

OECD releases Japan peer review report on implementation of Action 14 minimum standard

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Executive summary

On 30 August 2018, the Organisation for Economic Co-operation and Development (OECD) released the fourth batch of peer review reports relating to the implementation of the Base Erosion and Profit Shifting (BEPS) minimum standard under Action 14 on improving tax dispute resolution mechanisms.¹ Japan was among the assessed jurisdictions in the fourth batch.² Japan requested that the OECD also provide feedback concerning their adoption of the Action 14 best practices, and therefore, in addition to the peer review report, the OECD has released an accompanying best practices report.³

Overall the report concludes that Japan meets most of the elements of the Action 14 minimum standard.

Detailed discussion

Background

In October 2016, the OECD released the peer review documents (i.e., the Terms of Reference and Assessment Methodology) on Action 14 on *Making Dispute Resolution Mechanisms More Effective*.⁴ The Terms of Reference translated the Action 14 minimum standard into 21 elements and the best practices

into 12 items. The Assessment Methodology provided procedures for undertaking a peer review and monitoring in two stages. In Stage 1, a review is conducted of how a member of the Inclusive Framework (IF) on BEPS implements the minimum standard based on its legal framework for Mutual Agreement Procedure (MAP) and how it applies the framework in practice. In Stage 2, a review is conducted of the measures the member of the IF on BEPS takes to address any shortcomings identified in Stage 1 of the peer review.

Both of these stages are desk-based and are coordinated by the Secretariat of the Forum on Tax Administration's (FTA) MAP Forum.⁵ In summary, Stage 1 consist of three steps or phases:

- (i) Obtaining inputs for the Stage 1 peer review
- (ii) Drafting and approval of a Stage 1 peer review report
- (iii) Publication of Stage 1 peer review reports

Input is provided through questionnaires completed by the assessed jurisdiction, peers (i.e., other members of the FTA MAP Forum) and taxpayers. Once the input has been gathered, the Secretariat prepares a draft Stage 1 peer review report of the assessed jurisdiction and sends it to the assessed jurisdiction for its written comments on the draft report. When a peer review report is finalized, it is sent for approval of the FTA MAP Forum and later to the OECD Committee on Fiscal Affairs' to adopt the report for publication.

Minimum standards peer review reports

The report is divided into four parts, namely:

- (i) Preventing disputes
- (ii) Availability and access to MAP
- (iii) Resolution of MAP cases
- (iv) Implementation of MAP agreements

Each part addresses a different component of the minimum standard.

The report states that, overall, Japan meets most of the elements of the Action 14 minimum standard. The report states that in order to be fully compliant with all four key areas of an effective dispute resolution mechanism, Japan needs to amend and update a certain number of its tax treaties. The report notes that where there are deficiencies, Japan is working to address them.

Preventing disputes

A.1 - Include Article 25(3), first sentence, of the OECD Model Tax Convention in tax treaties

A.1 requires that jurisdictions should ensure that their tax treaties contain a provision which requires the competent authority of their jurisdiction to endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of their tax treaties.

All of Japan's 65 treaties, except for 1, enable competent authorities to endeavor to resolve any difficulties or doubts regarding the interpretation or application of treaty provisions by mutual agreement. According to the report, Japan intends to update the one treaty via bilateral negotiations, however there is no specific plan for such negotiation at this time.

The report recommends that Japan should request the inclusion of the required provision via bilateral negotiations.

A.2 - Provide roll-back of bilateral APAs in appropriate cases

A.2 requires that jurisdictions with bilateral advance pricing arrangement (APA) programs should provide for the roll-back of APAs in appropriate cases, subject to the applicable time limits (such as statutes of limitations for assessment) where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances on audit.

The Japanese competent authority is authorized to enter into bilateral and multilateral APAs, with roll-back, if opted for by the taxpayer. The peer review with respect to roll-back has been largely positive and the report recommends that Japan should continue to provide for roll-back of bilateral APAs in appropriate cases as it has done thus far.

Availability and access to MAP

B.1 - Include Article 25(1) of the OECD Model Tax Convention in tax treaties

B.1 requires that jurisdictions should ensure that their tax treaties contain a MAP provision which provides that when the taxpayer considers that the actions of one or both of the Contracting Parties result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty, the taxpayer, may irrespective of the remedies provided by the domestic law of those Contracting Parties, make a request for MAP assistance, and that the taxpayer can present the request within a period of no less than three

years from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty.

The report explains that 8 out of 65 tax treaties do not contain a provision that is equivalent to Article 25(1) of the OECD Model Tax Convention (OECD MTC). Of those eight tax treaties:

- ▶ Seven tax treaties do not contain the equivalent to Article 25(1), first sentence.
- ▶ One tax treaty provides that the timeline to file a MAP request is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty.

Where the treaties are not modified by the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the MLI), Japan reported that it will seek to update such treaties through bilateral negotiations and in line with OECD MTC as amended by the Action 14 final report. Japan has stated its intention to include the required provision in all future tax treaties.

The report recommends that Japan should as quickly as possible ratify the MLI to incorporate the equivalent to Article 25(1) of the OECD MTC in those treaties that currently do not contain such equivalent. This concerns both:

- ▶ A provision that is equivalent to Article 25(1), first sentence of the OECD MTC either:
 - As amended in the Action 14 final report (OECD MTC); or
 - As it read prior to the adoption of the Action 14 final report (OECD MTC), thereby including the full sentence of such provision; and
- ▶ A provision that allows taxpayers to submit a MAP request within a period of no less than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty.

The report recommends that for the remaining treaties that will not be modified by the MLI following its entry into force to include such equivalent, Japan should request the inclusion of the required provision via bilateral negotiations.

The report recommends that specifically with respect to the treaty with former Czechoslovakia, Japan should, once it enters into negotiations with the jurisdictions to which it applies that treaty, request the inclusion of the required provision.

In addition, the report recommends that Japan should maintain its stated intention to include the required provision in all future tax treaties.

B.2 - Allow submission of MAP requests to the competent authority of either treaty partner, or, alternatively, introduce a bilateral consultation or notification process

B.2 requires that jurisdictions should ensure that either: (i) their tax treaties contain a provision which provides that the taxpayer can make a request for MAP assistance to the competent authority of either Contracting Party; or (ii) where the treaty does not permit a MAP request to be made to either Contracting Party and the competent authority who received the MAP request from the taxpayer does not consider the taxpayer's objection to be justified, the competent authority should implement a bilateral consultation or notification process which allows the other competent authority to provide its views on the case (such consultation shall not be interpreted as consultation as to how to resolve the case).

As discussed under element B.1, out of Japan's 65 treaties, 7 currently contain a provision equivalent to Article 25(1), first sentence, of the OECD MTC as changed by the Action 14 final report (OECD MTC), allowing taxpayers to submit a MAP request to the competent authority of either treaty partner. In addition, as was also discussed under element B.1, 19 of these 65 treaties will, upon entry into force, be modified by the MLI to also allow taxpayers to submit a MAP request to the competent authority of either treaty partner.

Japan reported that where its competent authority considers that the objection raised in a MAP request is not justified, or where a MAP request does not include the required information/documentation as set out in its MAP guidance, it will apply a consultation process with the competent authority of the relevant treaty partner. Japan's stated intention has not been tested in practice. Japan reported that since 1 January 2014, its competent authority for none of the MAP requests it received decided that the objection raised by taxpayers in such request as being not justified. The 2016 and 2017 MAP statistics submitted by Japan also show that none of its MAP cases were closed with the outcome "objection not justified." Also, all peers that provided input indicated that they were not aware of any cases for which Japan's competent authority denied access to MAP since 1 January 2014.

B.3 - Provide access to MAP in transfer pricing cases

B.3 requires jurisdictions should provide access to MAP in transfer pricing cases.

Out of Japan's 65 tax treaties, 12 contain a provision equivalent to Article 9(2) of the OECD MTC requiring their state to make a correlative adjustment in the case of a transfer pricing adjustment imposed by the treaty partner whereas, 21 treaties do not contain such equivalent. Of the remaining, 31 treaties allow corresponding adjustments to be made only through MAP. In the other treaty, granting of a corresponding adjustment is optional, stating "may, where appropriate, make an appropriate adjustment" instead of "shall make an appropriate adjustment."

However, Japan indicated that it will always provide access to MAP for transfer pricing cases and is willing to make corresponding adjustments, irrespective of Article 9(2) being present in the tax treaties, but only insofar as the scope of these treaties cover transfer pricing cases. This is the case for all of Japan's treaties except five treaties which have limited scope and only apply to certain categories of income relating to individuals.

Japan reported that it had not denied access to MAP for transfer pricing cases and all peers that provided input indicated that they were not aware of a denial of access to MAP by Japan since 1 January 2014 for transfer pricing cases. Japan reported that it is in favor of including Article 9(2) of the OECD MTC in its tax treaties where possible and that it will seek to include this provision in all of its future tax treaties. In that regard, Japan signed the MLI.

B.4 - Provide access to MAP in relation to the application of anti-abuse provisions

B.4 requires that jurisdictions should provide access to MAP in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment as to whether the conditions for the application of a treaty anti-abuse provision have been met or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty.

None of Japan's 65 tax treaties allow competent authorities to restrict access to MAP for cases when a treaty anti-abuse provision applies or when there is a disagreement between the taxpayer and the tax authorities as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty.

Japan reported that it will provide access to MAP in cases relating to the application of a treaty anti-abuse provision or for cases concerning the question whether the application of the domestic anti-abuse provision comes into conflict with the provision of a tax treaty.

Japan reported that since 1 January 2014, it has not denied access to MAP in cases in which there was a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a treaty anti-abuse provision have been met, or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty to which the peers agreed. However, Japan's competent authority did not receive any MAP requests of this kind from taxpayers during the review period. The report recommends that Japan follows its policy and grants access to MAP in such cases if they occur in the future.

B.5 - Provide access to MAP in cases of audit settlements

B.5 requires that jurisdictions should not deny access to MAP in cases where there is an audit settlement between tax authorities and taxpayers. If jurisdictions have an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer, jurisdictions may limit access to the MAP with respect to the matters resolved through that process.

Japan reported that under its domestic law there is no process available allowing taxpayers and the tax administration to enter into a settlement agreement during the course of or after ending an audit. However, in practice taxpayers generally agree with findings of the auditors of the National Tax Agency during an audit. In such situation, taxpayers can voluntarily file an amended tax return to reflect these findings. Where taxpayers file an amended tax return, for which the legal basis is Article 19(1) of the *Act on General Rules for National Taxes*, they have to waive their rights to initiate domestic available administrative or judicial remedies with regard to the amounts that are reflected in the amended tax return.

In this respect, Japan reported that the voluntary filing of a tax return, however, has no effect on taxpayers' access to MAP for the amount of adjusted income.

Since the taxpayer and tax administration cannot officially enter into audit settlements, there cannot be a situation of not providing access to MAP in cases of audit settlements.

Hence, Japan reported that it has not denied access to MAP for cases where the issue presented by the taxpayer in a MAP request has already been resolved through an audit settlement between the taxpayer and the tax administration since 1 January 2014. Peers that provided input indicated not being aware of a denial of access to MAP by Japan since 1 January 2014 in cases where there was an audit settlement between the taxpayer and the tax administration.

B.6 - Provide access to MAP if required information is submitted

B.6 requires that jurisdictions should not limit access to MAP based on the argument that insufficient information was provided if the taxpayer has provided the required information based on the rules, guidelines and procedures made available to taxpayers on access to and the use of MAP.

The information and documentation that Japan requires taxpayers to include in a request for MAP assistance are discussed under element B.8. Where a taxpayer has not included all required information in its MAP request, Japan reported that its competent authority will request the taxpayer to supplement the missing information and/or documentation. If the requisite information is not submitted by the taxpayer after repeated requests, the competent authority may decide not to initiate MAP discussions with the other competent authority concerned. In such situation, the other competent authority will be notified of this intention and invited to provide its views on this decision.

Japan reported that it provides access to MAP in all cases where taxpayers have complied with the information or documentation requirements as set out in its MAP guidance. It further reported that since 1 January 2014 it has not denied access to MAP for cases where the taxpayer had not provided the required information or documentation. All peers that provided input indicated that they were not aware of a limitation of access to MAP by Japan since 1 January 2014 in situations where taxpayers complied with information and documentation requirements. The report concludes that Japan should continue this practice.

B.7 - Include Article 25(3), second sentence, of the OECD MTC in tax treaties

B.7 requires that jurisdictions should ensure that their tax treaties contain a provision under which competent authorities may consult together for the elimination of double taxation in cases not provided for in their tax treaties.

Article 25(3), second sentence, states that the treaty partners may also consult together for the elimination of double taxation in cases not provided for in their tax treaties. Out of Japan's 65 tax treaties, 57 contain a provision equivalent to Article 25(3), second sentence, of the OECD MTC. With respect to the eight tax treaties which are considered not to contain the equivalent of Article 25(3), Japan listed two of them as a CTA under the MLI and notified the same. However, out of the eight treaty partners (all being signatories to MLI), only one made the notification. Therefore, at this stage the MLI will modify only one of the eight tax treaties identified above to contain the equivalent of Article 25(3), second sentence. Therefore, the report recommends Japan should request the inclusion of the required provisions via bilateral negotiations. The report also recommends a plan is put in place for the update of the seven treaties and that Japan should maintain its stated intention to include the provision in future treaties.

B.8 - Publish clear and comprehensive MAP guidance

B.8 requires that Jurisdictions should publish clear rules, guidelines and procedures on access to and use of the MAP and include the specific information and documentation that should be submitted in a taxpayer's request for MAP assistance.

Japan has included basic information on its MAP process in Article 12 of the *Ministerial Ordinance of the Enforcement of the Act on Special Provisions of the Income Tax Act, the Corporation Tax Act and the Local Tax Act regarding the application of Tax Treaties*. The article stipulates at what moment taxpayers can submit a MAP request, to which governmental agency such a request should be submitted and what basic information needs to be included in a MAP request. It also specifies the nature of information that needs to be submitted when a taxpayer intends to submit a request for the initiation of an arbitration procedure where the competent authorities concerned were not able to resolve the case within MAP within the specified period given in a tax treaty containing an arbitration provision.

Furthermore, since 1992, Japan has issued specific guidance on MAP, which since 2001 has been laid down in the commissioner's directive on the MAP (MAP guidance).

The MAP guidance⁶ was last updated in June 2017, such to introduce procedures to ensure that nonresident taxpayers also have access to MAP for those of Japan's tax treaties that contain the new version of Article 25(1) of the OECD MTC, allowing taxpayers to submit a MAP request to the competent authority of either contracting state.

Although not required by the Action 14 minimum standard, the report recommends the Japan could consider including information on:

- ▶ Whether MAP is available in cases of: (i) the application of anti-abuse provisions, (ii) multilateral disputes and (iii) bona fide foreign-initiated self-adjustments
- ▶ Whether taxpayers can request for the multi-year resolution of recurring issues through MAP
- ▶ The consideration of interest and penalties in the MAP

Furthermore, the report recommends that Japan should consider updating its MAP guidance to include the contact information of its competent authority as soon as possible.

B.9 – Make MAP guidance available and easily accessible and publish MAP profile

B.9 requires that jurisdictions should take appropriate measures to make rules, guidelines and procedures on access to and use of the MAP available and easily accessible to the public and should publish their jurisdiction MAP profiles on a shared public platform pursuant to the agreed template.

As stated in B.8, MAP guidance is available on the National Tax Agency (NTA) website. Further, the website also captures information such as: (i) purpose of the MAP process; (ii) legal basis for the procedure; (iii) persons eligible to submit a MAP request; (iv) time limit for submissions of MAP requests; (v) a statement that no fees for MAP are charged; (vi) information and documents to be included in a MAP request; (vii) the standard form for submission of a MAP request; (viii) office in charge of MAP within the NTA; and (ix) operational time for MAP cases.

The MAP profile of Japan is published on the website of OECD.⁷ The report commented that this MAP profile is complete and contains detailed information and explanations for almost all items on how Japan deals with MAP cases. This profile includes external links which provide extra information and guidance where appropriate. The report recommends to ensure that future updates to the MAP guidance continue to be publically available and easily accessible and that Japan's MAP profile published on the shared public platform is updated if needed.

B.10 – Clarify in MAP guidance that audit settlements do not preclude access to MAP

B.10 requires that jurisdictions should clarify in their MAP guidance that audit settlements between tax authorities and taxpayers do not preclude access to MAP. If jurisdictions

have an administrative or statutory dispute settlement/ resolution process independent from the audit and examination functions that can only be accessed through a request by the taxpayer, and jurisdictions limit access to the MAP with respect to the matters resolved through that process, jurisdictions should notify their treaty partners of such administrative or statutory processes and should expressly address the effects of those processes with respect to the MAP in their public guidance on such processes and in their public MAP program guidance.

Under Japan's domestic law, it is not possible that taxpayers and the tax administration enter into audit settlements. In that regard, there is no need to address in Japan's MAP guidance that audit settlements do not preclude access to MAP. No recommendations were made by this report.

Resolution of MAP cases

C.1 – Include Article 25(2), first sentence, of the OECD MTC in tax treaties

C.1 requires that Jurisdictions should ensure that their tax treaties contain a provision which requires that the competent authority who receives a MAP request from the taxpayer, shall endeavor, if the objection from the taxpayer appears to be justified and the competent authority is not itself able to arrive at a satisfactory solution, to resolve the MAP case by mutual agreement with the competent authority of the other Contracting Party, with a view to the avoidance of taxation which is not in accordance with the tax treaty.

First sentence of Article 25(2), OECD MTC states that the competent authority shall endeavor, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention.

Out of Japan's 65 tax treaties, 63 contain a provision equivalent to Article 25(2), first sentence, of the OECD MTC. Though the remaining two treaties contain a provision that allows competent authorities to conduct a MAP process, the wording used in those tax treaties deviates from Article 25(2). At this stage, the MLI, upon entry into force, will not modify the two tax treaties to include the equivalent to first sentence of Article 25(2). For these two treaties, the report recommends that Japan should request the inclusion of this language of Article 25(2), of the OECD, 2015, via bilateral negotiations and ensure it is included in all future tax treaties.

C.2 – Seek to resolve MAP cases within a 24-month average timeframe

C.2 requires that jurisdictions should seek to resolve MAP cases within an average time frame of 24 months. This time frame applies to both jurisdictions (i.e., the jurisdiction which receives the MAP request from the taxpayer and its treaty partner).

For the cases closed during the Statistics Reporting Period of 1 January 2016 to 31 December 2017, the average time needed to close the MAP cases during the post-2015 cases (MAP requests submitted on or after 1 January 2016) was 26.34 months whereas for pre-2016 cases (MAP requests submitted before 1 January 2016) it was 29.92 months. Of the 54 cases closed during the Statistics Reporting Period, 67% were concluded with agreement fully eliminating double taxation/fully resolving taxation not in accordance with the treaty. In 11% partial elimination/resolution was achieved, in 4% of cases the taxpayer resolved through domestic remedies, for 2% of cases it was concluded there was no taxation not in accordance with the treaty, 11% of taxpayers withdrew and for 5% of cases no agreement/agreement to disagree was reached.

All peers stated that they had a very good working relationship with Japan's competent authority. Some peers complimented Japan's competent authority's approach to resolve MAP cases. A number of peers noted certain limitations in Japan to correspond and exchange positions via email of during conferences which impacts the timely resolution of cases, as resolution is only possible during face-to-face meetings. Japan reported that it is seeking a more efficient and effective approach in communicating with its treaty partners.

The report recommends that Japan seek to resolve the remaining post-2015 cases pending on 31 December 2017 within a timeframe that results in an average timeframe of 24 months for all post-2015 cases.

C.3 – Provide adequate resources to the MAP functions

C.3 requires that jurisdictions should ensure that adequate resources are provided to the MAP function.

Japan reported that currently the MAP office is organized into nine sections and employs 44 persons in total, including the director of the MAP office. This is an increase from 19 staff in 2007.

Japan also reported that in order to be able to resolve MAP cases within an average of 24 months, its competent authority has been making efforts at various levels, including earlier exchange of position papers and increased schedule of face-to-face meetings.

Of the 19 peers that provided input on Japan's implementation of the Action 14 minimum standard, 16 provided input on the contacts with Japan's competent authority. Most of the peers mentioned that most of the cases being dealt with concern APAs rather than MAP. The peer review was largely positive including a good working relationship.

Four peers for which the MAP relationship with Japan is important made suggestions for improvement. The first peer commented that it would be valuable if Japan's competent authority would have more economists available. Furthermore, this peer suggested that telephone or videoconferencing (with interpreters) would be welcomed for discussing and resolving MAP cases next to face-to-face meetings. A second peer also suggested that next to face-to-face meetings, Japan's competent authority could resort to a regular exchange of views via e-mail or letters to improve the (timely) resolution process of MAP cases. The third peer made a similar suggestion and mentioned that in its contacts with Japan's competent authority faxes are used for exchanging positions, for which it considered that it would be better to use additional and more efficient communication methods, such as e-mail. The fourth peer made, as a general suggestion for improvement, creation of consistency of communication on both procedural and substantive matters at each level of their tax administrations/competent authority: case handlers, managers, senior management or executives.

The report recommends that while Japan has added a significant number of staff to its competent authority, and conducts a high number of face-to-face meetings per year, it should nevertheless ensure that the governance within its competent authority enables that the resources available are adequately used in order to resolve MAP cases in a timely, efficient and effective manner. This, as also suggested by some peers, in particular concerns the discussion and progressing of cases outside face-to-face meetings, such, for example, via e-mail correspondence, faxes or conference calls.

C.4 – Ensure staff in charge of MAP has the authority to resolve cases in accordance with the applicable tax treaty

C.4 requires that jurisdictions should ensure that the staff in charge of MAP processes have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty, in particular without being dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy that the jurisdictions would like to see reflected in future amendments to the treaty.

Japan reported that the MAP office is separated from those departments within the NTA that are involved in the examination and assessment of taxpayers. Further, Deputy Commissioner for International Affairs is delegated full authority to enter into MAP agreements. Also, staff in charge of MAP in practice operates independently and has the authority to resolve MAP cases without being dependent on the approval/direction of the tax administration personnel directly involved in the adjustment at issue.

The report recommends that Japan continues to ensure that its competent authority has the authority and uses it in practice to resolve MAP cases without being dependent on approval or direction from the tax administration personnel directly involved in the adjustment at issue.

C.5 - Use appropriate performance indicators for the MAP function

C.5 requires that jurisdictions should not use performance indicators for their competent authority functions and staff in charge of MAP processes based on the amount of sustained audit adjustments or maintaining tax revenue.

Japan emphasized that none of the objectives for government officials relate to the amounts of sustained audit adjustments or the amount of tax revenue that is maintained. The same applies to the objectives set by the NTA for the MAP office.

The report recommends that Japan should continue to use appropriate performance indicators.

C.6 - Provide transparency with respect to the position on MAP arbitration

C.6 requires that jurisdictions should provide transparency with respect to their positions on MAP arbitration.

Japan reported that it has no domestic law limitations for including MAP arbitration in its tax treaties and that its policy is to include a mandatory and binding arbitration provision in its bilateral tax treaties. To date, Japan has incorporated an arbitration clause in 16 of its 65 treaties as a final stage to the MAP.

Concerning the practical application of arbitration under Japan's tax treaties, Article 12(3) of *Japan's Ministerial Ordinance on the Enforcement of the Act on Special Provisions of the Income Tax Act, the Corporation Tax Act and the Local Tax Act* regarding the application of tax treaties includes information on when taxpayers can submit a request for the initiation of an arbitration procedure under a tax treaty and what information needs to be included in

such a request. In addition, sections 34 to 42 of Japan's MAP guidance include detailed information on inter alia: (a) what procedures are to be followed when a taxpayer has requested the initiation of an arbitration procedure under Japan's tax treaties, or when the treaty partner has initiated such a procedure; (b) the information taxpayers should include in their request for the initiation of an arbitration procedure; and (c) the process for implementing the mutual agreement that implements the arbitration decision.

Peers did not provide any input in relation to element C.6, and the report made no recommendations.

Implementation of MAP agreements

D.1 - Implement all MAP agreements

D.1 requires that jurisdictions should implement any agreement reached in MAP discussions, including by making appropriate adjustments to the tax assessed in transfer pricing cases.

Japan reported that its domestic legislation includes different rules for upward and downward adjustments to a taxpayer's taxable income. It is further reported that Japan has implemented all the MAP agreements entered into between 2014 and 2017. Japan further reported that the requirement for taxpayers to request for an amendment of a filed tax return within two months as from the date of a MAP agreement had in no situation impacted the implementation of such agreements. However, Japan does not have a system in place that monitors the actual implementation of MAP agreements.

All the peers noted that they were not aware of any MAP agreement reached on or after 1 January 2014 that was not implemented by Japan.

The report recommends that Japan should continue to implement all MAP agreements. Additionally, Japan should closely monitor whether the requirements for taxpayers to request for an amendment of its filed tax return within a period of two months as from the date of that agreement results in obstructions in practice concerning the implementation of MAP agreements, where the underlying taxation was made by the other jurisdiction concerned. Where this is the case, Japan should consider amending this process with a view to enable the implementation of all MAP agreements. Further, Japan could introduce a tracking system to ensure that all MAP agreements continue to be implemented.

D.2 - Implement all MAP agreements on a timely basis

D.2 requires that agreements reached by competent authorities through the MAP process should be implemented on a timely basis.

Japan's MAP guidance discusses the steps to be followed by the taxpayers and the NTA in order to have MAP agreements implemented. Japan noted that it has no fixed deadline for implementing MAP agreements. In practice, if a taxpayer has filed a request of an amendment of its filed tax return, Japan noted that implementation will be completed within approximately two months from the date of receipt of such request.

Japan reported that all MAP agreements that were reached on or after 1 January 2014, once accepted by the taxpayers, have been (or will be) timely implemented and that no cases of noticeable delays have occurred. Peers have not indicated experiencing any problems with Japan in this regard.

Japan did not indicate that it anticipates any modifications in relation to D.2 and the report recommends that Japan should continue to implement all MAP agreements on a timely basis.

D.3 - Include Article 25(2), second sentence, of the OECD MTC in tax treaties or alternative provisions in Article 9(1) and Article 7(2)

D.3 requires that jurisdictions should either: (i) provide in their tax treaties that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law; or (ii) be willing to accept alternative treaty provisions that limit the time during which a Contracting Party may make an adjustment pursuant to Article 9(1) or Article 7(2), in order to avoid late adjustments with respect to which MAP relief will not be available.

Japan's domestic legislation does not include a statute of limitations for implementing MAP agreements when it concerns downward adjustment and a period of three to nine years for upward adjustments, unless overridden by tax treaties.

Out of the 65 tax treaties, 47 contain a provision equivalent to Article 25(2), second sentence of the OECD MTC that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law. Thirteen treaties do not contain such equivalent or the alternative provisions. For the remaining five treaties, there are partial references to the second sentence to Article 25(2) but they cannot be treated equivalent to second sentence of Article 25(2).

At this stage, the MLI, upon entry into force, will only modify 6 out of the 18 treaties identified above to include the equivalent of second sentence of Article 25(2).

The report recommends that the Instrument to incorporate the equivalent to Article 25(2), second sentence, of the OECD MTC in those six treaties that currently do not contain such equivalent and that will be modified by the MLI upon its entry into force. For the 12 treaties that will not be modified by the MLI to include the equivalent of Article 25(2), second sentence, of the OECD MTC following its entry into force, Japan should request the inclusion of the required provision via bilateral negotiations or be willing to accept the inclusion of both alternative provisions. To this end, Japan should put a plan in place on how it envisages updating these 12 treaties to include the required provision or the alternatives. In addition, the report recommends that Japan should maintain its stated intention to include the required provision, or be willing to accept the inclusion of both alternatives provisions, in all future tax treaties.

Best practice peer review reports

BP.1 - Implement bilateral APA programs

BP.1 requires that jurisdictions should implement bilateral APA programs.

Japan has implemented an APA program, which it has run since 1987 and which allows unilateral, bilateral and multilateral APAs. Three peers commented on their relationship with Japan. The first peer reported that Japan has a well-developed bilateral APA program. The second peer noted that it appreciates Japan's long-standing commitment to APAs, as being the most direct and viable means for preventing MAP cases and also to provide taxpayers with certainty. The third peer echoed similar views.

BP.2 - Publish mutual agreements of a general nature

BP.2 requires that jurisdictions should have appropriate procedures in place to publish agreements reached by competent authorities on difficulties or doubts arising as to the interpretation or application of their tax treaties in appropriate cases.

Japan reported that it publishes agreements reached on difficulties or doubts arising as to the interpretation or application of their tax treaties by the competent authorities. These publications can be found on the website of Japan's Ministry of Finance (in English) or of the NTA (in Japanese).⁸

In relation to the above, and as an example, Japan published mutual agreements reached with Portugal (2013)⁹ and the United States (2005). Eight peers did not provide input relating to this particular best practice.

BP.3 – Provide guidance on APAs

BP.3 requires that jurisdictions' published MAP guidance should provide guidance on APAs.

Japan has implemented an APA program and has issued specific guidance in relation to this program.

BP.4 – Develop “global awareness” of the audit/examination functions

BP.4 requires that jurisdictions to develop the “global awareness” of the audit/examination functions involved in international matters through the delivery of the Forum on Tax Administration’s “Global Awareness Training Module” to appropriate personnel.

Japan reported that the NTA provides training to officials in audit/examination functions through its National Tax College. This college provides trainings to learn these officials about relevant tax laws and auditing skills. In relation to dispute resolution, two training programs are relevant:

- ▶ International Training Course: a four month course that aims at providing officials basic knowledge and advance expertise concerning examinations of international transactions and other practical work concerning international taxation.
- ▶ Corresponding training courses: part of these courses concerns International Taxation I and II, which aim at providing officials with knowledge and skills in the field of international taxation.

Further to the above, Japan reported that each division of the Regional Taxation Bureaus organizes one day or short-term training sessions for auditors. An example hereof is the transfer pricing division, which gives trainings to all auditors in that division to update their knowledge in light of recent modifications of the OECD Transfer Pricing Guidelines, domestic laws and directives. In addition, Japan noted that the essence of the Global Awareness Training Module is shared among auditors through those trainings.

One peer opined that Japan has been a committed partner within the FTA MAP Forum as also in the FTA’s Large Business Program with a view to raise awareness of the principles of the Global Awareness Training Module at the level of

its examination function and at the competent authority level. This peer also appreciated the willingness of Japan’s competent authority to use “reference sets” of comparable companies in cases presenting common fact patterns and transfer pricing issues for efficient and consistent resolution of MAP/APA cases.

BP.5 – Implement appropriate administrative measures to facilitate recourse to MAP

BP. 5 requires that jurisdictions should implement appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes, recognizing the general principle that the choice of remedies should remain with the taxpayer.

Japan reported that taxpayers are for a particular dispute allowed to request MAP assistance and at the same time seek to resolve the dispute via domestically available judicial and administrative remedies. Peers did not provide input relating to this particular best practice.

BP.6 – Provide access to MAP for bona fide taxpayer-initiated foreign adjustments

BP.6 requires that jurisdictions' published MAP guidance should provide that taxpayers will be allowed access to the MAP so that the competent authorities may resolve through consultation the double taxation that can arise in the case of bona fide taxpayer-initiated foreign adjustments.

Japan reported that generally it allows taxpayers to request MAP in the case of bona fide taxpayer-initiated foreign adjustments. Whether for an individual case access to MAP is granted, however, depends on the facts and circumstances of the individual case. Peers did not provide input relating to this particular best practice.

BP.7 – Provide guidance on multilateral MAPs

BP.7 requires that jurisdictions' published MAP guidance should provide guidance on multilateral MAPs.

Japan’s MAP guidance does not contain the guidance on multilateral MAPs. However, the response to question 2.10 of Japan’s Q&A on MAP specifies that MAP is available in such cases. In this respect, Japan reported that where a request for multilateral MAPs is made, as a procedural matter, taxpayers have to file multiple MAP requests pertaining to each part of the multilateral case. Peers did not provide input relating to this particular best practice.

BP.8 - Provide for suspension of collection procedures for pending MAP cases

BP.8 requires that jurisdictions should take appropriate measures to provide for a suspension of collections procedures during the period a MAP case is pending. Such a suspension of collections should be available, at a minimum, under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.

Japan reported that taxpayers can ask for the suspension of tax collection for the period that a MAP case is pending and insofar it concerns a case concerning the allocation of profits between associated enterprises. Peers did not provide input relating to this particular best practice.

BP.9 - Permit taxpayers to request multi-year resolution of recurring issues through the MAP

BP.9 requires that jurisdictions should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by a taxpayer which are within the time period provided for in the tax treaty for the multi-year resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit.

Japan reported it allows taxpayers to request the multi-year resolution of recurring issues through the MAP where the facts and circumstances of the case remained the same and insofar the case concerns the application of the arm's length principle for profit allocation between associated enterprises and the attribution of profits to permanent establishments. Japan specified that a MAP agreement concerning an initial tax assessment can be prolonged to subsequent fiscal years via a bilateral APA. Peers did not provide input relating to this particular best practice.

BP.10 - Publish explanation of the relationship between the MAP and domestic remedies

BP.10 requires that jurisdictions should publish an explanation of the relationship between the MAP and domestic law administrative and judicial remedies.

Japan included information on the relationship between MAP and domestic law administrative and judicial remedies in the note 2 of section 3(1) of its MAP guidance. This note clearly stipulates that taxpayers are allowed to submit a MAP request under a tax treaty, such regardless of the fact whether the taxpayer (or its foreign affiliated person) has initiated administrative or judicial remedies in respect of the taxes that are subject of the MAP request.

One peer provided input on this best practice. It noted that in its experience Japan's competent authority has continuously made robust efforts to facilitate the opportunity for taxpayers to make use of MAP to avoid, or otherwise reduce, instances of double taxation. However, the peer also shared the view that in its belief taxpayers and competent authorities would benefit from enhanced efforts by Japan's competent authority to provide guidance to taxpayers concerning those situations where, in its view, the application of Japan's domestic law forestalls reliance on MAP to eliminate cases of double taxation. To this the peer added that it respectfully welcomes additional discussions with Japan's competent authority on the scope within which such situations should occur and on the best practices for addressing them in a collaborative and co-operative manner.

BP.11 - Provide guidance on consideration of interest and penalties in MAP

BP.11 requires that jurisdictions' published MAP guidance should provide guidance on the consideration of interest and penalties in the MAP.

Japan reported it does not take interest and/or penalties into consideration in MAP. However, where a MAP agreement requires an adjustment to be made in Japan, leading to a reduction of the taxable income, then Japan will reduce interest and/or penalties in proportion to such an adjustment on the moment of implementing the MAP agreement. Peers did not provide input relating to this particular best practice.

BP.12 - Include Article 9(2) of the OECD MTC in tax treaties

BP.12 requires that jurisdictions should include paragraph 2 of Article 9 of the OECD MTC in their tax treaties. Article 9(2) of the OECD MTC allows competent authorities to make a corresponding adjustment to unilaterally eliminate double taxation arising from primary adjustments.

Japan reported that it is in favor of including Article 9(2) of the OECD MTC in its tax treaties where possible and that it will seek to include this provision in all of its future tax treaties. In that regard, Japan signed the MLI. Article 17(2) of that instrument stipulates that Article 17(1) - containing the equivalent of Article 9(2) of the OECD MTC - will apply in place of or in the absence of a provision in tax treaties that is equivalent to Article 9(2) of the OECD MTC. Peers did not provide input relating to this particular best practice.

Endnotes

1. See EY Global Tax Alert, [OECD releases fourth batch of peer review reports on Action 14](#), dated 4 September 2018.
2. <https://www.oecd-ilibrary.org/docserver/9789264304307-en.pdf?expires=1537402898&id=id&accname=guest&checksum=2EF5B01382DEDA53D3D7BF7F565DE40A>.
3. <http://www.oecd.org/tax/beps/beps-action-14-peer-review-best-practices-japan.pdf>.
4. See EY Global Tax Alert, [OECD releases BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review](#), dated 31 October 2016.
5. <http://www.oecd.org/tax/forum-on-tax-administration/about/>.
6. www.nta.go.jp/english/00.pdf.
7. <http://www.oecd.org/tax/dispute/Japan-Dispute-Resolution-Profile.pdf>.
8. http://www.mof.go.jp/english/tax_policy/tax_conventions/press_release/index.htm; <http://www.nta.go.jp/taxes/shiraberu/kokusai/sonota/index.htm>.
9. http://www.mof.go.jp/english/tax_policy/tax_conventions/press_release/20131206pt.htm.

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