ICC submission to OECD Discussion Draft on BEPS Action 15 Multilateral Instrument

General Comments

The International Chamber of Commerce (ICC) speaks with authority on behalf of enterprises from all sectors in every part of the world and is a well-established arbitral institution through its International Court of Arbitration, and provides other valued dispute resolution mechanisms through its International Center for ADR.

Therefore, ICC would like to focus on the issues related to dispute resolution mechanisms to avoid double taxation. Regarding the technical issues described in the consultation document of the OECD we agree that these issues are difficult to resolve. In theory, the implementation of the results BEPS project via the Multilateral Instrument may appear to be an opportunity to swiftly and uniformly introduce the treaty related action points. On the other hand, there are substantial practical obstacles which include especially the multitude of different treaties with heterogeneous and divergent provisions. ICC therefore comes to the conclusion that the provisions should be adopted by countries via the Multilateral Instrument as a first step and should then be adjusted in a second step to the respective double tax treaty, in order to fit the concrete legal context. This might take longer and thus be not as efficient as an automatic implementation, but would serve the interest of both tax payers and tax administrations in having a higher degree of legal clarity and certainty.

Comments on dispute resolution

ICC strongly believes that more effective dispute resolution – providing much needed increased legal certainty and predictability for companies – is of utmost importance for enhancing cross-border trade, foreign direct investment and economic growth. The business community is confronted with increasing instances of dispute and a greater risk of double taxation. Improved dispute resolution mechanisms are, therefore, more pressing than ever. This reality is underscored by the many changes in process as a result of the Base Erosion and Profit Shifting (BEPS) process itself.

Mandatory Binding Arbitration (MBA)

As noted previously ICC considers that the arbitration procedure should be mandatory. Furthermore, ICC considers that a time-based requirement to resolve a dispute by way of MBA should be introduced to ensure that when a dispute has been on-going for a certain period of time, the dispute is referred to arbitration for a swift resolution.

Ensuring Compliance with the MBA

ICC notes that the OECD intends to introduce a peer to peer review procedure to act as a deterrent to prevent contracting states from failing to comply with their requirements under the MBA procedure.

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ICC welcomes the OECD's recognition of the need for compliance of contracting states' obligations under the MBA procedure to be monitored. However, ICC is concerned that monitoring compliance by way of a peer to peer review procedure will not act as an effective deterrent to prevent contracting states from failing to comply with the MBA process.

Our members have experienced that some countries are, in daily tax practice, not in favour of MAP and MBA. Several countries that have committed to MBA were cited as being particularly obstructive when resolving international tax disputes and imposing barriers to prevent, or delay taxpayers from using the MAP to resolve a dispute.

Our members mentioned complex interactions between domestic processes and the MAP, whereby they were prevented from invoking the MAP until domestic processes for dispute resolution had been exhausted, but once domestic processes had been completed they were then prevented from invoking the MAP on the basis that a decision made in the domestic courts should be considered final and therefore, the MAP could no longer be pursued.

MAP/EU Arbitration Convention settlements in some countries also appear to attract higher penalties than those that would apply to a dispute resolved in domestic administrative processes. The risk of higher penalties discourages corporates from invoking the MAP.

Other countries discourage use of the MAP by informing taxpayers that their final tax position is likely to be worse if they go through the MAP.

In contrast, the experiences of our members are more positive in other countries, which are more receptive to MAP applications and domestic processes and do not use them as a barrier to invoking the MAP; rather, domestic processes are paused when the MAP is invoked and are not resumed until the MAP has been completed.

Given these experiences, we recommend an introduction of sanctions, when countries do not comply with the MBA process (see also below).

Taxpayer involvement in the MBA Procedure

ICC contends that the taxpayer should be able to call for a dispute to be resolved through arbitration. Ultimately, the ability to refer a dispute to arbitration should lie with either contracting state or the taxpayer. The taxpayer's ability to refer a dispute to arbitration should not be restricted where the two contracting states have agreed the issue between themselves.

ICC members support taxpayers having greater involvement in the arbitration process. We consider that either the contracting states or the taxpayer should be able to call for a dispute to be resolved through arbitration and also that taxpayers should have a right to participate formally in the arbitration process, including the hearing before the arbitrator.

Ultimately, we recommend that taxpayers have an independent right to participate formally in the arbitration process, including the right to refer a case to arbitration even where the two Contracting States have agreed the issue between themselves but not to the satisfaction of the taxpayer, for instance because double taxation has not been resolved by the States´ agreement.

The Minimum Standards

ICC welcomes the introduction of Minimum Standards – that should be adopted and followed by contracting states when resolving disputes through the MAP. ICC notes that the proposed Minimum Standard 1.3 will require "countries to commit to a timely resolution of MAP cases" and those countries should "seek to resolve MAP cases within an average timeframe of 24 months".

We consider that in relation to the MAP, there are often unreasonable delays in reaching a resolution, or making progress in resolving international tax disputes. ICC therefore welcomes a commitment to resolve MAP cases in a timely manner and considers that the imposition of a deadline of 24 months would be an improvement on the status quo where many MAP disputes take significantly longer than 24 months to be resolved.

Our members have provided us with a number of examples where countries had actively delayed the process of resolving a dispute through the MAP. Some countries take unreasonably long to resolve MAP disputes and are very slow in providing the relevant information needed to progress the MAP.

We find it concerning that in some countries using the MAP takes longer to resolve a dispute than in other counties. Indeed, in one case, two very similar tax disputes arising in two different countries, took 2 and 1/2 years longer to resolve in one country than in the other country.

ICC notes that the OECD intends for a peer to peer review process to apply to monitor countries' compliance with the Minimum Standards. ICC recognises that the proposed Minimum Standard 1.6 will require countries to *"commit"* to having *their "compliance with the minimum standard reviewed by their peers in the context of the Forum on Tax Administration MAP Forum".*

However, ICC remains concerned that a peer to peer review will not constitute an effective sanction where countries fail to comply with the Minimum Standards. ICC contends that without effective penalties for delaying the resolution of a dispute through the MAP without a justifiable reason, the Minimum Standards will be ineffective in ensuring that disputes are resolved through MAP in a timely manner.

ICC therefore contends that the OECD should consider whether tax administrations should be required to publish an annual report, analysing the progress regarding the MBA process. This report should contain the number of cases submitted to the Competent Authority and the number that has been refused, the number of officials employed for MAP/MBA

processes, the time for a resolution of the case. Also, a range of sanctions could be introduced that would apply depending on the severity of the breach of the MAP process. For example, where a contracting state denies a taxpayer access to MAP a heavier sanction may be required, as opposed to when there is simply a delay in the MAP process being commenced. In these severe cases, sanctions could go as far as to consider whether financial penalties could be imposed and indeed enforced in certain circumstances.

ICC recognises the difficulties and limitations in imposing sanctions on sovereign territories. However, ICC maintains that imposing effective safeguards is important to ensure compliance with a MAP procedure and submits that the MAP procedure is likely to be ineffective without appropriate enforcement mechanisms. ICC would be willing to work with the OECD to determine appropriate measures where contracting states fail to comply with the MAP procedure.

For ease of reference please see **Annex 1** below on:
Comments to the OECD Discussion Draft on BEPS Action 14: "Make dispute resolution mechanisms more effective"

Comments to the OECD Discussion Draft on BEPS Action 14: "Make dispute resolution mechanisms more effective"

General Comment

The International Chamber of Commerce (ICC) speaks with authority on behalf of enterprises from all sectors in every part of the world and is a well-established arbitral institution through its International Court of Arbitration, and provides other valued dispute resolution mechanisms through its International Center for ADR.

ICC appreciates the time and effort invested by the OECD in developing potential options to address deficiencies in existing dispute resolution mechanisms, including the failure of member and non-member countries alike to broadly endorse utilization of binding mandatory arbitration in the Mutual Agreement Procedure (MAP) context. ICC encourages the OECD to honor its objective to contribute to the expansion of world trade by eliminating double taxation as a major obstacle to cross border trade. In this context, ICC is concerned that while the released Discussion Draft on Action 14 provides a number of options for improving the dispute resolution process, it misses the opportunity of taking mandatory and binding arbitration[1] and certain other measures further forward to eliminate double taxation. Furthermore, ICC is troubled that – taking into consideration that a strong deliverable on Action 14 is fundamental for the successful outcome of the OECD/BEPS project and the buy-in of stakeholders – a consultation of less than a month over the holiday season is unconstructive for the "inclusive consultation process" the OECD aims to value.

ICC strongly believes that more effective dispute resolution – providing much needed increased legal certainty and predictability for companies – is of utmost importance for enhancing cross-border trade, foreign direct investment and economic growth. The business community is confronted with increasing instances of dispute and a greater risk of double taxation. Improved dispute resolution mechanisms are, therefore, more pressing than ever. This reality is underscored by the many changes in process as a result of the Base Erosion and Profit Shifting (BEPS) process itself.[2]

As noted by the OECD, actions to counter BEPS are likely to give rise to new rules. The interpretation and implementation of which will introduce further uncertainty and inevitably lead to a higher risk of double taxation and consequently an increasing number of taxation disputes. A solid dispute resolution mechanism with mandatory agreements should remain a corner stone of the BEPS outcome. If the G20 and OECD fail to establish such a mechanism, this should be acknowledged in the outcome of the BEPS-project by avoiding such tax rules that foreseeably lead to increased double taxation and consequently stifle international trade.

ICC finds that while the Discussion Draft addresses a number of obstacles contributing to the cumbersome nature of the dispute resolution process, it does not fully take advantage of the capacity of the OECD/BEPS forum to identify foundational obstacles preventing the

[1] From here forward referred to as 'arbitration'.
[2] ICC notes the OECD Statistics on Mutual Agreement Procedures for 2013 (released on 25 Nov 2014) that the inventory of pending MAP cases has almost doubled since 2006 through 2013. This does not include data of non-OECD Member countries.

resolution of disputes and propose game changing measures that could serve to fundamentally safeguard

enhanced cross-border trade, increased foreign direct investment and continued economic growth. The Discussion Draft states that it reflects the results of preliminary work done to

identify "the obstacles that prevent" from resolving disputes through the MAP and develops possible measures to address these obstacles. ICC is disappointed that the Discussion Draft merely lists 34 potential incremental revisions that could be made to the Model Treaty MAP procedures. More ambitious progress on this critical issue was expected.

While the Discussion Draft reflects little support from a political perspective for a mandatory arbitration clause, ICC believes that the OECD should strongly recommend the arbitration solution already implemented by several of its Members. For example, Canada, France, Germany, Switzerland, the United Kingdom and the United States have all accepted arbitration in their taxation treaties, which has been implemented in certain cases. This underlines arbitration clauses are possible. Accordingly, it is difficult to understand why the OECD refrains from recommending arbitration. OECD Member states should be obliged to suggest solutions for arbitration that meet constitutional requirements in specific countries.

ICC strongly believes that if the obstacles to develop a broadly embraced arbitration mechanism are to be overcome, there needs to be frank recognition of their nature followed by a process to identify means of eliminating them. For example, the most common objection to arbitration is the perceived loss of "sovereignty" of the country in question. This term can have different connotations, though in the present context it most likely means that countries would surrender their ability to say "no" to a potential resolution.

International arbitration in a variety of contexts has grown significantly since it was initially addressed in 1923 with the establishment of the ICC International Court of Arbitration. ICC notes that many of the same obstacles cited in the taxation context have existed with respect to arbitration in non-taxation areas.

ICC proposes to undertake a comprehensive study as to how the hurdles facing arbitration in the tax field can be overcome taking into account ICC's vast experience as the world's leading arbitral institution in non-tax areas (also involving state and state entities). The consideration of lessons learned may provide useful guidance for forging a path by which countries embrace international taxation arbitration, as well as establishing and administering other dispute resolution mechanisms such as mediation and the administration of expert proceedings.

Based on ICC's experience in arbitration in non-taxation areas, ICC identifies the following elements as key for developing successful arbitration programmes:

- Develop a thorough understanding of the obstacles to be overcome;
- Identify the common objectives of the parties involved;
- Study the experience of successful alternative dispute resolution mechanisms in other areas;
- Outline a proposed approach that deals with the obstacles to the use of arbitration for the resolution of tax disputes, e.g. transparency *versus* confidentiality.

- Develop an approach that supports and strengthens broader accessible, effective and efficient dispute resolution mechanisms in which countries are encouraged to reach a mutually acceptable agreement where arbitration is the exception rather than the rule;

- Develop broad consensus for the proposed approach;
- Implement with an institution that has broad experience in administering cases through dispute resolution mechanisms in other contexts.

Specific Comments

A. Identification of obstacles to more effective dispute resolution

ICC observes that several countries have raised concerns with regards to mandatory arbitration for international taxation disputes and that the options listed in the OECD Discussion Draft attempt to address them to a certain extent. The obstacles raised by those countries include:

1) The perception of a loss of sovereignty, i.e. the ability of a tax authority to say "no" to a proposed resolution;

2) The expectation that independent arbitrators, perceived by all countries as being acknowledged experts and truly independent, may be difficult to identify;

3) Possible high and unforeseen cost;

4) Loss of control to participate in crafting solutions for cases deemed important to specific countries;

5) Additional time for cases to achieve resolution;

6) Expansion of the scope of the process ("scope creep");

7) Confidentiality of results of the process;

8) Skepticism of viability of the process in the absence of broad embrace of such procedures.

The listing above is intended to be merely illustrative. ICC underlines that such obstacles have existed in all non-tax contexts in which effective, and broadly embraced alternative dispute resolutions (including mandatory arbitration) have been developed by ICC and other arbitration bodies. Everything suggests that this can be done in the area of taxation.

A. Comments on the options as identified in the Discussion Draft

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

Comment: ICC observes that with respect to the importance of resolving MAP cases, it is not evident that the mere substitution of the phrase "obliged to seek to resolve" for "shall endeavor" will effectively address the circumstances in which a resolution may not be reached. Would it not be more demonstrative of the need of all parties, tax authorities and multinational enterprises ("MNEs") alike to use the declarative "shall resolve?". In the latter, countries could further clarify instances in which states "shall not endeavor", for example in the instance of willful neglect or perhaps in the instance in which the determination of the court cannot be further varied.

ICC further believes the OECD should at least combine adoption of those BEPS initiatives where interpretation is subjective and outcomes are potentially highly divergent, with an obligation for the participating country to adopt rules that ensure effective dispute resolution. Several of the BEPS deliverables may also imply a legal

obligation to adopt new local legislation (e.g., country-by-country reporting). Such requirements are likely to expand the level of tax disputes. Accordingly, it is crucial that action be taken to ensure more effective dispute resolution. In a multilateral instrument, states could be committed to combine certain BEPS actions items with an obligation to
adopt rules that ensure an effective dispute resolution, such as arbitration or the use of language such as "shall resolve".

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

Comment: If the intention is to eliminate the ambiguity of not having Art. 9.2 in specific treaties, which is to be implemented by a multilateral agreement, it seems preferable to mandate the inclusion of Art. 9.2 in all treaties. This would remove an apparent obstacle to effective resolution.

OPTION 3 – Ensure the independence of a competent authority

Comment: ICC agrees with this option but raises the question – which applies to all of the options – why the option is framed in the permissive "could" as opposed to making the language an element of the model? In any event, in a multilateral instrument ICC presumes that the Manual on Effective Mutual Agreement Procedures (MEMAP) would be included and independence would be an agreed upon requirement ("independence" is identified above as *obstacle 2*).

OPTION 4 – Provide sufficient resources to a competent authority

Comment: Same as comment to option 3 above. If there are not adequate resources provided, then the process will not function ("cost" is identified above as *obstacle 3* above). ICC believes that the development of OECD MAP trainings may be helpful.

OPTION 5 – Use of appropriate performance indicators

Comment: Same as comment to option 3 above.

ICC believes that performance indicators may prejudice the impartiality of competent authorities and should be used carefully if they are set. ICC notes that a number of the options include monitoring performance/ behavior of contracting states as it pertains to various aspects of the dispute resolution process. However, no measures are proposed to remedy the circumstance in the advent of suboptimal outcomes. In the case of information exchange, OECD implemented peer reviews. A similar peer or independent review process could be mandated, perhaps in the context of the multilateral instrument, in appropriate circumstances as a first measure to affect change.

OPTION 6 – Better use of paragraph 3 of Article 25

Comment: ICC welcomes the suggestion that agreement between competent authorities on general matters of interpretation and application of treaty matters be made available publically. ICC would also suggest that such matters of interpretation and application are incorporated in any best practice audit guidance developed under the Forum on Tax Administration (FTA) MAP Forum Strategic Plan.

Same comment as option 3 above regarding MEMAP reference.

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

Comment: ICC believes that more direct language to discourage this practice should be considered, such as replacing 'could commit to take appropriate steps' with 'are obligated to take appropriate steps'.

Similarly ICC believes that there should be a mandatory requirement to notify the competent authority of the other contracting state where details of such an audit settlement are discovered and there is a pending MAP matter.

OPTION 8 – Implement bilateral APA programs

Comment: ICC fully supports the commitment that participating countries implement bilateral Advance Pricing Agreement (APA) programmes. ICC further suggests that as part of the political monitoring mechanism commitment envisaged within Action 14 that data on the number of implemented bilateral or multilateral APAs be shared publically by participating countries (as is done in the OECD MAP statistics).

Beyond bilateral or multilateral processes, ICC recommends that as an important means of reducing disputes and increasing efficiency, an effective dispute resolution mechanism would include the adoption of effective unilateral processes enabling taxpayers to obtain different types of unilateral rulings from its tax authorities to clarify the tax consequences of a specific transaction where the uncertainty is primarily singular in nature (e.g. binding ruling, APA or similar procedures with respect to a specific cross-border transaction).

ICC believes that the OECD should also encourage countries to implement other alternative dispute resolution mechanisms (e.g. domestic arbitration, ombudsman, advanced tax agreements).

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

Comment: ICC supports the implementation of an appropriate procedure in these cases. It is important for the procedure to be simple and quick in order to be effective. The procedure could be based on the grouping together of disputes; for example, in cases of multi-year depreciation or amortization of an asset. It is also positive that the countries commit to provide the roll-back of APA in appropriate cases. It could be useful to have consensus guidance with respect to when roll-back is possible.

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

Comment: ICC supports this option but raises again the question why this option is also preceded by the verb "could". ICC considers that the transparency and simplicity of the procedure *must* be improved in order for it to work.

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

Comment: ICC supports this option and strongly believes that countries "should" commit to adopt the best practices included in the MEMAP. Commentators are requested to point out other obstacles related to the documentation and information requirements. The business community has experienced that critical issues can often be identified with relative succinctness. On the other hand, MAP processes often seem to generate an excessive amount of documentation which requires time to analyse and resource commitments of both taxpayers and tax administrations. In ICC's understanding, there should be two different approaches in terms of documentation: (i) "basic" information and documentation provided by the taxpayer or the administration to assess access to MAP; and (ii) "comprehensive" information requested by both tax administrations when the procedure is ongoing. The information should focus on the specific problem to be resolved.

Another obstacle is the language in which the information or/and documentation is provided. Therefore, there should be mechanisms to minimize the burden of translation. It is a good practice to have clear guidelines as to the relevant information and documentation in the language the administration is familiar with.

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

Comment: ICC welcomes this option, especially considering that as a result of the BEPS discussion the notion of what is perceived to be abusive appears likely to be very much broadened. In ICC's view, a preliminary assessment by the resident state of perceived abuse should not mean denial of MAP-access as an immediate

consequence. On the contrary, a taxpayer should be enabled, via MAP, to involve the other contracting state because the abuse assessment in itself can be 'not in accordance with the provisions of the Convention' and lead to double taxation issues. According to ICC, therefore, the default should be that there is MAP access in cases of alleged abuse. In order to ensure effective MAP access in such cases, ICC would welcome amendment of article 25(1) to permit a request for MAP assistance to be made to the competent authority of either contracting state (see option 15).

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

Comment: ICC sincerely doubts that this would be an efficient way to address the issue at hand, i.e. unilateral power in both contracting states to deny access to the MAP. It seems difficult from a procedural point of view and the power to deny MAP access still
seems to fully remain with the resident country. Also, there can be debate with the other contracting state whether a taxpayer's objection appears to be justified without entering into discussions about the case and its merits and, thus, how to potentially resolve the case.

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

Comment: A clarification would be welcomed as it may curb the power of the resident state to unilaterally deny MAP access. However, ICC feels that a better way to address the issue at hand, i.e. unilateral power to deny access to the MAP, would be to amend Article 25.1 to permit a request for MAP assistance to be made to the competent authority of either contracting state (see option 15).

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

Comment: ICC welcomes this option because the possibility to permit a request for MAP to the competent authority of either contracting state increases the flexibility for the taxpayer. Most notably in cases in which one of the two competent authorities is more experienced and has access to more qualified staff than the other. Nevertheless, the crucial point is to obligate all contracting states to ensure that their competent authorities have sufficient resources and that access to them is adequate and well-functioning.

Furthermore, the comments above with regards to options 12-14 also apply.

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

Comment: ICC strongly believes that MAP and domestic law remedies should not exclude each other and it should be made clear that the taxpayer is free to choose either of them or proceed with both alternatives simultaneously. If a cross border issue is assessed by one contracting state, it is inherent that either: (i) the assessment (or portion thereof) is correct and, therefore, a counter adjustment in the

other contracting state needs to follow, or (ii) the assessment itself is incorrect and no counter adjustment applies. It should not be burdened onto the taxpayers to limit themselves to only one of the applicable remedies and risk losing access to the other or risk a delay in effective relief.

Furthermore, the comments above with regards to option 7 also apply.

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

Comment: In the case of local remedies, often the payment of the tax assessed can be deferred until a decision upon the remedy is reached. In ICC's view, such a deferral should also be available in the case of a MAP. Taxpayers are often forced to settle cross border related disputes since a settlement offers a reduction in the tax payable and thus this might for many taxpayers be the only chance to afford the payment of any additional
tax due. ICC thinks it is peculiar that in cross border related cases – which should safeguard a counter adjustment and therefore related relief if the assessment is correct
– often no such deferral is available. ICC recommends each contracting state to provide for a deferral of the amount of double taxation until such time as resolution is achieved (except in circumstances of jeopardy).

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

Comment: ICC supports this option as improvement to MAP access is provided by removing obstacles due to timing issues. It is in the interest of all parties to have clarity on time limits ("time" is identified above as obstacle 5 above).

ICC particularly supports the second bullet point as it ensures access to MAP relief even though domestic law might prevent it according to time limits.

ICC recommends, ensuring better implementation of the whole option, strengthening the wording of "could commit" to "should commit".

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

Comment: ICC supports this option. Self-initiated adjustments seem to inevitably make bilateral disputes more difficult to resolve. Today, most countries resist self-initiated adjustments that are negative to their own revenue results. Accordingly, such clarification would be a materially positive element, including coordination with the MEMAP.

Unfortunately, no indication is given on how clarification to articles 7, 9 and 25 could be made. One possibility would be to extend Art.25.1 (which provides for the resolution of double tax issues following action of one or both States; but excluding the action of the taxpayer such as by self-initiated adjustment) to the action of the

taxpayer in specified circumstances. An example of such a circumstance could be "if the action is made in accordance, in the taxpayer's opinion, with the arm's length principle".

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

Comment: ICC supports this option. Fair and objective negotiations should be the corner stone of MAP. ICC recommends that the wording be strengthened from "could commit" to "should commit."

The second bullet point suggests using Art. 25.3 to resolve interpretive issues: in this case, Art. 25.3 should be reworded, as "shall endeavour" is simply not strong enough to achieve the goal mentioned in this option.

ICC notes that many complex MAP proceedings are resolved via profit split methodologies that are, often, much simpler in approach than the literal provisions of the guidelines. Accordingly, the work being done in other BEPS Actions can facilitate achieving this option.

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

Comment: ICC supports the proposals set forth in option 21. However, ICC again highlights that countries "should" commit to these obligations. In particular, ICC very strongly supports the notion that taxpayers be permitted to make presentations to competent authorities to clarify and facilitate the shared understanding of the relevant facts and issues. Taxpayers are uniquely positioned to provide this information and taking advantage of their expertise should improve dispute resolution. Presentations to the competent authorities may also speed up the resolution of disputes. As noted in the Discussion Draft, face-to-face meetings may allow for more open discussion to trigger bilateral focus and preparation. These advantages would also result from taxpayer presentations to competent authorities.

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

Comment: ICC supports this option which proposes deleting footnote 1 in Art. 25 and modifying paragraph 65 of the corresponding commentary. It is useful for countries to set forth their positions on such an important topic. Eliminating the footnote would require countries to enter an explicit reservation (or observation) which would explain their views more clearly.

The experiences in arbitration in other areas would provide useful guidance on how this can best be achieved.

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

Comment: ICC strongly supports arbitration while understanding that some countries are not willing to accept this at this time (due in part to the obstacles). In the

absence of broadly applicable arbitration, ICC encourages countries to take incremental steps to
move in the direction of arbitration. Therefore, ICC would support all of the options mentioned as possible steps towards broader mandatory dispute resolution. ICC agrees that it would be especially important that any limits on arbitration should be expressly defined in the ratified treaty document.

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

Comment: ICC strongly supports the rapid proliferation of MAP arbitration. Therefore the use of most favored nation clauses would be highly appreciated.

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

Comment: ICC supports the idea of clarifying the co-ordination between MAP arbitration and national legal remedies. For taxpayers it is crucial to have legal certainty. Therefore it must be predictable under which precise circumstances the decision of an arbitration tribunal can or cannot be enforced in national law. In international arbitration, such certainty is achieved through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), behind which ICC was a key driving force.

Similar arguments apply as to our comments regarding option 16.

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

Comment: ICC believes that the period of two years determined in Art.25.5 of the OECD-MA is a sufficient period to give the contracting states a possibility for reaching consensus (reflecting the most recent OECD statistics on time for resolution of MAP proceedings). If in some specific cases, the contracting states desire an extension of this period, they already have the possibility to approach the taxpayer and explain why this extension is necessary or reasonable. Once the taxpayer is convinced of the reasons, it might refrain from initiating the arbitration procedure. In any case, this decision should
remain with the taxpayer who is being taxed twice (absent the deferral proposed in the Comment to option 17).

OPTION 27 – Practical issues: Appointment of arbitrators

Comment: ICC believes that more direct language to deal with the practical issues is required and suggests replacing ‘could agree to develop’ with ‘should agree to develop’. ICC agrees that arbitrators’ independence is critical from the standpoint of all parties – public and private – and such independence has been safeguarded by arbitration institutions.

For example, ICC has developed institutional safeguards through the supervision of the International Court of Arbitration as well as working standards on arbitrator's independence.[3] The ICC International Court of Arbitration's vast experience with ensuring such independence, will be a reliable source for the research to be conducted in the area of taxation.

ICC underlines that a well-established and worldwide network of experts in developed and developing countries is crucial and notes that it has such a network in place to propose and nominate experts as potential arbitrators through its International Centre for ADR.

OPTION 28 – Practical issues: Confidentiality and communications

Comment: ICC reiterates the comment to option 27 above with respect to the use of direct rather than permissive language. Furthermore, the experience of ICC as the world's leading arbitral institution - routinely addressing issues of confidentiality and transparency – may provide helpful guidance in this regard.

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

Comment: ICC notes that in its initial treaty formulation of dispute resolution issued in 1924 (prior to the process being taken over by the League of Nations), it suggested that in the absence of bilateral agreement, the taxable income should simply be split – leaving both disputing countries with half of it to tax – if no other settlement could be achieved. Certainly this suggestion has to be viewed in the light of the process it was made in but it still illustrates very well the existing potential for alternative solutions. Other potential alternative dispute resolution should be studied, taking into account the experience and lessons learned in non-taxation areas.

OPTION 30 – Practical issues: Evidence

Comment: ICC agrees with these comments, which it also contemplates analysing as an element of the comprehensive study in the general comment above.

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

Comment: ICC concurs.

OPTION 32 – Practical issues: Costs and administration

Comment: ICC notes that arbitration is not necessarily more expensive than a MAP procedure. Having an arbitration administered by a recognized arbitral institution does

not only provide guarantees for a due process and fair trail, it can save costs considering the costs are predictable and manageable (e.g. cost schedules are applied and available). ICC concurs that the fees paid to the legal representatives

[3] See the ICC Rules of Arbitration: http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/

followed by the arbitrators tend to be the most significant share of the costs of the arbitration.

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

Comment: ICC concurs.

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

Comment: ICC concurs.

The International Chamber of Commerce (ICC)
Commission on Taxation

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy.

Founded in 1919, and with interests spanning every sector of private enterprise, ICC's global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the Organisation for Economic Co-Operation and Development (OECD), the G20 and other intergovernmental forums.

The ICC Commission on Taxation promotes transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border trade and investment. The Commission is composed of more than 150 tax experts from companies and business associations in approximately 40 countries from different regions of the world and all economic sectors. It analyses developments in international fiscal policy and legislation and puts forward business views on government and intergovernmental projects affecting taxation. Observers include representatives of the International Fiscal Association (IFA), International Bar Association (IBA), Business and Industry Advisory Committee to the OECD (BIAC), Business Europe and the United Nations Committee of Experts on International Cooperation in Tax Matters.