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**January 16, 2015**

**Ref: DISCUSSION DRAFT: OECD BEPS ACTION 14 – “MAKE DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE”**

Dear Marlies,

Thank you for the opportunity to comment on the Discussion Draft: OECD BEPS Action 14 – *Make Dispute Resolution Mechanisms More Effective*.

This Action Item is a critical factor in the success of the entire BEPS program. This is not because it deals itself with base erosion and profit shifting, but because it provides the necessary predicate for those issues to be successfully dealt with.

For the BEPS project to succeed, two things must happen. First, countries must be willing to truly support the project. Second, business must be willing to fully accept its outcomes.

- In relation to countries, there is going to be an unwillingness to participate in certain of the actions if the BEPS recommendations are viewed as giving a strategic advantage to another country, either in terms of enhanced revenue seen as taken from the first country, or in terms of the second country favouring its own taxpayers. Most observers have acknowledged that the BEPS project is likely to result in significantly increased instances of conflicting tax claims by countries. Therefore, a robust, and widely supported dispute resolution mechanism aimed at ensuring a fair and predictable application of the newly agreed standards will give countries confidence that their tax and revenue base can be protected from the unilateral actions of other countries, and, following from that, the confidence to enter into commonly agreed recommendations across the range of BEPS items. (This is even more important now, because the very welcome inclusion of many new countries in the consensus-forming process nevertheless means that the participants lack experience with one another’s commitment to applying mutually agreed standards.)
- In relation to business, success on this dispute resolution action item is also crucial. The concerns that we have raised before about the risks of double taxation discouraging cross-border trade and investment remain crucial – and these are equally important for countries themselves, which are anxious for foreign investment and the on-going success of their businesses. But there is a different, and perhaps more basic reason, why this action item must succeed. The BEPS outcomes will likely raise taxes on many businesses, and impose significant new reporting and compliance burdens on most. That is understood. However,

if the process also gives rise to a significant increase in cases of double taxation, the BEPS plan may fail for the simple reason that, if businesses do not feel they are being treated fairly, they will seek new ways to mitigate that double taxation. Put slightly differently, however many “hard law” aspects of BEPS are enacted, if the trust between businesses and governments (which is at the heart of “cooperative compliance”) breaks down, then we could find ourselves back in the adversarial situation that cooperative compliance sought to end – which will be to the substantial disadvantage of both sets of parties. Only if businesses feel that the new rules that will significantly increase burdens are balanced with an effective guarantee that their revenue will not be caught up in costly, lengthy, and potentially unresolvable disputes between states, will they be able to fully concur in the project’s conclusions.

I think I would be failing in my institutional BIAC obligation to the OECD if I did not make clear how serious a weak outcome on Action 14 could be, and the depth of the current concern.

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Our comments are relatively brief on specific issues, although we support the more detailed comments that many of our members have sent in, as well as ICC’s ongoing work in the arbitration area. We have, however, surveyed our members on their actual experiences with MAP in their countries. We attach the results of that survey to our comments, and would be happy to answer more questions on these.

I did, nevertheless, want to pick out one or two particularly important points from our comments:

- As this is primarily an issue of tax administration, and as tax authorities have the greater interest in maintaining cooperative compliance models, we believe that the FTA and, in particular, the MAP Forum, should be central, rather than parallel to this process. The FTA can make a real difference here.
- A “political commitment” is not enough. There have to be robust mechanisms and processes actually brought into effect as a direct outcome of the BEPS process.
- Binding arbitration is a critical part of any solution. We understand some countries have genuine concerns, but that is not a reason for binding arbitration not to be the general standard for countries that are fully committed to avoiding double taxation.
- The MAP process must be properly resourced and suitably positioned in the structure of a tax authority.

Again, thank you for the opportunity to comment and we look forward to working with you on this critical item.

Sincerely,



Will Morris, Chair  
BIAC Tax Committee

## BIAC Consensus Comments on Action 14

1. BIAC welcomes the OECD's work to "make dispute resolution mechanisms more effective", but we are very disappointed and concerned about the proposals made in the discussion draft. We firmly believe that adequate and effective dispute resolution mechanisms are crucial for cross border trade, which increasingly suffers from double taxation. A comprehensive framework of legal remedies, including domestic measures as well as Mutual Agreement Procedures (MAP) and Arbitration, should provide for more legal certainty. It is important that these mechanisms are robust and well defined, and effectively implemented. They should work in a transparent, predictable and expeditious manner and be accessible for taxpayers. BIAC believes that a "political commitment" is not enough to achieve success under this action. We invite the G20/OECD countries and all other members of the BEPS process to commit themselves more strongly to those principles, starting by replacing the "could" recommendations with firm "should" commitments, and by endorsing and adopting mandatory binding arbitration.
2. To assist with the effective delivery of firmer commitments, we strongly believe that the Forum of Tax Administrators, and more specifically, the MAP forum, should be central to the process. Success will only be achieved if the administrative aspects of the proposals are considered. Only through the use of such forums can we be sure that the MAP processes will be sufficiently resourced to ensure that disputes can be efficiently resolved.
3. Several of the BEPS Action Items are expected to increase disputes and associated double taxation for cross border business. The business community expects proposals under Action 14 to mitigate the risk of double taxation to the greatest extent possible.
4. Therefore, we ask all countries involved in the BEPS process to recognize that adopting a binding and universal arbitration framework should be an integral and inseparable part of the BEPS deliverables. If the G20/OECD does not succeed in establishing such a framework, further consideration must be given to how to mitigate the risk of double taxation caused by the OECD's proposals under the other BEPS Actions. In such a case, we believe that this should extend to a reconsideration of proposals where the widespread risk of double taxation appears to be unavoidable.
5. BIAC is convinced that having the ability to resolve disputes through arbitration is the most effective remedy to address the risk of double taxation. We believe that arbitration also benefits governments, including developing countries, in that it promotes a more impartial view towards disputed issues.
6. We are, therefore, surprised and very concerned that the aim of implementing mandatory arbitration is not proposed as a viable option under Action 14. At the same time, we note that the specific measures outlined in the discussion draft are only intended to establish a non-binding minimum standard to which participating countries may commit. Bearing this in mind, we do welcome the comment in para 7 of the discussion draft that the final proposals under Action 14 will also include more binding additional measures, such as, for example, MAP arbitration. However, we note again in this regard that the discussion draft only suggests that countries "*may also wish to commit to adopt [the additional measures] in order to address obstacles to an effective MAP in a more comprehensive way.*" Firmer commitments will be required for countries to adopt these additional standards.

7. Outside the world of taxation, much experience has been gained with alternative dispute resolution. We believe that the OECD should make use of the lessons learned through the use of these other dispute resolution mechanisms, by adapting them to reflect different needs of tax disputes, and by applying those lessons in a tax context. Many of the perceived downsides of arbitration will fade as arbitration proliferates. For example, as arbitration expands, the quality of arbitrators would improve. Advantages of arbitration, such as to depoliticize the intergovernmental process of avoiding double taxation, would also be achieved.
8. Preferably, all parties should have access to arbitration in addition to MAP. Countries that have committed themselves to arbitration already should give good examples of practically workable and useful mechanisms for all other countries. To have an effective two-step approach, MAP should, as mentioned above, be a transparent, predictable and expeditious mechanism with an appropriate role for the taxpayer.
9. The OECD discussion draft states that full implementation of MAP treaty obligations in good faith shall be ensured. To that end, we recommend that tax administrations should be required to publish a standardized annual report that outlines several criteria relevant to measuring progress in meeting the objectives. Transparency in this area would certainly help to encourage countries to dedicate sufficient resources, and to follow appropriate policies in their MAP efforts.
10. The criteria in such a report should include, in addition to the MAP statistics items OECD countries have already committed to report annually, the number of officials dedicated to the competent authority (CA) division, a description of performance evaluation criteria for CA officials, the number of cases submitted to the CA in the past year, the number of cases refused by the CA (through joint country CA consideration, as well as unilaterally), high, low and average times to CA resolution, number of CA waivers sought (and obtained) in the course of local tax audits, and a listing of best practices from MEMAP used in the local country's CA process.
11. We also believe that a great achievement would be to integrate the Action 14 MAP process commitments into the "multilateral instrument" (BEPS Action 15). This would expedite the adoption of best practices, and would empower countries to resolve disputes where bilateral tax treaty relationships may not exist. Another useful approach would be to improve the MAP timelines, for example, by committing to binding, compulsory arbitration after a 12 month period with no breakthrough.
12. In addition to these points, we are pleased to provide you with the attached annex that outlines the results of a BIAC MAP survey conducted in fall 2014. The annex highlights best practice; obstacles encountered with the MAP process, as well as provide a wish list for improving MAP processes.

## Annex 1

### BIAC MAP Questionnaire

#### Summary of BIAC members' responses

In October 2014, in advance of the OECD Discussion Draft on BEPS Action 14: Making Dispute Resolution Mechanisms More Effective, BIAC released a questionnaire asking its members for feedback on their first-hand experiences with MAP proceedings. The BIAC survey result provides useful and insightful information on issues encountered by MNEs with the MAP process and gives examples of where the MAP process does and does not work as intended. We have provided below a summary of the written responses received from the international business community in response to the BIAC MAP questionnaire (and referenced to the OECD Discussion Draft on BEPS Action 14: Dispute Resolution).

#### Question 1:

Please give examples of where you have experienced “best practices” with the MAP process, along with a description of these practices.

“Best Practices” experienced in the MAP process (and referenced to OECD MEMAP’s best practices)	Description of these best practices	Referenced to the OECD Discussion Draft on BEPS Action 14: Dispute Resolution
<b>Mandatory, binding arbitration</b>	<ul style="list-style-type: none"> <li>• Existence of mandatory, arbitration clauses in treaties helps create an incentive for competent authorities to settle the case.</li> <li>• Binding arbitration provides taxpayers with a mechanism to obtain resolutions and certainty in tax disputes expeditiously.</li> <li>• Mandatory arbitration is available for cases that have gone on for 2 years or more without resolution.</li> <li>• Taxpayers can choose to reject the arbitration board recommendations and pursue their challenge of the issues in the domestic courts.</li> </ul>	OECD Discussion Draft, section 4T: <i>Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases</i>
<b>Guidance for assessing and using MAP</b> - <b>Transparency and simplicity of procedures for accessing and</b>	<ul style="list-style-type: none"> <li>• Guidelines issued to provide guidance and clarification regarding application of MAP process and remedies available to taxpayers within the framework.</li> </ul>	OECD Discussion Draft, section 3J: <i>Complexity and lack of transparency of the procedures to access and use the MAP</i>

<p><b>using the MAP</b> (MEMAP Best Practice No. 4)</p>		
<p><b>Cooperation and transparency with taxpayers</b></p> <ul style="list-style-type: none"> <li>- <b>Taxpayer presentations to competent authorities</b> (MEMAP Best Practice No 13)</li> <li>- <b>Cooperation and transparency</b> (MEMAP Best Practice No 14)</li> <li>- <b>Decision summaries</b> (MEMAP Best Practice No 17)</li> </ul>	<ul style="list-style-type: none"> <li>• Well-developed consistent submission from the taxpayer to both countries competent authorities is crucial.</li> <li>• Anecdotal examples shared by BIAC members: <ul style="list-style-type: none"> <li>- Communication with taxpayer: CA gave solid feedback to taxpayer regarding possible changes in positions.</li> <li>- Open-minded and willing to thoughtfully consider the taxpayer’s position in developing positions.</li> <li>- Cooperation with taxpayer: Both taxpayer and CAs were well-prepared in advance of the MAP process, which allowed a conclusion to be agreed in a short time-frame.</li> </ul> </li> <li>• Regularly scheduled meetings, both between the taxpayers and the governments, and between governments helpful.</li> </ul>	<p>OECD Discussion Draft, section 4R: <i>Lack of a principled approach to the resolution of MAP cases</i>; and section 4S: <i>Lack of co-operation, transparency or good competent authority working relationships</i></p>
<p><b>Interaction between Competent Authorities</b></p> <ul style="list-style-type: none"> <li>- <b>Face-to-face meetings between competent authorities</b> (MEMAP Best Practice No 15)</li> <li>- <b>Bilateral process improvements</b> (MEMAP Best Practice No 16)</li> <li>- <b>Recommendation for MAP cases beyond two years</b> (MEMAP Best Practice No 18)</li> </ul>	<ul style="list-style-type: none"> <li>• MAP works best where there is reciprocity of trade. Trust between the treaty partners is critical.</li> <li>• Anecdotal examples shared by BIAC members: <ul style="list-style-type: none"> <li>- Proactive steps undertaken by CAs to try and narrow the differences in their opinions, resulting in more efficient processes.</li> </ul> </li> <li>• Regularly scheduled meetings, both between the taxpayers and the governments, and between governments helpful.</li> </ul>	<p>OECD Discussion Draft, section 4R: <i>Lack of a principled approach to the resolution of MAP cases</i>; and section 4S: <i>Lack of co-operation, transparency or good competent authority working relationships</i></p>
<p><b>Suspension of collections during MAP</b> (MEMAP Best Practice No 21)</p>	<ul style="list-style-type: none"> <li>• Suspension of collection during MAP proceedings.</li> <li>• Partial relief may be provided by some other countries but it tends to be limited.</li> </ul>	<p>OECD Discussion Draft, section 3O: <i>Issues connected with the collection of taxes</i></p>
<p><b>Roll-forward application of MAP treatment</b></p>	<ul style="list-style-type: none"> <li>• Taxpayers may request for assistance for subsequent tax years on the same issue as long as the underlying facts and circumstances are not</li> </ul>	<p>OECD Discussion Draft, section 2H: <i>Lack of APA programmes</i></p>

<ul style="list-style-type: none"> <li>- <b>Implementing and Promoting ACAP and Bilateral APA Programs</b> (MEMAP Best Practice No 25)</li> </ul>	<p>materially different. This allows taxpayers to gain certainty on issues for all open tax years for which tax returns have been filed.</p> <ul style="list-style-type: none"> <li>• MAP resolutions have been transferred into APA discussions further enhancing the value of the MAP process.</li> </ul>	
<p><b>Multilateral MAP proceedings</b></p>	<ul style="list-style-type: none"> <li>• Openness to multilateral MAP proceedings</li> </ul>	<p>OECD Discussion Draft, section 4U: <i>Issues related to multilateral MAPs and APAs</i></p>

### Question 2:

Please give examples of where you have experienced obstacles with the MAP process, along with details of what went wrong (or could have been better).

<b>Obstacles encountered with the MAP process</b> (and referenced to OECD MEMAP's best practices)	<b>Description of these best practices</b>	<b>Referenced to the OECD Discussion Draft on BEPS Action 14: Dispute Resolution</b>
<p><b>Limited use of CA function authority to relieve double taxation</b></p> <ul style="list-style-type: none"> <li>- <b>Robust use of Article 25(3) power to relieve double taxation</b> (MEMAP Best Practice No. 2)</li> </ul>	<ul style="list-style-type: none"> <li>• Limited commitment to the avoidance of double taxation.</li> <li>• Competent authorities demonstrate little willingness to compromise, undertake proactive negotiations and discussions to reach a mutually agreed outcome.</li> <li>• Anecdotal examples shared by BIAC members:               <ul style="list-style-type: none"> <li>- CA is not interested in considering taxpayer's position much less those of other governments involved forcing taxpayers to seek resolution in the domestic courts.</li> </ul> </li> <li>• No compulsory participation of countries which impedes the starting of the MAP process.</li> <li>• No time limit to MAP procedure if there is no arbitration clause specified in the treaty.</li> <li>• No compulsory result if there is no arbitration clause specified in the treaty. Cases may conclude without reaching an agreement.</li> </ul>	<p>OECD Discussion Draft, section 1A: <i>Absence of an obligation to resolve MAP cases presented under Article 25(1)</i>; and section 2F: <i>Insufficient use of paragraph 3 of Article 25</i></p>
<p><b>Exclusion from MAP process</b></p>	<ul style="list-style-type: none"> <li>• Adjustments are proposed by CA after expiration of a time limitation for</li> </ul>	<p>OECD Discussion Draft, section 3L: <i>Right to access</i></p>

<ul style="list-style-type: none"> <li>- <b>Avoiding exclusion from MAP relief due to late adjustments or late notification</b> (MEMAP Best Practice No 10)</li> <li>- <b>Consideration of MAP assistance for cases described as “tax avoidance”</b> (MEMAP Best Practice No 11)</li> <li>- <b>Countries eliminate or minimize “exceptions” to MAP</b> (MEMAP Best Practice No 12)</li> </ul>	<p>notifying or filing a MAP request specified in the treaty.</p> <ul style="list-style-type: none"> <li>• Unilateral rejection of cases based on avoidance arguments with allegations of law abuse or administrative penalties used to justify a denial to access MAP.</li> <li>• Countries reserve the right to exclude from MAP consideration any case in which auditors assert the existence of “tax avoidance” even on a secondary basis without legal determination.</li> <li>• Anecdotal examples shared by BIAC members: <ul style="list-style-type: none"> <li>- Bilateral APA application unilaterally terminated two years into the process with CA citing BEPS as the reason. No reason was provided to the treaty partner, and no attempt to justify the decision to the taxpayer.</li> <li>- Repeated requests over a 3 year period for negotiations with a treaty partner on a transfer pricing case was not acknowledged by the competent authority.</li> <li>- Transfer pricing adjustments are recharacterized as “non-deductibles” under domestic law in an effort to deny the taxpayer access to MAP.</li> <li>- CA excludes selected issues from MAP consideration without agreed limitation and notice in treaty.</li> </ul> </li> </ul>	<p><i>MAP may be unclear where domestic or treaty-based anti-abuse rules have been applied</i></p>
<p><b>Cooperation and transparency with taxpayers</b></p> <ul style="list-style-type: none"> <li>- <b>Taxpayer presentations to competent authorities</b> (MEMAP Best Practice No 13)</li> <li>- <b>Cooperation and transparency</b> (MEMAP Best Practice No 14)</li> <li>- <b>Decision summaries</b> (MEMAP Best Practice No 17)</li> </ul>	<ul style="list-style-type: none"> <li>• Limited taxpayer’s involvement in the MAP procedure.</li> <li>• Lack of transparency and communication between CAs and taxpayers makes it difficult for taxpayers to assess the status of the case during the course of the proceedings.</li> <li>• The lack of information and regular updates from tax authorities once receipt of the documentation set has been acknowledged can be frustrating for business.</li> <li>• Taxpayers may not have the opportunity to meet with the CAs to discuss the case. Given the magnitude of the numbers involved, a meeting can, at times, be helpful to ensure that both CAs understand the facts, and</li> </ul>	<p>OECD Discussion Draft, section 4R: <i>Lack of a principled approach to the resolution of MAP cases</i>; and section 4S: <i>Lack of co-operation, transparency or good competent authority working relationships</i></p>

	the reasons for the claim for relief from double taxation.	
<p><b>Interaction between Competent Authorities</b></p> <ul style="list-style-type: none"> <li>- <b>Face-to-face meetings between competent authorities</b> (MEMAP Best Practice No 15)</li> <li>- <b>Bilateral process improvements</b> (MEMAP Best Practice No 16)</li> <li>- <b>Recommendation for MAP cases beyond two years</b> (MEMAP Best Practice No 18)</li> </ul>	<ul style="list-style-type: none"> <li>• Lack of preparation in advance of the MAP process. This makes it difficult for both CAs to have any effective discussions or negotiations during their meetings and creates further delay.</li> <li>• Unprincipled approach to the resolution of cases.</li> <li>• Anecdotal examples shared by BIAC members: <ul style="list-style-type: none"> <li>- structuring agreements based on specified percentages of revenue;</li> <li>- insisting on the right to tax at least 50 percent of the income at issue;</li> <li>- taking a position that taxpayers have a permanent establishment in their jurisdiction solely because it has customers there or has registered for VAT purposes; and</li> <li>- unilateral view that absent a contract, no transaction should be deemed to have been entered into regardless of economic realities and clear need for remediation of an error or unforeseen extraordinary event.</li> </ul> </li> <li>• Length of MAP procedure is also a source of complaint. The MAP process is too long a procedure as compared to the rhythm of business life. MAP procedures takes at least 4 years on average for resolution. Some countries have also allowed MAP cases to remain pending for 8 to 10 years with no obvious prospect of resolution in the near term.</li> <li>• Anecdotal examples shared by BIAC members: <ul style="list-style-type: none"> <li>- CA took more than a year to begin a dialogue with its treaty partner;</li> <li>- Lack of clear timetable with MAP process likely to extend beyond 2 years; and</li> <li>- CA failed to reach an agreement within a reasonable time period.</li> </ul> </li> </ul>	<p>OECD Discussion Draft, section 4R: <i>Lack of a principled approach to the resolution of MAP cases</i>; and section 4S: <i>Lack of co-operation, transparency or good competent authority working relationships</i></p>
<p><b>MAP access blocked in audit settlements</b></p> <ul style="list-style-type: none"> <li>- <b>Avoid blocking MAP access via audit settlements or</b></li> </ul>	<ul style="list-style-type: none"> <li>• Competent authority offers a lower assessment to settle a case if MAP is waived, including in some cases contrary to stated policy.</li> </ul>	<p>OECD Discussion Draft, section 2G: <i>Audit settlements as an obstacle to MAP process</i></p>

<p><b>unilateral APAs</b> (MEMAP Best Practice No 19)</p>		
<p><b>Interest relief</b> (MEMAP Best Practice No 20)</p>	<ul style="list-style-type: none"> <li>• Failure to address interest relief as part of the MAP resolution.</li> </ul>	<p>OECD Discussion Draft, section 4V: <i>Issues related to consideration of interest and penalties in the mutual agreement procedure</i></p>
<p><b>“Pay to play” requirements to access MAP</b></p> <ul style="list-style-type: none"> <li>- <b>Suspension of collections during MAP</b> (MEMAP Best Practice No 21)</li> </ul>	<ul style="list-style-type: none"> <li>• “Pay to play” requirements to access MAP. Taxpayers are often required to pay all taxes owing in full to both tax jurisdictions until the matter is resolved. This is a significant period of time to have large amounts of cash tied up that could otherwise be used in the taxpayer’s normal business.</li> </ul>	<p>OECD Discussion Draft, section 3O: <i>Issues connected with the collection of taxes</i></p>
<p><b>Objectivity and resources of Competent Authorities</b></p> <ul style="list-style-type: none"> <li>- <b>Independence and resources of a competent authority</b> (MEMAP Best Practice No 23)</li> <li>- <b>Performance indicators for the competent authority and staff</b> (MEMAP Best Practice No 24)</li> </ul>	<ul style="list-style-type: none"> <li>• Lack of qualified MAP staff is a consistent issue.</li> <li>• Lack of impartiality and independence.</li> <li>• Anecdotal examples shared by BIAC members: <ul style="list-style-type: none"> <li>- MAP cases are reviewed by the same economists and audit staff that were involved in the original assessment;</li> <li>- Local tax authorities participate in the MAP process. Conflicts in approach or opinions between the central and local tax authorities’ acts as a barrier in reaching a reasonable outcome for the MAP process;</li> <li>- Competent authorities required to approve all tax adjustments involving international transactions in advance. This gives the competent authorities an investment in the position that makes it extremely hard to negotiate a settlement; and</li> <li>- No clear authority in cross-border matters. Tax authorities do not view the competent authority as a decision maker in the process, fails to communicate with the competent authority and cooperate with the treaty process.</li> </ul> </li> </ul>	<p>OECD Discussion Draft, section 2C: <i>Lack of independence of the competent authority and inappropriate influence of considerations related to the negotiation of possible treaty changes</i>; and section 2D: <i>Lack of resources of a competent authority</i></p>

<p><b>Roll-forward application of MAP treatment</b></p> <ul style="list-style-type: none"> <li>- <b>Implementing and Promoting ACAP and Bilateral APA Programs</b> (MEMAP Best Practice No. 25)</li> </ul>	<ul style="list-style-type: none"> <li>• Limited or no ability, in practice, to roll-forward the application of MAP treatment to future filed years. Taxpayers should be allowed to request for assistance for subsequent tax years on the same issue as long as the underlying facts and circumstances are not materially different. This allows taxpayers to gain certainty on issues for all open tax years for which tax returns have been filed.</li> </ul>	<p>OECD Discussion Draft, section 2H: <i>Lack of APA programmes</i>; and section 4U: <i>Issues related to multilateral MAPs and APAs</i></p>
<p><b>Confidentiality of sensitive information</b></p>	<ul style="list-style-type: none"> <li>• Politicization of MAP process, often with public comments regarding particular cases or threats of press leaks.</li> <li>• In an anecdotal example shared by BIAC members, tax authorities leaked facts of MAP cases to the press.</li> </ul>	<p>OECD Discussion Draft, section 4T: <i>Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases</i> (see option 28: Confidentiality and communications)</p>
<p><b>Multilateral MAP proceedings</b></p>	<ul style="list-style-type: none"> <li>• MAP proceedings are generally limited to cases involving direct transactions with a party in the treaty partner jurisdiction, with no participation in discussions of indirect transactions.</li> <li>• CAs typically refuses to engage in trilateral discussions.</li> </ul>	<p>OECD Discussion Draft, section 4U: <i>Issues related to multilateral MAPs and APAs</i></p>
<p><b>General comments</b></p>	<ul style="list-style-type: none"> <li>• MAP can be a heavy process not suitable for small amounts as it can trigger a tax audit in the other state.</li> </ul>	

**Question 3:**

**How do you think the MAP process could be further improved?**

Suggestions for improvement	Referenced to the OECD Discussion Draft on BEPS Action 14: Dispute Resolution
<p><b>Obligation to reach an agreement</b></p> <ul style="list-style-type: none"> <li>• An agreement should be made mandatory with outcomes that are binding on tax authorities.</li> </ul>	<p>OECD Discussion Draft, section 1A: <i>Absence of an obligation to resolve MAP cases presented under Article 25(1)</i>; and section 2F: <i>Insufficient use of paragraph 3 of Article 25</i></p>
<p><b>Mandatory, binding arbitration</b></p>	<p>OECD Discussion Draft, section 4T: <i>Absence of a</i></p>

<ul style="list-style-type: none"> <li>• Introduction of mandatory arbitration clauses can help to speed up the MAP process and ensure the resolution of double taxation. In cases where the competent authorities cannot come to an agreement, taxpayers should have the ability to initiate process for an independent, binding arbitration.</li> <li>• Arbitration can help developing countries obtain a neutral, external view to the issues disputed.</li> <li>• The form of arbitration should be consistent.</li> <li>• Suggested periods on when arbitration should be enforced ranges from 0 to 2 years - the presumption is that the audit work has been completed and the tax authorities' files are in a state to support the position. Generally, transfer pricing issues have a 7 year statute barred date - adding an additional 4 years or more to the issue means that we are dealing with issues that are potentially 11 years old. Documentation and people are very difficult to obtain as issues get this old.</li> <li>• An international permanent court of arbitration (e.g. the WTO panel) could be established.</li> </ul>	<p><i>mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases</i></p>
<p><b>Peer reviews of MAP</b></p> <ul style="list-style-type: none"> <li>• Conduct peer reviews of country conduct of MAP (measured against OECD MEMAP's best practices) with solicitation of confidential taxpayer and treaty partner inputs.</li> <li>• Monitor exclusions from MAP process: Track how many cases are lodged and refused.</li> <li>• Exchange of best practices between countries and tax administrations</li> <li>• KPIs: tax assessments should be raised based on fundamental transfer pricing principles (instead of tax revenue targets).</li> </ul>	<p>OECD Discussion Draft, section 2E: <i>Performance indicators for the competent authority function and staff</i></p>
<p><b>Guidance for assessing and using MAP</b></p> <ul style="list-style-type: none"> <li>• More guidance on MAP. Develop processes to resolve inter jurisdictional disputes quickly and provide certainty for the conduct of international business.</li> <li>• Document MAP process such that it is clear to all parties (i.e. taxpayers and tax authorities) what can be expected of each, why and when at all stages.</li> <li>• Create a model MAP request document to prepare a single submission. Standardized information requests can help to expedite the MAP process and also assure countries that the same information is being received.</li> <li>• Provide guidance on interaction between MAP and domestic handling of other audit issues.</li> </ul>	<p>OECD Discussion Draft, section 3J: <i>Complexity and lack of transparency of the procedures to access and use the MAP</i>; section 3K: <i>Excessive of unduly onerous documentation requirements</i>; and section 3N: <i>The use of domestic law remedies may have an impact on the use of the MAP</i></p>
<p><b>Cooperation and transparency with taxpayers</b></p> <ul style="list-style-type: none"> <li>• Joint fact-finding. Pre-filing discussions should be encouraged e.g. joint presentations to competent authorities.</li> </ul>	<p>OECD Discussion Draft, section 4R: <i>Lack of a principled approach to the resolution of MAP</i></p>

<p>Taxpayer involvement in joint meetings can help ensure that there is mutual understanding of the facts at an early stage.</p> <ul style="list-style-type: none"> <li>• Focus on transparency and relationship building between taxpayers and tax authorities. Regular updates should be provided to taxpayers involved in MAP proceedings.</li> <li>• Promote consistent case law. Publicize anonymised MAP agreements that could be relied on by other taxpayers or countries.</li> <li>• Countries could also develop a “fast track” MAP for commonly disputed issues thereby alleviating work load and resources, both for taxpayers and tax administrations.</li> <li>• Countries should accept all cases regardless of the value of the transaction, particularly if it pertains to commonly disputed issues.</li> </ul>	<p><i>cases; and section 4S: Lack of co-operation, transparency or good competent authority working relationships</i></p>
<p><b>Interactions between Competent Authorities</b></p> <ul style="list-style-type: none"> <li>• Strict and short time-table with agreed timeframes for discussion.</li> <li>• More frequent meetings between competent authorities.</li> </ul>	<p>OECD Discussion Draft, section 4S: <i>Lack of co-operation, transparency or good competent authority working relationships</i></p>
<p><b>Suspension of collections during MAP</b></p> <ul style="list-style-type: none"> <li>• Taxpayers should not be required to pay any assessment once the MAP process is initiated.</li> <li>• An escrow account could be established with the monies made available to either tax authorities as full and final settlement of the taxes when the dispute is ultimately resolved.</li> </ul>	<p>OECD Discussion Draft, section 3O: <i>Issues connected with the collection of taxes</i></p>
<p><b>Independence and resources of a competent authority</b></p> <ul style="list-style-type: none"> <li>• Adequate staffing for competent authority function both in terms of headcount and skilled resources.</li> <li>• Training for CA staff on the purposes and conduct of the CA function.</li> <li>• CA experts with a clear, consistent understanding of the MAP process should be made available and identified in each territory as decision makers.</li> </ul>	<p>OECD Discussion Draft, section 2C: <i>Lack of independence of a competent authority; and section 2D: Lack of resources of a competent authority</i></p>
<p><b>Roll-forward application of MAP treatment</b></p> <ul style="list-style-type: none"> <li>• Expand “roll-forward” application of agreed MAP treatment to future filed years.</li> <li>• Linkage of MAP to APA should be encouraged, and accelerated CA combined with a domestic appeals process should be encouraged.</li> <li>• Automatic application of the solution to future years (and to other countries if the case is similar).</li> </ul>	<p>OECD Discussion Draft, section 2I: <i>Failure to consider the implications of a taxpayer’s MAP or APA case for other tax years</i></p>

<ul style="list-style-type: none"> <li>• More flexible approach to adjustments to closed years.</li> <li>• Adopt multi-year analysis in MAP.</li> </ul>	
<p><b>Multilateral MAPs and APAs</b></p> <ul style="list-style-type: none"> <li>• Trilateral MAP and APA proceedings. Provisions for triangular cases.</li> <li>• Improved treaty network for developing countries.</li> <li>• Multilateral agreement for MAP process.</li> <li>• Agreement between governments, as part of the treaty conclusion process, to commit to following the OECD MEMAP best practices.</li> </ul>	<p>OECD Discussion Draft, section 2H: <i>Lack of APA programmes</i>; and section 4U: <i>Issues related to multilateral MAPs and APAs</i></p>
<p><b>Confidentiality of sensitive information</b></p> <ul style="list-style-type: none"> <li>• Information obtained in a MAP process should be fully protected by confidentiality provisions.</li> </ul>	<p>OECD Discussion Draft, section 4T: <i>Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases</i> (see option 28: Confidentiality and communications)</p>
<p><b>Costs and administration of MAP proceedings</b></p> <ul style="list-style-type: none"> <li>• The fees for access to MAP and/or during the MAP proceedings should not be dissuasive.</li> </ul>	<p>OECD Discussion Draft, section 4T: <i>Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases</i> (see option 32: Costs and administration)</p>
<p><b>General comments:</b></p> <ul style="list-style-type: none"> <li>• Make an effective MAP process a pre-condition for countries to obtain TP documentation packages (i.e. country-by-country report and master file).</li> </ul>	