

Subtopic 3.3: Major Benefits of BEPS Initiatives for Collaboration with Other Tax Administrations

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Summary

The world seems to be shrinking daily, with companies structuring their operations in multiple jurisdictions to achieve operational and financial efficiencies. The global tax environment has become truly integrated over the past few years. No single jurisdiction seems fully equipped to resolve tax issues on its own because few, if any, large companies operate in a single jurisdiction. However, the globalization of operations runs the risk of a jurisdiction losing the complete picture of a company's operations because they are spread throughout many jurisdictions and finding information about all the operations can be a challenge. Further, two jurisdictions may interpret the same facts differently, which could result in the same income being taxed twice or even not taxed at all. Multilateral collaboration and the benefits of engagement with other jurisdictions offer a venue for sharing data, improving processes and increasing knowledge through cooperation and coordination. The Organization for Economic Cooperation and Development's Base Erosion and Profit Shifting Project (BEPS) expanded the opportunities for coordination amongst tax administrations and, with the effort moving into an implementation phase, the major benefits of the BEPS initiatives for collaboration with other tax administrations have become more evident. This paper will explore some of the largest opportunities for collaboration among jurisdictions and highlight current and future activities that will continue to expand on these.

1. Introduction

This paper focuses on the main BEPS initiatives that lend themselves to collaboration among tax administrations: Action 13¹ and Action 14.² It will discuss Action 13 primarily as a new avenue for data sharing between jurisdictions that has fostered the development of the International Compliance Assurance Program, whose goal is to improve the collaborative process of identifying those multinational enterprises that present no or a low compliance risk with respect to transfer pricing or permanent establishment rules. As a result, those issues with no or low risk may be deselected for examination allowing jurisdictions to focus their resources on higher risk issues and taxpayers.

¹ Action 13: 2015 Final Report, *Transfer Pricing Documentation and Country-by-Country Reporting*, available at <http://www.oecd.org/tax/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report-9789264241480-en.htm> (hereafter "Action 13: 2015 Final Report").

² Action 14: 2015 Final Report, *Making Dispute Resolution Mechanisms More Effective*, available at <http://www.oecd.org/ctp/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report-9789264241633-en.htm> (hereafter "Action 14: 2015 Final Report").

Action 14 helps countries improve the dispute prevention and resolution mechanism through collaboration amongst treaty partners. By utilizing an agreed upon set of definitions and timelines for the mutual agreement procedure, countries can collaborate more effectively to provide taxpayers with greater tax certainty and offer greater transparency into the process. Collaborative efforts can also include joint audits and discussions around how jurisdictions are approaching risk assessment and other types of activities where the taxpayer can provide similar information to two tax administrations jointly, thus minimizing the resources required from both taxpayers and tax administrations for an examination. Together these actions highlight the benefits of BEPS initiatives in promoting effective collaboration between tax administrations.

2. BEPS Action Plan and BEPS Implementation

a. Background on BEPS Project

At the G20 meeting in Los Cabos, Mexico, in June 2012, the leaders stated that “In the tax area, we reiterate our commitment to strengthen transparency and comprehensive exchange of information... We reiterate the need to prevent base erosion and profit shifting and we will follow with attention the ongoing work of the OECD in this area.”³

The OECD issued the report *Addressing Base Erosion and Profit Shifting*⁴ in early 2013 and indicated that it would develop an action plan to deal with BEPS. It published the *Action Plan on Base Erosion and Profit Shifting*⁵ in July 2013 and provided a timeline for the work.⁶ The plan was organized around three pillars: 1) introducing coherence in the domestic rules that affect cross-border activities; 2) reinforcing substance requirements in the existing international standards, to ensure alignment of taxation with the location of economic activity and value creation; and 3) improving transparency, as well as certainty for businesses and governments.⁷ Both the G20 Finance Ministers and Central Bank Governors and the G20 fully endorsed the actions identified in the Actions Plans⁸ and encouraged further work.⁹

³ G20 Leaders Declaration, paragraph 48, available at <https://www.treasury.gov/resource-center/international/g7-g20/Documents/Los%20Cabos%20Leaders%27%20Declaration.pdf>.

⁴ <http://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm> (hereafter “Addressing Base Erosion”).

⁵ Action Plan on Base Erosion and Profit Shifting, 2013, available at <https://www.oecd.org/ctp/BEPSActionPlan.pdf> (hereafter “2013 Action Plan”).

⁶ *Id.* at 35. The G20 Finance Ministers’ expressed their support for the BEPS work at their July 2013 meeting (<http://www.g20.utoronto.ca/2013/2013-0720-finance.html>) and acknowledged the comprehensive Action Plan at its September 2013 meeting (<http://www.g20.utoronto.ca/2013/2013-0906-declaration.html>).

⁷ 2013 Action Plan, *supra* note 5, pages 13-14. The Report states that “mechanisms should be implemented to provide businesses with the certainty and predictability they need to make investment decisions.”

⁸ At the G20 Meeting of Finance Ministers and Central Bank Governors in Moscow on July 20, 2013, the G20’s communiqué fully endorsed “the ambitious and comprehensive Action Plan submitted at the request of the G-20 by the OECD aimed at addressing base erosion and profit shifting (BEPS)...” <http://www.g20.utoronto.ca/2013/2013-0720-finance.html>.

⁹ Tax Annex to the Saint Petersburg Leaders Declaration, paragraph 5, available at <https://obamawhitehouse.archives.gov/sites/default/files/image/files/g-20taxannex.pdf>.

All final action plans were completed by October 2015 and presented to the G20.¹⁰ The G20 endorsed the BEPS Action Plan and encouraged the participation of all countries and jurisdictions, including developing ones. To facilitate the inclusion of developing countries and emerging markets, the G20 called on the OECD to “develop an inclusive framework by early 2016 with the involvement of interested non-G20 countries and jurisdictions which commit to implement the BEPS project, including developing economies, on an equal footing.”¹¹ The Inclusive Framework now has more than 110 participating countries collaborating on the implementation of the BEPS Package.¹² A number of regional tax organizations are also engaged in this project as observers, including the Inter-American Center of Tax Administrations (CIAT).¹³

The BEPS project is of major significance for all countries. Developing countries, who may be reliant on revenue from corporate income tax, particularly from multinational enterprises, may find the BEPS project is of particular interest.¹⁴ Thus, the Inclusive Framework model engages developing countries in the international tax agenda and the implementation of BEPS to ensure that they receive support to address their specific needs.¹⁵ In particular, and as discussed in more detail later, the Inclusive Framework is now working to support the development of toolkits for low-capacity developing countries. The G20 Development Working Group (G20 DWG) requested the International Monetary Fund, the OECD, the United Nations and the World Bank Group to work collaboratively on developing toolkits and guidance on addressing BEPS issues as part of the Platform for Collaboration on Tax (“Platform”). The toolkits focus on how developing countries can implement measures to tackle BEPS as well as other issues that developing countries have identified as priorities during the regional consultations. Through the involvement of the regional and international organizations as Observers in the Inclusive Framework, participants can receive coordinated and targeted capacity building support for their implementation of the BEPS outcomes.¹⁶

¹⁰ *OECD presents outputs of OECD/G20 BEPS Project for discussion at G20 Finance Ministers meeting*, available at <http://www.oecd.org/tax/oecd-presents-outputs-of-oecd-g20-beps-project-for-discussion-at-g20-finance-ministers-meeting.htm>.

¹¹ G20 Leaders' Communiqué, paragraph 15, available at <http://www.g20.utoronto.ca/2015/151116-communicue.html>.

¹² For the list of participating countries as of March 2018, see <http://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>. For further information on the Inclusive Framework on BEPS see *Background Brief: Inclusive Framework on BEPS*, available at <https://www.oecd.org/ctp/background-brief-inclusive-framework-for-beps-implementation.pdf> (hereafter “Background Brief”).

¹³ *Id.* Also see *OECD, Developing Countries and BEPS*, available at <http://www.oecd.org/tax/beps/developing-countries-and-beps.htm>.

¹⁴ For example, key findings from the OECD's Revenue Statistics in Africa indicate that the shares of corporate income tax revenue to total tax revenues were significantly higher amongst the eight African countries covered in the report (Cameroon, Côte d'Ivoire, Mauritius, Morocco, Rwanda, Senegal, South Africa and Tunisia) than the 8.5% OECD average. In six of the eight African countries, these shares ranged between 13% and 18%. OECD, Press Release, April 1, 2016 “*Rising tax revenues are key to economic development in African countries*” available at <http://www.oecd.org/tax/tax-policy/rising-tax-revenues-are-key-to-economic-development-in-african-countries.htm>. Also see BEPS Frequently Asked Questions, available at <http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm>, question 102.

¹⁵ *About the Inclusive Framework on BEPS*, available at <http://www.oecd.org/tax/beps-about.htm>.

¹⁶ *Id.*

b. Current state and overview of four minimum standards: BEPS 5, 6, 13 and 14: The benefits of collaborative efforts on tax certainty and resource burdens for taxpayer and tax administrations

Achieving tax certainty as early as possible is a benefit for both taxpayers and tax administrations.¹⁷ Programs based on increased transparency, co-operation, and collaboration between a tax authority and a taxpayer can positively influence taxpayer behavior and improve tax compliance, which provides the taxpayer with greater tax certainty.¹⁸

Jurisdictions that increase certainty for taxpayers may see an increase in investment, as taxpayers recognize the benefits of certainty achieved through cooperation.¹⁹ While some certainty may be achieved through unilateral actions – unilateral tax rulings, for example – if a second tax jurisdiction is involved, the certainty only applies to one side of the transaction. Some certainty may be achieved bilaterally – through bilateral rulings or mutual agreement proceedings, for example - but the latter effort is a lengthy process that occurs after the transaction is consummated. Some certainty may be achieved multilaterally when transactions involve more than two jurisdictions and all jurisdictions collaborate to determine the tax treatment for the overall transaction. Examinations are labor intensive, as are mutual agreement procedures. Actions that achieve certainty for both the taxpayer and the tax authority as early in the process as possible are beneficial to both the taxpayer and the tax administration.

One of the goals of BEPS was to identify areas where collaborative efforts would benefit both tax administrations and taxpayers.²⁰ As part of the BEPS work, the OECD created “minimum standards” for four of the BEPS action items to tackle issues in cases where no action by some countries or jurisdictions would have created negative spill overs (including adverse impacts of competitiveness) on other countries or jurisdictions.²¹ The consistent implementation of these minimum standards across jurisdictions will allow all countries to better protect their tax base. The minimum standards will be reviewed through a peer review process and may be reconsidered in 2020.²²

However, despite the global consensus around these minimum standards, concerns remain that the implementation of BEPS in certain developing countries, including many of the Inclusive Framework countries, may be an activity for the future. When the Inclusive Framework was new, it was noted that members would have an opportunity to

¹⁷ *Tax Certainty, IMF/OECD Report for the G20 Finance Ministers*, March 2017, available at <http://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf> (hereafter “Tax Certainty”).

¹⁸ *International Compliance Assurance Programme Pilot Handbook*, available at <http://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-pilot-handbook.pdf>, paragraph 4 (hereafter “ICAP Handbook”).

¹⁹ Tax Certainty, *supra* note 17, page 6.

²⁰ The OECD stated in 2013 that “Collaboration and co-ordination will not only facilitate and reinforce domestic actions to protect tax bases, but will also be key to provide comprehensive international solutions that may satisfactorily respond to the issue.” Addressing Base Erosion, *supra* note 4, page 9.

²¹ Background Brief, *supra* note 12, page 9.

²² BEPS FAQs, available at <http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm>.

raise concerns about the timelines fixed for the implementation of the minimum standards and that discussions about adjusted timelines based on specific circumstances were possible.²³ At the Platform for Collaboration on Tax's first global conference in New York City, Logan Wort, executive secretary of the African Tax Administration Forum, discussed whether the BEPS project has worked well for African countries. He indicated that the African countries that joined the Inclusive Framework may be 10 years away from implementing the four minimum standards set out in the final BEPS project recommendations.²⁴ This reinforces the need for Toolkits and other capacity building efforts to facilitate developing countries in moving towards the minimum standards through practical implementation efforts.

The implementation of each of the four minimum standards will be evaluated through a peer monitoring mechanism to ensure that the commitments embodied in the minimum standard are effectively satisfied, and that all OECD and G20 countries, as well as jurisdictions that commit to the minimum standard through the Inclusive Framework, will undergo reviews pursuant to that monitoring mechanism.²⁵ The four minimum standards are described below.

i. BEPS Action 5: Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance

The OECD identified the availability of harmful preferential regimes as a key pressure area relating to base erosion and profit shifting.²⁶ The 2013 BEPS Action Plan stated that the work of the FHTP would be refocused “to develop more effective solutions.”²⁷ It also identified the need to work with non-OECD members on the basis of the existing framework.²⁸ Action 5 requires the spontaneous exchange of taxpayer rulings, including unilateral Advance Pricing Arrangements and other single-taxpayer rulings, that could give rise to BEPS concerns in the absence of such exchange.²⁹

²³ Background Brief, *supra* note 12, page 13.

²⁴ Soong, *African Countries Nowhere Near Meeting BEPS Minimum Standards*, 2018 WTD 33-12 (February 16, 2018). Pascal Saint-Amans, the Director of the OECD's Centre for Tax Policy and Administration, noted that the OECD understands that developing countries must balance their domestic interests with international tax reforms and that the base erosion and profit-shifting project is "purely voluntary" for those countries. See Soong, *Saint-Amans: BEPS Project 'Voluntary' for Developing Countries*, 2018 WTD 33-6 (February 16, 2018).

²⁵ *About the Inclusive Framework on BEPS*, available at <http://www.oecd.org/tax/beps/beps-about.htm#monitoring>; Background Brief, *supra* note 12, page 13.

²⁶ Addressing Base Erosion, *supra* note 4, page 48.

²⁷ 2013 Action Plan, *supra* note 5, page 17.

²⁸ *Id.*, page 18.

²⁹ Action 5: 2015 Final Report, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance*, available at <http://www.oecd.org/tax/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5-2015-final-report-9789264241190-en.htm>, page 10. The Action 5 report acknowledges that “there is no suggestion that a unilateral advance pricing arrangements (APAs) program is by itself a preferential regime.” However, exchanging rulings facilitates making fully informed decisions. The absence of exchange can lead to BEPS if countries have no knowledge or information on the tax treatment of a taxpayer in a specific

The Action 5 minimum standard has two parts. The first part relates to preferential tax regimes, where a peer review is undertaken to identify features of the regime that can facilitate base erosion and profit shifting and therefore have the potential to unfairly impact the tax base of other jurisdictions.³⁰ The second part includes a commitment to transparency through the compulsory spontaneous exchange of relevant information on taxpayer-specific rulings which, in the absence of such information, could give rise to BEPS concerns.³¹ The assessment of the two parts takes place separately, with the results published separately.

The work relating to the first part of the minimum standard resulted in the release of *Harmful Tax Practices – 2017 Progress Report on Preferential Regimes* in October 2017.³² The United States was not identified as having any preferential regimes.

Countries have begun to exchange tax rulings. The OECD released the Peer Review documents (Terms of Reference and a Methodology) relating to the review of the transparency framework on February 1, 2017.³³ The peer review and monitoring process will review four aspects that capture the key elements of the transparency framework: (1) information gathering process; (2) exchange of information; (3) confidentiality of information received; and (4) statistics.

The first annual report covering the 44 jurisdictions that participated in the BEPS project before the creation of the Inclusive Framework was issued in 2017 and covered the 2016 calendar year.³⁴ This report found that the United States had met all aspects of the Terms of Reference for the year and no recommendations were made.³⁵

ii. BEPS Action 6: Preventing the Granting of Treaty Benefits in Inappropriate circumstances

The OECD discussed the best way to implement in a timely fashion the measures governments can agree upon. If treaty changes are required, solutions for a quick implementation of these changes should be examined and proposed as well. OECD has

country and that tax treatment affects the transactions or arrangements undertaken with a related taxpayer resident in their country.

³⁰ BEPS Action 5 on Harmful Tax Practices: Transparency Framework: PEER REVIEW DOCUMENTS, available at <http://www.oecd.org/ctp/beps/beps-action-5-harmful-tax-practices-peer-review-transparency-framework.pdf>, page 9 (hereafter “Action 5 Peer Review Documents”).

³¹ *BEPS Action 5 peer review and monitoring*, available at <http://www.oecd.org/tax/beps/beps-action-5-peer-review-and-monitoring.htm>.

³² See <http://www.oecd.org/tax/beps/harmful-tax-practices-2017-progress-report-on-preferential-regimes-9789264283954-en.htm>. The report was updated in January 2018, see <http://www.oecd.org/tax/beps/update-harmful-tax-practices-2017-progress-report-on-preferential-regimes.pdf>.

³³ Action 5 Peer Review Documents, *supra* note 30.

³⁴ See <http://www.oecd.org/tax/beps/harmful-tax-practices-peer-review-reports-on-the-exchange-of-information-on-tax-rulings-9789264285675-en.htm>.

³⁵ *Id.*, page 293.

developed standards to eliminate double taxation and should ensure that this goal is achieved while efforts are deployed to also prevent double non-taxation.³⁶

The minimum standard for Action 6 requires that countries should agree to include in their tax treaties an express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements.³⁷

In May 2017, the OECD released the peer review documents setting out the Terms of Reference and the Methodology for the peer review process.³⁸ While signing the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS,³⁹ negotiated pursuant to BEPS Action 15,⁴⁰ will satisfy this minimum standard, it is not the only way to satisfy the standard.⁴¹

iii. BEPS Action 13: Transfer Pricing Documentation and Country-by-Country Reporting

Action 13 is the effort to re-examine the existing Transfer Pricing documentation and establish a system of reporting a multinational enterprise's (MNE) group allocation of income, taxes, and business activities on a tax jurisdiction-by-jurisdiction basis through Country-by-Country (CbC) reporting.⁴² The Action 13 Report includes a template for MNEs to annually report information for each tax jurisdiction in which they do business. Jurisdictions implementing Action 13 will then automatically exchange CbC Reports prepared by the Reporting Entity of an MNE Group and filed on an annual basis with the tax authorities of the jurisdiction of tax residence of that entity with the tax authorities of all jurisdictions in which the MNE Group operates.

The OECD issued peer review framework documents in February 2017 to monitor the implementation of the minimum standards related to Action 13.⁴³ The Terms of Reference focus on the following three key aspects of the CbC reporting standard that a

³⁶ Addressing Base Erosion, *supra* note 4, page 53.

³⁷ Action 6: 2015 Final Report, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, available at <http://www.oecd.org/tax/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report-9789264241695-en.htm>, paragraph 22 (hereafter "Action 6: 2015 Final Report").

³⁸ See Press Release at <http://www.oecd.org/tax/beps/oecd-releases-peer-review-document-for-assessment-beps-action-6-minimum-standard.htm> and the Peer Review documents at <http://www.oecd.org/tax/treaties/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf>.

³⁹ Available at <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>.

⁴⁰ Action 15: 2015 Final Report, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties*, available at <http://www.oecd.org/tax/developing-a-multilateral-instrument-to-modify-bilateral-tax-treaties-action-15-2015-final-report-9789264241688-en.htm>.

⁴¹ Action 6: 2015 Final Report, *supra* note 37, paragraph 23.

⁴² Action 13: 2015 Final Report, *supra* note 1, page 9.

⁴³ *BEPS Action 13 on Country-by-Country Reporting PEER REVIEW DOCUMENTS*, available at <http://www.oecd.org/tax/beps/beps-action-13-on-country-by-country-reporting-peer-review-documents.pdf> (hereafter "Action 13 Peer Review Documents").

jurisdiction must meet: (1) the domestic legal and administrative framework; (2) the exchange of information framework; and (3) the confidentiality and appropriate use of CbC reports. The peer review is structured as three phases of annual reviews starting, respectively, in 2017, 2018 and 2019. Each phase will focus on different key aspects of jurisdictions' implementation to mirror the evolving background.⁴⁴

Jurisdictions may use a variety of different mechanisms to ensure effective implementation of CbC reporting obligations; the Terms of Reference do not prescribe that any particular process must be used to meet the minimum standard. As of December 2017, the United States had reported that its domestic legal framework for CbC reporting was in place.⁴⁵ In addition, the United States has 31 bilateral exchange relationships currently in place for the automatic exchange of CbC Reports between tax authorities.⁴⁶

iv. Action 14: Making Dispute Resolution Mechanisms More Effective

Countries agreed to improve their approaches to dispute resolution through the adoption of the Action 14 minimum standard regarding the resolution of treaty-related disputes in a timely, effective, and efficient manner; the commitment to the implementation of that minimum standard; and a monitoring mechanism to ensure effective implementation.⁴⁷ Action 14 focuses on the Mutual Agreement Procedure (MAP), which offers a mechanism for resolving difficulties in relation to the interpretation or application of a tax treaty or disputes between taxpayers and tax authorities on the tax treaty treatment of their activities. This mechanism seeks to ensure the proper application and interpretation of tax treaties so that taxpayers entitled to the benefits of the treaty are not subject to taxation by either of the Contracting Parties which is not in accordance with the terms of the treaty. The Action 14 minimum standard requires members to provide timely and complete reporting of MAP statistics based on a new standardized statistical reporting framework every year and to publish their MAP profiles pursuant to an agreed template.⁴⁸

The complete peer monitoring process documents were released in October 2016.⁴⁹ The review process allows for input from the assessed jurisdiction, peer jurisdictions as well as taxpayer input. As the main users of the MAP, taxpayers are in the best position

⁴⁴ *Id.*, Methodology for the conduct of peer reviews of the Action 13 minimum standard for country-by-country reporting, page 21, paragraph 4.

⁴⁵ See <http://www.oecd.org/tax/automatic-exchange/country-specific-information-on-country-by-country-reporting-implementation.htm>.

⁴⁶ Country-by-Country Exchange relationships, available at <http://www.oecd.org/ctp/beps/country-by-country-exchange-relationships.htm>.

⁴⁷ Action 14: 2015 Final Report, *supra* note 2, at I.A.

⁴⁸ BEPS Action 14 peer review and monitoring, available <http://www.oecd.org/tax/beps/beps-action-14-peer-review-and-monitoring.htm>.

⁴⁹ *BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review Documents*, available at <http://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf> (hereafter "Action 14 Peer Review Documents").

to share their experience with certain focused aspects of the minimum standard.⁵⁰ The Stage 1 peer review process for the first batch of assessed jurisdictions launched in December 2016.⁵¹

The peer review report for the United States was released in September 2017.⁵² The report indicates that the United States meets the Action 14 minimum standard although, to be fully compliant with all four key areas of an effective dispute resolution mechanism under the Action 14 Minimum Standard, the United States needs to amend and update a certain number of its tax treaties.⁵³

The remainder of this paper focuses on Actions 13 and 14, which provide the greatest opportunities for collaboration and cooperation among tax administrations.

3. Action 13: Transfer Pricing Documentation and Country-by-Country Reporting

a. Background:

Transfer pricing documentation rules help tax administrations establish whether companies are applying the appropriate valuation of cross-border transactions between associated enterprises for tax purposes. However, tax administrations can find transfer pricing documentation to be insufficient for their tax enforcement and risk assessment needs. To resolve some of these issues, BEPS Action 13 is the effort to re-examine the existing transfer pricing documentation and establish a standardized system of reporting a multinational enterprise's (MNE) group allocation of income, taxes, and business activities on a tax jurisdiction-by-jurisdiction basis. This includes a three-tiered structure: (i) a master file containing standardized information relevant for all MNE group members, (ii) a local file referring specifically to material transactions of the local taxpayer, and (iii) a Country-by-Country Report containing certain information relating to the global allocation of the MNE's income and taxes paid together with certain indicators of the location of economic activity within the MNE group.⁵⁴

The new Country-by-Country Reporting requirements are to be implemented for fiscal years beginning on or after January 1, 2016, and apply to MNEs with annual consolidated group revenue equal to or exceeding EUR 750 million (approximately US\$ 821 million).⁵⁵

⁵⁰ *Id.*, page 22. The Director of the OECD Center for Tax Policy and Administration recently expressed frustration about the lack of taxpayer input in the MAP process. See Soong, *Participants Welcome Joint Tax Risk Assessment*, 2018 WTD 73-4 (April 15, 2018).

⁵¹ BEPS Action 14 peer review and monitoring, *supra* note 48.

⁵² *Making Dispute Resolution More Effective - MAP Peer Review Report, United States (Stage 1)*, available at <http://www.oecd.org/tax/beps/making-dispute-resolution-more-effective-map-peer-review-report-united-states-stage-1-9789264282698-en.htm>.

⁵³ *Id.*, page 9.

⁵⁴ Action 13: 2015 Final Report, *supra* note 1, page 14.

⁵⁵ The U.S. threshold for CbC reporting by U.S.-based MNEs is \$850 million. Income Tax Regulations 1.6038-4(h), available at <https://www.law.cornell.edu/cfr/text/26/1.6038-4>. Countries participating in BEPS will review the implementation of the new standard and reassess no later than 2020 whether modification are needed to the information reported. Action 13: 2015 Final Report, *supra* note 1, page 10.

Country-by-Country Reports (CbCR) will be filed annually and will include for each tax jurisdiction in which the MNEs do business, the amount of revenue, profit before income tax, income tax paid and accrued, number of employees, stated capital, retained earnings, and tangible assets in each jurisdiction. The CbCRs are to be filed in the jurisdiction of tax residence of the ultimate parent entity and will be shared between jurisdictions through automatic exchange of information, pursuant to appropriate exchange of information agreements. The IRS has developed Form 8975, Country by Country Report, and Schedule A (Form 8975), Tax Jurisdiction and Constituent Entity Information, to capture the appropriate information from U.S. parent MNEs.⁵⁶

The Action 13 Report included a multilateral competent authority agreement that countries could sign to facilitate the exchange of CbC reports with other treaty partners that also signed the multilateral agreement. In the United States, Country-by-Country Reporting data will be exchanged pursuant to bilateral competent authority arrangements (CAAs), which rely on double taxation conventions, tax information exchange agreements, or the Convention on Mutual Administrative Assistance in Tax Matters that permit automatic exchanges of information.⁵⁷

The U.S. Treasury Department and the IRS believe that the information received from other jurisdictions on CbCRs will assist in better enforcement of U.S. tax laws by providing greater transparency regarding the operations and tax positions of taxpayers. A platform for sharing this information, such as the International Data Exchange Service (IDES) or the Common Transmission System, will safely transmit encrypted information to an intended recipient. After the transmission of these reports, countries will have an opportunity to use new data sources as part of their analysis of transfer pricing risks.

i. Improving how to understand risk

CbCRs will be a helpful new tool for high-level transfer pricing risk assessment purposes and efforts to improve transparency. The reports will be the first time that tax authorities around the world will receive information on large MNE groups with operations in their country, breaking down a group's revenue, profits, tax and other attributes by tax jurisdiction. Previously this information has not been available to tax authorities and it represents a great opportunity for tax authorities to understand an MNE's business structure.⁵⁸ The reports may also be used by tax administrations in evaluating other BEPS-related risks and, where appropriate, for economic and statistical analysis. Countries have agreed that the information in the CbCR should not be used as a substitute for a detailed transfer pricing analysis of individual transactions and prices based on a functional analysis and a full comparability analysis. The information in the

⁵⁶ See <https://www.irs.gov/forms-pubs/about-form-8975> for details about Form 8975, Country-by-Country Report.

⁵⁷ Country-by-Country Reporting Jurisdiction Status Table, <https://www.irs.gov/businesses/country-by-country-reporting-jurisdiction-status-table>.

⁵⁸ OECD, Country-by-Country Reporting: Handbook on Effective Tax Risk Assessment, available at <http://www.oecd.org/tax/beps/country-by-country-reporting-handbook-on-effective-tax-risk-assessment.htm>, page 3 (hereafter "CbC Effective Risk Assessment").

CbCR does not constitute conclusive evidence on its own that transfer pricing is or is not appropriate; as a result, this information should not be used by tax administrations to propose transfer pricing adjustments based on a global formulary apportionment of income. However, when used appropriately, the CbCRs offer another informative data point to assist tax administrations in understanding the behavior of MNEs. The CbC data will be used by the IRS in conjunction with other taxpayer data for high-level assessment of transfer pricing, and other Base Erosion and Profit Shifting (BEPS) tax risks, and for economic and statistical analysis.⁵⁹

To ensure that the CbCR information is used appropriately, the OECD developed Terms of Reference and a methodology for the peer review process for participating jurisdictions.⁶⁰ The Peer Review process is a three-phase process that begins in 2017. Each phase focuses on a different key aspect of the jurisdiction's implementation of CbCR and builds on each other for full implementation.

- ii. Convergence around where to spend time; still difficult to get consensus/agreement on risk assessment

CbCR requires MNE groups to provide a significant amount of information extracted from their financial, regulatory or management accounts on a globally consistent basis; this has never been required previously.⁶¹ Tax authorities in all jurisdictions that are members of the OECD Inclusive Framework on BEPS and which satisfy the requirements for obtaining and using CbC Reports should on a going forward basis have access to this valuable information on the regional and global activities of MNE groups with operations in their jurisdiction. This will allow tax officials, including those in developing and emerging jurisdictions, to better understand how local entities fit within the activities of large and complex MNE groups, and to conduct more effective risk assessments to identify taxpayers and arrangements that may pose a higher tax risk. Where these taxpayers and arrangements are identified, a tax authority's resources may be directed towards conducting further review or more extensive compliance interventions (possibly including, but not limited to, tax audits). As this is common work across jurisdictions, this presents a new opportunity for coordination and collaboration between jurisdictions. Equally important, CbC Reports should also be used to identify taxpayers which pose a lower tax risk, requiring fewer or more targeted interventions, and correspondingly fewer resources.⁶² In helping countries identify where to deselect issues, there is an opportunity for collaboration to help alleviate pressure on resources.

- b. International Compliance Assurance Programme (ICAP)

- i. Background

⁵⁹ <https://www.irs.gov/businesses/international-businesses/frequently-asked-questions-faqs-country-by-country-reporting>, FAQ C.1

⁶⁰ Action 13 Peer Review Documents, *supra* note 43.

⁶¹ CbC Effective Risk Assessment, *supra* note 58, page 9.

⁶² *Id.*, page 10.

Action 13 makes it clear that information from the Country by Country Reports is to be used for high-level transfer pricing risk assessments and not as a substitute for a detailed transfer pricing analysis of individual transactions and prices based on a full functional analysis and a full comparability analysis.⁶³ Performing the appropriate level and degree of risk assessment could be a labor-intensive and time-consuming process for each interested tax administration. In an effort to centralize some of these activities, the Forum on Tax Administration (FTA) developed two handbooks to support tax authorities in making effective use of CbCR information for the purposes of tax risk assessment.⁶⁴ The *Country-by-Country Reporting: Handbook on Effective Implementation* is a practical guide to the key elements that countries need to keep in mind when introducing CbC Reporting, including technical issues related to the filing, exchange and use of CbC Reports, as well as practical matters that tax authorities will need to deal with.⁶⁵ The *Country-by-Country Reporting: Handbook on Effective Tax Risk Assessment* explores how a tax administration might use CbCR data, taking into account the variations in tax risk assessment approaches, the types of tax risk indicators that may be identified using information contained in CbC Reports, and the challenges that tax authorities may face and that they need to be aware of. The Handbook explains that CbC Reports can be a very important tool for the detection and identification of transfer pricing risk and other BEPS-related risk in the hands of a tax administration, used alongside other information that it holds and as a basis for further enquiries, but also raises cautions about the risk that simplistic and misleading conclusions may be drawn if CbC Reports are used in isolation.⁶⁶

Subsequently, in its Communiqué from the September 2017 Plenary Meeting in Oslo, the FTA noted that one of the projects on the tax certainty agenda was a new international compliance assurance programme – ICAP.⁶⁷ The idea for ICAP developed as the OECD worked on the processes for CbC reporting.⁶⁸

The ICAP process will use the CbC report data and other information to facilitate open and co-operative multilateral engagements between MNE groups and tax administrations thus building on some of the earlier work of the FTA. The benefits from this co-operative engagement include bringing benefits to both taxpayers and tax

⁶³ Action 13: 2015 Final Report, *supra* note 1, paragraphs 25 and 59; BEPS Action 13 on Country-by-Country Reporting: *Guidance on the Appropriate Use of Information Contained in Country-by-Country Reports*, available at <http://www.oecd.org/ctp/beps/beps-action-13-on-country-by-country-reporting-appropriate-use-of-information-in-CbC-reports.pdf>, paragraph 6 (hereafter “CbC Appropriate Use”). Information from CbC reports also may be used in evaluating other BEPS related risks and, where appropriate, for economic and statistical analysis. *Id.*, paragraph 4.

⁶⁴ CbC Appropriate Use, *supra* note 63, page 5; Country-by-Country Reporting: Handbook on Effective Implementation, available at <http://www.oecd.org/tax/beps/country-by-country-reporting-handbook-on-effective-implementation.htm>, page 3 (hereafter “CbC Effective Implementation”); CbC Effective Risk Assessment, *supra* note 58, page 3.

⁶⁵ CbC Effective Implementation, *supra* note 64, page 3.

⁶⁶ CbC Effective Risk Assessment, *supra* note 58, pages 3-4.

⁶⁷ See Communiqué of the 11th Meeting of the OECD Forum on Tax Administration, at <http://www.oecd.org/tax/forum-on-tax-administration/events/forum-on-tax-administration-communique-2017.pdf> (hereafter “FTA Communiqué”).

⁶⁸ Kassam, *Transfer Pricing: U.S. to Participate in Global Tax Risk Assessment Program*, 108 DTR I-1, June 7, 2017.

administrations, including improved risk assessment based on fully informed and targeted use of CbC information, an efficient use of resources, a faster and clearer route to multilateral tax certainty and fewer disputes entering into MAP.⁶⁹ Some multinational groups called for a multilateral conversation with the tax administrations in which the MNEs operate to have the chance to discuss their CbC reports.

ICAP has several goals: increase tax certainty; prevent disputes where possible; effectively utilize CbC reports; improve capability in risk assessing cross border activities; and take low-risk issues off the table while employing effective responses to those items presenting intolerable risks.⁷⁰

The increase in information available brings the risk that existing dispute resolution mechanisms will not keep pace with the growth in controversy.⁷¹ This could lead to a further back log of cases where tax must be paid in advance of the resolution of the issue or taxpayers and tax administrations must participate in the Mutual Agreement Procedure (MAP) process.⁷²

A benefit of CbC reporting is that all tax administrations will have the same dataset from each MNE group.⁷³ This should facilitate tax collaboration among tax administrations. Further, the Forum on Tax Administration (FTA) has identified, developed, and highlighted best practices in the areas of cooperative compliance, joint audits, tax control frameworks, and differentiated risk management. The previous collaborative work will provide a basis and background to explore new approaches for multilateral tax risk assessment and assurance. The earlier the resolution program begins, the more key decision makers and staff are available.⁷⁴ This should result in the determination of tax certainty earlier.

Participation in ICAP is entirely voluntary and a participating MNE group may exit ICAP without penalty at any point.

ii. The first ICAP meeting

In November 2017, it was announced that seven tax administrations (later increased to eight) would hold a pilot program beginning in 2018 designed to prevent cross-border tax disputes by helping to dispose of low-risk transfer pricing issues.⁷⁵

Discussing CbC reporting information with multiple tax administrations may speed up the decision-making process, as the MNE group only needs to provide the same

⁶⁹ International Compliance Assurance Programme Pilot Handbook, available at <http://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-pilot-handbook.pdf>, page 2 (hereafter “ICAP Handbook”).

⁷⁰ Prepared Remarks of Douglas W. O’Donnell, Commissioner, Large Business & International, Internal Revenue Service, Pacific Tax Policy Institute - Post-BEPS & MLI Tax World, March 8, 2018 (hereafter “O’Donnell Pacific Rim”).

⁷¹ *Id.*

⁷² *Id.*

⁷³ ICAP Handbook, *supra* note 69, paragraph 4.

⁷⁴ *Id.*, page 8.

⁷⁵ Kassam, *Global Pilot Assurance Program to Identify Low-Risk Tax Issues*, 208 DTR G-7 (October 30, 2017) (hereafter “Kassam Global Pilot”).

explanation once to multiple administrations and each administration receives the same information. If multiple tax administrations work with a single MNE group and agree on the level of risk, this should reduce the number of disputes that reach the MAP process.

The ICAP pilot was launched on January 23, 2018 with an orientation session that included MNE groups as well as the tax administrations from the initial 8 participants: Australia, Canada, Italy, Japan, the Netherlands, Spain, the United Kingdom, and the United States.⁷⁶ For the present, other FTA members are observers to the pilot; they may participate in discussions on the design and operation of the ICAP process, but at this time they do not participate in an MNE group's risk assessment or receive any information on the groups involved.⁷⁷

iii. The ICAP Pilot Handbook

In anticipation of the January meeting, the FTA released the ICAP Pilot Handbook.⁷⁸ This handbook describes the scope of the pilot; the risk assessment process; the governance, management, and resources required; the pilot documentation package; and the target timeframe for an ICAP risk assessment.

Scope of pilot

Part of the work of the pilot is determining the "covered tax administrations," that is, the relevant tax administrations for a particular ICAP assessment. A risk assessment for one MNE group may not include all eight participating tax administrations. Factors determining whether one of the participating tax administrations is a covered tax administration for a particular ICAP risk assessment include the level of the MNE groups' activity in the jurisdiction, the perceived level of risk, and the resources that would be required.⁷⁹

The pilot will assess "covered risks," that is, the international tax risks that are a concern to all tax administrations involved.⁸⁰ The relevant international tax risks are transfer pricing risks and permanent establishment risks.⁸¹ After the conclusion of the pilot, the MNE group and covered tax administrations may agree on other relevant international tax risks that should be considered.⁸²

The tax filing periods eligible for review in the ICAP pilot (the "covered periods") are an MNE group's reporting fiscal years beginning on or after January 1, 2016.⁸³ For calendar year taxpayers, the covered periods will be the calendar years 2016 and

⁷⁶ Eight FTA members kick off multilateral tax risk assurance programme to provide early certainty for tax administrations and MNEs, available at <http://www.oecd.org/tax/forum-on-tax-administration/news/eight-fta-members-kick-off-multilateral-tax-risk-assurance-programme-to-provide-early-certainty-for-tax-administrations-and-mnes.htm>.

⁷⁷ O'Donnell Pacific Rim, *supra* note 70.

⁷⁸ ICAP Handbook, *supra* note 69.

⁷⁹ *Id.*, paragraph 7.

⁸⁰ *Id.*, paragraph 8. Domestic tax risks are dealt with through the country's normal risk assessment process (examination, etc.)

⁸¹ *Id.*, paragraph 9.

⁸² *Id.*, paragraph 10.

⁸³ *Id.*, paragraph 11.

2017.⁸⁴ Because ICAP is also designed to be forward looking, any assurance provided to an MNE group at the end of the ICAP risk assessment should also cover the next two tax filing periods (e.g., calendar years 2018 and 2019 for calendar year taxpayers) if there are no material changes during the period.⁸⁵

ICAP risk assessment process

There are four phases in an ICAP risk assessment.

- Within six weeks: The MNE group and covered tax administrations meet and the MNE group provides the appropriate documentation package.
- Within eight weeks (plus an additional four weeks if needed or eight weeks if additional documentation is needed, plus three weeks if a risk assurance phase is required): The Level 1 risk assessment is performed.
- Within five months (plus an additional three weeks if a risk assurance phase is required): The Level 2 risk assessment is performed
- Within three weeks: The outcome letter is issued.⁸⁶

As a result, an ICAP risk assessment could be completed in as little as 17 weeks (6 weeks for first meeting, 8 weeks for Level 1 risk assessment, plus 3 weeks for outcome letter). It is expected that all cases will be completed within 12 months.⁸⁷

Documentation and kick-off

The MNE group provides a standard package of documentation to the covered tax administrations before an ICAP risk assessment begins. The documentation is provided either to each covered tax administration directly or to the lead tax administration, which shares the documentation with the other covered tax administrations through existing tax information exchange agreements.⁸⁸ During the kick-off meeting, the MNE group provides additional information, which should include a discussion of the global value chain of the MNE group and any transfer pricing and permanent establishment tax risks.

Level 1 risk assessment

A level 1 risk assessment is a coordinated risk assessment undertaken by all covered tax administrations. During this assessment, the tax administrations will reaffirm the risk categorization of the MNE group, looking at behavioral risk flags such as emerging signs of uncooperative behavior in the pilot or concerns with data integrity based on the information and materials provided, and will risk assess the covered risks for the MNE group.⁸⁹ The tax administrations will work collaboratively and share tax information in a transparent and reciprocal manner to the maximum extent possible while staying within the parameters of the legal framework for exchange of tax information. By relying on a common documentation package, it is more likely that any tax risk that does exist will be identified. With this information shared between covered tax administrations there will

⁸⁴ *Id.*

⁸⁵ *Id.*, paragraph 12.

⁸⁶ *Id.*, paragraph 13.

⁸⁷ *Id.*, paragraph 14.

⁸⁸ *Id.*, paragraph 15.

⁸⁹ *Id.*, paragraph 19.

be a greater comfort that the level of tax risk posed by the covered risks of the MNE group is fully understood.⁹⁰

A level 1 risk assessment can have two main outcomes:

- The covered tax administrations assess and assure the covered risks as low or no risk; the process moves directly to providing tax assurance, which concludes the ICAP risk assessment process for these MNE groups.
- The covered tax administrations are not able to conclude that the covered risks are low or no risk within the target timeframe and further information and/or discussion with the MNE group or other covered tax administrations is required. The process progresses to a Level 2 risk assessment.

However, other outcomes are also possible. For example, the covered tax administrations may determine that they could assure the covered risks as low or no risk if specific changes are made to aspects of the group's tax filings. If this is the case, the Level 1 risk assessment may enter a "risk assurance" phase, which is a cooperative process where all parties work together to agree what tax adjustments are required or why an adjustment may not be required. If the parties reach agreement, tax assurance is provided and the ICAP risk assessment ends. If agreement is not reached, the process moves to a Level 2 risk assessment.⁹¹

Level 2 risk assessment

A level 2 risk assessment is more detailed and comprehensive. The first step is a joint workshop where the tax administrations present their findings with respect to any covered risks they have not been able to conclude are no or low risk, discuss gaps in information available, and work together to develop a plan to finalize the ICAP risk assessment. The additional information needed is identified. The lead tax administration (and other covered tax administrations if they wish) meets with the MNE group and identifies areas of concern. The MNE group provides the information, which it circulates to all tax administrations, which then perform risk assessments based on their usual domestic procedures.⁹²

A level 2 risk assessment can have three outcomes:

- The covered tax administrations assess and assure the covered risks as low or no risk;
- The covered tax administrations identify aspects of the MNE group's filings where changes are needed in order for them to assess and assure the covered risks as low or no risk. The risk assessment may enter into a risk assurance phase; if agreement can be reached within the agreed timeframe, the process moves to providing tax assurance;
- The covered tax administrations identify aspects of the MNE group's tax filings where it is not possible to assess and assure the covered risks are low or no risk,

⁹⁰ *Id.*, paragraph 22.

⁹¹ *Id.*, paragraph 25.

⁹² *Id.*, paragraph 30.

or agreement is not reached by covered tax administrations and the MNE group. In this case, it is not possible to provide tax assurance.⁹³

Outcome letter

At the end of the ICAP risk assessment process, and subject to domestic requirements and processes, an ICAP outcome letter is prepared separately by each covered tax administration. This letter confirms the results of the ICAP risk assessment for the covered risks.⁹⁴

The ICAP process is based on a collaborative working relationship between the MNE group and the covered tax administrations built on transparency, cooperation and trust.⁹⁵ The lead tax administration maintains regular and timely communication with the MNE group to ensure it is kept abreast of the status of its risk assessment and any issues as they arise.⁹⁶

b. Next steps

Although the ICAP pilot currently includes only 8 countries, based on the results of the project, eventually there may be a broader roll-out of the program in which other jurisdictions and taxpayers may have an opportunity to apply for inclusion in ICAP.

Future ICAP risk assessments may cover other relevant or material international tax risks, if the MNE group and covered tax administrations agree.⁹⁷

c. How CbC data/ICAP could open up other areas for collaboration:

i. New opportunities for collaboration: FTA workstreams

The United States and Canadian tax administrations are leading an effort to understand how individual tax administrations risk assess and to capture lessons learned during the ICAP pilot through the FTA's Large Business and International Programme (FTA LBIP). This collaborative effort should result in the development of a useful guide that demonstrates varying perspectives on risk and responses to those risks that will be shared with other FTA members and eventually to the Inclusive Framework.⁹⁸ This guide should show both where tax administrations converge and where they diverge in their perspectives on risks and the response to those risks.⁹⁹ The information in the ICAP handbook also will be revised based on experiences gained in the pilot and will be used as the basis for an ICAP Operating Manual.¹⁰⁰

⁹³ *Id.*, paragraph 34.

⁹⁴ *Id.*, paragraph 35.

⁹⁵ *Id.*, paragraph 3.

⁹⁶ *Id.*

⁹⁷ *Id.*, paragraph 10.

⁹⁸ O'Donnell Pacific Rim, *supra* note 70.

⁹⁹ *Id.*

¹⁰⁰ ICAP Handbook, *supra* note 69, paragraph 2.

ICAP is one of the collaborative approaches to the global tax certainty agenda and helps create a riper environment for joint audits.¹⁰¹ In previous successful joint audits, an issue that was resolved was also rolled into an APA for future years. This resolves tax uncertainty for prior and future tax years, which reduces the need for examination resources.¹⁰²

While the initial ICAP project involves only 8 countries, participating in ICAP could provide useful information to smaller, more developing countries. The mutual collaboration can help countries with fewer MNE groups or with less experience in examining transfer pricing issues learn more about the process and go forward with more information. For example, as tax administrations jointly de-select compliance issues and taxpayers that pose a lower tax risk, they can collaboratively learn how to select and de-select issues.¹⁰³

The U.S. MNE participating in the ICAP pilot has indicated that “For us, just being able to have eight of the most sophisticated tax authorities in the world take a look at our transactions and hopefully be able to say that we’re a low-risk taxpayer with regards to those transactions, we think creates a little bit of a halo effect.”¹⁰⁴ Similarly, a Dutch participant in the program, indicated that it sees the ICAP program “as a possibility to ultimately operate more efficiently than what we’re doing now.”¹⁰⁵ In addition, the program could also give more confidence to the tax administrations and, perhaps, help resolve the slowness of APAs or reluctance to issue APAs.¹⁰⁶

Participation in the ICAP pilot program will help capture lessons learned, especially because tax administrations have significantly divergent views on tax risks.¹⁰⁷ This may help improve tax administration globally.¹⁰⁸ An important result of the ICAP program could be the resolution at an early stage of issues that might otherwise need to be resolved through the MAP process, which helps limit the MAP inventory growth.¹⁰⁹

The FTA also identified improved and better coordinated risk assessment as another aspect of its tax certainty agenda and indicated that the ICAP pilot will be complemented by a new FTA project mapping out jurisdictions’ differing approaches to risk assessment with a view to increasing mutual understanding, closer cooperation and convergence.¹¹⁰

¹⁰¹ Kassam Global Pilot, *supra* note 75.

¹⁰² *Id.*

¹⁰³ ICAP Handbook, *supra* note 69, paragraphs 4, 21, and 44.

¹⁰⁴ Kassam, *OECD: Procter & Gamble to Share Tax Data in OECD Pilot Program*, 033 DTR 16, February 16, 2018, quoting comments made by Amy Roberti, Procter & Gamble’s director of global tax & fiscal policy, during a Tax Council Policy Institute conference (hereafter “Kassam OECD”).

¹⁰⁵ Soong, *Participants Welcome Joint Tax Risk Assessment Pilot*, 2018 WTD 73-4 (April 16, 2018), quoting Irene Ros, Shell’s global transfer pricing manager, during a transfer pricing conference in Paris.

¹⁰⁶ Kassam OECD, *supra* note 104.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ International Compliance Assurance Programme (ICAP), available at <http://www.oecd.org/tax/forum-on-tax-administration/international-compliance-assurance-programme.htm>.

¹¹⁰ FTA Communiqué, *supra* note 67, page 2

ii. New opportunities for collaboration: Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC):

The Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC) has been involved in collaborative work among tax administrations for many years. After its membership was expanded in the FTA, JITSIC has continued to provide a highly effective mechanism for bringing together tax administrations to respond to new global compliance risks and to collaborate on individual cases.¹¹¹ In 2016, the head of the tax department at Germany's Ministry of Finance, indicated that more countries should participate in joint audits through the OECD's JITSIC network. JITSIC can provide a forum for coordination and information exchange without infringing on national sovereignty in taxation. Joint audits could help resolve cases of double taxation that would otherwise have to go through the lengthy mutual agreement procedure process.¹¹²

The United States has experienced success with joint audits. For example, in one joint audit, the taxpayer's issues for open years were resolved in the United States and another jurisdiction while also producing a bilateral advance pricing agreement on a transfer pricing methodology for future years as well as resolving prior years which were in the MAP inventories. This was accomplished in only six months.¹¹³ However, country experiences with other cooperative activities suggest that a joint audit could achieve efficient and effective results where proper planning occurs and processes are well-defined.¹¹⁴ Some examples of challenges that need to be considered in the planning of a joint audit include different audit standards between jurisdictions, different examination periods, and issues deriving from the domestic legal structures.¹¹⁵ Where used appropriately, joint audits can provide jurisdictions with streamlined audit efforts, reduced incidences of double taxation, and accelerated mutual agreement procedure (MAP). Joint audits also have the potential to shorten examination processes and reduce costs, both for revenue authorities and for taxpayers.

4. Action 14: Making Dispute Resolution Mechanisms More Effective

a. Background

Action 14 of the BEPS project, *Making Dispute Resolution Mechanisms More Effective*, includes measures aimed at strengthening the effectiveness and efficiency of the MAP

¹¹¹ *Id.*

¹¹² Finley, *German Head of Tax Supports Joint Audits, but not Public CBC Reporting*, 2016 WTD 100-3 (May 23, 2016).

¹¹³ Prepared Remarks of Douglas H. Shulman, Commissioner of Internal Revenue, Before the IRS/George Washington University 24th Annual Institute on Current Issues in International Taxation, Washington, D.C., Dec. 15, 2011.

¹¹⁴ Joint Audit Report, Sixth Meeting of the OECD Forum on Tax Administration, Istanbul, Turkey, 15 – 16 September 2010, available at <http://www.oecd.org/tax/administration/45988932.pdf>, page 2.

¹¹⁵ *Id.* at 26.

process.¹¹⁶ The aim of Action 14 is to minimize the risks of uncertainty and unintended double taxation by ensuring the consistent and proper implementation of tax treaties, including the effective and timely resolution of disputes regarding their interpretation or application through the MAP process.¹¹⁷ With the adoption of the Action 14 report, countries agreed to have their compliance with the minimum standard reviewed by peers through the Forum on Tax Administration MAP Forum (FTA MAP Forum).¹¹⁸

The FTA originally established the FTA MAP Forum to meet regularly to discuss and deliberate on general matters affecting participating jurisdictions' MAP programs.¹¹⁹ The objective of the MAP Forum is to ensure MAP continues to meet the needs of both governments and taxpayers and to assure the critical role of the MAP procedure as a provider of taxpayer certainty in the global tax environment. Through this group, Competent Authorities work collaboratively to improve the effectiveness of MAP but also to prevent disputes from arising in the first place.

The FTA MAP Forum's strategic plan describes the statement of vision and commitment of the group and the areas of strategic focus.¹²⁰ The FTA MAP Forum supports Competent Authorities in meeting their central objective of ensuring that the principles embodied in the global network of tax conventions are properly applied to minimize to the fullest possible extent incidents of double taxation, unintended double taxation and taxation otherwise not in accordance with the provisions of applicable tax conventions.

The FTA MAP Forum is working to improve the effectiveness of the MAP process to better meet the needs of both governments and taxpayers. Areas of strategic focus include resources, empowerment, relationships and posture, process improvements, and relationship with audit functions.¹²¹ Prior to the Action 14 peer review process and now as part of its effort to support that work, the FTA MAP Forum coordinates the publication of country MAP Profiles, the collection of MAP Statistics, and the development of the Global Awareness Training Module.¹²² These efforts have laid the foundation for collaboration and communication between Competent Authorities that continues to be built on as part of the Action 14 work. The peer review process under Action 14 offers new opportunities for a broader group of jurisdictions to explore how to better work together on dispute resolution efforts.

b. Update on Action 14 peer review and MAP Statistical Reporting

¹¹⁶ Action 14: 2015 Final Report, <http://www.oecd.org/ctp/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report-9789264241633-en.htm>, *supra* note 2, page 9.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous MAP Improvement*, available at <https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/map-strategic-plan.pdf> (hereafter "MAP Strategic Plan").

¹²⁰ *Id.*, page 2.

¹²¹ *Id.*

¹²² *Id.*

Stage 1 of the Action 14 peer review is currently underway with countries being reviewed in small “batches”. The first batch of reports was released in November 2017 for Belgium, Canada, the Netherlands, Switzerland, the United Kingdom, and the United States. To date reports are available for batches 1 through 3 and additional batches of reports are continually released after they are approved by the FTA MAP Forum and Committee on Fiscal Affairs.¹²³ By April 2019, Stage 1 peer reviews for more than 60 countries will have been completed or be in process with a small number of additional reviews expected to be undertaken in 2020 to wrap up Stage 1.

As part of the development of the peer review process, the MAP Forum recognized the unique perspective that taxpayers have of the MAP process. To utilize this experience, taxpayers are invited to provide their comments on a jurisdiction’s MAP program through a questionnaire available on the OECD website. Taxpayer input is collected prior to the launch of each batch of reviews with a standardized template for peer input available on the OECD website.¹²⁴ Also available is the schedule of reviews to allow taxpayers time to anticipate upcoming requests for input.¹²⁵ The taxpayer input questionnaire should be submitted to the OECD, which will review the content. Jurisdictions participating in the Action 14 peer review process have agreed to accept taxpayer input. The IRS’s Large Business and International Division has welcomed feedback on the taxpayer experience with MAP in a particular jurisdiction and sees this as an important opportunity to further improve global MAP efforts.

On November 27, 2017, the OECD released MAP statistics for 2016 based on a new statistical reporting framework.¹²⁶ The new agreed reporting framework reflects a collaborative approach for cases started as from 1 January 2016. In addition to the use of common definitions for key MAP dates, each jurisdiction will now report MAP statistics per treaty partner or per category of treaty partners and each case initiated as from 1 January 2016 in a given jurisdiction now appears in the MAP statistics of the treaty partner that is involved as well, which enables the identification of those cases that are reported by two different jurisdictions at the same time, therefore avoiding double counting of these cases. The new MAP reporting framework also show the types of cases concerned (transfer pricing or other cases) and the outcomes reached using ten standardized categories.¹²⁷ In 2017, the MAP Statistics for 2016 were developed according to this new reporting framework. By 2018 it is anticipated that that the 2017 statistics will be published following the jurisdiction by jurisdiction format.

With the standardized statistical reporting offering a unique diagnostic tool the measurement of timelines for MAP cases should not be perceived as a race in which

¹²³ *Supra* note 48.

¹²⁴ Questionnaire for Taxpayers, available at <http://www.oecd.org/tax/beps/beps-action-14-peer-review-taxpayer-questionnaire.docx>.

¹²⁵ Assessment Schedule for Stage 1 Peer Reviews, available at <http://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf>.

¹²⁶ OECD releases mutual agreement procedure (MAP) statistics for 2016, November 27, 2017, available at <http://www.oecd.org/ctp/oecd-releases-mutual-agreement-procedure-statistics-for-2016.htm>.

¹²⁷ *Id.*

there is a “winner” but an opportunity to improve dispute resolution mechanisms between treaty partners.

i. Outcomes to date

- a. Peer review process creates greater consistency in expectations of MAP functions and between CAs

Many jurisdictions are preparing for their Action 14 peer review by reflecting on their current MAP programs. Some are considering actions such as increasing their Competent Authority (CA) staff, adopting new systems to increase staff, capture statistical reporting, and close cases.¹²⁸ Others have recently reorganized their CA functions to increase the effectiveness and efficiency of their MAP Processes.¹²⁹ The peer review process has helped to create greater consistency in the expectations of MAP functions across jurisdictions and has promoted more frequent and focused interaction between Competent Authorities to facilitate statistical reporting and the overall peer review exercise. This increase in communication has spillover effects as Competent Authorities become more accustomed to regularized administrative interactions beyond the substantive discussions of MAP negotiations.

The peer reports and statistical reporting offer an opportunity to identify areas for improvement across the participating jurisdictions. The statistical reporting on a jurisdiction by jurisdiction basis is ensuring greater transparency to each individual country’s MAP inventory and will help taxpayers better understand CA relationships. The new format for the statistics helps to identify areas for improvement within the pipeline of each jurisdiction as well as highlight improvements and other successes.

To date improvements have already been identified through the matching of statistics across jurisdictions, which has required improved efforts at coordination of inventory and has eliminated the possibility of double counting.¹³⁰ This results in a better understanding of what is missing, improved efforts at meeting the 24-month average for processing a MAP case and additional MAP guidance to help taxpayers better understand the overall process.

- b. Improving effectiveness of Competent Authorities by narrowing focus of their resources

Finally, the Action 14 MAP process and related MAP statistical reporting will impact the future effectiveness of Competent Authorities by encouraging greater interaction between jurisdictions for the purposes of providing peer feedback and increasing the amount of interaction between jurisdictions to reduce overall inventory and allow for a

¹²⁸ Bonnet and Pit, *Implementing the Action 14 Minimum Standard: Signs of Improved Dispute Resolution*, 2018 WTD 83-14 (April 30, 2018).

¹²⁹ *Id.*

¹³⁰ Mutual Agreement Procedure Statistics for 2016, available at <http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm>.

greater focus on other areas such as new or novel issues, areas of continued concern or issues of complexity.

c. Training and knowledge sharing

i. Training materials and other opportunities

The FTA MAP Forum has long expressed the view that a critical component of its work is to prevent disputes from arising in the first place. Achieving this goal requires improvements in the global awareness of tax examiners. The FTA MAP Forum strategic plan explains that examiners in all audit functions involved in adjusting taxpayer positions on international matters must be aware of (1) the potential for creating double taxation, (2) the impact of proposed adjustments on the tax base of one or more jurisdictions, and (3) the processes and principles by which completing jurisdictional claims are reconciled by Competent Authorities.¹³¹ Through a deeper understanding of the MAP process and treaty relationships tax examiners can better work to ensure their adjustments do not lead to double taxation or other taxation not in accordance with the treaty. This can help avoid MAP cases in the future. To facilitate the development of this awareness, the FTA MAP Forum encourages the delivery of training to tax administration employees on these matters.

The FTA has developed a “Global Awareness Training Module” as a template for such training.¹³² The Global Awareness training is a PowerPoint slide deck that is not considered mandatory but offers a tool that tax administrations can build on to provide internal training. It offers FTA MAP Forum members a tool to teach examiners about treaties, the competent authority function, and the MAP process to prevent disputes from arising and taxpayers from needing to come into the MAP process. This will help to decrease the flow of new cases into MAP inventory across jurisdictions including to those with limited MAP experience by preventing disputes from arising in the first place.

In addition, through the OECD’s Global Relations Programme and other efforts, there are additional efforts underway to ensure training opportunities focus on the Competent Authority function, the Mutual Agreement Procedure and tax technical issues such as tax treaty interpretation and transfer pricing. This will encourage a common foundation of knowledge across jurisdictions.

ii. Knowledge sharing and capacity building

Many developing countries are not yet ready to meet the BEPS minimum standards.¹³³ However, being a part of the Inclusive Framework signifies a willingness to take steps towards implementing the minimum standards. The Background Brief on the Inclusive

¹³¹ MAP Strategic Plan, *supra* note 119.

¹³² *Id.*

¹³³ See the comments by Logan Wort referred to in note 24, *supra*.

Framework identified a future need for toolkits and other coordinated and more targeted capacity building support to implement BEPS.¹³⁴

The Large Business Network (LBN), created under the auspices of the Forum on Tax Administration (FTA) and sponsored by the Canada Revenue Agency, is beginning to develop toolkits aimed at assisting tax administrations who are receiving information for performing risk assessments. The IRS is participating in this work to help create practical tools that can be used by both emerging countries and those with more extensive transfer pricing experience. These toolkits will supplement the material in Action 13 to create a fuller set of resources for tax administrators; toolkits can explain how to use data appropriately and strengthen the capacity of all tax administrations to analyze and understand transfer pricing documentation. While emerging countries may have less familiarity with transfer pricing overall, even those countries with transfer pricing expertise will benefit from toolkits that better describe what it means to use the Country-by-Country reporting data for a high-level risk analysis. Toolkits promote consistency and can also assist in preventing the misuse of data by establishing a common and clear expectation of how tax administrators will use reports.¹³⁵

In the new Inclusive Framework, BEPS Associates will work to support implementation of the BEPS package through the development of these practical toolkits that will address the top priority issues that they have identified. Other capacity building initiatives can complement regulatory measures by identifying areas where emerging economies need additional action to fully benefit from the OECD BEPS initiative. For example, there may be a need to adapt or supplement specific BEPS actions.¹³⁶

Similarly, the FTA's Capacity Building Network assesses how the experience and products of the FTA can be tapped into for the benefit of developing countries.¹³⁷ A new platform has been developed by the Canada Revenue Agency, the Knowledge Sharing Platform (KSP), which allows learning tools and material to be disseminated more easily, and provides a one-stop shop to connect tax officials from around the world.¹³⁸ The Knowledge Sharing Platform (KSP) is an "innovative and low-cost online delivery service" designed to provide tax officials with a virtual space to access learning events, a library of training and reference materials, and to encourage interaction through online communities of practice.

While still under development, in 2017 the KSP was used to register OECD Global Relations Programme training participants and to share training materials. A final

¹³⁴ Background Brief, *supra* note 12, page 14

¹³⁵ *Taxing Multinational Enterprises*, OECD Policy Brief, October 2015, available at <http://www.oecd.org/ctp/policy-brief-beps-2015.pdf>.

¹³⁶ *Two-Part Report to G20 Developing Working Group on the Impact of BEPS in Low Income Countries*, available at <http://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf>, page 29.

¹³⁷ *Tax Administrations and Capacity Building: A Collective Challenge*, available at <http://www.oecd.org/ctp/tax-administrations-and-capacity-building-9789264256637-en.htm>, page 14.

¹³⁸ FTA Communiqué, *supra* note 67, page 3.

version of the web platform is anticipated to be launched in 2018.¹³⁹ This is just one example where multilateral engagements are creating new opportunities for collaboration around both BEPS implementation and general tax administration activities.

To better coordinate these different efforts, the Platform for Collaboration on Tax (Platform) was developed with joint sponsorship from the UN, the IMF, the World Bank, and the OECD. The First Global Conference of the Platform for Collaboration on Tax¹⁴⁰ was held in New York in February 2018, with all four groups participating and exploring opportunities for deeper collaborative work through the Platform.¹⁴¹ The partner organizations bring together their own mandates and expertise, and their convening power to engage in and stimulate research, and together through the Platform lead the debate and action on the broad role of taxation in achieving the sustainable development goals. The Platform, which is also supported by the governments of Luxemburg, Switzerland, and the United Kingdom, fosters collective action for stronger tax systems in developing and emerging countries. The four Platform sponsors each support country efforts through policy dialogue, technical assistance and capacity building, knowledge creation and dissemination, and input into the design and implementation of standards for international tax matters. The Platform also produces guidance and tools on key issues of capacity building and international taxation, and has also developed the Medium-Term Revenue Strategy, which is an approach for coordinated and sustained support to country-led tax reform.¹⁴²

5. Conclusion

The work on exchange of information standards begun in 2009 with the reformation of the Global Forum on Transparency and Exchange of Information for Tax Purposes may have been the first major acknowledgement that countries need to set standards collectively and ensure that countries meet those standards, in whatever way works best for the country. The BEPS work initiated in 2013 acknowledged that countries need to collaborate to ensure that companies are neither taxed twice or not taxed at all. The CbC reports required by Action 13 provide significant information that can be used in a collaborative way to deselect cases for examination by finding low or no transfer pricing or permanent establishment risk. In addition to the collaborative work that is part of ICAP, the top-level risk assessment that is performed by an individual country may result in an increase in exchange of information requests, as countries attempt to learn

¹³⁹ IOTA makes first steps towards the “Knowledge Sharing Platform for Tax Administrations”, August 8, 2017, available at <https://www.iota-tax.org/news/iota-encourages-its-members-join-knowledge-sharing-platform-tax-administrations>.

¹⁴⁰ Platform for Collaboration on Tax, available at <http://www.oecd.org/ctp/platform-for-collaboration-on-tax.htm>.

¹⁴¹ *Taxation & The Sustainable Development Goals*, Conference Statement, available at <http://www.oecd.org/tax/platform-for-collaboration-on-tax-conference-statement-2018.pdf>, page 1.

¹⁴² The First Global Conference of the Platform for Collaboration on Tax – Taxation and the Sustainable Development Goals was held from February 14-16, 2018. For full information on the conference, content, and speakers, see <http://www.worldbank.org/en/events/2017/06/06/first-global-conference-of-the-platform-for-collaboration-on-tax>.

more about a taxpayer's activities in another country. The Action 14 work on MAP will improve the collaborative work of the mutual agreement procedure by defining terms in a similar fashion. With the expanded coverage of BEPS brought about by the Inclusive Framework, more countries will be able to collaborate as toolkits are developed to help countries that need additional support to reach the level playing field.