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Ref: DISCUSSION DRAFT: BEPS ACTION 15 – “DEVELOPMENT OF A MULTILATERAL INSTRUMENT TO IMPLEMENT THE TAX TREATY RELATED BEPS MEASURES”

Dear Jesse,

Thank you for the opportunity to comment on the Discussion Draft: BEPS Action 15 – *Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures*.

The Multilateral Instrument (“MLI”) has the potential to expedite the implementation of the OECD’s recommendations in the Final Reports released in October 2015 and to ensure a swift and co-ordinated execution of the agreed BEPS measures, and in particular the minimum standards. Consistent application of the BEPS outputs would be welcomed by BIAC and the business community. Divergence in implementation creates uncertainty for businesses, which are already facing a rapid transformation in the global tax environment, and risks undermining the project’s purpose to create a coherent tax system which facilitates cross-border trade and ensures fair competition through the elimination of double taxation and double non-taxation.

Of particular importance is the development of a Mutual Agreement Procedure (“MAP”) arbitration provision. As highlighted in our comments below and in our [response in respect of the Action 14 discussion draft](#) prepared in January 2015, the effectiveness of dispute resolution mechanisms is critical to the success of the entire BEPS project. BIAC welcomes the final Action 14 report and in particular the recommended minimum standards in respect of MAP and peer reviews. Further, BIAC commends the OECD for already securing the commitment of 20 countries to provide provisions for mandatory binding arbitration in their bilateral tax treaties and we hope other countries will follow suit. We have appended to this letter, as we appended to our January 2015 letter, the results of a survey of our members on their actual experiences with MAP in their countries. We attach the results again to demonstrate the importance of this issue to our members and highlight the problems which taxpayers face in respect of resolution.

We understand that, given bilateral tax treaties are not typically subject to public consultation, no further public consultation is envisaged in respect of the MLI. In our view however, the MLI development process is fundamentally different from a bilateral treaty negotiation. It is a one-of-a-kind instrument built to support the implementation of the consensus outcomes of the BEPS project. The success of the BEPS project to date, and buy-in from so many governments and members of the wider tax community from business and civil society organizations has been in part

a result of the rigorous consultation processes conducted by the OECD. We would, therefore, encourage the Ad-hoc Group to reconsider its stance on not releasing the draft text of the MLI for public consultation.

As requested, our detailed comments below focus on the technical issues of implementation and on issues related to the development of a MAP arbitration provision, rather than on the scope of the provisions or on the substance of the underlying BEPS outputs.

Again, we thank you for the opportunity to comment on this discussion draft.

Sincerely,



Will Morris, Chair
BIAC Tax Committee

Introductory comments

1. BIAC strongly endorses pro-growth tax systems which facilitate cross-border trade and investment, enhancing economic growth and efficiencies in the international market place. Tax treaties enable and support cross-border trade and investment by clarifying which jurisdiction has the right to tax income and ensuring therefore that income is not subject to double-taxation.
2. The aim of the OECD/G20 BEPS project is to ensure taxation is aligned with economic substance and value creation, while preventing double taxation. Ensuring tax treaties are consistent with the BEPS project outcomes and their purpose of enabling and supporting cross-border commerce is therefore consistent with the goals of all of the countries involved in (or with an interest in) the OECD BEPS Project, and the business community.
3. The Multilateral Instrument (“MLI”) has the potential to ensure that the BEPS outcomes are implemented in a consistent and coherent way across jurisdictions. This MLI has the potential therefore to reduce uncertainty for business and could be particularly valuable for international businesses that may otherwise face diverging tax rules across the jurisdictions in which they operate. BIAC hopes the MLI project will be successful and offers any support that the Ad-hoc Group and the OECD secretariat require in order to ensure this success.

Technical issues of implementation

4. The MLI provisions must supersede provisions of bilateral tax treaties in order to be effective. However, bilateral tax treaties are numerous and diverse; even those based on the OECD Model frequently include divergences. Many OECD member countries have reserved the right to depart from the OECD Model Tax Treaty Guidance on numerous issues. Even more challenging is the fact that a great number of countries participating in the BEPS project are not OECD members and do not use the OECD Model as a basis for negotiating bilateral treaties at all. Further, as the consultation draft points out, many treaties are enforced in languages other than English or French, the languages of the MLI.
5. We are concerned therefore, about the practicability of an all-encompassing compatibility clause that countries could sign up to with a view to modifying multiple treaties in a single action. It would be unclear exactly which provisions of which treaties were affected and, for individual countries, which of the points they may have negotiated as part of the bilateral treaty discussions would be impacted.
6. There is a careful balance to be struck between complexity and flexibility in the operation of the MLI. If a single, straightforward solution were possible that was also flexible enough to be attractive to multiple jurisdictions while tackling each of the complex issues it seeks to address, that would be preferable. However, for the reasons noted above, we are uncertain how a single-action solution could be feasible – at least initially – without creating further disputes and uncertainty for those countries which do sign up to the MLI.

A practical solution: an intermediate step

7. A practical solution may be for the MLI to be an intermediate step, which enables all bilateral tax treaties to be amended swiftly and consistently.
8. We suggest that before the MLI can change any bilateral tax treaty, the two countries exchange official notes with each other ratifying their common understanding of the

changes to their treaty. Once exchange of the notes has taken place, the changes to the treaty will become effective.

9. This will ensure a common understanding of the new provisions – and will be fully accessible to the taxpayers who seek to rely on that treaty.
10. While this proposed solution is slightly more time consuming than modifying all treaties immediately on the signing of the MLI, it is practical, and would ensure clarity between treaty partners (and for taxpayers) in respect of the exact effect of the MLI modification on the relevant treaty.

Compatibility with multiple treaties

11. There are two distinct and different global Model Treaties under which most bilateral tax treaties are negotiated; the OECD and UN. We understand that the MLI will be primarily drafted to modify or add clauses to treaties based on the OECD Model. However, the reach of the BEPS project expands well beyond OECD jurisdictions and will impact bilateral tax treaties based on the UN Model.
12. There should, therefore, be specific language and guidance on how exactly the provisions of the MLI will change bilateral treaties that are based on the UN Model Treaty provisions. For example, with respect to Permanent Establishments, it is difficult to see how language could be used to address both treaties prepared under the OECD and under the UN model as they have significant substantive differences.
13. It is imperative that whether a bilateral treaty being amended is based on either the OECD or UN Model, any country that signs up to the various provisions included in the MLI, also commits to adopting the respective OECD guidance on those treaty aspects. This commitment should be formalized as part of commitment to the MLI to minimize the risk of inconsistency in application of the treaty provisions and to avoid unnecessary disputes in interpretation.
14. The MLI is very different from a bilateral negotiation where, if a country has a view that differs from the view reflected in the Model and the Commentary, both countries have an opportunity to understand the exact nature of the disagreement and draft language that both countries are willing to accept. If an accommodation cannot be reached; then a bilateral treaty would not be concluded.
15. In the context of the MLI, however, if the words are acceptable but a country understands those words to mean something very different from the usual interpretation, it would be unfair to other countries, to allow the non-conforming country to sign onto the MLI without resolving the inconsistency. We see two possible resolutions. First, the non-conforming country could commit to the standard interpretation (and, therefore, abandon its position). Second, if the non-conforming country is unwilling to commit to the standard interpretation, it would not be permitted to use the MLI to modify its bilateral treaties with respect to the relevant issue unless the other country explicitly accepted the non-conforming interpretation.

Minimum standards plus necessary flexibility

16. As noted in the Consultation Draft, the MLI ought to cover a number of tax treaty measures developed in the course of the OECD-G20 BEPS Project. Some of these measures relate to minimum standards, others to a revision of OECD guidance or recommended policy approaches only.

17. For swift implementation, countries need to ensure they comply with the minimum standards so tax treaties need to include BEPS-proof measures that prevent them from granting treaty benefits in inappropriate circumstances and the elements of the dispute resolution recommendations. It is BIAC's view that, in order to be meaningful and create basic consistency in global taxation systems, countries that sign up to the MLI cannot reserve on these provisions relating to minimum standards if such measures are not already included in their tax treaties.
18. Further, the OECD should ensure that countries effect these provisions where possible in their other tax treaties once they have signed up (e.g. through the MAP Forum and/or wider BEPS Monitoring process).
19. If individual countries are not willing to sign up to at least the provisions on the minimum standards and associated OECD commentary, they should not be able to use any part of the MLI and must renegotiate their treaties bilaterally to address BEPS concerns.
20. We note that even within the OECD-G20 reports on Action 6 (Preventing the granting of treaty benefits in inappropriate circumstances) and Action 14 (Making dispute resolution mechanisms more effective) which are minimum standards, there is optionality in the way those standards are implemented. For example, in respect of Action 6, countries may choose to implement the standard using a Limitation of Benefits ("LOB") Clause supplemented with conduit rules, a Principle Purpose Test ("PPT") or a combined approach with a LOB and PPT. We have provided some comments below in respect of Action 14.
21. To create some flexibility, the portions of the MLI which do not relate to the minimum standards, should be optional for countries to sign up to. For example, some jurisdictions may choose not to implement changes in respect of Action 2, Hybrid Mismatches, as per the October 2015 Final Report this is a recommendation item only. Without this flexibility, there is a risk some countries will not subscribe to the MLI at all, even if they are committed to the agreed minimum standards.
22. If treaty partners have signed up to the MLI there should be an implicit understanding they will seek to ratify the amendments to their bilateral treaty in respect of the minimum standards, which they must have signed up to, **and** in respect of any of the other MLI provisions which they have both chosen to adopt.
23. In order to ensure swift ratification of the MLI treaty amendments across jurisdictions, the MLI should include non-negotiable draft language in respect of each provision to avoid lengthy negotiations between bilateral treaty partners. Choosing exactly which bilateral treaty clauses the MLI provisions replace and ensuring they are accurately translated into the appropriate language(s) will require agreement between treaty partners. Treaty partners however should not be negotiating on substance of each provision, as this would greatly delay the process and severely reduce the effectiveness of the MLI.

Development of a MAP arbitration provision

The desirability of mandatory binding arbitration

24. As noted above, changes to ensure that Treaties apply with the Action 14 minimum standards are required and should apply to all jurisdictions who wish to adopt the MLI (and indeed, all countries who have agreed to the BEPS consensus).
25. BIAC strongly holds the view, as expressed in our previous correspondence in respect of the BEPS Project, that the MAP provision is of key importance not just to the success of the

MLI, but to the entire BEPS project. Effective dispute resolution provides the necessary framework to ensure mismatches in interpretations of the international tax rules are adequately dealt with.

26. A dispute resolution mechanism that is robust and ensures outcomes are fair and predictable will help to mitigate the uncertainty for business created by unilateral action in taxation and inconsistent application of the BEPS recommendations in some jurisdictions. It is our view that several of the BEPS Action items will increase the incidence of disputes over taxing rights between governments and a meaningful way to resolve these disputes is necessary to ensure that double taxation (or the risk of double taxation) does not distort market outcomes and hinder international commerce.
27. BIAC welcomed many aspects of the Final Action 14 Report. The Report sets out in detail the requirements of the minimum standard. Some of the key features of the standard are that: i. taxpayers can access MAP when eligible; ii. administrative processes promote resolution of disputes within target of 24 months; and iii. treaty obligations related to MAP are implemented in good faith.
28. The MLI should provide an appropriate mutual agreement procedure to resolve disputes, similar to what is currently provided in Article 25 of the OECD Model. The Competent Authorities (“CA”) of bilateral treaty partners, particularly those 20 that have signed up to mandatory binding arbitration, should be required to agree the details of the form of the process bilaterally.
29. The MLI should further ensure that taxpayers find the MAP process transparent, predictable, efficient and that they have an appropriate role. As well as ensuring taxpayers are informed of any MAP negotiations affecting them, countries should also be transparent to the wider public in respect of their approach to MAP (discussed further below).
30. The Final Action Report further notes that 20 countries have already committed to amending their bilateral tax treaties to provide for mandatory binding arbitration between governments to guarantee the resolution of disputes within a set timeframe. A commitment to time-bound mandatory binding arbitration is the only way to make these minimum requirements work in practice and to support the critical mass of countries that have already made this commitment.
31. As we have done previously, we ask all countries involved in the BEPS project (of which of course there are an ever-increasing number) to recognize that adopting a binding arbitration framework should be an integral part of the BEPS deliverables. The MLI provides a unique opportunity to make such a framework a reality.
32. Arbitration is the most effective method to resolve disputes and would mitigate some of business’ concerns regarding double taxation which discourages overseas trade and investment.
33. A commitment to arbitration is additionally beneficial to governments, as it promotes a more impartial view towards disputed issues and contributes to capacity building. In our view this is likely to be of particular importance to the governments of countries that were not part of the initial BEPS consensus-making process and who may join the project through the inclusive framework, as they will need assurance that they will have recourse to a fair and predictable process to protect their own tax base.
34. In order to support bilateral CA discussions, we suggest that supplementary examples are provided within the MLI guidance of forms of arbitration that the resolution process could take (e.g. “last-best-offer”, or “long form” arbitration).

35. We do not propose that any particular form is mandated specifically in the MLI or itself or in the associated guidance as this could risk a reduction in the number of countries willing to participate. We ask the OECD to encourage countries to be flexible in the form of arbitration that they are willing to proceed with. It would be disappointing if a prescriptive form of arbitration was offered and it diminished the number of other countries willing to participate at all.
36. By integrating the Action 14 MAP process into the MLI, and promoting significant adoption of mandatory binding arbitration, we can empower countries to resolve disputes where previously no adequate mechanism has been in place within bilateral treaties or where it has been felt that the mechanisms in place were not fair or impartial.
37. In order to ensure mandatory binding arbitration is a realistic and attractive option for governments, it is important that it is anchored within the countries that are party to the dispute. It is not necessary or desirable to have a new (or existing) “world tax body” or similar institution proposed in the MLI. If such a solution were proposed, we expect it would strongly discourage certain countries from signing up to the MLI at all.
38. Among all of the provisions of the MLI, we would like to particularly highlight our desire that the provisions to deliver mandatory binding arbitration (which will involve new Model language rather than negotiation departing from it between countries) should be subject to the same degree of public consultation as the rest of the BEPS project deliverables.

FTA MAP Forum and Public Transparency

39. The guidance associated with the MLI should ensure that countries that sign up to the MLI are required to commit to working on improving their competent authority relationships, including to becoming members of the FTA MAP Forum, providing MAP statistics and undergoing peer reviews, so that they can be held accountable for ensuring the mechanism functions.
40. As previously noted, 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 Action 14 objectives. Transparency in this area would certainly help to encourage countries to dedicate sufficient resources, and to follow appropriate policies in their MAP efforts.
41. 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.

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
Mandatory, binding arbitration	<ul style="list-style-type: none"> • Existence of mandatory, arbitration clauses in treaties helps create an incentive for competent authorities to settle the case. • Binding arbitration provides taxpayers with a mechanism to obtain resolutions and certainty in tax disputes expeditiously. • Mandatory arbitration is available for cases that have gone on for 2 years or more without resolution. • Taxpayers can choose to reject the arbitration board recommendations and pursue their challenge of the issues in the domestic courts. 	OECD Discussion Draft, section 4T: <i>Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases</i>
Guidance for assessing and using MAP - Transparency and simplicity of procedures for accessing and	<ul style="list-style-type: none"> • Guidelines issued to provide guidance and clarification regarding application of MAP process and remedies available to taxpayers within the framework. 	OECD Discussion Draft, section 3J: <i>Complexity and lack of transparency of the procedures to access and use the MAP</i>

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

<ul style="list-style-type: none"> - Implementing and Promoting ACAP and Bilateral APA Programs (MEMAP Best Practice No 25) 	<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"> • MAP resolutions have been transferred into APA discussions further enhancing the value of the MAP process. 	
<p>Multilateral MAP proceedings</p>	<ul style="list-style-type: none"> • Openness to multilateral MAP proceedings 	<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).

Obstacles encountered with 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
<p>Limited use of CA function authority to relieve double taxation</p> <ul style="list-style-type: none"> - Robust use of Article 25(3) power to relieve double taxation (MEMAP Best Practice No. 2) 	<ul style="list-style-type: none"> • Limited commitment to the avoidance of double taxation. • Competent authorities demonstrate little willingness to compromise, undertake proactive negotiations and discussions to reach a mutually agreed outcome. • Anecdotal examples shared by BIAC members: <ul style="list-style-type: none"> - 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. • No compulsory participation of countries which impedes the starting of the MAP process. • No time limit to MAP procedure if there is no arbitration clause specified in the treaty. • No compulsory result if there is no arbitration clause specified in the treaty. Cases may conclude without reaching an agreement. 	<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>Exclusion from MAP process</p>	<ul style="list-style-type: none"> • Adjustments are proposed by CA after expiration of a time limitation for 	<p>OECD Discussion Draft, section 3L: <i>Right to access</i></p>

<ul style="list-style-type: none"> - Avoiding exclusion from MAP relief due to late adjustments or late notification (MEMAP Best Practice No 10) - Consideration of MAP assistance for cases described as “tax avoidance” (MEMAP Best Practice No 11) - Countries eliminate or minimize “exceptions” to MAP (MEMAP Best Practice No 12) 	<p>notifying or filing a MAP request specified in the treaty.</p> <ul style="list-style-type: none"> • Unilateral rejection of cases based on avoidance arguments with allegations of law abuse or administrative penalties used to justify a denial to access MAP. • 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. • Anecdotal examples shared by BIAC members: <ul style="list-style-type: none"> - 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. - 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. - Transfer pricing adjustments are recharacterized as “non-deductibles” under domestic law in an effort to deny the taxpayer access to MAP. - CA excludes selected issues from MAP consideration without agreed limitation and notice in treaty. 	<p><i>MAP may be unclear where domestic or treaty-based anti-abuse rules have been applied</i></p>
<p>Cooperation and transparency with taxpayers</p> <ul style="list-style-type: none"> - Taxpayer presentations to competent authorities (MEMAP Best Practice No 13) - Cooperation and transparency (MEMAP Best Practice No 14) - Decision summaries (MEMAP Best Practice No 17) 	<ul style="list-style-type: none"> • Limited taxpayer’s involvement in the MAP procedure. • 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. • The lack of information and regular updates from tax authorities once receipt of the documentation set has been acknowledged can be frustrating for business. • 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 	<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>Interaction between Competent Authorities</p> <ul style="list-style-type: none"> - Face-to-face meetings between competent authorities (MEMAP Best Practice No 15) - Bilateral process improvements (MEMAP Best Practice No 16) - Recommendation for MAP cases beyond two years (MEMAP Best Practice No 18) 	<ul style="list-style-type: none"> • 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. • Unprincipled approach to the resolution of cases. • Anecdotal examples shared by BIAC members: <ul style="list-style-type: none"> - structuring agreements based on specified percentages of revenue; - insisting on the right to tax at least 50 percent of the income at issue; - 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 - 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. • 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. • Anecdotal examples shared by BIAC members: <ul style="list-style-type: none"> - CA took more than a year to begin a dialogue with its treaty partner; - Lack of clear timetable with MAP process likely to extend beyond 2 years; and - CA failed to reach an agreement within a reasonable time period. 	<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>MAP access blocked in audit settlements</p> <ul style="list-style-type: none"> - Avoid blocking MAP access via audit settlements or 	<ul style="list-style-type: none"> • Competent authority offers a lower assessment to settle a case if MAP is waived, including in some cases contrary to stated policy. 	<p>OECD Discussion Draft, section 2G: <i>Audit settlements as an obstacle to MAP process</i></p>

<p>unilateral APAs (MEMAP Best Practice No 19)</p>		
<p>Interest relief (MEMAP Best Practice No 20)</p>	<ul style="list-style-type: none"> • Failure to address interest relief as part of the MAP resolution. 	<p>OECD Discussion Draft, section 4V: <i>Issues related to consideration of interest and penalties in the mutual agreement procedure</i></p>
<p>“Pay to play” requirements to access MAP</p> <ul style="list-style-type: none"> - Suspension of collections during MAP (MEMAP Best Practice No 21) 	<ul style="list-style-type: none"> • “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. 	<p>OECD Discussion Draft, section 3O: <i>Issues connected with the collection of taxes</i></p>
<p>Objectivity and resources of Competent Authorities</p> <ul style="list-style-type: none"> - Independence and resources of a competent authority (MEMAP Best Practice No 23) - Performance indicators for the competent authority and staff (MEMAP Best Practice No 24) 	<ul style="list-style-type: none"> • Lack of qualified MAP staff is a consistent issue. • Lack of impartiality and independence. • Anecdotal examples shared by BIAC members: <ul style="list-style-type: none"> - MAP cases are reviewed by the same economists and audit staff that were involved in the original assessment; - 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; - 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 - 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. 	<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>Roll-forward application of MAP treatment</p> <ul style="list-style-type: none"> - Implementing and Promoting ACAP and Bilateral APA Programs (MEMAP Best Practice No. 25) 	<ul style="list-style-type: none"> • 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. 	<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>Confidentiality of sensitive information</p>	<ul style="list-style-type: none"> • Politicization of MAP process, often with public comments regarding particular cases or threats of press leaks. • In an anecdotal example shared by BIAC members, tax authorities leaked facts of MAP cases to the press. 	<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>Multilateral MAP proceedings</p>	<ul style="list-style-type: none"> • 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. • CAs typically refuses to engage in trilateral discussions. 	<p>OECD Discussion Draft, section 4U: <i>Issues related to multilateral MAPs and APAs</i></p>
<p>General comments</p>	<ul style="list-style-type: none"> • MAP can be a heavy process not suitable for small amounts as it can trigger a tax audit in the other state. 	

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>Obligation to reach an agreement</p> <ul style="list-style-type: none"> • An agreement should be made mandatory with outcomes that are binding on tax authorities. 	<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>Mandatory, binding arbitration</p>	<p>OECD Discussion Draft, section 4T: <i>Absence of a</i></p>

<ul style="list-style-type: none"> • 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. • Arbitration can help developing countries obtain a neutral, external view to the issues disputed. • The form of arbitration should be consistent. • 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. • An international permanent court of arbitration (e.g. the WTO panel) could be established. 	<p><i>mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases</i></p>
<p>Peer reviews of MAP</p> <ul style="list-style-type: none"> • Conduct peer reviews of country conduct of MAP (measured against OECD MEMAP's best practices) with solicitation of confidential taxpayer and treaty partner inputs. • Monitor exclusions from MAP process: Track how many cases are lodged and refused. • Exchange of best practices between countries and tax administrations • KPIs: tax assessments should be raised based on fundamental transfer pricing principles (instead of tax revenue targets). 	<p>OECD Discussion Draft, section 2E: <i>Performance indicators for the competent authority function and staff</i></p>
<p>Guidance for assessing and using MAP</p> <ul style="list-style-type: none"> • More guidance on MAP. Develop processes to resolve inter jurisdictional disputes quickly and provide certainty for the conduct of international business. • 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. • 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. • Provide guidance on interaction between MAP and domestic handling of other audit issues. 	<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>Cooperation and transparency with taxpayers</p> <ul style="list-style-type: none"> • Joint fact-finding. Pre-filing discussions should be encouraged e.g. joint presentations to competent authorities. 	<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"> • Focus on transparency and relationship building between taxpayers and tax authorities. Regular updates should be provided to taxpayers involved in MAP proceedings. • Promote consistent case law. Publicize anonymised MAP agreements that could be relied on by other taxpayers or countries. • Countries could also develop a “fast track” MAP for commonly disputed issues thereby alleviating work load and resources, both for taxpayers and tax administrations. • Countries should accept all cases regardless of the value of the transaction, particularly if it pertains to commonly disputed issues. 	<p><i>cases; and section 4S: Lack of co-operation, transparency or good competent authority working relationships</i></p>
<p>Interactions between Competent Authorities</p> <ul style="list-style-type: none"> • Strict and short time-table with agreed timeframes for discussion. • More frequent meetings between competent authorities. 	<p>OECD Discussion Draft, section 4S: <i>Lack of co-operation, transparency or good competent authority working relationships</i></p>
<p>Suspension of collections during MAP</p> <ul style="list-style-type: none"> • Taxpayers should not be required to pay any assessment once the MAP process is initiated. • 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. 	<p>OECD Discussion Draft, section 3O: <i>Issues connected with the collection of taxes</i></p>
<p>Independence and resources of a competent authority</p> <ul style="list-style-type: none"> • Adequate staffing for competent authority function both in terms of headcount and skilled resources. • Training for CA staff on the purposes and conduct of the CA function. • CA experts with a clear, consistent understanding of the MAP process should be made available and identified in each territory as decision makers. 	<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>Roll-forward application of MAP treatment</p> <ul style="list-style-type: none"> • Expand “roll-forward” application of agreed MAP treatment to future filed years. • Linkage of MAP to APA should be encouraged, and accelerated CA combined with a domestic appeals process should be encouraged. • Automatic application of the solution to future years (and to other countries if the case is similar). 	<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"> • More flexible approach to adjustments to closed years. • Adopt multi-year analysis in MAP. 	
<p>Multilateral MAPs and APAs</p> <ul style="list-style-type: none"> • Trilateral MAP and APA proceedings. Provisions for triangular cases. • Improved treaty network for developing countries. • Multilateral agreement for MAP process. • Agreement between governments, as part of the treaty conclusion process, to commit to following the OECD MEMAP best practices. 	<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>Confidentiality of sensitive information</p> <ul style="list-style-type: none"> • Information obtained in a MAP process should be fully protected by confidentiality provisions. 	<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>Costs and administration of MAP proceedings</p> <ul style="list-style-type: none"> • The fees for access to MAP and/or during the MAP proceedings should not be dissuasive. 	<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>General comments:</p> <ul style="list-style-type: none"> • Make an effective MAP process a pre-condition for countries to obtain TP documentation packages (i.e. country-by-country report and master file). 	