The BEPS Monitoring Group

Explanation and Analysis of

The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MC-BEPS)

This report has been prepared by the BEPS Monitoring Group (BMG). The BMG is a network of experts on various aspects of international tax, set up by a number of civil society organizations which research and campaign for tax justice including the Global Alliance for Tax Justice, Red de Justicia Fiscal de America Latina y el Caribe, Tax Justice Network, Christian Aid, Action Aid, Oxfam, and Tax Research UK. This report has not been approved in advance by these organizations, which do not necessarily accept every detail or specific point made here, but they support the work of the BMG and endorse its general perspectives. It has been drafted by Sol Picciotto, with contributions and comments from Francis Weyzig, Jeffery Kadet, Tommaso Faccio, Yansheng Zhu, Alexander Ezenagu and Catherine Ngina Mutava.

SUMMARY

This multilateral convention aims to implement the tax treaty related changes recommended by the G20/OECD project on base erosion and profit shifting (BEPS), by modifying existing tax treaties as rapidly as possible. It is open for all countries to join, even if they are not otherwise participants in the BEPS project. It is formulated so that it can apply to all tax treaties, whether based on the OECD or the UN model, or indeed another.

It is understandable that some countries may feel resistance to accepting provisions which they had little or no involvement in formulating. We also have been critical of the BEPS project outcomes, which fell short of providing a comprehensive and cohesive approach to reform of international tax rules. Nevertheless, it is important to evaluate the provisions in this convention in relation to existing tax treaty provisions. This report aims to provide an explanation and analysis of the convention, including most importantly also our recommendations for individual country implementation of the convention. We hope this will help to inform those in government as well as the wider public about its effects.

Overall, we consider that most of the provisions would be improvements on existing tax treaty rules. Tax treaties generally restrict rights to tax income at source, in favour of the residence countries of taxpayers. By restricting abusive techniques which erode the tax base, these provisions help to restore some source country taxation powers. The provisions against tax treaty abuse, including treaty shopping, will also strengthen the general powers of tax authorities to control tax avoidance.
Although we endorse some of the improvements to the mutual agreement procedures for amicable resolution between tax authorities of conflicts over interpretation of legal provisions and factual situations, we do not support those which entail a shift towards legalized dispute resolution, especially arbitration. International tax rules, especially on allocation of MNE profits, are subjective and discretionary, so it is inappropriate for states to assume a binding obligation to accept the decisions of arbitrators. Public opinion will not accept the legitimacy of decisions involving substantial government revenue being taken in complete secrecy by a small community of specialists likely to remain dominated by corporate tax advisers and officials mostly from rich countries.

1. GENERAL COMMENTS

A key element of the G20/OECD project on Base Erosion and Profit Shifting (BEPS) is the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (the MC-BEPS). It was drawn up by an Ad Hoc Group of states, open to all interested countries, and 99 states participated, as well as four non-state jurisdictions and seven international or regional organisations as observers. A sub-group formulated the arbitration provisions in Part VI. The text of the MC-BEPS, as well as an Explanatory Statement, were published on 24 November 2016, and it was opened for signature on 31st December. Its aim is to enable the amendment of a large number of bilateral double taxation agreements (DTAs) as quickly as possible, thereby introducing in standardized form the measures to reform international tax rules which require such treaty changes.

The MC-BEPS is a self-standing convention which will operate alongside existing DTAs, while applying to modify many of them, although in different ways according to the choices made by states. It is accompanied by an Explanatory Statement, but does not have a Commentary as do the model conventions. Instead, the reports on the relevant Actions in the BEPS project will be used as aids to interpretation of the substantive provisions. It includes provisions enabling countries to meet the minimum standards commitments expected of all states participating in the BEPS process, as well as some reflecting recommended common approaches. It attempts the difficult task of ensuring consistency, while allowing sufficient flexibility to accommodate the positions of different countries. States joining the convention are considered to be bound by all the articles, except that they may opt-out of specific provisions only by making any of the defined permitted reservations. With a few specific

---

1 Countries participating were Andorra, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belgium, Benin, Bhutan, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, China (People’s Republic of), Colombia, Costa Rica, Côte d’Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Egypt, Estonia, Fiji, Finland, France, Gabon, Georgia, Germany, Greece, Guatemala, Guernsey, Haiti, Hong Kong (China), Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Jamaica, Japan, Jersey, Jordan, Kazakhstan, Kenya, Korea, Latvia, Lebanon, Liberia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Moldova, Mongolia, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Philippines, Poland, Portugal, Qatar, Romania, Russia, San Marino, Saudi Arabia, Senegal, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Tanzania, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, Uruguay, Viet Nam, Zambia, Zimbabwe. By the end of February 2017 some 60 countries had begun participating in the process by notifying provisional lists of their reservations and CTAs based on a template prepared by the OECD.

2 An Annex of the Explanatory Statement identifies the reports which are relevant to each of the treaty articles.

3 The Inclusive Framework had 94 members as of February 2017; for further details see http://www.oecd.org/tax/beps/beps-about.htm.

4 In this paper we refer to a party adopting or accepting a provision, to mean that it has not made a reservation opting out of that provision. The permitted reservations are listed in Article 28.1, and those which require a
exceptions, if an Article is accepted by a country it must apply without discrimination to modify all existing treaties which contain a provision within the definition of that Article’s compatibility clause (which may include the absence of such a provision), provided that the other party to the treaty also accepts the Article. However, a party must opt in if it wishes to accept Part VI, which introduces mandatory binding arbitration.5

The convention was opened for signature from 2017 by all countries.6 This includes countries which are not participating in the BEPS project. A signing ceremony is planned in the first week of June 2017, but any state may sign at any time (article 27.1.a). The OECD will act as the Depositary of the convention, which will be a demanding role, as states have to make complex choices, and make detailed notifications to the Depositary of the specific provisions in each of their treaties which will be affected by those choices.

The OECD is also planning to produce supporting documentation, and to assist states with translations, as the convention is so far available only in its official languages of English and French. In our view this is problematic, since an increasing number of DTAs are concluded in a variety of languages. Hence,

consideration should be given to producing official versions of the MC-BEPS in other languages, particularly non-European languages such as Arabic and Chinese.

There are considerable issues concerning global acceptance due to the manner in which the Convention was developed. Its substantive content results from the BEPS project that emerged from the OECD. Following endorsement of the project by G20 leaders, non-OECD G20 states were allowed to join on an equal footing, and some non-G20 developing countries were also invited to join half-way through. This increased inclusiveness has been welcomed, but nevertheless the content of the convention was substantially agreed before it occurred.

The treaty-related proposals in the BEPS project reports addressed only the OECD model tax convention, and not that of the UN. However, the provisions of the MC-BEPS itself have been worded so that they can modify any treaty, whatever model it is based on. The UN Committee of Tax Experts has played only a marginal role in the BEPS project, but it did establish a subcommittee to monitor the process, facilitate input into it from developing countries, and consider its implications for the UN model convention.7 Although the MC-BEPS itself was negotiated by an Ad Hoc Group open to all states, the OECD will provide its secretariat. This convention therefore marks a further shift towards the establishment of the

5 This also allows a party to make reservations, especially as to the scope of cases to be eligible for arbitration; such reservations are deemed to be accepted by other parties unless they object within 12 months (Article 28.2).

6 This means all states, plus Guernsey, Jersey and the Isle of Man (Crown dependencies of the UK). Other non-state jurisdictions may also be authorised to join by consensus of the parties (art. 27), or the convention can be applied to DTAs of such jurisdictions by a state responsible for their international relations (art. 2). We will use the term ‘countries’ to refer to both states and non-state jurisdictions.

7 See the report of this subcommittee, Document E/C.18/2016/CRP.10, available at http://www.un.org/esa/fid/wp-content/uploads/2016/10/12STM_CRP10 -beps.pdf. It consisted of recommendations for changes to the UN model in line with the treaty-related proposals of the BEPS project, which were debated and generally accepted at the meeting of the full Committee in October 2016. This work also ensured that the treaty changes recommended in the BEPS Action Plan reports, which were formulated as amendments of the OECD model, were adapted in the MC-BEPS to be applicable also to treaties based on the UN model. (See further section 3 below).
OECD as a de facto international tax organisation, despite continuing calls from developing countries for the establishment of a truly representative body under UN auspices.

It is therefore understandable that many in developing countries view this convention with suspicion. We ourselves have been critical of the overall approach adopted in the BEPS project, and of some of its specific outcomes. Despite a strong G20 mandate to align tax with economic activities and value creation, many of the BEPS outcomes only provide patch-up remedies, and not a more coherent and comprehensive approach. Underlying all the tax avoidance techniques of MNEs is one basic strategy: exploitation of the fiction of separate legal personality and the ‘independent entity’ principle. Ending these abuses could have been achieved more efficiently and with greater coherence by clearly stating as a guiding principle that MNEs should be treated in accordance with the economic reality that they operate as single firms. Instead, the BEPS proposals are introducing a plethora of anti-abuse rules for revenue administrations to apply. This will require high levels of expertise and sophistication, which are often beyond the capacity of administrations in developed let alone developing countries. This approach is also a recipe for disagreements and conflicts, to the detriment in particular of developing countries, which often do not have the capacity to successfully monitor the schemes devised by tax practitioners and challenge them.

Nevertheless, the overarching aim of the provisions included in the MC-BEPS is to reduce the tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no corresponding economic activity, resulting in little or no overall corporate taxation being paid. Moreover, most of the provisions strengthen source country taxation, especially by addressing tax treaty shopping, and abuse of the taxable presence requirement in the definition of a permanent establishment. (They are discussed in more detail in section 4 below). They would therefore greatly improve existing tax treaty rules, especially if adopted uniformly. The MC-BEPS provides the easiest method of ensuring that this occurs quickly and coherently. Signing the convention does not entail making a commitment to the BEPS project, or joining the Inclusive Framework.

Hence, in our view

developing countries which have tax treaties should sign the MC-BEPS to benefit from improvements in existing tax treaty rules.

However, considering the inherent limitations of the ‘independent entity’ principle and the arm’s length approach to transfer pricing, as well as the practical difficulties involved, developing countries may want to retain the flexibility to apply their own approach to intra-group transactions. They will lose this flexibility if they accept Article 17 of the MC-BEPS without reservations. This article imposes an obligation to remove ‘economic’ double taxation, resulting from divergent transfer pricing methods being applied to different affiliates of the same MNE. Many DTAs already contain a similar provision, but some developing countries also have DTAs that do not include this obligation. Taking this into account,

developing countries should retain existing flexibility to use their own approach to transfer pricing, by making the reservation in Article 17.3.b.ii of the MC-BEPS.

If countries opt out of some of the other MC-BEPS provisions, it may result in the continuation or even proliferation of the tax planning strategies the provisions are intended to restrict. It will also mean that instead of moving towards a simpler and more uniform structure of anti-abuse provisions in tax treaties, non-uniform adoption would add a new layer of complexity and potential confusion.
The problems will be especially exacerbated if OECD states resort to selective application of general anti-abuse principles and unilateral measures, and do not implement the more targeted provisions which have been agreed in the BEPS project and incorporated in the MC-BEPS, notably those aiming at abuse of the taxable presence criterion provided by the permanent establishment (PE) concept. Such a partial adoption of MC-BEPS provisions would inevitably create more gaps and mismatches (or loopholes) between tax rules applied by different countries, encourage tax rule arbitrage in BEPS-motivated structures, and generate a higher number of conflicts.

Comprehensive and coherent implementation of the BEPS project proposals will depend on adoption by all countries of both the minimum standards and the recommended best practices, even though further improvements may be considered desirable, and could be subsequently negotiated. We would expect the OECD and G20 countries in particular, having initiated the BEPS project and having been actively involved in formulation of the proposals, to be in the lead in implementation of the outcomes. Some of these countries have built up extensive networks of well over a hundred DTAs. Any failure by these states to adopt provisions of the MLI would create major gaps and inconsistencies in the tax treaty system. Hence,

**a decision to opt out of any of the other MC-BEPS provisions should only be made after very careful consideration, supported by strong reasons; OECD and G20 countries in particular should make few reservations to the MC-BEPS.**

Even if some countries adopt a cautious approach initially, it is possible for reservations to be withdrawn subsequently. We urge them to do so as part of the multilateral process established in this convention, rather than resorting to offering to include its provisions as part of bilateral negotiations.

It is particularly important that countries which have negotiated a large number of DTAs, and thus offer themselves as hubs for tax planning strategies, whether for only their own residents or also for multinationals based in other countries, should adopt all the provisions of the MC-BEPS for all their treaties. This includes both OECD countries (e.g. Ireland, the Netherlands, Switzerland, the UK, the US), as well as others (e.g. Mauritius, Singapore, United Arab Emirates). Hence

**countries should normally list all their DTAs as Covered Tax Agreements under the MC-BEPS.**

Different considerations apply to the provisions relating to dispute settlement, especially chapter VI providing for mandatory binding arbitration. In our view it is putting the cart before the horse to seek to provide certainty in international tax by strengthening the mutual agreement procedure (MAP) for settlement of disputes. Priority should be given to preventing disputes, by agreeing clear rules for allocation of profit which are easy to administer. The MAP is a totally secret procedure, under which even the existence of a claim is regarded as confidential. Such an administrative process may be helpful, but it should be subject to some degree of public accountability, for example by providing reports of the numbers and types of cases, and principles used to resolve them. However, we oppose the attempt to move towards compulsory resolution of such conflicts, especially by binding arbitration. This raises justified concerns about national sovereignty, since it gives power to third parties to decide important issues without agreement on clear rules which could be applied. Hence, in our view

**states should not accept mandatory binding arbitration (Part VI).**
Our view might change if the process were opened up to full transparency with reasoned
decisions based on principles that can guide other taxpayers and tax authorities.

The MC-BEPS is highly technical, and the arrangements governing its application to existing
DTAs are complex. Some of this complexity is due to the difficulty of reconciling
divergences between the states engaged in the BEPS project, while aiming at consistency in
the final text. Our aim in this report is therefore to try to facilitate understanding of these
complex provisions, as well as providing our own viewpoints. The next two sections will
explain and analyse how the convention will work. We then provide an explanation and
analysis of all its substantive provisions, with our detailed comments and recommendations.
We conclude with a Table which outlines and summarises the substantive provisions of the
convention.

2. STRUCTURE OF THE CONVENTION

Countries signing the MC-BEPS may decide which of their tax treaties they would like it to
modify, and must provide a list of them. They can then choose which provisions of the MC-
BEPS would apply to these treaties only by making one or more of the permitted
reservations.\(^8\) Reservations must, with a few exceptions, apply without discrimination to all
these listed treaties. Generally also, the relevant provision will apply to a particular treaty
only if the other party\(^9\) to that treaty has accepted it (i.e. has not made a reservation opting out
of it). Thus, by making a reservation a party denies its treaty partners the possibility of
implementing the provision in the treaties between them. Part VI, which introduces
mandatory binding arbitration of disputes, is opt-in (it also allows some specific
reservations).

In fact, it is possible to opt-out of any of the provisions of the convention, since all the
substantive articles allow a reservation to exclude the whole article. However, for the
provisions that are regarded as minimum commitments for states participating in the BEPS
project, the opt-out reservation is conditional on the party complying with the commitment by
making appropriate changes to its DTAs, except for those DTAs which already comply.
These are the provisions on Treaty Abuse (articles 6 and 7), and on Improving Dispute
Resolution (articles 16 and 17).

This is most problematic in relation to article 7, since preventing treaty abuse is the core
element of the MC-BEPS. The difficulty has been caused by the divergence between those
states (the large majority) which prefer a general over-arching anti-abuse principle (the
principal purpose test, or PPT), and those (particularly the USA) which consider that this is
too vague and discretionary, and prefer a detailed set of rules on limitation of benefits (LoB).
An attempt was made to reconcile these two approaches by drafting a simplified LoB rule
(SLoB), to be combined with the PPT, but it is not clear whether this will be acceptable to the
USA. The addition of a SLoB to a PPT can be unilateral, provided the other state agrees (or it
can accept the combination to apply bilaterally, in that treaty).

No agreed detailed LoB article is provided in this convention. So, a state is allowed to opt-out
of article 7 (under its para. 15a):

---

\(^8\) Specified in Article 28.1 and 28.8; the list relating to 28.8 must include the treaties to which each reservation
applies, and in many cases the relevant article and paragraph number.

\(^9\) We assume in this report that there are two parties, since the vast majority of DTAs are bilateral; however, the
MC-BEPS is worded so that it can apply to a multilateral tax treaty. They are referred to in the MC-BEPS as
Contracting Jurisdictions, as the term Party is used for those adhering to the MC-BEPS.
‘on the basis that it intends to adopt a combination of a detailed limitation on benefits provision and either rules to address conduit financing structures or a principal purpose test; in such cases, the Contracting Jurisdictions shall endeavour to reach a mutually satisfactory solution which meets the minimum standard’.

Similarly, if a country does not accept another state’s choice to combine the PPT with a SLoB, that other country can exclude the whole of article 7 from that DTA, and the two must try to reach a solution (article 7.16). These conditions are obviously hard or impossible to enforce.

In effect, these provisions mean that the US could sign the MC-BEPS, while opting out of article 7, on the basis that it intends to negotiate an alternative meeting the minimum commitments. This would also allow the US, and perhaps others, to benefit from the strengthening of dispute resolution in Part V, as well as opting-in to Part VI to introduce mandatory binding arbitration with other states also opting in, while rejecting all the other provisions of the MC-BEPS.

In our view,

**countries which have failed to comply with the minimum commitments of the BEPS project, especially by including an anti-abuse provision in their treaties, should not be entitled to accept the other provisions of the MC-BEPS, notably mandatory binding arbitration.**

Articles 16 and 17 relate to dispute resolution. Most of these also are minimum commitments for countries participating in the Inclusive Framework. Some allow reservations based on making an undertaking, in this case to comply with the requirements in practice. Compliance with these undertakings (including those on article 7) will presumably be verified through the ‘peer review’ procedures which are being set up to monitor implementation of the BEPS standards. It is intended that these procedures will apply not only to countries which have joined the Inclusive Framework set up for the BEPS process, but also other jurisdictions which are ‘of interest’. However, it should be noted that the minimum commitment under Action 14 is only to provide access to the MAP; the introduction of an obligation to make a ‘corresponding adjustment’ in transfer pricing cases by including article 9(2) of the OECD model convention is only a recommended best practice in the Action 14 report.

Hence, in our view

**countries should avail themselves of the reservation allowed in article 17.3.b.ii, under which they would ‘endeavour’ to resolve such cases.**

### 3. PROCEDURES

A country participating in the MC-BEPS is referred to as a **Party**. The DTAs to which the MC-BEPS applies are referred to as **Covered Tax Agreements (CTAs)**. The parties to those CTAs are described as **Contracting Jurisdictions (CJs)**.

On signing the MC-BEPS, a country must provide (i) a list of those of its treaties which it would like to modify (Article 2), and (ii) a list of its reservations. To facilitate matching of choices between parties, the latter can be a provisional list, and in any case must be confirmed if and when a country ratifies the convention. This provides an opportunity for treaty partners to discuss and negotiate the changes they might wish to make before making their reservations final by ratification. A reservation can be subsequently withdrawn, or be replaced with a more limited reservation (Article 28.9). However, once a party has ratified the MC-BEPS, it cannot add a further reservation. Additions (but not retraction)
made to the list of agreements notified (Article 29.5). Each substantive article includes a paragraph specifying the permitted reservations to that article, and they are listed in Article 28.

The substantive Articles also include a Compatibility clause, which explains the relationship between the provisions of that article and those of existing DTAs. Generally the Compatibility clause describes the provision which would be replaced or amended by that article, and the effect on a CTA which does not contain the provision described. Parties are required to make Notifications, along with their list of reservations, which reflect their choice of optional provisions, and specify the relevant provisions in those CTAs which would be affected.10

There are several types of compatibility clause, each of which describes a different effect,11 as follows:

(i) it applies in place of an existing provision of a CTA, i.e. to replace it (if one exists); so it will only apply if both CJs include it in their notification;

(ii) it applies to, or modifies, an existing provision; again, this occurs only if both CJs include it in their notification;

(iii) it applies in the absence of an existing provision; both CJs must notify that the provision is absent;

(iv) it applies in place of or in the absence of an existing provision; here the provision of the MC-BEPS will always apply, with the effect described by the compatibility clause; this will occur regardless of the notifications.

Case (iv) may obviously give rise to confusion if the notifications made by the parties do not match. As the Explanatory Statement points out (pp. 6-7), where a provision of the MC-BEPS applies, it will override the provisions of a pre-existing CTA to the extent that they are incompatible. So it is obviously important for all intending parties to look closely at the relevant provisions of their existing treaties, and consider carefully the wording of the compatibility clause, to clarify the effect of the corresponding provision of the MC-BEPS.12

The procedure which has been adopted, for intending parties to supply at least a provisional list of reservations when they sign, will allow an opportunity to check their lists with those of their treaty partners, and if necessary correct them before the list is confirmed on ratification. Subsequent disagreements may be resolved through the mutual agreement procedure (MAP). There is also the possible of making a later notification in article 29.6.

The MC-BEPS will come into force three months after five countries have ratified it, and for each country three months after it ratifies. Normally, it would enter into effect at the same time for all that party’s CTAs with all other parties which have also ratified. However, article 35.7 allows parties to make reservations so that it enters into force separately for each CTA, on completion of the internal procedures for entry into effect. The reason for this is that some states must change their domestic legislation to reflect the exact changes made by each DTA (Explanatory Statement, para. 342). If one party makes such a reservation, the CTAs concerned do not enter into effect (for either or any of the parties) until 30 days after notification to the Depositary of completion of the internal procedures for entry into effect.

---

10 For the list of Notifications required see Article 29.
12 See for example, the compatibility clause in Article 12 which we discuss further below.
Any party may withdraw from the MC-BEPS at any time, but this would not affect the modifications already made to its CTAs (Article 37). It will affect only prior DTAs, and does not prevent countries from revising them subsequently (Article 30), or entering into new ones that diverge from its provisions. Nevertheless, the intention is to establish a new level of harmonisation of key provisions of tax treaties. There is also provision for a Conference of the Parties, which must be convened by the Depositary if one-third of the parties agree (Article 31). Such a Conference can consider any question regarding interpretation of the convention (Article 32), as well as amendments (Article 33).


In this section we provide an explanation of the substantive provisions of the MC-BEPS, and our recommendations for countries in relation to each. Our general view is that the MC-BEPS offers a good opportunity to make some significant changes which would, with a few exceptions, improve existing treaties. As mentioned above, we have been critical of the BEPS project, especially for adopting patch-up solutions, rather than a more comprehensive and coherent approach. We have also proposed different solutions and formulations for some of the measures than those which were finally agreed and are now part of the MC-BEPS. Nevertheless, most of the measures now brought together in the MC-BEPS would improve existing treaties. Since the effect of tax treaties is generally to limit rights to tax at source, the measures to counteract tax base erosion in the MC-BEPS mainly restore source taxation rights, even if to a limited extent. It is preferable that they should be introduced as quickly and as uniformly as possible. Relying on bilateral negotiations would cause uncertainty and delay, and disadvantage weaker countries. Adoption of these provisions does not preclude countries from seeking further improvements by direct negotiation. The articles have been drafted so that they can apply to treaties whether based on the OECD or the UN model. Our recommendations therefore generally urge all countries to adopt these measures.

Part II Hybrid Mismatches

This Part contains three provisions which prevent the abuse of treaty provisions to avoid tax by exploiting differences in tax treatment of a person or a payment. They result from the work in BEPS Action 2 on hybrid mismatches, and in Action 6 on treaty abuse, both of which also provide recommendations for action under domestic law.

In effect, these three provisions help to prevent erosion of source country taxation. The treaty provisions which they would modify are the same in both the OECD and the UN model conventions. Although these provisions add some complexity, their adoption would improve existing tax treaties, and benefit all countries which wish to prevent tax avoidance, including developing countries.

Article 3 – Transparent Entities

This aims to prevent the use of fiscally transparent entities, such as partnerships and trusts, to ‘pass through’ income that has not been taxed at source. Paragraph 1 provides that such income should be considered as income of a resident (and hence entitled to treaty benefits such as reduced withholding tax at source) only to the extent that it is treated as taxable income of a resident. Developing countries have sometimes taken the view that safeguards against the use of hybrids are not a high priority for them. In view of the complexity of some

---

13 I.e. their income is not taxed, as it is treated as belonging to their partners or beneficiaries.

of the recommendations relating to domestic law in the report on BEPS Action 2, this is understandable. Nevertheless, it is important for such countries to protect their taxation rights as primarily source states, which is ensured by this provision, and the MC-BEPS offers an easy way to do so.

We recommend all countries to adopt this paragraph.

Paragraph 2 modifies the obligation to relieve double taxation (via a tax credit or exemption, under article 23 of the model conventions) so that it does not apply to income taxable only on the basis of residence of the taxpayer, i.e. relief is only for taxes levied on the basis of source, or attributable to a PE, in accordance with the convention. This is intended to remove any doubt on the interpretation of article 23.\(^\text{15}\)

This should be adopted by all countries, in the interests of coherence of the treaty system.

Article 4 – Dual Resident Entities

An entity may claim residence of both treaty partners to gain a tax advantage. Article 4.3 of both the OECD and the UN model conventions provides that in such cases it shall be deemed to be resident only of the state where its place of effective management is situated. However, this may be interpreted differently. This article would replace 4.3 with a ‘tie-breaker’ provision, requiring the competent authorities to reach a mutual agreement on the country of residence, having regard not only to the place of effective management, but also the place where it is incorporated, or any other relevant factor.\(^\text{16}\) If they fail to agree, the taxpayer shall lose entitlement to tax relief, except as may be agreed by the competent authorities. Countries may choose not to adopt the article, or not to apply it to treaties which already have one of the specified tie-breaker rules.

We recommend all countries to adopt the new provision as an improvement, and in the interests of coherence, even if some of their treaties already contain an alternative.

Article 5 – Application of Methods for Elimination of Double Taxation

The BEPS Action 2 report on Hybrids recommends as its primary rule that the jurisdiction from which a payment is made on a financial instrument should deny a deduction of that amount to the extent that it is not treated as taxable in the destination jurisdiction. Since the deductibility of expenses is a matter of domestic law, this is not in conflict with any treaty provision.\(^\text{17}\) However, that report also recommends a secondary ‘defensive’ rule, that if the payer (source) jurisdiction does not neutralise the mismatch (by denying deductibility), the payee jurisdiction should require such payment to be included in taxable income. For countries which relieve double taxation by exempting foreign income, a treaty change may be needed to implement this defensive rule. This is not necessary for countries which already include such payments as income, but allow a tax credit. This article provides three Options between which countries which use an exemption system countries can choose:

---

\(^\text{15}\) Explained in the BEPS Action 6 report on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, paragraph 64.

\(^\text{16}\) See the BEPS Action 6 report, paragraph 48. The report of the UN subcommittee on BEPS recommended adoption of this provision, while retaining in the Commentary the option for states which wish to do so to keep the ‘place of effective management test’ as the sole criterion (p. 45).

\(^\text{17}\) See BEPS Action 2 report, paragraph 438, citing paragraph 30 of the Commentary to article 7 of the OECD model.
Option A: to deny exemption but provide a tax credit for such payments.

Option B: to deny exemption for dividends treated as deductible in the payer state, but allow a tax credit for any tax paid attributable to that income.

Option C: to use the tax credit method (instead of exemption), based on the OECD model provision (for both income and capital).

For this Article, asymmetrical application is permitted, i.e. if parties choose different Options (or none), by default each party may apply its chosen option to its own residents. However, a Party that decides not to choose any Option may reserve the right to refuse to allow any of these options to apply to one or more specified treaties (paragraph 8); and a party which does not choose Option C may reserve the right to refuse the other CJ to any or all its CTAs to apply that option (paragraph 9).

The aim of ending double non-taxation should be seen as involving a new approach to tax sovereignty. Until now, the allocation of a right to tax under a treaty also allowed the state concerned to decide not to tax. This was abused by both MNEs and residence countries offering generous exemption of foreign source income, which facilitated avoidance. This was of course one of the main reasons for the BEPS project. Source countries also sought the freedom to offer tax incentives to attract investment, by requesting the inclusion in their treaties of ‘tax sparing’ provisions, to prevent such incentives being neutralised by a corresponding reduction of tax credits. However, it has become increasingly recognised that generalised incentives harm all countries by spurring tax competition, especially if they are profit- rather than cost-based. At the same time, tax sparing provisions have become more targeted, by specifying named incentives and a defined time period during which the tax sparing benefit will apply. Such provisions amount in effect to an agreement to provide aid, in the form of tax credits, which is used by the recipient country to provide tax incentives to encourage investment.

Commonly, tax sparing provisions provide in the country of residence a foreign tax credit for source country taxes that were not collected by the source country pursuant to the specific tax incentive specified in the tax treaty. For such situations, Article 5 would appear not to apply since it only applies to treaties that apply the exemption method.

Where a country has granted tax sparing benefits on an exemption basis for its residents in one or more of its tax treaties with other countries, then acceptance of any of the three options would appear to override and effectively terminate those tax sparing provisions in the CTAs.

The exemption method frequently facilitates tax avoidance, so we recommend all countries to take this opportunity to adopt the tax credit method (Option C), and urge their treaty partners to allow them to do so.

Countries wishing to adopt Option C and move from the exemption to the credit method could also consider the desirability of negotiating on a case-by-case basis specific treaty protocols with developing countries according a foreign tax credit for incentives that could be considered justified.

PART III TREATY ABUSE

Tax treaties have been developed historically mainly to prevent double taxation, aiming to encourage international investment. Their exploitation to avoid tax, or achieve ‘double non-
taxation’ has been to some extent countered by domestic anti-avoidance rules, but these may be challenged legally if they contradict treaty provisions. A long section on improper use of treaties has been included in the Commentaries to Article 1 of both the OECD model convention (since 1977, added to in 2003 and 2010), and the UN (including some quotations from the OECD Commentary). However, the actual texts of the model conventions have included only a few, specific anti-abuse provisions, and the anti-abuse provisions in actual treaties vary widely.

Since the main aim of the BEPS project was to counter double non-taxation, the inclusion of explicit anti-abuse provisions in tax treaties is a key part of its outcomes. This section includes both general and targeted anti-abuse provisions. Articles 6 and 7 are regarded as minimum commitments for states participating in the BEPS project.

**Article 6 – Purpose of a CTA**

This provides a preamble statement to be included in all treaties, unless they already include the same text.

**All countries should adopt this.**

**Article 7 – Prevention of Treaty Abuse**

This provides a general anti-abuse provision, which would allow denial of a treaty benefit based on a principal purpose test (PPT). This is regarded as a minimum commitment. The provision which has been drafted is wider than other versions which have been used and are less effective, for example referring to avoidance being the ‘main’ rather than ‘one of the principal purposes’. Wide adoption of this provision would overcome the concern sometimes expressed that including it in some treaties might imply that domestic anti-abuse rules could not otherwise apply, i.e. where there is a treaty without the provision. Countries which still have such concerns should modify their domestic law to preclude such an interpretation.

**Inclusion of an anti-abuse rule in tax treaties is essential: all countries should adopt the PPT.**

A more targeted provision to allow denial of treaty benefits in specific detailed cases is also provided in this article, described as a simplified limitation on benefits provision (SLoB). This is optional, for states to add to the PPT if they wish. A state choosing the SLoB may apply it unilaterally, provided its treaty partner agrees. If the treaty partner does not agree, it may also refuse to adopt the PPT in its treaty with that country, but in that case the states must find a solution which meets the minimum standard.

**We see no need to opt for the SLoB, which might mean negotiating with treaty partners.**

---

See Commentary to Article 1 of the UN model convention, paragraph 37.

The BEPS Action 6 report (paragraph 25) included a draft of both the SLoB, and of a ‘detailed version’, as well as a draft Commentary, most of which referred to the detailed version. The Explanatory Statement of the MC-BEPS (paragraph 104) includes the draft SLoB produced by OECD Working Party 1 as it stood when the MC-BEPS was agreed, which will apparently be included in the OECD model in due course, presumably together with the relevant parts of the Commentary published in the Action 6 report. Articles 8-13 of the MC-BEPS provide a version of the SLoB modified to adopt the terminology of the MC-BEPS, and replacing references to articles and paragraphs in the convention by descriptive language. Since the MC-BEPS has no Commentary, states adopting the SLoB would presumably have to rely on those parts of the draft Commentary that were published in the Action 6 report, or perhaps on whatever is eventually included in the OECD model.
A state can refuse to adopt the PPT only on the basis that it intends to adopt a detailed limitation on benefits provision plus either a PPT or ‘rules to address conduit finance structures’, which should be agreed with the other Contracting Jurisdiction.

We regret the option which has been given for some countries to opt out of this Article on the basis of only a commitment to reach agreement on an alternative, which would be very detailed and complex.

Article 8 – Dividend Transfer Transactions

Tax treaties generally impose a lower maximum withholding tax on dividends paid to direct investors (MNEs) than for portfolio investors, defined in terms of a minimum ownership threshold.\textsuperscript{21} This article provides a specific anti-abuse rule, requiring that the minimum ownership threshold be met for the whole of a 365-day period including the date the dividend was paid, in order to benefit from the reduced rate. It modifies the application of article 10.2 of both the OECD and the UN model conventions, which are in similar terms, and which require the competent authorities to agree how the limitations should apply.\textsuperscript{22}

This is a strictly defined anti-abuse provision, which is relatively easy to administer and hard to avoid, so should be included in all treaties.

Article 9 - Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property

To reinforce taxation of capital gains from sales of immovable property in the state where it is located, tax treaties also provide that sales of shares in companies owning such property can also be taxed there.\textsuperscript{23} This Article strengthens the provision by extending it to interests in a partnership or trust, and ensuring that it can apply if the threshold is met at any time in the 365 days prior to the sale. The wording has been drafted to make it applicable to treaties based on either the OECD or the UN model.\textsuperscript{24}

We recommend that all countries adopt this Article.

Article 10 – Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions

Withholding tax limits in a tax treaty can be abused if the income paid is exempt in the recipient country because it is treated as attributable to a permanent establishment (PE) of the recipient in a third country, and is taxed at a low rate in the country of the PE. This article allows a source country to deny treaty benefits in such circumstances, if the PE is taxed at a rate equal to less than 60\% of the tax that would be payable by its enterprise in the state of residence.\textsuperscript{25} Paragraph 2 states that paragraph 1 does not apply if the income paid is derived

\textsuperscript{21} A direct investor is defined in the OECD model as a company owning at least 25\% of the company paying the dividends, and 10\% in the UN model. However, the report of the UN Committee’s subcommittee on BEPS, while recommending amendment of the UN model to include the 365-day requirement, also proposed increasing the threshold to 25\% (see report of UN Subcommittee on BEPS, p. 45). The article in the MC-BEPS does not affect the threshold.

\textsuperscript{22} See BEPS Action 6 report, paras. 34-36, and the relevant parts of the Explanatory Statement of the MC-BEPS.

\textsuperscript{23} Article 13.4 of both the OECD and the UN models; the UN model has a different wording, and covers not only a company but also ‘a partnership, trust or estate’.

\textsuperscript{24} See Explanatory Statement paras. 128-131, and the BEPS Action 6 report paras. 41-48.

\textsuperscript{25} The BEPS Action 6 report (paragraph 52) included a provisional draft of this article, and related Commentary; the Explanatory Statement to the MC-BEPS (paragraph 142) contains a later version developed by OECD
from the active conduct of a business by the PE (other than the business of managing investments for the enterprise itself, except for the business of a bank, insurance firm or registered securities dealer).

The drafting of this article has undergone several revisions, and could perhaps be improved further. However, the present version seems sufficiently clear and should be effective,

We recommend that all countries adopt this Article.

Article 11 – Application of Tax Agreements to Restrict a Party’s Right to Tax its Own Residents

This is a ‘savings clause’, preserving the right of a state to tax its own residents. Its aim is to defeat interpretations claiming that some domestic rules may be contrary to treaty provisions, e.g. taxing residents on the income of their controlled foreign corporations, or partners on their share of partnership income. Paragraph 2 lists some exceptions (when residents may get a tax benefit), worded in general terms so that they can apply to treaties based on the OECD or the UN models. Some of the exceptions refer to provisions which may not be present in some actual treaties (e.g. to provide corresponding or correlative adjustments), but in such cases the Article would have no modifying effect.

We recommend that all countries adopt this Article, except in relation to treaties already containing a suitable savings clause.

PART IV AVOIDANCE OF PERMANENT ESTABLISHMENT STATUS

The BEPS project did not extend to any reconsideration of the balance between tax rights of residence and source countries. Nevertheless, Action 7 did address some aspects of the definition of permanent establishment (PE), on which taxable presence is based. These provisions would modify the terms of article 5 of the model conventions, which is significantly different as between the OECD and the UN models. Nevertheless, the wording of the MC-BEPS has been formulated so that it can apply to treaties based on either model. The provisions of the MC-BEPS aim to block loopholes which may enable MNEs to avoid being taxed on sales and related activities in a source country, by introducing some slight modifications of the PE definition. They would not restrict provisions in some treaties which are already wider than those in the OECD model.

Article 12 – Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies

Paragraph 1 provides that a person acting on behalf of an enterprise can be a PE if it ‘habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise’, and these contracts are (a) in the name of the enterprise, (b) for the transfer of rights to property from the enterprise, or (c) for the provision of services by the enterprise. These definitions may be considered narrower than what was initially proposed under Action 7, and which were supported by some commentators (including ourselves). The UN Subcommittee on BEPS proposed an option, to be debated for inclusion in the UN model, which would have excluded the phrase ‘that are routinely concluded without material modification by the enterprise’. A few treaties already

Working Party 1 (based on work done in the US), but no Commentary. This Article is a modified version of that text (specifying 60% as the low tax threshold, rather than a rate to be agreed between the parties).

include a wider definition, but these would not seem to be affected, since the compatibility clause (para. 3(a)) specifies that this article replaces provisions that ‘address the situation in which such person has, and habitually exercises, in that Contracting Jurisdiction an authority to conclude contracts in the name of the enterprise’. States could of course attempt to agree such a wider definition with their treaty partners in negotiations. In addition, work is continuing on BEPS Action 1 on tax implications of the digital economy which could also result in widening of the definition of a PE. In the meantime, the version in the MC-BEPS should be considered a desirable improvement on the PE definition.

Paragraph 2 clarifies that paragraph 1 does not apply to a person acting in the ordinary course of their business as an independent agent, but this is not the case for a person acting ‘exclusively or almost exclusively’ on behalf of one or more closely related enterprises.

We recommend that all countries adopt this Article, without prejudice to discussions and negotiations on further improvements.

Article 13 – Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions

Article 5.4 of both the OECD and the UN model conventions list some specific activities which even if conducted through a fixed place of business are not considered to constitute a PE (e.g. storing or keeping goods for display or delivery, purchasing goods or collecting information). The list is almost exactly the same in the two models, but that exceptions (a) and (b) in the OECD model extend the use of facilities or maintenance of a stock of goods beyond the purposes of ‘storage or display’, to include ‘delivery’, which is not included in the UN model. This Article in the MC-BEPS is worded so that it does not affect this difference.

The aim of this Article is to clarify whether the activities described in the exceptions in article 5.4 only fall outside the definition of a PE if they are ‘of a preparatory or auxiliary character’. Countries are offered two ways of achieving this (or may choose neither), in paragraph 1. Option A in paragraph 2 applies (with rather convoluted wording) to modify the article 5.4 exceptions so that each of them will be made subject to the proviso of being ‘of a preparatory or auxiliary character’. The effect of Option B, in paragraph 3, is to retain the existing exceptions (a) – (d), without making them subject to the proviso, and that a combination of such activities in a fixed place is also not a PE provided that they are ‘of a preparatory or auxiliary character’. Hence, only Option A would make it possible for a host state to decide that a fixed place of business for the purposes listed in (a) to (d) may constitute a PE if the activity can be regarded as not merely ‘preparatory or auxiliary’.

The definition of a PE requires serious revision, and the change proposed in this Article is a helpful step. It would not remove the need for a physical ‘fixed place of business’, but would ensure that the exceptions only apply if the activities are not a key element of the enterprise, by applying the concepts ‘preparatory or auxiliary’. Although this leaves some scope for interpretation, the Commentary provides some clarification, e.g. that a large warehouse with a

---

27 For example, the DTA between China and Chile of 2015 uses the formulation ‘habitually concludes contracts, or negotiates the material elements of contracts’, which was one of those initially proposed in the BEPS Action 7 discussion draft. Since this uses a different wording than that in the compatibility clause, it would not be replaced, although of course the treaty partners could decide to adopt the version in the MC-BEPS.

28 It should also be borne in mind that even if this revised definition leads to the finding of a PE engaged in sales, the question of the profit attributable to that activity is still debatable. Work on the issue of attribution of profits to a PE under Action 7 is still continuing in the BEPS project, and may also be taken up in the UN Committee.
significant number of employees used for filling orders sold online to customers is more than just ‘preparatory or auxiliary’. It seems preferable to move forward on an agreed basis to reform the PE definition than for states to resort to unilateral and ad hoc measures.

In our view, therefore

**All countries should adopt Option A in paragraph 2 of this Article, to ensure that any activity conducted through a fixed place of business may constitute a PE, unless it is only ‘preparatory or auxiliary’**.

It should be noted that states choosing Option A may reserve the right for it not to apply to any existing treaties which already explicitly include the ‘preparatory or auxiliary’ condition for all the exceptions (paragraph 6).

Paragraph 4 aims to deal with the problem that MNEs can fragment their operations in a country so that different aspects are attributed to separate legal entities, though they all form part of one commercially-related activity of the corporate group. Under a strict interpretation of tax treaty rules each entity must be treated as independent, and so each may arguably be merely ‘preparatory or auxiliary’. This paragraph provides that such activities conducted in one place, or by related enterprises in a second place in the same country, may constitute a PE if in combination they are not ‘preparatory or auxiliary’, and they ‘constitute complementary functions that are part of a cohesive business operation’.

**All countries should adopt the anti-fragmentation rule in paragraph 4.**

**Article 14 – Splitting-up of Contracts**

The requirement in article 5 of tax treaties that activities such as construction projects must last for a minimum period, e.g. 6 months, to constitute a PE can be circumvented by splitting the activities into contracts which each take less than that time. The report on BEPS Action 7 (p. 42) pointed out that this could be prevented by applying a domestic anti-abuse rule and/or a treaty anti-abuse rule, such as the Principal Purpose Test. However, it also included in the revised Commentary a more automatic rule to combat this problem.

This Article provides such a targeted rule. It applies where an enterprise carries out the activities such as construction in a place for a period or periods exceeding 30 days but falling short of the specific time threshold for a PE, and connected activities are carried out at the same place by closely related enterprises for different periods each exceeding 30 days, in which case the periods must be aggregated to decide if the threshold is exceeded.

This type of targeted rule is generally clearer and easier to apply than a general anti-abuse principle such as the PPT, but does not preclude application of the PPT in other cases of abuse. Hence, in our view

**All countries should adopt this provision against splitting up of contracts.**

---

29 The provision in Article 13 was put forward in the BEPS Action 7 report, pp. 28-38, which also contains the associated revisions to the Commentary; the warehouse example is in paragraph 22, p. 31. The report of the Subcommittee on BEPS to the UN Committee in 2016 (pp. 56-67) put forward changes to the Commentary of the UN model to bring it into line with the Action 7 report.

30 Report on BEPS Action 7, pp. 42-4. The report of the UN Subcommittee on BEPS in 2016 proposed changes to the UN Model’s Commentary to bring it into line with the BEPS Action 7 report (pp. 85-9). It also made proposals to deal with problems sometimes experienced with the phrase ‘same or connected project’ (pp. 90-92).
Article 15 – Definition of a Person Closely Related to an Enterprise

This Article contains a definition of the term ‘closely related to an enterprise’. It is based on the concept of common control, but with an assumption that control is deemed to exist in any case if there is direct or indirect ownership of more than 50% of the beneficial ownership. This definition is needed if Articles 12.2, 13.4 or 14.1 have been adopted.

Countries must adopt this Article if they have adopted Articles 12.2, 13.4 or 14.1

PART V IMPROVING DISPUTE RESOLUTION

Disagreements or divergences as to the interpretation or application of tax treaty provisions may lead to conflicts. It should be borne in mind that the taxpayer (usually a MNE) also has the possibility of legal proceedings in domestic courts, since tax treaties generally have direct effect as law in most countries. Tax treaties provide the additional possibility for a taxpayer to bring a claim to the competent authority. The competent authority must (i) decide if it considers the claim to be justified, and if so (ii) resolve it, or (iii) ‘endeavour’ to reach a solution with the competent authority of the treaty partner. The mutual agreement procedure (MAP) aims to seek a solution by amicable discussions between the tax administrations.

There has been a significant and continuing growth in tax conflicts over the last 20 years among the OECD countries, and some conflicts have begun to occur more recently with developing countries.\(^{31}\) There are now widespread fears that the BEPS project outcomes will further exacerbate these conflicts. This has led to pressures to strengthen the MAP, especially by introducing mandatory binding arbitration (which is Part VI of the MC-BEPS). However, moving towards a more binding obligation, and especially a more legalised form of dispute settlement, raises issues of national sovereignty, which are important in such a key area as tax. These concerns have been felt most strongly in smaller and developing countries. The UN Committee in 2016 established a Subcommittee on Dispute Avoidance and Resolution.\(^{32}\)

In these circumstances, pressures to reform the procedures for dispute resolution seem premature, especially for countries where until now there have been few MAP claims. It would clearly be desirable first to understand the reasons for the rise of conflicts among OECD countries, and to analyse the nature and type of disputes which have occurred. This is very difficult, because MAP claims have been treated as totally secret, even the existence of a case is kept confidential. No information is published about the kinds of disputes involved, or how they have been resolved in practice. The OECD has published only aggregate data about the number of MAP claims in each country, since 2006.

Article 16 – Mutual Agreement Procedure

This Article modifies treaties based on either the OECD or the UN model (and those which depart from both). The only substantive change to the model provisions is that it now gives a right to the taxpayer to present a claim ‘to the competent authority of either Contracting Jurisdiction’ (paragraph 1 first sentence). This new obligation is explained in an amended

---

\(^{31}\) See S. Picciotto, ICTD Summary Brief 7: What Have We Learned About International Tax Disputes (2017), available at [http://www.ictd.ac/publication/7-policy-briefing/152-summary-brief-number-7-what-have-we-learned-about-international-tax-disputes](http://www.ictd.ac/publication/7-policy-briefing/152-summary-brief-number-7-what-have-we-learned-about-international-tax-disputes)

\(^{32}\) This subcommittee has been considering various forms of dispute resolution, as well as analysing changes which could be made to the UN model and its Commentary, and to the Committee’s Guide to the MAP (available at [http://www.un.org/esa/ffd/tax/gmap/index.htm](http://www.un.org/esa/ffd/tax/gmap/index.htm)). These will be considered by the full Committee at its final meeting with the present composition in April 2017, but the work is also likely to continue subsequently.
version of the Commentary to the OECD model, contained in the report on BEPS Action 14 (pp. 22-25).

Countries are not required to accept this change to comply with the BEPS minimum commitments. It is possible to opt out of this provision of the MC-BEPS, subject to specified conditions, essentially to implement a bilateral notification or consultation procedure with the competent authorities of Contracting Jurisdictions, for cases that are not considered justified (paragraph 5(a)).

For countries which already have an article on MAP in their tax treaties based on either the OECD or the UN model, this is a minimal change. It means that if the taxpayer makes a MAP claim against a decision which the tax authority considers is a valid interpretation of the treaty, and hence the competent authority rejects the claim, it must notify and consult with the treaty partner. In our view,

**Countries which already have MAP provisions based on the OECD or UN models in their treaties should accept this provision.**

This article would also modify any tax treaty provisions that are not in line with the current models, by introducing the main provisions of the MAP, i.e.:

(i) to allow a MAP claim to be submitted within three years of first notification of the action involving a breach of a treaty provision (paragraph 1, second sentence); it is possible to opt out of this, but only by accepting an obligation to ensure that taxpayers are allowed to present a case within three years (paragraph 5(b));

(ii) that a competent authority must, if it finds the claim justified and is unable to find a satisfactory solution, ‘endeavour … to resolve the case by mutual agreement’ with the treaty partner (paragraph 2, first sentence); no reservation is permitted to this obligation;

(iii) that any agreement reached under the MAP must be implemented notwithstanding any time limits in domestic law (paragraph 2 second sentence); it is possible to opt out of this, but on conditions specified in paragraph 5(c), which allows the option of accepting an alternative in its CTAs, spelled out in paragraph 5(c)(ii);

(iv) that the competent authorities must ‘endeavour to resolve’ not only claims brought by taxpayers, but ‘any difficulties or doubts arising as to the interpretation or application’ of a CTA; and they may also ‘consult together for the elimination of double taxation in cases not provided for’ in a CTA (paragraph 3); no reservation is permitted to these provisions.

Most existing treaties should already contain these provisions. Countries may wish to review any of their treaties which do not, and consider whether to list them as CTAs. Clearly, by not listing them, the opportunity would be lost to introduce into those treaties other provisions of the MC-BEPS which they may consider desirable. However, that opportunity may not be available if the other party does not include the treaty in its list of CTAs, or makes reservations against the articles which the country considers desirable.

**Article 17 – Corresponding Adjustments**

This Article introduces the obligation in article 9.2 of the OECD and the UN model conventions, to relieve ‘economic’ double taxation. This occurs when a tax authority makes a transfer price adjustment under article 9 affecting transactions between a taxpayer and an

---

33 This implements point 3.1 in the report on BEPS Action 14, p. 22, with slightly different wording.
associated enterprise in the treaty partner, hence increasing the aggregate tax payable by the two entities. This does not constitute ‘juridical’ double taxation, since they are separate legal persons, and are to be treated under article 9 as if they were independent. States have long been reluctant to accept such an obligation, but it was included in the OECD model convention in 1977, and is now also in the UN model. However, the Commentary points out that the obligation in 9.2 to make the corresponding adjustment applies only if the initial adjustment is in accordance with the treaty. There may of course be a disagreement about this, so the second sentence provides for consultations between the competent authorities in such cases. In addition, the obligation is to make ‘an appropriate’ adjustment.

Although this may seem a modest obligation, it has far-reaching implications. Article 9 allows a tax authority to adjust the accounts of an enterprise within its jurisdiction, applying the ‘independent entity’ test, according to its own judgement. Accepting article 9.2 creates an obligation to consider the allocation of the combined profits of that entity and its associated enterprises in other countries, and to accept an adjustment made by the other party if it can be considered in accordance with the treaty. This contradicts the ‘independent entity’ principle, and current transfer pricing guidelines do not provide clear rules for such an allocation of combined profits. The obligation to accept an adjustment could be used to pressurise weaker countries to apply transfer pricing methods which they consider inappropriate or unacceptable for their circumstances.

We recommend that countries make the reservation permitted in Article 17.3.b.ii not to apply this Article, on the basis that ‘its competent authority shall endeavour to resolve the case under the provisions of a Covered Tax Agreement relating to mutual agreement procedure’.

**PART VI ARBITRATION**

This introduces mandatory binding arbitration, for those countries which decide to opt in to this Part (Article 18). It provides that if the competent authorities do not resolve a MAP claim within two years (or three if Article 19.11 is chosen), the taxpayer can insist on binding arbitration. A country can reserve the right for a claim not to proceed to arbitration, or for the arbitration to end, if a decision on it has been given by a court or administrative tribunal (Article 19.12). The case also terminates if the competent authorities reach agreement, or if the taxpayer withdraws the claim (Article 22). A party may make reservations as to the scope of cases which are eligible for arbitration, and these reservations are deemed to have been accepted by other parties unless they object within 12 months (Article 28).

By default, the procedure is ‘last best offer’ or ‘baseball’ arbitration (specified in Article 23.1). Under this, the parties must submit a proposal for specific monetary amounts, or a maximum tax rate to be charged, for each adjustment or issue in the claim, and the arbitrators can only choose between these offers. No reasons can be given for their decision and it shall have no value as precedent. Parties may opt for the alternative ‘reasoned opinion’ procedure (Article 23.2), under which the arbitrators’ decision ‘shall indicate the sources of law relied upon and the reasoning’, but this also has no precedential value. Parties may also agree different rules. Where the reasoned opinion procedure applies, a party may choose to provide that the arbitrators’ decision is not binding on the parties if they agree a different resolution within three months, but this provision applies only if both parties accept it (Article 24).

Arbitrators, and up to three staff for each of them, may have information disclosed to them under the CTA, and would be subject to its confidentiality obligations (Article 21). Parties may choose also to require the taxpayer and its advisers to accept a written obligation of nondisclosure, breach of which would result in termination of the MAP and of the arbitration.
(Article 23.5). A party which considers this obligation to be essential can opt out of arbitration entirely with a party that has not chosen this rule (Article 23.7). There is no provision for publication of the decisions, or of any information at all even about the existence of a claim.

In our view, the complete lack of transparency makes these procedures unacceptable. International tax cases can involve hundreds or even billions of dollars. Direct taxation is at the heart of national sovereignty. Binding arbitration hands these sensitive issues over to be decided by a relatively small community of international tax specialists. They generally come from the dominant OECD countries, and have worked for the Big Four accountancy firms or other tax firms, and many have worked for both government and the private sector. These procedures lack any accountability.

In our view, countries should not adopt these procedures for secret and unaccountable arbitration.

5. OUTLINE OF SUBSTANTIVE PROVISIONS

Table of Substantive Provisions

<table>
<thead>
<tr>
<th>Article (explanation)</th>
<th>Provision (paraphrase)</th>
<th>Permitted reservations (opt-outs)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PART II HYBRID MISMATCHES</strong></td>
<td>1. Income of entity treated as transparent in either CJ shall be treated as income of a resident of a CJ to the extent that it is so treated for taxation purposes.</td>
<td>5. Can exclude</td>
</tr>
<tr>
<td><strong>Article 3 - Transparent Entities</strong></td>
<td>2. Provisions in a CTA which require CJ to give credit/exempt income derived by a resident which may be taxed in other CJ shall not apply to extent they allow taxation solely because that income is also income derived by a resident of that other CJ.</td>
<td>a) whole Article.</td>
</tr>
<tr>
<td></td>
<td>3. If a Party to a CTA has made art. 11.3 reservation (restriction of right to tax own residents), add following to para 1 – this para doesn’t affect right to tax its residents</td>
<td>b) para 1 for CTAs already having such a provision</td>
</tr>
<tr>
<td></td>
<td>4. applies in place of or in the absence of CTA provisions to the extent they address income from fiscally transparent entities</td>
<td>c) para 1 for CTAs already having such a provision for income from 3rd jurisdiction</td>
</tr>
<tr>
<td></td>
<td>5. Notify relevant CTAs.</td>
<td>d) para 1 for CTAs already having such a provision identifying treatment of fact patterns</td>
</tr>
<tr>
<td><strong>Article 4 – Dual Resident</strong></td>
<td>1. Where under a CTA a person</td>
<td>e) para 1 for CTAs already identifying treatment of fact patterns for income through 3rd jurisdiction</td>
</tr>
<tr>
<td></td>
<td>2.</td>
<td>f) para 2</td>
</tr>
<tr>
<td></td>
<td>4.</td>
<td>g) para 1 except for CTAs already having such provisions identifying treatment of specific fact patterns</td>
</tr>
</tbody>
</table>
| **Entities.** | other than individual is resident of more than one CJ, CAs shall endeavour to agree which, having regard to place of effective management, place of incorporation etc, failing which the person is not entitled to relief, except to the extent agreed by CAs.  
2. Applies in place of or in the absence of CTA provisions on residence of legal person except companies participating in dual-listing  
4. Notify and list unless opted-out of whole  
| a) whole Article  
b) whole Article from CTAs which already require CAs to reach agreement  
c) whole Article from CTAs which already deal with dual residence by denying benefits  
d) whole Article from CTAs which require CA agreement and set out treatment if no agreement  
e) drop last part of last sentence (i.e. exclude allowing CAs to agree extent of relief)  
f) whole Article from CTAs with parties making reservation (e) . |
### Article 5 – Application of Methods for Elimination of Double Taxation

Aims to prevent non-taxation due to use of an entity resident in a state which exempts foreign source income, if the income is not taxed at source; may choose Option A, B, or C, or none

2. Option A: exemption provisions in CTA do not apply if other CJ exempts, or if it limits tax. Should give credit for tax paid in other CJ.

4. Option B: provisions exempting income because treated as a dividend do not apply if the income gives rise to a deduction in other CJ. Credit should be given for tax paid in other CJ.

6. Option C: [credit method provision, latest OECD version]

7. Para. 6 applies in place of exemption provisions

8. Party choosing No Option can exclude whole of this Article for one or more or all of its CTAs

9. Party not choosing Option C may exclude the other CJ from applying it.

10. Party choosing any Option shall notify and list CTAs covered

### PART III

#### Treaty Abuse

### Article 6 – Purpose of a Covered Tax Agreement

New preamble text regarded as a minimum commitment

1. “Intending to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions),”

2. Applies in place of or in the absence of preamble language referring to intent to eliminate double taxation

3. May also choose to include: “Desiring to further develop their economic relationship and to enhance their co-operation in tax matters,”

5 & 6 notifications of 1 and 3

4. Can only exclude para. 1 if CTA already has same language.

### 7. Prevention of Treaty Abuse

Regarded as a minimum commitment

PPT is required, unless state intends to adopt a detailed limitation on benefits provision (DLOB) plus conduit

1. Principal Purpose Test (PPT): benefit shall not be granted “if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit” unless shown to be in accordance with the

3. Unless state rejects PPT under 15(a), may also choose para 4

5. Para 4 applies to CTAs which already have PPT

6. May also choose SLoB, applies if all parties to the CTA agree BUT

7. If not all choose SLoB, it applies (a) to all CJs if CJ not
financing rules, to be agreed by CAs.

The simplified limitation on benefits provision (SLOB) may be added to the PPT. It may apply to only one CJ if the other CJ agrees (unilaterally), or to both (bilaterally) (i.e. without extending to all that CJ’s CTAs).

Object and purpose of the relevant provisions of the CTA.

2. Para 1 applies in place of or in the absence of CTA provisions on denial of benefits based on principal purpose

4. Competent Authority (CA) can nevertheless allow part or all of benefit

**SLOB provisions**

8. Benefits (except MAP rights) can be denied to a resident which is not a “qualified person”.

9. Qualified person = individual, state/sub-state body, entity whose principal class of shares are regularly traded on recognised exchange, non-profit as agreed by CJs, regulated pension fund, entity shares of which are owned for at least 6 months by other qualified persons.

10. Resident who is not qualified person entitled to benefits if engaged in active conduct of business and that income is incidental, provided the business is not as a holding company, group administrator, financing or investment management.

11. Also entitled if equivalent beneficiaries own at least 75% of beneficial interest of the resident

12. CA may nevertheless grant benefit, after consulting the other CA, subject to PPT.


14. SLOB applies in place of or in the absence of CTA provisions for LoB based on categorical tests

17 Notifications

Choosing SLoB agrees & notifies, or (b) to CJ choosing it if CJ not choosing agrees

15 **Can exclude**
a) Para 1 (PPT) if intends to adopt DLoB plus rules dealing with conduit financing structures to meet minimum standards. CJs shall try to agree solution.
b) Para 1 (PPT) if CTA already has one
c) SLoB from CTA which already has LoB based on categorical tests described in 14

16. **Can exclude** whole article from a particular CTA if opts for SLoB under 6 and the other CJ doesn’t agree under 7; in such case CJs must agree solution meeting minimum standards
### 8. Dividend Transfer Transactions

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1.</strong></td>
<td>Provisions in CTA exempting dividend between related parties defined by ownership/control conditions apply only if those conditions are met throughout a 365 day period.</td>
</tr>
<tr>
<td></td>
<td>2. Applies in place of or in the absence of CTA provisions on minimum holding period</td>
</tr>
<tr>
<td></td>
<td>3. <strong>Can exclude</strong></td>
</tr>
<tr>
<td></td>
<td>a. Whole Article.</td>
</tr>
<tr>
<td></td>
<td>b. Whole Article from CTAs which already have minimum holding period.</td>
</tr>
<tr>
<td></td>
<td>4. Notify, unless excluded</td>
</tr>
</tbody>
</table>

### 9. Capital Gains from Sale of Shares in Entities with Value Principally from Immoveable Property

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1.</strong></td>
<td>Provisions allowing CG tax on shares if part of value from immoveable property shall apply</td>
</tr>
<tr>
<td></td>
<td>a) if value threshold is met at any time in preceding 365 days</td>
</tr>
<tr>
<td></td>
<td>b) to shares or comparable interests (e.g. in partnership or trust)</td>
</tr>
<tr>
<td></td>
<td>2. 365 days applies in place of or in the absence of CTA provisions on any other period</td>
</tr>
<tr>
<td></td>
<td>3. May also choose para 4</td>
</tr>
<tr>
<td></td>
<td>4. May tax gains from sale of shares if &gt;50% of value from real property</td>
</tr>
<tr>
<td></td>
<td>5. Para 4 applies in place of or in the absence of CTA provisions on % of value</td>
</tr>
<tr>
<td></td>
<td>7 &amp; 8 Notifications</td>
</tr>
<tr>
<td><strong>6.</strong></td>
<td><strong>Can exclude</strong></td>
</tr>
<tr>
<td></td>
<td>a) para 1</td>
</tr>
<tr>
<td></td>
<td>b) para 1a</td>
</tr>
<tr>
<td></td>
<td>c) para 1b</td>
</tr>
<tr>
<td></td>
<td>d) para 1a if CTA already has time period</td>
</tr>
<tr>
<td></td>
<td>e) para 1b from CTA which has provision on alienation of interests other than shares</td>
</tr>
<tr>
<td></td>
<td>f) para 4 if CTA has para 5 provision (% of value)</td>
</tr>
</tbody>
</table>

### Article 10 – Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1.</strong></td>
<td>Denies benefits where income is paid to an enterprise but treated in the residence state of the enterprise as exempt and attributable to a PE in a third state, and that income is taxed in the state where the PE is located at a rate equal to less than 60% of tax payable in CJ of residence (i.e. source country can tax)</td>
</tr>
<tr>
<td><strong>2.</strong></td>
<td>Benefits not denied where income derived in connection with the active conduct of a business carried on by the branch</td>
</tr>
<tr>
<td><strong>3.</strong></td>
<td>CA may nevertheless grant benefits</td>
</tr>
<tr>
<td><strong>4.</strong></td>
<td>Paras 1-3 apply in place of or in</td>
</tr>
</tbody>
</table>

### 5. **Can exclude**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Whole Article</td>
<td></td>
</tr>
<tr>
<td>b) Whole Article from CTAs already having provisions limiting benefits to a 3rd country PE</td>
<td></td>
</tr>
<tr>
<td>c) Whole Article except for CTAs which already have provisions limiting benefits to a 3rd country PE.</td>
<td></td>
</tr>
<tr>
<td>PART IV AVOIDANCE OF PERMANENT ESTABLISHMENT STATUS</td>
<td></td>
</tr>
<tr>
<td>Article 12 – Artificial Avoidance of Permanent Establishment Status through Commissionnaire Arrangements and Similar Strategies</td>
<td></td>
</tr>
<tr>
<td>amends the dependent and independent agent provisions of article 5 so that agent habitually involved in conclusion of contracts can be a PE</td>
<td></td>
</tr>
</tbody>
</table>

1. Agent can be a PE if it “habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise”
2. Exception for independent agent, unless it “acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related”
3. Paras 1 and 2 apply in place of the dependent and independent agent articles in CTAs
4. & 6 unless excluded, notify CTAs

| Article 13 – Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions |
| Article 5 of tax treaties lists exceptions from PE status for a place of business used exclusively for specified activities (e.g. storing or keeping goods for display or delivery, purchasing goods or collecting information). |

1. May choose either Option.
2. Option A the specific activity exceptions from PE all depend on the activity “being of a preliminary or auxiliary character”, singly or in combination
3. Option B: the specific activity exceptions are subject to the “preliminary or auxiliary” condition only if the CTA says so.
4. Anti-fragmentation rule, i.e. the specific activities exclusions do not apply if there is another fixed place of business of that or a closely related enterprise which is a PE or if

| the absence of CTA provisions limiting benefits to 3rd country PE |
| 6. Notification of which CTAs will be changed. |

| 1. CTA shall not affect taxation by CJ of its own residents, except for listed benefits a-j (corresponding adjustments, government pensions etc.) |
| 2. Para 1 applies in place of or in the absence of CTA provisions on taxation of own residents |
| 4. Unless opted out, notify CTAs which already have provision |

| 3. Can exclude |
| a) Whole Article from all CTAs |
| b) Whole Article from CTAs already having such provisions |

| 4. Can exclude whole Article. |

| 6. Can exclude |
| a) whole Article |
| b) Para. 2 for CTAs that explicitly say that “preparatory / auxiliary” condition only applies to specific exceptions |
| c) Para. 4 (anti-fragmentation rule) |
Under this article a state can choose to make it clear **either** that all these exceptions only apply if the activities are “of a preparatory or auxiliary character”, singly or combined **or** that the “preliminary or auxiliary” condition only applies where specified.

The overall activity in combination of both is not “preliminary or auxiliary”, and “constitute complementary functions that are part of a cohesive business operation”.

5. a) para 2 or 3 apply in place of the relevant part of the PE exception provisions in CTAs.
   b) para. 4 applies to provisions in CTAs on specific activity exceptions.

7. Must notify choice of option under para 1 and list CTAs to which applies.

8. Unless excluded must notify the CTAs with provisions for specific activity exceptions.

**Article 14 – Splitting-up of Contracts**

Provision to prevent manipulation of PE time limit relating to building sites etc. by connected parties

1. In determining the period after which specific projects or activities constitute a PE, can aggregate periods over 30 days during which activities are carried out in a place (e.g. building site, construction project) by an enterprise and by related enterprises.

2. Para 1 applies in place of or in the absence of CTA provisions to the extent that they address splitting of contracts

4. Unless whole article excluded, must notify and list CTAs covered

3. May exclude
   a) Whole Article for all CTAs
   b) Whole Article for CTA provisions relating to exploration/exploitation of natural resources

**Article 15 – Definition of a Person Closely Related to an Enterprise**

Needed if arts. 12, 13, 14 are accepted

1. For the purposes of art. 12, 13.4, or 14.1, a person is closely related “if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises”, and in any case if one has directly or indirectly >50% interest in the other

2. Party may exclude if it has opted out of 12, 13 or 14.
<table>
<thead>
<tr>
<th>PART V</th>
<th>IMPROVING DISPUTE RESOLUTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 16 – Mutual Agreement Procedure</td>
<td></td>
</tr>
<tr>
<td>Regarded as a minimum commitment that both competent authorities should be made aware of MAP requests so that they can give their views on its acceptability.</td>
<td></td>
</tr>
<tr>
<td>Conditional opt-out for para. 1 1st sentence, and 2nd sentence, para 2 2nd sentence.</td>
<td></td>
</tr>
<tr>
<td>No opt-out for para. 2 1st sentence, or for para.3</td>
<td></td>
</tr>
</tbody>
</table>

| 1. A person which considers that actions of either CJ result or will result in taxation not in accordance with treaty may present a case to competent authority (CA) of either CJ, irrespective of other remedies under domestic law. Time limit is 3 years. |
| 2. CA ‘shall endeavour’ if objection appears to it to be justified & it is not able to resolve it alone to resolve the case by mutual agreement with the CA of the other CJ, to remove taxation not in accordance with treaty. Agreement reached shall be implemented despite time limits in domestic law. |
| 3. CAs ‘shall endeavour’ by MAP to resolve difficulties/doubts of interpretation/application of CTAs. They ‘may also’ consult together to eliminate other cases of double taxation. |
| 4. (a) (i) para 1 1st sentence applies in place of or in the absence of CTA provisions on right to MAP (ii) para 1 2nd sentence applies in place of existing provisions with time limit shorter than 3 years, or in absence of time limit |
| b) (i) para 2 applies in absence of such provisions on MAP (ii) para 3 applies in absence of such provisions on MAP. |
| 5. Can exclude |
| a) para 1 1st sentence, on basis that where existing CTAs provide for MAP claim to be made to country of residence or nationality, the CA of that country will notify the other CA of cases which it considers unjustified. |
| b) para 1 2nd sentence from CTAs which do not have a time limit on the basis that it intends to meet the BEPS minimum standard by allowing MAP cases to be made within 3 years. |
| c) para 2 2nd sentence from all CTAs, on basis that (i) all MAP agreements shall be implemented regardless of domestic law time limits, or (ii) it intends to meet the minimum standard by accepting in bilateral treaty negotiations a provision for an agreed time limit for adjustments to profit attribution to a PE or transfer pricing. |

| Article 17 – Corresponding Adjustments |
| Access to MAP in transfer pricing cases is a minimum commitment, BUT the obligation to ensure a corresponding adjustment is a best practice recommendation. |
| Opt-out allowed for CTAs already having a requirement to make a |

<p>| 1. Where one CJ has made a transfer pricing adjustment in accordance with the treaty, the other CJ <strong>must</strong> make an “appropriate adjustment”, and the CAs shall if necessary consult each other. |
| 2. Para 1 applies in place of or in the absence of a provision about an appropriate adjustment. [i.e. it replaces provisions which say that a CJ “may” make an adjustment.] |
| 4. Must notify CTAs to which |
| 3. Can exclude |
| a) whole Article in CTAs which already have the provision. |
| b) whole Article, on the basis that (i) it shall make the appropriate adjustment, or (ii) its CA shall endeavour to resolve the case under the MAP. |
| c) whole Article, if it has opted under article 16.5.c.ii to include suitable provisions in its bilateral treaties and the CJs were able to |</p>
<table>
<thead>
<tr>
<th><strong>VI ARBITRATION</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 18 – Choice to Apply Part VI</strong></td>
</tr>
<tr>
<td>Party may choose to apply this Part to its CTAs and must notify accordingly, and it applies where both CJs have notified.</td>
</tr>
</tbody>
</table>

| **Article 19 – Mandatory Binding Arbitration** |
| Any issues which CAs fail to resolve within 2 or 3 years must at request of taxpayer be referred to arbitration. |
| time limit may be extended by agreement may exclude issues decided by a domestic court. |
| arbitrators’ decision is final and binding, unless taxpayer rejects it or pursues litigation, or it is held invalid by domestic court |

| **Article 20 – Appointment of Arbitrators** |
| Default rules. |

<p>| <strong>11.</strong> Can replace 2-year time limit in 1 with 3 years. |
| <strong>12.</strong> Can reserve right for (a) unresolved issue not to go to arbitration if it has been decided by a court; (b) arbitration to terminate if a court gives a decision on the issue. |</p>
<table>
<thead>
<tr>
<th>Article 21 – Confidentiality of Arbitration Proceedings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information disclosed to arbitrators and staff protected by confidentiality and nondisclosure obligations of the CTA</td>
</tr>
<tr>
<td>1. Solely for the purposes of the arbitration, arbitrators and up to 3 staff for each can receive information, under the provisions of the CTA relating to exchange of information.</td>
</tr>
<tr>
<td>2. CAs must ensure that arbitrators and staff agree in writing to treat all information consistently with confidentiality and nondisclosure obligations of the CTA.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 22 – Resolution of a Case Prior to the Conclusion of the Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>The MAP and the arbitration shall terminate if at any time</td>
</tr>
<tr>
<td>(a) CAs reach mutual agreement, or</td>
</tr>
<tr>
<td>(b) the person presenting the case withdraws it.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 23 – Type of Arbitration Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>Default is “last best offer” procedure, but party may choose “reasoned decision” arbitration. Where CJs make different choices, they must try to agree which applies to each CTA, otherwise there is no mandatory binding arbitration in that CTA.</td>
</tr>
<tr>
<td>1. Except to the extent that CAs agree different rules, the following apply:</td>
</tr>
<tr>
<td>(a) each CA must by an agreed date submit to the panel a proposal, limited to specific monetary amounts, or maximum rate of tax to be charged, for each adjustment or issue in the case. If there is an unresolved “threshold question” (e.g. residence, or existence of a PE), CAs may submit alternative proposals contingent on how that is decided.</td>
</tr>
<tr>
<td>(b) CA may also submit a supporting position paper, and a reply to the other’s.</td>
</tr>
<tr>
<td>(c) The panel shall select as its decision one of the proposals made by the CAs for each issue, and “shall not include a rationale or any other explanation of the decision”. It shall be decided by simple majority. “The arbitration decision shall have no precedential value.”</td>
</tr>
<tr>
<td>2. Party may exclude 1, in which case (except to the extent that CJs mutually agree different rules) the following apply:</td>
</tr>
<tr>
<td>(a) CAs shall supply necessary information to Panel without undue delay;</td>
</tr>
<tr>
<td>(b) Panel shall decide the issues in accordance with CTA and , subject to that, to the domestic laws of the CJs; also any other sources which CAs by mutual agreement identify.</td>
</tr>
<tr>
<td>(c) The decision shall be delivered in writing “and shall indicate the sources of law relied upon and the reasoning which led to its result”. It shall be decided by simple majority. “The arbitration decision shall have no precedential value”</td>
</tr>
</tbody>
</table>
| 3. A Party that has not made this reservation may exclude this article from CTAs of CJs which have chosen it. In such a case CAs shall endeavour to agree the type of arbitration process to apply, in the absence of which Article 19 (mandatory binding arbitration) does not apply to that
<table>
<thead>
<tr>
<th>Article 24 – Agreement on a Different Resolution</th>
<th>Article 25 – Costs of Arbitration Proceedings</th>
<th>Article 26 – Compatibility</th>
</tr>
</thead>
<tbody>
<tr>
<td>CJs may agree to reserve the right to agree a different resolution within 3 months</td>
<td>Arbitrators’ fees and all costs to be borne by CJs as agreed between them, failing which each bears costs of its own arbitrator and they share the rest equally.</td>
<td>If this Part is accepted, its procedures replace existing MAP arbitration provisions or are inserted in CTA which does not have them, which must be Notified.</td>
</tr>
<tr>
<td>1. Party may choose 2 and must notify, applies only if both CJs have notified.</td>
<td>2. These procedures don’t apply to any unresolved issue in a case for which a panel has already been set up for mandatory binding arbitration.</td>
<td>1. Where this Part has been accepted, its provisions replace existing MAP arbitration provisions or are inserted in CTA which does not have them, which must be Notified.</td>
</tr>
<tr>
<td>2. Decision not binding on CJs if the CAs agree different resolution on all issues within 3 months of delivery of decision.</td>
<td>3. May choose 2 only for CTAs where 23 para 2 (reasoned opinion procedure) applies</td>
<td>2. These procedures don’t apply to any unresolved issue in a case for which a panel has already been set up for mandatory binding arbitration.</td>
</tr>
<tr>
<td>3. May choose 2 only for CTAs where 23 para 2 (reasoned opinion procedure) applies</td>
<td>3. This Part does not affect wider obligations for arbitration under a MAP in other conventions.</td>
<td>3. This Part does not affect wider obligations for arbitration under a MAP in other conventions.</td>
</tr>
<tr>
<td>Article 28 – Reservations</td>
<td></td>
<td>4. May exclude this whole Part for one or more specific CTAs, or all of them, which already provide for mandatory binding arbitration.</td>
</tr>
<tr>
<td>1. No reservations can be made except for those expressly permitted by the following [lists reservation provisions]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Notwithstanding para 1, reservations permitted to Part VI</td>
<td>2. (a) A party choosing to apply Part VI Arbitration may make one or more reservations as to scope of cases eligible for arbitration.</td>
<td></td>
</tr>
<tr>
<td>2. (b) Such reservations are subject to acceptance, but are deemed to be accepted unless a party notifies its objection within 12 months, or when it joins the Convention whichever is later.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>