Canadian Competent Authority Update

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Abstract

Canada has approximately 86 tax treaties with countries around the world for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital. While each treaty is negotiated separately, guidance is available through the Organisation for Economic Co-operation and Development (OECD) model tax convention. In this paper, the authors examine a change proposed by the OECD to article 25 of the model tax convention to introduce a paragraph on arbitration, as well as the draft *Manual on Effective Mutual Agreement Procedures* (MEMAP) released by the Joint Working Group of the OECD Committee on Fiscal Affairs that presents 24 best practices following the various critical areas of the mutual agreement procedure. The Canadian competent authority has already put in place some of the best practices with its counterpart in the United States.

The authors also discuss a consultative meeting held by the competent authority to solicit input on improving the advance pricing arrangement program and the resulting response from the competent authority.

Keywords APA; OECD; arbitration; competent authority; tax treaties; Canada-US.

Introduction

Readers who have used the competent authority process over the past decade, whether for an advance pricing arrangement (APA) or for the resolution of double taxation, will likely agree that the experience can be described as anything but fast. Explanations of why cases move so slowly vary, with the most common being strained relations between the case officers negotiating the cases, aggressive positions taken by Canada, and excessive delays in providing position papers.

In this paper, we discuss recent activity undertaken by the Canadian competent authority to advance the handling of cases through improvements to its own APA program and its relations with its counterpart in the United States. We also discuss broad-based solutions to resolving competent authority processes in a timely manner—namely, the introduction of an arbitration paragraph to the Organisation for Economic Cooperation and Development (OECD) model tax convention[1] and the publication of the 24 best practices offered as guidance to taxpayers and administrators.[2] Because much of what the Canada Revenue Agency (CRA) adopts is derived from the OECD, these changes may affect the competent authority process both currently and in the future.

Memorandum of Understanding (June 3, 2005)

Aware of serious issues that needed to be addressed, the competent authority for Canada and the competent authority for the United States undertook a series of private meetings with service providers and other interested parties in both countries to listen to their experiences and to develop recommendations for remedies. After consultation with their staffs, the two competent authorities identified issues and agreed, in a memorandum of understanding (MOU) signed on June 3, 2005, to establish principles and guidelines aimed at improving the mutual agreement procedure (MAP) as set forth in the Canada-US Income Tax Convention.[3]

The fundamental purpose of the MAP, which is set out in article XXVI of the treaty, is to permit the two taxing authorities to resolve double taxation or taxation that is contrary to the treaty. Although double taxation may not be resolved in every case, there is an onus on the competent authorities to endeavour to arrive at a satisfactory resolution by mutual agreement. Even though timing is not specifically mentioned in the treaty, there is an implied understanding that cases will be resolved on a timely basis.

Reaching Agreement

The competent authorities are committed to the principle that resolution of double taxation or taxation contrary to the treaty should be possible in all cases. In order to achieve this end, they are committed to the following understandings:

1) *Positions will be principled, reasonable, and consistent*. Position papers put forward by a competent authority will have merit and be consistent with positions taken in previous similar cases. A competent authority should advance only those positions that it would be prepared to accept if they were being presented by the other competent authority.
2) *Agreement on the facts*. Because many cases are delayed as a result of disagreement on the facts, the competent authorities will accept the transaction as represented by the taxpayer; only in exceptional circumstances will they consider disregarding or restructuring a transaction.

3) *Means of resolving cases*. If major differences of opinion on an issue exist, the competent authorities will look for opportunities to compromise. If a case has not been resolved within two years of its acceptance, the competent authorities or their delegates will meet to resolve the case.

Procedural Issues

Procedural issues resulting from domestic administrative policies, practices, and procedures in either country may impede the resolution of MAP cases.

1) *Removal of barriers*. The competent authorities should endeavour to identify and remove administrative policies, practices, and procedures that may impede the resolution of a MAP case.
2) *Notification*. Article IX(3) of the treaty provides that a competent authority must be notified, within six years of the fiscal year-end of a taxpayer in the other state, of a pending adjustment to the taxpayer in the other state that may result in double taxation. Although under the treaty the competent authorities may agree to accept a case when notification has not been provided within the required time limit, the MOU provides for agreement on a broad interpretation of the term "notification" that reflects the intention to be as inclusive as possible when considering requests for MAP assistance.

Substantive Issues

The competent authorities have identified a number of substantive issues that could result in double taxation. These include the following:

- arm's-length compensation for consignment manufacturers;
- situations in which a profit split may be appropriate;
- the valuation of non-routine intangibles;
- profits attributable to a permanent establishment;
- characterization of a transaction as a service or a licence of intangibles;
- closure or relocation costs; and
- conflict between the laws of the source country and the laws of the residence country.

In the MOU, the competent authorities agree to initiate discussions to (1) create an MOU to implement a procedure to determine the facts of a specific case, (2) establish guidelines to resolve substantive issues that complicate the case resolution, (3) identify and remove procedural obstacles that hinder the MAP process, and (4) create an MOU to address notification issues.

To date, the only item that has been addressed pertains to factual disagreement (discussed below). According to Francis Ruggiero, acting director of the Competent Authority Services Division, no action is currently being taken on entering

into additional MOUs with the US competent authority with respect to substantive, procedural, or notification issues. The signing of the June 3, 2005 MOU apparently had the effect of enhancing the efforts of both tax authorities to resolve MAP cases.

Memorandum of Understanding (December 8, 2005)

On December 8, 2005, the Canadian and US competent authorities signed another MOU whereby they established principles, guidelines, and procedures for resolving disagreements pertaining to the underlying facts in MAP cases. For taxpayers that have cooperated with the competent authorities, this MOU establishes an independent review process in cases where factual disagreement exists in respect of (1) whether a fact has occurred, (2) the relevance of a fact, or (3) the importance or significance of a fact.

If the competent authorities cannot agree on the facts pertaining to a case within six months after their first face-to-face meeting, then they must refer the case to a joint panel of officials of the respective Appeals Divisions. An exception arises when the competent authorities agree to refer the case either before or after the six-month period.

The referral outlining the factual disagreement must be made in writing to the Appeals Divisions no later than 30 days after the expiration of the six-month period. If the competent authorities agree, they may make a joint referral that does not disclose which country initiated the original reassessment.

Each Appeal Division must acknowledge receipt of the referral and advise its competent authority of the members of the review committee within 30 days of the referral. The review committee is composed of one voting member from each country. Each competent authority may also appoint additional non-voting members. Members of the review committee should not have had any previous involvement in an audit or appeal filed by the taxpayers unless the competent authorities agree otherwise. The review committee is to have no contact with either the taxpayers or the competent authorities, but it may request additional information from any party.

The review committee is to meet face to face, if necessary, and must render a decision within 150 days of the referral. Extensions may be requested and granted by either competent authority.

If the voting members of the review committee agree on a resolution of the factual disagreement, they will provide a summary of the resolution, in writing, to the competent authorities; the competent authorities are required to follow the resolution. If the voting members do not agree on a resolution, each Appeals Division will be provided with a written explanation of its voting member's determination.

A decision reached by the review committee is not precedent-setting.

To date, there have been no referrals to the Appeals Division to resolve an issue of factual disagreement between the competent authorities. While the

competent authorities appear to have taken it upon themselves to remedy previous issues without utilizing the process outlined in the December 8, 2005 MOU, there has not been a substantial decrease in the amount of time it takes to resolve a MAP case. One reason for this is the staff shortage on the CRA side and the resulting delay in providing position papers to other competent authorities. This is an acknowledged issue, and the CRA is taking steps to remedy the situation.

Advance Pricing Arrangements

In addition to MAP cases, the Canadian competent authority also has responsibility for the CRA's APA program. As part of its efforts to promote and refine the APA program, the CRA invited advisers to a consultation meeting in June 2006. Approximately 20 representatives from accounting and law firms accepted the invitation. The CRA contingent was led by Francis Ruggiero, acting director of the Competent Authority Services Division; he was accompanied by four staff members.

Following are some of the topics of interest that were discussed:

- The treatment of rollbacks should be in the hands of the APA team in Ottawa rather than a responsibility of the local auditor.[4] Advisers have encountered too many problems in disputes with the auditors about what years should be included in a rollback and the methodology to be applied. Because a large number of taxpayers enter into the APA program as a result of a difficult audit, the role of the auditor should be limited to advising as a member of the APA team. The CRA confirmed that a rollback is the responsibility of the auditor, but it will consider wording changes to *Information Circular* 94-4R to clarify this point.[5] The CRA commented that it was considering having unilateral APAs handled by the local auditors; however, after input from the advisers, the CRA realized that this practice would not be supported.
- Applying the agreed-upon methodology to rollback years can result in a combination of upward and downward adjustments. It was suggested that in order to remove the unfairness in the different interest rates, rollback adjustments could be brought forward into the first year of the APA. The CRA replied that legislation requires that each year be reassessed separately, and a major policy change would be required.
- The CRA has completed three small business APAs and currently has a few in progress. Most of these requests have come directly from taxpayers without the input of advisers. While the wording in *Information Circular* 94-4R (Special Release)[6] indicates that the CRA will prepare the economic analysis on behalf of a taxpayer, the CRA is negotiating with taxpayers on the methodology. The CRA has said that the wording in the revised information circular will clarify this point.
- Some taxpayers that have been advised at pre-filing meetings that the CRA does not agree with the methodology proposed have ignored the CRA's

request for a change and proceeded with the original methodology in the APA submission, believing it to be correct. As a result, the CRA has introduced a new acceptance procedure that would make a taxpayer's acceptance into the APA program conditional on the CRA's review of the submission. Tax advisers believe that this procedure promotes a Canadian-centric point of view, disregards what the taxpayer believes to be correct, and may upset the foreign tax authority. Furthermore, it may deter taxpayers from considering the APA program, because they may not want to invest in an APA without assurance that they will be admitted into the program.

At one point, the CRA was using "conditional acceptance" letters, which were issued after the pre-filing meeting and contained items that the CRA wanted to see addressed in the submission. It was agreed that this format worked well.

- Stemming from the foregoing discussion, there was a consensus among the advisers that the CRA reaches its own conclusions at pre-filing meetings based on previous experiences, and that the CRA should wait until the submission is provided and it has confirmed the facts. The CRA should give more consideration to the taxpayer's weighing of the facts for the value drivers in its business; the taxpayer knows its business better than the CRA does. The CRA acknowledges that this happens and is endeavouring to prevent it.
- Advisers would like to see an increase in the level of taxpayer involvement in the bilateral APA process. Again, the taxpayer knows its business best, and this knowledge may speed up the process. The CRA was receptive to this proposal.
- Because APAs are voluntary, the taxpayer should be protected from a transfer-pricing penalty when the methodology is applied to a rollback year.[7]
- The CRA inquired about interest in holding pre-filing meetings via teleconferencing or videoconferencing. The majority of the advisers expressed an interest in maintaining the current face-to-face meeting format.
- The feasibility of conducting the APA process in phases was discussed: the parties would agree on the facts, then proceed to agreement on the methodology and then to the comparables. The CRA indicated that this practice could be feasible, especially in the case of unilateral APAs.

After the meeting, the CRA provided the participants with a summary of the recommendations for revisions to the upcoming circular and the recommendations for program changes:[8]

A. Recommendations for Revisions to the Upcoming Circular

- Include an expanded description of the APA program and process;
- Include a description of both the advantages and disadvantages (risks) of an APA;

- Clarify the treatment of rollback years and the role of the TSO and HQ in the decision to include rollback years in the APA process;
- Provide a detailed description of the APA acceptance procedures;
- Describe the extent, if any, to which interest relief will be available when adjustments are required to bring the taxpayer in line with an agreed upon APA;
- Explain the applicability of transfer pricing penalties to APA and rollback years; and
- Improve the tone and messaging related to Unilateral and Small Business APAs.

B. Recommendations for Program Changes

- Explore opportunities to reduce annual reporting requirements for the traditional program;
- Explore opportunities for facilitating the inclusion of rollback years such as through the use of waivers;
- Consider eliminating the use of a classification system (red/green/yellow light) for APA requests and to address case specific concerns of taxpayer risks within conditional acceptance letters;
- Identify opportunities to improve efficiencies in the renewal process at the pre-file, submission and site visit stages of the APA process; and
- Improve communications to better address the needs of taxpayers and representatives.

Shortly after the meeting in June 2006, the CRA abandoned the "red-green-yellow light" classification system. While the system was in existence, "green light" classification indicated that the methodology proposed by the taxpayer was acceptable and could lead to resolution; a "yellow light" classification indicated that the CRA had concerns that may have made agreement on the requested methodology unlikely; and a "red light" classification indicated that the transfer-pricing method was unreliable and that it was inappropriate for the CRA to proceed.

In our opinion, the issue of primary importance at this time is rollbacks. It is now common for taxpayers to make use of the APA program to avoid audits that either have gone or are currently going poorly. More and more auditors are seen to be taking aggressive positions that can be attributed to their not understanding the facts that are associated with profit drivers within the taxpayer's business and to their not understanding or following the arm's-length principle and the guidelines presented in *Information Circular* 87-2R.[9] In any case, taxpayers are required to spend almost as much time in audit defence for a single taxation year as in obtaining an APA for multiple future years and resolving some prior years as well.

For an APA methodology to be applied to prior years, the years must not have been previously audited, a current audit must not be substantially complete, and a waiver must be provided.[10] If a waiver cannot be provided for a specific year because the normal reassessment period has expired, then that year cannot be

considered for a rollback. The rationale is that when taxpayers have requested rollbacks to prior years, the CRA has agreed to a rollback only to be informed at the conclusion of the APA process that a taxpayer has withdrawn the request for that year to be included in the rollback. In some cases, the CRA has lost its right to audit that year. Thus, as protection against losing the right to audit a specific year, the CRA requires that a waiver be signed.

When taxpayers enter the APA program and request a rollback to prior years, there is an expectation that the process will run smoothly and that the years the taxpayer has asked to have included in the rollback will be dealt with appropriately as part of the APA process. In situations where adjustments expected by the taxpayer are not made to particular rollback years, the taxpayer may be able to have the adjustment raised in the foreign jurisdiction, and the competent authorities can then settle the case as agreed in the APA process. It appears to be a needless waste of a taxpayer's time and resources to pursue this route when an auditor could have agreed to process the adjustment on the basis of the APA agreement.

The APA program is one that a taxpayer would enter on a voluntary basis. Therefore, the taxpayer believes that it should be entitled to the benefits afforded under the voluntary disclosure program (VDP) in the event that a transfer-pricing penalty could be applied to any specific year included in the rollback request. At the time of filing an APA submission, the taxpayer may know whether there will be upward adjustments in prior years and may be willing to pay the tax and interest arising from the adjustments, but may not know the exact amount of the adjustment until the APA process is complete. Thus, the taxpayer cannot make a separate request under the VDP, because the amount of the error or omission must be stated. The rollback years are presently under the control of an auditor; if the adjustment processed in a rollback year exceeds the limits for a transfer-pricing penalty, a referral must be made to the Transfer Pricing Review Committee, which will determine whether a penalty should be applied.

The unsettling issue is that even though the APA submission was provided without a written request from the CRA pursuant to paragraph 247(4)(c) of the Income Tax Act, an auditor can contend that the submission was not prepared within the filing deadline for specific years included in the rollback and that the taxpayer does not possess contemporaneous documentation. This is especially applicable in situations where the methodology proposed by the taxpayer in the APA submission or agreed upon through the APA process is different from that used by the taxpayer in prior years. Because the CRA has not performed an audit on a rollback year, the auditor can issue a written request for the taxpayer to provide its contemporaneous documentation, even though the APA process has been concluded. If, upon the mandatory referral to the Transfer Pricing Review Committee, the committee finds that the taxpayer has not made reasonable efforts to prepare contemporaneous documentation, the taxpayer could be penalized.

Although the case did not involve an APA, the CRA has formally requested a taxpayer's contemporaneous documentation after an audit was completed and a

penalty was levied after the Transfer Pricing Review Committee determined that reasonable efforts had not been made. Given that this practice is not beyond the CRA, a taxpayer may be subject to a transfer-pricing penalty in a rollback year if the upward adjustment exceeds the penalty threshold. The CRA has already demonstrated that it will go to extreme lengths—some may say unfair lengths—to impose a transfer-pricing penalty. The simple solution is to obtain an agreement with the Transfer Pricing Review Committee that penalties will not be imposed in situations where an adjustment is based on a methodology negotiated through the APA process.

The draft revision to IC 94-4R should be completed in 2007 and will be posted on the CRA's Web site for comments. We hope that it will address the areas of primary concern to the taxpayers in a favourable manner.

Recent OECD Developments Regarding Supplementary Dispute Resolution Mechanisms

The Joint Working Group (JWG) of the OECD Committee on Fiscal Affairs has continued its work on improving the effectiveness of MAP. Following on the conclusions of the July 27, 2004 Progress Report,[11] the JWG issued its *Manual on Effective Mutual Agreement Procedures* (MEMAP) in draft form;[12] it also issued for public commentary proposed changes to article 25 of the OECD model tax convention and its corresponding commentary. Whereas MEMAP addresses current MAP processes and best practices, the changes to article 25 introduce arbitration as an example of a supplementary dispute resolution (SDR) mechanism. These two initiatives of the OECD are discussed below.[13]

MEMAP

The OECD's draft version of MEMAP emerged from its initiative to examine ways of improving the speed and effectiveness of the MAP provision already enshrined in the OECD's model tax convention.

MEMAP sets out 24 best practices that follow the various critical areas of the MAP process. These best practices are intended to "describe recommended approaches for conducting MAP activities" and to raise awareness of the MAP process.[14] The preamble to MEMAP clarifies that statements or information provided therein do not take precedence over any enacted conventions, domestic guidance, the OECD model tax convention and commentary, or the OECD transfer-pricing guidelines.[15] MEMAP is presented as a complement and in response to issues raised in respect of the OECD model tax convention. At the time of writing, the term of the JWG working on the finalization of MEMAP had been extended to January 2007.

The 24 best practices are summarized below. Following this summary, a number of discussion items are presented. Although these items are not defined as best practices, they may nonetheless be interesting to taxpayers and their advisers.

1) *Robust use of authority to resolve issues of interpretation or application*. Competent authorities are encouraged to exercise the authority provided to them in the first sentence of article 25(3) of the model tax convention:

> The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention.

2) *Principled approach to resolution of cases*. Competent authorities should resolve cases without regard to the balance of outcomes of prior cases; they should use a consistent approach to issues, without switching sides, regardless of the result in a given case.
3) *Transparency and simplicity of procedures for accessing and using MAP*. Competent authorities should formulate, publicize, and maintain information accessible to taxpayers on how to access MAP. Only necessary formalities should be used.
4) *Provision of complete, accurate, and timely information to the competent authorities*. Taxpayers should ensure that they provide both competent authorities with the same information at the same time. This information should be complete and accurate.
5) *Allowing of electronic submissions*. Both taxpayers and competent authorities would benefit from the use of electronic filing through the reduction in the administrative burden and the facilitation of administrative tasks.
6) *Allowing of early resolution of cases*. Competent authorities often wait for confirmation of an adjustment to income before addressing a MAP application. Taxpayers should be able to apply for MAP at an early stage of a potential dispute. Competent authorities should seek pragmatic solutions to foreseeable cases of double taxation.
7) *Earlier notification of a potential case*. Taxpayers should notify the competent authorities of a potential MAP case as soon as it appears likely that double taxation will occur. Beyond compliance with notification deadlines, this will give competent authorities the opportunity to make early resolutions.
8) *Liberal interpretation of time limits for requesting access to MAP*. Although the tax authorities are within their rights in implementing reasonable time limitations, taxpayers should receive the benefit of the doubt when it is not clear whether the time limitations in a given treaty have been met. Furthermore, at the time that a formal adjustment is made, tax authorities should inform the taxpayer in writing of the possible MAP relief available and the time limitations pertinent to them. Time limitations in domestic law should not serve as a bar to accessing MAP. If a competent authority uses a domestic-law impediment as a reason to deny a taxpayer's access to MAP, it should explain the legal basis of that position to its counterpart.
9) *Avoiding exclusion from MAP relief due to late adjustments or late notification.* If a MAP case could potentially result, the tax authorities should advise a

taxpayer as early as possible of their intention to make an adjustment. If there is a conflict between the time limit set out in domestic legislation and that set out in the enacted tax convention, and if the convention should take precedence over domestic legislation, competent authorities should apply the convention in good faith. Another means of encouraging taxpayer access to MAP is the allowance for protective claim or notification filing, whether domestically or within MAP.

10) *Eliminating or minimizing exceptions to MAP*. Domestic legislation should be consistent with tax conventions. If discrepancies exist, tax authorities should publish a list of those discrepancies. As noted in point 8 above, if a competent authority uses a domestic-law impediment as a reason to deny a taxpayer's access to MAP, it should explain the legal basis of its position to its counterpart.[16]
11) *Consideration of MAP assistance for cases described as tax avoidance*. An adjustment arising from the application of tax-avoidance provisions in domestic legislation should not bar a taxpayer from accessing MAP, provided that the taxpayer is eligible under the criteria set out in the convention. According to MEMAP, if domestic tax-avoidance legislation is attached to anti-avoidance penalties and interest, barring a taxpayer's access to MAP can have an overly punitive effect on the taxpayer. In any event, if a competent authority is prevented by domestic legislation from providing relief in such cases, its counterpart ought to provide any relief that it considers appropriate.
12) *Taxpayer presentations to competent authorities on fact-intensive or complex cases*. Notwithstanding that MAP is a government-to-government process, if a taxpayer's MAP application is complex or fact-intensive, the taxpayer should, with the agreement of both competent authorities, be invited to give a presentation to the competent authorities to clarify issues or facts.
13) *Cooperation and transparency*. Cooperation among all parties will ensure a well-functioning program. To this end, taxpayers should provide information pursuant to competent authority requests (for instance, providing additional information or information previously requested but not provided) in a timely manner. Taxpayers should also provide identical documentation packages to both competent authorities. Competent authorities should keep taxpayers apprised of the status of their application frequently and in a timely manner.
14) *Face-to-face meetings between competent authorities*. Competent authorities should endeavour to meet face to face. Such meetings increase open discussion and foster collegiality. Furthermore, the face-to-face meeting is usually a trigger in the MAP timeline (see "Timeline of a Typical MAP Process," below), thereby leading to activity and progress on the file.
15) *Bilateral process improvements*. Examples of specific process improvements cited by MEMAP are the October 25, 2000 administrative arrangement between the United States and the United Kingdom competent authorities

and the issuance in 2004 of the Pacific Association of Tax Administrators' internal operational guidance on the MAP.[17] MEMAP observes that bilateral memoranda of understanding can enhance consistency and drive continued improvements.

16) *Decision summaries provided to taxpayers*. In order to adhere to the principle of transparency and to avoid any appearance of trading cases, the competent authority should provide decision summaries to the taxpayer. The summaries would not be detailed, nor would they represent full disclosure. Rather, they would set out the underlying reasons and principles that led to the proposed solution. Though the summaries would generally be provided in the closing letter, in contentious cases the taxpayer should be invited to a meeting with the competent authority.
17) *Recommendation for MAP cases beyond two years*. MEMAP sets out a timeline for the resolution of MAP cases. (This timeline is further discussed below under the heading "Timeline of a Typical MAP Process.") If the competent authorities do not resolve a case within two years or within the period agreed by the competent authorities at the outset, they may continue their deliberations or agree to an extension of the period. If it is likely that a case will exceed the agreed-upon time limit, senior officials of the competent authorities should review the case and agree on an approach.
18) *Avoid blocking MAP access via audit settlements or unilateral APAs*. A taxpayer's access to MAP should not be blocked by the tax administration of either country. Such a bar is counter to the principles of cooperation and reciprocity between competent authorities. An example of a bar is the request on the part of a tax administration that a taxpayer agree not to seek MAP relief in return for certain concessions on its audit file.[18] Similarly, taxpayers with unilateral APAs are sometimes refused access to MAP; MEMAP suggests that unilateral APAs be regarded as equivalent to a taxpayer's (initial) filing and not as an irreversible settlement. If a foreign adjustment is made, the unilateral APA would be revisited and adjusted.
19) *Interest relief*. All or a portion of the interest that accrues against a proposed adjustment during the time that the competent authority request is open should be waived or cancelled. The overarching reason for this is that the taxpayer has no control over a large part of the MAP process. MEMAP notes that some jurisdictions may take taxpayer cooperation into account.
20) *Suspension of collections during MAP*. Tax administrations should suspend or defer collections activities on tax amounts that are subject to an ongoing MAP application. To do otherwise is to impose effective double taxation. A risk assessment of the taxpayer's creditworthiness may lead to security being requested of the taxpayer.
21) *Readily available access to a competent authority*. The competent authority officials working on case files should be empowered with delegated decision-making powers to conclude MAP arrangements. At the same time, the

competent authorities may be expected to consult internally and may seek to make decisions by consensus with a view to ensuring consistency and internal transparency.

22) *Independence of a competent authority.* The competent authority should remain autonomous from the audit function of the tax administration. Although the point is not cited in the best practice itself, MEMAP qualifies this statement by pointing out that individual tax administrators who are involved in proposing the adjustment could be invited, in a consultancy role, by the competent authorities to answer factual queries and to explain the basis for the adjustments that have been made.[19]
23) *Performance indicators for the competent authority function and staff.* Appropriate performance indicators for competent authority staff relate to measures of consistency, timeliness of case resolutions, and principled and objective MAP outcomes. The rate of retention of tax revenue should not be used as a performance indicator.
24) *Implementing and promoting accelerated competent authority procedure (ACAP) and bilateral APA programs*. The use of ACAP and APA programs ought to be increased, thereby reducing taxpayers' reliance on MAP and providing both taxpayers and tax administrations with greater certainty.

In addition to the best practices, MEMAP contains a discussion of other elements of MAP process, such as position papers, the use of third parties, a taxpayer's rejection of the outcome of the MAP process, the repatriation of funds, and the timetable of a typical MAP. These points are discussed in more detail below.

Position Papers

Excluded from the best practices, but discussed at some length in MEMAP, is the provision of position papers by one competent authority to the other. The exchange of position papers that have sufficient detail and that are provided as a matter of priority enables the optimal resolution of a MAP request. MEMAP calls for the automatic preparation of a position paper by the state that has made the adjustment giving rise to the MAP application, regardless of whether the taxpayer submitted the application to that state. With respect to sufficiency of detail, a listing of information that should be included in the position paper is set out in MEMAP.[20]

If there is disagreement between the competent authorities, a rebuttal position paper should be prepared as a matter of priority. A listing of points that should be covered in the rebuttal position paper is similarly set out in MEMAP.[21]

Use of Third Parties

Under the heading "Problematic Cases," MEMAP discusses the use of third parties. It suggests that third parties can assist in improving the efficiency of an

application if they are impartial and neutral and if their participation has been sanctioned by both competent authorities. Examples cited of third parties are experts in the taxpayer's commercial area, in tax law, or in economics, and/or arbitrators, mediators, or facilitators.

Rejection of a Proposal by the Taxpayer

If the competent authorities have considered a MAP application and proposed a resolution that is not acceptable to the taxpayer, the taxpayer may reject the proposal and the case will be considered closed. If valid notices of objection or appeal have been filed, the taxpayer may pursue domestic relief. If no such relief is forthcoming, the taxpayer may make a second MAP application. However, while the competent authority ought to accept a second request for relief from double taxation, it is expected to do no more than present it to the other competent authority for the provision of any possible relief. MEMAP cautions taxpayers that both competent authorities may offer no relief if full relief was offered to and refused by the taxpayer initially.[22]

Repatriation Agreements

Under the heading "Secondary Adjustments, Withholding Tax, and Repatriation on Transfer Pricing Adjustments," MEMAP discusses the optimal mechanics for making a repatriation payment, as well as the ideal repatriation agreement.[23] Furthermore, MEMAP states that a repatriation agreement reached at an audit stage should not preclude a request by the taxpayer for competent authority assistance. Neither should it indicate that the taxpayer concurs or agrees with the related audit adjustment. MEMAP states that the competent authorities alone may agree on terms of repatriation if the taxpayer does not agree on repatriation terms before initiating a MAP request.[24]

Timeline of a Typical MAP Process

Included in an appendix to MEMAP is a timeline of the typical MAP process. This timeline is synopsized in table 1.[25] After acceptance of the MAP request, the competent authorities should reach an agreement within 24 months.

Arbitration: Proposed Changes to Article 25 of the OECD Model Tax Convention

Context

In February 2006, the OECD issued for public comment proposed changes to article 25 of the OECD model tax convention, along with proposed changes and additions to the accompanying commentary.[26] Emerging out of the perceived need to improve the efficiency of MAP, the proposed changes aim to enshrine

Table 1 An Ideal MAP Timeline

Stage	Action	Target time
First	• Initiation of MAP request.	• OECD model tax convention target is three years from notification of action. • Actual targets vary by tax convention.
	• Confirmation of receipt of request and notification of other competent authority. • Preliminary review of request and taxpayer information request.	• Within one month of initiation by the taxpayer.
	• Acceptance of MAP request: determination of eligibility and notification of taxpayer.	• Within one month after the necessary information is received by the competent authority.
Second	• Analysis and evaluation by the competent authority. • Initiation of MAP consultations. • Determination whether unilateral relief is available. • Issuance of position paper.	• Within four months and not later than six months after agreement between competent authorities to enter into consultations.
	• Review of the case by the opposite (relieving) competent authority. • Preliminary screening for completeness of position paper and followup regarding missing information. • Determination whether unilateral relief is available.	• Within six months of receiving the position paper.
	• Negotiation between the competent authorities.	• Six months.
Third	• Mutual agreement between competent authorities. • Document the agreement in a memorandum of understanding.	• Within 24 months of the acceptance of the MAP request.
	• Taxpayer's approval of the mutual agreement.	• One month after conclusion of the mutual agreement.
	• Confirmation of the mutual agreement terms and conditions. • Exchange of closing letters.	• As soon as possible after acceptance of the mutual agreement by the taxpayer.
	• Implementation of the mutual agreement.	• No later than three months after exchange of closing letters.

an arbitration mechanism within MAP. Their inclusion is anticipated in the 2008 update of the OECD model tax convention.

Citing the fact that some taxpayers are subject to double taxation as the inevitable result of competent authorities not reaching agreement in all disputes, the preamble to the proposed changes introduces the arbitration mechanism as an SDR mechanism. The current environment leads to a lack of certainty for all parties; the introduction of an arbitration mechanism as an extension of MAP, the argument goes, will motivate competent authorities to reach agreement in a timely manner and will motivate taxpayers to provide sufficient information and resources to the MAP request.

The proposed changes to article 25 have a precedent in the European Union's multilateral arbitration convention.[27] This convention was first signed in July 1990; the first decision under it was reached between the governments of Italy and France in September 2004. Lacking in practical guidance at its inception, the EU arbitration convention was eventually complemented by a code of conduct that set out procedural matters.[28]

Another precedent is found in article XXVI(6) of the Canada-US treaty. Dating from 1995, this provision allows for the introduction of arbitration upon the mutual consent of both competent authorities. The arbitration process is triggered by the exchange of diplomatic notes and the taxpayer's agreement, in writing, to be bound by the results. The provision in the proposed changes to the OECD model tax convention for taxpayer-initiated arbitration within time limits, as well as the level of guidance provided in the proposed new commentary, differentiates, at least for the time being, these new SDR initiatives from the example of arbitration in the treaty.

A third precedent is found in article XIII of the US-Germany protocol,[29] which introduces an arbitration mechanism to the MAP article. Unlike the EU arbitration convention, which is quasi-judicial in its approach, the US-Germany protocol introduces "baseball arbitration," whereby each competent authority provides a proposed resolution to an arbitration panel. This panel then chooses one of the two proposed resolutions for implementation. Although the arbitration procedure is broadly worded, it is not clear whether the procedure can be initiated by the taxpayer.[30]

Representing a compromise between EU arbitration standards and those embraced by the United States, the proposed changes to the OECD model tax convention discussed in this paper entail the addition of a fifth paragraph to article 25 and the introduction of 55 new paragraphs of commentary. The proposed addition (herein referred to as "article 25(5)") reads as follows:

> 5. Where, under paragraph 1, a person has presented a case to the competent authority of a Contracting State and the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State, any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved

> issues shall not, however, be submitted to arbitration if any person directly affected by the case is still entitled, under the domestic law of either State, to have courts or administrative tribunals of that State decide the same issues or if a decision on the same issues has already been rendered by such a court or administrative tribunal. The arbitration decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.[1]
>
> [1] In some States, national law, policy or administrative considerations may not allow or justify the type of dispute resolution envisaged under this paragraph. In addition, some countries may only wish to include this paragraph in treaties with certain countries. For these reasons, the paragraph should only be included in the Convention where each State concludes that it would be appropriate to do so based on the factors described in paragraph 46 of the Commentary on the paragraph.[31]

Proposed Article 25(5)

Proposed article 25(5) provides for the initiation of arbitration proceedings by the taxpayer when agreement on a settlement has not been reached within two years of the presentation of the case to the competent authorities.[32]

Proposed article 25(5) also requires that all taxpayers "directly affected by the case" no longer be entitled to recourse under the domestic law of their states. Taxpayers cannot apply for arbitration if a decision has already been rendered by a court or an administrative tribunal.[33] The arbitrator's decision is binding on both states and is to be implemented notwithstanding any time limits in domestic laws.

Relationship Between Domestic Law and the Tax Convention

The footnote to proposed article 25(5) that the arbitration mechanism envisioned may be proscribed by "national law, policy or administrative considerations." Paragraph 46 of the proposed new commentary provides for the introduction of article 25(5) only where it will be effective.

Proposed Commentary on Article 25

The proposed commentary on article 25 discusses various matters related to the introduction of arbitration. Some of these are summarized below.

Character of the Arbitration Decision

The arbitration decision is to be binding on both states. The implementation of the decision is simple: each competent authority will implement the decision of the arbitrator on the basis of the communications that the arbitrator has provided.

The decision of the arbitrator is to have no formal precedential value. On a literal reading, the proposed commentary envisions that the decision may not be binding on other taxable periods of the same taxpayers. A decision to apply the decision to other years will be subject to the mutual agreement of the competent authorities.

If more than one arbitrator has been appointed, the arbitration decision is to be determined by a simple majority of the arbitrators. The arbitrators must communicate their decision within six months from the date on which the last of the arbitrators was appointed.[34] If a decision is not communicated to the competent authorities within that time, the competent authorities may extend the time limit by an additional six months, or they may appoint new arbitrators.[35]

Competent Authorities Retain Precedence over Arbitrators

Because the arbitration procedure is an extension of the original MAP request, if the competent authorities reach agreement on all outstanding issues before the arbitration procedure is concluded, their decision will take precedence over the arbitrator's decision.[36]

Procedural Matters

Procedural details are not set out in proposed article 25(5). Rather, the parties involved are foreseen to mutually agree on procedure. Though absent from proposed article 25(5), a detailed template, "Mutual Agreement on the Implementation of Paragraph 5 of Article 25" ("the template agreement"), is provided in the commentary.[37] The template agreement contemplates the development of the questions to be provided to the arbitrators, the appointment of arbitrators, the timeline for submission, the handling of costs, and other procedural matters.

Selection of Arbitrators

The template agreement calls for each of the competent authorities to appoint an arbitrator within three months of the receipt of the terms of reference by the party who requested arbitration. At the same time, a neutral and independent third arbitrator is to be appointed by both competent authorities. The third arbitrator will chair the arbitration panel.[38]

Streamlined Arbitration Process

The template agreement provides for a simpler arbitration process whereby only one arbitrator is appointed. This arbitrator is appointed mutually by the competent authorities and is to be neutral and independent.[39] Each competent authority is to submit to the arbitrator, within two months, its reply to the questions set out in the terms of reference. Within one month from receipt of the last reply, the arbitrator is to select one of the replies over the other and to provide a brief explanation of the reasons for selecting that reply.

Information Required To Begin the Arbitration Process

Neither the proposed commentary nor the template agreement contains a list of the information that is sufficient to allow the arbitration procedure to begin. However, it is clear that the taxpayer has an obligation to provide "sufficient information." Paragraph 52 of the proposed commentary says that "sufficient information" is information sufficient to allow the competent authority "to decide whether the objection underlying the case appears to be justified."[40] The template agreement states that if a taxpayer has not fulfilled all information requests made by the competent authorities, and of that failure has caused delays in the deliberations of the competent authorities, the request for arbitration may be put on hold for a period of time equal to the delay in provision of information.[41]

Terms of Reference

The competent authorities are to agree within three months after receipt of the request for arbitration on a list of questions to be resolved by the arbitrators. The list is to be provided to the party requesting arbitration and will be incorporated into the terms of reference of the arbitration request. The terms of reference contain stipulations beyond the list of questions to be decided by the arbitrators; they set out all procedural matters. Paragraph 67 of the proposed commentary states that the template agreement will apply where the customized agreement between the competent authorities does not provide otherwise.[42] Thus, the terms of reference constitute an important base document that will guide many aspects of the arbitration procedure.

The list of questions in the terms of reference may include a request for interpretation of an MOU in place between two states and questions about other areas where the application of the tax convention depends upon the interpretation of domestic law.[43]

Neither the template agreement nor the proposed commentary provides for the party requesting arbitration (the taxpayer) to approve the terms of reference. Rather, the terms of reference are to be communicated to the party requesting arbitration within three months.[44]

Initiation of Arbitration by the Competent Authorities

Under paragraph 48, when competent authorities mutually agree to refer a specific case to arbitration but do not have proposed article 25(5) enshrined in their bilateral tax treaty, they may nevertheless use an arbitration agreement; to this end, sample wording of a mutual agreement is set out in paragraph 48.

Variance of the Arbitrator's Decision

Citing the example of article 12 of the EU arbitration convention, the proposed commentary suggests that the third sentence of proposed article 25(5) could be changed to allow for a period of six months after the decision of the arbitrators

wherein the competent authorities and the taxpayers involved can mutually agree to an alternative to that called for by the arbitrators.[45]

"Serious Penalties" Assessed Against a Taxpayer

In cases where serious penalties have been imposed on the taxpayer for a violation of domestic law, the proposed commentary contemplates a justified bar to the taxpayer's access to arbitration proceedings.[46] Moreover, a state is not bound by an arbitration decision if the same condition applies. However, the proposed commentary counsels states to clarify the definition of "serious penalties," bearing in mind that it would not be reasonable to bar a taxpayer's access to arbitration or the implementation of its decision simply because the taxpayer "took a different, but not unreasonable, interpretation of the treaty."[47]

Current Status

The highlights set out above provide a great degree of practical structure in arbitration proceedings; however, it is by no means clear what form effective arbitration proceedings will take. Although they are still little used in the context of treaty relief from double taxation, arbitration proceedings are increasingly being discussed, including through mention of "arbitration commissions" made up of states with mutual treaty relations.[48]

In the Canadian context, the CRA and the Department of Finance have not made their positions on arbitration known. While MEMAP and changes to article 25 and its commentary were being drafted at the OECD level, the competent authority of Canada and the competent authority of the United States negotiated MOUs that contain provisions similar to some set out in MEMAP. Some of the common provisions include (1) the requirement that the positions taken be principled; (2) the removal of barriers to taxpayers' access to MAP; (3) face-to-face meetings between competent authorities; and (4) a two-year deadline for arriving at a MAP resolution. One might say that through the MOU negotiations, the CRA has begun to enact some of the best practices of MEMAP.

Although a provision for arbitration proceedings currently exists in the Canada-US treaty, the inclusion of the equivalent of article 25(5) of the OECD model tax convention in the treaty or in other Canadian treaties may be a long way off. A more immediate question is whether arbitration in another form will be implemented before then.

One possible model is the "baseball arbitration" previously discussed. Baseball arbitration has the advantage of encouraging both competent authorities to draft and submit positions that reflect the limit of their ability to compromise in the dispute, thereby leading, it is hoped, to a timely resolution.

Overall, the best interests of taxpayers in the context of arbitration are yet to be determined. It initially appears that taxpayers would be best served by an arbitration mechanism that they can invoke, at their discretion, any time after two years have elapsed without complete resolution of the issues. The problem for the taxpayer today is that any resolution is difficult to obtain; thus, a taxpayer's

interests may not necessarily be better served through the arbitration process. However, by maintaining the arbitration mechanism within the context of MAP, the proposed changes to article 25 may be enough to put effective pressure on competent authorities to resolve cases in a timely manner.

Summary

Where does this leave the taxpayer? The Canadian competent authority has been proactive in taking steps to improve the APA program. It has solicited comments and recommendations from the private sector, but how many of these will actually be implemented? Will substantive issues such as rollbacks and potential penalty exposure be resolved through consultation with the Audit Directorate so that the taxpayers can have some clarity, or will the competent authority continue to maintain that those issues are outside its control? Will the process be streamlined and the tangle of red tape reduced? Will all staff working on APAs recognize that taxpayers know their business best and be willing to listen to them?

These are questions that for the time being remain unanswered. Only time will tell whether the competent authority is truly committed to improving the program and whether it is willing to take the necessary steps outside the treaty umbrella to implement some changes. One aspect of the APA program about which there has unfortunately been no discussion is the time that it takes to finalize an APA. In the case of bilateral APAs, there seems to be little improvement when one is dealing with the competent authority of the United States. Perhaps an MOU could be considered, as it was for MAP cases.

With the signing of the MOUs, the competent authority recognized issues relating to MAP cases that needed to be addressed. It is difficult to ascertain whether the competent authority was being proactive in this situation or whether too much pressure was being exerted and something had to be done. In any event, the MOUs represented a positive step; but in hindsight, were they necessary? With the exception of the MOU on factual disagreements, there have been no discussions with the US competent authority on any of the other topics for which an MOU was to be negotiated. If those topics are no longer perceived to be significant issues by the competent authorities, then why was the MOU necessary for the competent authorities to begin to handle the MAP cases in the manner that, generally speaking, they should have been handling them all along? As far as timely resolution is concerned, it remains to be seen whether there has been any improvement in this area.

With respect to arbitration, the actual form that the arbitration procedures take will be important for taxpayers. Similarly, adequate guidance to taxpayers and tax administrators is essential if the mechanism is not to be bogged down in procedural details.

In this paper, we have presented the steps recently undertaken by the Canadian competent authority and the OECD to address the concerns of taxpayers globally. Developments appear to be positive and to present a glimmer of hope for an improved MAP process; it is now up to the competent authorities to implement

those steps in a timely manner that will benefit taxpayers throughout the OECD member states.

Notes

1 See Organisation for Economic Co-operation and Development, *Proposals for Improving Mechanisms for the Resolution of Tax Treaty Disputes* (Paris: OECD, February 2006), proposing to add new paragraph 5 to article 25 of Organisation for Economic Co-operation and Development, *Model Tax Convention on Income and on Capital* (Paris: OECD, 2005).

2 See Organisation for Economic Co-operation and Development, *Manual on Effective Mutual Agreement Procedures (MEMAP)* (Paris: OECD, February 2007), annex 2.

3 The Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital, signed at Washington, DC on September 26, 1980, as amended by the protocols signed on June 14, 1983, March 28, 1984, March 17, 1995, and July 29, 1997 (herein referred to as "the treaty").

4 The CRA's APA team is normally composed of a case officer, an economist, and a legal adviser, all based in Ottawa, along with an auditor from the local Taxation Services Office who is familiar with the taxpayer.

5 *Information Circular* 94-4R, "International Transfer Pricing: Advance Pricing Agreements (APAs)," March 16, 2001.

6 *Information Circular* 94-4R (Special Release), "Advance Pricing Agreements for Small Businesses," March 18, 2005.

7 A transfer-pricing penalty pursuant to subsection 247(3) of the Income Tax Act (RSC 1985, c. 1 (5th Supp.), as amended) may be applied if the amount of the adjustment exceeds the lesser of 10 percent of the gross revenue of the taxpayer in the year and $5 million, and if the Transfer Pricing Review Committee finds that the taxpayer has not made reasonable efforts to prepare contemporaneous documentation pursuant to subsection 247(4).

8 Reproduced with the permission of Francis Ruggiero, acting director of the Competent Authority Services Division, the author of the letter sent to participants in the consultation meeting.

9 *Information Circular* 87-2R, "International Transfer Pricing," September 27, 1999.

10 For a non-Canadian-controlled private corporation, a waiver for a taxation year can only be filed within four years from the date of mailing of a notice of an original assessment or an original notification that no tax is payable.

11 Organisation for Economic Co-operation and Development, *Improving the Process for Resolving International Tax Disputes* (Paris: OECD, July 2004) (online: http://www.oecd.org/dataoecd/44/6/33629447.pdf).

12 Supra note 2.

13 With the one noted exception, this paper discusses only the proposed changes to the commentary on article 25 stemming from the proposed changes to the article; the changes proposed to the remainder of the commentary to article 25 generally resemble those set out in MEMAP.

14 Supra note 2, at 5.

15 Organisation for Economic Co-operation and Development, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (Paris: OECD) (looseleaf).

16 Readers may wish to note that this stipulation is weaker than that in proposed paragraph 18.6 of the commentary on article 25 of the OECD model tax convention. The proposed new paragraph of the commentary says that where states are hindered by domestic (constitutional or other) legislation from resolving a given MAP request, the onus is on the tax administrator to justify its decision on the basis of the provisions of the tax convention: "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, however . . . . 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." (Supra note 1, at 26.)

17 Pacific Association of Tax Administrators, "MAP Operational Guidance for Member Countries of the Pacific Association of Tax Administrators," June 25, 2004.

18 One reason tax administrations may take this step is that the concessions granted would reduce the administration's ability to defend a case in MAP discussions: MEMAP, supra note 2, at 34.

19 Ibid., at 39.

20 Ibid., at 27-28.

21 Ibid., at 26-27.

22 Ibid., at 30.

23 "The terms may vary, but generally allow for the repatriation of funds to be effected either by a direct reimbursement or through an offset of inter-company accounts. Typically, the agreed terms also allow a taxpayer to repatriate within a mutually agreed reasonable time period, free from withholding taxes by the country out of which the repatriation is made and from taxable treatment in the country to which the repatriation is made." Ibid., at 38.

24 Ibid.

25 Ibid., annex 1.

26 *Proposals for Improving Mechanisms for the Resolution of Tax Disputes*, supra note 1. The period for public commentary closed definitively on April 30, 2006.

27 European Union Arbitration Convention, 90/436/EEC, July 23, 1990 (hereinafter "the EU arbitration convention").

28 European Commission, "Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the Work of the EU Joint Transfer Pricing Forum in the Field of Business Taxation from October 2002 to December 2003 and on a Proposal for a Code of Conduct for the Effective Implementation of the Arbitration Convention (90/436 EEC of 23 July 1990)" (2004) 297 final, April 23, 2004. A press release from the European Commission indicates that in the absence of the juridical integration of the EU arbitration convention with the European Court of Justice, the code of conduct was issued to improve the practical implementation of the EU arbitration convention. It also states that the EU arbitration convention and code of conduct may have application to MAP cases beyond transfer-pricing disputes—for example, they may be relevant to cases in which a finding of thin capitalization has been made by an EU tax administrator (European Commission, "Code of Conduct To Eliminate Double Taxation in Cross-Border Transfer Pricing Cases: Frequently Asked Questions," *Press Release*, April 27, 2004 (online: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/04/96&format=HTML&aged=0&language=EN&guiLanguage=en). The proposed changes to the commentary of article 25 of the OECD model tax convention refers to the EU arbitration convention several times. The EU arbitration convention is cited as an example for allowing departure from an arbitrator's decision, and as an example of how to remunerate arbitrators (paragraph 58 and paragraph 60(4) of the proposed new commentary to the OECD model tax convention, respectively). The EU arbitration convention code of conduct is cited as a possible example for establishing a fee structure for the arbitration proceeding (paragraph 85 of the proposed commentary to the OECD model tax convention).

29 Protocol Amending the Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, Signed on 29th August 1989 (protocol signed on June 1, 2006).

30 Rather, both the new article and the commentary surrounding it are clear that the competent authorities must mutually agree that the particular case is "suitable for determination by arbitration." (Article XIII(5) of the US-Germany protocol and amended paragraph 22 of the August 29, 1989 protocol to the US-Germany tax convention.)

31 Supra note 1, at 5.

32 Specifically, MEMAP envisions the resolution of MAP requests within two years of the acceptance of the request by both competent authorities (MEMAP, annex 1); in contrast, the proposed article 25(5) allows a taxpayer request after two years from the original MAP submission.

33 Paragraph 54 of the proposed commentary on article 25 of the OECD model convention clarifies that if any one party "directly affected by the case" is still entitled to domestic recourse, even if the party requesting arbitration has renounced such recourse, the arbitration request cannot be accepted.

34 Paragraph 60(14) of the proposed commentary on article 25 of the OECD model convention.

35 In addition, with the consent of the taxpayer, and in anonymized and redacted form, the decision of the arbitrator may be made public: paragraph 14 of the proposed commentary on article 25 of the OECD model convention.

36 Paragraph 45 and paragraph 60(17) of the proposed commentary on article 25 of the OECD model convention.

37 Paragraph 60 of the proposed commentary on article 25 of the OECD model convention.

38 If the competent authorities fail to reach consensus on the appointment of the third arbitrator within one month, the template agreement calls for the director of the OECD Centre for Tax Policy and Administration to appoint the third arbitrator within 10 days of receiving the request.

39 Again, if the competent authorities have not selected an arbitrator within one month of provision of the terms of reference, an arbitrator will be appointed by the director of the OECD Centre for Tax Policy and Administration.

40 Paragraph 53 of the proposed commentary on article 25 of the OECD model convention.

41 Paragraph 60(8) of the proposed commentary on article 25 of the OECD model convention.

42 Paragraph 67 of the proposed commentary on article 25 of the OECD model convention.

43 Paragraphs 90 and 91 of the proposed commentary on article 25 of the OECD model convention.

44 Paragraph 66 of the proposed commentary on article 25 of the OECD model convention calls for the provision of the terms of reference within three months of receipt of the arbitration request by both competent authorities.

45 Paragraph 58 of the proposed commentary on article 25 of the OECD model convention.

46 Paragraph 47 of the proposed commentary on article 25 of the OECD model convention provides draft wording for this eventuality.

47 Paragraph 47 of the proposed commentary on article 25 of the OECD model convention.

48 Organisation for Economic Co-operation and Development, "Transfer Pricing Country Profiles" (online: http://www.oecd.org/document/25/0,2340,en_2649_33753_37837401_1_1_1_1,00.html).