

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

BEST PRACTICES
New Zealand



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Abbreviations and Acronyms

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

Introduction

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

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

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

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

This document contains a general overview of the adoption of best practices and comments by peers on the adoption of these best practices.

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

Part A

Preventing Disputes

[BP.1] Implement bilateral APA programmes

Jurisdictions should implement bilateral APA programmes.

1. APAs concluded bilaterally between competent authorities provide an increased level of certainty in both jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes.
2. New Zealand reported it is authorised to enter into unilateral, bilateral and multilateral APAs. New Zealand uses the MAP provision contained in New Zealand's tax treaties as the legal basis for entering into APAs.
3. New Zealand further reported it actively promotes using APAs as the best solution for complex cases that concern difficult facts and circumstances. Taxpayers who wish to obtain an APA are advised to contact New Zealand's transfer pricing specialists. In a general sense, the following steps are typically applied when a taxpayer intends to request for an APA:²
 - Submission of a short written proposal by the taxpayer discussing the background of its business, the associated enterprise that is party to the transaction(s) in question and the suggested transfer pricing methodology to be applied;
 - A pre-application meeting with one of New Zealand's transfer pricing principal advisors to informally discuss the submitted proposal; and
 - A formal application for an APA.
4. New Zealand reported there are no specific timelines for filing of an APA request in New Zealand. Furthermore, no fees are charged to taxpayers when filing a request for a bilateral APA, albeit that if New Zealand's tax administration needs to travel overseas, it will seek to recover so-called out of pocket costs on an actual and reasonable basis. Typically, New Zealand applies a bilateral APA for a period of three to five years.
5. In the webpage of New Zealand's tax administration containing information on APAs, New Zealand noted that it aims to complete all unilateral APAs within six months of the date of acceptance of a formal application, which generally has been met. Furthermore, it is also mentioned that New Zealand also strives to complete bilateral APAs with Australia, being its main APA partner, within this six month time frame as well. While it generally meets this timeframe for this treaty partner, it stressed that negotiations with other tax authorities generally take considerably longer to resolve.

²

Available at: <http://www.ird.govt.nz/transfer-pricing/practice/transfer-pricing-practice-apas.html>

6. Two peers provided input on this best practice, one of them noting that New Zealand has an established APA programme that is managed by New Zealand's transfer pricing specialist team. This peer highlighted that this team is the contact point for any company seeking to gather information about APAs including knowledge of the pre-application process and any subsequent formal APA request. The second peer noted that it has a cooperative and productive APA relationship with New Zealand.

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

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

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

8. New Zealand reported that it publishes agreements reached concerning difficulties or doubts arising as to the interpretation or application of their tax treaties by the competent authorities, provided that the other competent authority concerned consents to such publication. In this respect, and as an example, New Zealand has up to date published an interpretative mutual agreement reached with the United States (2005).³

9. In view of the above, publications relating to MAP agreements of a general nature can be found at the website of New Zealand's tax administration:

<http://taxpolicy.ird.govt.nz/tax-treaties>

10. Further to the above, the webpage of New Zealand's tax administration containing information on MAP notes that from time to time competent authorities may resolve difficulties or doubts on the interpretation or application of the tax treaty and that are of a general nature or concern a category of taxpayers. Where such agreement is entered into by New Zealand's competent authority, the webpage notes it will be published on the website of New Zealand's tax administration, under the section tax policy.

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

[BP.3] Provide guidance on APAs

Jurisdictions' published MAP guidance should provide guidance on APAs.

12. Guidance on a jurisdiction's APA programme facilitates the use of that programme and creates awareness for taxpayers on how the APA process functions. As APAs may also

³ Available at: <http://taxpolicy.ird.govt.nz/news/2005-02-11-us-nz-agree-fiscally-transparent-entities>

prevent future disputes from arising, including information on APAs in a jurisdiction's MAP guidance is relevant.

13. As previously mentioned under element BP.1, New Zealand allows unilateral, bilateral and multilateral APAs. New Zealand has not issued specific guidance on APAs separately or in its MAP guidance. It has included in a dedicated webpage of New Zealand's tax administration information on APAs and is available at:

<http://www.ird.govt.nz/transfer-pricing/practice/transfer-pricing-practice-apas.html>

14. This webpage contains information on what an APA is and on what basis taxpayers can request for it. It also discusses the steps taxpayers need to take to apply for an APA, the steps that will be taken by New Zealand when reviewing such an application and the possibility of recovering costs from taxpayers when overseas travel is involved by New Zealand's tax administration.

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

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

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

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

17. New Zealand reported that training is provided to its officials involved in the auditing/examination of taxpayers. In this respect, staff within the tax administration that are working on international tax matters are required to be skilled in interpreting the law and to exercise technical judgment. While most of the training is given by acquiring practical experience (“training on the job”), New Zealand mentioned that part of the training takes place through formal learning activities and structured courses, which are given by the National Technical Training & Development Unit. Examples of structured courses that are provided to auditors/examiners concern *inter alia*: (i) tax residence, (ii) double taxation agreements, (iii) taxation of offshore investments, (iv) taxation of non-residents, (v) transfer pricing, (vi) BEPS and (vii) tax avoidance. Furthermore, New Zealand reported that these structured courses are supplemented by various events throughout the years. To gain further knowledge, the auditors/examiners may also attend external training and courses.

18. Specifically concerning transfer pricing issues, New Zealand reported that its tax administration employs a number of experts on certain subjects, including specialists that focus on transfer pricing and international tax matters. These specialists provide advice and assistance to auditors/examiners, particularly when it concerns more complex issues that arise in practice. In that regard, New Zealand also noted that it has made available a comprehensive series of practice notes on transfer pricing issues, which cover 21 issues of which the mutual agreement procedure is one of the issues. These practice notes are publically available at:

<http://www.ird.govt.nz/transfer-pricing/practice/>

19. New Zealand additionally reported that its tax administration has publicised the Global Awareness Training Module in internal presentations to its staff and that it has made the module available on its International Revenue Strategy intranet site. Furthermore, New Zealand also noted that it has distributed the module to the people in its Investigations & Advice department who are engaged in international matters.

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

Part B

Availability and access to MAP

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

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

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

22. New Zealand reported that no fees are charged to taxpayers for a MAP request and that taxpayers in New Zealand are allowed to request MAP assistance and at the same time seek to resolve the same dispute via domestically available judicial and administrative remedies. Furthermore, such requests can be made regardless of whether the issue under dispute has already been decided via these judicial and administrative remedies. However, New Zealand's competent authority is bound to follow a domestic court decision. In that regard, New Zealand reported it will only enter into dialogue with the other competent authorities concerned to explain its position so as to allow this competent authority to grant relief from double taxation.

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

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

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

24. A taxpayer-initiated foreign adjustment is considered bona fide where it reflects the good faith effort of the taxpayer to report correctly, timely and properly the adjusted taxable income from a controlled transaction or the profits attributable to a permanent establishment

with a view to reflect an arm's length result, and where the taxpayer has otherwise timely and properly fulfilled all of its obligations related to such taxable income or profits under the laws of the treaty partners. As such taxpayer-initiated foreign adjustments may lead to cases of double taxation, it is relevant that there is access to MAP for resolving these cases. Furthermore, specifying whether there is access to the MAP for these adjustments in a jurisdiction's MAP guidance also provides additional clarity.

25. New Zealand reported it provides access to MAP in cases of bona fide taxpayer-initiated foreign adjustments. New Zealand further reported that it will notify the other competent authority of a downward adjustment made in such situation so as to prevent an outcome that leads to (partially) non-taxation of a primary adjustment made.

26. The webpage of New Zealand's tax administration containing information on MAP gives examples of cases for which taxpayers have access to MAP, which includes cases concerning bona fide taxpayer initiated foreign adjustments.

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

[BP.7] Provide guidance on multilateral MAPs

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

28. In recent years, globalisation has created unique challenges for existing tax treaty dispute resolution mechanisms. Whilst the mutual agreement procedure provided for in Article 25 of the OECD Model Tax Convention has traditionally focused on the resolution of bilateral disputes, phenomena such as the adoption of regional and global value chains as well as the accelerated integration of national economies and markets have emphasised the need for effective mechanisms to resolve multi-jurisdictional tax disputes. In that regard, it is for clarity purposes relevant that jurisdiction's MAP guidance includes information on availability of and access to multilateral MAPs.

29. New Zealand reported that it is amenable to consider multilateral MAPs on a case-by-case basis and that it has one such case in its MAP inventory. New Zealand's webpage containing information on MAP, however, does not contain specific guidance on multilateral MAPs. In this respect, New Zealand reported that given the paucity of cases, it did not consider detailed guidance as being necessary but will give further consideration to this matter.

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

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

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

31. If, following an adjustment taxpayers immediately have to pay the tax due, whereas the same amount was already paid to the tax administration of the other jurisdiction involved, double taxation will in fact occur. As taxpayers may then face significant cash-flow issues,

at least for the period the MAP case is pending, it is relevant that jurisdictions provide for suspension of collection procedure for this period under at least the same conditions as available for domestic remedies.

32. New Zealand reported that if a taxpayer submits a MAP request, this does not preclude domestic action. While officially suspension of tax collection is not available for pending MAP cases, New Zealand explained that in practice, however, collection procedures are suspended during the period a valid MAP case is in progress.

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

Part C

Resolution of MAP Cases

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

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

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

35. New Zealand reported it allows taxpayers to request the multi-year resolution of recurring issues through the MAP, which is also stated in the webpage of New Zealand's tax administration that contains information on MAP.

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

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

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

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

38. The webpage of New Zealand's tax administration containing information on MAP specifies that taxpayers can request for MAP assistance simultaneously with initiating domestic law administrative and judicial remedies. However, it is also stated that New Zealand's competent authority is under its domestic law legally bound by decisions from its domestic courts, but that it is willing to enter into dialogue with other competent authorities

to explain its position so as to allow this competent authority to grant relief from double taxation.

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

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

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

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

41. New Zealand reported that imposed penalties and interest can only be deferred if taxpayers challenge the tax assessment through either the domestic disputes process or New Zealand's courts. The webpage of New Zealand's tax administration containing information on MAP also specifies this position.

42. Furthermore, New Zealand reported it is currently considering a change of its domestic law to allow a deferral in all MAP cases, regardless of whether the taxpayer challenged its tax position in New Zealand via domestic available remedies.

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

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

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

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

45. Out of New Zealand's 48 tax treaties, 27 contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention requiring their state to make a correlative adjustment in case a transfer pricing adjustment is imposed by the treaty partner. Furthermore, 19 treaties do not contain such a provision. Of the remaining two treaties, one does not include a provision on associated enterprises at all, as the scope of the treaty is limited to individuals, and one treaty includes a provision on granting corresponding adjustments, but deviates from this provision because granting of corresponding adjustments is only allowed through MAP.

46. New Zealand reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention in its tax treaties where possible and that it will seek to include this provision in all of its future tax treaties. In that regard, New Zealand signed the Multilateral Instrument. Article 17(2) of that instrument stipulates that Article 17(1) – containing the equivalent of Article 9(2) of the OECD Model Tax Convention – will apply in place of or in

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

47. New Zealand has not reserved the right, pursuant to Article 17(3), not to apply Article 17(2) of the Multilateral Instrument for those tax treaties that already contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention. In regard of the 21 tax treaties identified in paragraph 46 above that are considered not to contain this equivalent, New Zealand listed 12 as a covered tax agreement under the Multilateral Instrument, but only for two of them made a notification on the basis of Article 17(4) that they do contain a provision described in Article 17(2). Both treaty partners are a signatory to the Multilateral Instrument and listed their treaty with New Zealand under that instrument, but only one of them has, on the basis of Article 17(3), reserved the right not to apply Article 17(2) as it considered that its treaty with New Zealand already contains the equivalent of Article 9(2). The remaining treaty partner made a notification on the basis of Article 17(4). Therefore, at this stage, the Multilateral Instrument will, upon entry into force, replace the provisions in one treaty to include the equivalent of Article 9(2) of the OECD Model Tax Convention.

48. Furthermore, for the remaining 10 of the 12 tax treaties that New Zealand listed as covered tax agreements under the Multilateral Instrument and for which it did not make a notification on the basis of Article 17(4), two have not listed their treaty with New Zealand under that instrument. Of the relevant eight treaty partners, one has, pursuant to Article 17(3), reserved the right to not apply Article 17(2), as they consider their treaty with New Zealand already to contain the equivalent of Article 9(2) of the OECD Model Tax Convention. Therefore, at this stage, the Multilateral Instrument will, upon entry into force, supersede the remaining seven treaties only to the extent that the provisions contained in those treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1).

49. One peer provided input and mentioned that its treaty with New Zealand includes Article 9(2) of the OECD Model Tax Convention, which is indeed the case.

Part D

Implementation of MAP agreements

50. There are no best practices for Part D.

Glossary

Action 14 Minimum Standard	The minimum standard as agreed upon in the final report on Action 14: Making Dispute Settlement Mechanisms More Effective
Look-back period	Period starting from 1 January 2015 for which the New Zealand wished to provide information and requested peer input
Multilateral Instrument	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD Model Tax Convention	OECD Model Tax Convention on Income and on Capital as it read on 21 November 2017
Terms of Reference	Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective (CTPA/CFA/NOE2(2016)45/REV1)



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