

**Day 4, Session 3**

# Resolving Transfer Pricing Disputes



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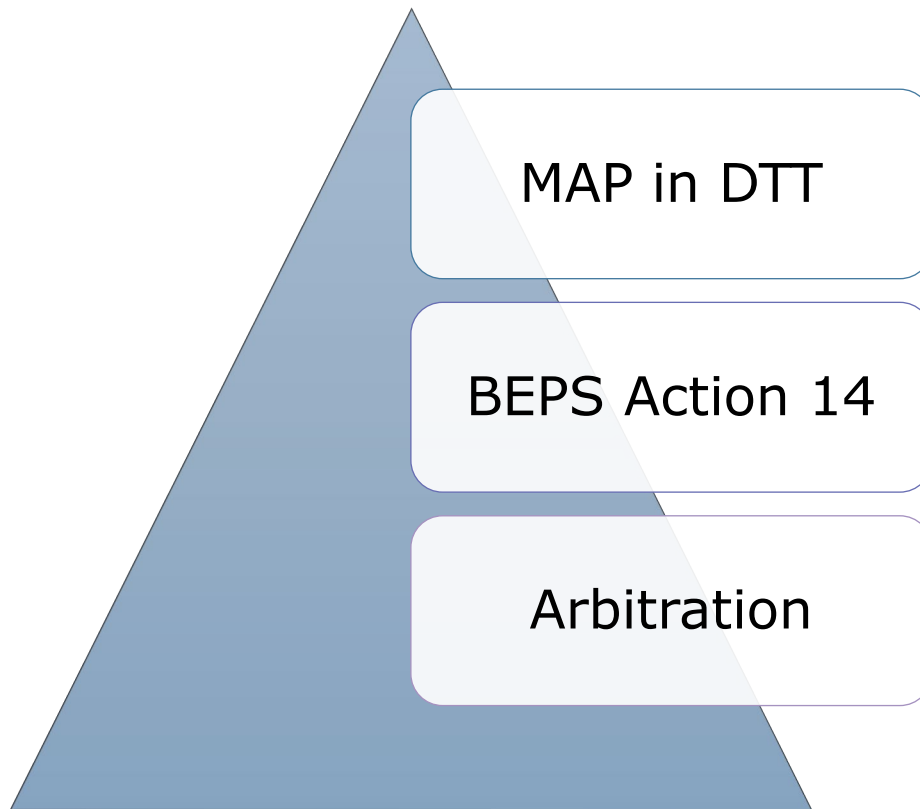


Advanced Transfer Pricing Course (General Topics), April 15-19, 2024

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# Agenda



## Section I

# MAP in DTT

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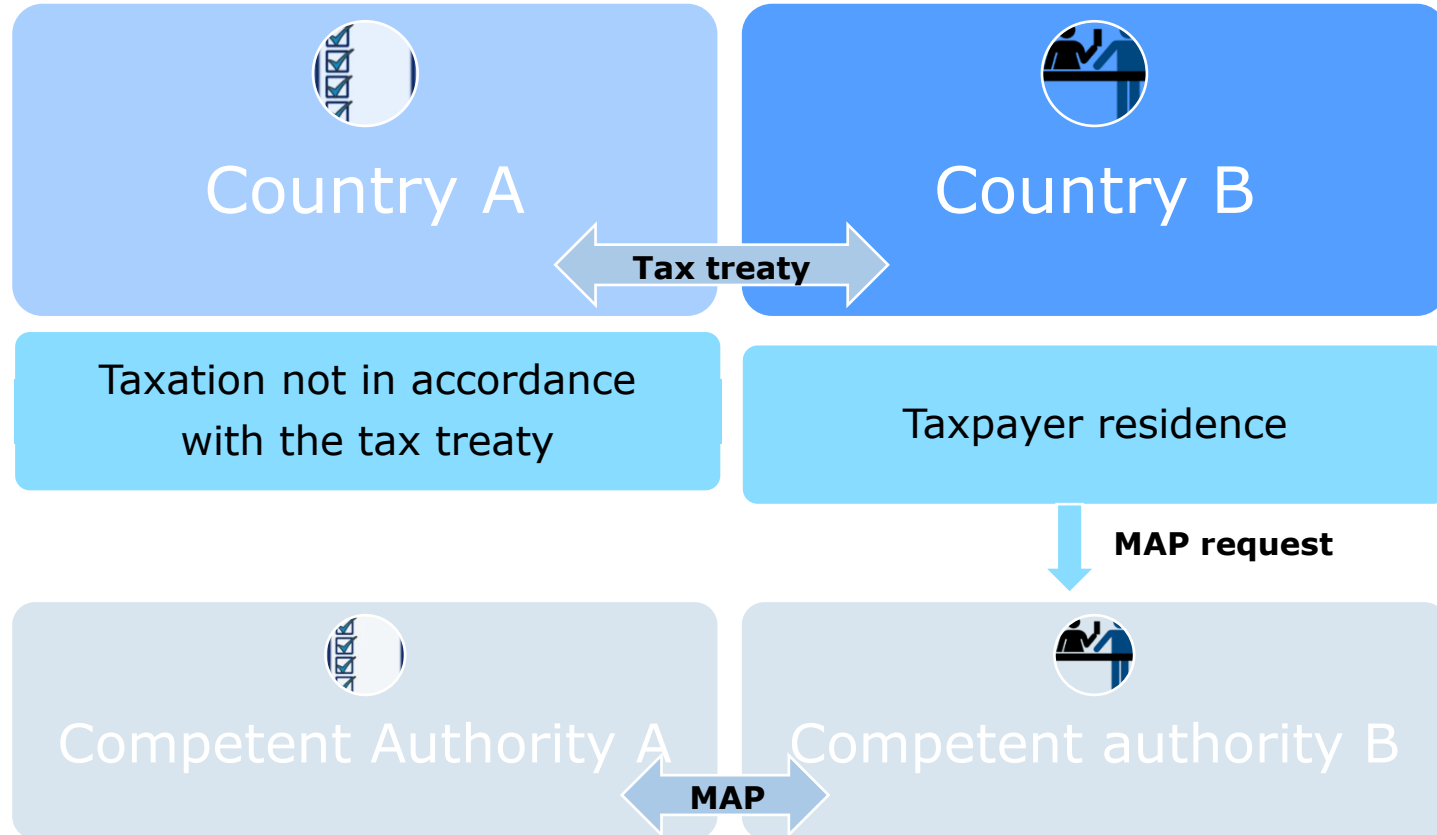
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# Purpose of the MAP provision



# MAP - Example





# Operation of MAP

## *Initiation of the 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 ...**

- **Who?**
- Consider
- What is an action?
- Result or will result
- Taxation not in accordance with ...

... **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.

- **Where?**
- Irrespective of domestic law remedies
- What is presenting of a case?
- Obligation to present it to both competent authorities?

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.

- **When?**
- What is the first notification of action?

# Operation of MAP

## Handling and resolving the case – Article 25(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** ...

- What constitutes a justified objection?
- When is it not possible 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.**

- What is *endeavour* to resolve a case?
- When is a case resolved?

Any agreement reached shall be implemented **notwithstanding any time limits** in the domestic law of the Contracting States

- What are domestic time limits in this respect?

# Operation of MAP

## *General MAP provisions – Article 25(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.*

- Concerns cases of a general nature, for example, applying to a category of taxpayers
- Not cases under Article 25(1)
- Examples:
  - Definition of an “ambiguous” term
  - Preventing disputes via bilateral APAs
  - Procedures for refunds of withholding taxes
- Result binding?

*They may also consult together for the elimination of double taxation in **cases not provided for** in the Convention.*

- Cases that do not come in the scope of the convention
- Examples?



# MAP in practice

<i>Unilateral phase</i>	
Step 1	Submission of a MAP request – taxpayers
Step 2	Case eligible for MAP? – CA of receipt
Step 3	Analysis of the case: unilateral relief or negotiations necessary – CA of receipt
<i>Bilateral phase</i>	
Step 4	Preparing a position paper, discussions and reaching an agreement – both CAs
Step 5	Implementation MAP agreement – both CAs



## Section II

# BEPS Action 14

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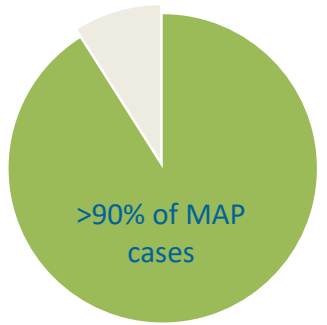


# The new approach to dispute resolution

## Action 14 Minimum Standard

### 20 countries

Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States.



# BEPS Action 14: *Minimum Standard*

## Preventing Disputes

Roll-back of bilateral APAs

## Availability and access to MAP

Bilateral notification/consultation where ONJ

Access to MAP

- – TP cases,
- audit settlements,
- anti-abuse cases,
- where info provided by taxpayer;
- special remedies

Publish MAP guidance, MAP profile

## Resolution of MAP cases

24 months on average

Adequate resources to CA function

Authority to resolve – no influence by tax admin or policy

Adequate performance indicators

transparency re arbitration

## Implementation of MAP Agreements

Ensure implementation of all MAP agreements

Timely implementation

## Treaties

Article 25(1)-(3) in treaties

25(1) – 2017/2014 version

25(2) 2 - option

# BEPS Action 14: *Best Practices*

## Preventing disputes

- **Implement bilateral APA programmes**
- **Guidance on APAs in MAP guidance**
- Publish MAP agreements of a general nature
- **Develop “global awareness”**

## Availability and access to MAP

- Facilitate recourse to MAP
- **Suspension of collections during MAP**
- **Access in case of bona fide taxpayer-initiated foreign adjustments**
- Guidance on multilateral MAPs

## Resolution of MAP cases

- **Permit multi-year resolution through the MAP of recurring issues**
- Publish info on relationship between MAP and domestic law
- Guidance on the consideration of interest and penalties in MAP
- Include art. 9(2) OECD MTC

# State of play peer review process

## First peer review process

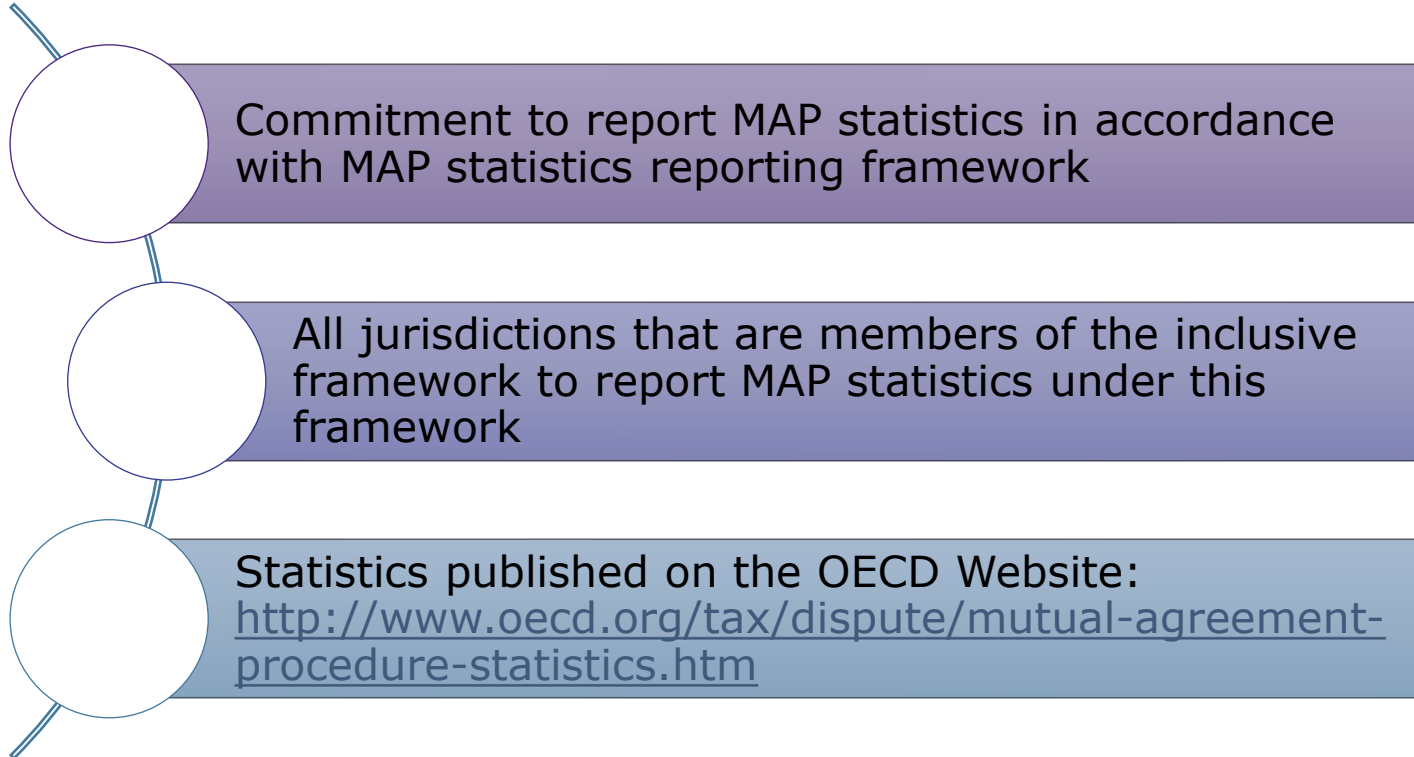
- 82 jurisdictions reviewed, 55+ deferred
- Stage 1 review and stage 2 monitoring finalised
- Results at:  
<https://www.oecd.org/tax/beps/beps-actions/action14/> (scroll down)

## New peer review process

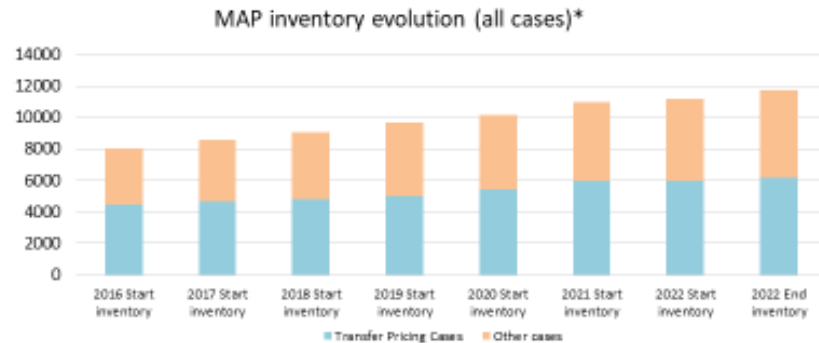
- All jurisdictions
- Significant MAP experience ► full peer review
  - Starts Q2 2024, schedule on website
- Other jurisdictions ► simplified review
  - Started January 2023, schedule on website



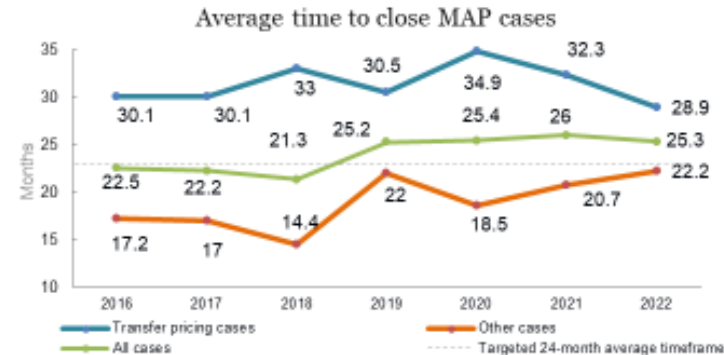
# MAP statistics



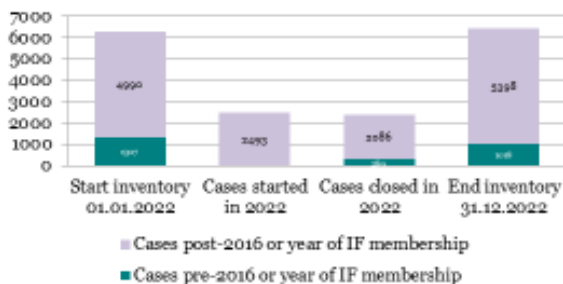
# 2022 MAP statistics



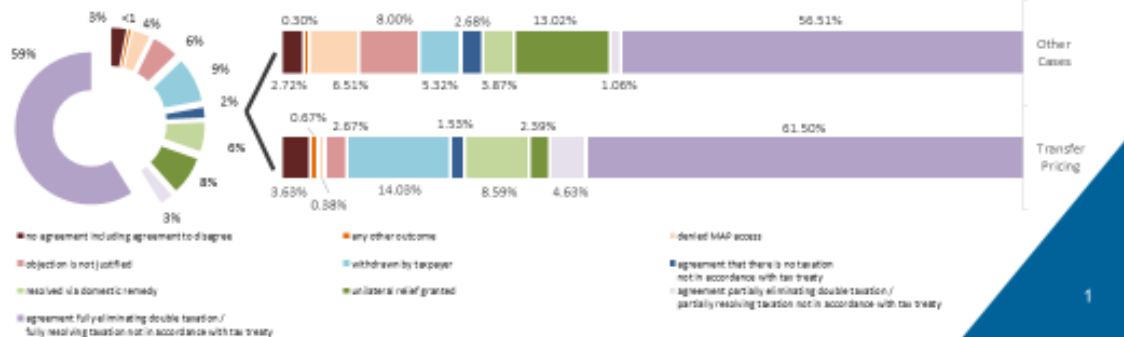
\* These numbers do not eliminate the double counting of MAP cases



## 2022 MAP inventory



## 2022 MAP outcomes



# More transparency as from 2023 statistics

## MAP statistics:

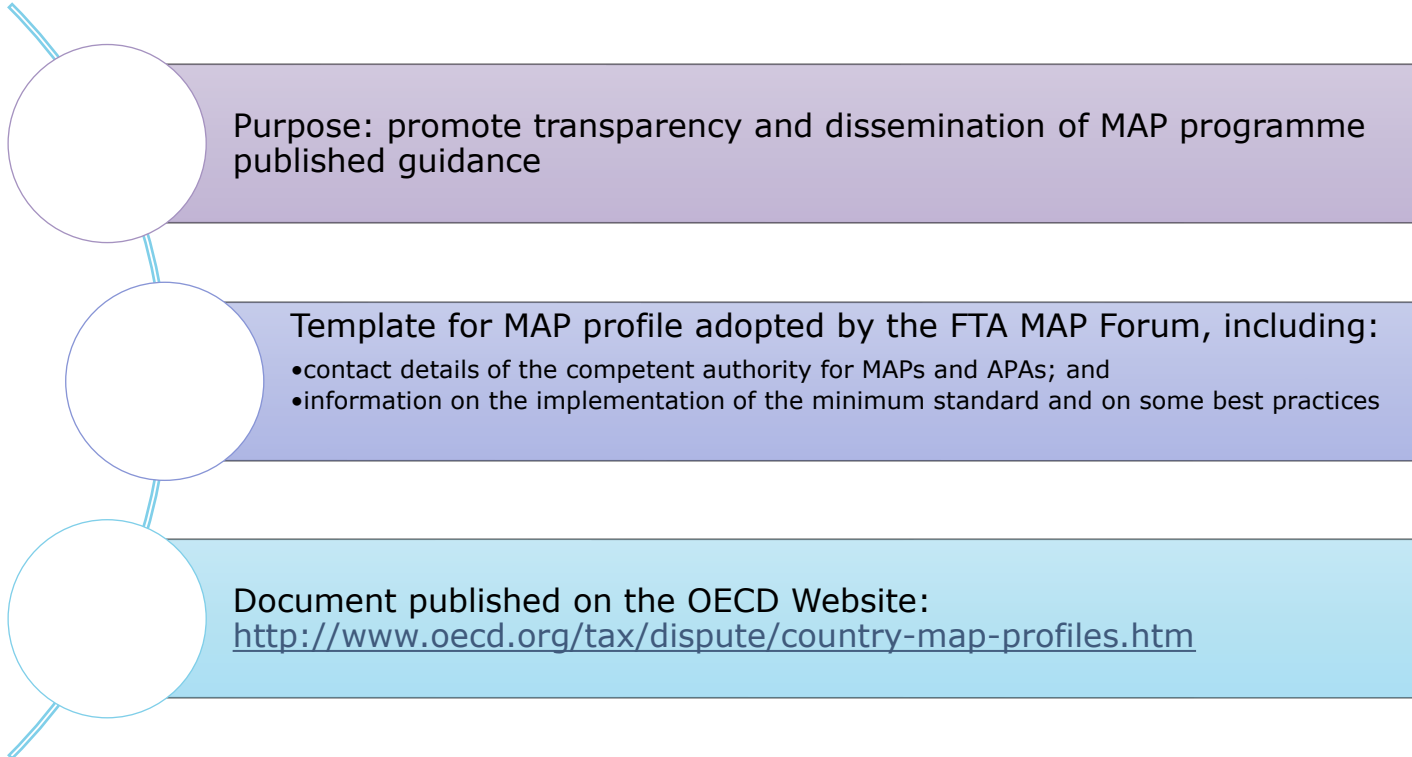
- Average time in unilateral and bilateral phase
- Age of cases remaining in inventory

## APA statistics

- Flexibility
  - Counting
  - Reporting period



# MAP Profile



## Section III

# Arbitration

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# Timeline of different tools

Arbitration  
Convention of 23 July  
1990

- elimination of double taxation in connection with the adjustment of profits of associated enterprises

10 October 2017: EU  
directive on dispute  
resolution

Arbitration in double  
taxation treaties:

- as from 2008 in OECD Model Convention
- November 2016: arbitration in MLI





# Arbitration Convention

## *Scope of application cases covered*

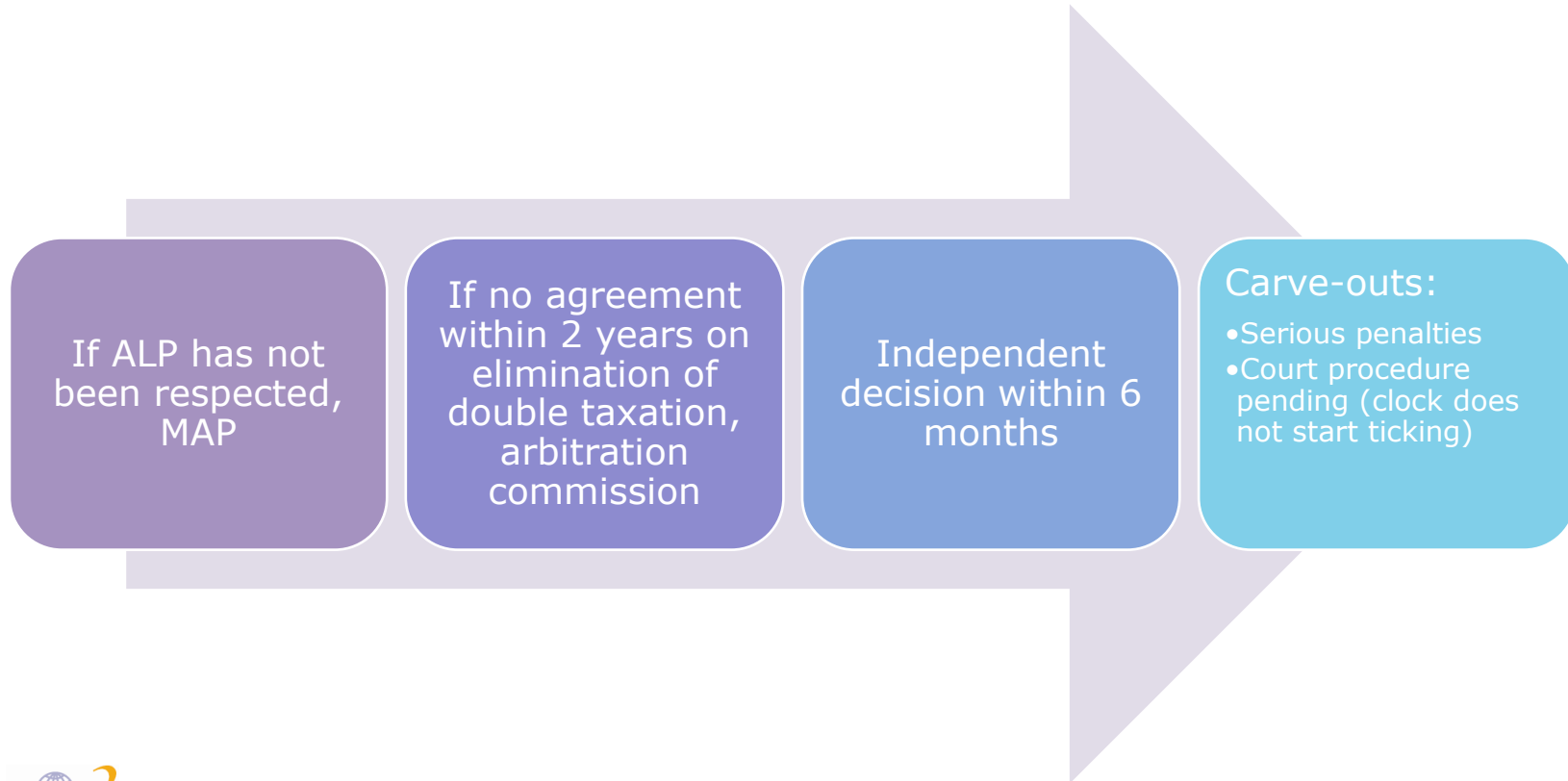
### Article 1

*This Convention shall apply where, for the purposes of taxation, profits which are included in the profits of an enterprise of a Contracting State are also included or are also likely to be included in the profits of an enterprise of another Contracting State on the grounds that the principles set out in Article 4 and applied either directly or in corresponding provisions of the law of the State concerned have not been observed.*

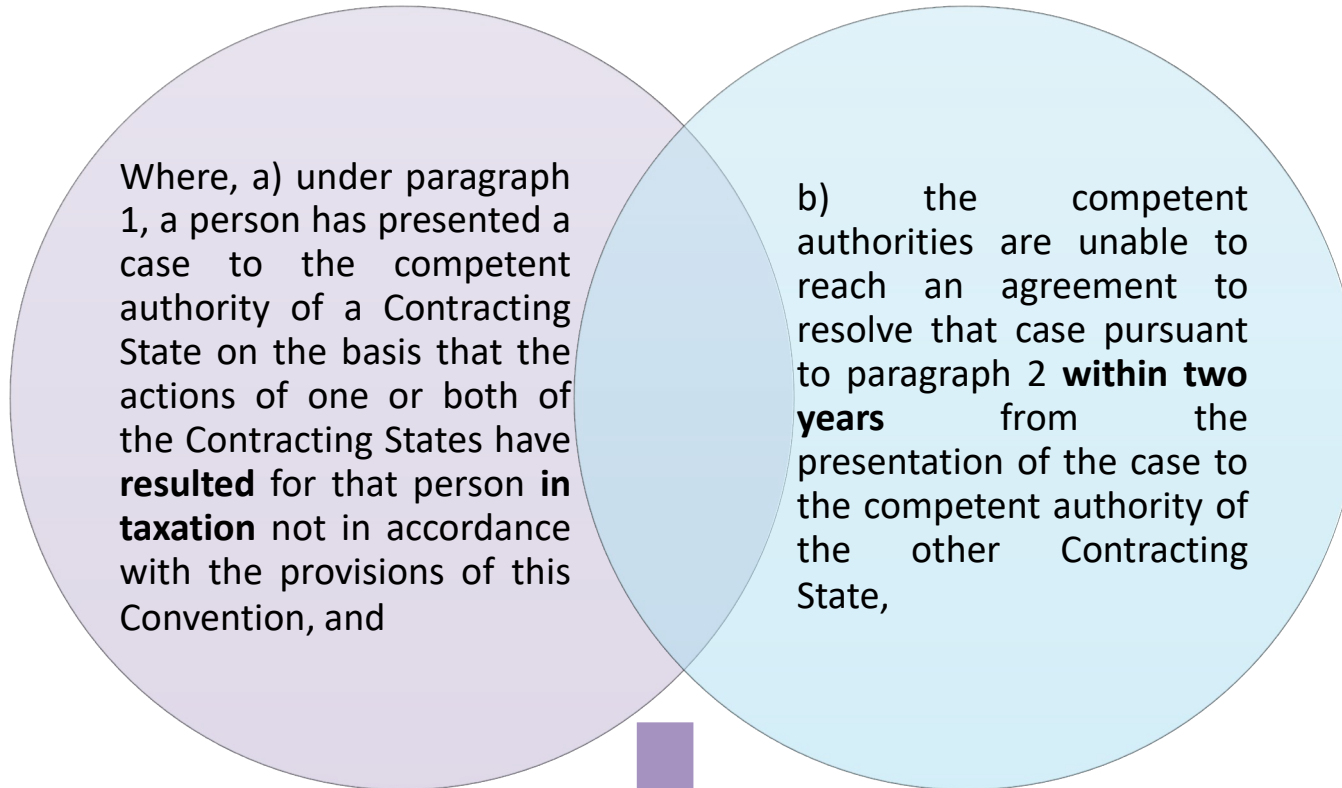
- Scope includes:
  - Attribution of profits to a PE
  - Situations where losses are made

# Arbitration Convention

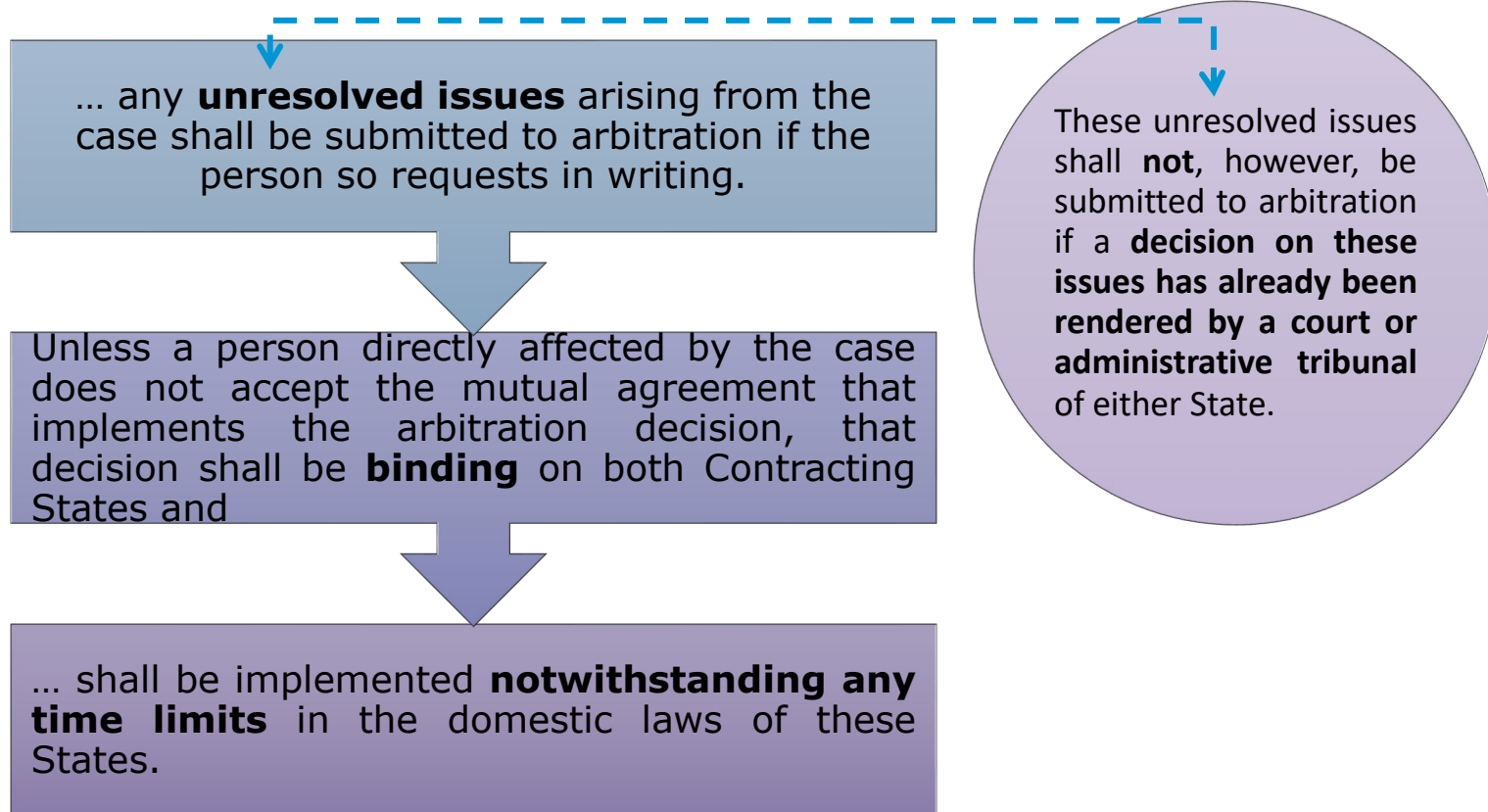
## *Main features*



# Article 25 (5) of the OECD Model Tax Convention



# Article 25 (5) of the OECD Model Tax Convention



# Arbitration under the Multilateral Instrument

## Basis

Same basis as Article 25(5)

More detailed rules of procedure

Specific rules for acceptance of the outcome and implementation

## Scope

All unresolved issues

States may limit the scope via “free form” reservations → subject to acceptance by treaty partners

## Timing

Two-year period for MAP, with option to three-years

Specific rules to determine start date of the period

## Detailed rules

Appointment of arbitrators

Confidentiality during the arbitration procedure

Type of arbitration procedure: independent opinion vs. baseball arbitration

Cost sharing

Direct binding effect of the arbitration procedure

# EU Directive on dispute resolution

## *Scope of application cases covered*

### Article 1

*This Directive lays down rules on **a mechanism to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital. (...) For the purposes of this Directive, the matter giving rise to such disputes is referred to as a 'question in dispute'.***

- Scope includes:
  - Double tax conventions between Member States on income/capital
  - EU Arbitration Convention
- Carve-outs: unilateral decision to deny access to dispute resolution process
  - Tax fraud, wilful default and gross negligence
  - No double taxation





# EU Directive on dispute resolution

## *Procedural functioning*

### Phase I: submission

- 3-year filing period to either competent authority concerned

### Phase II: review stage

- 6 months for decision on acceptance complaint

### Phase III: MAP

- 2 years for reaching a MAP agreement

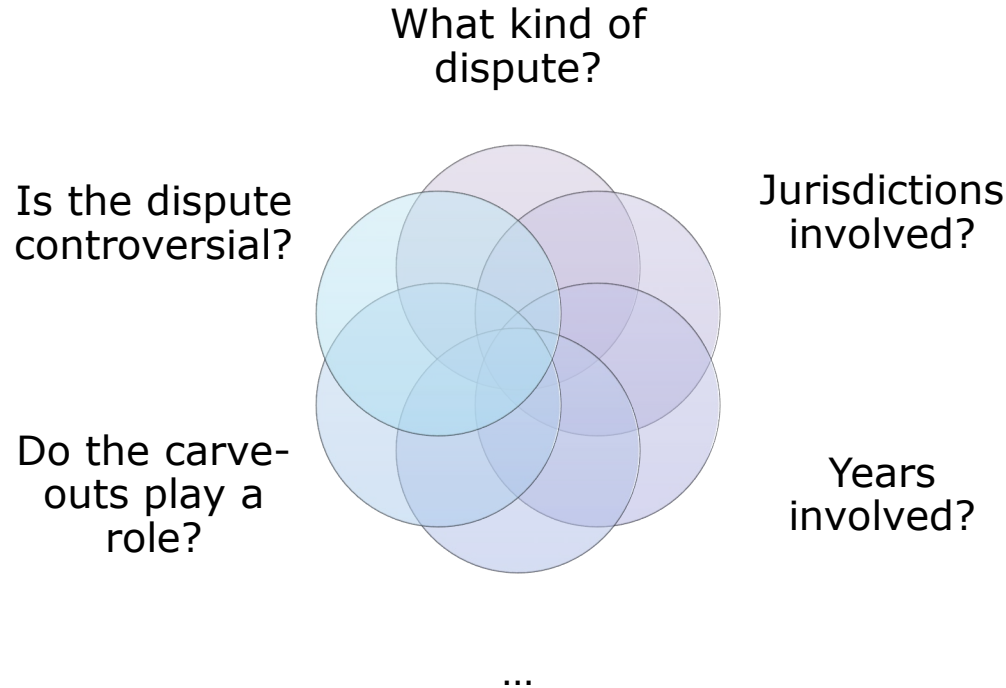
### Phase IV: arbitration

- 4 months for establishing an advisory commission
- 6 months for the commission to render an opinion

### Phase V: final decision and implementation

- 6 months for taking a final decision
- 2 months for taxpayers to accept the decision and renouncing domestic remedies

# Which tool to use?





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