

**Inclusive Framework on BEPS: Action 14
Making Dispute Resolution More Effective
MAP Peer Review Report**

BEST PRACTICES

**Japan
2021**



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Making Dispute Resolution More Effective
MAP Peer Review Report

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Abbreviations and Acronyms

APA	Advance Pricing Arrangement
BEPS	Baser Erosion and Profit Shifting
FTA	Forum on Tax Administration
MAP	Mutual Agreement Procedure
OECD	Organisation for Economic Co-operation and Development

Introduction

The final report on BEPS Action 14: “Making Dispute Resolution Mechanisms More Effective” identified a number of best practices related to the three general objectives of the Action 14 Minimum Standard.

Paragraph 9 of the Terms of Reference to monitor and review the implementation of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective¹ stipulates that:

The best practices are not part of the minimum standard and whether or not a jurisdiction has implemented the best practices will not be peer reviewed or monitored, nor will it affect the assessment of the assessed jurisdiction. Jurisdictions are free, however, to identify best practices they have adopted.

Japan has provided information and requested feedback by peers on how it has adopted best practices. In that regard, the FTA MAP Forum agreed on an optional best practices feedback form that peers have used to provide feedback on Japan’s adoption of the best practices.

The peer review process on the implementation of the Action 14 Minimum Standard consists of two stages: a peer review process (stage 1) and a peer monitoring process (stage 2). Stage 2 is launched within one year upon the adoption of the peer review report by the BEPS Inclusive Framework through an update report by Japan. This document contains a general overview of the adoption of best practices and comments by peers on the adoption of these best practices during stage 1 (period ranging from 1 January 2015 up to 31 December 2017) and stage 2 (ranging from 1 January 2018 up to 31 August 2019).

¹ Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective ([CTPA/CFA/NOE2\(2016\)45/REV1](#)).

Part A

Preventing Disputes

[BP.1] Implement bilateral APA programmes

Jurisdictions should implement bilateral APA programmes.

1. APAs concluded bilaterally between competent authorities provide an increased level of certainty in both jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes.
2. Japan reported that it has implemented an APA programme, which it has run since 1987 and which allows unilateral, bilateral and multilateral APAs. These types of APAs can be applied both for determining the arm's length price of transactions between associated enterprises and for the attribution of profits to permanent establishments. As will be discussed in more detail under element BP.3, Japan has included in chapter 6 of the Commissioner's Directive on the operation of transfer pricing ('**Transfer Pricing Directive**') detailed information on its APA programme.
3. Further to the above, Japan noted that in addition to its APA programme, the Regional Taxation Bureaus of the National Tax Agency have since June 2017 started accepting enquiries from taxpayers in relation to transfer pricing documentation. This programme has specifically been introduced to ensure and enhance taxpayers' voluntary tax compliance, also with a view to further prevent disputes.
4. Where it concerns unilateral APAs, the competence to handle APA requests is assigned to the National Tax Agency, and sub-mandated to the Regional Commissioner Large Enterprise Examination Division of the Regional Taxation Bureau, or to the District Director of the Examination Group (Corporation) of the Tax Office, such dependent on which department has jurisdiction over the taxpayer submitting the APA request.² Contact details for each department are made available online in Japanese and can be found at:

<https://www.nta.go.jp/taxes/shiraberu/sodan/kobetsu/itenkakakuzeisei/03.htm>

<https://www.nta.go.jp/about/organization/index.htm>

5. Where an APA request concerns a bilateral or multilateral APA, it is the Regional Tax Bureau's Large Enterprise Examination Division that will conduct the initial review of the APA request. However, where such a request is made under the MAP provision of a tax treaty, it is MAP office that will – in co-operation with the Regional Tax Bureau – further

² See chapter 6, section 2 of the Transfer Pricing Directive.

handle the request and conduct negotiations with the treaty partner.³ In this respect, Japan noted that next to the request for a bilateral or multilateral APA, taxpayers are also required to submit a MAP request on the basis of the MAP guidance (see element B.8 of the peer review report for a discussion).

6. In relation to the filing of an APA request, Japan reported it encourages taxpayers to have a pre-filing consultation with the competent department, such with a view to have a common understanding of the request, to assist taxpayers in submitting the required documentation efficiently and to expedite the APA process.⁴ Japan further reported that there are no specific timelines for filing of APA requests and that no fees are charged to taxpayers. However, an APA request needs to be filed on or before the commencing date of the first taxable year for which the request is made. Where an APA request relates to fiscal years 2021-2024, the request thus has to be submitted on or before 1 January 2021. Typically, Japan applies APAs for a period of three to five years.⁵

7. In view of the above, Japan annually publishes statistics relating to APAs on the website of the National Tax Agency since 2006. These statistics can be found at (in English):⁶

https://www.nta.go.jp/english/map_report/index.htm

8. These statistics *inter alia* relate to the number of APA requests received, the number of cases closed and the inventory of pending APA cases as per year-end. For calendar years 2014-2019 Japan reported the following statistics:⁷

Year	Number bilateral APA requests	Number of APAs granted	Inventory per year-end
2014	157	147	302
2015	161	106	357
2016	122	116	363
2017	157	152	368
2018	163	134	397
2019	110	115	392

9. Three peers provided input on this best practice. The first peer reported that Japan has a well-developed bilateral APA programme. 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. In this peer's view the commitment to concluded APAs with a meaningful level of prospectively is a best practice that underlies the valuable promise of APAs to provide taxpayers with certainty on a going-forward basis. In that regard, the peer respectfully welcomed additional discussions with Japan's competent authority in a co-operative and collaborative manner. Lastly, the third peer echoed the previous input and noted it has a very positive relationship with Japan's competent authority, whereby contacts are considered easy and frequent, as also that Japan's competent authority provides quick responses. Such contacts take place in various manners such as e-mail, letters and face-to-face meetings, whereby meetings are scheduled once or twice a year.

³ See chapter 6, section 12/13 of the Transfer Pricing Directive.

⁴ See chapter 6, section 10 of the Transfer Pricing Directive.

⁵ See chapter 6, section 7 of the Transfer Pricing Directive.

⁶ Statistics on APAs are also available in the annual report of the National Tax Agency. For 2018, these statistics are available in Part III-3(4). Available at: http://www.nta.go.jp/english/Report_pdf/2018e_06.pdf.

⁷ The numbers reported in the table deviate slightly from the numbers included in the annual report issued by Japan's National Tax Agency due to the fact that in the latter the basis is the fiscal year, which in Japan runs from 1 July to 30 June. Further, the numbers reported for the year involves the period until 31 August 2019.

This peer further mentioned that in all pending MAP cases with Japan progress is made in a reasonable time.

[BP.2] Publish mutual agreements of a general nature

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.

10. Agreements reached by competent authorities to resolve difficulties or doubts arising as to the interpretation or application of their tax treaties in relation to issues of a general nature which concern, or may concern, a category of taxpayers reflect the competent authorities' mutual understanding of the meaning of the convention and its terms. As such agreements provide information that might be useful to prevent difficulties or doubts in the interpretation or application of tax treaty provisions, publication of these agreements is valuable.

11. 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 National Tax Agency (in Japanese) and are available at:

https://www.mof.go.jp/english/tax_policy/tax_conventions/press_release/index.htm

<https://www.nta.go.jp/taxes/shiraberu/kokusai/sonota/index.htm>

12. In relation to the above, and as an example, Japan published mutual agreements reached with Portugal (2013) and the United States (2005).⁸

13. Peers did not provide input relating to this particular best practice.

1.1. [BP.3] Provide guidance on APAs

Jurisdictions' published MAP guidance should provide guidance on APAs.

14. Guidance on a jurisdiction's APA programme facilitates the use of that programme and creates awareness for taxpayers on how the APA process functions. As APAs may also prevent future disputes from arising, including information on APAs in a jurisdiction's MAP guidance is relevant.

15. As previously mentioned under element BP.1, Japan has implemented an APA programme and has issued specific guidance in relation to this programme in the form of the Transfer Pricing Directive. This guidance in relation to APA procedure was lastly updated on 16 February 2018 and is available online and can be found at (in English):

<http://www.nta.go.jp/english/07.pdf>

16. This guidance includes information on: Japan's policy in respect of APAs, when and by whom an APA can be requested, the governmental department competent to handle APA

⁸ The agreement with Portugal is published in English and is available at: http://www.mof.go.jp/english/tax_policy/tax_conventions/press_release/20131206pt.htm.

requests, the list of information that taxpayers have to submit alongside the APA request, the period covered by an APA, how the process for obtaining an APA will be conducted, organisation of a pre-filing meeting, the relationship with the mutual agreement procedure, the implementation of an APA and the effect thereof, the submission of an annual APA report by taxpayers, the possibility to amend, renew or cancel an APA, and the possibility of applying APAs to previous fiscal years (roll-back).

17. For corporations for which the consolidated taxation system applies, Japan has issued specific APA guidance in the Commissioner's Directive on the operation of transfer pricing for consolidated corporations (in relation to APA procedure, lastly updated in February 2018).⁹ This guidance is available online and can be found at (in Japanese):

<http://www.nta.go.jp/law/jimu-unei/hojin/050428/05.htm>

18. Furthermore, Japan also provides guidance on APAs in relation to the attribution of profits to permanent establishments in the following documents:

- *For domestic and foreign corporations*: chapters 6 and 7 of the Commissioner's Directive on the operation of auditing, etc. for income attributable to permanent establishments (in relation to APA procedure, lastly updated in February 2018). The information is available at (in Japanese):

<http://www.nta.go.jp/law/jimu-unei/hojin/160630/06.htm>

<http://www.nta.go.jp/law/jimu-unei/hojin/160630/07.htm>;

- *For domestic consolidated corporations*¹⁰: chapter 5 of the Commissioner's Directive on the operation of auditing, etc. for consolidated income attributable to consolidated corporation's permanent establishments located overseas (in relation to APA procedure, lastly updated in February 2018). The information is available at (in Japanese):

http://www.nta.go.jp/law/jimu-unei/hojin/160630_2/05.htm;

- *For (resident and non-resident) individuals*¹¹: chapters 5 and 6 of the Commission's Directive on the operation of auditing, etc. for various income attributable to individual's permanent establishments (issued on 31 March 2017). The information is available at (in Japanese):

<http://www.nta.go.jp/law/jimu-unei/shotoku/shinkoku/170331/05.htm>

<http://www.nta.go.jp/law/jimu-unei/shotoku/shinkoku/170331/06.htm>

19. While the documents mentioned in paragraphs 17 and 18 are issued for specific subjects, Japan reported that the content of the APA guidance included in these documents does not substantially deviate from the general APA guidance discussed in paragraphs 15 and 16 above, but are separately issued to provide clarity for each category of taxpayers.

20. In addition to the above, Japan has also included information on its APA programme, particularly on bilateral and multilateral APAs in several sections of the Commissioner's Directive on the mutual agreement procedure ("MAP guidance") – (e.g. sections 6(2), 13(3),

⁹ As defined in item 12-7-2 of Article 2 of the Corporations Tax Act

¹⁰ As defined in item 3 of Article 2 of the Corporations Tax Act.

¹¹ As defined in items 3 and 5 of Article 2(1) of the Income Tax Act.

24 and 25) and the Guidance for taxpayers on the mutual agreement procedure Q&A (“**Q&A on MAP**”). These are available at (in English):

<http://www.nta.go.jp/english/00.pdf>

<http://www.nta.go.jp/english/03.pdf>

21. Japan reported that it has carried out an update to its Transfer Pricing Directive in February 2018 in respect of (i) the procedure applicable where taxpayers are required to submit additional information and (ii) the procedure applicable where the APA process is deferred or closed in exceptional cases. Accordingly, corresponding updates were also made to the Commissioner’s Directives mentioned above in respect of specific taxpayers.

22. Peers did not provide input relating to this particular best practice.

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

Jurisdictions should 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.

23. Making audit/examination function of tax administrations that are involved in international matters aware of: (i) the potential for creating double taxation, (ii) the impact of a proposed adjustment on the tax base of one or more jurisdictions and (iii) the process and principles by which competing juridical claims are reconciled by competent authorities, may be useful to prevent disputes from arising. Using the Global Awareness Training Module developed by the Forum on Tax Administration (FTA) can be helpful in this respect.

24. Japan reported that the National Tax Agency 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 programmes 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.¹² In more detail, the curriculum of the course consist of teaching: (i) international tax laws (including tax treaties), (ii) examination methods for international transactions and (iii) rules and practices concerning international trade; and
- *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.¹³ The training consists of assignments as a preparation to the course and several days of lecture.

25. Further to the above, Japan reported that each division of the Regional Taxation Bureaus organises 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,

¹² See for information in English: http://www.nta.go.jp/about/organization/ntc/english/education/08_international.htm.

¹³ See for information in English: http://www.nta.go.jp/about/organization/ntc/english/education/11_courses.htm..

domestic laws and directives. In addition, Japan noted that the essence of the Global Awareness Training Module is shared among auditors through those trainings.

26. One peer provided input on this best practice and mentioned that Japan has been a committed partner within the FTA MAP Forum as also in the FTA’s Large Business Programme 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. To this the peer added that it also appreciates the willingness of Japan’s competent authority to discuss the use of “reference sets” of comparable companies in cases presenting common fact patterns and transfer pricing issues. In this peer’s view such reference sets provide for a useful tool for the efficient and consistent resolution of MAP/APA cases with Japan’s competent authority. In that regard it appreciates the opportunity to discuss these reference sets and other ideas with Japan with a view to improve current practices concerning the resolution of cases.

Part B

Availability and access to MAP

[BP.5] Implement appropriate administrative measures to facilitate recourse to MAP

Jurisdictions should implement appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes, recognising the general principle that the choice of remedies should remain with the taxpayer.

27. Under Article 25(1) of the OECD Model Tax Convention, the mutual agreement procedure is a dispute settlement procedure in annex to domestic available remedies and not a substitute for such remedies. Reference is made to inter alia paragraph 7 of the Commentary to Article 25 of the OECD Model Tax Convention, which specifies that the right to submit a MAP request is available to taxpayers without depriving them of the ordinary legal remedies available. Facilitating recourse to the MAP through appropriate administrative measures, under the general principle that the choice of remedies remains with taxpayers, enables them to effectively resort to such dispute settlement procedure.

28. Where a taxpayer does not agree with an action taken by the competent department of the National Tax Agency, it can submit within three months as from the date of that action request for a re-examination with the Regional Commissioner of the Regional Taxation Bureau, or the District Director of the Tax Office, such dependent on which of the departments holds competence over the particular taxpayer. Alternatively and also within three months, the taxpayer can request for a reconsideration of the action at the level of the National Tax Tribunal. In both instances, a decision should be taken within three months. Where re-examination decision is dissatisfactory to the taxpayer, the latter can ask for a review by the National Tax Tribunal within one month after the ruling. After having run through these administrative procedures, taxpayers are allowed to lodge an appeal at Japan's domestic courts within a period of six months.

29. In view of the above, 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. This is also in the situation where the specific case under review has already been decided via these remedies, but in that situation, Japan's competent authority will abide by that decision in its MAP discussions with the other competent authority concerned. Furthermore, no fees are charged to taxpayers when submitting a MAP request, or when requesting for a pre-filing meeting before submitting a MAP request.

30. Article 12 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 defines the legal basis upon which taxpayers can submit a MAP

request. This article does not contain any limitation on the scope of application of MAP, thus also not in relation to the interaction with domestic remedies.

31. Peers did not provide input relating to this particular best practice.

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

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.

32. A taxpayer-initiated foreign adjustment is considered bona fide where it reflects the good faith effort of the taxpayer to report correctly, timely and properly the adjusted taxable income from a controlled transaction or the profits attributable to a permanent establishment with a view to reflect an arm's length result, and where the taxpayer has otherwise timely and properly fulfilled all of its obligations related to such taxable income or profits under the laws of the treaty partners. As such taxpayer-initiated foreign adjustments may lead to cases of double taxation, it is relevant that there is access to MAP for resolving these cases. Furthermore, specifying whether there is access to the MAP for these adjustments in a jurisdiction's MAP guidance also provides additional clarity.

33. Japan reported that generally it allows taxpayers to request MAP in 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.

34. Article 12 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 defines the legal basis upon which taxpayers can submit a MAP request. This article does not contain any limitation on the scope of application of MAP, thus also not in relation to cases concerning bona fide taxpayer-initiated foreign adjustments. Japan's MAP guidance, in note 2 attached to section 3(1)(a), confirms that access to MAP may be granted in such cases, where eligible. Further, the response to question 2.10 of Japan's Q&A on MAP includes examples for which cases taxpayers can submit a MAP request, which also includes such cases.¹⁴

35. Peers did not provide input relating to this particular best practice.

[BP.7] Provide guidance on multilateral MAPs

Jurisdictions' published MAP guidance should provide guidance on multilateral MAPs.

36. In recent years, globalisation has created unique challenges for existing tax treaty dispute resolution mechanisms. Whilst the mutual agreement procedure provided for in Article 25 of the OECD Model Tax Convention has traditionally focused on the resolution of bilateral disputes, phenomena such as the adoption of regional and global value chains as well as the accelerated integration of national economies and markets have emphasised the need for effective mechanisms to resolve multi-jurisdictional tax disputes. In that regard, it

¹⁴

Available in English at: <http://www.nta.go.jp/english/03.pdf>.

is for clarity purposes relevant that jurisdiction's MAP guidance includes information on availability of and access to multilateral MAPs.

37. Japan's MAP guidance, in note 1 attached to Section 3(1)(a), states that domestic corporations may initiate multilateral MAP discussions by filing separate requests with regard to each of the treaties involved based on the location of the associated enterprises. Further, the response to question 2.10 of Japan's Q&A on MAP specifies that MAP is available in such cases.

38. Peers did not provide input relating to this particular best practice.

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

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.

39. If, following an adjustment taxpayers immediately have to pay the tax due, whereas the same amount was already paid to the tax administration of the other jurisdiction involved, double taxation will in fact occur. As taxpayers may then face significant cash-flow issues, at least for the period the MAP case is pending, it is relevant that jurisdictions provide for suspension of collection procedure for this period under at least the same conditions as available for domestic remedies.

40. Japan reported that taxpayers can ask for the suspension of tax collection for the period a MAP case is pending and insofar it concerns a case concerning the allocation of profits between associated enterprises. The relevant rules in relation hereto are included in Article 66-4-2 of the Act on Special Measures Concerning Taxation, which stipulates that where a taxpayer has submitted a MAP request to either Japan's competent authority or the competent authority of its treaty partner, the National Tax Agency may – upon request by the taxpayer – grant a suspension of tax collection for the tax due for which a MAP request is submitted.¹⁵ The period for which such suspension is granted ranges from the date on which the taxation in question becomes due and payable (or on the date where a request for suspension is submitted if this is later) and ends one month after the date on which the MAP agreement is implemented in Japan. Where no MAP agreement is entered into, the suspension is granted until one month from the date the Commissioner's notification to the taxpayer of the fact that the MAP case is closed. Furthermore, under the domestic rules the suspension of tax collection may be cancelled when the taxpayer: (i) has withdrawn its MAP request, (ii) does not co-operate in providing documents necessary for MAP discussions, (iii) is found unable to pay the tax due, (iv) does not issue a security deposit, (v) has any new delinquent national tax due other than taxes related to the suspension of tax collection, or (iv) is found inappropriate to be granted a suspension of tax collection.

41. Furthermore, section 43 of Japan's MAP guidance includes detailed information on the possibility for taxpayers to obtain a suspension of tax collection for the period a MAP is pending, the conditions under which the request for such a suspension are granted, what steps taxpayers need to take when filing a request hereto and the process for granting the requested

¹⁵ The relevant rules to calculate the tax due are included in Article 39-12-2(1) and 39-112-2(1) of the Order for Enforcement of the Act on Special Measures concerning taxation.

suspension.¹⁶ In this respect, section 43 specifies the following requirements to be fulfilled before a suspension of tax collection will be granted:

- The taxpayer is subject to taxation in Japan as listed in the specific provisions;
- The taxpayer has submitted a MAP request;
- The amount of tax due is the subject of the consideration with a treaty partner in MAP;
- The taxpayer does not have any delinquent national taxes other than taxes related to the suspension of tax collection; and
- The taxpayer deposited a security equivalent to the amount for which a suspension of tax collection is requested.

42. Further, a summary of the above provisions, in easy-to-read language, has been added to Japan’s Q&A on MAP in Q 4-1 to Q 4-10 under the title ‘Grace of tax payment related to transfer pricing taxation’.

43. Peers did not provide input relating to this particular best practice.

¹⁶

Available in English at: <http://www.nta.go.jp/english/03.pdf>.

Part C

Resolution of MAP Cases

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

Jurisdictions should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by 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.

44. In certain cases, a MAP request with respect to a specific adjustment to income may present recurring issues that may be relevant in previous or subsequent tax years. Allowing taxpayers to submit requests for the multi-year resolution through MAP with respect to such recurring issues, where the relevant facts and circumstances are the same, may help avoid duplicative MAP requests and facilitate a more efficient use of competent authority resources.

45. 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. To this end, taxpayers need to submit a MAP request for the initial tax assessment alongside an APA request (including a roll-back request) for the current and subsequent fiscal years.

46. Japan's MAP guidance, in note 1 attached to Section 3(2), states that for the multi-year resolution of cases, the taxpayer must file a MAP request for the present year and an APA request for future years.

47. Peers did not provide input relating to this particular best practice.

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

Jurisdictions should publish an explanation of the relationship between the MAP and domestic law administrative and judicial remedies.

48. As mentioned under BP.5, pursuant to Article 25(1) of the OECD Model Tax Convention taxpayers are allowed to submit a MAP request irrespective of available domestic remedies. This, however, does not further specify how to proceed if both available remedies are initiated and the case is dealt with in the bilateral phase of the MAP. Publicly available guidance on the relationship between the MAP and domestic remedies provides clarity to taxpayers as well as treaty partners.

49. Japan included information on the relationship between MAP and domestic law administrative and judicial remedies in the note attached to 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. The same information is included in the response to question 2.11 of the Q&A on MAP. This response further specifies that where the court in Japan has already decided on a case, its competent authority will follow that decision in its MAP negotiations with the other competent authority concerned. The response to question 2.8 of this Q&A further specifies that no fees are charged to taxpayers when submitting a MAP request. Furthermore, section 5(1) of the MAP guidance notes that taxpayers can ask for a pre-filing meeting before submitting a MAP request. The response to question 2.3 of the Q&A on MAP also includes information hereon.

50. 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

Jurisdictions' published MAP guidance should provide guidance on the consideration of interest and penalties in the mutual agreement procedure.

51. As interests and penalties may concern substantial amounts, providing clarity in a jurisdiction's MAP guidance on whether interest and penalties are in the scope of the MAP is relevant to ensure that a taxpayer is well-informed on this issue.

52. 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. Japan's position on the consideration of interest and penalties in MAP, that the competent authority would explain to the taxpayer the application of interests and penalties to the MAP agreement, is discussed in the note attached to Section 16(1) of the MAP guidance.

53. Peers did not provide input relating to this particular best practice.

[BP.12] Include Article 9(2) of the OECD Model Tax Convention in tax treaties

Jurisdictions should include paragraph 2 of Article 9 of the OECD Model Tax Convention in their tax treaties.

54. Article 9(2) of the OECD Model Tax Convention (OECD, 2017) allows competent authorities to make a corresponding adjustment to unilaterally eliminate double taxation arising from primary adjustments. Including this provision in tax treaties provides taxpayers the possibility to obtain the elimination of such double taxation via a unilateral corresponding adjustment.

55. Japan reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention (OECD, 2017) in its tax treaties where possible and that it will seek to include this provision in all of its future tax treaties.

Overview of tax treaties

56. Out of Japan's 71 tax treaties, 19 contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017) requiring their state to make a correlative adjustment in case a transfer pricing adjustment is imposed by the treaty partner.¹⁷ Furthermore, 20 tax treaties do not contain a provision that is based on or equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017), six of which does not contain in its entirety a provision that is based on Article 9 of the OECD Model Tax Convention (OECD, 2017) with regard to associated enterprises.¹⁸ The remaining 32 treaties do contain a provision that is based on Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but deviate from this provision for the following reasons:

- In 31 corresponding adjustments can only be made through a consultation between the competent authorities; and
- In one treaty granting of a corresponding adjustment is optional, as the phrase “(...) shall make an appropriate adjustment” is replaced by “(...) may, where appropriate, make an appropriate adjustment”.

Recent developments

Bilateral modifications

57. Japan signed a new tax treaty with a treaty partner that concerns the replacement of an existing treaty currently in force. This newly signed treaty has not yet entered into force, but Japan has already ratified it. This treaty contains a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017), which was not the case for the existing treaty currently in force. Further, Japan signed new tax treaties with six treaty partners which are newly negotiated treaties with treaty partners with which there were no

¹⁷ These 19 treaties include the newly negotiated treaty with Spain which will replace the currently existing treaty with this jurisdiction of 1974 and the newly negotiated treaty with Uzbekistan, for which Japan currently continues to apply the treaty with the former USSR of 1986 and that it will no longer do so upon entry into force of this new treaty.

¹⁸ These 20 treaties include the treaty with former Czechoslovakia that Japan continues to apply to the Czech Republic and the Slovak Republic and these six treaties include the treaty with the former USSR that Japan continues to apply to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Ukraine.

treaties yet in place.¹⁹ Three of these six treaties have already entered into force. All of these treaties contain a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017). The effects of these newly signed treaties have been reflected in the analysis above where it has relevance.

Multilateral Instrument

58. Japan signed the Multilateral Instrument and has deposited its instrument of ratification on 26 September 2018. The Multilateral Instrument has entered into force for Japan on 1 January 2019.

59. Article 17(2) of that instrument stipulates that Article 17(1) – containing the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017) – 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 Model Tax Convention (OECD, 2017). However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument. Article 17(2) of the Multilateral Instrument does not take effect for a tax treaty if one or both of the treaty partners have, pursuant to Article 17(3), reserved the right not to apply Article 17(1) for those tax treaties that already contain the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), or not to apply Article 17(1) in the absence of such equivalent under the condition that: (i) it shall make appropriate corresponding adjustments or (ii) its competent authority shall endeavour to resolve the case under mutual agreement procedure of the applicable tax treaty. Where neither treaty partner has made such a reservation, Article 17(4) of the Multilateral Instrument stipulates that both have to notify the depositary whether the applicable treaty already contains a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017). Where such a notification is made by both of them, the Multilateral Instrument will modify this treaty to replace that provision. If neither or only one treaty partner made this notification, Article 17(1) of the Multilateral Instrument will supersede this treaty only to the extent that the provision contained in that treaty relating to the granting of corresponding adjustments is incompatible with Article 17(1) (containing the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017)).

60. Japan has not reserved, pursuant to Article 17(3), the right not to apply Article 17(1) of the Multilateral Instrument for those tax treaties that already contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017). With regard to the 46 tax treaties identified in paragraph 56 above (disregarding those six treaties that do not contain Article 9 at all) that are considered not to contain this equivalent, Japan listed 36 treaties as a covered tax agreement under the Multilateral Instrument, but only for 25 of them made a notification on the basis of Article 17(4) that they do contain a provision described in Article 17(2).²⁰

61. Of the relevant treaty 25 partners, all are signatories to the Multilateral Instrument and have listed their treaty with Japan as a covered tax agreement under that instrument, but 11 have, on the basis of Article 17(3), reserved the right not to apply Article 17(1) as they considered that their treaty with Japan already contains the equivalent of Article 9(2). 12 of the 14 remaining treaty partners also made a notification on the basis of Article 17(4). Of

¹⁹ One of these treaties is with a treaty partner, for which Japan currently continues to apply the 1986 treaty with the former USSR, but which will no longer do so upon entry into force of this new treaty.

²⁰ These 36 treaties include the treaty with former Czechoslovakia that Japan continues to apply to the Czech Republic and the Slovak Republic.

these 12 treaty partners, nine have already deposited their instrument of ratification of the Multilateral Instrument, following which the Multilateral Instrument has entered into force for the treaties between Japan and these treaty partners, and therefore has replaced the relevant treaty provision to include the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017). For the remaining three treaties, the Multilateral Instrument will, upon entry into force, replace the provisions in these treaties to include the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017). For the remaining two treaty partners that did not make a notification on the basis of Article 17(4), these treaty partners have already deposited its instrument of ratification of the Multilateral Instrument. Therefore, the Multilateral Instrument has entered into force for these treaties and has superseded the relevant treaty provisions to include the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but only to the extent that the provision contained in these treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1).

62. Furthermore, for the remaining 11 treaties for which Japan did not make a notification on the basis of Article 17(4), all relevant treaty partners are signatories to the Multilateral Instrument and listed their treaty with Japan as a covered tax agreement under that instrument. Of the partners to the 11 relevant treaties, two have, pursuant to Article 17(3), reserved the right not to apply Article 17(1).²¹ Four of the remaining nine treaty partners have already deposited their instruments of ratification of the Multilateral Instrument, following which the Multilateral Instrument has entered into force for the treaties between Japan and these treaty partners, and therefore has superseded the relevant treaty provision to include the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but only to the extent that the provision contained in these treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1). The provision in the remaining five treaties will, upon the entry into force of the Multilateral Instrument for these treaties, be superseded by the Multilateral Instrument to include the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but only to the extent that the provision contained in these treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1).

63. Peers did not provide input relating to this particular best practice.

²¹ With respect to the treaty with former Czechoslovakia, which Japan continues to apply to the Czech Republic and the Slovak Republic, the Czech Republic is one of the treaty partners that made a reservation on the basis of Article 17(3) of the Multilateral Instrument. The treaty is therefore included in these two treaties. The treaty with former Czechoslovakia will therefore not be modified concerning the Czech Republic. However, as regards the Slovak Republic, since it has already deposited its instrument of ratification of the Multilateral Instrument, Article 17(1) of the Multilateral Instrument has superseded the relevant treaty provision to include the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but only to the extent that the provision contained in these treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1).

Part D

Implementation of MAP agreements

There are no best practices for Part D.

Glossary

Action 14 Minimum Standard	The minimum standard as agreed upon in the final report on Action 14: Making Dispute Settlement Mechanisms More Effective
MAP guidance	Commissioner's Directive on the Mutual Agreement Procedure
Multilateral Instrument	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD Model Tax Convention	OECD Model Tax Convention on Income and on Capital as it read on 21 November 2017
Q&A on MAP	Guidance for taxpayers on the mutual agreement procedure in the form of an Q&A
Terms of Reference	Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective (CTPA/CFA/NOE2(2016)45/REV1)



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