

GLOBAL IFA TRAVELLING LECTURESHIP PROGRAMME 2024

INTERNATIONAL TAX DISPUTE RESOLUTION



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Opening remarks on the scientific program

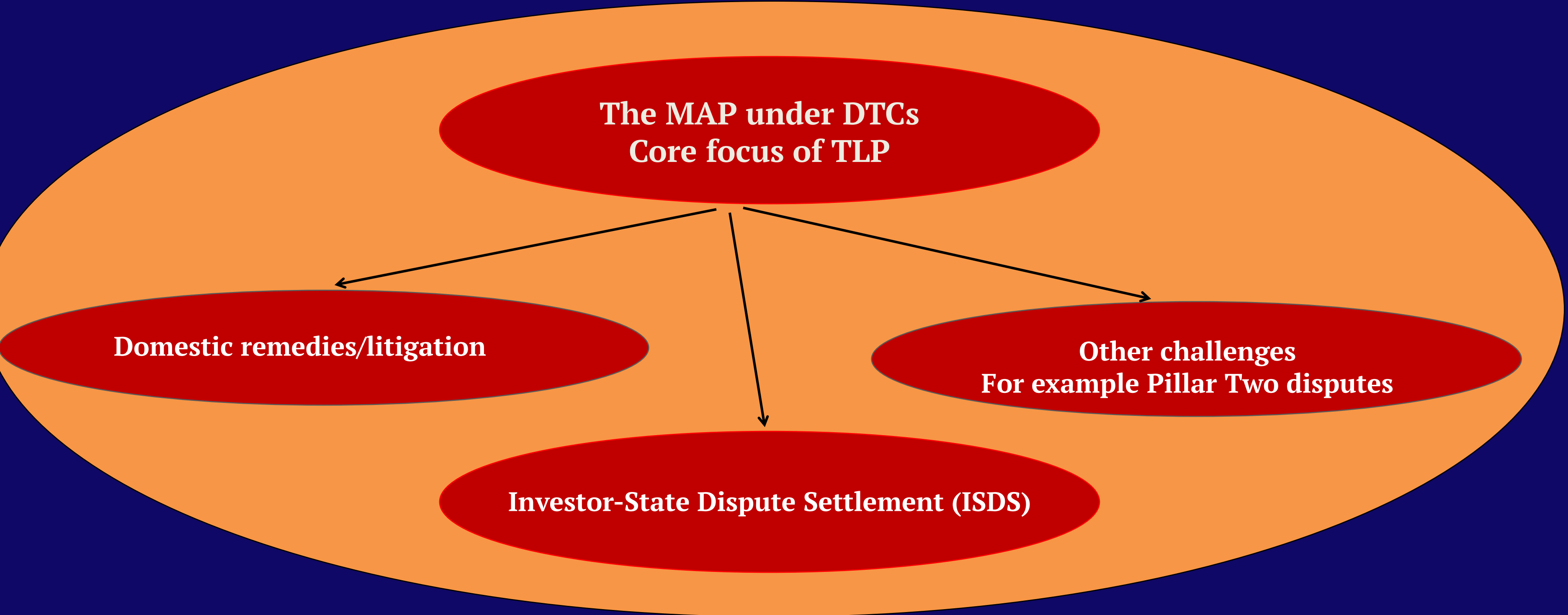
Prof. Robert Danon

Objectives of Global IFA's 2024 TLP

- Revisit the **current and future practical challenges posed by MAP as a state-to-state dispute settlement procedure inspired from diplomatic protection** (both at the level of access and operation of the MAP) and explore **broader ramifications** (for example penalties, criminal law ramifications, relation between TP and custom duties, etc.). Does it work? What can (should) be improved?
- Explore **possible improvements to the OECD Commentary on Art. 25 as well as to minimum standards and best practices on BEPS Action 14.**
- Scientific agenda reflects the strong emphasis put by Global IFA **on International Tax Dispute Resolution from a holistic perspective.**
- Main topic of the Cape Town Congress ***“Practical approaches to International Tax Dispute Prevention and Resolution”*** is the first important milestone.



Global IFA's 2024 TLP in the global tax controversy context



TOPIC: INTERNATIONAL TAX DISPUTE RESOLUTION

Making dispute resolution mechanisms more effective in the aftermath of OECD Action 14

Jakarta – 13 May 2024
Singapore – 14 May 2024

INTERNATIONAL TAX DISPUTE RESOLUTION

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International Fiscal Association

ACTION 14 : OBJECTIVES

- Ensure that treaty obligations related to MAP are fully implemented in good faith and that MAP cases are resolved in a timely manner;
- Ensure that administrative processes promote the prevention and timely resolution of treaty-related disputes; and
- Ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 of the OECD Model Tax Convention can access the MAP.

ACTION 14 : ELEMENTS OF MINIMUM STANDARDS

- Countries should ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner
- Include Paragraphs 1 to 3 of Article 25 in tax treaties
- Provide MAP access in case of disagreement between the taxpayer and the tax authority
- Commit to timely resolution of MAP cases within an average timeframe of 24 months
- Enhance CA relationships and improve the effectiveness of MAP by becoming members of FTA MAP Forum
- Timely & complete reporting of MAP statistics
- Commit to comply with minimum standard reviewed by peers in the context of FTA MAP Forum
- Provide transparency with respect to their positions on MAP arbitration

ACTION 14 : ELEMENTS OF MINIMUM STANDARDS

- Countries should ensure that administrative processes promote the prevention and timely resolution of treaty-related disputes
- Publish rules, guidelines and procedures to access and use the MAP and take appropriate measures to make such information available to taxpayers.
- publish their country MAP profiles on a shared public platform
- ensure that the staff in charge of MAP processes have the authority to resolve MAP cases
- should not use performance indicators for their competent authority functions
- should ensure that adequate resources are provided to the MAP function.
- should clarify in their MAP guidance that audit settlements between tax authorities and taxpayers do not preclude access to MAP
- Countries with BAPA programme should provide for the roll-back of APAs in appropriate cases, subject to the applicable time limits

ACTION 14 : ELEMENTS OF MINIMUM STANDARDS

- Countries should ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 can access MAP
- Both competent authorities should be made aware of MAP requests being submitted and should be able to give their views on whether the request is accepted or rejected
- published MAP guidance should identify the specific information and documentation that a taxpayer is required to submit with a request for MAP assistance.
- include in their tax treaties the second sentence of paragraph 2 of Article 25

ACTION 14 : SCOPE OF MAP

Article 25

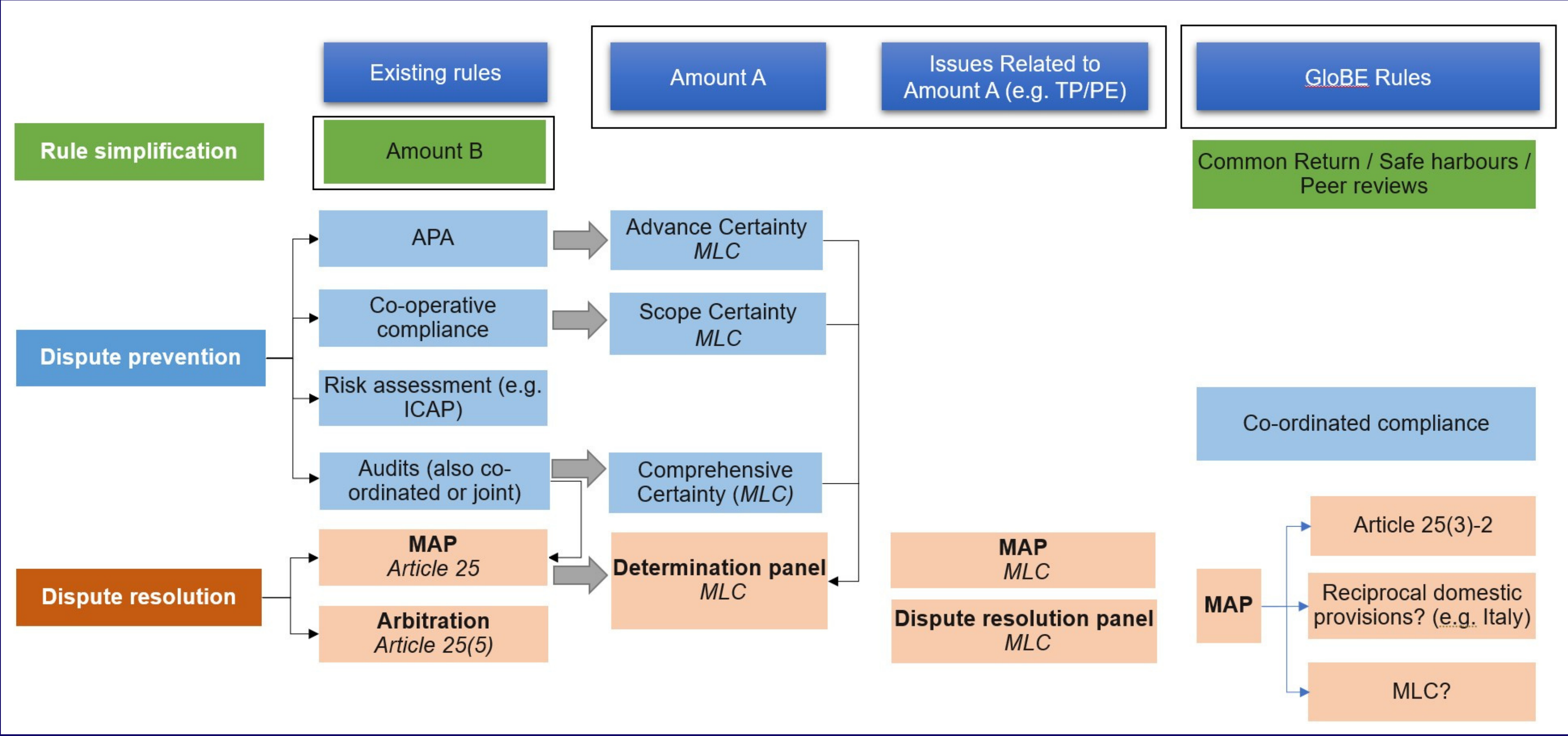
1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.
2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.
3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

ACTION 14 : OVERVIEW

- Terms of Reference – contains 21 elements and 12 best practices in 4 key areas – A)preventing disputes; B)availability and access to MAP; C)resolution of MAP cases; and D)implementation of MAP agreements
- Assessment Methodology
- MAP Statistics Reporting Framework
- Guidance on Specific Documentation required to be submitted with MAP request

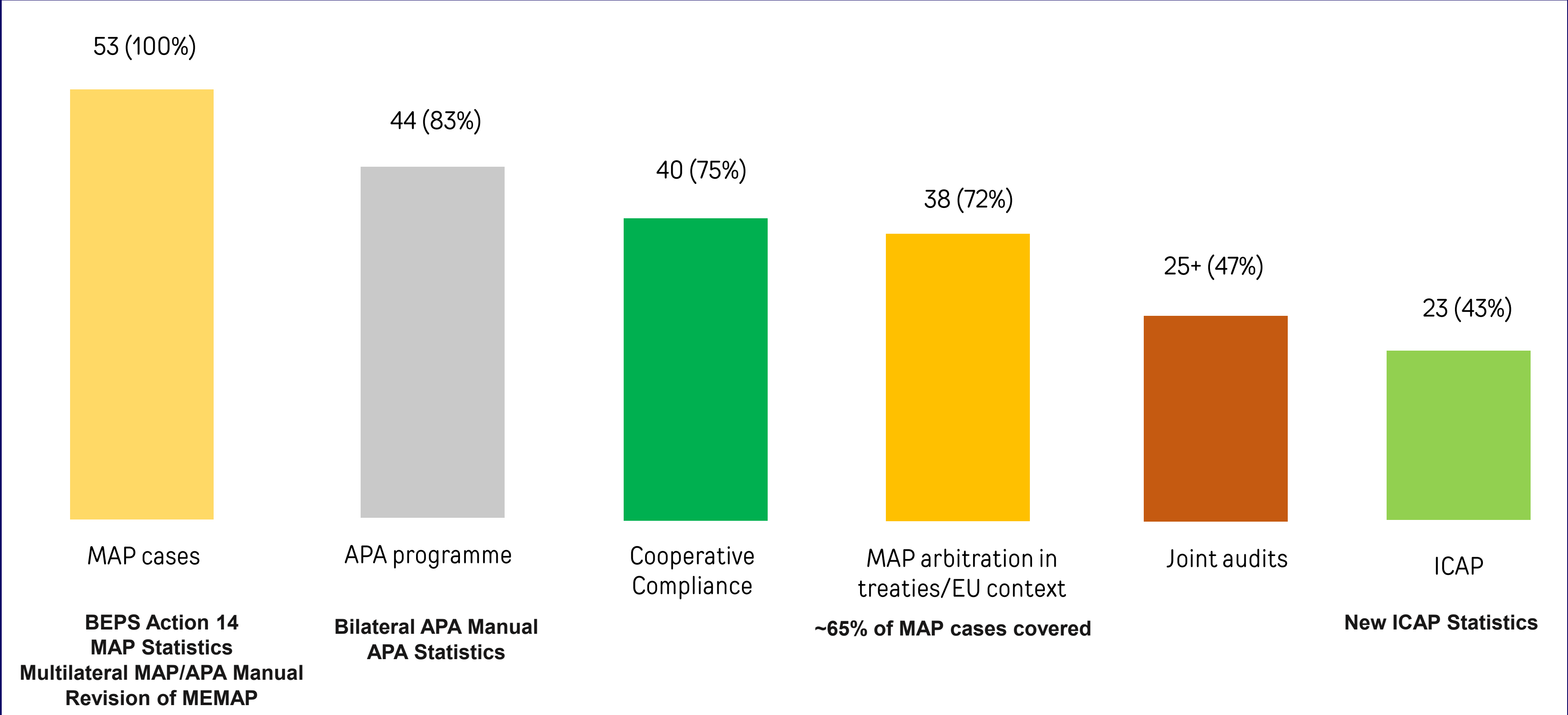
Source : BEPS ACTION 14 ON MORE EFFECTIVE DISPUTE RESOLUTION MECHANISMS – PEER REVIEW DOCUMENTS © OECD 2023

TAX CERTAINTY: CURRENT AND FUTURE LANDSCAPE

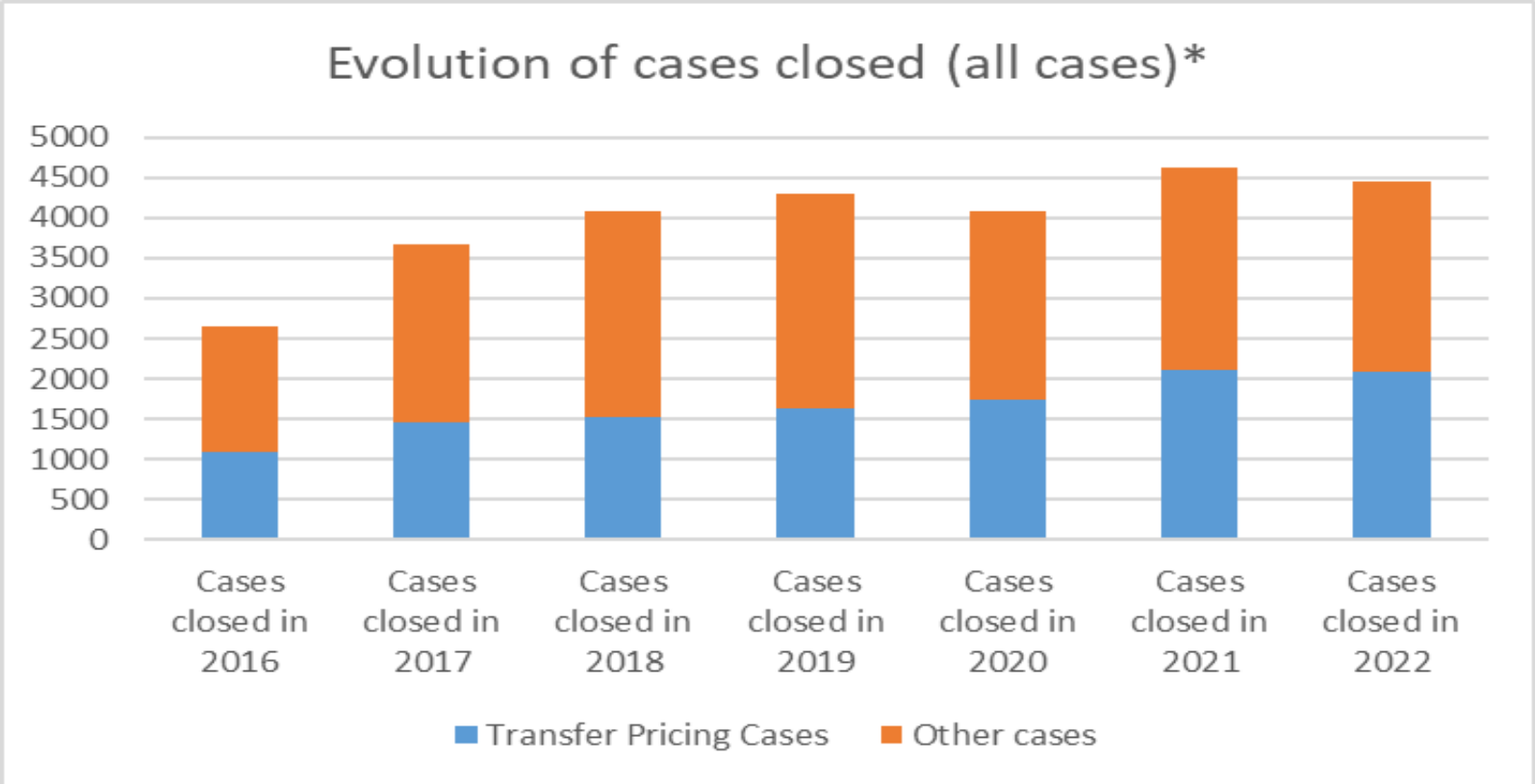
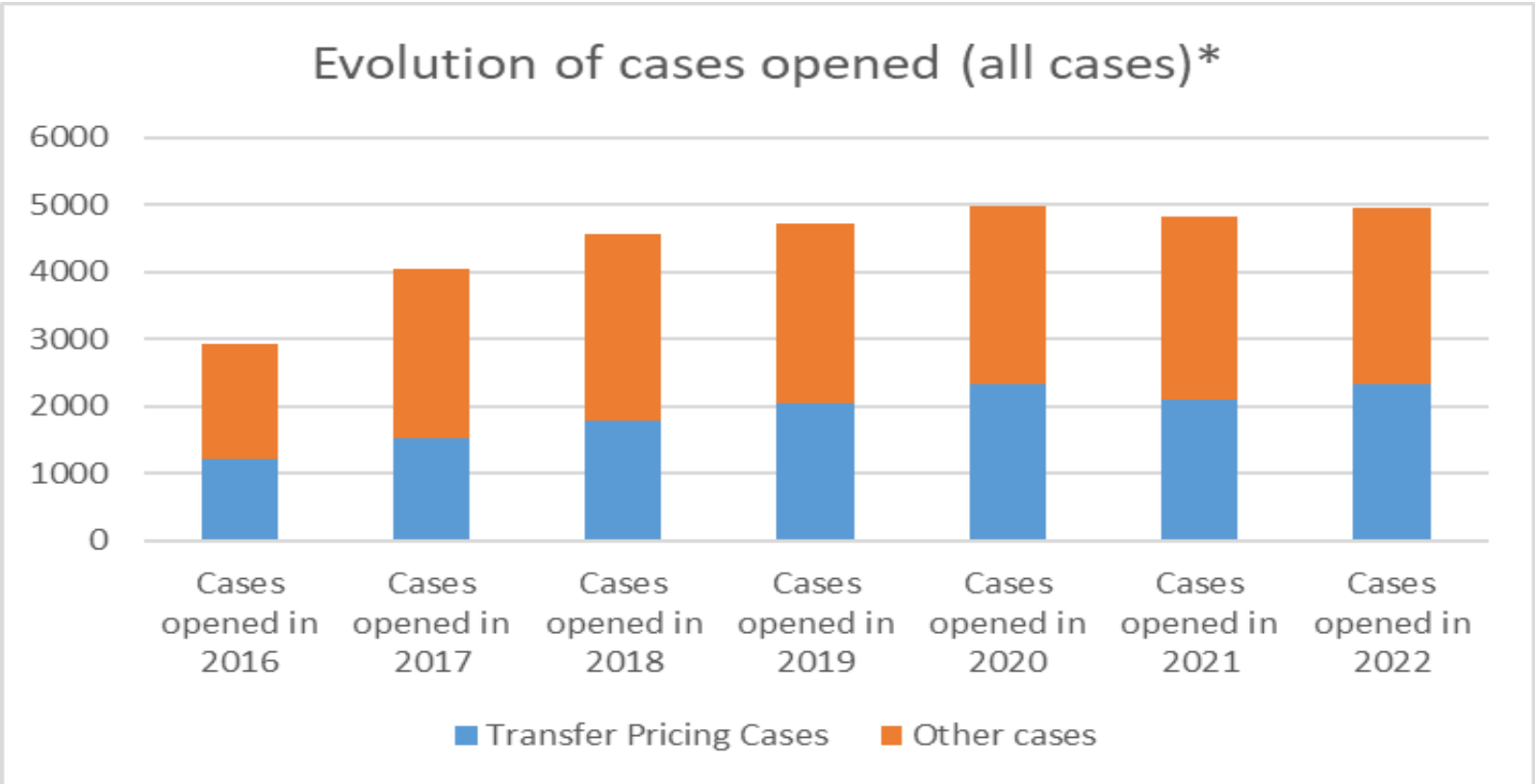


WHERE ARE WE ON THE TAX CERTAINTY JOURNEY?

TAX CERTAINTY TOOLS IN 53 FTA MEMBER JURISDICTIONS

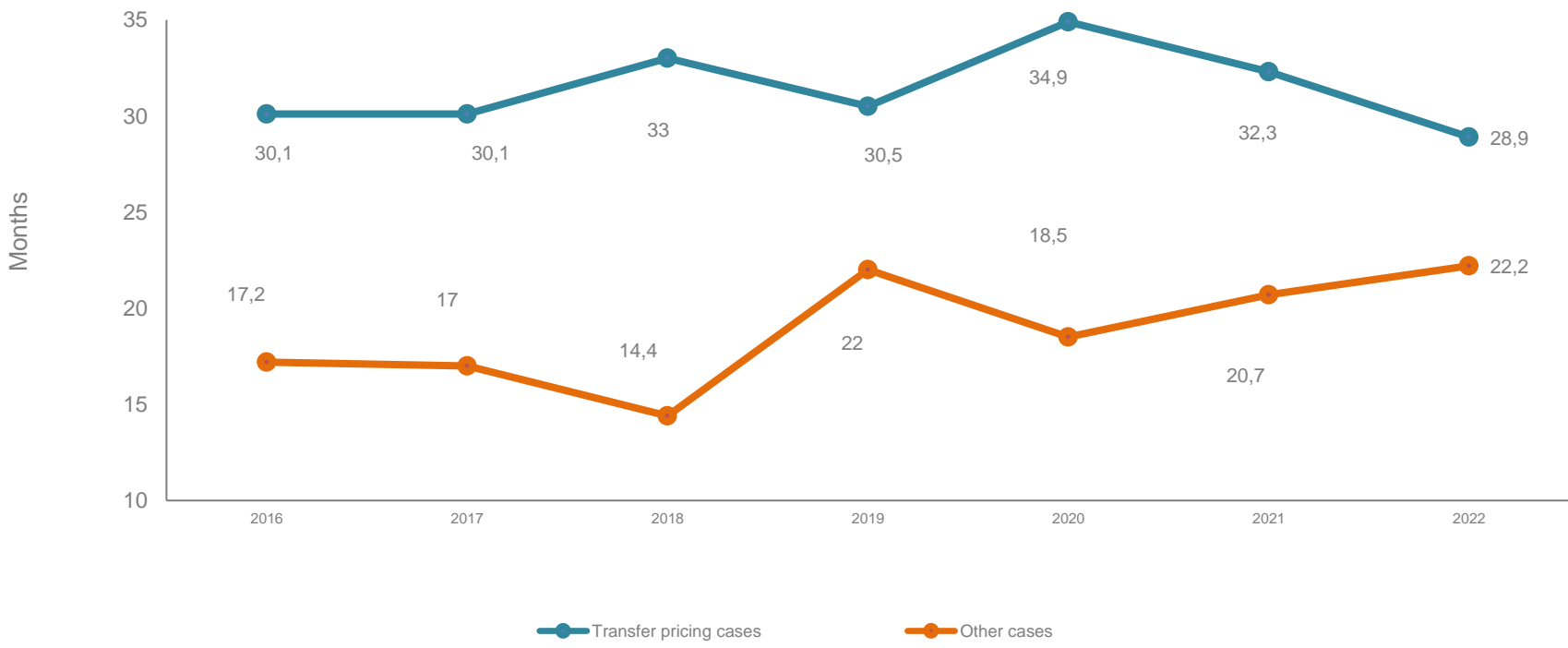


FOCUS ON MAP: MAP IN NUMBERS



- Increase of ~70% in cases opened and closed
- Average time above 24 months & decreasing for TP cases; below 24 months for other cases
- Outcomes consistent – around 70-80% of cases fully resolved for taxpayer

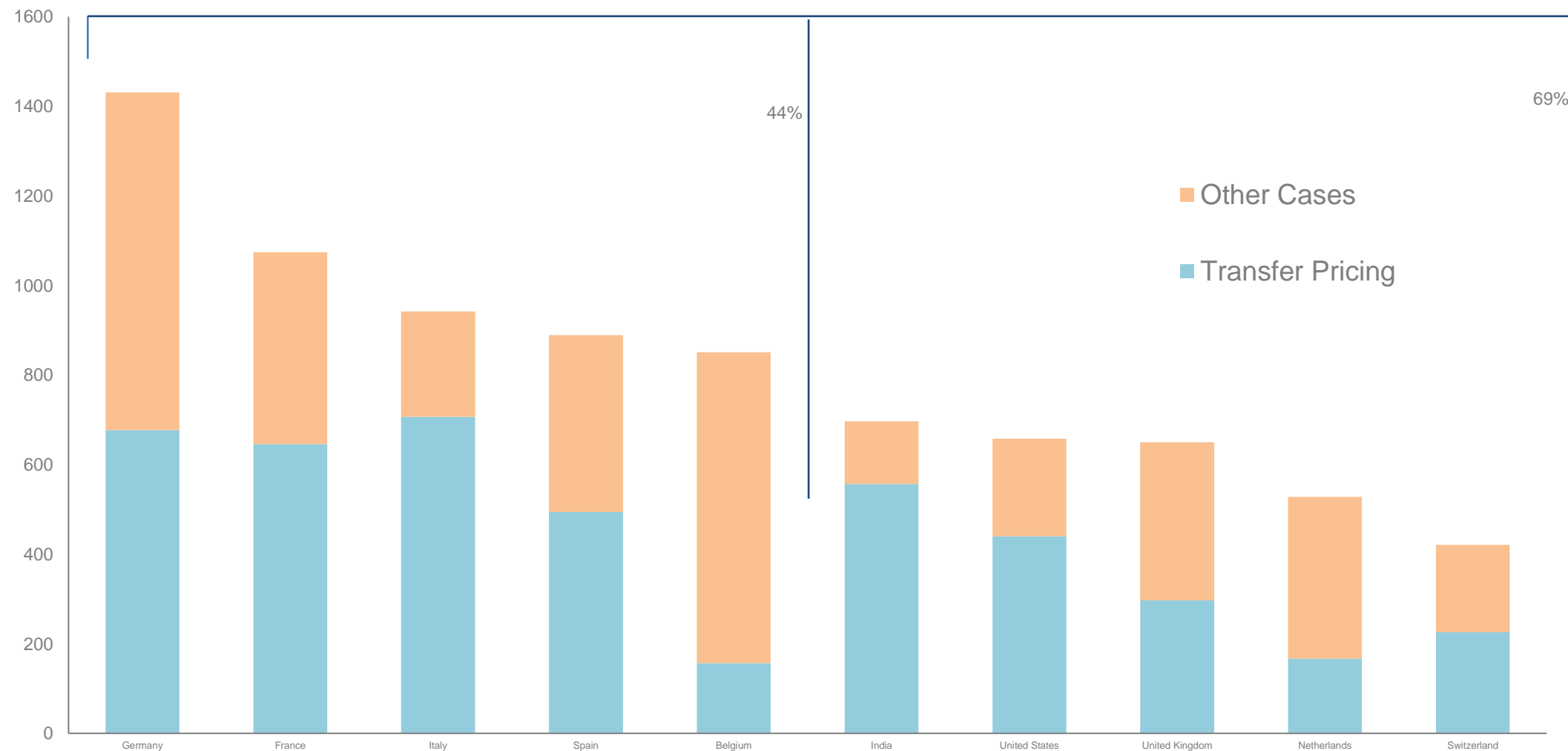
Average time to close MAP cases



* The sum of inventory of all cases & MAP cases opened / closed for all jurisdictions does not eliminate double counting

FOCUS ON MAP: GLOBAL COVERAGE

Cases started in 2022
Top 10 jurisdictions



MAP remains concentrated, but 88 IF members have MAP cases now → work to cater to all

MAP Forum aims to:

- make MAP more **available and accessed globally;**
- ensure all jurisdictions are **equipped to deal with MAP cases**

FOCUS ON MAP: WHERE ARE WE ON BEPS ACTION 14?



Action 14 final report:
21 elements in
Minimum Standard, 12
best practices on MAP



82 jurisdictions peer
reviewed in 2 stages
from December 2016
MAP Statistics from
2016 (133 IF members
in 2022)



Stage 2 concluded in
September 2022



Continued monitoring
from 2023 for all IF
members □ simplified
review where limited
MAP experience; full
review for others

Before BEPS Action 14

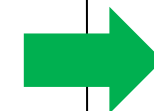
Many treaties – no effective MAP provision

Limited roll-back of bilateral APAs

Access restrictions (TP, anti-abuse etc.)
Limited guidance/published info on MAP

MAP time-consuming
Limited CA resources, independence issues

Implementation issues (e.g. domestic time-limits)



Today

> 500 treaties now also have MAP provisions via MLI
Others plan to do bilaterally

APA Roll-back common practice now

Access to MAP in most eligible cases
More published guidance, MAP profiles

Better organised CA function, more resources
Statistics show closer to 24-month target average

Timely implementation
Countries have taken measures to overcome domestic limits

FOCUS ON MAP: WHERE NEXT?

Dispute prevention: continued focus on ICAP, APAs, etc.

Dispute resolution: further improve MAP

- Remaining access issues, focus resources/timelines
- Improve practical aspects of MAP
- Review of 2007 MEMAP – survey through BIAC ☐ inputs by 5 April 2024

Tax Certainty and the Two-Pillar Solution: ongoing focus on GloBE Rules, etc.

OECD Round Table on Tax Certainty (April/May 2024)

ACCESS OF MAP REQUESTS:



1. Transfer pricing cases: Treaties are implemented with the aim of eliminating economic double taxation. Therefore, access should be granted to transfer pricing cases, particularly where Article 9(2) is provided in the treaty. Additionally, access should be granted in cases where Article 9(2) is not provided, but the provisions of domestic law in both contracting states do not allow for a corresponding adjustment.
2. Anti-abuse cases: Access should be granted in cases where taxpayers and tax authorities disagree about the application of treaty anti-abuse provisions. Similarly, access should be granted when the application of domestic anti-abuse provisions conflicts with the provisions of the treaty.

DENIAL OF MAP REQUESTS:

1. Lack of Eligibility: Taxpayers who do not meet the eligibility criteria specified in the tax treaty may have their MAP requests denied. For example, if the taxpayer is not a resident of one of the treaty countries or if the income is not covered by the treaty provisions.
2. Abuse of Process: MAP requests may be denied if tax authorities believe that the taxpayer is abusing the process for purposes of tax avoidance or evasion.
3. Jurisdictional Issues: MAP requests may be denied if the tax authorities believe that the issues raised fall outside the scope of the tax treaty or their jurisdiction.
4. Exhaustion of Remedies: Some tax treaties require taxpayers to exhaust domestic remedies, such as administrative appeals, before initiating MAP. Failure to do so may result in the denial of the MAP request.
5. Insufficient Information: MAP requests that lack essential information or supporting documentation may be denied, or tax authorities may request additional information before considering the case.

OECD - Frequently Asked Questions On The Mutual Agreement Procedure (November 2022)

JUDICIAL REVIEW IN RELATION TO THE DENIAL OF ACCESS TO MAP AND INFORMATION ACCESS –

Kevin McCabe versus The Commissioners for her Majesty's Revenue and Customs

- Mr. McCabe presented a case for the MAP on the application of the tiebreaker rule in Article 4(2) of the Belgium-UK DTAA. The MAP resulted in a resolution in which Mr McCabe was considered a resident of the UK.
- Mr. McCabe did not accept the decision and filed an appeal before the FTT against the assessment to the UK tax authorities.
- Mr. McCabe applied for disclosure of HMRC documents relating to the MAP, including the representations made by both competent authorities to each other and the specific position papers sent to each other. Mr. McCabe's primary reason for obtaining the evidence was to identify the position in the appeal.
- Mr. McCabe stated that the disclosed documents revealed a significantly different position in the appeal before the FTT than the one adopted in the MAP, and therefore, the requested documentation should be granted.
- HMRC denied the evidence and argued that the documents did not have any material relevance and went against the public policy of disclosing information between two competent authorities, as such proceedings are conducted in secret.

JUDICIAL REVIEW IN RELATION TO THE DENIAL OF ACCESS TO MAP AND INFORMATION ACCESS –

Kevin McCabe versus The Commissioners for her Majesty's Revenue and Customs

- The FTT's approach can be summarized as follows:
 1. The default principle is that the tax authority should disclose pertinent documents to the taxpayer unless there is a valid reason for withholding them.
 2. Any document relevant to an aspect of the tax authority's case as pleaded in the proceedings is likely to be deemed relevant.
 3. When determining whether there is a valid reason to withhold disclosure of relevant documents, the overriding objective of dealing with cases fairly and justly must be considered.
 4. This entails weighing all relevant factors, if a document has relatively low relevance, it will require less justification to withhold disclosure. Conversely, if a document is highly relevant, more justification will be needed to justify withholding it.

Conclusion- The FTT concluded that while the requested material was relevant, its relevance was deemed to be low. Consequently, the FTT decided that the material should not be disclosed.



X V. BELGIUM 23 ITLR 221

Facts-

- Taxpayer, a British citizen and having his residence in Belgium, involved in a tax dispute on his liability to tax in UK.
- Application under MAP determines him as resident of UK on the basis of tie-breaker test under the treaty
- Taxpayer requests for his MAP case file which is denied to him
- The respondent relies on art 6, § 1, 3° of the Government a Information (Public Access) Act to refuse the disclosure of the correspondence and the administrative file.

Held-

- The respondent does not give a specific and factual reason either with reference to the details of the case as to why the disclosure of the requested correspondence and the administrative file would damage the federal international relations of Belgium.
- The sheer fact that the competent h authority of the United Kingdom and the Belgian competent authority also would 'fundamentally' oppose this as 'policy' is in itself insufficient.
- the interest that is protected by the exemption ground should not be weighed up against the private interest of the applicant, but against the public interest that is served by the disclosure.
- The Council of State nullified the decision taken to refuse disclosure of the correspondence with and the administrative file regarding the mutual consultation procedure with the United Kingdom to [X].



GARLON SA V BELGIUM 23 ITLR 187

Facts-

- taxpayer was a Belgian company which subcontracted services to a Luxembourg company for which it paid charges.
- Belgian Tax authorities disallowed these expenses in hands of the Belgian taxpayer.
- The receipt was taxed in hands of the Luxembourg company as its income.
- MAP was invoked by the taxpayer for avoidance of double taxation.
- The taxpayer subsequently applied to see its tax file and was told that it could not have access to the correspondence between the Competent Authorities as this would interfere with Belgium's relations with Luxembourg
- The taxpayer applied again and was told in a letter dated 12 July 2012 that the matter had been referred to the Commission for Access to and Reuse of Administrative Documents and the tax authorities would maintain its position pending the decision of the Commission.

Held on appeal-

- The decision of 12 July 2012 was set aside as the letter gave the remotest understanding of the General Tax Office's reasons for refusal to grant the taxpayer's request.



JUDICIAL REVIEW OF MAP

CGI Holding LLC v Minister of National Revenue 19 ITLR 692

Facts & Issue-

- The taxpayer sought the reduced withholding tax from Canada under the Canada-US treaty, and, when refused, it initiated MAP through the US competent authority.
- The two competent authorities failed to reach an agreement.
- The taxpayer sought judicial review of the Canadian competent authority in respect of the MAP procedure.
- Whether the conduct of a competent authority in respect of mutual agreement procedure (MAP) under a double tax treaty is or is not amenable to judicial review.

Held- (In principle)

- The competent authorities are subject to judicial review in their conduct of MAP.
- However, it found that the authorities had acted reasonably, there had been no breach of procedural fairness, and no order was made in favour of the taxpayer.

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BINDING EFFECT OF MAP

Sifto Canada Corp and another v R 20 ITLR 770

Facts-

- The taxpayer in Canada suffered a certain transfer pricing adjustments leading to additional tax payments in Canada after a voluntary disclosure of information leading to a reassessment of its income.
- The transaction on the other hand was also taxed un US.
- The taxpayer and its US AE applied for double tax relief under MAP.
- An agreement was reached between the CAs of USA & Canada which was accepted by the taxpayer.
- |Subsequently, Canada again reassessed the income of the taxpayer for the same year.

Held on appeal-

- MAP agreement constituted a Settlement Agreement which fixed the transfer price of the salt and was binding on the Canadian Revenue.
- MAP agreement between the CAs of two treaty partners are binding on the Canadian Revenue.
Reassessments are inconsistent with the settlement agreements between the Minister and the Appellant and with the MAP agreements between the Minister and the IRS.

EFFECT OF MAP OUTSIDE MAP

- PCIT v. JP Morgan Services (2020) 119 taxmann.com 414 (SC)
- PCIT v. JP Morgan Services (2020) 119 taxmann.com 413 (BOM)
- JP Morgan Services v. DCIT (2016) 70 taxmann.com 228 (Mum)
- Harman Connected Services Corpn. India P. Ltd. v. ACIT (2023) 151 taxmann.com 500 (B'lore)
- Colt Technology Services v. DCIT (2022) 141 taxmann.com 386 (Del)
- JCIT v. Dell International Services India (2021) 133 taxmann.com 532 (B'lore)



MAP ARBITRATION – PART VI MLI

- In what situations:
- Where a taxpayer is of the opinion that the “taxation is not in accordance with the provisions of the CTA” AND
- competent authorities are unable to reach an agreement within a period of two years
- Then, any unresolved issue shall be, on request of the taxpayer, be submitted to arbitration.



MAP ARBITRATION EXCEPTIONS – PART VI MLI



- Exceptions:
 - Where the competent authority has suspended MAP because of the issue pending before domestic courts.
 - If there is delay by the taxpayer in submitting additional documents to the competent authorities, then the period of 2 years may be extended correspondingly.
- Binding: The binding nature of arbitration decision comes by mutual agreement. The arbitration decision shall be final.
- Reservations: A party may reserve:
 - Any unresolved issue if decision on which has already been rendered by domestic court
 - After initiation of arbitration,
 - Extend the period of 2 years to 3 years for MAP unable to resolve issue.

MAP ARBITRATION - ACCEPTANCE

- 30 countries out of 96 have accepted MLI arbitration:
- Andorra, Australia, Austria, Barbados, Belgium, Canada, Curacao, Fiji, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Liechtenstein, Malta, Mauritius, Netherlands, New Zealand, Papua New Guinea, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland and the United Kingdom

DEVELOPMENTS RELATING TO MAP IN SINGAPORE'S TAX TREATIES

- 88 out of 96 tax treaties contains MAP provision in line with or will be modified by the Multilateral Instrument to be in line the Action 14 Minimum Standard [As of 15 August 2023]

Source: OECD CIM 2023

DEVELOPMENTS RELATING TO MAP IN SINGAPORE'S TAX TREATIES

Organisation of competent authority function

- 21 persons:
 - 4 CAs for MAP
 - 11 staff handling attribution / allocation MAP cases (and other areas relating to cross border transfer pricing matters)
 - 6 staff handling other MAP cases (and other areas relating to tax treaty matters).

DEVELOPMENTS RELATING TO MAP IN SINGAPORE'S TAX TREATIES

Singapore's MAP Statistics for 2022

- Closed 36 MAP cases
- Average time taken to resolve was 21.53
- Did not deny MAP access to any person during the year
- 4 cases withdrawn by the tax payer
- Granted unilateral relief in 1 case
- 27 cases with full resolution under the agreement
- 1 case with partial resolution

DEVELOPMENTS RELATING TO MAP IN INDONESIA'S TAX TREATIES

- 70 out of 72 tax treaties contains MAP provision in line with or will be modified by the Multilateral Instrument to be in line the Action 14 Minimum Standard [As of 15 August 2023]

Source: OECD CIM 2023

DEVELOPMENTS RELATING TO MAP IN INDONESIA'S TAX TREATIES

Organisation of competent authority function

- 38 persons:
 - One Director, one Deputy Director and four Head of Divisions
 - 32 persons working on MAP cases (all of which work on other tasks as well)

DEVELOPMENTS RELATING TO MAP IN INDONESIA'S TAX TREATIES

Indonesia's MAP Statistics for 2022

- Closed 10 MAP cases
- Average time taken to resolve was 44.87
- Did not deny MAP access in any case
- 1 case withdrawn by the tax payer
- No agreement in 4 cases
- 5 cases with full resolution

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5. The views of business

Q&A from the floor & Conclusion