UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

January 14, 2015

VIA EMAIL
Marlies de Ruiter
Head, Tax Treaties, Transfer Pricing and Financial Transactions Division
Centre for Tax Policy and Administration
Organisation for Economic Cooperation and Development
2 rue Andre-Pascal
75775, Paris
Cedex 16
France
(taxtreaties@oecd.org)

Re: USCIB Comment Letter on the OECD Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective

Dear Ms. de Ruiter,

USCIB[1] is pleased to have this opportunity to provide comments on OECD's discussion draft on BEPS Action 14. USCIB would like the opportunity to present comments at the public consultation. For ease of reference, we have included language from the discussion draft in boxes throughout this comment letter.

General Comments

USCIB strongly supports the intent behind Action 14, as having effective and efficient mutual agreement procedures is critically important to the success of the BEPS project as a whole. While the discussion draft includes many positive suggestions for addressing the extensive problems with current MAP programs, USCIB believes the draft, unfortunately, falls far short of describing an effort that will adequately deal with the profound dispute resolution problems that exist today. In fact, it appears from the draft that the OECD's support for best MAP practices may have even diminished from prior publications on this topic. USCIB believes the OECD is the best forum to promote dispute resolution and urges the OECD to remain a strong

[1] USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

champion for effective dispute resolution in every respect and to become a strong advocate for mandatory binding arbitration as an important part of the path forward.

Business is especially disappointed because, throughout the BEPS process, we have been told that we were overly concerned with increased double taxation and that improvements to the dispute resolution process would ensure a single level of taxation aligned with economic activity. The options in the Action 14 discussion draft, and the tepid tone of OECD support expressed, will not accomplish that objective. As the OECD has acknowledged "risk is inherent in commercial activities. Businesses undertake commercial activities because they seek opportunities to make profits, but those opportunities carry uncertainty".[2] The risk of double taxation is one that companies will aggressively seek to avoid. Double taxation can turn a profitable enterprise into a loss making enterprise or one where it is impossible to satisfy the hurdle rate that would justify an investment. In order to mitigate this risk, businesses will be forced to take steps that will likely shrink their global footprint and will have a negative impact on cross border trade and investment.

All parties involved in the BEPS process believe that BEPS implementation will cause disputes to proliferate. Any change to a complex legal system will result in a period of uncertainty during which issues will arise and need to be resolved. The mutual agreement procedures are already strained by rapidly growing caseloads,[3] are at times difficult or impossible to access, and seem to be struggling to adhere to objectivity and predictability. Many country tax audit practices seem to have adopted new principles in the name of BEPS even before those principles have been agreed upon. The new rules and principles envisioned by the BEPS Action Plan promise to make this situation much worse if substantial improvements are not made to support and enhance MAP programs all around the world.

There is no doubt that successful work on Action 14 is critically important to the success of the entire BEPS Action Plan. If the substantive BEPS changes are to be successfully implemented by countries, there must be changes to country audit processes combined with intergovernmental dispute resolution processes that are predictable, accessible, objective, and principled that occur simultaneously with the substantive changes. Dispute resolution will be both essential and particularly sensitive, since resolution of disputes resulting from BEPS will shift taxing jurisdiction among sovereign countries during a time of intensive pressure on budgets and political pressure to avoid budget cuts.[4] This is a key point since many countries believe that the intent of the BEPS project is to realign taxing rights from "residence countries" to "source countries." To the extent that there is disagreement on the extent of such realignment,

[22] BEPS Actions 8, 9, and 10: Discussion Draft on Revisions to Chapter 1 of the Transfer Pricing Guidelines (Including Risk, Recharacterisation, and Special Measures) para. 36, page 12.

[3] See BIAC comment letter on Action 14 which cites recent MAP statistics.

[4] The politics of finding more revenue to fund public services are the same around the globe. Politicians look first to the tax gap and then to foreign persons. The BEPS project brings both of these into play. This is acceptable if in fact the tax is owed by foreign persons, but when countries insist on collecting a tax and then refuse to resolve legitimate disputes, then the political dynamic is inappropriately controlling the tax dispute resolution process.

taxpayers will be caught in the middle, and, unless there is an effective dispute resolution mechanism, economically harmful double taxation will occur.

The discussion draft seems to take a significant step back from the MEMAP and the Article 25 Commentary. Countries have already made a political commitment to the MEMAP best practices and the Article 25 Commentary and ***all*** of those commitments should be not only reiterated but also strengthened. To the extent that important principles previously agreed to are not mentioned in the discussion draft, there may be an implication that the OECD no longer supports those principles. In addition, while USCIB recognizes that the discussion draft is attempting to set out options to address existing problems, use of the word "could," in lieu of the word "should," throughout the draft in connection with principles to which countries have previously committed appears to suggest that countries are starting all over with deciding what good MAP practices are.

Detailed comments on the discussion draft are provided below. We highlight here some of USCIB's overarching recommendations:

- USCIB continues to believe that "final offer" mandatory binding arbitration must be an essential component of the mutual agreement procedures. Given the importance of effective dispute resolution, the OECD should recommend mandatory binding arbitration as a best practice and require countries that reject it to explain the basis for their objections. This issue is too important to abandon at this stage of the process.
- The OECD should reaffirm its support of all of the principles set forth in both the Article 25 Commentary and the MEMAP. In the absence of a reaffirmation, selective reference to some principles undercuts others. Action 14 should not result in a significant step backwards.
- USCIB believes that the amount of work that must be done to improve MAP is substantial, requires radical changes to tax administration policies and practices, and cannot be expected based on political commitments alone. USCIB supports the FTA MAP Forum having a central role in ensuring that MAP works in the future to eliminate the growing risk of double taxation and calls for all tax commissioners and other high-level tax officials in each government to support and carefully monitor the work of the MAP Forum, improving audit and MAP processes. This forum includes the government officials actually responsible for making decisions on the audits and dispute resolution. Their agreement to process changes is essential if change is actually going to occur.
- Greater taxpayer participation in MAP procedures should be endorsed, particularly early in the MAP process. Taxpayers are uniquely able to clarify facts. Competent Authorities should consider combined meetings with taxpayers in order to reach a common understanding of the facts.

Specific Comments

Paragraph 3 of the discussion draft provides that:

The discussion draft must be read in the broader context of the intention to introduce a three-pronged approach designed to represent a step change in the resolution of treaty-related disputes through the MAP. This three-pronged approach would (*i*) consist in political commitments to effectively eliminate taxation not in accordance with the Convention (such political commitments reflecting the political dimension of the BEPS Project), (*ii*) provide new measures to improve access to the MAP and improved procedures (this discussion draft describes the envisaged measures) and (*iii*) establish a monitoring mechanism to check the proper implementation of the political commitment.

In terms of the overall approach to the on-going work driven by Action 14, it is imperative that the OECD not simply rely upon a mere political commitment to take specific measures identified in a written document and a not-yet-defined process for "monitoring" the overall functioning of MAP programs around the world. Political commitments are easy to make and also easy for tax administrations to subsequently ignore in the press of all that they must handle on a day-to-day basis. The monitoring process must be carefully designed if it is to avoid the pitfalls common to multilateral processes. As a starting point, the OECD should publish MAP statistics for all countries. Taxpayers must be able to take effectiveness of dispute resolution into account in making investment decisions.

USCIB supports the FTA MAP Forum having a central role in identifying the required enhancements and reforms of current audit and dispute resolution processes and in monitoring the progress made by governments around the world to bring about these enhancements and reforms. The work that must be done to truly increase the effectiveness of MAP, much of which is identified in the discussion draft, is necessarily multilateral work, so it must be carried out through a multilateral body. This work must be done by those directly responsible for the MAP programs that will be affected by the outcome, not by a more remote policy-oriented body. Further, this work will require extensive changes to tax administration processes and policies, so it must have the full and ongoing support of tax administration and tax policy officials at the highest levels. Given these requirements, it is recommended that the MAP Forum launched by the FTA Commissioners in Moscow in May 2013 should be viewed as a critical body in the direct line for the implementation of Action 14, not as a body engaged in "parallel work," as described later in the discussion draft. In short, the competent authorities themselves, with the unwavering support of their "commissioners" and other top policy officials must take full ownership of the problems and solutions contemplated by Action 14.

Business is concerned that none of the three prongs mention a commitment to avoid double taxation. This is particularly concerning given that countries may interpret BEPS as a political commitment to raise revenue. The absence of any sense of how the monitoring mechanism will work is also concerning.

OPTION 1 – Clarify in the Commentary the importance of resolving cases presented under Article 25(1)

The following paragraph could be added to the Commentary on Article 25 in order to emphasise that the mutual agreement procedure is an integral part of the obligations that follow from concluding a tax treaty:

Add the following paragraph 5.1 to the Commentary on Article 25:

5.1 The undertaking to resolve by mutual agreement cases of taxation not in accordance with the Convention is an integral part of the obligations assumed by a Contracting State in entering into a tax treaty and must be performed in good faith. In particular, the requirement in paragraph 2 that the competent authority "shall endeavour" to resolve the case by mutual agreement with the competent authority of the other Contracting State means that the competent authorities are obliged to seek to resolve the case in a principled, fair and objective manner, on its merits, in accordance with the terms of the Convention and applicable principles of international law.

Comments on Option 1 in paragraph 10: USCIB supports Option 1 because this provision would emphasize that the competent authorities have an obligation to seek to resolve the cases presented to them for consideration and to do so in a principled, fair and objective manner. USCIB supports this clarification. Some USCIB members have recent experience of countries refusing to pursue MAP procedures with some other countries perhaps because of a perception that taxes are lower in these countries and therefore the country failing to pursue the MAP does not wish to cede taxing jurisdiction in such a case.

OPTION 2 – Ensure that paragraph 2 of Article 9 is included in tax treaties

Participating countries could commit to include paragraph 2 of Article 9 in all their tax treaties, using the multilateral instrument envisaged by Action 15 where appropriate. It would also be clarified that such a change is not intended to create any negative inference with respect to treaties that do not currently contain a provision based on paragraph 2 of Article 9.

Comment on Option 2 in para 11: Article 25 of the OECD Model Convention provides broad authority to resolve issues of taxation not in accordance with the convention. Therefore the absence of paragraph 2 of Article 9 in any treaty should not serve as a basis for a legitimate claim that MAP cannot be accessed with respect to a correlative transfer pricing adjustment. Nevertheless, USCIB supports Option 2 for the sake of ensuring absolute clarity on the question. This is an area where reiterating support for the guidance currently provided in the Commentary would be helpful. Moreover, for the sake of ensuring absolute clarity on the obligation to relieve economic double taxation arising from transfer pricing adjustments, the BEPS Project should produce a firm commitment by all participating countries to include Article

9(2) in all their tax treaties (not just a suggestion that they "could" do so) and should use the multilateral instrument envisaged by Action 15 to implement that commitment.

Comment on paragraphs 12 and 13: Paragraphs 12 and 13 touch on the most essential problems experienced by competent authorities in resolving MAP cases in accordance with the competent authority mandate created by tax conventions. The constraints placed on competent authorities because of their relational positions within their tax administrations determine their ability to deviate from positions staked out by tax auditors and thereby dictate their responsiveness, efficiency, and willingness to compromise based on multilateral principles. These problems, and all appropriate solutions, must be addressed if MAP functions are to operate as intended. The nature of these problems is necessarily oriented towards practical and operational considerations, not policy considerations, and solutions must be identified and implemented through concerted efforts to bring about operational change, not merely through political commitments to do so. Therefore, the work of FTA's MAP Forum must be regarded as central to the Action 14, not as work that is merely in parallel to Action 14, as described.

In addition to Options 3, 4 and 5, which are addressed more fully below, it is understood that the MAP Forum has given some consideration to having a business advisory council dedicated to working with the MAP Forum participants to identify specific MAP problems and potential solutions. It is strongly recommended that such a council be established to work side by side with MAP Forum participants to ensure that business perspective and knowledge about MAP difficulties arising around the world is brought to bear. In addition, business can assist with the conduct of studies, benchmarking best practices, or developing and presenting common approaches to shared problems. The OECD's VAT/TAG is an excellent example of cooperation between the OECD, countries, and business that has led to a better understanding of VAT issues on all sides and has, we believe, improved the OECD's guidance in this area.

OPTION 3 – Ensure the independence of a competent authority

Participating countries could commit to adopt the best practices currently included in the OECD Manual on Effective Mutual Agreement Procedures (MEMAP) concerning the independence of a competent authority. In particular, they should take the necessary steps to ensure the autonomy of the competent authority from the audit and examination functions, as well as to guarantee, in practice, an appropriate distinction between the objective application of existing treaties and the forward-looking determination of the policy to be adopted and reflected in future treaties.

Comment on Option 3 in paragraph 15: Ensuring the independence of a competent authority is the principal challenge facing MAP functions face around the world. This challenge cannot be addressed by countries merely making a political commitment to the best practices set out in the MEMAP. Such commitments were made by OECD delegates, as well as by participating competent authorities, when the MEMAP was written, and the results have not lived up to

expectations. Merely renewing these commitments in an effort to complete the BEPS work is unlikely to improve the MAP process.

The "independence" of a competent authority or, in the terms used in the MAP Forum Strategic Plan, the degree to which a competent authority is "empowered," is dependent on an wide array of administrative considerations that can only be addressed through intensive evaluative work followed by adoption of very specific changes in administrative practices and policies designed to remedy the problems identified. This difficult work must involve tax officials within each government at the highest levels.

Barriers to independence come in a variety of forms. Examples include: (1) strategic choices made by tax administrations to enhance revenue collections from enforcement of transfer pricing or treaty positions, particularly as they may pertain to foreign-based multinational corporations, and further to set specific revenue goals to be achieved by such enforcement efforts; (2) administrative practices which involve the collection of revenue upon adjustment and/or the accounting for that revenue for purposes of performance metrics prior to MAP resolution; (3) the line reporting of competent authorities to officials who are not charged with the mandate to resolve cases objectively, but who instead are expected to meet revenue collection metrics; and (4) deference paid by competent authorities to the views of policy officials, whose views may be more influenced by future policy goals than by objective applications of principles governing positions taken by taxpayers in the year under audit. These types of problems need to be identified and, where present, affirmatively addressed through substantial reforms to administrative policies and practices.

Business regularly experiences double taxation resulting from these practices. In particular, CAs cannot concede cases even if they acknowledge taxation not in accordance with the convention because of the adverse effect on exam revenue targets. Recently, the ability to resolve APA agreements and CA negotiations have been adversely effected by the BEPS project. The notion that future policy goals should not have an effect on the resolution of current disputes should apply equally to changes based on the BEPS project. Until those changes take formal effect, in the relevant tax treaties or domestic law rules, tax auditors and CAs should not be asserting these policies as a basis for either assessing tax or for resolving disputes.

OPTION 4 – Provide sufficient resources to a competent authority

Participating countries could commit to adopt the best practices currently included in the MEMAP concerning the provision of sufficient resources to their competent authorities. They could, in particular, commit to provide their competent authorities with sufficient resources in terms of personnel, funding, training, etc. to carry out their mandate to resolve cases of taxation not in accordance with the provisions of a tax treaty in a timely and efficient manner.

Comment on Option 4 in paragraph 16: Funding is a political commitment. As such this is one of the few areas where a true political commitment is the essential element of achieving the goal of adequate funding. The OECD should seek to make clear at the highest levels of the G20

that inadequate funding of tax administrations including exam, MAP, APA programs will lead to a failure to implement the BEPS results.

As a result of the recent fiscal crisis, many tax administrations are struggling to meet increased demands for revenue without commensurate resources. In this environment, intra-administration competition for resources often leads to resources dedicated to audit functions making country-favorable adjustments to taxpayer's reported income. MAP units responsible for reconciling those adjustments with other governments which may result in amounts being due to taxpayers may be seen as a lesser priority and may be underfunded.

Like the independence challenge, the resource challenge cannot be addressed through merely renewing commitment to the best practices set out in the MEMAP. Instead, the resource problem needs to be addressed through intensive evaluative work and through a commitment by tax commissioners, and other tax officials at the highest levels, to ensure that MAP resources are commensurate with MAP workload. The FTA MAP Forum, under the guidance of the FTA Commissioners, is the most appropriate body to take forward that commitment and effect the necessary change. Valid statistics on MAP would be helpful in determining whether resources are adequate, and improved and expanded reporting of the type originally agreed upon by the OECD in 2007 should be a commitment of all participating countries. Increasing caseloads and long resolutions times are a clear indication that adequate resources are not being provided.[5] Failure to provide adequate resources and support for MAP will only increase the resource requirements for courts to adjudicate tax disputes, resulting in even greater costs to both tax administrations and taxpayers, and lost business investment due to uncertainty, for countries.

OPTION 5 – Use of appropriate performance indicators

Participating countries could commit to adopt the best practices currently included in the MEMAP concerning the use of appropriate performance indicators for their competent authority functions and staffs based on factors such as consistency, time to resolve cases, and principled and objective MAP outcomes and not on factors such as sustained audit adjustments or maintaining tax revenues already collected.

Comment on Option 5 in paragraph 17: Clearly, paragraph 17 identifies a problem that should be addressed, to the extent it exists. It is unclear, however, that many, if any, competent authority functions operate based on MAP performance metrics that create disincentives to the resolution of cases. Rather, it is much more prevalent that performance metrics, revenue accounting mechanisms, and collection goals associated with the audit functions of the broader tax administration serve to impair the independence of competent authorities by placing "unwritten" limitations on their ability to reach appropriate resolutions. These types of harmful metrics and goals need to be identified and addressed in connection with the "independence" or "empowerment" problem addressed in paragraph 15. USCIB, therefore, supports Option 5.

[5] See the statistics set forth in the BIAC comment letter.

In addition to Option 5, consideration should be given to developing a program of MAP negotiation training that could be delivered to MAP negotiators in all countries. Such training could be carefully designed to ensure that MAP staff fully understand their mandate and understand that the goal for MAP negotiators is to eliminate double taxation to the fullest possible extent and to reach resolution as efficiently as possible. Such training could advance an approach to MAP discussions that maximizes the prospect for efficient resolution. For example, such training could incorporate the principles of the "getting to yes" approach to negotiation advanced by Harvard University, or some similar agreed approach for reaching mutually satisfactory results. Such training would ensure that MAP staff would come to the discussion table with a coordinated mindset as to the goals and steps of the process.

OPTION 6 – Better use of paragraph 3 of Article 25

Participating countries could commit to using paragraph 3 of Article 25 more effectively in order to reinforce the consistent bilateral application of tax treaties. In particular –

− Participating countries could commit to make more use of the authority provided by the first sentence of Article 25(3) and, where an Article 25(3) mutual agreement relates to a general matter which affects the application of the treaty to all taxpayers or to a category of taxpayers (rather than to a specific taxpayer's MAP case), to publish the agreement in order to provide guidance and prevent future disputes.

− Participating countries could commit to adopt the best practices currently included in the MEMAP concerning the use of the Article 25(3) power to relieve double taxation in cases not provided for in the Convention (*e.g.* in the case of a resident of a third State having permanent establishments in both Contracting States – see paragraph 55 of the Commentary on Article 25).

In addition, changes to the Commentary on Article 3 could expand upon existing guidance regarding the role of Article 25(3) mutual agreements in resolving difficulties or doubts as to the application or interpretation of the Convention where such difficulties or doubts arise as a result of an incompletely or ambiguously defined term or a conflict in meaning under the laws of the Contracting States. Additional changes to the Commentary on Article 25 could also clarify the legal status of an Article 25(3) mutual agreement, making specific reference to the principles of international law for the interpretation of treaties.

Comment on Option 6 in paragraph 18: USCIB supports the adoption of Option 6, as effective and widespread use of Article 25(3) by competent authorities will likely result in more certainty for multinational enterprises and fewer disputes between and among countries. It is noted, however, that effective use of this Option depends on the CA having adequate resources since the resolution of general issues and publication of the resulting mutual agreements will require substantial time and effort of expert MAP staff. USCIB reiterates its support for the MOU process to develop generally applicable safe harbor guidance out of particular cases or other safe harbors for routine transactions. We again note that asking countries to recommit to

current MEMAP best practices seems to undercut those MEMAP best practices that are not explicitly mentioned in the discussion draft.

OPTION 7 – Ensure that audit settlements do not block access to the mutual agreement procedure

Participating countries that allow their tax administrations to conclude audit settlements with respect to treaty-related disputes which preclude a taxpayer's access to the mutual agreement procedure could commit to take appropriate steps to discontinue that practice or to implement procedures for the spontaneous notification of the competent authorities of both Contracting States of the details of such settlements. Changes to the Commentary on Article 25 could also address the obstacles to an effective mutual agreement procedure created by audit settlements.

Comment on Option 7 in paragraph 19: USCIB strongly supports the discontinuation of these practices as they are prevalent throughout the world and constitute a significant barrier to MAP. Notification of the competent authorities is an inadequate response to this problem. Regardless of whether these practices can be combined with effective "self-help" measures to eliminate double taxation at times, these practices challenge the integrity of the fundamental proposition that double taxation should be relieved through formal mutual agreement procedures and hence raise questions about whether a Contracting State is applying its treaties in good faith, such that they do deserve to be addressed in the Commentary.

20. The FTA MAP Forum Strategic Plan recognises the importance of the "global awareness" of the audit functions involved in international matters – *i.e.* awareness of (*i*) the potential for creating double taxation, (*ii*) the impact of proposed adjustments on one or more other jurisdictions and (*iii*) the processes and principles by which competing jurisdictional claims are reconciled by competent authorities. In this regard, stakeholders are invited to comment on best audit practices that reflect an appropriate global awareness and that facilitate an effective mutual agreement procedure.

Comment on paragraph 20: The concept of "global awareness" is important to the proper functioning of the audit/MAP process. Thus, the importance of instilling "global awareness" among international audit functions within all tax administrations is clear. This would seem best accomplished through training, and it is understood that the FTA developed and approved a global awareness training module for that purpose approximately three years ago. It would seem appropriate at this juncture to revisit and enhance that module and to ensure that the training is delivered to international audit functions around the world. Development of such training is the type of project that a business advisory council could work on along with the MAP Forum to ensure that business realities and cross-border considerations are fully understood by tax auditors.

OPTION 8 – Implement bilateral APA programmes

Participating countries could commit to implement bilateral Advance Pricing Arrangement (APA) programmes.

Comment on Option 8 in paragraph 21: USCIB strongly supports the adoption of Option 8. Bilateral APA programs are critically important to achieving certainty of outcome in advance. Bilateral APAs also reduce the possibility of the "worst practices" that may occur at the audit level, since the audit should be more limited – confirming that the actual facts lined up with the APA.

It is also important to point out, however, that mere implementation of such programs is not enough if the programs, once implemented, are under-resourced such that taxpayers' interest in utilizing the programs cannot be met, or if the administration in question prioritizes other activities, such as audit programs, over providing certainty to taxpayers as early as possible. Thus, it might be important to enhance this option such that in includes a commitment on the part of all participating countries to support and utilize their bilateral APA programs to the fullest possible extent.

OPTION 9 – Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs

Participating countries could commit, in certain cases and after an initial tax assessment, to implement appropriate procedures to permit taxpayer requests for the multi-year resolution of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances. Participating countries that have implemented APA programmes could similarly commit to provide for the roll-back of advance pricing arrangements in appropriate cases, subject to the applicable time limits provided by domestic law (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.

Comment on Option 9 in paragraph 23: USCIB strongly supports the adoption of Option 9, but it could be further enhanced to be more forward-looking. The joint audit tool, developed by the FTA, the competent authorities' general authority to consult with one another, plus use of tools like APAs and APA roll-backs, could provide an opportunity for countries to work together on issues as they are identified to ensure that issues are pursued (1) when appropriate (taking "global awareness" concepts into account), (2) jointly (using a joint audit approach), and (3) in a way that addresses the most number of years possible (by using APAs and APA roll-backs). After a joint audit with another country, the United States has agreed to apply the audit result not only to the years covered by the audit but also to future years under an APA.

Ultimately, any country intending to initiate an audit of a transaction involving a second country could invite that second country to engage in a joint audit of the transaction with the agreed-upon result applying not only for the audit years in the first country, but also for unaudited years in the second country and for future years in both countries. Of course, such processes require that the audit, APA and competent authority functions of the tax administrations involved be as coordinated as possible, much like the U.S. IRS has integrated its international functions under a single deputy commissioner.

OPTION 10 – Improve the transparency and simplicity of the procedures to access and use the MAP

Participating countries could commit to adopt the best practices currently included in the MEMAP concerning the transparency and simplicity of the procedures to access and use the mutual agreement procedure, which should minimise the formalities involved in the MAP process taking into account the challenges that may be faced by taxpayers. This would include a commitment –

− To develop and publicise rules, guidelines and procedures for the use of the MAP (and to provide, where possible, appropriate notice to taxpayers of such guidance).

− To identify the office that has been delegated the responsibility to carry out the competent authority function (along with contact details).

OPTION 11 – Provide additional guidance on the minimum contents of a request for MAP assistance

Participating countries could commit to adopt the best practices currently included in the MEMAP concerning the minimum contents of a request for MAP assistance. This would include a commitment –

− To identify, in public guidance, the specific information and documentation that a taxpayer is required to submit with a request for MAP assistance, seeking to balance the burdens involved in supplying such information with the complexity of the issues the competent authority is called upon to resolve. Competent authorities would in turn expect taxpayers to submit complete and accurate information consistent with such guidance, and to respond promptly to requests for missing or other relevant information.

− Where a country has not yet provided guidance and a taxpayer's request for MAP assistance is accompanied by relevant information in line with the guidance in Section 2.2.1 of the MEMAP, a competent authority should not, without consulting the other competent authority, deny access to MAP on the basis that the taxpayer has provided insufficient information.

Comment on Options 10 and 11 in paragraphs 25 and 26: USCIB supports the best practices currently included in the MEMAP and believes countries should recommit to all of those best practices, although this will likely be insufficient to achieve the objectives of Options 10 and 11. Participating competent authorities should (1) revisit in the MAP Forum the procedural and documentation requirements for accessing MAP, (2) adopt a set of consensus guidelines addressing these MAP access elements, and (3) take responsibility for publishing the consensus guidelines as the local standard in each country. A process that is consistent across jurisdictions is important to business and will ultimately be simpler than multiple processes (even if some of those individual processes are somewhat simpler). Further, participating countries should maintain up-to-date websites that contain this information on MAP processes and should ensure that they provide the OECD on an ongoing basis with full and up-to-date information necessary for the publication of their MAP Country Profiles on the OECD website, as approved by the OECD in 2007.[6] Countries should also consider simplified procedures for smaller taxpayers or issues involving less tax revenue.

OPTION 12 – Clarify the availability of MAP access where an anti-abuse provision is applied

Where there is a disagreement between the taxpayer and the competent authority to which its MAP case is presented as to whether the conditions for the application of a treaty anti-abuse rule (*e.g.* a treaty-based rule such as the PPT rule) have been met or whether the application of a domestic anti-abuse rule conflicts with the provisions of a treaty, participating countries could commit to provide access to the mutual agreement procedure, provided the requirements of Article 25(1) are met. If participating countries would seek to limit or deny MAP access in all or certain of these cases, they could commit to specifically and expressly agree upon such limitations with their treaty partners. In addition, where a participating country would deny MAP access based on the application of domestic law or treaty anti-abuse provisions (or similar rules or doctrines), that country could commit to notify its treaty partner about the case and the circumstances involved.

Comment on Option 12 in paragraph 29: The existing Commentary on Article 25 has for a number of years specifically addressed the question of whether a country is entitled to deny access to MAP based on allegations of abuse. Paragraphs 26 and 27 of that Commentary clearly express the relevant standards:

- "In the absence of a special provision, there is no general rule denying perceived abusive situations going to the mutual agreement procedure…." (paragraph 26)
- "The simple fact that a charge of tax is made under an avoidance provision of domestic law should not be a reason to deny access to mutual agreement." (paragraph 26)
- "The circumstances in which a State would deny access to the mutual agreement procedure should be made clear in the Convention." (paragraph 26)

[6] See http://www.oecd.org/ctp/dispute/countrymapprofiles.htm.

- "The recognised general principle for tax and other treaties is that domestic law, even domestic constitutional law, does not justify a failure to meet treaty obligations…." (paragraph 27)
- "It follows that any justification for what would otherwise be a breach of the Convention needs to be found in the terms of the Convention itself, as interpreted in accordance with accepted tax treaty interpretation principles." (paragraph 27)
- "[T]he view that a matter is not susceptible of taxpayer initiated mutual agreement procedure should not be lightly made, and needs to be supported by the terms of the Convention as negotiated. A competent authority relying upon a domestic law impediment as the reason for not allowing the mutual agreement procedure to be initiated by a taxpayer should inform the other competent authority of this and duly explain the legal basis of its position." (paragraph 27)

Of the 34 OECD Member countries and the more than 30 non-OECD countries that have published their positions on the OECD Model, only Hungary has expressed any potential disagreement with these principles.[7] Action 14 should guarantee that all participating countries are committed to and will live up to these principles. The discussion draft's suggestion that there is a lack of clarity about countries' obligations in this respect is troubling. To the extent there is any need to state in the Commentary, even more clearly than has already been done, that in the absence of an explicit treaty provision providing otherwise, a competent authority is not entitled to unilaterally find a taxpayer's case "unjustified" for further handling under Article 25(2) on the grounds of alleged abuse, whether the allegation is based on domestic law or a treaty anti-abuse provision, that further statement should be made. The commitment to notification also set forth in paragraph 27 of the Commentary is a necessary mechanism to ensure treaty obligations are met whenever one Contracting State is contemplating denying access to treaty benefits based on grounds of alleged abuse, but it in no way should be seen as exhausting that State's potential obligations under Article 25. The participating countries should acknowledge that good faith compliance with the obligations of Article 25 implies a duty on such a Contracting State to negotiate with the other Contracting State on the question of whether valid grounds do exist for denying the treaty benefit in question. This clarification will be made even more important given that wide-spread use of domestic anti-abuse rules to deny treaty benefits will likely result from the work on Action 6 of the BEPS Action Plan. Further, this important clarification should be made with regard to application of <u>all</u> domestic laws effectively precluding results contemplated by a treaty, such as laws denying allocations of home office expenses or rules requiring excessive documentation to substantiate the charge out of service fees.

Experience shows that, in most instances, domestic laws leading to the denial of treaty benefits are invoked by the country of source or by the country of residence of a subsidiary corporation (leading to potential double taxation of the parent corporation resident in a second country). Thus, MAP access via the residence country or the country of the parent's residence is not the

[7] Even Hungary's observation could be interpreted as limited to situations where a Hungarian court has already ruled on the merits of the case.

problem, at least in most cases, and the concerns raised in section 3L and section 3M must not be addressed merely through language ensuring MAP access in these types of cases via Article 25(1). As indicated above, commentary pertinent to Article 25(2) should make clear that the interpretation and application of the domestic laws in question should be subject to full MAP negotiations in light of the overarching purpose of Article 25 to eliminate double taxation or taxation not otherwise in accordance with the treaty.

OPTION 13 – Ensure that whether the taxpayer's objection is justified is evaluated prima facie by both competent authorities

Where the relevant Convention follows the current wording of paragraph 1 of Article 25, participating countries could commit to a bilateral notification and/or consultation process where the competent authority to which a MAP case is presented does not consider the taxpayer's objection to be justified.

Whilst such a process would ensure that the determination whether the objection is justified is made taking into account all potentially relevant facts and circumstances, it would be clarified that such notification and/or consultation should not be interpreted as consultation as to how to resolve the case.

OPTION 14 – Clarify the meaning of "if the taxpayer's objection appears to it to be justified"

Participating countries could commit to clarify, in the Commentary on Article 25, the meaning of the phrase "if the taxpayer's objection appears to it to be justified".

OPTION 15 – Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either Contracting State

Paragraph 1 of Article 25 could be amended to permit a request for MAP assistance to be made to the competent authority of either Contracting State (*i.e.* to the competent authority of one or both Contracting States). Such an amendment could be accompanied by corresponding changes to the Commentary on Article 25, which would include the current text of paragraph 1 of Article 25 as an alternative provision to accommodate the preferences of some countries.

Comment on Options 13, 14 and 15 in paragraph 30: USCIB believes that that options 13, 14, and 15 are not mutually exclusive and could bring useful clarity to MAP access. Of course, any changes to the treaty text should not lead to any negative inference about countries' obligations to engage in good faith negotiations on MAP cases for which there is no mutual agreement exclusion from MAP. While clarity is important, even more important is broad MAP access. Thus, USCIB believes that MAP access should only be denied if both treaty partners agree that the taxpayer's claim does not appear to be justified. Further, USCIB believes that commentary to Article 25(2) should be clarified to provide that the interpretation and application of the domestic laws in the context of the applicable treaty must be subject to full MAP discussions in light of the overarching purpose of Article 25 to eliminate double taxation

or taxation not otherwise in accordance with the treaty. Such commentary to Article 25(2) would foreclose any possibility that the country seeking to apply its domestic law notwithstanding the treaty would be able to deny access to MAP based on the claim that the taxpayer's objection is not justified.

OPTION 16 – Clarify the relationship between the MAP and domestic law remedies

Participating countries could commit to clarify the relationship between the mutual agreement procedure and domestic law remedies. They could, in particular, commit –

− To facilitate recourse to the mutual agreement procedure as a first option to resolve treaty-related disputes through appropriate adaptations to their domestic legislation and administrative procedures, which may include provision for the suspension of domestic law proceedings as long as a MAP case is pending.

− To publish clear guidance on the relationship between the MAP and domestic law remedies, the processes involved and the conditions and rules underlying these processes. Such guidance could address, specifically, whether the competent authority considers itself to be legally bound to follow a domestic court decision in the MAP, or whether the competent authority will not deviate from a domestic court decision as a matter of administrative policy or practice, and thereby permit taxpayers to make an informed choice between the MAP and domestic law remedies. The Commentary on Article 25 could also be amended to address this issue.

Comment on Option 16 in paragraph 32: USCIB supports the adoption of Option 16. In particular, the Commentary on Article 25 should be amended to set forth appropriate processes and governments should commit to modify local procedural rules to carry out these processes. These changes would reduce confusion and time spent unproductively trying to resolve these issues and thus would lead to more efficient MAP processes. Further, with respect to the notion that a competent authority will not deviate from a domestic court decision, the OECD should discourage this practice, as it effectively amounts to a domestic law override of a treaty benefit.

OPTION 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure

Participating countries could commit to further clarify issues connected with the collection of taxes and the mutual agreement procedure, which could include a commitment to examine, in the context of treaty negotiations, each Contracting State's domestic law and procedures for the collection of taxes, with a view to a clear shared understanding of such law and procedures and to address directly any obstacles to MAP access that they may effectively create. Changes to the Commentary on Article 25 could also address the suspension of collection procedures pending resolution of a MAP case; these amendments could further clarify, in particular, the policy considerations supporting a suspension of collection procedures during the period that

any mutual agreement proceeding is pending and provide that such suspension should be available under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.

Comment on Option 17 in paragraph 33: The requirement that taxpayers pay assessments prior to accessing MAP is a very serious impediment to MAP access, as described in some detail at paragraphs 46 – 48 of the existing Commentary on Article 25. USCIB strongly supports options that would reduce this impediment. The options currently recommended in the Commentary (escrow accounts, bank guarantees, and topping up the tax payment rather than paying the whole amount twice) should all be supported. We also support Option 17 and recommend the following modifications. First, Option 17 should focus not only on the suspension of collection of taxes but also on the accrual of interest on any finally determined deficiencies. In some countries the interest charged on underpayments is so high that payment of the proposed deficiency is necessary, even if not mandated, merely to avoid excessive interest charges on any amounts ultimately paid after MAP resolution. Second, Option 17 seems to contemplate addressing the problem of collection (and interest accrual) primarily in the context of treaty negotiations. While this would be welcomed, of course, it should be noted that many competent authorities may have the authority to suspend collection (although perhaps not interest accrual) without a specific treaty provision so providing. Thus, Option 17 should include an instruction to competent authorities to implement suspension of collection arrangements with their partners to the fullest possible extent and a suggestion that such implementation of bilateral collection suspension agreements should be made a focus for the MAP Forum.

Suspension of collection is especially important given the significant proposed changes to the transfer pricing rules in the area of intangibles, risk, recharacterization and special measures. It is unlikely that the rollout of these provisions will be smooth and if collection is not suspended during the pendency of any dispute, taxpayers may find themselves being forced to pay punitive assessments of hundreds of millions of dollars. Once these amounts are collected (and booked as revenue) it may be very difficult if not impossible to get a refund. As mentioned in the general comment section of this letter, these are instances when double taxation may convert a profitable enterprise into a loss-making enterprise. Option 17 should strongly support all countries that currently permit suspension of collection and encourage other countries to adopt this practice.

P. Time limits to access the MAP

Description of the obstacle

34. Time limits connected with the mutual agreement procedure present particular obstacles to an effective MAP. In some cases, uncertainty regarding the "*first notification of the action resulting in taxation not in accordance with the provisions of the Convention*" may present interpretive difficulties. More importantly, some countries may be reluctant to accept "late" cases – *i.e.* cases initiated by a taxpayer within the deadline provided by Article 25(1) but long

after the taxable year at issue. Countries have adopted various mechanisms to protect their competent authorities against late objections, which include requirements to present a MAP case to the "other" competent authority within an agreed-upon period in order for MAP relief to be implemented and treaty provisions limiting the period during which transfer pricing adjustments may be made. In practice, competent authorities have found that the early discussion of MAP cases may contribute to a more effective and timely MAP process (recognising that competent authority consultation prior to the conclusion of the audit should respect the principle of the independence of the competent authority and audit functions).

OPTION 18 – Clarify issues connected with time limits to access the mutual agreement procedure

Participating countries could commit to different measures to clarify issues connected with time limits to access the mutual agreement procedure, including, in particular –

− To adopt the best practices currently included in the MEMAP concerning time limits to access the mutual agreement procedure, in particular to allow early resolution of MAP cases and to provide the benefit of the doubt to taxpayers when interpreting a tax treaty's time limitation for MAP requests in borderline cases (*e.g.* where it is not clear when "first notification" has occurred).

− To include in their treaties the second sentence of paragraph 2 of Article 25 ("*Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States*"). Where a country does not include that sentence or deviates from its wording, it could commit to ensure that its audit practices do not unduly create the risk of late adjustments for which taxpayers may not be able to obtain MAP relief.

− Where there are difficulties or doubts as to what constitutes "first notification" for purposes of paragraph 1 of Article 25, to discuss and agree on the necessary clarifications with their treaty partners.

In order to provide guidance to countries that wish to use treaty provisions that require a MAP case to be presented to the other competent authority within a specified period in order for relief to be implemented, an alternative provision – and an explanation of the circumstances in which Contracting States might consider it appropriate – could be added to the Commentary on Article 25. An alternative provision could also be added to the Commentary on Article 9 to limit the time during which a Contracting State may make an adjustment pursuant to paragraph 1 of Article 9. Similarly, to provide guidance to countries that wish to use treaty provisions that deal with the length of time during which a Contracting State is obliged to make an appropriate corresponding adjustment under Article 9(2), an alternative provision could be added to the Commentary on Article 9.

Comment on Option 18 in paragraph 34: USCIB generally supports the adoption of Option 18. We believe that the current Commentary and MEMAP should be a minimum standard, so any

alternatives to these standards should improve taxpayer protections. Thus, we would support an alternative provision that would limit the time during which a Contracting State may make an adjustment under Article 9 paragraph 1. It is not clear what the second alternative would be and therefore we express no opinion, other than to reiterate that taxpayer rights should not be narrowed. The existing Commentary also has very helpful language on this topic changes to the Commentary should only expand, not narrow, taxpayer rights. In this regard, he Commentary on Article 25 should be amended to set forth appropriate detailed guidelines and governments should commit to modify local procedural rules to carry out those guidelines.

OPTION 19 – Clarify issues related to self-initiated foreign adjustments and the mutual agreement Procedure

Changes to the Commentaries on Articles 7, 9 and 25 could be made to clarify the circumstances where double taxation could be resolved under MAP in the case of self-initiated foreign adjustments and to emphasise the importance of bilateral competent authority consultation to determine appropriate corresponding adjustments and to ensure the relief of double taxation.

Comment on Option 19 in paragraph 35: USCIB supports Option 19. Taxpayers must comply with arm's length principles. They should, therefore, be allowed to self-initiate adjustments to their reported positions and should not be penalized afterwards by withholding access to MAP for purposes of eliminating any double taxation that results.

OPTION 20 – Ensure a principled approach to the resolution of MAP cases

Participating countries could commit to different measures to ensure a principled approach to the resolution of MAP cases, including, in particular –

− To adopt the best practice currently included in the MEMAP concerning fair and objective MAP negotiations, based on a good faith application of the treaty, and the resolution of MAP cases on their merits.

− Where the interpretation of a treaty provision is likely to be difficult or controversial, to agree on specific interpretive guidance (*e.g.* in the form of a protocol or exchange of notes) proactively, ideally at the same time the treaty is negotiated. Such interpretive issues could also appropriately be resolved by the competent authorities of the Contracting States under the authority of paragraph 3 of Article 25.

OPTION 21 – Improve competent authority co-operation, transparency and working relationships

Participating countries could commit to adopt the relevant best practices currently included in the MEMAP, which would include, in particular, the following commitments –

− Countries could commit to a co-operative and fully transparent MAP process, in which competent authorities exchange documentation and information in a timely manner and regular competent authority communications are used to reinforce a collaborative working relationship. Competent authorities could also agree as to when taxpayers would be permitted to make presentations to the competent authorities to clarify – and facilitate a shared understanding of – the relevant facts and issues. Competent authorities could also commit to provide taxpayers with updates on the status of their MAP cases.

− Countries could commit, where possible, to face-to-face meetings between competent authorities, recognising that such meetings may allow for a more open discussion and collegial approach and may also represent a milestone that helps to advance a case by triggering bilateral focus and preparation.

Comment on Options 20 and 21 in paragraphs 38 and 39: USCIB strongly supports Options 20 and 21. However, a recommitment to MEMAP best practices is not enough. Options should be addressed through an intensive program of work conducted by the MAP Forum. One particular point that should be made clearer, taxpayers should always have the right to make a written presentation on an issue. Taxpayers are uniquely able to explain their business and the facts involved in any dispute and should therefore be able to present their view in writing.

USCIB's general comments with respect to arbitration are at the end of the arbitration options. Those comments that relate only to a particular option are included beneath that option.

OPTION 22 – Policy issues: Increase transparency with respect to MAP arbitration

In order to provide transparency with respect to country positions on mandatory binding MAP arbitration, footnote 1 to Article 25(5) could be deleted (and paragraph 65 of the Commentary on Article 25 modified accordingly).

Comment on Option 22 in paragraph 25: USCIB strongly supports Option 22. We believe these changes are intended to mean that the OECD supports mandatory binding arbitration as the general rule and those countries that do not support it would be required to enter a reservation or take a formal position to preserve their opposition. Establishing mandatory binding arbitration as the recommended model is a significant step forward. Requiring countries to make a formal reservation or take a formal position would identify those countries that oppose arbitration and perhaps cause them to be clearer about their objections.

OPTION 23 – Policy issues: Tailor the scope of MAP arbitration

OPTION 24 – Policy issues: Facilitate the adoption of MAP arbitration following a change in treaty policy

Because national policies with respect to MAP arbitration may be expected to evolve over time, particularly as more countries gain experience and familiarity with MAP arbitration, most favoured nation (MFN) provisions could be used as an elective mechanism for the quick implementation of MAP arbitration between a country and its treaty partners where that country determines in the future that MAP arbitration should appropriately be included as part of its treaty policy. Commentary would be developed to accompany such provisions to illustrate their potential advantages and disadvantages.

OPTION 25 – Policy issues: Clarify the co-ordination of MAP arbitration and domestic legal remedies

In order to improve the articulation of MAP arbitration and domestic remedies, participating countries could commit to provide guidance on the interaction between the mutual agreement implementing the decision of the arbitration panel and pending litigation on the issues resolved through the mutual agreement procedure (such guidance would complement the guidance to be developed pursuant to the commitment described above under Option 16). The Commentary on Article 25 could also be amended to provide greater clarity, addressing, for example, the reference to a "decision" in the final sentence of Article 25(5).

OPTION 26 – Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration in appropriate circumstances

Paragraph 5 of Article 25 could be amended to permit the competent authorities to defer the initiation of MAP arbitration in appropriate circumstances – *e.g.* to allow the competent authorities to mutually agree to defer the initiation of MAP arbitration under specific conditions.

Comment Option 26 in paragraph 47: USCIB supports option 26 because we believe it will encourage countries to include mandatory binding arbitration in their treaties. USCIB is concerned, however, that this authority could be subject to abuse, and therefore it might be useful to describe the situations in which the arbitration deferral is appropriate – for example, in situations in which the competent authorities mutually and genuinely believe the case is close to resolution without arbitration.

OPTION 27 – Practical issues: Appointment of arbitrators

In order to avoid potential differences, participating countries could agree to develop mutually agreed criteria for the appointment and qualifications of arbitrators, to be included in the text of the arbitration provision itself and/or in competent authority agreements concluded for purposes of the implementation of MAP arbitration, in advance of any MAP arbitration procedure. To ensure that prospective arbitrators are impartial and independent, participating countries may also wish to develop a standardised declaration that would be executed by

arbitrators to attest to their fitness to serve as arbitrators and to disclose any potential conflicts of interest.

Comment on Option 27 in paragraph 48: USCIB supports these proposals.

OPTION 28 – Practical issues: Confidentiality and communications

In order to protect the confidentiality of taxpayer information in the context of MAP arbitration (and the overall integrity of the MAP arbitration process), the Article 25 arbitration provision could be amended as follows:

• To ensure the proper consideration of the relevant information in the MAP arbitration process, any disclosure of taxpayer information by a competent authority to the members of the arbitration panel would be made pursuant to the authority of the Convention and subject to confidentiality requirements that are at least as strong as those applicable to the competent authorities. An express provision in the text of the Convention itself, with a cross-reference to Article 26, would ensure the legal status of the arbitrators.

• The Commentary on Article 25 could provide additional relevant guidance, noting the practice of some competent authorities (*i*) to request that taxpayers authorise the disclosure of relevant information to the arbitrators and (*ii*) to require that the arbitrators and their staffs agree in writing to maintain the confidentiality of the information they receive in the course of the arbitration process (subject only to further disclosure in accordance with the requirements and further authorisation of the competent authorities and the affected taxpayers).

• The Commentary on Article 25 could also note the practice of some countries to oblige taxpayers and their representatives to maintain confidentiality regarding arbitration in a MAP case, subject to any necessary disclosures such as for financial reporting purposes, with a view to avoiding potential taxpayer manipulation of the MAP arbitration process.

Comment on Option 28 in paragraph 49: USCIB agrees that the security of taxpayer and competent authority information and communication are critical to public confidence in tax administration. We, therefore, support these provisions that address maintaining confidentiality.

OPTION 29 – Practical issues: Default form of decision-making in MAP arbitration

In light of experience with MAP arbitration, participating countries could develop additional guidance under Article 25 of the OECD Model on the use of different decision-making mechanisms as default approaches in MAP arbitration, with an explanation of the respective advantages and disadvantages of the independent opinion and Final Offer approaches. Stakeholder comments are invited in particular on the preferred default form of decision-making in MAP arbitration.

Comment on Option 29 in paragraph 50: USCIB strongly supports Final Offer arbitration but independent opinion is preferable to no arbitration.

OPTION 30 – Practical issues: Evidence

In light of experience with MAP arbitration, guidance in the Commentary on Article 25 of the OECD Model could be developed to address particular evidentiary issues that may arise in connection with different forms of arbitral decision-making. Such guidance could provide, for example, that where the format for arbitral decision-making is the Final Offer approach, an "on the record" evidentiary format should be used. This guidance could also provide, for example, that where the format for arbitral decision-making is the independent opinion approach, it may be appropriate in some cases for the competent authorities to permit the taxpayer to present its position orally during the arbitration procedure, at the request, or with the permission, of the arbitrators. Stakeholder comments are invited on approaches to evidentiary issues in the MAP arbitration process. In addition, in order to ensure that the taxpayer's position is clearly communicated to the arbitration panel, guidance under Article 25 could allow for the taxpayer's submission of some form of brief for consideration by the panel (subject to review and comment by the competent authorities); such a brief should not, however, contain new facts which have not previously been considered by the competent authorities.

Comment on Option 30 in paragraph 52: USCIB strongly supports the right of a taxpayer to make a written submission in an arbitration proceeding.

OPTION 31 – Practical issues: Multiple, contingent and integrated issues

Participating countries could establish mutually-agreed guidance for arbitrators on how to deal with multiple, contingent and integrated issues.

OPTION 32 – Practical issues: Costs and administration

In order to address the particular concerns that costs may present an obstacle to the adoption of MAP arbitration, participating countries could consider ways to reduce the costs of MAP arbitration procedures, with a view to developing guidance in the Commentary on Article 25 on these issues and approaches to address them.

General comments on Options 22-32 in paragraphs 41-55: That MAP arbitration can work to ensure efficient MAP resolution has been proven. Further, there is support among some competent authorities for the proposition that the mere existence of an arbitration mechanism has made traditional MAP processes more efficient and effective where the mechanism exists. Given this positive experience and support, and given the critical need for MAP enhancement, it is imperative that (1) all countries work together toward widespread acknowledgement of the need for arbitration as a MAP resolution tool, (2) all objections to the adoption of arbitration be made known by countries harboring those objections, and (3) all countries work intensively

together to address specific objections to arbitration and to implement any and all possible solutions to those specific objections. The discussion set forth in section 3T makes a good first start at cataloguing possible objections and potential solutions. The follow-on work on Action 14 should focus on furthering a transparent discussion of these objections and solutions, and others that may not yet be identified, with a goal of ensuring that all barriers to MAP arbitration are eliminated as the earliest possible time.

Only in the event that countries are unwilling to agree to mandatory binding arbitration, one possible alternative that could be considered would be mandatory non-binding arbitration. That is, under this alternative a country could proceed to domestic dispute resolution options if the arbitrator's decision were unfavorable. The fact of the decision and the decision itself (either the independent opinion or the other country's position) would be admissible in any judicial proceeding. This approach might deal with the sovereignty issue; that is the country always has the choice to use its own judicial mechanism, so accepting the arbitrator's decision is merely settling a tax case, not a concession of sovereignty. Taxpayers rights would need to be protected so, for example: (i) taxpayers must not be obligated to waive their rights to domestic remedies to have access either to MAP itself or the arbitration proceeding; (ii) the time period for pursuing judicial remedies in the event of a failure to achieve a mutual agreement upon the conclusion of the arbitration must be kept open until the conclusion of the arbitration proceeding. This approach might also allow countries to become comfortable with arbitration and move on to mandatory binding arbitration.

OPTION 33 – Address issues related to multilateral MAPs and advance pricing arrangements (APAs)

Changes to Article 25 and/or its Commentary could also be made in order to address directly the interpretation and application of Article 25 with respect to multilateral MAPs and APAs, in particular to address the issue of how the arbitration process could be used in a multilateral MAP and to address legal, practical and/or procedural issues, including issues connected with time limits (*e.g.* domestic statutes of limitation for assessment) and issues connected with ensuring that third-State competent authorities are made aware of cases with multilateral implications.

The possibility of developing a specific provision that would address mutual agreement procedure issues that arise in multilateral situations, including how the arbitration process could be used in such situations, could be considered by the interested parties that will participate in the development of the multilateral instrument contemplated by Action 15 (*Develop a multilateral instrument*) of the BEPS Action Plan.

Comment on Option 33 in paragraph 59: Experience shows a growing prevalence of situations in which multilateral resolution mechanisms would provide great efficiencies for both businesses and competent authorities. USCIB, therefore, supports Option 33. It should be noted, however, that, in addition to the legal and process barriers that need to be addressed through this work, there appears to be an important, but less tangible, concern held by at least

some competent authorities that multilateral case resolution may undercut their ability to argue for their position strenuously enough. This reluctance to engage in a process in which a country is forced to defend its position against more than one other country must be addressed head-on, and situations in which a country simply refuses to engage multilaterally, notwithstanding a lack of legal or process barriers, must be dealt with.

OPTION 34 – Provide guidance on consideration of interest and penalties in the mutual agreement procedure

Changes to Article 25 or its Commentary could be made to address the treatment of interest and penalties in the MAP, in particular to explain that whilst it is not appropriate to consider interest and penalties as "taxes" in order to apply limitations on source State taxation or for purposes of the obligation of the State of residence to relieve double taxation, interest and administrative penalties that are directly connected to the taxes to which they are related should be treated in the same way as taxes to which they are directly connected (in particular where interest and penalties are computed with reference to the amount of the underlying tax and the underlying tax is found not to have been levied in accordance with the provisions of the Convention).

Comment on Option 34 in paragraph 60: Experience shows that these issues are encountered frequently on MAP cases and that competent authorities, while willing to deal with them on a case-by-case basis, do not have consistent policies for doing so, and certainly these policies are not uniform among treaty partners. USCIB, therefore, supports development of Option 34.

Sincerely,

William J. Sample
Chair, Taxation Committee
United States Council for International Business (USCIB)

Washington Office
1400 K Street, N.W., Suite 905
Washington, D.C. 20005
202.371.1316 tel
202.371.8249 fax
www.uscib.org

Global Business Leadership as the U.S. Affiliate of:
International Chamber of Commerce (ICC)
International Organization of Employers (IOE)
Business and Industry Advisory Committee (BIAC) to the OECD
ATA Carnet System