 years for a MAP request (2 years)	5
Filing period referring to the domestic law of the contracting states	2

* These three treaties include the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone.

23. With respect to the two treaties referred to in the last row of the table above, it follows that the filing period may be shorter than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty, depending on what is provided in both contracting states’ domestic law (see below for a description of what is provided in South Africa’s domestic law). Therefore, these two treaties are considered not to be in line with this part of element B.1.

Practical application

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

24. As noted in paragraphs 17 and 18 above, in all but one of South Africa’s tax treaties taxpayers can file a MAP request irrespective of domestic remedies. In this respect, South Africa reported that if a taxpayer submits a MAP request and simultaneously initiates domestic available remedies, access to MAP would be granted. Access would also be granted if these domestic remedies have been finalised, even though South Africa is not able to derogate from decisions of its domestic courts and thus will only seek correlative relief at the level of the treaty partner. Finally, South Africa also reported that it would discuss a case that would be submitted to the competent authority of its treaty partner if a decision has already been made by its domestic court, even though the efforts of its competent authority would be limited to provide any information the other competent authority would need.

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

25. When no filing period is provided in the tax treaty, or when the filing period refers to the domestic law of the contracting states, South Africa reported that its domestic law provides that the MAP request shall be submitted under the rules prescribed in section 99 of the Tax Administration Act 28 of 2011 (“**TA Act**”). According to these rules, and as specified in paragraphs 3.2.2 and 3.2.3 of South Africa’s MAP guidance, the MAP request shall be submitted within three years after the date of the original assessment. South Africa clarified that the date of assessment would be:

- i. in case of an adjustment made by South Africa’s tax administration, the date of the reassessment in South Africa

- ii. in case of an adjustment made by the treaty partner, the date of the original assessment made in South Africa.

26. South Africa reported that taxpayers could request for the extension of domestic time limits, but this request would need to be submitted before the expiration of such domestic time limits. This approach is not in line with the Action 14 Minimum Standard, which prescribes that taxpayers that meet the requirements of paragraph 1 of Article 25 can access the MAP, while one of these requirements is that taxpayers 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 tax treaty.

Anticipated modifications

Multilateral Instrument

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

27. South Africa signed the Multilateral Instrument. Article 16(4)(a)(i) of that instrument stipulates that Article 16(1), first sentence – containing the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention as amended by the Action 14 final report and allowing the submission of MAP requests to the competent authority of either contracting state – will apply in place of or in the absence of a provision in tax treaties that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this tax treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified the depositary, pursuant to Article 16(6)(a), that this treaty contains the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report. Article 16(4)(a)(i) will for a tax treaty not take effect if one of the treaty partners has, pursuant to Article 16(5)(a), reserved the right not to apply the first sentence of Article 16(1) of that instrument to all of its covered tax agreements.

28. South Africa reserved, pursuant to Article 16(5)(a) of the Multilateral Instrument, the right not to apply the first sentence of Article 16(1) of that instrument to its existing tax treaties, with a view to allow taxpayers to submit a MAP request to the competent authority of either contracting state.⁴ In this reservation, South Africa declared to ensure that all of its tax treaties, which are considered covered tax agreements for purposes of the Multilateral Instrument, contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention, as it read prior to the adoption of the Action 14 final report. It subsequently declared to implement a bilateral notification or consultation process for those cases in which its competent authority considers the objection raised by a taxpayer in its MAP request as not being justified. The introduction and application of such process will be further discussed under element B.2.

29. In view of the above, following the reservation made by South Africa, those six treaties identified in paragraphs 16 to 20 above that are considered not including the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the Action 14 final report, will not be modified via the Multilateral Instrument with a view to allow taxpayers to submit a MAP request to the competent authority of either contracting state.

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

30. With respect to the period of filing of a MAP request, Article 16(4)(a)(ii) of the Multilateral Instrument stipulates that Article 16(1), second sentence – containing the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention – will apply where such period is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provisions of a tax treaty. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified, pursuant to Article 16(6)(b)(i), the depositary that this treaty does not contain the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention.

31. In regard of the seven tax treaties identified in paragraph 22 above that contain a filing period for MAP requests of less than three years or that referred to the domestic law of the contracting states, South Africa listed all of them as a covered tax agreement under the Multilateral Instrument and for all of them did it make, pursuant to Article 16(6)(b)(i), a notification that they do not contain a provision described in Article 16(4)(a)(ii). Of the seven relevant treaty partners, two are not a signatory to the Multilateral Instrument. All the remaining five tax treaties partners also listed their treaty with South Africa under that instrument and also made the relevant notification. Therefore, at this stage, five of the seven tax treaties identified above will be modified by the Multilateral Instrument upon its entry into force for these treaties to include the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention.

Bilateral modifications

32. South Africa further reported that for the tax treaties that do not contain the equivalent of Article 25(1) of the OECD Model Tax Convention, as it read prior to the adoption of the Action 14 final report, and which will not be modified by the Multilateral Instrument, it intends to update them via bilateral negotiations with a view to be compliant with element B.1. In this respect, South Africa reported that it prioritises the treaties that contain major deficiencies, along with those under which a significant number of MAP cases is pending. South Africa reported that it will also use the opportunity that may arise when it wishes to renegotiate other articles of the treaty to amend the MAP provision so that it is in line with the Action 14 Minimum Standard.

33. With respect to the first sentence of Article 25(1), South Africa reported that it will in those bilateral negotiations propose to include the equivalent as it read prior to the adoption of the Action 14 final report. In addition, South Africa reported it will seek to include Article 25(1) of the OECD Model Tax Convention, as it read prior to or after the adoption of the Action 14 final report, in all of its future tax treaties, on a treaty-by-treaty basis.

Peer input

34. For the 13 treaties identified that do not contain the equivalent of Article 25(1) of the OECD Model Tax Convention, ten peers did not provide input. The remaining three peers provided the following input: one reported that its treaty with South Africa is not compliant with Element B.1, without referring to any actions planned, one reported that it signed the Multilateral Instrument whereas the treaty will not be modified by that instrument, and the remaining one reported that it made the necessary notifications in order to have the treaty modified, which will be the case as per the above analysis.

Conclusion

	Areas for improvement	Recommendations
	Six out of 80 tax treaties do not contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention. None of these six treaties will be modified by the Multilateral Instrument.	As none of South Africa's treaties will be modified by the Multilateral Instrument to include the equivalent of Article 25(1), first sentence of the OECD Model Tax Convention in those treaties that currently do not contain such equivalent South Africa should in accordance with its plan for five of the six treaties request the inclusion of the required provision via bilateral negotiations, either: <ol style="list-style-type: none"> as amended in the Action 14 final report; or as it read prior to the adoption of Action 14 final report, thereby including the full sentence of such provision. Specifically with respect to the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, it should, once it enters into negotiations with such jurisdictions, request the inclusion of the required provision.
[B.1]	Seven out of 80 tax treaties provide that the timeline to file a MAP request is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty. Of these seven treaties: <ul style="list-style-type: none"> • Five are expected to be modified by the Multilateral Instrument to include the required provision. • Two will not be modified by that instrument to include the required provision. 	South Africa should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent of Article 25(1), second sentence of the OECD Model Tax Convention in those five treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned. For the remaining two treaties that will not be modified by the Multilateral Instrument to include the equivalent to Article 25(1), second sentence of the OECD Model Tax Convention, South Africa should request the inclusion of a provision that allows taxpayers to submit a MAP request within a period of no less than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty.
	Where tax treaties do not include a time limit for submission of a MAP request, applicable rules under domestic legislation may lead to a filing period of less than three years as from the first notification of the action resulting in taxation not in accordance with the provisions of a tax treaty.	South Africa should ensure that where its domestic time limits apply for filing of MAP requests, in the absence of a provision hereon in its tax treaties, such time limits do not prevent taxpayers from having access to MAP if a request thereto is made within a period of three years as from the first notification of the action resulting in taxation not in accordance with the provisions of a tax treaty.
		In addition, South Africa should maintain its stated intention to include Article 25(1) of the OECD Model Tax Convention as it read prior to or after the adoption of the Action 14 final report in all future tax treaties.

[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).

35. 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 contain 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

36. As discussed under element B.1, out of South Africa's 80 treaties, one currently contains a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention as changed by the Action 14 final report, allowing taxpayers to submit a MAP request to the competent authority of either treaty partner. In addition, as was also discussed under element B.1, none of the remaining treaties will be modified by the Multilateral Instrument to allow taxpayers to submit a MAP request to the competent authority of either treaty partner as South Africa reserved the right, as is allowed pursuant to Article 16(5)(a) of the Multilateral Instrument, not to apply the first sentence of Article 16(1) of that instrument to existing treaties, with a view to allow taxpayers to submit a MAP request to the competent authority of either contracting state.⁵

37. South Africa reported that it has introduced a bilateral consultation process which allows the other competent authority concerned to provide its views on the case when South Africa's competent authority considers the objection raised in the MAP request not to be justified. Paragraph 5.1. of South Africa's MAP guidance refers to the existence of such a process. In this respect, South Africa clarified that its competent authority will provide the other competent authority with a legal opinion and any supporting document. South Africa further clarified that it uses the templates developed by the FTA MAP Forum for such a purpose. However, South Africa reported that it has not yet formalised such a practice in its internal guidance for the MAP office.

Practical application

38. South Africa reported that since 1 January 2016 its competent authority has for none of the MAP requests it received decided that the objection raised by taxpayers in such request was not justified. The 2016 and 2017 MAP statistics submitted by South Africa also show that none of its MAP cases was closed with the outcome “objection not justified”.

39. All peers that provided input indicated not being aware of any cases for which South Africa’s competent authority denied access to MAP. They also reported not having been consulted/notified of a case where South Africa’s competent authority considered the objection raised in a MAP request as not justified. This can be explained by the fact that South Africa since this date did not consider that an objection raised in a MAP request was not justified.

Anticipated modifications

40. South Africa reported that an internal guide on MAPs is in the process of being prepared for training new incumbents of the competent authority, and that such guidance will incorporate the actions to be taken if its competent authority considers an objection as not justified as well as the relevant templates.

Conclusion

	Areas for improvement	Recommendations
[B.2]	79 of the 80 tax treaties do not contain a provision equivalent to Article 25(1) of the OECD Model Tax Convention as changed by the Action 14 final report, allowing taxpayers to submit a MAP request to the competent authority of either treaty partners. For these treaties no documented bilateral consultation or notification process is in place, which allows the other competent authority concerned to provide its views on the case when the taxpayer’s objection raised in the MAP request is considered not to be justified.	South Africa should without further delay document its bilateral consultation process and provide in that document rules of procedure on how that process should be applied in practice, including the steps to be followed and timing of these steps. Furthermore, South Africa should apply that process in practice for future cases in which its competent authority considered the objection raised in a MAP request not to be justified and when the tax treaty concerned does not contain Article 25(1) of the OECD Model Tax Convention as amended by the Action 14 final report.

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

Jurisdictions should provide access to MAP in transfer pricing cases.

41. 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. Jurisdictions should thus provide access to MAP in transfer pricing cases.

Legal and administrative framework

42. Out of South Africa’s 80 tax treaties, 36 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 treaty partner. Furthermore, six do not

contain such equivalent.⁶ The remaining 38 treaties do contain a provision that is based on Article 9(2) of the OECD Model Tax Convention, but deviate from this provision for the following reasons:

- Four treaties contain a provision on the granting of corresponding adjustments, but the wording used and structure of the provision is different from Article 9(2) of the OECD Model Tax Convention, as the granting of corresponding adjustments can only be made after consultation or by involving the other competent authority.
- 34 treaties contain a provision that is based on Article 9(2) of the OECD Model Tax Convention, but the granting of a corresponding adjustment could be read as only optional as the word “shall” is replaced by “may”.

43. Access to MAP should be provided in transfer pricing cases regardless of whether the equivalent of Article 9(2) is contained in South Africa’s 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, South Africa indicated that it will always provide access to MAP for transfer pricing cases and is willing to make corresponding adjustments, such regardless of whether the equivalent of Article 9(2) of the OECD Model Tax Convention is contained in its tax treaties, unless the relevant treaty does not contain a MAP provision. As mentioned under element B.1, three of South Africa’s tax treaties do not contain any MAP provision.⁷

44. The guidance explaining the relationship between access to MAP and transfer pricing can be found in paragraph 2.1.3 of South Africa’s MAP guidance that clarifies that transfer pricing cases are eligible to MAP.

Application of legal and administrative framework in practice

45. South Africa reported that since 1 January 2016, it has not denied access to MAP on the basis that the case concerned a transfer pricing case, while its competent authority has received such MAP requests.

46. Peers indicated not being aware of a denial of access to MAP by South Africa on the basis that the case concerned was a transfer pricing case.

Anticipated modifications

47. South Africa reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention in its tax treaties where possible and that it will seek to include this provision in all of its future tax treaties. In that regard, South Africa signed the Multilateral Instrument. Article 17(2) of that instrument stipulates that Article 17(1) – containing the equivalent of Article 9(2) of the OECD Model Tax Convention – will apply in place of or in the absence of a provision in tax treaties that is equivalent to Article 9(2) of the OECD Model Tax Convention. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument. Article 17(2) of the Multilateral Instrument does not take effect for a tax treaty if one or both of the treaty partners have, pursuant to Article 17(3), reserved the right not to apply Article 17(2) for those tax treaties that already contain the equivalent of Article 9(2) of the OECD Model Tax Convention, or not to apply Article 17(2) in the absence of such equivalent under the condition that: (i) it shall make appropriate corresponding adjustments or (ii) its competent authority shall endeavour to resolve the case under mutual agreement procedure of the applicable tax treaty. Where neither treaty partner has made such a

reservation, Article 17(4) of the Multilateral Instrument stipulates that both have to notify the depositary whether the applicable treaty already contains a provision equivalent to Article 9(2) of the OECD Model Tax Convention. Where such a notification is made by both of them, the Multilateral Instrument will modify this treaty to replace that provision. If neither or only one treaty partner made this notification, Article 17(1) of the Multilateral Instrument will supersede this treaty only to the extent that the provision contained in that treaty relating to the granting of corresponding adjustments is incompatible with Article 17(1) (containing the equivalent of Article 9(2) of the OECD Model Tax Convention).

48. South Africa has, pursuant to Article 17(3), not reserved the right not to apply Article 17(2) of the Multilateral Instrument for those tax treaties that already contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention. In regard of the 44 tax treaties identified in paragraph 42 above that are considered not to contain this equivalent, South Africa listed 40 treaties as a covered tax agreement under the Multilateral Instrument and for 37 of them made a notification on the basis of Article 17(4).

49. With regard to those 37 treaties, 15 treaty partners are not a signatory to the Multilateral Instrument, whereas one has not listed its treaty with South Africa under that instrument and ten have, on the basis of Article 17(3), reserved the right not to apply Article 17(2) as they considered that their treaty with South Africa already contains the equivalent of Article 9(2). Of the remaining 11 treaty partners, seven made, a notification on the basis of Article 17(4) that their treaty with South Africa contains a provision described in Article 17(2). Therefore, at this stage, seven of the 43 tax treaties identified above will be replaced by the Multilateral Instrument upon its entry into force for these treaties to include the equivalent of Article 9(2) of the OECD Model Tax Convention. The remaining four will be superseded by the Multilateral Instrument upon its entry into force for these treaties to include the equivalent of Article 9(2) of the OECD Model Tax Convention, but only to the extent that the provisions contained in those treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1).

50. With regard to the remaining 3 treaties, two treaty partners are not a signatory to the Multilateral Instrument. The remaining treaty partner has listed its treaty with South Africa under that instrument and has not, on the basis of Article 17(3), reserved the right not to apply Article 17(2). Therefore, at this stage, one of the three tax treaties identified above will be superseded by the Multilateral Instrument upon its entry into force for these treaties to include the equivalent of Article 9(2) of the OECD Model Tax Convention, but only to the extent that the provisions contained in those treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1).

51. South Africa reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention in its tax treaties where possible and that it will seek to include Article 9(2) of the OECD Model Tax Convention in all of its future tax treaties.

Conclusion

	Areas for improvement	Recommendations
[B.3]	-	As South Africa has thus far granted access to MAP in eligible transfer pricing cases, it should continue granting access for these cases.

[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.

52. 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

53. None of South Africa's 80 tax treaties allow competent authorities to restrict access to MAP for cases where a treaty anti-abuse provision applies or where 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 South Africa do not include a provision allowing its competent authority to limit access to 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.

54. South Africa reported that it will not deny access to MAP to cases where a treaty anti-abuse provision applies or where 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, unless the relevant treaty does not contain a MAP provision. This is also clarified in paragraph 3.4 of South Africa's MAP guidance.

Practical application

55. South Africa reported that since 1 January 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, since that date no requests in relation hereto were received by its competent authority.

56. Peers indicated not being aware of cases that have been denied access to MAP in South Africa since 1 January 2016 in relation to the application of treaty and/or domestic anti-abuse provisions.

Anticipated modifications

57. South Africa indicated that it does not anticipate any modifications in relation to element B.4.

Conclusion

	Areas for improvement	Recommendations
[B.4]	South Africa reported it will give access to MAP in cases concerning whether the conditions for the application of a treaty anti-abuse provision have been met or whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty. Its competent authority, however, did not receive any MAP requests of this kind from taxpayers during the Review Period. South Africa is therefore recommended to follow its policy and grant access to MAP in such cases.	

[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.

58. 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 statutory disputes settlement/resolution process that functions independently from the audit and examination function and which is only accessible through a request by taxpayers.

Legal and administrative framework

Audit settlements

59. Under South Africa's domestic law it is not possible that taxpayers and the tax administration enter into an audit settlement.

Administrative or statutory dispute settlement/resolution process

60. South Africa reported it has an administrative or statutory dispute settlement/resolution process in place, which is independent from the audit and examination functions and which can only be accessed through a request by the taxpayer. South Africa clarified that the process follows from a request from the taxpayer, and that one of South Africa's three national appeal committees could consider the relevant settlement, whereby the competency of each national appeal committee is defined by the amount of tax in dispute. South Africa reported that each national appeal committee is chaired by a member of Legal Counsel of South Africa's tax administration, and that the highest national appeal committee is chaired by the Chief Officer of Legal Counsel. South Africa further clarified that audit function is represented in each national appeal committee but that the majority of members in each national appeal committee are from Legal Counsel and other non-audit divisions.

61. South Africa reported that access to MAP will be denied if a settlement is reached through this independent settlement procedure. As it will be discussed under element B.10, this is also specified in paragraph 3.3 of South Africa's MAP guidance.

Practical application

62. South Africa reported that since 1 January 2016 it has not denied access to MAP in cases where the issue presented by the taxpayer in a MAP request has already been resolved through its administrative or statutory dispute settlement/resolution process. However, since that date no requests in relation hereto were received by its competent authority.

63. All peers indicated not being aware of a denial of access to MAP in South Africa since 1 January 2016 in cases where the issue at stake was resolved by its administrative or statutory dispute settlement/resolution process.

Anticipated modifications

64. South Africa indicated that it does not anticipate 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.

65. 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 publically available.

Legal framework on access to MAP and information to be submitted

66. The information and documentation South Africa requires taxpayers to include in a request for MAP assistance are discussed under element B.8.

67. If taxpayers fail to provide all required information or documentation, South Africa reported that it would require them to provide the missing information or documentation. South Africa further reported that its competent authority usually requires to provide such information or documentation within 21 business days, and that additional time may be allowed if the taxpayer asks for it because of the complexity of the case for instance. South Africa clarified that it would generally follow up with the taxpayer that failed to provide the required information after having been invited to do so and then either proceed with the MAP case or close the MAP case.

Practical application

68. South Africa reported that it provides access to MAP in all cases where taxpayers have complied with the information or documentation requirements as set out in its MAP guidance. It further reported that since 1 January 2016 it has not denied access to MAP for cases where the taxpayer had not provided the required information or documentation, while its competent authority has received MAP requests.

69. All peers that provided input indicated not being aware of a limitation of access to MAP by South Africa since 1 January 2016 in situations where taxpayers complied with information and documentation requirements.

Anticipated modifications

70. South Africa indicated that it does not anticipate any modifications in relation to element B.6.

Conclusion

	Areas for improvement	Recommendations
[B.6]	-	As South Africa has thus far not limited access to MAP in eligible cases when taxpayers have complied with South Africa's information and documentation requirements for MAP requests, it should continue this practice.

[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.

71. 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 South Africa's tax treaties

72. Out of South Africa's 80 tax treaties, 71 contain a provision equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention allowing their competent authorities to consult together for the elimination of double taxation in cases not provided for in their tax treaties.⁸ Of the remaining nine treaties, three do not contain any MAP provision and six do not contain any provision that is based on Article 25(3), second sentence, of the OECD Model Tax Convention.⁹

Anticipated modifications

Multilateral Instrument

73. South Africa signed the Multilateral Instrument. Article 16(4)(c)(ii) of that instrument stipulates that Article 16(3), second sentence – containing the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention. In other words, in the absence of this equivalent, Article 16(4)(c)(ii) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified, pursuant to Article 16(6)(d)(ii), the depositary that this treaty does not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention.

74. In regard of the nine tax treaties identified above that are considered not to contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, South Africa listed six treaties as a covered tax agreement under the Multilateral Instrument, but only for four treaties did it make, pursuant to Article 16(6)(d)(ii), a notification that they do not contain a provision described in Article 16(4)(c)(ii). All the relevant four treaty partners are signatory to the Multilateral Instrument and all listed their treaty with South Africa as a covered tax agreement. All also made such notification. Therefore, at this stage, four of the nine tax treaties identified above will be modified by the Multilateral Instrument upon its entry into force for these treaties to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention.

Bilateral modifications

75. South Africa further reported that for those five tax treaties that do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention and which will not be modified by the Multilateral Instrument, it intends to update them via bilateral negotiations with a view to be compliant with element B.7. In this respect, South Africa reported that it prioritises the treaties that contain major deficiencies, along with those under which a significant number of MAP cases is pending. South Africa reported that it will also use the opportunity that may arise when it wishes to renegotiate other articles of the treaty to amend the MAP provision so that it is in line with the Action 14 Minimum Standard. In addition, South Africa reported it will seek to include Article 25(3), second sentence, of the OECD Model Tax Convention in all of its future tax treaties.

Peer input

76. For the nine treaties identified that do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, only two peers provided input stating, for the first one, that it has not contacted South Africa and, for the second one, that the treaty is expected to be modified by the Multilateral Instrument to incorporate the relevant provision. Both treaties will be modified by the Multilateral Instrument according to the above analysis.

Conclusion

	Areas for improvement	Recommendations
[B.7]	<p>Nine out of 80 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention. Of these nine treaties:</p> <ul style="list-style-type: none"> • Four are expected to be modified by the Multilateral Instrument to include the required provision. • Five will not be modified by that instrument to include the required provision. 	<p>South Africa should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention in those four treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned.</p> <p>For four of the remaining five treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, South Africa should request the inclusion of the required provision via bilateral negotiations in accordance with its plan.</p> <p>Specifically with respect to the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, it should, once it enters into negotiations with such jurisdictions, request the inclusion of the required provision.</p> <p>In addition, South Africa should maintain its stated intention to include the required provision in all future tax treaties.</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.

77. 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.

South Africa's MAP guidance

78. South Africa's rules, guidelines and procedures are included in the Guide on Mutual Agreement Procedures ("**MAP Guidance**"). They were released by Legal Counsel of South Africa's tax administration in July 2018 and are available at:

www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-IT-G24%20-%20Guide%20on%20Mutual%20Agreement%20Procedures.pdf

79. This contains information on:

- a. contact information of the competent authority or the office in charge of MAP cases, both for transfer pricing cases and other MAP cases
- b. the manner and form in which the taxpayer should submit its MAP request
- c. the specific information and documentation that should be included in a MAP request (see also below)

- d. how the MAP functions in terms of timing and the role of the competent authorities
- e. information on availability of arbitration
- f. relationship with domestic available remedies
- g. access to MAP in transfer pricing cases, audit settlements, anti-abuse provisions and for multi-year resolution of cases
- h. implementation of MAP agreements
- i. rights and role of taxpayers in the process
- j. suspension of tax collection
- k. interest and penalties.

80. The above-described MAP guidance of South Africa includes detailed information on the availability and the use of MAP and how its competent authority conducts the procedure 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.¹⁰

81. Although the information included in South Africa's MAP guidance is detailed and comprehensive, one subject is not specifically discussed in South Africa's MAP guidance which is the timing of the steps for the implementation of MAP agreements.

Information and documentation to be included in a MAP request

82. 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 request for MAP assistance.¹¹ This agreed guidance is shown below. South Africa's MAP guidance enumerating which items must be included in a request for MAP assistance (if available) are checked in the following list:

- identity of the taxpayer(s) covered in the MAP request
- the basis for the request
- 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.

83. In addition to the items enumerated above, South Africa reported that the following items are also required, in accordance with what is provided in its MAP guidance:

- An identification of the domestic and tax treaties' time limits in the relevant jurisdictions in respect of the years for which relief is sought.
- For attribution/allocation cases:
 - Details regarding the adjustment (or proposed adjustment) in addition to the facts provided above:
 - calculations setting out the adjustment or proposed adjustment translated in both currencies
 - state how effect was given to the adjustment in practice including an explanation of the accounting treatment
 - state clearly whether any portion of the adjustment relates to secondary adjustments
 - state clearly whether any portion of the adjustment relates to interest on unpaid taxes or statutory penalties
 - state whether any previous or subsequent years are to be audited where there is a prospect of similar issues arising
 - an indication of any specific issues raised by the foreign competent authority
 - set out those elements of the transfer pricing policy that the other jurisdiction did not agree with and why, and how the associated enterprise sought to rebut the other jurisdiction's findings, including copies of all relevant correspondence
 - Statements indicating whether the taxpayer has:
 - filed a refund claim, or
 - entered into a settlement agreement, in either of the jurisdictions related to the relief sought
 - Supporting documents in addition to the supporting documents listed above should include the following:
 - copies of the relevant related party agreements
 - copies of the South African and foreign-related parties' transfer pricing policies or documentation and benchmarking studies whether at a group level or at a company level
 - copies of the financial statements of both related parties
 - copies of the tax return disclosure of the South African taxpayer involved
 - The following minimum information must be provided of any related foreign taxpayer involved:
 - company/entity name
 - physical address
 - contact details
 - tax or other identification number (if possible).

Anticipated modifications

84. South Africa indicated that it does not anticipate any modifications in relation to element B.8.

Conclusion

	Areas for improvement	Recommendations
[B.8]	-	Although not required by the Action 14 Minimum Standard, in order to further improve the level of details of its MAP guidance South Africa's could consider including information on the timing of the steps for the implementation of MAP agreements.

[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.

85. 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.¹²

Rules, guidelines and procedures on access to and use of the MAP

86. The MAP guidance of South Africa is published and can be found at:

www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-IT-G24%20-%20Guide%20on%20Mutual%20Agreement%20Procedures.pdf

87. This guidance was released in July 2018 and updated in October 2018. As regards its accessibility, South Africa's MAP guidance can easily be found on the website of the tax administration by searching for mutual agreement procedure on such website.

MAP profile

88. The MAP profile of South Africa is published on the website of the OECD. This MAP profile is complete and often with detailed information. This profile includes external links which provide extra information and guidance where appropriate.

Anticipated modifications

89. South Africa indicated that it does not anticipate any modifications in relation to element B.9.

Conclusion

	Areas for improvement	Recommendations
[B.9]	-	As it has thus far made its MAP guidance available and easily accessible and published its MAP profile, South Africa should ensure that its future updates to the MAP guidance continue to be publicly available and easily accessible and that its MAP profile published on the shared public platform is updated if needed.

[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.

90. 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 previously mentioned processes.

MAP and audit settlements in the MAP guidance

91. As previously discussed under B.5, it is not possible under South Africa's domestic law for taxpayers and the tax administration to enter into audit settlements.

92. Peers raised no issues with respect to the availability of audit settlements and the inclusion of such information in South Africa's MAP guidance.

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

93. As previously mentioned under element B.5, South Africa has an administrative or statutory dispute settlement/resolution process in place that is independent from the audit and examination functions and that can only be accessed through a request by the taxpayer. The domestic legal basis/guidance that explains the relationship between access to MAP and internal administrative or statutory dispute settlement/resolution processes is available in paragraph 3.3. of South Africa's MAP guidance, which clarifies that taxpayers do not have access to MAP in case of internal dispute settlement/resolution process.¹³ However,

the public guidance on such processes does not clarify that taxpayers do not have access to MAP in such cases.¹⁴ South Africa reported that taxpayers are also made aware of the impact of such a settlement by inserting a clause in settlement agreements that records that MAP is excluded.

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

94. South Africa 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 South Africa’s MAP guidance and MAP profile, both of which are publicly available.

95. All peers but one that provided input indicated not being aware of the existence of an administrative or statutory dispute settlement/resolution process in South Africa. The last peer indicated that it became aware of such a process during a MAP case and noted that the process is outlined in South Africa’s MAP guidance.

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

Anticipated modifications

97. South Africa indicated that it does not anticipate any modifications in relation to element B.10.

Conclusion

	Areas for improvement	Recommendations
[B.10]	The effects of the administrative or statutory dispute/resolution settlement processes on MAP are not addressed in the guidance on such process.	South Africa’s guidance on administrative or statutory dispute settlement/resolution processes should clarify the effects on MAP when the case was resolved through a dispute settlement/resolution process.

Notes

1. These 64 treaties include the treaty recently signed with Germany (2008) that is not yet in force and which will replace, once entered into force, the existing treaty of 1973.
2. These three treaties include the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone.
3. These 67 treaties include the treaty recently signed with Germany (2008) that is not yet in force and which will replace, once entered into force, the existing treaty of 1973.

4. This reservation on Article 16 – Mutual Agreement Procedure reads: “Pursuant to Article 16(5)(a) of the Convention, the Republic of South Africa reserves the right for the first sentence of Article 16(1) not to apply to its Covered Tax Agreements on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the competent authority of either Contracting Jurisdiction), where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, that person may present the case to the competent authority of the Contracting Jurisdiction of which the person is a resident or, if the case presented by that person comes under a provision of a Covered Tax Agreement relating to non-discrimination based on nationality, to that of the Contracting Jurisdiction of which that person is a national; and the competent authority of that Contracting Jurisdiction will implement a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction for cases in which the competent authority to which the mutual agreement procedure case was presented does not consider the taxpayer’s objection to be justified”. An overview of South Africa’s positions on the Multilateral Instrument is available at: www.oecd.org/tax/treaties/beps-mli-position-south-africa.pdf.
5. This reservation on Article 16 – Mutual Agreement Procedure reads: “Pursuant to Article 16(5)(a) of the Convention, South Africa reserves the right for the first sentence of Article 16(1) not to apply to its Covered Tax Agreements on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the competent authority of either Contracting Jurisdiction), where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, that person may present the case to the competent authority of the Contracting Jurisdiction of which the person is a resident or, if the case presented by that person comes under a provision of a Covered Tax Agreement relating to non-discrimination based on nationality, to that of the Contracting Jurisdiction of which that person is a national; and the competent authority of that Contracting Jurisdiction will implement a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction for cases in which the competent authority to which the mutual agreement procedure case was presented does not consider the taxpayer’s objection to be justified”. An overview of South Africa’s positions on the Multilateral Instrument is available at: www.oecd.org/tax/treaties/beps-mli-position-south-africa.pdf.
6. These six treaties include the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone.
7. These three treaties include the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone.
8. These 71 treaties include the treaty recently signed with Germany (2008) that is not yet in force and which will replace, once entered into force, the existing treaty of 1973.
9. The three treaties include the former treaty with the former United Kingdom that South Africa continues to apply to Grenada and Sierra Leone.
10. Available at: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf.
11. Available at: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf.
12. The shared public platform can be found at: www.oecd.org/ctp/dispute/country-map-profiles.htm.

13. South Africa’s MAP guidance is available at www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-IT-G24%20-%20Guide%20on%20Mutual%20Agreement%20Procedures.pdf.
14. The public guidance on such process is provided in the Alternative Dispute Resolution: Quick Guide, available at www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TAdm-G06%20-%20Quick%20Guide%20on%20Alternative%20Dispute%20Resolution.pdf.

References

- OECD (2015a), *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report*. In *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris, <https://dx.doi.org/10.1787/9789264241633-en>.
- OECD (2015b), *Model Tax Convention on Income and on Capital 2014 (Full Version)*, OECD Publishing, Paris, <https://dx.doi.org/10.1787/9789264239081-en>.
- OECD (2017), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, <https://dx.doi.org/10.1787/g2g972ee-en>.

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.

98. It is of critical importance that in addition to allowing taxpayers to request for a MAP, tax treaties also include the equivalent of the first sentence of Article 25(2) of the OECD Model Tax Convention (OECD, 2017a), 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 South Africa’s tax treaties

99. Out of South Africa’s 80 tax treaties, 76 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.¹ Three treaties do not contain any MAP provision at all.² The remaining treaty contains a provision that is based on Article 25(2), first sentence, but that also incorporates additional language that imposes an obligation to notify the other competent authority within a certain time limit after receiving MAP request. This provision is therefore considered not being the equivalent of Article 25(2), first sentence.

Anticipated modifications

Multilateral Instrument

100. South Africa signed the Multilateral Instrument. Article 16(4)(b)(i) of that instrument stipulates that Article 16(2), first sentence – containing the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(2), first sentence, of the OECD Model Tax

Convention. In other words, in the absence of this equivalent, Article 16(4)(b)(i) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified, pursuant to Article 16(6)(c)(i), the depositary that this treaty does not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention.

101. In regard of the four tax treaties identified above that are considered not to contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention, South Africa listed one of them as a covered tax agreement under the Multilateral Instrument and made, pursuant to Article 16(6)(c)(i), a notification that it does not contain a provision described in Article 16(4)(b)(i). The relevant treaty partner is a signatory to the Multilateral Instrument and listed its treaty with South Africa as a covered tax agreement as well as made such notification. Therefore, at this stage, one of the four tax treaties identified above will be modified by the Multilateral Instrument upon its entry into force for this treaty to include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention.

Bilateral modifications

102. South Africa further reported that for the tax treaties that do not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention and which will not be modified by the Multilateral Instrument, it intends to update them via bilateral negotiations with a view to be compliant with element C.1. In this respect, South Africa reported that it prioritises the treaties that contain major deficiencies, along with those under which a significant number of MAP cases is pending. South Africa reported that it will also use the opportunity that may arise when it wishes to renegotiate other articles of the treaty to amend the MAP provision so that it is in line with the Action 14 Minimum Standard. In addition, South Africa reported it will seek to include Article 25(2), first sentence, of the OECD Model Tax Convention in all of its future tax treaties.

Peer input

103. For the four treaties identified that do not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention, the relevant peers did not provide input.

Conclusion

	Areas for improvement	Recommendations
[C.1]	Four out of 80 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention. One of these four treaties is expected to be modified by the Multilateral Instrument.	As three of the treaties that do not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention will not be modified via the Multilateral Instrument, South Africa should request the inclusion of the required provision via bilateral negotiations for two of the three relevant treaties in accordance with its plan. Specifically with respect to the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, it should, once it enters into negotiations with such jurisdictions, request the inclusion of the required provision. In addition, South Africa should maintain its stated intention to include the required provision in all future tax treaties.

[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).

104. 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

105. Statistics regarding all tax treaty related disputes concerning South Africa are published on the website of the OECD as of 2008.³

106. 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. South Africa provided its MAP statistics pursuant to the MAP Statistics Reporting Framework within the given deadline, including all cases involving South Africa and of which its competent authority was aware.⁴ The statistics discussed below include both pre-2016 and post-2015 cases and the full statistics are attached to this report as Annex B and Annex C respectively⁵ and should be considered jointly for understanding of the MAP caseload of South Africa. With respect to post-2015 cases, South Africa reported having reached out to all its MAP partners with a view to have their MAP statistics matching. In that regard, South Africa reported that it could match its post-2015 MAP statistics with all of them. Based on the information provided by South Africa’s MAP partners, its post-2015 MAP statistics actually match those of its treaty partners as reported by the latter.

Monitoring of MAP statistics

107. South Africa reported that it has a system in place with its treaty partners that communicates, monitors and manages the MAP caseload. South Africa reported that average time needed to close MAP cases are reported in a monthly report to the Chief Officer of Legal Counsel, which also includes a breakdown between the cases started before and after 1 January 2016. In addition, South Africa specified that individual MAP cases average time is also reported to the Chief Officer.

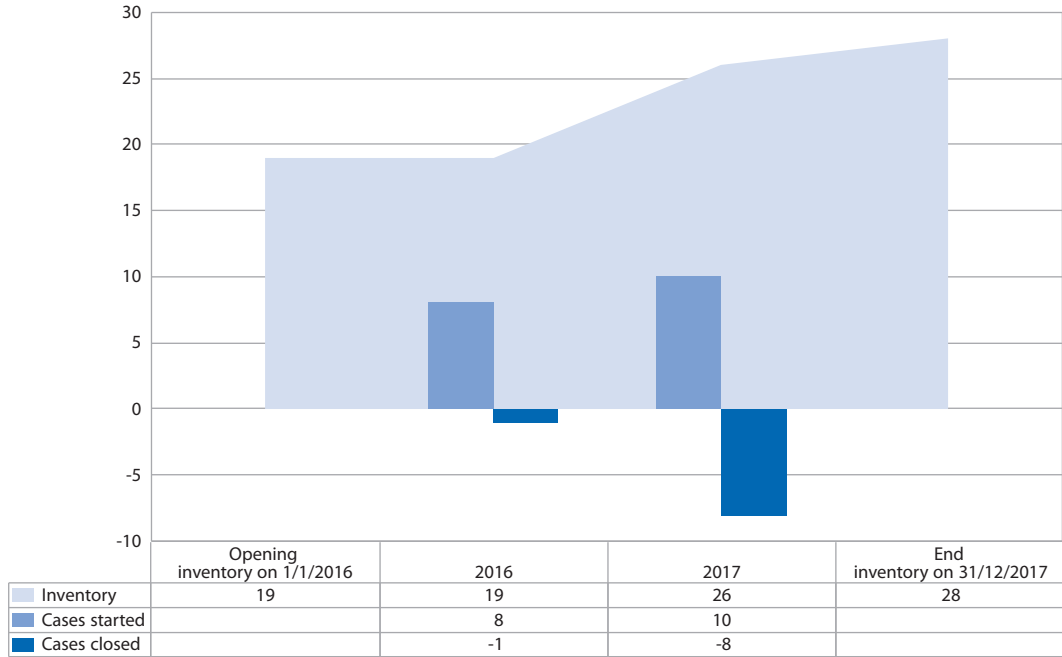
Analysis of South Africa’s MAP caseload

Global overview

108. Figure C.1 shows the evolution of South Africa’s MAP caseload over the Statistics Reporting Period.

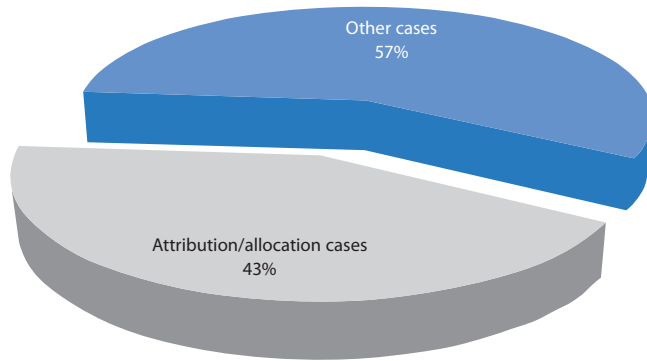
109. At the beginning of the Statistics Reporting Period South Africa had 19 pending MAP cases, of which 10 were attribution/allocation cases and nine other MAP cases.⁶ At the end of the Statistics Reporting Period, South Africa had 28 MAP cases in its inventory, of which 12 are attribution/allocation cases and 16 are other MAP cases. South Africa’s MAP caseload has increased by 47% during the Statistics Reporting Period, which can be broken down in an increase by 20% for attribution allocation cases and by 78% for other cases.

Figure C.1. Evolution of South Africa’s MAP caseload



110. The breakdown of the end inventory can be shown as follows:

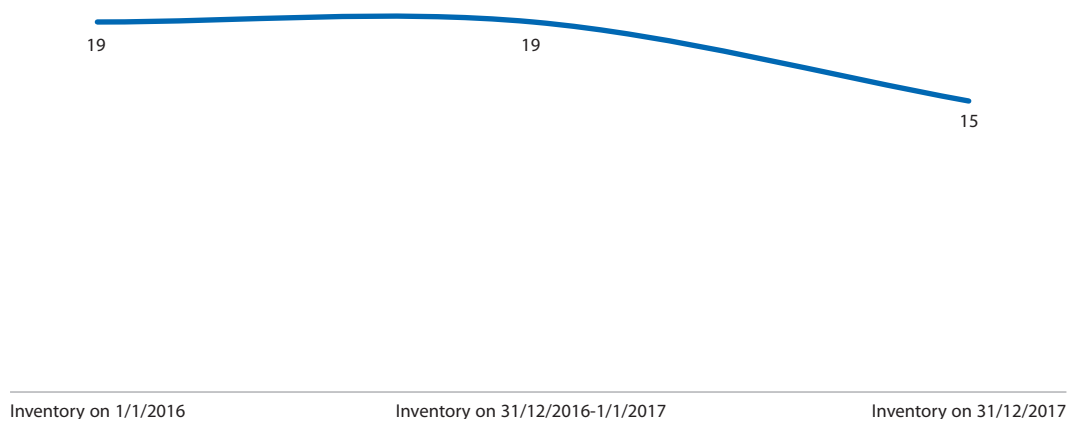
Figure C.2. End inventory on 31 December 2017 (28 cases)



Pre-2016 cases

111. Figure C.3 shows the evolution of South Africa’s pre-2016 MAP cases over the Statistics Reporting Period.

Figure C.3. Evolution of South Africa’s MAP inventory Pre-2016 cases



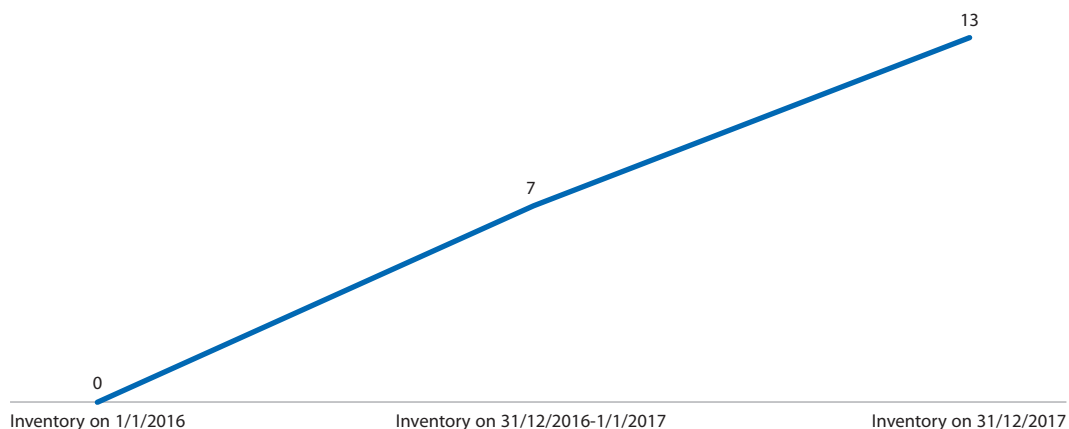
112. At the beginning of the Statistics Reporting Period, South Africa’s MAP inventory of pre-2016 MAP cases consisted of 19 cases, of which were ten attribution/allocation cases and nine other cases. At the end of the Statistics Reporting Period the total inventory of pre-2016 cases had decreased to 15 cases, consisting of ten attribution/allocation cases and five other cases. The decrease in the number of pre-2016 MAP cases is shown in the table below.

Pre-2016 cases only	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	0% (no cases closed)	0% (no cases closed)	0% (no cases closed)
Other cases	0% (no cases closed)	-44%	-44%

Post-2015 cases

113. The following graph shows the evolution of South Africa’s post-2015 MAP cases over the Statistics Reporting Period.

Figure C.4. Evolution of South Africa’s MAP inventory Post-2015 cases



114. In total, 18 MAP cases started during the Statistics Reporting Period, three of which concerned attribution/allocation cases and 15 other cases. At the end of this period the total number of post-2015 cases in the inventory was 13 cases, consisting of two attribution/allocation cases and 11 other cases. Conclusively, South Africa closed five post-2015 cases during the Statistics Reporting Period, one of them being attribution/allocation cases and four of them of them being other cases. The total number of closed cases represents 28 % of the total number of post-2015 cases that started during the Statistics Reporting Period, which can be broken down into 33% for attribution/allocation cases and 27% for other cases.

115. 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.

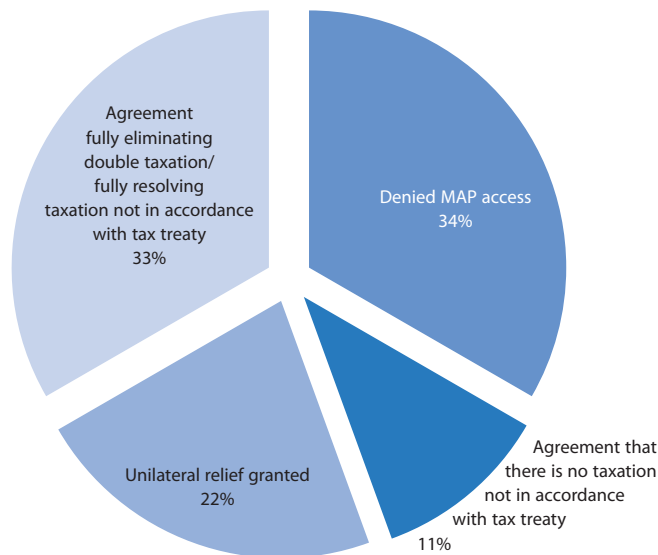
Post-2015 cases only	% of cases closed in 2016 compared to cases started in 2016	% of cases closed in 2017 compared to cases started in 2017	Cumulative % of cases closed compared to cases started over the two years (2016 + 2017)
Attribution/allocation cases	0% (no cases closed)	100%	33%
Other cases	17%	33%	27%

Overview of cases closed during the Statistics Reporting Period

Reported outcomes

116. During the Statistics Reporting Period South Africa in total closed nine MAP cases for which the following outcomes were reported:

Figure C.5. Cases closed during the Statistics Reporting Period (9 cases)



117. This chart shows that during the Statistics Reporting Period, three out of nine 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

118. In total, one attribution/allocation case was closed during the Statistics Reporting Period. The reported outcome for this case is unilateral relief granted.

Reported outcomes for other cases

119. In total, eight 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 tax treaty (38%)
- denied MAP access (38%).

Average timeframe needed to resolve MAP cases

All cases closed during the Statistics Reporting Period

120. The average time needed to close MAP cases during the Statistics Reporting Period was 19.72 months. This average can be broken down as follows:

	Number of cases	Start date to End date (in months)
Attribution/Allocation cases	1	17.29
Other cases	8	20.02
All cases	9	19.72

Pre-2016 cases

121. For pre-2016 cases South Africa reported that on average it needed 34 months to close other cases (it did not close any attribution/allocation cases). For the purpose of computing the average time needed to resolve pre-2016 cases, South Africa reported that it uses the following dates:

- *Start date*: the date of the receipt of the MAP request from the taxpayer or other competent authority
- *End date*: the date of the mutual agreement with the other competent authority.

Post-2015 cases

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

123. For post-2015 cases South Africa reported that on average it needed 17.29 months to close one attribution/allocation case and 6.04 months to close four other cases. This resulted in an average time needed of 8.29 months to close five post-2015 cases.

Peer input

124. Most of the peers that provided input reported having very few MAP experience with South Africa’s competent authority, as only one or two cases were handled during the Review Period. Five of the eleven peers that provided input did not comment on the time it takes in South Africa to close MAP cases.

125. One peer mentioned that the only case it has with South Africa was received in July 2017 and the 24 month pursued timeframe for this case can still be met. One peer mentioned that South Africa is one of its major trading partners and that it could contact South Africa by mail, e-mail or phone. This peer noted that the resolution of MAP cases with South Africa may take some time, which is actually explained by the lack of resources in this peer’s competent authority. Two other peers reported that they experienced efficient exchanges with South Africa, one of them referring to the swiftness of the exchanges and the other one also emphasising constructive exchanges. One other peer reported having experienced timely responses from South Africa’s competent authority and specified that (i) one of the two MAP cases it has had with South Africa during the Review period has been resolved in less than 24 months and (ii) the other one is currently in abeyance because of an objection that the taxpayer lodged in South Africa.

126. One last peer reported that it experienced some delays in dealing with “other” cases before South Africa’s competent authority responded to position papers, and specified that this may cause that the 24 month timeframe to close MAP cases will be missed. South Africa responded that some MAP requests were sent by post to a central address, rather than through the listed electronic channels, which led to the delays. South Africa further stated that the situation has improved significantly since the treaty partner switched to electronic channels.

Anticipated modifications

127. South Africa indicated that it does not anticipate any modifications in relation to element C.2.

Conclusion

	Areas for improvement	Recommendations
[C.2]	South Africa submitted comprehensive MAP statistics on time on the basis of the MAP Statistics Reporting Framework for the years 2016 and 2017. Based on the information provided by South Africa’s MAP partners, its post-2015 MAP statistics actually match those of its treaty partners as reported by the latter.	South Africa’s MAP statistics show that during the Statistics Reporting Period it closed 28% (five out of 18 cases) of its post-2015 cases in 8.29 months on average. In that regard, South Africa is recommended to seek to resolve the remaining 72% of the post-2015 cases pending on 31 December 2017 (13 cases) within a timeframe that results in an average timeframe of 24 months for all post-2015 cases.

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

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

128. 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 South Africa’s competent authority

129. Under South Africa’s tax treaties, the competent authority function resides with the Commissioner for the South African Revenue Service (“SARS”), which is South Africa’s tax administration. The MAP competent authority function is delegated to team members working with Legal Counsel within SARS, and especially within the Legislative Research and Development’s unit within that department. South Africa’s competent authority staff is made up of six people. In practice three are involved in MAP cases on a day-to-day basis. South Africa further clarified that handling MAP cases is a secondary duty for all the staff members. Among the three staff members:

- One team member is responsible for attribution/allocation MAP cases.
- Two team members are responsible for other MAP cases.

130. South Africa clarified the other tasks of the staff in charge of MAP. South Africa reported that the team member dealing with attribution/allocation MAP cases is also involved in tax avoidance cases. South Africa further clarified that this team member acts as the secretary and technical reviewer for South Africa’s tax administration’s internal General Anti-Avoidance Rule (“GAAR”) Committee, which considers auditors’ requests to issue notices to taxpayers of the potential application of the GAAR and, after taxpayers’ responses have been considered, to subsequently apply the GAAR. The team member schedules the meetings of the GAAR Committee, takes minutes and monitors the implementation of the recommendations of the GAAR Committee. Furthermore, South Africa reported that the two team members dealing with non-allocation cases are involved in treaty negotiations.

131. South Africa reported that the three team members dealing with MAP cases in practice have had approximately four years of experience in these positions. South Africa also emphasised that the three team members were present in the MAP office while the final report on Action 14 was being discussed and adopted, and that there have been no new staff members added to the MAP office since then.

132. South Africa further reported that the treaty unit within SARS in charge of the interpretation and application of tax treaties has conducted some trainings for staff members in charge of the MAP function. In addition, South Africa reported that the budget for international trips has been limited due to budget constraints experienced by the entire organisation in South Africa. However, South Africa emphasised team members continue to participate in the work of the FTA MAP Forum.

Monitoring mechanism

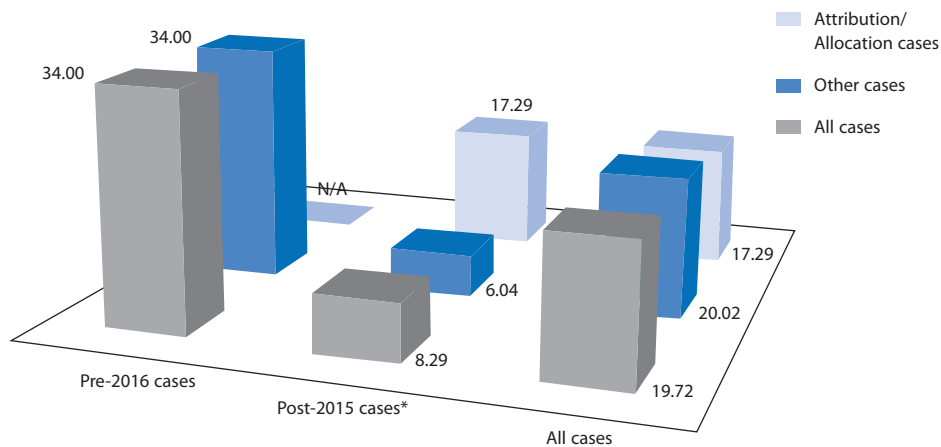
133. The framework for the monitoring/assessment of whether such resources are adequate consists of analysing the time needed to close MAP cases with the existing level of resources. Furthermore, the mechanisms/procedure to request more staff to handle the increase of MAP inventory is subject to budgetary constraints. In this respect, South Africa clarified that a business case for the additional resource must be prepared by the unit’s management and submitted to the enterprise vacancy committee, which considers the business case based on alignment with South Africa’s tax administration’s strategic direction, workforce plan and budget availability. South Africa further explained that once approval is granted, the usual recruitment process is followed.

Practical application

MAP statistics

134. As discussed under element C.2 South Africa closed its MAP cases during the Statistics Reporting Period within the pursued 24-month average. However, there are some discrepancies in the timeframe needed to close the MAP cases. This can be illustrated by the following graph:

Figure C.6. Average time (in months) to close cases in 2016 or 2017



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

135. Based on these figures, it follows that on average it took South Africa 19.72 months to close MAP cases during the Statistics Reporting Period. However, during this period South Africa’s MAP inventory has increased by almost 50%, as shown in the table below:

	Evolution of total MAP caseload in 2016	Evolution of total MAP caseload in 2017	Evolution of total MAP caseload over the two years (2016 + 2017)
Attribution/allocation cases	+20%	0%	+20%
Other cases	+56%	+14%	+78%
Total	+37%	+8%	+47%

136. South Africa further reported that some cases that are in its MAP inventory will take more than 24 months to be closed, mainly because its competent authority has experienced difficulties in reaching out to its MAP partners or because its competent authority has been waiting for a long time for a position paper from the other jurisdiction.

Peer input

137. As mentioned under element C.2, most of the peers that provided input reported having very few MAP experience with South Africa’s competent authority, as only one or two cases were handled during the Review Period. Most peers also did not formulate any suggestion for improvement for South Africa’s competent authority.

138. One peer reported that the current practice of periodic email and telephone communications on MAP cases works well and facilitates a positive relationship, also emphasising the efficient and constructive exchanges it had with South Africa. Another

peer noted that the resolution of MAP cases with South Africa may take some time, which is actually explained by the lack of resources in this peer’s competent authority and did not comment on the adequacy of resources in South Africa. One peer commented on the fact that the communication with South Africa’s competent authority has been efficient and cordial.

139. One last peer reported that it experienced some delays in dealing with “other” cases before South Africa’s competent authority responded to position papers, and specified that this may cause that the 24 month timeframe to close MAP cases will be missed. This peer, however, also specified that it has a good working relationship with South Africa’s competent authority and that the communication via email has helped exchange of letters.

Anticipated modifications

140. South Africa reported that it has made provision in the workforce plan of the competent authority unit for an additional team member in the medium term if needed, and that filling this position will be dependent on budgetary constraints.

Conclusion

	Areas for improvement	Recommendations
[C.3]	As South Africa’s MAP caseload has increased significantly since 1 January 2016, this might indicate that South Africa’s competent authority is not adequately resourced while no specific actions have been taken by South Africa to address this in the meantime.	South Africa should ensure that the resources available for the competent authority function are adequate in order to resolve MAP cases in a timely, efficient and effective manner.

[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.

141. 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 and absent any policy considerations, contributes to a principled and consistent approach to MAP cases.

Functioning of staff in charge of MAP

142. South Africa reported that its competent authority functions independently from the other units of SARS. While there is an internal approval process within the competent authority and consistency is ensured throughout the resolution of MAP cases, no other approval is needed within SARS. South Africa reported that staff in charge of MAP are not dependent on the approval or the direction of the tax administration personnel who made the adjustment at issue, even though they may consult such personnel as:

- The team member responsible for the attribution/allocation MAP cases in some instances consults with the auditors to clarify the facts of the case and/or for assistance with print outs of assessments and details from the system.

- The team members responsible for other MAP cases in some instances consult with the auditor to clarify the facts of the case, with legal advisers involved in appeal cases to ensure that the factual circumstances are consistent and with the operations unit within SARS to assist with print out of assessments and details from the systems.

143. South Africa further reported that the tax administration personnel who made the adjustment at issue does not attend competent authority meetings. In regard of the above, South Africa reported that staff in charge of MAP in practice operates independently and has the authority to resolve MAP cases without being dependent on the approval/direction of the tax administration personnel directly involved in the adjustment.

144. With respect to the involvement of the team member in charge of attribution/allocation MAP cases in the General Anti-Avoidance Rule Committee, the explanations provided by South Africa show that this staff member may influence or give a direction for the audit process, and that in turn he would be influenced by the position he took during the committee. As he is the only team member in charge of attribution/allocation cases on a day-to-day basis, this practice bears the risk that the position of South Africa's competent authority may be influenced by positions taken during the audit process. However, South Africa stated that if this situation arose in practice, it would be dealt with by the other official delegated to deal with attribution/allocation MAP cases. In this regard South Africa clarified that:

- The question of “whether the application of a domestic anti-abuse provision is in conflict with the provision of a tax treaty” (paragraph 3.4 of the SARS MAP Guide) is likely to be a question to be dealt with by the two other team members that deal with interpretative or “other” MAP cases.
- Should there be a need for attribution/allocation expertise, one of the other six team members mentioned in paragraph 129 would handle the relevant attribution/allocation case.

145. However, South Africa reported that this practice is not documented.

146. In addition, while South Africa reported that staff in charge of other MAP cases are involved in treaty negotiations it also reiterated that they will take into consideration the actual terms of a tax treaty as applicable for the relevant year and that they are committed not to be influenced by policy considerations that South Africa would like to see reflected in future amendments to the relevant treaty when entering into MAP agreements.

Practical application

147. Peers generally reported no impediments in South Africa to perform its MAP function in the absence of 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 not being aware that staff in charge of the MAP in South Africa is dependent on the approval of MAP agreements by the personnel within the tax administration that made the adjustment under review.

Anticipated modifications

148. South Africa indicated that it does not anticipate any modifications in relation to element C.4.

Conclusion

	Areas for improvement	Recommendations
[C.4]	The team member in charge of attribution/allocation cases also acts as a member of the General Anti-Avoidance Rule Committee, which bears the risk that the tax administration personnel directly involved in the adjustments at issue when anti-abuse rules are applied and the decision making process of handling these MAP cases become intertwined and may influence the process of resolving these cases. While appropriate measures are in place to mitigate this risk, these measures are not documented.	South Africa should document the mitigation measures it put in place to ensure that MAP cases are resolved without being dependent on approval or direction from the tax administration personnel directly involved in the adjustment at issue when it concerns cases where anti-abuse rules are applied.
		As it has done thus far, South Africa should continue to ensure that its competent authority has the authority, and uses that authority in practice, to resolve MAP cases without being dependent on approval or direction from the tax administration personnel directly involved in the adjustment at issue and absent any policy considerations that South Africa would like to see reflected in future amendments to the treaty.

[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.

149. 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 for 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 South Africa

150. South Africa reported that it has the following system in place to evaluate the performance of staff in charge of MAP processes: on a quarterly basis, the performance is assessed based on several factors, such as (i) the time needed to resolve MAP cases as well as (ii) the follow up of MAP cases, along with (iii) the preparation of MAP statistics for the relevant cases.

151. The Action 14 Final Report (OECD, 2015) includes examples of performance indicators that are considered appropriate. These indicators are shown below and presented in the form of a checklist when they are used by South Africa:

- 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).

152. Further to the above, South Africa also reported that it does not use any performance indicators for staff in charge of MAP that are related to the outcome of MAP discussions in terms of the amount of sustained audit adjustments or maintained tax revenue. In other words, staff in charge of MAP are not evaluated on the basis of the material outcome of MAP discussions

Practical application

153. Peers that provided input did not report being aware of the use of performance indicators by South Africa that are based on the amount of sustained audit adjustments or maintaining a certain amount of tax revenue.

Anticipated modifications

154. South Africa indicated that it does not anticipate any modifications in relation to element C.5.

Conclusion

	Areas for improvement	Recommendations
[C.5]	-	As it has done thus far, South Africa should continue to use appropriate performance indicators.

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

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

155. 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

156. South Africa reported that it has no domestic law limitations for including MAP arbitration in its tax treaties. South Africa's tax treaty policy is to include a voluntary and binding arbitration provision in its bilateral tax treaties if the treaty partner requests such a provision.

157. South Africa has reserved the right not to include paragraph 5 of Article 25 of the OECD Model Tax Convention in its tax treaties in the Commentary of the OECD Model Tax Convention. South Africa has also clarified in paragraph 7 of its MAP guidance that it did not commit to include MAP arbitration in its tax treaties.

Practical application

158. South Africa has incorporated an arbitration clause in three of its 80 treaties as a final stage to the MAP, which are all voluntary arbitration clauses.⁷

Anticipated modifications

159. South Africa indicated that it does not anticipate any modifications in relation to element C.6.

Conclusion

	Areas for improvement	Recommendations
[C.6]	-	-

Notes

1. These 76 treaties include the treaty recently signed with Germany (2008) that is not yet in force and which will replace, once entered into force, the existing treaty of 1973.
2. These three treaties include the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone.
3. Available at: www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm. These statistics are up to and include fiscal year 2017.
4. South Africa's 2016 MAP statistics were corrected in the course of its peer review and deviate from the published MAP statistics for 2016. See further explanations in Annex B and Annex C.
5. For post-2015 cases, if the number of MAP cases in South Africa's inventory at the beginning of the Statistics Reporting Period plus the number of MAP cases started during the Statistics Reporting Period was more than five, South Africa reports its MAP caseload on a jurisdiction-by-jurisdiction basis. This rule applies for each type of cases (attribution/allocation cases and other cases).
6. For pre-2016 and post-2015 South Africa follows the MAP Statistics Reporting Framework for determining whether a case is considered an attribution/allocation MAP case. Annex D of MAP Statistics Reporting Framework provides that "an attribution/allocation MAP case is 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".
7. This concerns the treaties with Canada, the Netherlands and Switzerland. See also Annex A for an overview of South Africa's tax treaties.

References

OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report*. In *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris, <https://dx.doi.org/10.1787/9789264241633-en>.

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

160. 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

161. If not overridden by a tax treaty, South Africa reported that its domestic law provides that the implementation of MAP agreements is subject to its domestic time limits, both for upward and downward adjustments that would result from a MAP agreement. According to South Africa's domestic rules, the implementation of the MAP agreement shall be requested within three years after the date of assessment of an original assessment. In this respect, South Africa referred to sections 3.2.2 and 3.2.3 of its MAP guidance relating to access to MAP as the same domestic time limits apply. South Africa clarified that the date of assessment would be:

- in case of an adjustment made by South Africa's tax administration, the date of the reassessment in South Africa
- in case of an adjustment made by the treaty partner, the date of the original assessment made in South Africa.

162. South Africa further reported that taxpayers could request for the extension of domestic time limits, but this request would need to be submitted before the expiration of such domestic time limits.

163. South Africa described the implementation process as follows. Upon conclusion of a MAP agreement, its competent authority informs the taxpayer of the details of the agreement. For attribution/allocation cases, South Africa reported that its competent authority informs the taxpayer of the content of the proposed agreement in writing before such an agreement is formally reached. This is also clarified in section 5.2 of South Africa's MAP guidance. South Africa further reported that its competent authority would ask the taxpayer to confirm acceptance of the MAP agreement within a reasonable time, which would be approximately 21 business days. In some instances, South Africa reported that it needs some information from the taxpayer to actually implement the MAP agreement. South Africa further reported that its competent authority monitors the implementation of MAP agreements. For attribution/allocation cases, South Africa reported that the instructions

are given by one of its competent authority's team member to the tax administration staff to make the adjustment on the relevant system and the same team member follows up on the implementation of the MAP agreement. For other cases, South Africa reported that the same applies and that a statement of account reflecting the adjustment and refund where applicable is requested and sent to the competent authority of the other jurisdiction.

Practical application

164. South Africa reported that none of the MAP agreements that were reached on or after 1 January 2016 needed to be implemented in South Africa.

165. All peers that provided input reported that they were not aware of any MAP agreement reached on or after 1 January 2016 that was not implemented by South Africa. One peer noted that in the absence of the equivalent of the second sentence of Article (2) of the OECD Model Tax Convention (OECD, 2017) in its treaty with South Africa, the implementation of MAP agreements may be hindered by the expiry of time limits under South Africa's domestic law. Furthermore, one peer noted that South Africa usually implements MAP agreements timely.

Anticipated modifications

166. South Africa indicated that it does not anticipate any modifications in relation to element D.1.

Conclusion

	Areas for improvement	Recommendations
	As there was no MAP agreement reached during the Review Period that needed to be implemented in South Africa, it was not yet possible to assess whether South Africa has implemented all MAP agreements thus far.	
[D.1]	As will be discussed under element D.3, not all of South Africa's tax treaties contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention. Therefore, there is a risk that for those tax treaties that do not contain that provision, not all MAP agreements will be implemented due to the three-year time limits in its domestic law.	When, after a MAP case is initiated, the domestic statute of limitation may, in the absence of the second sentence of Article 25(2) of the OECD Model Tax Convention in an assessed jurisdiction's relevant tax treaty, prevent the implementation of a MAP agreement, South Africa should put appropriate procedures in place to ensure that such an agreement is implemented. In addition, where during the MAP process the domestic statute of limitations may expire and may then affect the possibility to implement a MAP agreement, South Africa should for clarity and transparency purposes notify the treaty partner thereof without delay.

[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.

167. 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

168. South Africa reported that there is no specific domestic legislation that governs the timeframe of implementation of MAP agreements in South Africa. South Africa further reported that after accepting a MAP agreement, the tax liabilities are changed automatically by South Africa’s tax administration and refunds are made accordingly.

Practical application

169. All peers that provided input reported that they were not aware of any MAP agreement reached on or after 1 January 2016 that was not implemented by South Africa. Furthermore, one peer noted that South Africa usually implements MAP agreements timely.

Anticipated modifications

170. South Africa indicated that it does not anticipate any modifications in relation to element D.2.

Conclusion

	Areas for improvement	Recommendations
[D.2]	As there was no MAP agreement reached during the Review Period that needed to be implemented in South Africa, it was not yet possible to assess whether South Africa has implemented all MAP agreements on a timely basis thus far.	

[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.

171. In order to provide full certainty to taxpayers it is essential that 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 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 South Africa’s tax treaties

172. As discussed under element D.1, South Africa’s domestic legislation includes a statute of limitations of three years for implementing MAP agreements, unless overridden by tax treaties.

173. Out of South Africa’s 80 tax treaties, 60 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.¹ Furthermore, one tax treaty contains the equivalent of the alternative provisions in

Article 9(1) and Article 7(2), setting a time limit for making adjustments as such a time limit is provided in the MAP article.

174. Three tax treaties do not contain any MAP provision.² Additionally, 10 treaties do not contain the second sentence of Article 25(2) at all nor any alternative provision.

175. For the remaining six treaties the following analysis is made:

- Two treaties provide that the MAP agreements shall be implemented within the period prescribed in the domestic law of the contracting states.
- Two treaties contain a provision on the implementation of MAP agreements, but the wording used imposes a time limit for implementation of MAP agreements of ten years. As this may obstruct the full implementation of a MAP agreement notwithstanding domestic time limits in both states, such treaty provision is considered not being equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention.
- Two treaties do not contain a provision equivalent to Article 25(2), second sentence of the OECD Model Tax Convention and only one of the alternative provisions as a time limit for making primary adjustment is included in the equivalent of article 9.

176. Therefore 19 treaties do not contain the required provision or its alternatives under element D.3.

Anticipated modifications

Multilateral Instrument

177. South Africa signed the Multilateral Instrument. Article 16(4)(b)(ii) of that instrument stipulates that Article 16(2), second sentence – containing the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention. In other words, in the absence of this equivalent, Article 16(4)(b)(ii) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both, pursuant to Article 16(6)(c)(ii), notified the depositary that this treaty does not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention. Article 16(4)(b)(ii) of the Multilateral Instrument will for a tax treaty not take effect if one or both of the treaty partners has, pursuant to Article 16(5)(c), reserved the right not to apply the second sentence of Article 16(2) of that instrument for all of its covered tax agreements under the condition that: (i) any MAP agreement shall be implemented notwithstanding any time limits in the domestic laws of the contracting states, or (ii) the jurisdiction intends to meet the Action 14 Minimum Standard by accepting in its tax treaties the alternative provisions to Article 9(1) and 7(2) concerning the introduction of a time limit for making transfer pricing profit adjustments.

178. In regard of the 19 tax treaties identified above that are considered not to contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention or the alternative provisions for Articles 9(1) and 7(2), South Africa listed 16 treaties as covered tax agreements under the Multilateral Instrument and for 14 of them did it make, pursuant to Article 16(6)(c)(ii), a notification that they do not contain a provision described in Article 16(4)(b)(ii). Of the relevant 14 treaty partners, three are not a signatory to the

Multilateral Instrument and the remaining 11 all listed their treaty with South Africa as a covered tax agreement. Of the remaining 11 treaty partners, one reserved the right not to incorporate the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention. Therefore, at this stage, 10 of the 19 tax treaties identified above will be modified by the Multilateral Instrument upon its entry into force for these treaties to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention.

Bilateral modifications

179. South Africa further reported that for tax treaties that do not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention or both alternatives provided for in Articles 9(1) and 7(2) and which will not be modified by the Multilateral Instrument, it intends to update them via bilateral negotiations with a view to be compliant with element D.3. In this respect, South Africa reported that it prioritises the treaties that contain major deficiencies, along with those under which a significant number of MAP cases is pending. South Africa reported that it will also use the opportunity that may arise when it wishes to renegotiate other articles of the treaty to amend the MAP provision so that it is in line with the Action 14 Minimum Standard. In addition, South Africa reported it will seek to include Article 25(2), second sentence, of the OECD Model Tax Convention or both alternatives in all of its future tax treaties.

Peer input

180. For the 19 treaties identified that do not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, or both alternatives, five peers provided input. Three of these five peers either stated not having contacted South Africa or that the treaty is expected to be modified by the Multilateral Instrument to incorporate the relevant provision. The relevant treaties will be modified by the Multilateral Instrument according to the above analysis. One peer did not provide input on this element, and the relevant treaty is also expected to be modified by the Multilateral Instrument. The remaining peer reported that its treaty with South Africa does not meet element D.3 and that bilateral discussions have not yet taken place.

Conclusion

	Areas for improvement	Recommendations
[D.3]	<p>19 out of 80 tax treaties contain neither a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention nor both the alternative provisions provided for in Article 9(1) and Article 7(2). Out of these 19:</p> <ul style="list-style-type: none"> • 10 are expected to be modified by the Multilateral Instrument to include the required provision. • 9 will not be modified by that instrument to include the required provision. <p>South Africa should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention in those 10 treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned.</p>	<p>For eight of the remaining nine treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, South Africa should, in accordance with its plan, request the inclusion of the required provision via bilateral negotiations or be willing to accept the inclusion of both alternative provisions.</p> <p>Specifically with respect to the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, it should, once it enters into negotiations with the jurisdictions to which it applies that treaty, request the inclusion of the required provision or its alternatives.</p> <p>In addition, South Africa should maintain its stated intention to include the required provision, or be willing to accept the inclusion of both alternative provisions, in all future tax treaties.</p>

Notes

1. These 60 treaties include the treaty recently signed with Germany (2008) that is not yet in force and which will replace, once entered into force, the existing treaty of 1973.
2. These three treaties include the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone.

Reference

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

Summary

	Areas for improvement	Recommendations
Part A: Preventing disputes		
[A.1]	Four out of 80 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention. None of them is expected to be modified by the Multilateral Instrument.	<p>As the four treaties that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention will not be modified via the Multilateral Instrument, South Africa should follow up on its stated intention to modify its notifications in order for one treaty to be modified by the Multilateral Instrument and should request for two others the inclusion of the required provision via bilateral negotiations in accordance with its plan.</p> <p>Specifically with respect to the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, it should, once it enters into negotiations with the jurisdictions to which it applies that treaty, request the inclusion of the required provision.</p> <p>In addition, South Africa should maintain its stated intention to include the required provision in all future tax treaties.</p>
[A.2]	-	-
Part B: Availability and access to MAP		
[B.1]	Six out of 80 tax treaties do not contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention. None of these six treaties will be modified by the Multilateral Instrument.	<p>As none of South Africa's treaties will be modified by the Multilateral Instrument to include the equivalent of Article 25(1), first sentence of the OECD Model Tax Convention in those treaties that currently do not contain such equivalent South Africa should in accordance with its plan for five of the six treaties request the inclusion of the required provision via bilateral negotiations, either:</p> <ol style="list-style-type: none"> a. as amended in the Action 14 final report; or b. as it read prior to the adoption of Action 14 final report, thereby including the full sentence of such provision. <p>Specifically with respect to the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, it should, once it enters into negotiations with such jurisdictions, request the inclusion of the required provision.</p>

	Areas for improvement	Recommendations
[B.1]	<p>Seven out of 80 tax treaties provide that the timeline to file a MAP request is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty. Of these seven treaties:</p> <ul style="list-style-type: none"> • Five are expected to be modified by the Multilateral Instrument to include the required provision. • Two will not be modified by that instrument to include the required provision. 	<p>South Africa should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent of Article 25(1), second sentence of the OECD Model Tax Convention in those five treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned.</p> <p>For the remaining two treaties that will not be modified by the Multilateral Instrument to include the equivalent to Article 25(1), second sentence of the OECD Model Tax Convention, South Africa should request the inclusion of a provision that allows taxpayers to submit a MAP request within a period of no less than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty.</p>
	<p>Where tax treaties do not include a time limit for submission of a MAP request, applicable rules under domestic legislation may lead to a filing period of less than three years as from the first notification of the action resulting in taxation not in accordance with the provisions of a tax treaty.</p>	<p>South Africa should ensure that where its domestic time limits apply for filing of MAP requests, in the absence of a provision hereon in its tax treaties, such time limits do not prevent taxpayers from having access to MAP if a request thereto is made within a period of three years as from the first notification of the action resulting in taxation not in accordance with the provisions of a tax treaty.</p>
		<p>In addition, South Africa should maintain its stated intention to include Article 25(1) of the OECD Model Tax Convention as it read prior to or after the adoption of the Action 14 final report in all future tax treaties.</p>
[B.2]	<p>79 of the 80 tax treaties do not contain a provision equivalent to Article 25(1) of the OECD Model Tax Convention as changed by the Action 14 final report, allowing taxpayers to submit a MAP request to the competent authority of either treaty partners. For these treaties no documented bilateral consultation or notification process is in place, which allows the other competent authority concerned to provide its views on the case when the taxpayer's objection raised in the MAP request is considered not to be justified.</p>	<p>South Africa should without further delay document its bilateral consultation process and provide in that document rules of procedure on how that process should be applied in practice, including the steps to be followed and timing of these steps.</p> <p>Furthermore, South Africa should apply that process in practice for future cases in which its competent authority considered the objection raised in a MAP request not to be justified and when the tax treaty concerned does not contain Article 25(1) of the OECD Model Tax Convention as amended by the Action 14 final report.</p>
[B.3]	-	<p>As South Africa has thus far granted access to MAP in eligible transfer pricing cases, it should continue granting access for these cases.</p>
[B.4]	<p>South Africa reported it will give access to MAP in cases concerning whether the conditions for the application of a treaty anti-abuse provision have been met or whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty. Its competent authority, however, did not receive any MAP requests of this kind from taxpayers during the Review Period. South Africa is therefore recommended to follow its policy and grant access to MAP in such cases.</p>	
[B.5]	-	-
[B.6]	-	<p>As South Africa has thus far not limited access to MAP in eligible cases when taxpayers have complied with South Africa's information and documentation requirements for MAP requests, it should continue this practice.</p>

	Areas for improvement	Recommendations
[B.7]	<p>Nine out of 80 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention. Of these nine treaties:</p> <ul style="list-style-type: none"> • Four are expected to be modified by the Multilateral Instrument to include the required provision. • Five will not be modified by that instrument to include the required provision. 	<p>South Africa should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention in those four treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned.</p> <p>For four of the remaining five treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention, South Africa should request the inclusion of the required provision via bilateral negotiations in accordance with its plan.</p> <p>Specifically with respect to the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, it should, once it enters into negotiations with such jurisdictions, request the inclusion of the required provision.</p> <p>In addition, South Africa should maintain its stated intention to include the required provision in all future tax treaties.</p>
[B.8]	-	<p>Although not required by the Action 14 Minimum Standard, in order to further improve the level of details of its MAP guidance South Africa's could consider including information on the timing of the steps for the implementation of MAP agreements.</p>
[B.9]	-	<p>As it has thus far made its MAP guidance available and easily accessible and published its MAP profile, South Africa should ensure that its future updates to the MAP guidance continue to be publicly available and easily accessible and that its MAP profile published on the shared public platform is updated if needed.</p>
[B.10]	<p>The effects of the administrative or statutory dispute/resolution settlement processes on MAP are not addressed in the guidance on such process.</p>	<p>South Africa's guidance on administrative or statutory dispute settlement/resolution processes should clarify the effects on MAP when the case was resolved through a dispute settlement/resolution process.</p>
Part C: Resolution of MAP cases		
[C.1]	<p>Four out of 80 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention. One of these four treaties is expected to be modified by the Multilateral Instrument.</p>	<p>As three of the treaties that do not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention will not be modified via the Multilateral Instrument, South Africa should request the inclusion of the required provision via bilateral negotiations for two of the three relevant treaties in accordance with its plan.</p> <p>Specifically with respect to the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, it should, once it enters into negotiations with such jurisdictions, request the inclusion of the required provision.</p> <p>In addition, South Africa should maintain its stated intention to include the required provision in all future tax treaties.</p>

	Areas for improvement	Recommendations
[C.2]	<p>South Africa submitted comprehensive MAP statistics on time on the basis of the MAP Statistics Reporting Framework for the years 2016 and 2017. Based on the information provided by South Africa's MAP partners, its post-2015 MAP statistics actually match those of its treaty partners as reported by the latter.</p> <p>South Africa's MAP statistics show that during the Statistics Reporting Period it closed 28% (five out of 18 cases) of its post-2015 cases in 8.29 months on average. In that regard, South Africa is recommended to seek to resolve the remaining 72% of the post-2015 cases pending on 31 December 2017 (13 cases) within a timeframe that results in an average timeframe of 24 months for all post-2015 cases.</p>	
[C.3]	<p>As South Africa's MAP caseload has increased significantly since 1 January 2016, this might indicate that South Africa's competent authority is not adequately resourced while no specific actions have been taken by South Africa to address this in the meantime.</p>	<p>South Africa should ensure that the resources available for the competent authority function are adequate in order to resolve MAP cases in a timely, efficient and effective manner.</p>
[C.4]	<p>The team member in charge of attribution/allocation cases also acts as a member of the General Anti-Avoidance Rule Committee, which bears the risk that the tax administration personnel directly involved in the adjustments at issue when anti-abuse rules are applied and the decision making process of handling these MAP cases become intertwined and may influence the process of resolving these cases. While appropriate measures are in place to mitigate this risk, these measures are not documented.</p>	<p>South Africa should document the mitigation measures it put in place to ensure that MAP cases are resolved without being dependent on approval or direction from the tax administration personnel directly involved in the adjustment at issue when it concerns cases where anti-abuse rules are applied.</p>
		<p>As it has done thus far, South Africa should continue to ensure that its competent authority has the authority, and uses that authority in practice, to resolve MAP cases without being dependent on approval or direction from the tax administration personnel directly involved in the adjustment at issue and absent any policy considerations that South Africa would like to see reflected in future amendments to the treaty.</p>
[C.5]	-	<p>As it has done thus far, South Africa should continue to use appropriate performance indicators.</p>
[C.6]	-	-
Part D: Implementation of MAP agreements		
[D.1]	<p>As there was no MAP agreement reached during the Review Period that needed to be implemented in South Africa, it was not yet possible to assess whether South Africa has implemented all MAP agreements thus far.</p> <p>As will be discussed under element D.3, not all of South Africa's tax treaties contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention. Therefore, there is a risk that for those tax treaties that do not contain that provision, not all MAP agreements will be implemented due to the three-year time limits in its domestic law.</p>	<p>As will be discussed under element D.3, not all of South Africa's tax treaties contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention. Therefore, there is a risk that for those tax treaties that do not contain that provision, not all MAP agreements will be implemented due to the three-year time limits in its domestic law.</p>
[D.2]	<p>As there was no MAP agreement reached during the Review Period that needed to be implemented in South Africa, it was not yet possible to assess whether South Africa has implemented all MAP agreements on a timely basis thus far.</p>	

	Areas for improvement	Recommendations
[D.3]	<p>19 out of 80 tax treaties contain neither a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention nor both the alternative provisions provided for in Article 9(1) and Article 7(2). Out of these 19:</p> <ul style="list-style-type: none"> • 10 are expected to be modified by the Multilateral Instrument to include the required provision. • 9 will not be modified by that instrument to include the required provision. 	<p>South Africa should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention in those 10 treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaties concerned.</p> <p>For eight of the remaining nine treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention, South Africa should, in accordance with its plan, request the inclusion of the required provision via bilateral negotiations or be willing to accept the inclusion of both alternative provisions.</p> <p>Specifically with respect to the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, it should, once it enters into negotiations with the jurisdictions to which it applies that treaty, request the inclusion of the required provision or its alternatives.</p> <p>In addition, South Africa should maintain its stated intention to include the required provision, or be willing to accept the inclusion of both alternative provisions, in all future tax treaties.</p>

Annex A
Tax treaty network of South Africa

Treaty partner	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.1			B.3	B.4	C.1	D.3		A.1	B.7							
	Column 4		Column 5		Column 6		Column 7		Column 8		Column 9		Column 10		Column 11			
		Inclusion Art. 25(1) first sentence?	Inclusion Art. 25(1) second sentence?	Inclusion Art. 9(2) of the OECD MTC	Anti-abuse	C.1	D.3	A.1	B.7	C.6								
		Inclusion Art. 25(1) first sentence? if yes, submission to either competent authority? (new Art. 25(1), first sentence)	Inclusion Art. 9(2) if no, will your CA provide access to MAP in TP cases?	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?	Inclusion Art. 25(2) first sentence?	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 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	Inclusion Art. 25(3) first sentence? Inclusion Art. 25(3) second sentence?	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 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 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 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 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 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 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 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	
Algeria	Y	O	Y	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Australia	Y	N	Y	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Austria	Y	O	Y	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Belarus	Y	O	Y	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Belgium	Y	O	Y	i*	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N

Treaty partner	Column 2		Column 3		Column 4		Column 5		Column 6		Column 7		Column 8		Column 9		Column 10		Column 11		
	DTC in force?	Inclusion Art. 25(1) first sentence?	Inclusion Art. 25(1) second sentence?	Inclusion Art. 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC	C.1	Inclusion Art. 25(2) first sentence?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the abuse of the DTC or of the domestic tax law?	Inclusion Art. 25(2) second sentence?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	
Botswana	Y	O	Y	i	i	Y	Y	i	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the abuse of the DTC or of the domestic tax law?	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Brazil	Y	O	iv	i	i		Y	i	If no, will your CA accept a taxpayer's request for MAP in relation to such cases?	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Bulgaria	Y	O	Y	i	i		Y	i		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Cameroon	Y	O	Y	Y	Y		Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Canada	Y	O	ii*	Y	Y		Y	i		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Chile	Y	O	Y	Y	Y		Y	i		Y	Y	Y	Y	Y	Y	Y	Y	Y	N*	N	N
China	Y	O	Y	Y	Y		Y	i		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Democratic Republic of the Congo	Y	O	Y	i	i		Y	i		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Croatia	Y	O	Y	i	i		Y	i		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Cyprus (1)	Y	O	Y	Y	Y		Y	i		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Czech Republic	Y	O	Y	i	i		Y	i		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Denmark	Y	O	Y	Y	Y		Y	i		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Egypt	Y	O	Y	Y	Y		Y	i		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Kingdom of Eswaziland	Y	O	Y	i	i		Y	i		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Ethiopia	Y	O	Y	i	i		Y	i		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N

Treaty partner	Column 2		Column 3		Column 4		Column 5		Column 6		Column 7		Column 8		Column 9		Column 10		Column 11		
			B.1	B.1	B.1	B.1	B.3	B.4	C.1	C.1	D.3	A.1	A.1	B.7	B.7	C.6	C.6				
			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(2) of the OECD MTC	Article 25(3) of the OECD MTC	Arbitration												
Finland	Y	O	Y	Y	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	
France	Y	O	Y	Y	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Gabon	N	O	Y		i				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Germany	N	O	Y		i				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Ghana	Y	O	Y		i				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Greece	Y	O	Y		i				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Grenada	Y	N	iv		ii				N	N	N	N	N	N	N	N	N	N	N	N	N
Hong Kong	Y	O	Y		i				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Hungary	Y	O	Y		i				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N
India	Y	O	Y		i				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Indonesia	Y	O	ii*		i				Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Iran	Y	O	ii		i				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Ireland	Y	O	Y		i				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Israel	Y	O	i		i**				Y	Y	N*	N	N	Y	Y	Y	Y	Y	Y	N	N
Italy	Y	N	Y		i*				Y	Y	N*	Y	Y	Y	Y	Y	Y	Y	Y	N	N
Japan	Y	O	Y		i*				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N

Column 1	Column 2		Column 3		Column 4		Column 5		Column 6		Column 7		Column 8		Column 9		Column 10		Column 11	
	Article 25(1) of the OECD Model Tax Convention (“MTC”)	B.1	B.1	Article 9(2) of the OECD MTC	B.3	B.4	Article 25(2) of the OECD MTC	C.1	D.3	A.1	B.7	C.6	Arbitration							
Treaty partner	DTC in force?	Inclusion Art. 25(1) first sentence?	Inclusion Art. 25(1) second sentence?	Inclusion Art. 9(2) if no, will your CA provide access to MAP in TP cases?	Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the abuse of the DTC or of the domestic tax law?	Inclusion Art. 25(2) first sentence?	Inclusion Art. 25(2) first sentence?	Inclusion Art. 25(2) second sentence?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	Inclusion arbitration provision?									
Kenya	Y	O	Y	Y	i	Y	Y	Y	Y	Y	N	Y								
Korea	Y	O	Y	Y	i	Y	Y	Y	Y	Y	N	Y								
Kuwait	Y	O	Y	i*	i	Y	Y	Y	Y	Y	N	Y								
Lesotho	Y	O	Y	Y	i	Y	Y	Y	Y	Y	N	Y								
Luxembourg	Y	O	Y	Y	i	Y	Y	Y	Y	Y	N	Y								
Malawi	Y	N	iv	ii	ii	N	N	N	N	N	N	N								
Malaysia	Y	O	Y	i**	i	Y	Y	Y	Y	Y	N	Y								
Malta	Y	O	Y	Y	i	Y	Y	Y	Y	Y	N	Y								
Mauritius	Y	O	Y	Y	i	Y	Y	Y	Y	Y	N	Y								
Mexico	Y	O	Y	i	i	N**	N	N	Y	Y	N	Y								
Mozambique	Y	O	Y	i	i	Y	Y	Y	Y	Y	N	Y								
Namibia	Y	O	Y	i	i	Y	Y	Y	Y	Y	N	Y								
Netherlands	Y	O	Y	Y	i	Y	Y	Y	Y	Y	N	Y								
New Zealand	Y	O	Y	i**	i	Y	Y	Y	Y	N*	N	Y								
Nigeria	Y	O	Y	i	i	Y	Y	Y	Y	Y	N	Y								
Norway	Y	O	Y	i	i	Y	Y	Y	Y	Y	N	Y								

Column 1	Column 2		Column 3		Column 4		Column 5		Column 6		Column 7		Column 8		Column 9		Column 10		Column 11	
	Article 25(1) of the OECD Model Tax Convention (“MTC”)	B.1	B.1	B.3	B.4	C.1	D.3	A.1	B.7	C.6	Arbitration									
Treaty partner	DTC in force?	Inclusion Art. 25(1) first sentence?	Inclusion Art. 25(1) second sentence?	Inclusion Art. 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC	Article 25(3) of the OECD MTC	Article 25(3) of the OECD MTC	Arbitration											
Oman	Y	O	Y	i	i	Y	Y	Y	N	N										
Pakistan	Y	O	ii*	i*	i	Y	Y	Y	Y	N	N									
Poland	Y	N	Y	Y	i	Y	N*	Y	Y	Y	N									
Portugal	Y	O	Y	Y	i	Y	Y	Y	Y	Y	N									
Qatar	Y	O	Y	i	i	Y	Y	Y	Y	Y	N									
Romania	Y	O	Y	Y	i	Y	N*	Y	Y	Y	N									
Russia	Y	O	Y	Y	i	Y	Y	Y	Y	Y	N									
Rwanda	Y	O	Y	i	i	Y	Y	Y	Y	Y	N									
Saudi Arabia	Y	O	Y	Y	i	Y	Y	Y	Y	Y	N									
Seychelles	Y	O	ii*	i	i	Y	ii*	Y	Y	Y	N									
Sierra Leone	Y	N	iv	ii	ii	N	N	N	N	N	N									
Singapore	Y	O	Y	i*	i	Y	Y	Y	Y	Y	N									
Slovak Republic	Y	O	Y	i	i	Y	Y	Y	Y	Y	N									
Spain	Y	O	Y	i**	i	Y	Y	Y	Y	Y	N									
Sudan	N	O	Y	Y	i	Y	Y	Y	Y	Y	N									
Sweden	Y	O	Y	Y	i	Y	Y	Y	Y	Y	N									
Switzerland	Y	O	Y	Y	i	Y	ii	Y	Y	Y	Y									

Treaty partner	Column 1		Column 2		Column 3		Column 4		Column 5		Column 6		Column 7		Column 8		Column 9		Column 10		Column 11	
	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.1	B.3	B.4	C.1	D.3	A.1	B.7	C.6													
Taiwan	O	Y	Y	i	Y	N	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Tanzania	O	Y	i	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Thailand	O	i	i	i	Y	N	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Tunisia	O	Y	i*	i	Y	N*	Y	Y	Y	Y	N*	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Turkey	O	iv*	Y	i	Y	N*	Y	Y	Y	Y	N*	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Uganda	O	Y	Y	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Ukraine	O	Y	i	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N*	Y	N
United Arab Emirates	O	Y	i**	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
United Kingdom	O	i	Y	i	Y	N*	Y	Y	Y	Y	N*	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
United States	E	Y	Y	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Zambia	N	iv	ii	ii	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N
Zimbabwe	O	Y	Y	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	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.

Legend

E*	The provision contained in this treaty was already in line with the requirements under this element of the Action 14 Minimum Standard, but has been modified by the Multilateral Instrument to allow the filing of a MAP request in either contracting state.
E**	The provision contained in this treaty was not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty has been modified by the Multilateral Instrument and is now in line with this standard.
O*	The provision contained in this treaty is already in line with the requirements under this element of the Action 14 Minimum Standard, but will be modified by the Multilateral Instrument upon entry into force for this specific treaty and will then allow the filing of a MAP request in either contracting state.
Y*	The provision contained in this treaty was not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty has been modified by the Multilateral Instrument and is now in line with this element of the Action 14 Minimum Standard.
Y**	The provision contained in this treaty already included an arbitration provision, which has been replaced by part VI of the Multilateral Instrument containing a mandatory and binding arbitration procedure.
Y***	The provision contained in this treaty did not include an arbitration provision, but part VI of the Multilateral Instrument applies, following which a mandatory and binding arbitration procedure is included in this treaty
i*/ii*/iv*/N*	The provision contained in this treaty is not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty will be modified by the Multilateral Instrument upon entry into force for this specific treaty and will then be in line with this element of the Action 14 Minimum Standard.
i**/iv**/N**	The provision contained in this treaty is not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty will be superseded by the Multilateral Instrument upon entry into force for this specific treaty only to the extent that existing treaty provisions are incompatible with the relevant provision of the Multilateral Instrument.
i***	The provision contained in this treaty is not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty will be superseded by the Multilateral Instrument only to the extent that existing treaty provisions are incompatible with the relevant provision of the Multilateral Instrument.

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
		Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12		
	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 14		
Attribution/ Allocation	0	0	0	0	0	0	0	0	0	0	10	n.a.	
Others	0	0	0	0	0	0	0	0	0	0	9	n.a.	
Total	0	0	0	0	0	0	0	0	0	0	19	n.a.	

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
		Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12		
	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 14		
Attribution/ Allocation	0	0	0	0	0	0	0	0	0	0	10	n.a.	
Others	2	0	0	0	0	1	0	1	0	0	5	34.0	
Total	2	0	0	0	0	1	0	1	0	0	15	34.0	

Annex C

MAP Statistics Reporting 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 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13			
Attribution/ Allocation	0	2	0	0	0	0	0	0	0	0	0	0	0	2	n.a.
Others	0	6	0	0	0	0	0	1	0	0	0	0	0	5	6.25
Total	0	8	0	0	0	0	0	1	0	0	0	0	0	7	6.25

Notes: These figures are different from 2016 published MAP statistics for South Africa as two inbound “other” MAP cases from one jurisdiction were added to the cases started in 2016. Correspondence with regards to one of the MAP cases (that was sent by post) was addressed to the incorrect office and recipient.

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 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13			
Attribution/ Allocation	2	1	0	0	0	1	0	0	0	0	0	0	0	2	17.29
Others	5	9	1	0	0	1	0	1	0	0	0	0	0	11	5.97
Total	7	10	1	0	0	2	0	1	0	0	0	0	0	13	8.80

Glossary

Action 14 Minimum Standard	The minimum standard as agreed upon in the final report on Action 14: Making Dispute Resolution Mechanisms More Effective
GAAR	General Anti-Avoidance Rule
MAP Guidance	Guide on Mutual Agreement Procedures issued by Legal Counsel of SARS
MAP Statistics Reporting Framework	Rules for reporting of MAP statistics as agreed by the FTA MAP Forum
Multilateral Instrument	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD Model Tax Convention	OECD Model Tax Convention on Income and on Capital as it read on 21 November 2017
OECD Transfer Pricing Guidelines	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
Pre-2016 cases	MAP cases in a competent authority's inventory that are pending resolution on 31 December 2015
Post-2015 cases	MAP cases that are received by a competent authority from the taxpayer on or after 1 January 2016
Review Period	Period for the peer review process that started on 1 January 2016 and ended on 31 August 2018
SARS	South African Revenue Service
Statistics Reporting Period	Period for reporting MAP statistics that started on 1 January 2016 and that ended on 31 December 2017
TA Act	Tax Administration Act 28 of 2011
Terms of Reference	Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The OECD is a unique forum where governments work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The European Union takes part in the work of the OECD.

OECD Publishing disseminates widely the results of the Organisation's statistics gathering and research on economic, social and environmental issues, as well as the conventions, guidelines and standards agreed by its members.

OECD/G20 Base Erosion and Profit Shifting Project

Making Dispute Resolution More Effective – MAP Peer Review Report, South Africa (Stage 1)

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 1 peer review of the implementation of the Action 14 Minimum Standard by South Africa.

Consult this publication on line at <https://doi.org/10.1787/3f820b8e-en>.

This work is published on the OECD iLibrary, which gathers all OECD books, periodicals and statistical databases. Visit www.oecd-ilibrary.org for more information.

