

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



Making Dispute Resolution More Effective – MAP Peer Review Report, South Africa (Stage 2)

INCLUSIVE FRAMEWORK ON BEPS: ACTION 14



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Foreword

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

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

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 BEPS planning strategies that rely on outdated rules or on poorly co-ordinated domestic measures will be rendered ineffective.

Implementation is now the focus of this work. The BEPS package is designed to be implemented via changes in domestic law and practices, and in tax treaties. With the negotiation of a multilateral instrument (MLI) having been finalised in 2016 to facilitate the implementation of the treaty related BEPS measures, over 90 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 OECD/G20 Inclusive Framework on BEPS (Inclusive Framework), 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 135 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 7 May 2021 and prepared for publication by the OECD Secretariat.

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Abbreviations and acronyms

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

Executive summary

South Africa has an extensive tax treaty network with close to 80 tax treaties. South Africa also has an established MAP programme with modest experience in resolving MAP cases. It has a small MAP inventory, with a small number of new cases submitted each year and 25 cases pending on 31 December 2019. Of these cases, 44% concern allocation/attribution cases. The outcome of the stage 1 peer review process was that overall South Africa met most of the elements of the Action 14 Minimum Standard. Where it has deficiencies, South Africa worked to address them, which has been monitored in stage 2 of the process. In this respect, South Africa solved almost all of the identified deficiencies.

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 OECD Model Tax Convention (OECD, 2017). Its treaty network is mostly consistent with the requirements of the Action 14 Minimum Standard, except for the fact that:

- Approximately 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.
- Approximately 10% of its tax treaties do not contain the equivalent of Article 25(3), second sentence of the OECD Model Tax Convention stating that the competent authorities may consult together for the elimination of double taxation for cases not provided for in the tax treaty.

In order to be fully compliant with all four key areas of an effective dispute resolution mechanism under the Action 14 Minimum Standard, South Africa signed the Multilateral Instrument. Through this instrument, a number of its tax treaties will be modified to fulfil the requirements under the Action 14 Minimum Standard. South Africa is in contact with a few treaty partners to strive to include the required provisions via the Multilateral Instrument. Where treaties will not be modified, upon entry into force and entry into effect of the Multilateral Instrument in spite of this, South Africa reported that it intends to update all of its tax treaties to be compliant with the requirements under the Action 14 Minimum Standard via bilateral negotiations. However, South Africa only has a specific plan in place or has taken or planned any specific actions for negotiations for with some treaty partners.

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

South Africa meets almost all 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 September 2018 not received any MAP request concerning the application of anti-abuse provisions. However, where tax treaties do not include a time

limit for submission of a MAP request, South Africa’s 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. It further has 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 and has applied this process in practice since 1 September 2018. South Africa also has clear and comprehensive guidance on the availability of MAP and how it applies this procedure in practice under tax treaties.

Concerning the average time needed to close MAP cases, the MAP statistics for South Africa for the period 2016-19 are as follows:

2016-19	Opening inventory 1/1/2016	Cases started	Cases closed	End inventory 31/12/2019	Average time to close cases (in months)*
Attribution/allocation cases	11	8	8	11	35.40
Other cases	9	31	26	14	23.77
Total	20	39	34	25	26.50

*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.

Although there was an increase in the cases closed in 2018 and 2019 as compared to 2016-17, South Africa’s MAP inventory has still overall increased and the average time taken to resolve cases in 2018 and 2019 increased as compared to 2016-17. During these years, MAP cases were on average not closed within a timeframe of 24 months (which is the pursued average for resolving MAP cases received on or after 1 January 2016), as the average time necessary was 26.50 months. This particularly concerns attribution/allocation cases, as the average time needed for such cases is 35.40 months while for other cases the average is within the pursued 24-month average (23.77 months). Further, peer input suggests that there may be delays in receiving position papers from South Africa. Accordingly, South Africa should devote additional resources to its competent authority to handle pending and future MAP cases and to be able to cope with the increase in its MAP inventory in general, so as to be able to resolve current pending and future MAP cases in a timely, efficient and effective manner.

Furthermore, South Africa meets all 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.

Lastly, South Africa almost meets the Action 14 Minimum Standard as regards the implementation of MAP agreements. South Africa monitors the implementation of such agreements. However, it has a domestic statute of limitation, 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 (OECD, 2017), albeit that no problems have surfaced regarding implementation throughout the peer review process.

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>.

Introduction

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

South Africa has entered into 78 tax treaties on income (and/or capital), all of which are in force.¹ These 78 treaties are being applied to 79 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 78 treaties provide for an arbitration procedure as a final stage to the mutual agreement procedure.³

Under South Africa’s tax treaties, the competent authority function is assigned to the Commissioner for the South African Revenue Service (“SARS”), which is delegated to the Legislative Research and Development unit within the Legal Counsel department of 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, was last updated in March 2020 and which is available (in English) at:

<https://www.sars.gov.za/legal-counsel/international-treaties-agreements/double-taxation-agreements-protocols/mutual-agreement-procedure-map/>

Developments in South Africa since 1 September 2018

Developments in relation to the tax treaty network

The stage 1 report noted that South Africa was conducting tax treaty negotiations with several jurisdictions. This situation has remained the same. Further, the stage 1 report noted that South Africa had signed a new treaty with Germany, which have not yet entered into force since the treaty partner had not yet ratified it. This situation has remained the same as well.

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. 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. South Africa reported that it expects to deposit its instrument of ratification in the coming year.

For the 16 treaties that are considered not to be in line with one or more elements of the Action 14 Minimum Standard and that will not be modified by the Multilateral Instrument, South Africa reported that it intends to update them via bilateral negotiations. In this regard, South Africa shared the following overview regarding the actions planned to be taken by it:

- *One treaty (concerning Grenada and Sierra Leone):* These treaty partners concern the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone and thus, bilateral renegotiations are not necessary.
- *One treaty:* South Africa expects the treaty partner to sign the Multilateral Instrument to have the respective treaties modified by it. If this is seen to not be possible, South Africa would initiate bilateral negotiations.
- *Four treaties:* South Africa intends to update its list of notifications and reservations to the Multilateral Instrument upon deposit of its instrument of ratification to have the treaties concerned modified by it. For one of these treaties, where the treaty partner has placed a reservation as well, the treaty partner has informed South Africa that it will withdraw its reservation under the Multilateral Instrument, following which it is expected that this treaty will be modified by the instrument to be in line with the Action 14 Minimum Standard.
- *Two treaties:* Negotiations are ongoing for new treaties with these treaty partners in line with the Action 14 minimum standard.
- *One treaty:* Discussions have been initiated and negotiations are scheduled to be initiated in the near future.
- *Seven treaties:* No actions have been taken nor have any actions been planned to be taken. South Africa clarified that negotiations with one of these treaty partners is difficult to initiate at the moment owing to diplomatic constraints.

Other developments

Further to the above, South Africa reported that it has made a few changes to the operation of the MAP in South Africa and that it has updated its MAP guidance. These changes can be summarised as follows:

- *Internal guide on MAP:* the introduction of an internal guide on MAP to provide guidance to the staff in charge of MAP on the administrative processing of MAP requests. This Internal Guide includes:
 - the steps to be taken when an objection is considered not justified
 - mitigation measures put in place to ensure that MAP cases are resolved without being dependent on approval or direction from the tax administration personnel directly involved on the adjustment at issue when it concerns cases where anti-abuse rules are applied
 - the timing to be followed and steps to be taken for the implementation of MAP agreements.

- *MAP guidance*: an update to its MAP guidance to cover the process to be followed where an objection is not considered justified by South Africa’s competent authority.
- *Dispute resolution guidance*: the guidance on South Africa’s 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 is updated to specifically reference South Africa’s MAP guidance which addresses the effects on MAP when the case was resolved through this process.
- *Training for competent authority staff*: continuing internal MAP training for staff in charge of MAP.

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 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 process consists of two stages: a peer review process (stage 1) and a peer monitoring process (stage 2). In stage 1, South Africa’s implementation of the Action 14 Minimum Standard as outlined above is evaluated, which has been reflected in a peer review report that has been adopted by the BEPS Inclusive Framework on 8 May 2019. This report identifies the strengths and shortcomings of South Africa in relation to the implementation of this standard and provides for recommendations on how these shortcomings should be addressed. The stage 1 report is published on the website of the OECD.⁶ Stage 2 is launched within one year upon the adoption of the peer review report by the BEPS Inclusive Framework through an update report by South Africa. In this update report, South Africa reflected (i) what steps it has already taken, or are to be taken, to address any of the shortcomings identified in the peer review report and (ii) any plans or changes to its legislative and/or administrative framework concerning the implementation of the Action 14 Minimum Standard. The update report forms the basis for the completion of the peer review process, which is reflected in this update to the stage 1 peer review report.

Outline of the treaty analysis

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 were taken into account, even if it concerns 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.

Timing of the process and input received from peers and taxpayers

Stage 1 of the peer review process for South Africa was launched on 31 August 2018, with the sending of questionnaires to South Africa and its peers. The FTA MAP Forum has approved the stage 1 peer review report of South Africa in March 2019, with the subsequent approval by the BEPS Inclusive Framework on 8 May 2019. On 8 May 2020, South Africa submitted its update report, which initiated stage 2 of the process.

The period for evaluating South Africa’s implementation of the Action 14 Minimum Standard for stage 1 ranged from 1 January 2016 to 31 August 2018 and formed the basis for the stage 1 peer review report. The period of review for stage 2 started on 1 September 2018 and depicts all developments as from that date until 30 April 2020.

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 in 2016 or 2017. These nine peers represented almost 90% of post-2015 MAP cases in South Africa’s inventory that started in 2016 or 2017. During stage 2, the same peers, except for Botswana, provided input. In addition, Denmark and Sweden also provided input during stage 2. For this stage, these peers represent approximately 61.5 % of post-2015 MAP cases in South Africa’s MAP inventory that started in 2016, 2017, 2018 or 2019. Generally, almost all peers indicated having little experience with South Africa, some of them emphasising the good working relationship they have with South Africa. Specifically with respect to stage 2, all peers that provided input reported that the update report of South Africa fully reflects the experiences these peers have had with South Africa since 1 September 2018 and/or that there was no addition to previous input given. However, the peers that provided input only during stage 2 experienced some delays and/or difficulties in their MAP relationship with South Africa.

Input by South Africa and cooperation throughout the process

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:

- a. MAP profile⁷
- b. MAP statistics⁸ according to the MAP Statistics Reporting Framework (see below).

Concerning stage 2 of the process, South Africa submitted its update report on time and the information included therein was extensive. South Africa was very cooperative during stage 2 and the finalisation of the peer review process.

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

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 2019 (“**Statistics Reporting Period**”). According to the statistics provided by South Africa, its MAP caseload during this period was as shown in the table below.

2016-19	Opening inventory 1/1/2016	Cases started	Cases closed	End inventory 31/12/2019
Attribution/allocation cases	11	8	8	11
Other cases	9	31	26	14
Total	20	39	34	25

General outline of the peer review report

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 implementation of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective (“**Terms of Reference**”).⁹ 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 during stage 1 and stage 2. 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 basis of this report is the outcome of the stage 1 peer review process, which has identified in each element areas for improvement (if any) and provides for recommendations how the specific area for improvement should be addressed. Following the outcome of the peer monitoring process of stage 2, each of the elements have been updated with a recent development section to reflect any actions taken or changes made on how recommendations have been addressed, or to reflect other changes in the legal and administrative framework of South Africa relating to the implementation of the Action 14 Minimum Standard. Where it concerns changes to MAP guidance or statistics, these changes are reflected in the analysis sections of the elements, with a general description of the changes included in the recent development sections.

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

Notes

1. The tax treaties South Africa has entered into are available at: www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/default.aspx. Two treaties that have been signed with Gabon (2005) and Sudan (2007) but have not yet entered into force that were included in the analysis in the stage 1 report have been excluded since South Africa has indicated that these treaties were signed some time ago, have not been ratified by either treaty partner and thus, have not entered into force. 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/beps/making-dispute-resolution-more-effective-map-peer-review-report-south-africa-stage-1-3f820b8e-en.htm.
7. Available at: www.oecd.org/tax/dispute/country-map-profiles.htm.
8. The MAP statistics of South Africa are included in Annex B and C of this report.
9. 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 78 tax treaties, 74 contain a provision equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a) 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 a provision that is based on equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a).² The remaining treaty contains a provision that is based on Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a), but does not contain the term “interpretation”. For this reason, these four treaties are considered to not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a).

3. South Africa reported that for the treaty that contains a provision that is based on Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a), it would not be obstructed from entering into a MAP agreement of a general nature.

4. For the four treaties identified that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a), the relevant peers did not provide input during stage 1.

Recent developments

Multilateral Instrument

5. 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 (OECD, 2017a) – 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 (OECD, 2017a). 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 (OECD, 2017a).

6. With regard to 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 (OECD, 2017a), 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 (OECD, 2017a).

Other developments

7. As one of the four tax treaties that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a) and which will not be modified by the Multilateral Instrument concerns a former treaty with the United Kingdom that South Africa continues to apply to two treaty partners, renegotiations are not necessary.

8. South Africa reported that for the remaining three tax treaties that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a) and which will not be modified by the Multilateral Instrument, the following actions are being taken or planned:

- For one treaty, it intends to update its list of notifications and reservations to the Multilateral Instrument to have the treaty modified by it.
- For two treaties, negotiations are pending.

Peer input

9. Of the peers that provided input during stage 2, two provided input in relation to their tax treaty with South Africa, out of which neither provided input in relation to this element.

Anticipated modifications

10. South Africa reported that it will continue to seek to include Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a) in all of its future treaties.

Conclusion

	Areas for improvement	Recommendations
[A.1]	<p>Four out of 78 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a). None of them will be modified by the Multilateral Instrument. With respect to these treaties:</p> <ul style="list-style-type: none"> For one, South Africa will revise its list of notifications and reservations to the Multilateral Instrument with a view to have it modified by the Multilateral Instrument. For two, negotiations are pending. For one, no actions have been taken nor are any actions planned to be taken. 	<p>As one of the four treaties that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a) and that will not be modified by the Multilateral Instrument is a former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, South Africa should ensure that, once it enters into negotiations with these treaty partners, it includes the required provision.</p> <p>For the remaining three treaties that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a) and will not be modified via the Multilateral Instrument, South Africa should:</p> <ul style="list-style-type: none"> for one treaty, continue to work in accordance with its plan to include the required provision via the Multilateral Instrument for two treaties, continue negotiations with the treaty partner with a view to including the required provision.

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

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

11. 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

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

Roll-back of bilateral APAs

13. 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.

Recent developments

14. There are no recent developments with respect to element A.2.

Practical application of roll-back of bilateral APAs

Period 1 January 2016-31 August 2018 (stage 1)

15. South Africa reported not having received any requests for bilateral APAs in the period 1 January 2016-31 August 2018, which is logical given that South Africa does not have such a programme in place.

16. All peers that provided input indicated that they have not received a request for a roll-back of bilateral APAs concerning South Africa in the period 1 January 2016-31 August 2018. 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.

Period 1 September 2018-30 April 2020 (stage 2)

17. South Africa reported also not having received any requests for a bilateral APA since 1 September 2018, which is logical given that South Africa does not have such a programme in place.

18. All but one peer that provided input during stage 1 stated in stage 2 that the update report provided by South Africa fully reflects their experience with South Africa since 1 September 2018 and/or there are no additions to the previous input given. The same input was given by the two peers that only provided input during stage 2.

Anticipated modifications

19. 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 74 treaties include the treaty 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.

20. 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

21. Out of South Africa’s 78 tax treaties, one contains a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2017), as amended by the Action 14 final report (OECD, 2015b) and allowing taxpayers to submit a MAP request to the competent authority of either state when they consider that the actions of one or both of the treaty partners result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty and that can be requested irrespective of the remedies provided by domestic law of either state. Furthermore, 62 tax treaties contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), allowing taxpayers to submit a MAP request to the competent authority of the state in which they are resident.¹

22. The remaining 15 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 (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), whereby taxpayers can only submit a MAP request to the competent authority of the contracting state of which they are resident.	11
A variation of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), 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
No MAP provision	3*

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

23. The 11 treaties mentioned in the first row of the table are considered not to have the full equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), 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).

24. For the remaining two treaties, the non-discrimination provision is almost identical to Article 24(1) of the OECD Model Tax Convention (OECD, 2017) 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 (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b) is therefore not clarified by the absence of or a limited scope of the non-discrimination provision, following which these two treaties are considered to not be in line with this part of element B.1.

25. The treaty mentioned in the second 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.

26. 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, even though the provision contained in the MAP article is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the final report on Action 14 (OECD, 2015b). This treaty is therefore also considered not in line with this part of element B.1.

27. Finally, the three treaties mentioned in the last row of the table do not contain a provision based on Article 25 of the OECD Model Tax Convention (OECD, 2017) that allows taxpayers to file a MAP request and thus, these treaties are considered not to be in line with this part of element B.1.

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

28. Out of South Africa's 78 tax treaties, 65 contain a provision equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017) 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.²

29. 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.

30. The provisions contained in the last two rows of the above table are considered not to be in line with this part of element B.1 as taxpayers cannot file a MAP request within a period of three years as from the first notification of the action resulting in taxation not in accordance with the treaty in all situations under these provisions.

Peer input

31. For the 13 treaties identified that do not contain the equivalent of Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) as it read prior to or as amended by the adoption of the Action 14 Final Report (OECD, 2015b), ten peers did not provide input. The remaining three peers provided input during stage 1. One of the remaining three peers reported that its treaty with South Africa is not compliant with Element B.1, without referring to any actions planned. The second peer reported that it signed the Multilateral Instrument whereas the treaty will not be modified by that instrument. The third peer reported that it made the necessary notifications in order to have the treaty modified, which is confirmed by the below analysis.

Practical application

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

32. As noted in paragraphs 21-27 above, all but one of South Africa’s tax treaties allow taxpayers to 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. Further, South Africa also reported that access to MAP 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 would only seek correlative relief at the level of the treaty partner in such cases. 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. This is confirmed in paragraph 1.1 of South Africa’s MAP guidance, titled “What is a mutual agreement procedure?”.

33. One peer noted in this regard that South Africa considered the “objection not justified” for a MAP request received by it in 2019 on the basis that the issue raised was not covered by the tax treaty concerned and notified such peer of such decision under its bilateral notification process. The peer noted its view that the issue is covered by its tax treaty with South Africa and thus, provided detailed input suggesting that South Africa had not provided access to MAP in an eligible case in its view.

34. South Africa reported that this case involved a MAP request filed by a South African resident taxpayer with regard to the denial of a deduction in respect of a royalty payment that was made to a resident of the peer under its domestic law. South Africa clarified that the deduction was denied based on section 23I (2) of its Income Tax Act that essentially prohibits the allowance of a deduction of an amount paid for the use or right to use “tainted” intellectual property, as defined therein, to the extent that the amount does not constitute income that is taxable under the South African Income Tax Act received by or accrued to any other person. South Africa noted that the taxpayer filed a MAP request on the basis that such denial of deduction was not in accordance with Article 24(4) of the treaty, which requires inter alia that arm’s length royalty payments made by an enterprise of one state to a resident of the other are deductible under the same conditions as if they had been paid to a resident of the first state.

35. South Africa clarified in this regard that section 23I (2) would deny the deduction for such a payment made to any person that is not taxable under South Africa’s domestic law irrespective of their residence. South Africa further noted that there are many circumstances where a non-resident recipient would be considered taxable on such income under South Africa’s law i.e. for example, if the income is connected to a South African permanent establishment or if there is a withholding tax under its domestic law (and if permitted by the concerned treaty) on the income. In such a situation, South Africa confirmed that the deduction would not be denied. South Africa clarified that since South Africa’s treaty with the peer does not allow for source taxation of royalties, there was no withholding tax in South Africa even as allowed under its domestic law. South Africa further confirmed that if a withholding tax in South Africa was allowed under the treaty and was collected under its domestic law on this transaction, it would grant a fractional deduction based on the rate provided in the treaty, adjusting for the gross taxation at source. Finally, South Africa also clarified that a resident of South Africa receiving such amount would also face such denial of deduction if the amount is not considered taxable income under South Africa’s domestic law.

36. Accordingly, South Africa reported that it considered Article 24(4) of its treaty with the peer to not be applicable and referred to paragraphs 1 and 3 of the Commentary on Article 24 of the OECD Model Tax Convention (OECD, 2017) in this regard. The Commentary on Article 24 of the OECD Model Tax Convention (OECD, 2017) in paragraph 1 states as follows:

This Article deals with the elimination of tax discrimination in certain precise circumstances. All tax systems incorporate legitimate distinctions based, for example, on differences in liability to tax or ability to pay. The non-discrimination provisions of the Article seek to balance the need to prevent unjustified discrimination with the need to take account of these legitimate distinctions. For that reason, the Article should not be unduly extended to cover so-called “indirect” discrimination. For example, whilst paragraph 1, which deals with discrimination on the basis of nationality, would prevent a different treatment that is really a disguised form of discrimination based on nationality such as a different treatment of individuals based on whether or not they hold, or are entitled to, a passport issued by the State, it could not be argued that non-residents of a given State include primarily persons who are not nationals of that State to conclude that a different treatment based on residence is indirectly a discrimination based on nationality for purposes of that paragraph.

37. In addition, paragraph 3 states that “The various provisions of Article 24 prevent differences in tax treatment that are solely based on certain specific grounds (e.g. nationality, in the case of paragraph 1). Thus, for these paragraphs to apply, other relevant aspects must be the same...”

38. South Africa further reported that on this basis, it considered the objection raised in the MAP request to not be justified and notified the peer’s competent authority as required under the Action 14 minimum standard.

39. The peer noted in this regard that it considered the case to be covered under Article 24(4) of its treaty with South Africa since the deduction would be available for all South African residents except those that are exempt from taxation under its domestic law and since the taxpayer’s affiliate was taxed in the peer jurisdiction on this income. The peer clarified that its view of Article 24(4) is that the provision requires the situation of non-residents that are taxable in the residence country to be compared to fully taxable residents in the source country. On this basis, the peer stated its position that the denial of deduction in this case goes against the purpose of Article 24(4) of the treaty. For this, the peer further relied on paragraph 73 of the Commentary on Article 24 of the OECD Model Tax Convention (OECD, 2017) which states that Article 24(4) of the treaty seeks “to end a particular form of discrimination resulting from the fact that in certain countries the deduction of interest, royalties and other disbursements allowed without restriction when the recipient is resident is restricted or even prohibited when he is a non-resident.”

40. Since South Africa’s domestic law in this regard may deny deductions to any taxpayer, whether resident or non-resident, as clarified above, it is not clear that such cases are covered by the equivalent of Article 24(4) of the OECD Model Tax Convention (OECD, 2017) in its tax treaties and the issue remains subjective. Therefore, it is not clear that South Africa’s position constitutes a general issue in such cases as regards access to MAP.

41. Further, South Africa’s decision in relation to this case was not to deny access to MAP without an investigation into the merits of the case, but that the objection raised by the taxpayer was not justified after such investigation. As South Africa has notified its treaty partner of the decision in accordance with the Action 14 minimum standard and

has reconsidered its decision after a consultation with the peer (as further explained under element B.2), this decision is considered to be in line with its obligation under this element of the minimum standard.

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

42. 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 from the date of the original assessment. South Africa clarified that the date of original assessment would be the date of the first assessment in respect of the relevant tax period. Individuals are permitted eight to 11 months after the close of their fiscal year to file returns and companies are permitted 12 months. An original assessment generally follows shortly after a return has been filed.

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

44. In this situation, since the starting point is the date of the original assessment and not the date of first notification of the action resulting in taxation not in accordance with the provisions of the treaty, it is possible that this time-period is shorter than the time-period prescribed under Article 25(1), second sentence of the OECD Model Tax Convention (OECD, 2017).

45. This approach is not in line with the Action 14 Minimum Standard, which prescribes that taxpayers that 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 can access the MAP.

46. South Africa noted that since 1 September 2018, it received a MAP request under one of the treaties that contain no filing period for a MAP request and that it granted access to MAP since its domestic time limit had not expired in this case.

47. One peer that provided input only during stage 2 noted that it had one case with South Africa, which was presented within the three year limit in the peer’s jurisdiction, but due to unforeseen delays, South Africa’s competent authority was notified of the same only one year afterwards. This peer noted that although South Africa’s competent authority initially considered the three-year time limit to have expired, after discussions, both competent authorities agreed to accept the case for MAP discussions. This was confirmed by South Africa.

Recent developments

Multilateral Instrument

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

48. 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 (OECD, 2017) as amended by the Action 14 final report (OECD, 2015b) 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 (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b). 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 (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b). 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.

49. 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.³ 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 (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b). 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.

50. In view of the above, following the reservation made by South Africa, those six treaties identified in paragraphs 21-27 above that are considered not including the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), 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

51. 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 (OECD, 2017) – 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 (OECD, 2017).

52. With regard to the five tax treaties identified in paragraph 29 above that contain a filing period for MAP requests of less than three years, South Africa listed all of them as a covered tax agreement under the Multilateral Instrument and made for all, 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 five relevant treaty partners, one is not a signatory to the Multilateral Instrument. All the remaining four tax treaties partners are signatories to the Multilateral Instrument, listed their treaty with South Africa as a covered tax agreement and also made the relevant notification. Therefore, at this stage, four of the five 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 (OECD, 2017).

53. With regard to the two tax treaties identified in paragraph 29 above that contain a provision that is considered not the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017) as it refers to domestic laws of the contracting state for the filing period of MAP requests, South Africa listed both of them as a covered tax agreement under the Multilateral Instrument and made for both, 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 two relevant treaty partners, one is not a signatory to the Multilateral Instrument. The remaining treaty partner neither made such notification on the basis of Article 16(6)(b)(i) nor a notification on the basis of Article 16(6)(b)(ii) that this treaty contains a provision described in Article 16(4)(a)(ii). In this situation, Article 16(6)(b)(i) of the Multilateral Instrument stipulates that the second sentence of Article 16(1) – containing the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017) – will supersede the provision of the covered tax agreement to the extent it is incompatible with that second sentence. Since the relevant treaty refers to the domestic law of the contracting states to determine the filing period of a MAP request and given the fact that in the case of South Africa such filing period may in some cases be less than three years as from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty, the provision in this covered tax agreement is considered to be incompatible with the second sentence of Article 16(1). Therefore, at this stage, the treaty identified above will be superseded by the Multilateral Instrument upon its entry into force for this treaty to include the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017).

Other developments

54. As one of the eight tax treaties that do not contain the equivalent of Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) as it read prior to or as amended by the Action 14 final report (OECD, 2015b) and which will not be modified by the Multilateral Instrument concerns a former treaty with the United Kingdom that South Africa continues to apply to two treaty partners, renegotiations are not necessary.

55. South Africa reported that for the remaining seven tax treaties that do not contain the equivalent of Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) as it read prior to or as amended by the Action 14 final report (OECD, 2015b) and which will not be modified by the Multilateral Instrument, the following actions are being taken or planned:

- For three treaties, negotiations are envisaged, scheduled or pending.
- For the remaining four treaties, no actions have been taken nor are any actions planned to be taken.

Peer input

56. Of the peers that provided input during stage 2, two provided input in relation to their tax treaty with South Africa, both of which related to this element. The first peer noted that it encouraged South Africa to withdraw its reservation to the Multilateral Instrument to allow its treaty with this peer to be modified by the Multilateral Instrument to allow taxpayers to submit a MAP request to the competent authority of either contracting state. South Africa responded to such input by stating that its present policy is to retain the equivalent of Article 25(1), first sentence of the OECD Model Tax Convention (OECD, 2015a) as it read prior the adoption of the Action 14 final report (OECD, 2015b) in its tax treaties paired with a bilateral notification/consultation process as allowed under the Action 14 minimum standard. The second peer noted that its treaty with South Africa would be superseded by the Multilateral Instrument to make it in line with the Action 14 minimum standard, which is confirmed by the above analysis.

Anticipated modifications

57. South Africa reported that it will continue to seek to include Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b) in all of its future treaties.

Conclusion

	Areas for improvement	Recommendations
[B.1]	<p>Six out of 78 tax treaties do not contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of or as amended by the Action 14 final report (OECD, 2015b). None of these treaties will be modified by the Multilateral Instrument. With respect to these six treaties:</p> <ul style="list-style-type: none"> • For three, negotiations are envisaged, scheduled or pending. • For three, no actions have been taken nor are any actions planned to be taken. 	<p>As one of the six treaties that do not contain the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of or as amended by the Action 14 final report (OECD, 2015b) and that will not be modified by the Multilateral Instrument is a former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, South Africa should ensure that, once it enters into negotiations with these treaty partners, it includes the required provision.</p> <p>For the remaining five treaties that do not contain the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of or as amended by the Action 14 final report (OECD, 2015b) and that will not be modified by the Multilateral Instrument, South Africa should:</p> <ul style="list-style-type: none"> • for three treaties, continue (the initiation of) negotiations with the treaty partner with a view to including the required provision • for two treaties, without further delay request via bilateral negotiations the inclusion of the required provision. <p>This concerns a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) either:</p> <ol style="list-style-type: none"> a. as amended by the Action 14 final report (OECD, 2015b); or b. as it read prior to the adoption of the Action 14 final report (OECD, 2015b), thereby including the full sentence of such provision.
	<p>Seven out of 78 tax treaties do not contain a provision that is equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017), as the timeline to file a MAP request is in these treaties 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 or superseded by the Multilateral Instrument to include Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017). • Two will not be modified by the Multilateral instrument to include to include Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017). With respect to these treaties, no actions have been taken nor are any actions planned to be taken. 	<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 (OECD, 2017) 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 (OECD, 2017), South Africa should without further delay request via bilateral negotiations the inclusion of the required provision.</p>

	Areas for improvement	Recommendations
[B.1]	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.

[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).

58. 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

59. As discussed under element B.1, only one out of South Africa's 78 treaties currently contains a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2017) as amended by the Action 14 final report (OECD, 2015b), allowing taxpayers to submit a MAP request to the competent authority of either 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.⁴

60. 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 a MAP request not to be justified. In this respect, South Africa clarified that its competent authority will provide the other competent authority with a legal opinion and supporting documents, if any. South Africa further noted that it uses the templates developed by the FTA MAP Forum for such purpose. South Africa's internal guidance for its competent authority staff documents this process as well as the template to be used for the notification initiating the bilateral consultation. Further, paragraph 5.1. of South Africa's MAP guidance refers to the existence of such a process as well.

Recent developments

61. The stage 1 report noted that South Africa used a bilateral consultation process which allows the other competent authority to provide its view where South Africa's competent authority considers the objection raised in a MAP request not to be justified, but that such process was not documented. As noted above, South Africa has now documented the consultation process as well as the template to be used for such consultation to be initiated with the other competent authority.

62. In view of this, the recommendation made in the stage 1 report is considered addressed.

Practical application

Period 1 January 2016-31 August 2018 (stage 1)

63. South Africa reported that in the period 1 January 2016-31 August 2018 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".

64. All peers that provided input indicated not being aware of any cases for which South Africa's competent authority denied access to MAP in the period 1 January 2016-31 August 2018. 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 in the period 1 January 2016-31 August 2018. This can be explained by the fact that South Africa did not consider that an objection raised in a MAP request was not justified during this period.

Period 1 September 2018-30 April 2020 (stage 2)

65. South Africa reported that since 1 September 2018 its competent authority has for two of the MAP requests it received decided that the objection raised by taxpayers in such request was not justified. South Africa clarified that in both cases, the competent authority of the concerned treaty partner was notified of the reasoning and that both treaty partners acknowledged receipt of the same. South Africa noted that at the request of the treaty partner, the outcome was re-examined for one of the cases, although there was no changes made to the decision of its competent authority. In the other case, South Africa clarified that while notifying its decision, based on incorrect calculations made by the taxpayer, to such taxpayer, its competent authority also provided suggestions on how the request may be revised for fresh submission.

66. The 2018 and 2019 MAP statistics submitted by South Africa show that two of its MAP cases were closed with the outcome “objection not justified”. Both of these cases concern the cases referred to above, where South Africa’s competent authority made the decision.

67. All but one peer that provided input during stage 1 also stated during stage 2 that since 1 September 2018 they are not aware of any cases for which South Africa’s competent authority considered the objection raised in a MAP request as not justified. The same input was provided by one peer that provide input only during stage 2. The other peer that only provided input during stage 2 noted that its competent authority was informed of a case where South Africa’s competent authority considered the objection raised in a MAP request not to be justified and that since it did not agree with such decision, consultations are ongoing. This corresponds to one of the cases mentioned above and the case which is discussed in detail under element B.1 (paragraphs 33-41). The peer involved in the second case where South Africa’s competent authority considered the objection raised in a MAP request not to be justified did not provide input.

Anticipated modifications

68. South Africa did not indicate that it anticipates any modifications in relation to element B.2.

Conclusion

	Areas for improvement	Recommendations
[B.2]	-	-

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

Jurisdictions should provide access to MAP in transfer pricing cases.

69. 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

70. Out of South Africa’s 78 tax treaties, 35 contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017) 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.⁵ The remaining 37 treaties do contain a provision that is based on Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but deviate from this provision for the following reasons:

- Four treaties contain a provision that is based on Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but the granting of a corresponding adjustment can only be made through a consultation between the competent authorities.

- 33 treaties contain a provision that is based on Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but the granting of a corresponding adjustment could be read as only optional as the word “shall” is replaced by “may”.

71. 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, regardless of whether the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017) 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 a MAP provision.⁶

72. This is confirmed in paragraph 2.1.3 of South Africa’s MAP guidance where it is clarified that transfer pricing cases are eligible to MAP and further details are provided as regards how such cases would be resolved.

Recent developments

73. 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 (OECD, 2017) – 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 (OECD, 2017). 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 (OECD, 2017), 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 (OECD, 2017). 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 (OECD, 2017)).

74. 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 (OECD, 2017). With regard to the 43 tax treaties identified in paragraph 70 above that are considered not to contain this equivalent, South Africa listed 39 treaties as a covered tax agreement under the Multilateral Instrument and for 36 of them made a notification on the basis of Article 17(4).

75. With regard to those 36 treaties, 14 treaty partners are not a signatory to the Multilateral Instrument and eight have, on the basis of Article 17(3), reserved the right not

to apply Article 17(2). Of the remaining 14 treaty partners, nine 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, nine of these 14 treaties 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 (OECD, 2017). The remaining five treaties 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 (OECD, 2017), 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).

76. With regard to the three treaties for which South Africa did not make a notification based on Article 17(4), one treaty partner is not a signatory to the Multilateral Instrument and another treaty partner reserved the right not to apply Article 17(2). The remaining treaty partner has listed its treaty with South Africa as a covered tax agreement 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 these three tax treaties 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 (OECD, 2017), 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).

Application of legal and administrative framework in practice

Period 1 January 2016-31 August 2018 (stage 1)

77. South Africa reported that in the period 1 January 2016-31 August 2018, 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.

78. 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 in the period 1 January 2016-31 August 2018.

Period 1 September 2018-30 April 2020 (stage 2)

79. South Africa reported that also since 1 September 2018, it has for none of the MAP requests it received denied access to MAP on the basis that the case concerned was a transfer pricing case.

80. All but one peer that provided input during stage 1 stated in stage 2 that the update report provided by South Africa fully reflects their experience with South Africa since 1 September 2018 and/or there are no additions to the previous input given. The same input was given by the two peers that only provided input during stage 2.

Anticipated modifications

81. South Africa reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention (OECD, 2017) in its tax treaties where possible and that it will seek to include this provision in all of its future tax treaties. Other than this, South Africa did not indicate that it anticipates any modifications in relation to element B.3.

Conclusion

	Areas for improvement	Recommendations
[B.3]	-	-

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

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

82. 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

83. None of South Africa's 78 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.

84. 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.

Recent developments

85. There are no recent developments with respect to element B.4.

Practical application

Period 1 January 2016-31 August 2018 (stage 1)

86. South Africa reported that in the period 1 January 2016-31 August 2018 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.

87. Peers indicated not being aware of cases that have been denied access to MAP in South Africa in the period 1 January 2016-31 August 2018 in relation to the application of treaty and/or domestic anti-abuse provisions.

Period 1 September 2018-30 April 2020 (stage 2)

88. South Africa reported that since 1 September 2018, it has also not denied access to MAP in cases in which there was a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a treaty anti-abuse provision have been met, or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty. However, no such cases in relation hereto were received since that date.

89. All but one peer that provided input during stage 1 stated in stage 2 that the update report provided by South Africa fully reflects their experience with South Africa since 1 September 2018 and/or there are no additions to the previous input given. The same input was given by the two peers that only provided input during stage 2.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[B.4]	-	-

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

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

91. 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

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

Administrative or statutory dispute settlement/resolution process

93. 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 following a request from the taxpayer, one of South Africa's three national appeal committees could consider the relevant case, depending on 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 the audit function of its tax administration 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.

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

Recent developments

95. There are no recent developments with respect to element B.5.

*Practical application**Period 1 January 2016-31 August 2018 (stage 1)*

96. South Africa reported that in the period 1 January 2016-31 August 2018 it has not denied access to MAP for cases where the issue presented by the taxpayer in a MAP request has already been resolved through an audit settlement between the taxpayer and the tax administration, as audit settlements are not available in South Africa. Further, South Africa reported it has in the period 1 January 2016-31 August 2018 not denied access to MAP for cases where the issue presented by the taxpayer in a MAP request has already been resolved through its administrative settlement process.

97. All peers that provided input indicated not being aware of a denial of access to MAP by South Africa in the period 1 January 2016-31 August 2018 in cases where there was an audit settlement between the taxpayer and the tax administration or in cases that were already resolved via its administrative dispute settlement process.

Period 1 September 2018-30 April 2020 (stage 2)

98. South Africa reported that since 1 September 2018 it has also not denied access to MAP for cases where the issue presented by the taxpayer has already been dealt with in an audit settlement between the taxpayer and the tax administration since such settlements are still not possible in South Africa. Further, South Africa reported it has since 1 September 2018 also not denied access to MAP for cases where the issue presented by the taxpayer in a MAP request has already been resolved through its administrative settlement process.

99. All but one peer that provided input during stage 1 stated in stage 2 that the update report provided by South Africa fully reflects their experience with South Africa since 1 September 2018 and/or there are no additions to the previous input given. The same input was given by the two peers that only provided input during stage 2.

Anticipated modifications

100. 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.

101. 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

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

103. If taxpayers fail to provide all necessary 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 requests depending on circumstances such as the complexity of the case. If the taxpayer fails to provide such information, South Africa clarified that it would generally follow up with them and depending on whether the information is then received, either proceed with the MAP case or close the MAP case.

Recent developments

104. There are no recent developments with respect to element B.6.

*Practical application**Period 1 January 2016-31 August 2018 (stage 1)*

105. South Africa reported that in the period 1 January 2016-31 August 2018 its competent authority has not denied access to MAP for cases where the taxpayer had provided the required information or documentation.

106. All peers that provided input indicated not being aware of a limitation of access to MAP by South Africa in the period 1 January 2016-31 August 2018 in situations where taxpayers complied with information and documentation requirements.

Period 1 September 2018-30 April 2020 (stage 2)

107. South Africa reported that since 1 September 2018 its competent authority has also not denied access to MAP for cases where the taxpayer had provided the required information or documentation.

108. All but one peer that provided input during stage 1 stated during stage 2 that the update report provided by South Africa fully reflects their experience with South Africa since 1 September 2018 and/or there are no additions to the previous input given. The same input was given by the two peers that only provided input during stage 2.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[B.6]	-	-

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

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

110. 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 (OECD, 2017), 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

111. Out of South Africa's 78 tax treaties, 69 contain a provision equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) allowing their competent authorities to consult together for the elimination of double taxation in cases not provided for in their tax treaties.⁷ None of the remaining nine treaties contain a provision that is based on Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017).⁸

112. For the nine treaties identified that do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017), only two peers provided input during stage 1. The first peer stated that it has not contacted South Africa. The second peer noted 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 below analysis.

Recent developments

Multilateral Instrument

113. 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 (OECD, 2017) – 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 (OECD, 2017). 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 (OECD, 2017).

114. With regard to 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 (OECD, 2017), 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 signatories to the Multilateral Instrument, listed their treaty with South Africa as a covered tax agreement and 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 (OECD, 2017).

Other developments

115. As one of the five remaining tax treaties that do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) and which will not be modified by the Multilateral Instrument concerns a former treaty with the United Kingdom that South Africa continues to apply to two treaty partners, renegotiations are not necessary.

116. South Africa reported that for the remaining four tax treaties that do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) and which will not be modified by the Multilateral Instrument, the following actions are being taken or planned:

- For one treaty, it intends to update its list of notifications and reservations to the Multilateral Instrument to have the treaty modified by it.
- For two treaties, negotiations are pending.
- For one treaty, no actions have been taken nor are any actions planned to be taken.

Peer input

117. Of the peers that provided input during stage 2, two provided input in relation to their tax treaty with South Africa, out of which neither provided input in relation to this element.

Anticipated modifications

118. South Africa reported that it will continue to seek to include Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) in all of its future treaties.

Conclusion

	Areas for improvement	Recommendations
[B.7]	<p>Nine out of 78 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017). 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. With respect to these treaties: <ul style="list-style-type: none"> - For one, South Africa will revise its list of notifications and reservations to the Multilateral Instrument with a view to have it modified by the Multilateral Instrument. - For two, negotiations are pending. - For two, no actions have been taken nor are any actions planned to be taken. 	<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 (OECD, 2017) 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>As one of the five treaties that do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) and that will be modified by the Multilateral Instrument is a former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, South Africa should ensure that, once it enters into negotiations with these treaty partners, it includes the required provision.</p> <p>For the remaining four treaties that do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) and will not be modified via the Multilateral Instrument, South Africa should:</p> <ul style="list-style-type: none"> • for one treaty, continue to work in accordance with its plan to include the required provision via the Multilateral Instrument • for two treaties, continue (the initiation of) negotiations with the treaty partner with a view to including the required provision • for one treaty, without further delay request via bilateral negotiations the inclusion of the required provision.

[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.

119. 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

120. South Africa’s rules, guidelines and procedures are included in its Guide on Mutual Agreement Procedures (“**MAP guidance**”). The MAP guidance was released by the Legal Counsel of South Africa’s tax administration in July 2018, was last updated in March 2020 and is available (in English) at:

<https://www.sars.gov.za/legal-counsel/international-treaties-agreements/double-taxation-agreements-protocols/mutual-agreement-procedure-map/>

121. South Africa’s MAP guidance consists of seven chapters, containing several sub-sections. The seven chapters and the main sub-sections are:

Chapter	Content
1. Background	<ul style="list-style-type: none"> • definition of MAP cases • the legal basis for MAP, including the effect of the Multilateral Instrument • interaction with domestic available remedies • the role of a competent authority in MAP • links to South Africa’s MAP profile and its competent authority’s web page on MAP.
2. Applicability of MAP	<ul style="list-style-type: none"> • typical cases in MAP, including transfer pricing cases and dual residence cases.
3. Circumstances where MAP requests may be accepted or denied	<ul style="list-style-type: none"> • filing period for a MAP request, including domestic time-limits involved • details about the administrative or statutory dispute settlement/resolution process in place in South Africa, which is independent from the audit and examination functions and which can only be accessed through a request by the taxpayer and its interaction with access to MAP • transfer pricing access in cases involving anti-abuse provisions.
4. Making a MAP request	<ul style="list-style-type: none"> • the steps involved in the MAP request • the manner and form of a MAP request in South Africa • the multi-year resolution of recurring issues through MAP • contact information of the office in charge of MAP cases in South Africa • withdrawal of a MAP request • the use of information provided a taxpayer in a MAP request.
5. Concluding a MAP case	<ul style="list-style-type: none"> • situations where an objection is not considered justified, including the documented notification/consultation process • implementation of MAP agreements, including the role of the taxpayer • the treatment of interest and penalties in MAP.
6. Interaction with domestic law	<ul style="list-style-type: none"> • suspension of tax collection when cases are dealt with in MAP.
7. Miscellaneous issues	<ul style="list-style-type: none"> • clarification that South Africa does not have an APA programme • the consideration of bona fide taxpayer initiated self-adjustments • protective MAP requests • information regarding arbitration in South Africa’s tax treaties • multilateral MAP cases.

122. 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.⁹

Information and documentation to be included in a MAP request

123. 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.¹⁰ 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.

124. 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).

Recent developments

125. There are no recent developments with respect to element B.8, except that the documented bilateral notification/consultation process where South Africa's competent authority considers the objection in a MAP request not to be justified has been covered in more detail in South Africa's MAP guidance, under paragraph 5.1.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[B.8]	-	-

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

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

127. 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.¹¹

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

128. The MAP guidance of South Africa was published in July 2018, last updated in March 2020 and is available (in English) at:

<https://www.sars.gov.za/legal-counsel/international-treaties-agreements/double-taxation-agreements-protocols/mutual-agreement-procedure-map/>

129. As regards its accessibility, South Africa’s MAP guidance can easily be found on the website of the tax administration by searching for the keyword “mutual agreement procedure”.

MAP profile

130. The MAP profile of South Africa is published on the website of the OECD and was last updated in March 2020. This MAP profile is complete and often with detailed information. This profile includes external links which provide extra information and guidance where appropriate.

Recent developments

131. There are no recent developments with respect to element B.9.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[B.9]	-	-

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

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

133. 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

134. As previously discussed under B.5, under South Africa's domestic law, audit settlements are not available. In that regard, there is no need for South Africa to address in its MAP guidance whether taxpayers can have access to MAP in such a situation.

135. Peers raised no issues with respect to this element concerning audit settlements.

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

136. 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.¹² Further, the public guidance on such processes refers to paragraph 3.3 of the MAP guidance, with an embedded link to such paragraph, and notes that the restrictions contained therein would apply.¹³ South Africa reported that taxpayers are also made aware of the impact of such a resolution by inserting a clause in the settlement agreements that records that MAP is excluded.

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

137. 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.

138. 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.

139. 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.

Recent developments

140. It was noted in the stage 1 report that South Africa's public guidance on the internal administrative or statutory dispute settlement/resolution process did not specifically address that taxpayers do not have access to MAP in such cases. However, as discussed above,

South Africa updated this guidance since to note this. By updating its public guidance, South Africa has addressed the recommendation that was included in its stage 1 peer review report.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[B.10]	-	-

Notes

1. These 62 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 65 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.
3. 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.
4. 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.
5. These six treaties include the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone.
 6. These three treaties include the former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone.
 7. These 69 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.
 8. The nine treaties include the former treaty with the former United Kingdom that South Africa continues to apply to Grenada and Sierra Leone.
 9. Available at: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf.
 10. Available at: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf.
 11. The shared public platform can be found at: www.oecd.org/ctp/dispute/country-map-profiles.htm.
 12. South Africa’s MAP guidance is available at <https://www.sars.gov.za/legal-counsel/international-treaties-agreements/double-taxation-agreements-protocols/mutual-agreement-procedure-map/>.
 13. The public guidance on such process is referred to in South Africa’s Tax Administration webpage, which is available at: <https://www.sars.gov.za/legal-counsel/legal-counsel-publications/find-a-guide/tax-administration/> or directly accessible at: <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-TAdm-G05-Dispute-Resolution-Guide.pdf>.

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

142. 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, 2017), which obliges competent authorities, in situations where the objection raised by taxpayers are considered justified and where cases cannot be unilaterally resolved, to enter into discussions with each other to resolve cases of taxation not in accordance with the provisions of a tax treaty.

Current situation of South Africa’s tax treaties

143. Out of South Africa’s 78 tax treaties, 74 contain a provision equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017) 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 Of the remaining four treaties, three do not contain a provision that is based on or equivalent to 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017).²

144. The remaining tax treaty contains the text of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017), but also contains additional language that limits the possibility to discuss cases bilaterally, as this additional language reads: “...provided that the competent authority of the other Contracting State is notified of the case within 4 (four) and a half years from the due date or the date of filing of the return in that other State, whichever is later”. Therefore, this provision is considered as not being equivalent to Article 25(2), first sentence of the OECD Model Tax Convention (OECD, 2017).

145. For the four treaties identified that do not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017), the relevant peers did not provide input during stage 1.

Recent developments

Multilateral Instrument

146. 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 (OECD, 2017) – 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 (OECD, 2017). 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 (OECD, 2017).

147. With regard to 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 (OECD, 2017), South Africa listed only 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, listed its treaty with South Africa as a covered tax agreement and 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 (OECD, 2017).

Other developments

148. As one of the three remaining tax treaties that do not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017) and which will not be modified by the Multilateral Instrument concerns a former treaty with the United Kingdom that South Africa continues to apply to two treaty partners, renegotiations are not necessary.

149. South Africa reported that for the remaining two tax treaties that do not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017) and which will not be modified by the Multilateral Instrument, negotiations are pending.

Peer input

150. Of the peers that provided input during stage 2, two provided input in relation to their tax treaty with South Africa, out of which neither provided input in relation to this element.

Anticipated modifications

151. South Africa reported that it will continue to seek to include Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017) in all of its future treaties.

Conclusion

	Areas for improvement	Recommendations
[C.1]	<p>Four out of 78 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017). Of these four treaties:</p> <ul style="list-style-type: none"> • One is expected to be modified by the Multilateral Instrument to include the required provision. • Three will not be modified by that instrument to include the required provision. With respect to these treaties: <ul style="list-style-type: none"> - For two, negotiations are pending. - For one, no actions have been taken nor are any actions planned to be taken. 	<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 (OECD, 2017) in the one treaty that currently does not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaty concerned.</p> <p>As one of the remaining three treaties that do not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017) and that will be modified by the Multilateral Instrument is a former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, South Africa should ensure that, once it enters into negotiations with these treaty partners, it includes the required provision.</p> <p>For the remaining two treaties that do not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017) and will not be modified via the Multilateral Instrument, South Africa should continue negotiations with the treaty partner with a view to including the required provision</p>

[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).

152. 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

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

154. 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. 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 respectively⁴ and should be considered jointly for understanding of the MAP caseload of South Africa.

155. With respect to post-2015 cases, South Africa reported that for the years 2016-19, it has reached out to all of its MAP partners with a view to have their MAP statistics matching. In that regard, South Africa indicated that it could match its statistics with all of them.

156. Based on the information provided by South Africa's MAP partners, its post-2015 MAP statistics for the years 2016-19, actually match those of its treaty partners as reported by the latter.

Monitoring of MAP statistics

157. 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.

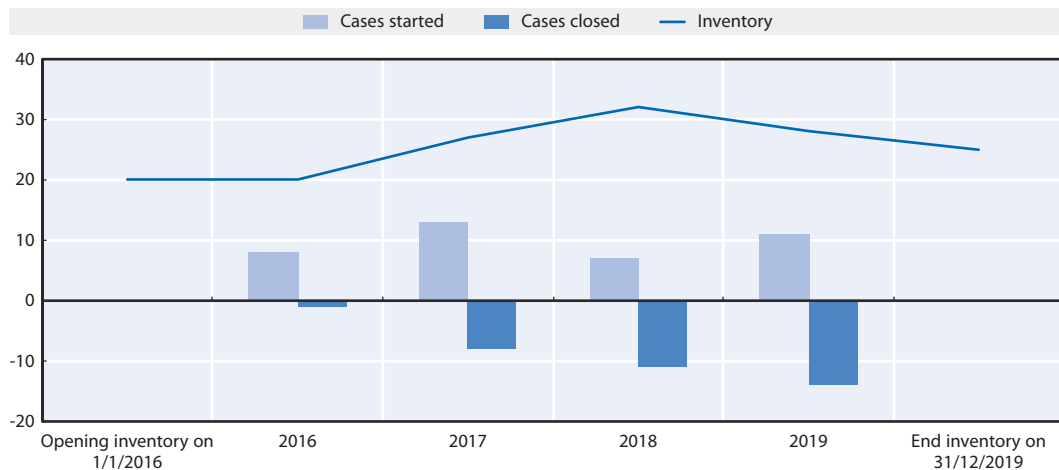
Analysis of South Africa's MAP caseload

Global overview

158. The analysis of South Africa's MAP caseload relates to the period starting on 1 January 2016 and ending on 31 December 2019.

159. Figure C.1 shows the evolution of South Africa's MAP caseload over the Statistics Reporting Period.⁵

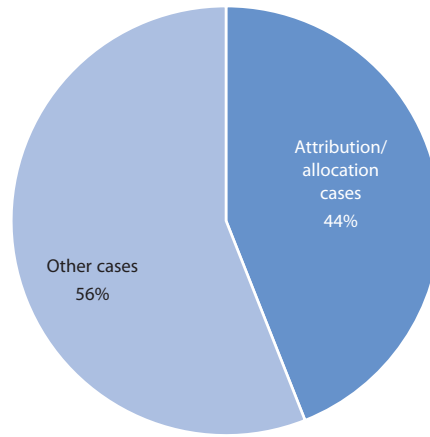
Figure C.1. Evolution of South Africa's MAP caseload



160. At the beginning of the Statistics Reporting Period South Africa had 20 pending MAP cases, of which 11 were attribution/allocation cases and nine were other MAP cases.⁶ At the end of the Statistics Reporting Period, South Africa had 25 MAP cases in its inventory, of which 11 are attribution/allocation cases and 14 are other MAP cases. South Africa's MAP caseload has increased by 25% during the Statistics Reporting Period, which can be broken down into no change for attribution allocation cases and an increase of 56% for other cases.

161. The breakdown of the end inventory can be shown as in Figure C.2.

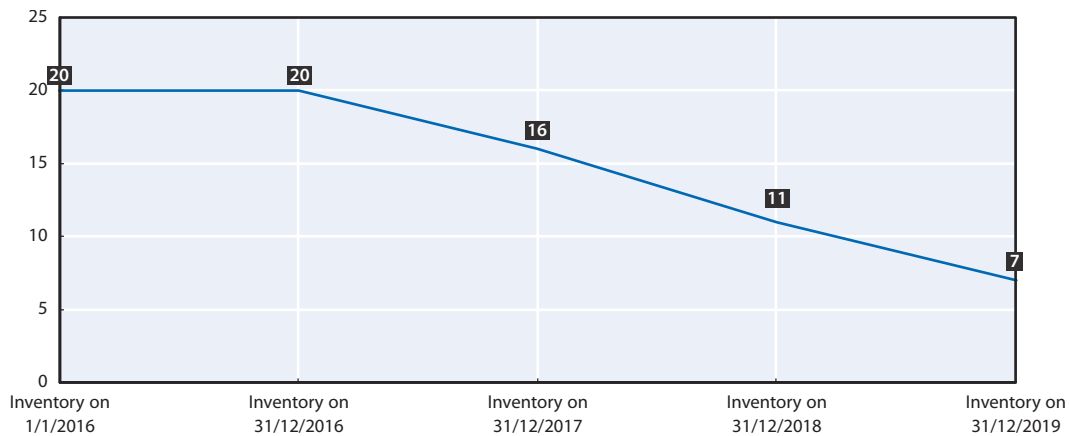
Figure C.2. End inventory on 31 December 2019 (25 cases)



Pre-2016 cases

162. 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



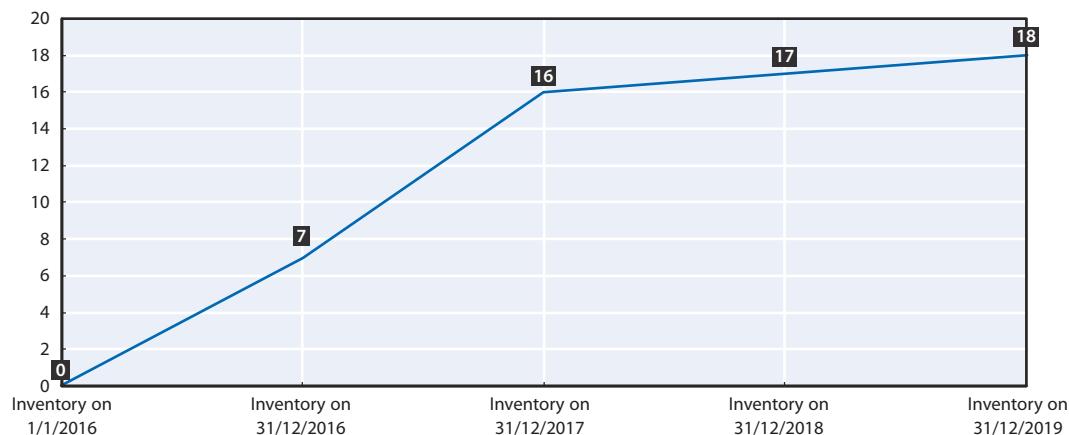
163. At the beginning of the Statistics Reporting Period, South Africa's MAP inventory of pre-2016 MAP cases consisted of 20 cases, of which 11 were attribution/allocation cases and nine were other cases. At the end of the Statistics Reporting Period the total inventory of pre-2016 cases had decreased to seven cases, consisting of six attribution/allocation cases and one other case. The decrease in the number of pre-2016 MAP cases is shown in the table below.

Pre-2016 cases	Evolution of total MAP caseload in 2016	Evolution of total MAP caseload in 2017	Evolution of total MAP caseload in 2018	Evolution of total MAP caseload in 2019	Cumulative evolution of total MAP caseload over the three years (2016-19)
Attribution/allocation cases	(no cases closed)	(no case closed)	-27%	-25%	-45%
Other cases	(no cases closed)	-44%	-40%	-67%	-89%

Post-2015 cases

164. Figure C.4 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



165. In total, 39 MAP cases started during the Statistics Reporting Period, out of which eight were attribution/allocation cases and 31 were other cases. At the end of this period the total number of post-2015 cases in the inventory was 18 cases, consisting of five attribution/allocation cases and 13 other cases. Accordingly, South Africa closed 21 post-2015 cases during the Statistics Reporting Period, three of them being attribution/allocation cases and 18 being other cases. The total number of closed cases represents 54 % of the total number of post-2015 cases that started during the Statistics Reporting Period, which can be broken down into 38% for attribution/allocation cases and 58% for other cases.

166. 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	% of cases closed in 2016 compared to cases started in 2016	% of cases closed in 2017 compared to cases started in 2017	% of cases closed in 2018 compared to cases started in 2018	% of cases closed in 2019 compared to cases started in 2019	Cumulative evolution of total MAP caseload over the four years (2016-19)
Attribution/allocation cases	0%	100%	100%	25%	38%
Other cases	17%	25%	83%	129%	58%

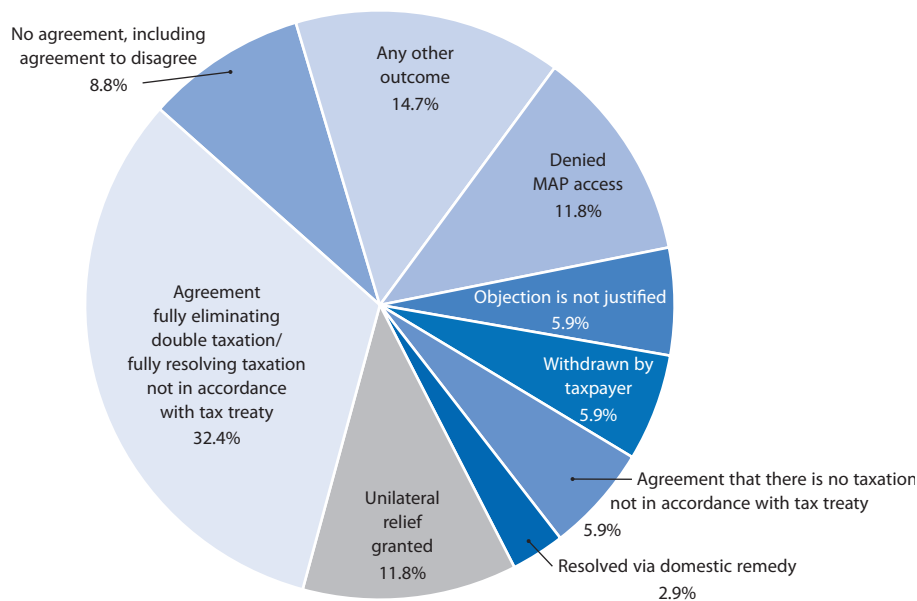
Overview of cases closed during the Statistics Reporting Period

Reported outcomes

167. During the Statistics Reporting Period South Africa in total closed 34 MAP cases for which the outcomes shown in Figure C.5 were reported.

168. Figure C.5 shows that during the Statistics Reporting Period, 11 out of 34 cases were closed with the outcome “agreement that fully eliminated double taxation or fully resolved taxation not in accordance with the tax treaty”.

Figure C.5. Cases closed in 2016, 2017, 2018 or 2019 (34 cases)



Reported outcomes for attribution/allocation cases

169. In total, eight attribution/allocation cases were closed during the Statistics Reporting Period. The reported outcome for these cases are:

- agreement fully eliminating double taxation or fully resolving taxation not in accordance with a tax treaty (38%)
- any other outcome (38%)
- unilateral relief granted (25%).

Reported outcomes for other cases

170. In total, 26 other cases were closed during the Statistics Reporting Period. The main reported outcomes for these cases are:

- agreement fully eliminating double taxation or fully resolving taxation not in accordance with a tax treaty (31%)
- denied MAP access (15%)
- no agreement including agreement to disagree (12%).

Average timeframe needed to resolve MAP cases

All cases closed during the Statistics Reporting Period

171. The average time needed to close MAP cases during the Statistics Reporting Period was 26.50 months. This average can be broken down as follows:

	Number of cases	Start date to End date (in months)
Attribution/Allocation cases	8	35.40
Other cases	26	23.77
All cases	34	26.50

Pre-2016 cases

172. For pre-2016 cases, South Africa reported that on average it needed 45.97 months to close five attribution/allocation cases and 45.79 months to close eight other cases. This resulted in an average time needed of 45.86 months to close 13 pre-2016 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

173. For post-2015 cases South Africa reported that on average it needed 17.80 months to close three attribution/allocation cases and 13.98 months to close 18 other cases. This resulted in an average time needed of 14.52 months to close 21 post-2015 cases.

Peer input

174. Most of the peers that provided input reported having very little MAP experience with South Africa's competent authority. Five of the 11 peers that provided input did not comment on the time it takes with South Africa to close MAP cases.

175. 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. Another 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 however, explained by the lack of resources in this peer's competent authority. Two further peers reported that they experienced efficient exchanges with South Africa, one of them referring to the swiftness of and the other one also emphasising the constructiveness in these exchanges. Another peer reported having received timely responses from South Africa's competent authority and specified that (i) one of the two MAP cases it has had with South Africa have 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.

176. One last peer reported that it experienced some delays in dealing with "other" cases with South Africa since South Africa's competent authority responded late 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.

Recent developments

177. South Africa was in the stage 1 peer review report under element C.2 recommended to seek to resolve the remaining 72% of its post-2015 MAP cases that were pending on 31 December 2017 (13 cases), within a timeframe that results in an average timeframe of 24 months for all post-2015 cases.

178. With respect to this recommendation, South Africa reported that it has engaged in more regular follow-up communications with competent authorities of treaty partners on aged cases to identify issues causing delays and to agree on actions to be taken to resolve the cases.

179. In view of the statistics discussed above, it also follows that South Africa's inventory increased by 25% during the Statistics Reporting Period. However, South Africa was also able to close 54% of all cases that started during this period and close 65% of its pre-2016 cases. The statistics also show that South Africa has in the period 2016-19 not closed its MAP cases within the pursued average of 24 months. Element C.3 will further consider these numbers in light of the adequacy of resources.

180. All but one peer that provided input during stage 1 confirmed that this input holds equal relevance for the period starting on 1 September 2018, albeit that one additional peer that provided input only during stage 2 commented on its experience with South Africa concerning the resolution of MAP cases since that date. This input is further discussed under element C.3.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[C.2]	-	-

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

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

182. 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

183. Under South Africa's tax treaties, the competent authority function resides with the Commissioner for the SARS, which is South Africa's tax administration. The competent authority function is delegated to team members working with Legal Counsel department

within SARS, and specifically within the Legislative Research and Development unit within that department. South Africa's competent authority staff is made up of six staff members. 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 and two team members are responsible for other MAP cases.

184. South Africa further 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, by acting as the secretary and technical reviewer for the internal General Anti-Avoidance Rule (“GAAR”) Committee of South Africa's tax administration. South Africa clarified that this committee 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. South Africa reported that this 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.

185. 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 Action 14 final report (OECD, 2015) was being discussed and adopted, and that there have been no new staff members added to the MAP office since then.

186. 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

187. 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 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. More recently, South Africa noted that it closely monitors its available resources through monthly reports provided to senior management.

Recent developments

188. There are no recent developments with respect to element C.3, other than that the SARS has continued to provide training on tax treaties to its local staff members as well and that it continues to closely monitor its resources based on the time taken to resolve MAP cases through monthly reports as described above.

Practical application

MAP statistics

189. As discussed under element C.2, South Africa has not closed its MAP cases during the Statistics Reporting Period within the pursued 24-month average, as it needed 26.50 months to close MAP cases. This concerns attribution/allocation cases where the time needed was 35.40 months, where the time needed to resolve other MAP cases was 23.77 months. The average time to resolve MAP cases in 2016, 2017, 2018 and 2019 can be illustrated by Figure C.6.

Figure C.6. Average time (in months) to close cases in 2016-19



* Note that post-2015 cases only concern cases started and closed during 2016, 2017, 2018 or 2019

190. The stage 1 peer review report of South Africa analysed the 2016-17 MAP statistics and showed an average of 19.72 months to resolve nine MAP cases, which concerned 17.29 months for one attribution/allocation case and 20.02 months for eight other MAP cases that were closed. Although the overall average was below the pursued average of 24 months, since South Africa's MAP inventory had increased significantly during this period, South Africa was recommended to 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.

191. For stage 2, the 2018 and 2019 MAP statistics are also taken into account. The average time to close MAP cases for these years are as follows:

	2018	2019
Attribution/Allocation cases	40.61	34.51
Other cases	23.47	26.68
All cases	29.70	28.36

192. The 2018 and 2019 statistics of South Africa show that the average completion time of MAP cases increased from 19.72 months (2016-17) to 29.70 months (2018) and then, decreased slightly to 28.36 months (2019), which for 2018 and 2019 were higher than the pursued 24-month average, owing to the time taken to resolve five pre-2016 cases in 2018 and four pre-2016 cases in 2019.

193. Further – as analysed in element C.2 – the MAP inventory of South Africa has increased by 25% since 1 January 2016. This can be shown as follows:

	Opening inventory on 1/1/2016	Cases started	Cases closed	End inventory on 01/01/2019	Increase in %
Attribution/allocation cases	11	8	8	11	0%
Other cases	9	31	26	14	56%
Total	20	39	34	25	25%

194. These numbers show that there was a significant increase of 56% in other MAP cases during this period. These numbers also show that there has been no decrease in the number of attribution/allocation cases although the pending case-load of attribution/allocation cases was modest and increase in attribution/allocation cases has been modest as well during the Statistics Reporting Period.

195. However, the figures in the above table also show that the number of closed cases is similar to the number of all cases started in the period 2016-19. Further, South Africa was able to close 54% of all cases that started in this period and close 65% of its pre-2016 inventory, with noted improvements seen in both numbers for the years 2018 and 2019. Finally, although South Africa saw an increase in its inventory in total, it has reduced its inventory by 13% in 2018 and by a further 11% in 2019. These numbers show that South Africa's competent authority has taken efforts since the stage 1 report to ensure that current pending and future MAP cases are resolved in a timely, efficient and effective manner.

Peer input

Period 1 January 2016-31 August 2018 (stage 1)

196. As mentioned under element C.2, most of the peers that provided input reported having very little MAP experience with South Africa's competent authority. Most peers also did not formulate any suggestion for improvement for South Africa's competent authority.

197. 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 in fact 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.

198. One last peer reported that it experienced some delays in dealing with "other" cases with South Africa since South Africa's competent authority responded late 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 positions. As noted above, 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.

Period 1 September 2018-30 April 2020 (stage 2)

199. All but one peer that provided input during stage 1 stated in stage 2 that the update report provided by South Africa fully reflects their experience with South Africa since 1 September 2018 and/or there are no additions to the previous input given. The same input was given by one peer that only provided input during stage 2. Some additional inputs were received from the other peer that only provided input during stage 2.

200. This peer noted that for one case that started since 1 September 2018, the peer's competent authority sent a position paper to South Africa's competent authority in October 2018, for which it still has not received a response. Although the peer acknowledged that South Africa's competent authority has assured that it would respond with a position paper and that there is clearly an intention from South Africa's competent authority to engage in discussions, the peer stated that the delay in sending across a position paper could indicate that South Africa's competent authority requires more resources. South Africa responded to this input and noted that it monitors MAP cases in progress and has made a provision in the workforce plan for its competent authority for an additional team member in the medium term if needed. South Africa noted that this position has not been filled but remains on the workforce plan to be reconsidered in the future, dependent on budgetary constraints. South Africa further clarified that it accepts the peer's input and would be sharing its position paper as soon as possible.

Anticipated modifications

201. 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]	MAP cases were closed in 26.50 months on average, which is above the 24-month average (which is the pursued average for resolving MAP cases received on or after 1 January 2016). This particularly concerns attribution/allocation cases, as the average time needed for such cases is 35.40 months while for other cases the average is within the pursued 24-month average (23.77 months). Although there was an increase in the cases closed in 2018 and 2019 as compared to 2016-17, South Africa's MAP inventory has still overall increased and the average time taken to resolve cases in 2018 and 2019 increased as compared to 2016-17. Further, peer input suggests that there may be delays in receiving position papers from South Africa. Therefore, there is a risk that post-2015 cases are not resolved within the average timeframe of 24 months.	While South Africa has made efforts to resolve MAP cases, resulting in more cases being closed and a reduction of its inventory in 2018 and 2019, further actions should be taken to ensure a timely resolution of MAP cases, which concerns both attribution/allocation cases and other cases. Accordingly, South Africa should devote additional resources to its competent authority to handle pending and future MAP cases and to be able to cope with the increase in its MAP inventory in general, so as to be able to resolve current pending and future MAP cases in a timely, efficient and effective manner. Where necessary, additional resources should be added to the competent authority, in particular to submit position papers to treaty partners and to respond to position papers issued by treaty partners in a timely 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.

202. 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

203. 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 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 auditors 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.

204. South Africa further reported that the tax administration personnel who made the adjustment at issue does not attend competent authority meetings. With regard to the above, South Africa noted 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.

205. This is documented in South Africa’s internal guide on MAP in paragraph 6.3.1.

206. With respect to the involvement of the team member in charge of attribution/allocation MAP cases in the GAAR Committee as noted under element C.3, the staff member may influence or direct the audit process and if such staff member acts in MAP on the same cases, he may be influenced by his previous position while acting as competent authority.

207. However, South Africa stated that if this situation arises, the MAP case 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 MAP guidance) 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 under element C.3 would handle the relevant attribution/allocation case.

208. This practice is also documented in South Africa’s internal guide on MAP in paragraph 6.3.1.

209. 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. This is documented in South Africa’s internal guide on MAP in paragraph 6.3.1 as well.

Recent developments

210. The stage 1 report noted that the acting of the competent authority staff member dealing with attribution/allocation cases in South Africa’s GAAR Committee bears the risk that the position of South Africa’s competent authority may be influenced by positions taken during the audit process. Accordingly, South Africa was recommended to 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. South Africa has now documented such mitigation measure in its internal guide on MAP as noted above.

211. On that basis, the recommendation made in the stage 1 report is considered to be addressed.

Practical application

Period 1 January 2016-31 August 2018 (stage 1)

212. 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 in the period 1 January 2016-31 August 2018. 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.

Period 1 September 2018-30 April 2020 (stage 2)

213. All but one peer that provided input during stage 1 stated in stage 2 that the update report provided by South Africa fully reflects their experience with Africa since 1 September 2018 and/or there are no additions to the previous input given. The same input was given by the two peers that only provided input during stage 2.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[C.4]	-	-

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

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

215. 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

216. 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.

217. 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).

218. 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

Recent developments

219. There are no recent developments with respect to element C.5.

Practical application*Period 1 January 2016-31 August 2018 (stage 1)*

220. All peers that provided input indicated not being aware that South Africa used performance indicators based on the amount of sustained audit adjustments or maintaining tax revenue in the period 1 January 2016-31 August 2018.

Period 1 September 2018-30 April 2020 (stage 2)

221. All but one peer that provided input during stage 1 stated in stage 2 that the update report provided by South Africa fully reflects their experience with South Africa since 1 September 2018 and/or there are no additions to the previous input given. The same input was given by the two peers that only provided input during stage 2.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[C.5]	-	-

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

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

223. 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

224. 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. This is clarified in South Africa's MAP profile as well.

225. South Africa has reserved the right not to include paragraph 5 of Article 25 of the OECD Model Tax Convention (OECD, 2017) in its tax treaties in the Commentary of the OECD Model Tax Convention (OECD, 2017). 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.

Recent developments

226. There are no recent developments with respect to element C.6.

Practical application

227. South Africa has incorporated an arbitration clause in three of its 78 treaties as a final stage to the MAP, which are all voluntary arbitration clauses.⁷

Anticipated modifications

228. 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 2019.
4. 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).
5. South Africa’s 2016 and 2017 MAP statistics were corrected in the course of its peer review and deviate from the published MAP statistics for 2016 and 2017. See further explanations in Annex B and Annex C.
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.

229. 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

230. 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 and stated the same domestic time limits would apply for implementation as well. South Africa clarified that the date of original assessment would be the date of the first assessment in respect of the relevant tax period. Individuals are permitted eight to 11 months after the close of their fiscal year to file returns and companies are permitted 12 months. An original assessment generally follows shortly after a return has been filed.

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

232. 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.

233. South Africa clarified that the implementation of none of its MAP agreements were affected by domestic time-limits and the information on the above can be seen in South Africa's MAP guidance as noted above.

234. South Africa reported that upon conclusion of a MAP agreement, its competent authority informs the taxpayer of the details of the agreement. For attribution/allocation cases, South Africa noted 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 paragraph 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 noted 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 clarified 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. In either case, South Africa noted that the treaty partner's competent authority is required to be notified after implementation.

235. South Africa's internal guide on MAP contains an authorised checklist, which is supposed to be used for the implementation of MAP agreements. The guide also envisages monitoring of the implementation by the competent authority as well as regular updates to be shared with the treaty partner's competent authority and taxpayer. Further, letter templates, forms and example letters have been included as Annexures to the internal guide on MAP. South Africa noted that these templates are used by its competent authority to communicate with the competent authorities of MAP partners and taxpayers.

Recent developments

236. There are no recent developments with respect to element D.1, except for the fact that an authorised checklist and templates for the implementation of a MAP agreement have been added through the publication of South Africa's internal guide on MAP.

Practical application

Period 1 January 2016-31 August 2018 (stage 1)

237. South Africa reported that none of the MAP agreements that were reached in the period 1 January 2016-31 August 2018 needed to be implemented in South Africa.

238. All peers that provided input reported that they were not aware of any MAP agreement reached in the period 1 January 2016-31 August 2018 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 in a MAP agreements timely manner.

Period 1 September 2018-30 April 2020 (stage 2)

239. South Africa reported that since 1 September 2018 all MAP agreements that were reached have been implemented.

240. All but one peer that provided input during stage 1 stated in stage 2 that the update report provided by South Africa fully reflects their experience with South Africa since 1 September 2018 and/or there are no additions to the previous input given. The same input was given by the two peers that only provided input during stage 2.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[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 (OECD, 2017). 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 (OECD, 2017) in South Africa'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.

242. 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

243. South Africa reported that there is no specific domestic legislation that governs the timeframe of implementation of MAP agreements in South Africa.

244. However, Annexure A of South Africa's internal guide on MAP, which provides the timelines involved in the MAP process, notes that a MAP agreement should be implemented no later than 3 months from the issuance of closing letters.

Recent developments

245. As noted above, a model timeframe for the implementation of MAP agreements has been added through the publication of South Africa's internal guide on MAP.

Practical application***Period 1 January 2016-31 August 2018 (stage 1)***

246. All peers that provided input reported that they were not aware of any MAP agreement reached in the period 1 January 2016-31 August 2018 that was not implemented by South Africa. Furthermore, one peer noted that South Africa usually implements MAP agreements in a timely manner.

Period 1 September 2018-30 April 2020 (stage 2)

247. South Africa reported that also since 1 September 2018 all MAP agreements that were reached have been implemented in a timely manner.

248. All but one peer that provided input during stage 1 stated in stage 2 that the update report provided by South Africa fully reflects their experience with South Africa since 1 September 2018 and/or there are no additions to the previous input given. The same input was given by the two peers that only provided input during stage 2.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[D.2]	-	-

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

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

250. 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 (OECD, 2017) in tax treaties, or alternatively, setting a time limit in Article 9(1) and Article 7(2) for making adjustments to avoid that late adjustments obstruct granting of MAP relief.

Legal framework and current situation of South Africa's tax treaties

251. 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.

252. Out of South Africa's 78 tax treaties, 58 contain a provision equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) 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 both 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.

253. For the remaining 19 treaties the following analysis is made:

- Two treaties do not contain a provision that is based on or equivalent to Article 25(2), second sentence of the OECD Model Tax Convention (OECD, 2017), but only contain one of the alternative provisions in article 9.
- 13 treaties do not contain a provision that is based on or equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) or either of the alternative provisions².
- Two treaties provide that the MAP agreements shall be implemented within the period prescribed in the domestic law of the contracting states and are thus, considered not to contain the equivalent of Article 25(2) second sentence of the OECD Model Tax Convention (OECD, 2017).
- One tax treaty allows for a MAP agreement to be implemented only when a submitted MAP request has been notified in due time to the competent authority of the other contracting state and where it concerns the other contracting jurisdiction, within ten years as from the first notification referred to in the equivalent of Article 25(1), second sentence contained in the treaty or a longer time period if allowed under the other contracting jurisdiction's domestic law. As this provision may cause that MAP agreements cannot be implemented when the other competent authority was not notified in a timely manner and since it does not state that MAP agreements shall be implemented notwithstanding domestic time limits, this tax treaty is considered not to contain the equivalent of Article 25(2) second sentence of the OECD Model Tax Convention (OECD, 2017).
- One treaty contains a provision that is based on Article 25(2), second sentence, of the OECD Model Tax Convention, but also contains additional language stating that any agreement shall not be implemented later than ten years after the end of the concerned taxable year. As this ten-year time limit could obstruct the implementation of MAP agreements, this treaty is not considered to have the equivalent of Article 25(2), second sentence of the OECD Model Tax Convention.

254. For the 19 treaties identified that do not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017), or both alternatives, five peers provided input during stage 1. Three of these five peers either stated that they have not 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 below analysis. One peer did not provide input on this element, although 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.

Recent developments

Multilateral Instrument

255. 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 (OECD, 2017) – 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 (OECD, 2017). 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 (OECD, 2017). 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.

256. With regard to 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 (OECD, 2017) or the alternative provisions for Articles 9(1) and 7(2), South Africa listed 16 treaties as covered tax agreements under the Multilateral Instrument, but only 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 14 relevant treaty partners, three are not a signatory to the Multilateral Instrument and two reserved the right not to incorporate the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017). All of the remaining nine treaty partners are signatories to the Multilateral Instrument, listed their treaty with South Africa as a covered tax agreement and made such notification. Therefore, at this stage, nine 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 (OECD, 2017).

Other developments

257. As one of the ten remaining tax treaties that do not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) or both alternative provisions and which will not be modified by the Multilateral Instrument concerns a former treaty with the United Kingdom that South Africa continues to apply to two treaty partners, renegotiations are not necessary.

258. South Africa reported that for the remaining nine tax treaties that do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) or both alternative provisions and which will not be modified by the Multilateral Instrument, the following actions are being taken or planned:

- For two treaties, it intends to update its list of notifications and reservations to the Multilateral Instrument to have the treaty modified by it. For one of these treaties, where the treaty partner has placed a reservation as well, the treaty partner has informed South Africa that it will withdraw its reservation under the Multilateral Instrument, following which it is expected that this treaty will be modified by the instrument to be in line with the Action 14 Minimum Standard.
- For one treaty, it would encourage the concerned treaty partner to sign the Multilateral Instrument to bring this treaty in line with the requirements under the Action 14 minimum standard. South Africa reported that the concerned treaty partner has informed South Africa that it intends to sign the Multilateral Instrument before the end of 2020.

- For two treaties, negotiations are envisaged, scheduled or pending.
- For four treaties, no actions have been taken nor are any actions planned to be taken.

Peer input

259. Of the peers that provided input during stage 2, two provided input in relation to their tax treaty with South Africa, out of which neither provided input in relation to this element.

Anticipated modifications

260. South Africa reported that it will continue to seek to include Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) in all of its future treaties.

Conclusion

	Areas for improvement	Recommendations
[D.3]	<p>19 out of 78 tax treaties contain neither a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) 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"> • Nine are expected to be modified by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) • Ten will not be modified by that instrument to include the required provision. With respect to these treaties: <ul style="list-style-type: none"> - For two, South Africa will revise its list of notifications and reservations to the Multilateral Instrument with a view to have it modified by the Multilateral Instrument. - For one, the relevant treaty partner has been or will be contacted by South Africa with a view to have the treaty modified by the Multilateral Instrument. - For two, negotiations are envisaged, scheduled or pending. - For five, no actions have been taken nor are any actions planned to be taken. 	<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 (OECD, 2017) in those nine 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>As one of the ten treaties that do not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) and that will be modified by the Multilateral Instrument is a former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, South Africa should ensure that, once it enters into negotiations with these treaty partners, it includes the required provision or be willing to accept the inclusion of both alternative provisions.</p> <p>For the remaining nine treaties that do not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) and will not be modified via the Multilateral Instrument, South Africa should:</p> <ul style="list-style-type: none"> • for two treaties, continue to work in accordance with its plan to include the required provision via the Multilateral Instrument • for one treaty, continue to work in accordance with its plan to strive to include the required provision via the Multilateral Instrument and where this is not possible, request via bilateral negotiations the inclusion of the required provision or be willing to accept the inclusion of both alternative provisions • for two treaties, continue (the initiation of) negotiations with the treaty partner with a view to including the required provision or be willing to accept the inclusion of both alternative provisions • for four treaties, without further delay request via bilateral negotiations the inclusion of the required provision or be willing to accept the inclusion of both alternative provisions.

Notes

1. These 58 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 13 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]	<p>Four out of 78 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017). None of them will be modified by the Multilateral Instrument. With respect to these treaties:</p> <ul style="list-style-type: none"> • For one, South Africa will revise its list of notifications and reservations to the Multilateral Instrument with a view to have it modified by the Multilateral Instrument. • For two, negotiations are pending. • For one, no actions have been taken nor are any actions planned to be taken. 	<p>As one of the four treaties that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017) and that will not be modified by the Multilateral Instrument is a former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, South Africa should ensure that, once it enters into negotiations with these treaty partners, it includes the required provision.</p> <p>For the remaining three treaties that do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017) and will not be modified via the Multilateral Instrument, South Africa should:</p> <ul style="list-style-type: none"> • for one treaty, continue to work in accordance with its plan to include the required provision via the Multilateral Instrument • for two treaties, continue negotiations with the treaty partner with a view to including the required provision.
[A.2]	-	-
Part B: Availability and access to MAP		
[B.1]	<p>Six out of 78 tax treaties do not contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of or as amended by the Action 14 final report (OECD, 2015b). None of these treaties will be modified by the Multilateral Instrument. With respect to these six treaties:</p> <ul style="list-style-type: none"> • For three, negotiations are envisaged, scheduled or pending. • For three, no actions have been taken nor are any actions planned to be taken. 	<p>As one of the six treaties that do not contain the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of or as amended by the Action 14 final report (OECD, 2015b) and that will not be modified by the Multilateral Instrument is a former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, South Africa should ensure that, once it enters into negotiations with these treaty partners, it includes the required provision.</p> <p>For the remaining five treaties that do not contain the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of or as amended by the Action 14 final report (OECD, 2015b) and that will not be modified by the Multilateral Instrument, South Africa should:</p> <ul style="list-style-type: none"> • for three treaties, continue (the initiation of) negotiations with the treaty partner with a view to including the required provision • for two treaties, without further delay request via bilateral negotiations the inclusion of the required provision. <p>This concerns a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) either:</p> <ol style="list-style-type: none"> a. as amended by the Action 14 final report (OECD, 2015b); or b. as it read prior to the adoption of the Action 14 final report (OECD, 2015b), thereby including the full sentence of such provision.

	Areas for improvement	Recommendations
[B.1]	<p>Seven out of 78 tax treaties do not contain a provision that is equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017), as the timeline to file a MAP request is in these treaties 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 or superseded by the Multilateral Instrument to include Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017). • Two will not be modified by the Multilateral instrument to include to include Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017). With respect to these treaties, no actions have been taken nor are any actions planned to be taken. 	<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 (OECD, 2017) 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 (OECD, 2017), South Africa should without further delay request via bilateral negotiations the inclusion of the required provision.</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>
[B.2]	-	-
[B.3]	-	-
[B.4]	-	-
[B.5]	-	-
[B.6]	-	-
[B.7]	<p>Nine out of 78 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017). 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. With respect to these treaties: <ul style="list-style-type: none"> - For one, South Africa will revise its list of notifications and reservations to the Multilateral Instrument with a view to have it modified by the Multilateral Instrument. - For two, negotiations are pending. - For two, no actions have been taken nor are any actions planned to be taken. 	<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 (OECD, 2017) 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>As one of the five treaties that do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) and that will be modified by the Multilateral Instrument is a former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, South Africa should ensure that, once it enters into negotiations with these treaty partners, it includes the required provision.</p> <p>For the remaining four treaties that do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) and will not be modified via the Multilateral Instrument, South Africa should:</p> <ul style="list-style-type: none"> • for one treaty, continue to work in accordance with its plan to include the required provision via the Multilateral Instrument • for two treaties, continue (the initiation of) negotiations with the treaty partner with a view to including the required provision • for one treaty, without further delay request via bilateral negotiations the inclusion of the required provision.

	Areas for improvement	Recommendations
[B.8]	-	-
[B.9]	-	-
[B.10]	-	-
Part C: Resolution of MAP cases		
[C.1]	<p>Four out of 78 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017). Of these four treaties:</p> <ul style="list-style-type: none"> • One is expected to be modified by the Multilateral Instrument to include the required provision. • Three will not be modified by that instrument to include the required provision. With respect to these treaties: <ul style="list-style-type: none"> - For two, negotiations are pending. - For one, no actions have been taken nor are any actions planned to be taken. 	<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 (OECD, 2017) in the one treaty that currently does not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force for the treaty concerned.</p> <p>As one of the remaining three treaties that do not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017) and that will be modified by the Multilateral Instrument is a former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, South Africa should ensure that, once it enters into negotiations with these treaty partners, it includes the required provision.</p> <p>For the remaining two treaties that do not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017) and will not be modified via the Multilateral Instrument, South Africa should continue negotiations with the treaty partner with a view to including the required provision</p>
[C.2]	-	-
[C.3]	<p>MAP cases were closed in 26.50 months on average, which is above the 24-month average (which is the pursued average for resolving MAP cases received on or after 1 January 2016). This particularly concerns attribution/allocation cases, as the average time needed for such cases is 35.40 months while for other cases the average is within the pursued 24-month average (23.77 months). Although there was an increase in the cases closed in 2018 and 2019 as compared to 2016-17, South Africa's MAP inventory has still overall increased and the average time taken to resolve cases in 2018 and 2019 increased as compared to 2016-17. Further, peer input suggests that there may be delays in receiving position papers from South Africa. Therefore, there is a risk that post-2015 cases are not resolved within the average timeframe of 24 months.</p>	<p>While South Africa has made efforts to resolve MAP cases, resulting in more cases being closed and a reduction of its inventory in 2018 and 2019, further actions should be taken to ensure a timely resolution of MAP cases, which concerns both attribution/allocation cases and other cases. Accordingly, South Africa should devote additional resources to its competent authority to handle pending and future MAP cases and to be able to cope with the increase in its MAP inventory in general, so as to be able to resolve current pending and future MAP cases in a timely, efficient and effective manner. Where necessary, additional resources should be added to the competent authority, in particular to submit position papers to treaty partners and to respond to position papers issued by treaty partners in a timely manner.</p>
[C.4]	-	-
[C.5]	-	-
[C.6]	-	-

	Areas for improvement	Recommendations
Part D: Implementation of MAP agreements		
[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 (OECD, 2017). 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 (OECD, 2017) in South Africa'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]	-	-
[D.3]	<p>19 out of 78 tax treaties contain neither a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) 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"> • Nine are expected to be modified by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017). • Ten will not be modified by that instrument to include the required provision. With respect to these treaties: <ul style="list-style-type: none"> - For two, South Africa will revise its list of notifications and reservations to the Multilateral Instrument with a view to have it modified by the Multilateral Instrument. - For one, the relevant treaty partner has been or will be contacted by South Africa with a view to have the treaty modified by the Multilateral Instrument. - For two, negotiations are envisaged, scheduled or pending. - For four, no actions have been taken nor are any actions planned to be taken. 	<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 (OECD, 2017) in those nine 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>As one of the ten treaties that do not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) and that will be modified by the Multilateral Instrument is a former treaty with the United Kingdom that South Africa continues to apply to Grenada and Sierra Leone, South Africa should ensure that, once it enters into negotiations with these treaty partners, it includes the required provision or be willing to accept the inclusion of both alternative provisions.</p> <p>For the remaining nine treaties that do not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) and will not be modified via the Multilateral Instrument, South Africa should:</p> <ul style="list-style-type: none"> • for two treaties, continue to work in accordance with its plan to include the required provision via the Multilateral Instrument • for one treaty, continue to work in accordance with its plan to strive to include the required provision via the Multilateral Instrument and where this is not possible, request via bilateral negotiations the inclusion of the required provision or be willing to accept the inclusion of both alternative provisions • for two treaties, continue (the initiation of) negotiations with the treaty partner with a view to including the required provision or be willing to accept the inclusion of both alternative provisions • for four treaties, without further delay request via bilateral negotiations the inclusion of the required provision or be willing to accept the inclusion of both alternative provisions.

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 3		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? (Note 1)		Inclusion Art. 9(2) (Note 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?		Inclusion Art. 25(2) first sentence? (Note 3)		Inclusion Art. 25(2) second sentence? (Note 4)		Inclusion Art. 25(3) first sentence? (Note 5)		Inclusion Art. 25(3) second sentence? (Note 6)		Inclusion arbitration provision?		
	Y = yes N = signed pending ratification	E = yes, either CAs O = yes, only one CA N = No	Y = yes i = no, no such provision ii = no, different period iii = no, starting point for computing the 3 year period is different iv = no, other reasons	if ii, specify period	Y = yes i = no, but access will be given to TP cases ii = no and access will not be given to TP cases	Y = yes i = no and such cases will be accepted for MAP ii = no but such cases will not be accepted for MAP	Y = yes 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 N = no	Y = yes N = no	Y = yes N = no	Y = yes N = no	Y = yes N = no	Y = yes N = no	Y = yes N = no	Y = yes N = no	Y = yes N = no	Y = yes N = no	
Algeria	Y	O	Y	N/A	i	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Australia	Y	N	Y	N/A	Y	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Austria	Y	O	Y	N/A	Y	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Belarus	Y	O	Y	N/A	i	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
Belgium	Y	O	Y	N/A	i*	i	Y	N*	Y	Y	Y	Y	Y	Y	N*	Y	N*	Y	N
Botswana	Y	O	Y	N/A	i	i	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N

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
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11
Brazil	Y	O	iv	Domestic law	i	Y	N	Y	N	N
Bulgaria	Y	O	Y	N/A	i**	Y	Y	Y	Y	N
Cameroon	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Canada	Y	O	ii*	2-years	Y	Y	iii	Y	Y	Y
Chile	Y	O	Y	N/A	Y	Y	N	Y	N*	N
China	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Chinese Taipei	Y	O	Y	N/A	Y	Y	N	Y	Y	N
Democratic Republic of the Congo	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Croatia	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Cyprus (1)	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Czech Republic	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Denmark	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Egypt	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Eswatini	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Ethiopia	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Finland	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
France	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Germany	N	O	Y	N/A	i	Y	Y	Y	Y	N
Ghana	Y	O	Y	N/A	i	Y	Y	Y	Y	N

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			C.1	D.3	A.1	B.7		
	Column 3	Column 4			Column 7	Column 8	Column 9	Column 10		Column 11
Greece	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Grenada	Y	N	i	No MAP article	ii	N	N	N	N	N
Hong Kong	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Hungary	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
India	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Indonesia	Y	O	ii*	2-years	i*	Y	N	Y	Y	N
Iran	Y	O	ii	2-years	i	Y	Y	Y	Y	N
Ireland	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Israel	Y	O	i	N/A	i**	Y	N*	N	Y	N
Italy	Y	N	Y	N/A	i*	Y	N*	Y	Y	N
Japan	Y	O	Y	N/A	i*	Y	Y	Y	Y	N
Kenya	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Korea	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Kuwait	Y	O	Y	N/A	i*	Y	Y	Y	Y	N
Lesotho	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Luxembourg	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Malawi	Y	N	i	No MAP article	ii	N	N	N	N	N
Malaysia	Y	O	Y	N/A	i**	Y	Y	Y	Y	N

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
Column 1	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? (Note 1)	Inclusion Art. 9(2) (Note 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?	Inclusion Art. 25(2) first sentence? (Note 3)	Inclusion Art. 25(2) second sentence? (Note 4)	Inclusion Art. 25(3) first sentence? (Note 5)	Inclusion Art. 25(3) second sentence? (Note 6)	Inclusion arbitration provision?
Malta	Y	O	Y	Y	i	Y	Y	Y	Y	N
Mauritius	Y	O	Y	Y	i	Y	Y	Y	Y	N
Mexico	Y	O	Y	N/A	i	N**	N	Y	Y	N
Mozambique	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Namibia	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Netherlands	Y	O	Y	N/A	i*	Y	Y	Y	Y	Y
New Zealand	Y	O	Y	N/A	i**	Y	Y	Y	N*	N
Nigeria	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Norway	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Oman	Y	O	Y	N/A	i	Y	Y	Y	N	N
Pakistan	Y	O	ii*	2-years	i	Y	Y	Y	Y	N
Poland	Y	N	Y	N/A	i	Y	N*	Y	Y	N
Portugal	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Qatar	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Romania	Y	O	Y	N/A	i	Y	N*	Y	Y	N
Russia	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Rwanda	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Saudi Arabia	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Seychelles	Y	O	ii*	2-years	i	Y	ii*	Y	Y	N
Sierra Leone	Y	N	i	No MAP article	ii	N	N	N	N	N

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 1	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? (Note 1)	Inclusion Art. 9(2) (Note 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?	Inclusion Art. 25(2) first sentence? (Note 3)	Inclusion Art. 25(2) second sentence? (Note 4)	Inclusion Art. 25(3) first sentence? (Note 5)	Inclusion Art. 25(3) second sentence? (Note 6)	Inclusion arbitration provision?
		If yes, submission to either competent authority? (new Art. 25(1), first sentence)	If no, please state reasons		If no, will your CA accept a taxpayer's request for MAP in relation to such cases?		If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4)			
Singapore	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Slovak Republic	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Spain	Y	O	Y	N/A	i**	Y	Y	Y	Y	N
Sweden	Y	O	Y	N/A	Y	Y	Y	Y	Y	N
Switzerland	Y	O	Y	N/A	Y	Y	ii	Y	Y	Y
Tanzania	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Thailand	Y	O	Y	N/A	i	Y	N	Y	Y	N
Tunisia	Y	O	Y	N/A	i*	Y	N*	Y	Y	N
Turkey	Y	O	iv**	Domestic law	i	Y	N*	Y	Y	N
Uganda	Y	O	Y	N/A	i	Y	Y	Y	Y	N
Ukraine	Y	O	Y	N/A	i	Y	Y	Y	N*	N
United Arab Emirates	Y	O	Y	N/A	i**	Y	Y	Y	Y	N
United Kingdom	Y	O	Y	N/A	i	Y	N*	Y	Y	N
United States	Y	E	Y	N/A	i	Y	Y	Y	Y	N
Zambia	Y	N	i	No MAP article	ii	N	N	N	N	N
Zimbabwe	Y	O	Y	N/A	i	Y	Y	Y	Y	N

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 was not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty has been 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 Reporting for the 2016, 2017, 2018 and 2019 Reporting Periods (1 January 2016 to 31 December 2019) for pre-2016 cases

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

Notes: The inventory of pre-2016 attribution/allocation cases has been increased by one case as South Africa either missed reporting the case or was informed afterwards by its treaty partners about the case.

2017 MAP Statistics													
Category of cases	No. of pre-2016 cases in MAP inventory on 1 January 2017	Number of pre-2016 cases closed during the reporting period by outcome										No. of pre-2016 cases remaining in on MAP inventory on 31 December 2017	Average time taken (in months) for closing pre-2016 cases during the reporting period
		Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty	Agreement that there is no taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14
Attribution/Allocation	11	0	0	0	0	0	0	0	0	0	0	11	n.a.
Others	9	2	0	0	0	0	1	0	1	0	0	5	34
Total	20	2	0	0	0	0	1	0	1	0	0	16	34

2018 MAP Statistics													
Category of cases	No. of pre-2016 cases in MAP inventory on 1 January 2018	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 2018	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		
Attribution/Allocation	11	0	0	0	0	0	2	0	0	0	1	8	49
Others	5	0	0	0	0	0	2	0	0	0	0	3	35
Total	16	0	0	0	0	0	4	0	0	0	1	11	43.4

2019 MAP Statistics													
Category of cases	No. of pre-2016 cases in MAP inventory on 1 January 2019	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 2019	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		
Attribution/Allocation	8	0	0	0	0	0	0	0	0	0	2	6	41.42
Others	3	0	0	0	0	0	0	0	0	0	2	1	80.14
Total	11	0	0	0	0	0	0	0	0	0	4	7	60.78

Annex C

MAP Statistics Reporting for the 2016, 2017, 2018 and 2019 Reporting Periods (1 January 2016 to 31 December 2019) for post-2015 cases

2016 MAP Statistics														
Category of cases	No. of post-2015 cases in MAP inventory on 1 January 2016	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	
		Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12			Column 13
		No. of post-2015 cases started 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		
Attribution/Allocation	0	2	0	0	0	0	0	0	0	0	0	0	2	n.a.
Others	0	6	0	0	0	0	1	0	0	0	0	0	5	6.25
Total	0	8	0	0	0	0	1	0	0	0	0	0	7	6.25

2017 MAP Statistics														
Category of cases	No. of post-2015 cases in MAP inventory on 1 January 2017	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	
		Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12			Column 13
		No. of post-2015 cases started 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		
Attribution/Allocation	2	1	0	0	0	1	0	0	0	0	0	0	2	17.29
Others	5	12	1	0	0	1	0	1	0	0	0	0	14	5.97
Total	7	13	1	0	0	2	0	1	0	0	0	0	16	8.8

Note: The inventory of post-2015 other cases has been increased by three cases as South Africa reported cases with non-Inclusive Framework members only from 2018.

2018 MAP Statistics														
Category of cases	No. of post-2015 cases in MAP inventory on 1 January 2018	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 2018	Average time taken (in months) for closing post-2015 cases during the reporting period		
			Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11			Column 12	Column 13
	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
Attribution/Allocation	2	1	0	0	0	0	0	1	0	0	0	0	2	15.42
Others	14	6	0	0	1	1	0	1	0	1	1	0	15	18.86
Total	16	7	0	0	1	1	0	2	0	1	1	0	17	18.29

2019 MAP Statistics														
Category of cases	No. of post-2015 cases in MAP inventory on 1 January 2019	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 2019	Average time taken (in months) for closing post-2015 cases during the reporting period		
			Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11			Column 12	Column 13
	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
Attribution/Allocation	2	4	0	0	0	1	0	0	0	0	0	0	5	20.68
Others	15	7	1	2	1	0	1	2	0	0	2	0	13	14.8
Total	17	11	1	2	1	1	1	2	0	0	2	0	18	15.39

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
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 2019
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

OECD/G20 Base Erosion and Profit Shifting Project

Making Dispute Resolution More Effective – MAP Peer Review Report, South Africa (Stage 2)

INCLUSIVE FRAMEWORK ON BEPS: ACTION 14

Under Action 14, countries have committed to implement a minimum standard to strengthen the effectiveness and efficiency of the mutual agreement procedure (MAP). The MAP is included in Article 25 of the OECD Model Tax Convention and commits countries to endeavour to resolve disputes related to the interpretation and application of tax treaties. The Action 14 Minimum Standard has been translated into specific terms of reference and a methodology for the peer review and monitoring process. The peer review process is conducted in two stages. Stage 1 assesses countries against the terms of reference of the minimum standard according to an agreed schedule of review. Stage 2 focuses on monitoring the follow-up of any recommendations resulting from jurisdictions' stage 1 peer review report. This report reflects the outcome of the stage 2 peer monitoring of the implementation of the Action 14 Minimum Standard by South Africa.



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