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THE EFFECTIVENESS OF THE ADOPTED OECD TRANSFER PRICING DISPUTE RESOLUTION MECHANISMS IN AN AFRICAN CONTEXT

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DECLARATION

I declare that 'THE EFFECTIVENESS OF THE ADOPTED OECD TRANSFER PRICING DISPUTE RESOLUTION MECHANISMS IN AN AFRICAN CONTEXT' is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

Dr ___________________

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GLOSSARY

Abbreviations	Detailed description
ACA	Arbitration and Conciliation Act of Uganda
ADR	Alternative Dispute Resolution
AEOI	Automatic Exchange of Information
APA	Advance Pricing Agreement
AMATM	ATAF Agreement on Mutual Assistance in Tax Matters
ATAF	African Tax Administration Forum
ATR	Advance Tax Ruling
AU	African Union
BEPS	Base Erosion and Profit Shifting
CAA	Competent Authority Agreement
CbCR	Country by Country Reports
CRS	Common Reporting Standards
CTA	Covered Tax Agreement
DTA	Double Tax Agreements
DTC	Davis Tax Committee
EACDTA	East African Community Double Taxation Agreement
EC	European Commission
ECC	European Commission Convention
ECJ	European Court of Justice
EEC	European Economic Community
EOI	Exchange of Information
EU	European Union
FATCA	Foreign Account Tax Compliance Act
GRA	Ghana Revenue Authority
ICC	International Chamber of Commerce
ICJ	International Court of Justice
IFF	Illicit Financial Flows
IT	Information Technology

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ITA	South African Income Tax Act 58 of 1962
KRA	Kenyan Revenue Authority
MAAC	Multilateral Convention Mutual Administrative Assistance in Tax Matters (as it appears on the OECD abbreviation list)
MAP	Mutual Agreement Procedure
MRA	Mauritius Revenue Authority
MBA	Mandatory Binding Arbitration
MBTA	Mandatory Binding Tax Arbitration
MCAA	Multilateral Competent Authority Agreement
MEMAP	Manual on Effective Mutual Agreement Procedures
MOU	Memorandum of Understanding
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS
MMAA	Multilateral Mutual Administrative Assistance
MNE	Multinational Enterprise
MTC	Model Tax Convention
NYC	New York Convention
NCIA	National Centre for International Arbitration
OECD	Organisation for Economic Co-operation and Development
OTO	Office of the Tax Ombudsman
SADC	Southern African Development Community
SARS	South African Revenue Service
TAA	Tax Administration Act 28 of 2011
TPM	Transfer pricing method
TIEA	Tax Information Exchange Agreements
UIA	Uganda Investment Authority
UN	United Nations
UNECA	United Nations Economic Commission for Africa
URA	Uganda Revenue Authority
WTO	World Trade Organisation
WCO	World Customs Organisation

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ABSTRACT

With the developments happening globally that are aimed at curbing base erosion and profit shifting by multinationals, improving the resolution of transfer pricing disputes has been identified as one of the key issues. This thesis investigates the challenges uniquely faced by African countries that militate against the use of the OECD transfer pricing dispute resolution mechanisms. The thesis starts by reflecting on the effect of transfer pricing manipulation by multinational enterprises in Africa in particular. Transfer pricing manipulation is one of the causes of the so-called tax gap, which is, the gap between anticipated and actual revenue collection. The aggression by revenue authorities against transfer pricing manipulation in order to close this gap has triggered a lot of transfer pricing adjustments. These adjustments have resulted in multiple transfer pricing disputes.

In the analysis of the adopted OECD dispute resolution mechanisms, the thesis focuses on the effectiveness of the mutual agreement procedure (MAP), the advance pricing arrangement (APA) and the mandatory binding arbitration (MBA). It identifies the problems that result in the failure of or the delay in the resolution of many transfer pricing disputes by analysing the domestic frameworks that exist in four African countries namely: South Africa, Kenya, Uganda and Ghana.

The thesis identifies problems such as the absence of a tax treaty network within the African continent, the use of underdeveloped double tax agreements and the lack of commitment from African countries to subscribe to and ratify multilateral conventions. These problems delay or stifle the resolution of tax treaty disputes. They also cause uncertainty for taxpayers and lead to continued tax avoidance by multinational enterprises that essentially avoid paying tax in African countries where the economic activities of these enterprises take place.

The thesis also identifies the importance of other OECD supporting tools such as the exchange of tax information in the resolution of transfer pricing disputes. It focuses on tools such as country by country reports, the master file, the local file and simultaneous tax examination as covered by the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

The thesis contributes to the resolution of the identified problems with transfer pricing dispute resolution in Africa by recommending certain improvements that can be effected. These

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recommendations entail, regarding the MAP, the expansion of tax treaty networks by African countries and the establishment of a Tax Treaty Dispute Resolution Committee by ATAF.

Regarding the APA, it is recommended that African countries should sign the multilateral instrument (MLI) and make use of advance tax rulings (ATRs) as alternatives. With respect to the MBA, this thesis recommends that African countries should use optional arbitration by effectively using article 25(4) of the OECD Model tax convention (MTC). It also recommends that African countries must enhance their tax transparency by ratifying multilateral conventions that seek to address international tax co-operation and to improve compliance with transfer pricing documentation requirements in order to make the resolution of transfer pricing disputes more effective.

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CHAPTER 1

INTRODUCTION

1 Background

According to Arnold & McIntyre:

> [a] transfer price is a price set by a taxpayer when selling to, buying from, or sharing resources with a related person. For example, if A Co manufactures goods in Country A and sells them to its foreign affiliate, B Co, organised in Country B, the price at which that sale takes place is called a transfer price. A transfer price is usually contrasted with the market price, which is the price set in the marketplace for transfers of goods and services between unrelated persons.[1]

Based on this definition; 'it is clear that it would be possible for a multinational group of companies to price intra-group transactions so that profits are taxed in low tax jurisdictions while deductions are obtained in high tax jurisdictions.'[2] This has resulted in significant loss of the tax revenue worldwide. Research shows that Africa loses approximately $50 billion US dollars per annum through such practices.[3]

As stated above, transfer pricing can be used as a mechanism of relocating profits to a more favourable tax jurisdiction for the purposes of obtaining a tax benefit. Accordingly, transfer pricing is increasingly seen as a risk which requires proper management, hence the proliferation in transfer pricing legislation and guidelines in recent years. There is a need for revenue authorities world-wide to regulate transfer pricing with the hope of preventing base erosion and profit shifting (BEPS) and the significant loss in tax revenue that accompanies it.

The Organisation for Economic Co-operation and Development (OECD) has been at the forefront, since 1995, of resolving the problem of transfer pricing manipulation by providing

[1] BJ Arnold & MJ McIntyre *International tax premier* (2002) 55. See also A Miller & L Oats *Principles of international taxation* (2016) 352. R Feinschreiber & M Kent *OECD transfer pricing handbook: guidance on the OECD regulations* (2012) 1 state that transfer pricing 'is an economic and not a legal concept. However, one can argue that even if it is said to be an economic concept, the regime thereof requires tax legislative regulation because of its tax consequence and so are the disputes that will arise therefrom.

[2] L Olivier & M Honiball *International tax: a South African perspective* (2008) 484.

[3] This was revealed by then South African Finance Minister Pravin Gordhan at a High Level Conference on Illicit Financial Flows: Inter-Agency Cooperation and Good Tax Governance in Africa organised in Cooperation with United Nations Office on Drugs and Crime held on 14 July 2016 in Pretoria https://www.fic.gov.za/Documents/2016071501%20-%20Speech%20by%20Minister%20of%20Finance%20on%20Illicit%20Financial%20Flows.pdf (accessed 10 December 2016) 4.

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guidelines for multinational enterprises (MNEs) and tax administrations.[4] Various instruments have been suggested and used by different forums with the aim of resolving disputes vis-à-vis transfer pricing but many of them have not yielded the intended results. The OECD itself came up with a number of methods to be used when pricing goods and services between intra-group transactions, with the 'arm's length principle' being the most favoured.

To counter BEPS arising from business transactions between related parties based on the arm's length principle, various methods were introduced namely the:

- i) comparable uncontrolled price method;
- ii) the resale price method;
- iii) cost plus method;
- iv) transactional net margin method;
- v) transactional profit split method.[5]

It is important to note that the efficiency of the arm's length principle and the suggested transfer pricing methods is dependent on other tools such as the double tax agreement (DTA) and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAAC).[6] The mutual agreement procedure (MAP), advanced pricing arrangement[7] (APA) and the mandatory binding arbitration (MBA) are some of the mechanisms suggested for the resolution of transfer pricing disputes.

2 Statement of the Problem

The regulation of transfer pricing between related parties is one of the many anti-tax avoidance measures which revenue authorities use internationally. Revenue authorities internationally have demonstrated an increasingly vigilant approach against MNEs and as a result there is a possibility of double taxation. Conversely, there is a possibility of double non-taxation for some MNEs which may in some instances lead to tax evasion.

[4] OECD *Transfer pricing guidelines for multinational enterprises and tax administrations* (2017) https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations (accessed 15 January 2017) 15.
[5] OECD Transfer pricing methods (2010) https://www.oecd.org/ctp/transfer-pricing/45765701.pdf (accessed 17 April 2020) 2. See generally A Rudzikiene 'Transfer pricing methods' (2017) https://www.royaltyrange.com/home/blog/transfer-pricing-methods (accessed 17 April 2020).
[6] OECD Multilateral convention on mutual administrative assistance in tax matters (MAAC) https://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm (accessed 21 June 2020).
[7] Art 25(3) and (4) of articles of the Model convention with respect to taxes on income and on capital (MTC); Y Hadari 'Resolution of international transfer-pricing disputes' (1998) 46 *Canadian Tax Journal* 56.

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MNEs are an important source of global innovation, growth and tax revenue. Nevertheless, as the proportion of international trade between members of MNEs grows, the scope for these companies to exploit differences between national tax systems to reduce their tax liability also expands. Aggressive tax practices by MNEs undermine countries' tax bases and the fairness of tax systems. According to Cooper et al 'transfer pricing, or rather, transfer mispricing, by multinationals is probably the most challenging global tax planning tool.'[8]

The recent legislative attempts to curb BEPS through transfer pricing have triggered transfer pricing audits by various tax authorities. This has resulted in a lot of transfer pricing adjustments. Transfer pricing adjustments entail both an upward and a downward adjustment by revenue authorities. The power by tax authorities to effect an upwards adjustment on a transfer price to prevent taxpayers from shifting profits to related juristic persons organised in tax havens or low tax jurisdictions has resulted in transfer pricing disputes, particularly where the other country involved does not effect a corresponding downwards adjustment.[9]

The transfer pricing adjustments referred to above result in disputes between taxpayers and revenue authorities. The resolution of these disputes is a challenge. The research will examine the efficacy of the MAP, APA and MBA as the adopted OECD transfer pricing dispute resolution mechanisms. The research looks into current guidelines and frameworks in selected African countries to determine the efficacy of the above-mentioned OECD transfer pricing dispute resolution mechanisms. The research will also look at the efficacy of the other supporting tools adopted by the OECD in the resolution of transfer pricing disputes.

3 Rationale

3.1 Transfer Pricing Dispute Resolution Challenges

This research deals with the importance of the speedy and effective resolution of transfer pricing disputes. It examines the efficacy of the OECD dispute resolution mechanisms with the aim of recommending changes that will improve dispute resolution in transfer pricing cases in African countries, if any such recommendations are required. The resolution of transfer pricing disputes is important in the administration of tax in Africa.

[8] Foreword to J Cooper et al *Transfer pricing and developing economies: a handbook for policy makers and practitioners* (2016).
[9] Arnold & McIntyre (n 1 above) 56. These adjustments have for long resulted in multiple transfer pricing disputes. It is common cause that an increase in international trade and investments is accompanied by growth in cross border commercial disputes. These commercial disputes have placed a strain on international rules which were designed a long time ago.

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When one country makes an upward adjustment, the other country is expected to make a corresponding downward adjustment in order to eliminate double taxation.[10] Failure by the other country to effect a corresponding transfer pricing adjustment may automatically trigger a transfer pricing dispute. Various dispute resolution mechanisms have been adopted but the confusion is still there in many cases.

The enforcement of new regulations by tax authorities aimed at curbing BEPS will come with a number of new rules that will be challenging for taxpayers to apply and for tax authorities to administer. This will trigger multiple transfer pricing disputes that will need to be resolved. The efficacy of the transfer pricing dispute resolution process will be important in these instances. Some commentators have suggested that we have to 'develop a consistent philosophy of controversy which will dictate under what circumstances will disputes be resolved, litigated or otherwise handled.'[11]

In 2011, the African Union (AU) and the United Nations Economic Commission for Africa (UNECA)[12] brought together various Ministers of Finance and Economic Development across Africa. Together they identified illicit capital outflows as an obstacle to development on the continent. From this meeting a high-level panel delegation on illicit financial flows (IFFs) chaired by former President of South Africa, Thabo Mbeki emerged.

On 31 January 2015, the panel tabled its final report which summarised three components that give rise to illicit financial outflows namely:

i) the commercial;
ii) the criminal; and
iii) the corrupt.

The report identified transfer pricing manipulation as one of the contributors to illicit financial outflows within the commercial component. This research only focuses on the commercial

[10] Art 9 OECD MTC. Should both countries claim the same taxing rights then a dispute will certainly arise. This will arise also if there is a mismatch in the application of the pricing method hence the need for co-operation and co-ordination amongst countries.
[11] See generally T MacDonald 'Uneven BEPS adoption complicates tax picture' (2017) https://taxinsights.ey.com/archive/archive-articles/uneven-beps-adoption-complicates-tax-picture.aspx (accessed 23 January 2017).
[12] UNECA also known as ECA (Economic Commission for Africa) https://www.uneca.org/ (accessed 12 February 2017). UNECA is an African regional body established to promote the economic and social development of its member states, to foster intra-regional integration, and promote international cooperation for Africa's development.

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component which includes mainly transfer pricing manipulation with specific reference to the resolution of disputes arising therefrom.

IFFs out of the developing world are a substantial impediment to tackling poverty and inequality. They deprive the African continent of an estimated US $50 billion each year, funds that could be used for development.[13] Baker states that 'illicit financial flows are corrosive to development efforts and curtail the ability to capture domestic resources.'[14] African countries have placed emphasis on domestic resource mobilisation (DRM). However, IFFs undermine this process in the sense that developing countries world-wide lose around US $1 trillion in IFFs per year.

The inability to resolve disputes and the absence of mechanisms and guidelines to effectively resolve transfer pricing disputes are some of the issues that pose a threat to Africa's tax base.[15] However, the resolution of transfer pricing disputes cannot be achieved unilaterally, hence the need for a multinational approach. There are a number of unique challenges faced by Africa. Obstacles that prevent countries from resolving tax treaty related disputes have been on the table at the OECD for years. This led the OECD to adopt a 15 Action Plan to address BEPS. The 15 Action BEPS Project Plan is to:

> [e]nsure that profits are taxed where the economic activities generating those profits are performed and where value is created, while at the same time giving business greater certainty by reducing disputes over the application of international tax rules.[16]

3.2 OECD BEPS Project Plan

Improving dispute resolution has always been one of the integral parts of the work of the BEPS Project. Even though Action 14 thereof is specifically crafted and adopted to deal with disputes, five or more Actions in the BEPS Project Plan are directly or indirectly linked with resolving transfer pricing disputes namely:

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[13] See generally G Nicolson 'Fighting Africa's illicit financial flows: A 14-step guide revealed' (2017) *Daily Maverick*. https://www.dailymaverick.co.za/article/2017-01-29-fighting-africas-illicit-financial-flows-a-14-step-guide-revealed (accessed 12 February 2017). The AU summit was about taking steps to strengthen the institutional and regulatory capacity to combat illicit financial outflows and establishing a multifaceted but united front to address the complex nature of illicit financial from Africa https://www.uneca.org/events/types/main-events (accessed 21 June 2020).

[14] R Barker (then) President of the Global Financial Integrity. This statement was made at the same AU summit mentioned above.

[15] This was also seen in *Unilever Kenya v Commissioner of Income Tax* [2005] eKLR Income Tax Appeal No 753 of 2003. In this case, the absence of domestic guidelines triggered the application of OECD guidelines in a matter before the court. It is against this background that it is important for African countries to be active in the development of their transfer pricing legislation and guidelines to be used when challenges arise.

[16] J Vreeswijk & AL Tan 'BEPS is broader than tax: practical business implications of BEPS: the impact of BEPS Action 7 on operating models' (2016) 105 *International Tax Review* 17.

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i) Action 5 dealing with harmful tax practices.
ii) Action 6 dealing with the prevention of tax treaty abuse.
iii) Action 8 dealing with transfer pricing.
iv) Action 13 dealing with country-by-country reporting.
v) Action 15 dealing with multilateral instruments.

These efforts by the OECD and some of the G20 countries have neither dealt with the reduction of disputes nor the effective resolution thereof. Rather there has been an escalation in the number of unresolved transfer pricing dispute resolution cases. Looking at transfer pricing disputes between treaty partners among OECD countries, there has been a remarkable increase in disputes from 2006 through to 2014.[17]

One should not forget that there are issues of political expediency that normally affect relations between countries. The question is, at what stage can a country use any of the methods or mechanisms? Some scholars have suggested that to avoid conflicting positions on the same unresolved issues one should not pursue domestic legal remedies such as the courts system and the MAP at the same time.[18]

At the Foundation for International Taxation Conference held in 2015 in Mumbai, various professionals and academics identified that Action 14 has shortcomings including but not limited to:

i) whether the MBA has been adequately addressed;
ii) how far can countries not supporting the MBA stretch the argument on sovereignty;
iii) is mediation an option to non-OECD countries?[19]

In October 2016, the OECD released a revised BEPS Action 14 and later in December 2016, launched a peer review monitoring process in an attempt to enhance dispute resolution.[20] Exchange of information was also highlighted as one of the key issues to be addressed to effectively address transfer pricing disputes. The need for more information was pointed out in

[17] Cooper et al (n 7 above) 329.
[18] Art 25 OECD MTC Commentaries on the articles of the convention http://www.oecd.org/berlin/publikationen/43324465.pdf (accessed 12 February 2017) para 76.
[19] Foundation for International Taxation Conference-December 3-5 2015 ITC held at Maratha, Mumbai available on https://www.ibfd.org/sites/ibfd.org/files/content/pdf/FIT-Conference-2016-Flyer.pdf (accessed 13 February 2017).
[20] OECD BEPS Action 14 'On more effective dispute resolution mechanisms' (2016) OECD Peer review documents. http://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf (accessed 13 February 2017) 7. All these efforts have not yet yielded the intended results. The process is still underway.

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the BEPS Project Report entitled: 'Transfer Pricing Documentation and Country-by-Country Reporting.'[21] Consensus and a co-ordinated effort between states is necessary in order to foster all forms of administrative assistance in matters concerning taxes of any kind whilst at the same time ensuring adequate protection of the rights of taxpayers.[22]

4 Research Questions

This research aims to respond to the following questions:

4.1 What is transfer pricing and transfer pricing manipulation?

4.2 What are the OECD transfer pricing dispute resolution mechanisms and how effective are they?

4.3 What are the challenges for developing African countries in resolving transfer pricing disputes through the MAP?

4.4 What are the challenges for developing African countries in resolving transfer pricing disputes through the APA?

4.5 What are the challenges for developing African countries in resolving transfer pricing disputes through MBA?

4.6 How can the other OECD support tools be employed to ensure the efficacy of the current OECD dispute resolution mechanisms?

4.7 What role should African regional bodies such as the ATAF play in resolving transfer pricing disputes, if any?

4.8 What recommendations, if any, can be made in order to improve the efficacy of transfer pricing dispute resolution mechanisms in Africa?

5 Research Methodology

The research methodology to be used will be the qualitative research method. A comparative legal analytic review of the relevant legislation, case law, and literature will be conducted in four African countries namely: South Africa, Kenya, Uganda and Ghana. These countries were selected because African research by the Global Financial Integrity, which used, amongst other African countries such as Ghana, Kenya and Uganda as case studies, found that trade mis-

[21] G20/OECD 'Base erosion and profit shifting project' (2015) final reports: executive summaries https://www.oecd.org/ctp/beps-reports-2015-executive-summaries.pdf (accessed 13 February 2017) 37. The report suggests that access to extra information will enable authorities to better scrutinise transfer pricing.

[22] OECD (n 6 above) 1.

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invoicing was a significant source of illicit outflows of capital in these countries.[23] South Africa and Kenya are seen as the gateways to Africa with many MNEs taking residence in them before expanding to the rest of Africa.[24] It is therefore important to include these countries in this research and to determine whether they are able to resolve disputes likely to emanate from cross-border transactions by MNEs operating in them.[25]

6 Limitations

Even though the study will be focusing on Africa, because of the complex nature of business and its global impact, reference will be made to relevant literature and legislation in Europe. The study will focus on only four African countries selected namely, South Africa, Kenya, Uganda and Ghana. With the above-mentioned countries embarking on programs to develop and improve their transfer pricing regimes, transfer pricing audits are likely to follow. This is, in turn, likely to trigger transfer pricing disputes.

The study will not deal extensively with European transfer pricing dispute resolution challenges. Any reference to these challenges will be to the extent that these challenges are relevant to the study of the identified African countries. Another limitation is that, there are not much of transfer pricing cases in Africa.

7 The Structure of the Thesis

The thesis will comprise of seven chapters which will be segmented as follows:

7.1 Chapter 2 will deal with the definition of concepts such as transfer pricing, transfer pricing manipulation, the arm's length principle, the MAP, APA, MBA, the OECD BEPS Project Plan and its related concepts. The purpose will be to review the work done in the area of transfer pricing dispute resolutions, and to present various dispute resolution mechanisms suggested by the OECD. The advantages and disadvantages of these mechanisms and the challenges faced by these mechanisms in the resolution of transfer pricing disputes will be analysed.

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[23] R Baker et al 'Hiding in plain sight trade mis-invoicing and the impact of revenue loss in Ghana, Kenya, Mozambique, Tanzania, and Uganda: 2002-2011 (2014) https://gfintegrity.org/report/report-trade-misinvoicing-in-ghana-kenya-mozambique-tanzania-and-uganda/ (accessed 27 October 2020) 1.

[24] See generally L Louw 'Keep knocking on the African door' (2020) http://www.africanmining.co.za/2020/03/11/keep-knocking-on-the-african-door/ (accessed 24 June 2020).

[25] R Nyiri 'International tax: transfer pricing -15 by 2015?' (2015) *Tax Professional* 27.

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7.2 Chapter 3 will deal with MAP as one of the dispute resolution mechanisms in South Africa, Kenya, Uganda and Ghana. The challenges in relation to the efficacy of the MAP in the existing frameworks in the above-mentioned jurisdictions will be analysed.

7.3 Chapter 4 will concentrate on APA as one of the dispute resolution mechanisms in South Africa, Kenya, Uganda and Ghana. The challenges in relation to its efficacy in jurisdictions that have APA as a transfer pricing dispute resolution mechanism will be analysed. The use of advance tax rulings (ATR) as an alternative transfer pricing dispute resolution mechanism in jurisdictions where there is no APA program in place will also be analysed.

7.4 Chapter 5 will deal with the MBA as one of the transfer pricing dispute resolution mechanisms in South Africa, Kenya, Uganda and Ghana. The relevance of domestic legislation such as arbitration acts as alternatives to the resolution of transfer pricing disputes will be analysed. The challenges posed by the notion of sovereignty in the application of arbitration in the resolution of transfer pricing disputes will also be analysed.

7.5 Chapter 6 will focus on other OECD supporting tools that are relevant and directly linked to the process of effective resolution of transfer pricing disputes. The use, relevance and effectiveness of other adopted OECD multilateral instruments to enhance the exchange of tax information between competent authorities will be analysed. Also dealt with in this chapter is global tax transparency and international co-operation and how they can enable the effective resolution of transfer pricing disputes in Africa.

7.6 Chapter 7 concludes the study, summarises the findings and recommends possible legislative and other legal solutions to the challenges with transfer pricing dispute resolution mechanisms in Africa.

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CHAPTER 2

Transfer Pricing Manipulation and the Existing OECD Dispute Resolution Mechanisms

1 Introduction

For one to comprehend any discussion of transfer pricing and the resolution of transfer pricing disputes, it is important to understand various important concepts such as transfer pricing, transfer pricing manipulation, the arm's length principle and the various applicable pricing methods. It is also important to understand concepts such as the double tax agreement (DTA) and the OECD BEPS Project Plan and other central concepts discussed and analysed in this chapter.

This chapter discusses the above-mentioned concepts before it delves into various OECD dispute resolution mechanisms. These mechanisms are the mutual agreement procedure (MAP), advance pricing arrangement (APA) and the mandatory binding arbitration (MBA). This chapter also deals with supporting tools that are important in ensuring the effective resolution of transfer pricing disputes such as exchange of information article, the tax information exchange agreements (TIEA) and other tools that deal with tax transparency by revenue authorities including country-by-country reports (CbCR) and other adopted OECD multilateral instruments.

2 Traditional Definition of Transfer Pricing

Traditionally, transfer pricing is defined as:

> [p]ricing policies and practices that are established when physical goods, intangibles and services are charged between business units within the [same] group. The prices which are established for cross-border transfers should satisfy the arm's length principle. Essentially, this principle requires that intra group transfer prices should be equivalent to those that are or would have been charged between independent persons dealing at arm's length in otherwise similar circumstances.[1]

[1] A Lymer & J Hasseldine *International taxation system* (2002) 158; R Melnychenko et al 'Tax control of transfer pricing' (2017) 14 *Investment Management and Financial Innovations* 41. See generally L Sheppard 'Transfer pricing' (2012) https://www.taxjustice.net/topics/corporate-tax/transfer-pricing/ (accessed 17 April 2020); United Nations (UN) conference on trade and development 'Transfer pricing' (1999) https://unctad.org/en/docs/psiteiitd11v1.en.pdf (accessed 17 April 2020) 4. See also T Lohse et al 'The increasing importance of transfer pricing regulations – a worldwide overview' (2012) 12 *Centre for Business Taxation* 2.

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Nowhere in the definition does the concept of taxation appear. However, it should be noted that when discussing transfer pricing within the international context, it would often be in reference to the artificial manipulation of internal transfer prices within a multinational group with the intention to create a tax advantage.[2] The objective of such price manipulation will be to have an undue tax benefit that has the potential to erode the tax base of the affected jurisdiction.

MNEs are organisations that engage in foreign operations in several countries. They often take advantage of the structural market imperfections that exist in the complex international economic exchange process. Market imperfections constitute a broad set of economic and socio-political factors that differ from one country to another. These imperfections include taxes, duties, quotas, re-investment requirements, and other economic differentials.[3]

3 Transfer Pricing Manipulation

Although there are many avenues for tax minimisation by MNEs, transfer pricing manipulation appears to be the one that is predominantly pursued. Transfer pricing manipulation is used by MNEs to minimise taxes and maximise profits.[4] As stated before in the traditional definition of transfer pricing, when two or more enterprises that are part of the same MNE group trade with each other, the price which they place on the services or the goods being sold is referred to as a transfer price.[5]

Transfer pricing is *per se* neither illegal nor necessarily abusive. What is illegal or abusive is transfer mispricing, also known as transfer pricing manipulation or abusive transfer pricing. Transfer mispricing is a form of a more general phenomenon known as trade mispricing.[6] This occurs when the set price is appreciably higher or lesser than what the market prescribes or what the arm's length principle dictates.[7]

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[2] A Miller & L Oats *Principles of international taxation* (2016) 352; A Stroud & P Masters *Transfer pricing* (1991) 1. It is the allocation of profits to an entity which will then give rise to the tax liability of the said entity in the jurisdiction with the taxing rights. Once profits are attributed to the entity, there is a need to correspondingly link it to the specific tax jurisdiction. It is also important to note that the allocation of income *per se* is not sufficient because once it is allocated, it must be valued. Valuation of intra firm transfers is amongst the key issues in transfer pricing.

[3] RA Leitch & K Barrett 'Multinational transfer pricing: objectives and constraints' (1992) 11 *Journal of Accounting Literature* 47. It is these market imperfections that may motivate management to try to shift the MNE's profit to countries with lower tax rates in order to minimise the total dutiable amount of taxes in countries with greater relative tax rates. Different tax rules across jurisdictions create a certain degree of complexity and uncertainty to both the tax authority and the taxpayers. The result has been a number of unresolved transfer pricing cases.

[4] KS Mansori & AJ Weichenrieder 'Tax competition and transfer pricing disputes' (2001) 58 *Public Finance Analysis* 1.

[5] SJ Pak et al 'Detecting abnormal pricing in international trade: the Greece-USA case' (2003) *Informs* 54.

[6] See generally T Jose 'What is meant by transfer pricing and transfer mispricing?' (2015) 33 *Today's Classroom* https://www.indianeconomy.net/splclassroom/what-is-mean-by-transfer-pricing-and-transfer-mispricing/ (accessed 2 August 2017).

[7] L Harmse & P van der Zwan 'Alternatives for the treatment of transfer pricing adjustments in South Africa' (2016) 49 *De Jure* 288.

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When two related companies trade with each other, they may wish to artificially distort the price at which their trade is recorded, to minimise the overall tax bill.[8] It is estimated that about 60 per cent of international trade happens within, rather than between MNEs; that is, across national boundaries but within the same corporate group. As a result, MNEs are, through transfer pricing manipulation, able to shift their profits to tax havens or to low tax jurisdictions.[9] There are increasing concerns about international income shifting activities of MNEs as a strategy to reduce their global taxation. The strategy consists in transferring profits from high-tax locations to low-tax locations, so as to subject a greater fraction of total profits to lower tax rates.[10]

The differences in jurisdictions create a space for MNEs to plan their trades in such a way that profits arise in a country with a favourable tax regime, rather than in one where those profits would suffer a heavier fiscal burden. The differences could be either in corporate tax, tax incentives, tax reliefs and customs duties.[11] Empirical evidence shows that the variation in the location of reported profits is consistent with income-shifting incentives by MNEs and is also influenced by international differences in corporate taxation.[12] This artificial price setting in intra-firm transactions may also be to get other economic benefits.[13]

3.1 Economic Benefits Resulting from Transfer Pricing Manipulation

Research conducted shows that the manipulation of prices by MNEs may occur for reasons other than corporate tax considerations. Plasschaert lists a number of factors including but not limited to, a strong currency, repatriation of profits, enlarging the market to the detriment of

[8] See generally www.taxjustice.net/topics/corporate-tax/transfer-pricing (accessed 17 July 2017).

[9] G Bhat 'Transfer pricing, tax havens and global governance' (2009) https://www.files.ethz.ch/isn/102933/2009-07e.pdf (accessed 28 October 2020) 1. Also see generally L Shepperd 'Transfer pricing' (2012) https://www.taxjustice.net/topics/corporate-tax/transfer-pricing/ (accessed 27 October 2020).

[10] AAT Rathke 'Transfer pricing manipulation, tax penalty cost and the impact of foreign profit' (2015) https://ideas.repec.org/p/zbw/esconf/129075.html (accessed 2 August 2017) 1. This is done by either inflating or undervaluing the transfer prices inter se. Also, to be noted is that during this transfer pricing manipulation, the host country not only loses the right to tax the gain that should have been but a gain in one company may account for a loss in another company meaning that because of the manipulation of prices it is possible for the company in a host country to incur losses as a result of the manipulative practices. Such losses unduly claimed in the host country affects the tax base at it may be accounted for billions of dollars particularly in developing countries that does not have good legislation in place.

[11] Stroud & Master (n 2 above). The fiscal policies of countries differ, and such differences do reflect in revenue laws and incentives offered to foreign investors. Some countries may have a higher Value Added Tax (VAT), while others may offer huge tax incentives as a way of attracting foreign investment. Others may have low corporate tax as a way of attracting foreign companies to invest and operate within their jurisdiction so as to create employment for the local residents. It is common that tax specialists in these MNEs will take advantage and plan their business in such a way that they take advantage of those differences to minimise their tax bills.

[12] H Grubert & J Mutti 'Taxes, tariffs, and transfer pricing in multinational corporate decision making' (1991) 73 *Review of Economics and Statistics* 293.

[13] Jose (n 6 above).

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competitors and supporting an infant subsidiary as being amongst other reason for transfer pricing manipulation.[14]

3.2 The Effects of Transfer Pricing Manipulation

Even though this is a general problem that all countries face, the budgets of developing African countries are the ones that are affected the most hence the need for African countries to put an extra focus on establishing effective rules to tackle transfer pricing manipulation.[15] When MNEs trade assets between their national subsidiaries at reduced prices they deprive developing countries exchequers of revenue.

Transfer pricing manipulation does not only affect governments and their ability to deliver on their constitutional socio-economic duties. It also affects third parties like shareholders and employees as the shifting of profits to other jurisdictions causes poor financial performance in companies.[16] Another concern is that corporations that operate only in domestic markets have difficulty in competing with MNEs that have the ability to shift their profits across borders to avoid tax or to reduce tax.[17] It also undermines other government policy objectives, such as using tax for wealth redistribution.[18]

3.3 Regulation of Transfer Pricing in Africa

Most European tax authorities, unlike many African tax authorities, have legislation that is aimed at protecting their tax base from manipulative transfer pricing practices by providing that intra group transactions must be accounted for at market value using the arm's length

[14] Stroud & Masters (n 2 above) 1. Profits may be shifted to a subsidiary in another country as a means of providing financial support for its sustenance instead of financing it through loans. At times the manipulation of prices may be simply because of the country of operation is known to be susceptible to a lot of labour unrest, hence the moving profits to another jurisdiction will be used as a motivation during wage negotiations to proof poor performance by the local company.

[15] V Daurer *Tax treaties and developing countries* (2014) 37.

[16] SRF Plasschaert *Transfer pricing and multinational corporations: an overview of concepts, mechanisms and regulations* (1979) 7. It should also be noted that the higher profits, better the chances for local employees to obtain higher wages. Higher profits can also potentially lead to the declaration of dividends for local shareholders. Ultimately other forms of tax like VAT, personal income tax and dividends tax will be positively affected, due to increased income, expenditure and dividends. The profits that accrue to the shareholder enable them to re-invest in other local business initiatives. This shows that curbing transfer pricing manipulation does not only affect the host country from a revenue collection perspective but also has a direct, positive effect on economic growth.

[17] R Feinschreiber & M Kent 'OECD responds to base erosion and profit shifting' (2013) 17 *Corporate Business Taxation Monthly* 29. It is therefore important for revenue authorities to ensure that corporations, both domestic and MNEs, pay their fair share of taxes, as this may contribute to their commercial success or failure of smaller enterprises that are unable to shift profits to other jurisdictions.

[18] S Jaiswal *A primer on transfer pricing: norms, standards, misuse for tax avoidance, and impacts on developing countries* (2017) 4.

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principle.[19] However, establishing the arm's length market value is not easy. Governments are anxious to ensure that the profits reported by MNEs reflect a fair commercial level of profit.[20]

From an African perspective there are still countries such as Tunisia, Algeria and Mozambique which have no specific transfer pricing regulations in place. Some of these countries only have some guidance on transfer pricing in their tax codes.[21] Countries like Zimbabwe introduced transfer pricing laws in 2016. For African countries, increasing and guaranteeing corporate income tax collection through the regulation of transfer pricing is vital in addressing their socio-economic challenges.[22]

It is important for organisations such as the ATAF, which is responsible for improving tax systems in Africa through exchanges, knowledge dissemination and capacity development to play an active role in Africa.[23] It needs to make sure that African countries are given the necessary support to develop legislation, frameworks, guidance and are assisted with the requisite technical skills in the regulation of transfer pricing.

3.4 Transfer Pricing Audits

Auditing MNEs often involves a broad range of complex technical issues.[24] At the core of the auditing of MNEs is clear understanding of how the MNEs business is organised. This includes understanding the commercial and economic reality of business operations such as the generation of income, profits, the functions of the business that are essential to generating the profits and understanding the benchmarking exercises for transfer pricing comparability analyses. Transfer pricing audits are fact-intensive and may include difficult assessments of

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[19] See generally OECD 'Transfer pricing country profiles' (2019) http://www.oecd.org/tax/transfer-pricing/transfer-pricing-country-profiles.htm (accessed 22 April 2020). It lists European countries including but not limited to United Kingdom, Netherlands, Germany, Italy, New Zealand, Sweden, Poland as having transfer pricing legislation in place. While as regards Africa only a few has specific transfer pricing legislation in place namely South Africa, Kenya, Nigeria, Uganda Zambia while many including Mozambique, Tunisia and Algeria do not have a specific transfer pricing legislation in place; see PWC 'Spotlight on Africa's transfer pricing landscape' https://www.pwc.com/gx/en/tax/transfer-pricing/management-strategy/assets/pwc-transfer-pricing-africa-pdf.pdf (accessed 22 April 2020) 8.

[20] Leitch & Barrett (n 3 above) This has been a challenge for many if not all developing countries as there is a need to balance how they approach this manipulative behaviour of MNEs with encouraging and attracting foreign investment. Developing countries especially African countries need to understand that the control of transfer pricing manipulation is not the exclusive responsibility of developed countries, even though developed counties may suffer as a result of their massive economies.

[21] A Curtis & O Todorova 'The spotlight on Africa's transfer pricing landscape' (2012) *Transfer Pricing Special Edition* https://www.pwc.com/gx/en/tax/transfer-pricing/management-strategy/assets/pwc-transfer-pricing-africa-pdf (accessed 30 July 2017) 8.

[22] A Ezenagu 'Safe harbour regimes in transfer pricing: an African perspective' (2019) 100 *International Centre for Tax and Development* 2.

[23] See generally ATAF mission statement https://www.ataftax.org/overview (accessed 13 June 2017).

[24] T Shongwe 'Improving transfer pricing audit challenges in Africa through modern legislation and regulations' (2019) 8 *Tax Cooperation Policy Brief* 3.

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comparability. Consequently, transfer pricing audits and disputes are often complex and somewhat subjective.[25]

Some countries, because of their economic challenges, see the institution of transfer pricing audits as a source of additional revenue.[26] It is these audits that will trigger multiple transfer pricing disputes. Transfer pricing compliance today typically involves huge and expensive databases and high-level expertise to handle. Audits thereon, be performed on a case-by-case basis and are often complex and costly tasks for all the parties concerned.[27]

4 The Arm's Length Principle

In a bid to avoid the above-mentioned problems with transfer pricing audits, the current OECD international guidelines on transfer pricing are based on the arm's length principle. The arm's length principle states that a transfer price for services and goods between entities of the same group should be the same as the price between two independent companies that are transacting at arm's length and are not part of the same corporate structure.[28] OECD member states have agreed that for tax purposes, the profits of associated enterprises may be adjusted as necessary to correct any such distortions and thereby ensure that the arm's length principle is satisfied.[29]

When transfer pricing does not reflect market forces and the arm's length principle, the tax liabilities of the associated enterprises and the tax revenues of the host countries could be distorted. There are various methods to be considered when applying the arm's length principle. These are as follows:

i) the comparable uncontrolled price method;
i) the resale price method;
ii) the cost plus method;
iii) the transactional net margin method; and
iv) the transactional profit split method.

[25] S Arendsen 'Dispute channels' in A Bakker & MM Levey *Transfer pricing and dispute resolution: aligning strategy and execution* (2011) 17. Even before one can talk about the resolution of transfer pricing disputes, transfer pricing audit in itself is a complex and problematic area of concern.
[26] There is a continued reliance on corporate taxation as a significant revenue base. More taxes are collected from MNEs as their income statements often reflect millions, and billions in some cases, of taxable income.
[27] UN Tax Committee 'Background paper working draft chapter 1: an introduction to transfer pricing' https://www.un.org/esa/ffd/wp-content/uploads/2011/06/20110607_TP_Chapter1_Introduction.pdf (accessed 29 July 2017) 33.
[28] See generally J Neighbour 'Transfer pricing: keeping it at arm's length' https://oecdobserver.org/news/archivestory.php/aid/670/Transfer_pricing:_Keeping_it_at_arms_length.html (accessed 27 November 2019). See also JM Weiner 'An economist's view of income allocation under the arm's length standard and under formulary apportionment' (2009) Symposium edition *The State and Local Tax Lawyer* 30.
[29] Para 1.3 OECD *Centre for tax policy and administration*: proposed revision of ch i-iii of the transfer pricing guidelines (2009) 6. This can be achieved by an upward adjustment and if need be by charging interest thereon.

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The reason OECD member countries and other non-members adopted the arm's length principle is that it provides a broad parity of tax treatment for members of MNE groups and independent enterprises. It puts associated and independent enterprises on a more equal footing for tax purposes. It avoids the creation of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either type of entity.[30] It should be noted that only one method can be applied in a particular case. The following paragraphs contain a brief discussion of these methods.

4.1 Comparable Uncontrolled Price Method (CUP)

The CUP method, as it is commonly referred to, compares the price charged for property or services transferred in a controlled transaction to the price charged in an uncontrolled transaction, in comparable circumstances.[31] Any difference between the two prices may indicate that the commercial and financial relations were not at arm's length. This means that there is a need to adjust the price in an uncontrolled transaction with that in a controlled transaction.

4.2 The Resale Price Method (RPM)

This method begins with the price at which a product that has been purchased from an associated enterprise is resold to an independent enterprise. It then proceeds by reducing it by an appropriate gross margin representing the amount out of which the reseller would seek to cover its selling and operating expenses. What is left after subtracting the gross margin can be regarded as an arm's length price for the original transfer of the property.[32]

4.3 Cost Plus Method (CPM)

This method looks at the cost incurred by the supplier of the goods or services in a controlled transaction for the goods transferred or services provided to a related purchaser. Added to the costs is the mark up to make the appropriate profit in light of the functions performed, the risk

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[30] Neighbour (n 27 above). It must be noted that the arm's length principle is an old principle which owes its origin from the law of contract. When parties entered into a contract the terms upon which they transact will be determined through the use of the arm's length principle, to establish the connection between them and to ensure that there is no fraud or simulation to defraud others.

[31] OECD *Transfer pricing guidelines for multinational enterprises and tax administrations* (2001) https://www.oecd-ilibrary.org/taxation/transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations_9789264192218-en (accessed 4 August 2017) II-2.

[32] J Abrahamson *International taxation of corporate finance* (2014) 309.

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assumed and the market conditions. What is arrived at after adding the cost plus mark up to the above costs may be regarded as the arm's length price of the original controlled transaction.[33]

4.4 Transactional Net Margin Method (TNMM)

This method examines the net profit margin relative to an appropriate base that a taxpayer realises from a controlled transaction. The net margin of the taxpayer from the controlled transaction should be established by reference to the net margin that the same taxpayer earns in comparable transactions. Where possible the net margin that would have been earned in a comparable transaction by an independent enterprise may serve as a guide.[34]

4.5 Profit Split Method (PSM)

This method aims to split the profit earned in a transaction by all group companies involved by using an equitable formula. The said formula is arrived at by studying comparable pairs of companies and the contribution made by each to the overall profit achieved. There are two steps in applying this method:

i) identifying the profit to be split for the associated enterprises from the controlled comparable transactions in which the associated enterprise engaged
ii) splitting the profits between the associated enterprises on an economically valid basis resulting in the division of profits in a manner that would reflect an agreement made at arm's length.[35]

While these methods are established and commonly applied, it does not follow that one of them must be used in a particular case. There is space for the taxpayer and the revenue authority to adopt and apply any other method not mentioned above. What is important in the end is that the arm's length principle is adopted.[36]

The successful application of a particular method is dependent on the agreement with the affected revenue authorities on the use thereof. Any disagreement will result in a dispute whose resolution is reliant on the available transfer pricing dispute resolution mechanisms. The arm's length principle itself is becoming increasingly difficult and complex to administer. The arm's length principle has been under scrutiny for years and lacks a sound theoretical foundation and

[33] This method is useful where semi-finished good are sold between related parties.
[34] See generally Tag: Transactional net margin method (TNMM) https://tpguidelines.com/tag/transactional-net-margin-method-tnmm/ (accessed 25 July 2017).
[35] Miller & Oats (n 2 above) 369.
[36] *Glaxo Smith Kline Inc. v HMQ (Glaxo Canada)* (2008) TCC 324.

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offers possibilities for tax avoidance strategies.[37] The arm's length principle in itself has its own challenges, it is seen as being very complicated to apply in some cases and leading to disputes.[38]

It is often not possible to find comparable transactions with unrelated parties.[39] Another challenge has been how it will be effectively applied with the digitalisation of the economies.[40] It is also important to note that all the methods and mechanisms available are reliant on the existence of a DTA between affected states. Any negotiation to resolve tax disputes, rights and or obligations will be stipulated in the DTA. The absence of a DTA may be another factor militating against the effective resolution of transfer pricing disputes.

5 Double Tax Agreement

A DTA is an official agreement between two states on the administration of taxation when the domestic tax laws of the two states apply simultaneously to a particular issue or taxpayer. A DTA deals with the allocation of taxing rights between those states.[41] A DTA provides a means of settling the most common problems that arise in the field of international double taxation on a uniform basis.[42] Among others, a DTA is there to:

i) prevent tax evasion;
ii) prevent tax from discouraging the free flow of international trade and investment;
iii) prevent discrimination between taxpayers and ultimately;
iv) to provide a measure of fiscal and legal certainty in international operations.[43]

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[37] S Greil 'The arm's length principle in the 21st century – alive and kicking?' (2019) 1; See generally J Myers 'The arm's length principle under pressure?' (2018) https://www.taxadvisermagazine.com/article/arm%E2%80%99s-length-principle-under-pressure (accessed 27 November 2019); CR Irish 'Transfer pricing abuses and less developed countries' (1986) 18 *The University of Miami Inter-American Law Review* 87. The establishment of a transfer price is often an imprecise exercise.
[38] See generally GD Robertis 'The end of the arm's-length principle?' (2018) https://responsibletax.kpmg.com/page/the-end-of-the-arm-s-length-principle- (accessed 22 April 2020).
[39] AJ Cockfield 'Formulary taxation versus the arm's length principle: the battle among doubting thomases, purists, and pragmatists' (2004) 52 *Canadian Tax Journal* 117.
[40] See generally MF Patton & P Flignor 'Can the arm's length be used to resolve challenges of digitalisation of the economies' https://www.expertsguides.com (accessed 22 April 2020).
[41] MB Knitell 'Article 25,26 and 27: administrative cooperation' in T Ecker & G Ressler *History of tax treaties: the relevance of the OECD documents for the interpretation of tax treaties* (2011) 687.
[42] OECD Manual on effective mutual agreement procedures (MEMAP) (2007) https://www.oecd.org/ctp/38061910.pdf (accessed 19 August 2017) 7. Many African countries do not have (DTAs) amongst themselves and their trade partners. It has been noted that during treaty negotiations between developed and developing counties, when coming to the allocation rules most developed countries are biased towards a residence-based tax than a source-based tax. This approach by developed countries leads to a loss of revenue by developing countries as they are usually the source country and not the residence country and they are expected to give away their taxing rights while getting nothing in return. Most developing countries do not have DTAs and as such any disputes that arise becomes a challenge to resolve. This may result in a number of unresolved transfer pricing disputes as both countries so affected in the dispute may claim the same taxing rights with no recourse to the matter. One can argue though that while having a DTA is important, a DTA is not enough because consistency in the regulation of transfer pricing which will discourage transfer pricing manipulation is also required.
[43] Miller & Oats (n 2 above) 125. A DTA is entered into to ensure that states do not tax the same income. It provides some certainty in relation to the states with taxing rights. Tax treaties also ensure cooperation in tax matters which includes the exchange of information and mutual assistance in the collection of taxes. See also arts 26 and 27 of the OECD and the UN Model Tax Convention. Access to information and the exchange thereof between states inter se has been identified by the OECD as an important tool to fight non-compliance with tax laws in cross border transactions. Also, it is important to note that without a DTA, MNEs stand a higher risk of double taxation as there will be no

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In a global world where there are a lot of cross border transactions, it is important for countries to have DTAs.[44] African countries generally have a comparatively low DTA network with other countries. The scope of countries' treaty networks matters because it is through these treaties that a legal basis for the resolution of disputes is provided. Without a treaty, the resolution of a dispute is difficult. The more integrated a country is into the global economy, with more cross border activity of taxpayers, the higher the potential number of cross border disputes. An African country like South Africa has more DTAs with European countries than it has with other African countries. Of the 54 African countries, South Africa has only about 22 signed DTAs with other African countries. This position is unfavourable considering the role played by a DTA in transfer pricing disputes.[45] Of course this is informed by the fact that it trades more with European countries than with fellow African countries.

Most DTAs typically contain four most key sections namely:

i) A preliminary section on the scope of the convention and the definition of terms used.
ii) The main part of the convention which settles the extent to which the two contracting states may tax income and determines how international juridical double taxation and international economic double taxation are to be eliminated.
iii) A key section on special provisions such as the MAP article, which establishes the mutual agreement procedures to be followed for eliminating double taxation and resolving conflicts of interpretation of the convention.
iv) A section on the implementing and termination provisions of the DTA.[46]

Once it is found from a transfer pricing audit that the taxpayer has undercharged, in that the price for goods and services was not at an arm's length, then the other contracting state will make an upward adjustment thereby increasing its declared taxable income. The other contracting state will be expected to make a corresponding downward adjustment by reducing

mechanism to get the authorities of the two or more countries to come together to start the negotiations on the taxing rights whenever there is a conflict.

[44] JS Wilkie et al 'International taxation' (2007) 41 *The International Lawyer* 588.

[45] This will mean that because of the absence of DTAs with other African countries, South African MNEs have a higher risk of double taxation if they do business in other African jurisdictions. The same will apply in cases where the headquarters of a company which is in Europe but has subsidiaries in South Africa and another Africa country which has no tax treaty with SA. What is important in these circumstances is that where there is a risk of double taxation there is a corresponding risk of double non-taxation. Double non-taxation of a company whose headquarters are situated outside the African continent will trigger a loss of revenue for the continent. The only way through which all the international dispute resolution mechanisms and tools available could be effective, is through DTAs.

[46] B J Arnold 'An introduction to tax treaties' https://www.un.org/esa/ffd/wp-content/uploads/2015/10/TT_Introduction_Eng.pdf (accessed 18 February 2017) 7.

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the taxpayer's taxable income. Any disagreement in the adjustments to be made will effectively trigger a transfer pricing dispute. In as far as disputes arising from upward and downward adjustments are concerned, tax conventions reduce juridical double taxation by allocating taxing rights between residence and source states on various categories of income, typically by eliminating or limiting source country taxation or by requiring a residence state to grant relief for source state taxation through a credit or exemption mechanism.

6 OECD Dispute Resolution Mechanisms

Disputes usually arise where two different jurisdictions claim the right to tax the same transactions or income, imposing an excessive tax burden on taxpayers. The imposition of double taxation constitutes a significant barrier to the free flow of trade and investment. Where such double taxation disputes remain unresolved, confidence in the certainty, fairness and integrity of the international tax system is undermined.[47]

In various forums such as the 2015 Foundation for International Taxation Conference held in Mumbai the issue of sovereignty was identified as one of the challenges that adversely affect the resolution of international tax disputes.[48] It was said that 'neither administrative bodies nor the courts of one country are bound by the administrative or judicial decisions of the other state.'[49] As such, conflicts in the application of DTAs remain possible. This can easily lead to unintended double taxation or double non-taxation.[50] It is imperative that countries make effective use of practical mechanisms for resolving the disputes originating from transfer pricing and other international taxation aspects. The rise of globalisation has not only resulted in an unprecedented increase in cross-border trade, but also in the parallel escalation of disputes in the international tax arena.

There are currently three transfer pricing dispute resolution mechanisms adopted by majority of the OECD member states namely:

i) the mutual agreement procedure;[51]

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[47] M Markham 'International tax treaty arbitration – fighting an uphill battle in the global arena' (2017) 28 *Australasian Dispute Resolution Journal* 164. Complex cross border disputes create unnecessary uncertainty on the part of business. This uncertainty makes business entities reluctant to transact in foreign jurisdictions if they are not certain about how disputes are resolved in the foreign jurisdictions.

[48] See generally https://www.ibfd.org/IBFD-Tax-Portal/Events/Foundation-International-Taxations-Jubilee-Conference (accessed 7 August 2017).

[49] K Vogel *On double tax conventions: a commentary to the OECD-UN-and US model conventions for the avoidance of double taxation of income and capital: with particular reference to German treaty practice* (1997) 74.

[50] G Groen 'Arbitration in bilateral tax treaties' (2002) 30 *Intertax* 4. It is possible then that a taxpayer may be taxed twice on the same income (juridical double taxation) or may as a result of different interpretation by the two jurisdictions, end up not paying tax in neither of them resulting in double non-taxation.

[51] Art 25 of the OECD MTC.

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ii) the advance pricing arrangement; and

iii) the mandatory binding arbitration.[52]

These abovementioned dispute resolution mechanisms are discussed in full as they form an integral part of the research.

6.1 The Mutual Agreement Procedure

Article 25(1) of the OECD Model Tax Convention (MTC) reads as follows:

> [w]here 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 the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national.

Article 25(2) of the OECD MTC reads as follows:

> [t]he 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.

A MAP article in a DTA allows the designated representatives of the competent authorities from the governments of the contracting states to interact with the intent to resolve international tax disputes. These disputes involve cases of double taxation as well as inconsistencies in the interpretation and application of a convention. Most, if not all DTAs have the MAP in them which will address the procedure to be followed in cases where there are disputes arising from the application of the treaty in question.[53] The MAP is mostly utilised when the taxation of the individual or the entity is unclear.

The presence of a MAP article in a convention does not guarantee the resolution of disputes. There are other factors such as the application of domestic laws and other economic issues that

[52] OECD Response of the committee on fiscal affairs to the comments received on the April discussion draft on the 2008 update to the model tax convention (2008) http://www.oecd.org/ctp/treaties/41032122.pdf (accessed 29 July 2017) 7. To date, not all member states have amended their DTAs to include binding arbitration. A survey conducted by practitioners' shows that only a few have included arbitration into their MAP article.

[53] OECD (n 42 above) 8. Most MAP articles do not have a clause compelling the competent authorities to reach an agreement. Majority MAP disputes are based on transfer pricing where associated companies of a multinational group incur economic double taxation due to an upwards adjustment of their income from intra-group transactions by one or more tax administrations.

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may hinder the contracting states from reaching an agreement.[54] The negotiation of a case under the MAP between competent authorities is a government-to-government process. Hence taxpayers do not, as a general rule, participate or attend as observers at the negotiations or consultations between the competent authorities. The negotiations take the form of a diplomatic engagement between countries. The taxpayer only provides the required information to the competent authority of his resident state which will share this information with the other contracting state.

A competent authority will first attempt to resolve the matter unilaterally, and if this is not possible, the competent authority will engage the competent authority of the other contracting state, and the second phase of the MAP will then commence where both states will start to engage one another.[55] Once the two states initiate engagements towards the resolution of the dispute and reach a decision, they will then apply and interpret the treaty as per the outcome of the MAP.

The taxpayer has a responsibility to furnish the authorities with all the relevant information. Failure to discharge this onus will give the competent authority reason and justification to suspend or to not consider the request. Upon receiving a MAP request, the competent authority needs to consider various aspects including, amongst others:

i) whether the issue or transaction is covered by the applicable treaty;
ii) whether the request is submitted within the time limits specified; and
iii) whether the issue or objections seem to be justified.

The taxpayer has the right to accept the results of the MAP and give up his domestic remedies in the two jurisdictions or to reject the MAP and seek judicial relief under the domestic legal systems.[56] The taxpayer may also lodge a second MAP process. The competent authority may

[54] The taxpayer needs to be aware of the existing time limit within which he can initiate a MAP process. In the majority of DTAs the time limit is three years from the date on which a taxpayer became aware of a notice to tax that is not in accordance with the convention. It is possible for the competent authority to reject a MAP application if the time limit has lapsed. Some DTAs may provide for a longer time limit that taxpayers need to adhere to.

[55] Arendsen (n 25 above). The importance of a DTA needs to be emphasised because the second phase of the MAP of engaging the other country can only happen if there is a DTA between the affected countries. The only way in which the resident country can start any form of negotiation with the other country is through the mechanisms provided for in the DTA. Conversely the obligation on the other country to engage and listen to the resident country arises from the DTA. The absence of a DTA would mean that the negotiation will be stifled not only as regards the substance of the case but also as regards the procedure to be adopted for an effective inter-governmental diplomatic engagement.

[56] Once a MAP agreement is reached between the competent authorities, the taxpayer may either accept it or reject it. Once an agreement is reached, the case is regarded as closed and the authorities and or country to which the taxpayer is resident will advise the taxpayer accordingly. If the agreement is not what the taxpayer expects, the taxpayer may appeal through the courts. If the courts do not reverse the decision by the competent authority, the agreement will remain in force.

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accept this request or may reconsider the initial request of the taxpayer. Where the two competent authorities decide not to reconsider the request, it will mean that the competent authority where the taxpayer is resident will have to provide another form of relief to the taxpayer. While taxpayers may lodge second MAP requests, these requests will not be entertained if full relief was offered and rejected by the taxpayer in the initial MAP case.

In the MAP process, the assistance of a third party such as a mediator or facilitator could help provide a neutral perspective during the deliberations. In some cases, mediation may bring more focus to the problem and may offer an opportunity for the competent authorities to view a specific case or the MAP process from a neutral perspective.

6.1.1 Advantages of the MAP

If applied properly, the MAP has the potential to eliminate double taxation. The taxpayer can invoke the MAP to resolve potential double taxation arising from a transfer pricing adjustment initiated by a country.[57] Taxpayers facing a transfer pricing adjustment may approach their country of residence to resolve any potential double taxation concern that can arise from this transfer pricing adjustment. For taxpayers with dual residence, the MAP can be invoked to ascertain which country has the right to impose tax on the taxpayer as the country of residence.

The existence of DTAs containing a MAP article offers protection to taxpayers by prohibiting or limiting a country's ability to tax income from certain cross border transactions. Where a country's actions under its domestic law are contrary to such treaty commitments, taxpayers are able to invoke the MAP to enforce the treaty limitation. Taxpayers who feel discriminated in the application of tax laws may invoke the MAP to secure equal taxation treatment based on the non-discrimination principles in the applicable DTA.

[57] See generally J Cooper et al 'The mutual agreement procedure: a taxpayers tool reinvented' (2017) https://www.israelglobalgateway.com/2017/07/the-mutual-agreement-procedure-a-taxpayers-tool-reinvented/ (accessed 29 July 2017). The MAP has advantages in that even though statistics show that there are a lot of unresolved transfer pricing cases, there are those that have been successfully resolved despite the pitfalls inherent in the MAP process. While there are delays in the resolution of MAP cases, there are many that are resolved. Issues that affect the success of MAP cases such as full co-operation and disclosure of relevant material by the taxpayer contribute to the success or failure of MAP cases.

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6.1.2 Weaknesses and challenges of the MAP

Lack of taxpayer involvement

The MAP is not immune from challenges and weaknesses. Amongst its weaknesses is that the revenue authorities do not involve the taxpayer in the deliberations. Private participation is not allowed during international debates and the MAP, being a dispute resolution mechanism emanating from an international instrument, must conform to such norms. A MAP process is an international procedure between states which requires the use of diplomatic channels, hence the exclusion of the taxpayer.[58]

Normally, in a transfer pricing dispute, the primary source of information on pricing policies and decisions will be the affected taxpayer company itself. The company will have a better understanding of its markets and its product than the tax authority. By excluding the company from the process, there are probabilities that the decision or the outcome from the MAP may be poor because of an incomplete or inadequate understanding of the information so provided.[59]

Possibility of extraneous diplomatic issues influencing the MAP decision

The mutual solution arrived at by the competent authorities after a MAP is in many instances a compromise that is dictated by considerations other than the merits of the case.[60] The taxpayer may have a valid case, but due to outside compromises and the possible consideration of peripheral diplomatic issues unrelated to the merits of the case, the conclusion reached between states may not be what the taxpayer would have ordinarily received. Moreover, the process is not transparent and does not contain substantive reasoning as to how the conclusion was reached. There is a fear that cases may not be resolved on their individual merits but by reference to the balance of the results in previous cases. There is also a fear of retaliation or offsetting adjustments by the country from which the corresponding adjustment has been

[58] Para 39 commentaries on the articles of the Model tax convention. The taxpayer will have to trust that the government representatives so entrusted with the responsibility to negotiate on his behalf will do so in good faith. It is important to note that the taxpayer is expected to have the same trust even though the taxpayer's resident country is the one that has effected taxation that is not in accordance with the DTA

[59] Miller & Oats (n 2 above) 389. It is submitted that since the taxpayer is not part of the process, the taxpayer often has to provide more information than required to enable the tax authority to have a clear understanding of the facts. This extended disclosure has the potential to expose the taxpayer to future investigations and/or adjustments. This is because the information provided during the MAP process may be used by the tax authority to revisit previous assessments or be kept for future reference and ultimately result in taxation that has nothing to do with the current case.

[60] B Runge 'Mutual agreement procedure and the role of the taxpayer' (2002) 9 *International Transfer Pricing Journal* 17. One can argue when countries engage inter se, they do so in consideration of their general diplomatic relations. These relations may unduly influence the engagements and not be wholly guided by the respective law that the taxpayer would have relied on when submitting his case.

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requested. These fears may be completely incorrect and not warranted but because the taxpayer is not part of the process, he may be justified in making such conclusions.

Absence of a direct obligation to engage in a MAP

Another aspect that needs to be considered is whether the competent authorities are under any obligation to enter into negotiations. Even though fiscal authorities accept the existence of their objective duty to enter into negotiations, they deny that the taxpayer has a legal right to enforce the initiation of a MAP.[61] The wording found in the MAP process states that the competent authorities may 'endeavour to resolve.' Some authors argue that the only obligation the competent authorities have is to negotiate and not to settle.[62]

Possibility of delays in dispute resolution due to 'lumping'

Another uncertainty surrounding the MAP arises from the fact that they appear to be more of a negotiated settlement. There is a suspicion that tax authorities tend to lump together current cases and to negotiate a general settlement. This would not only affect one taxpayer but all taxpayers whose cases are lumped together. This would mean that individual case is not dealt with separately in consideration of its own merits. The lumping of cases together is time and cost effective on the part of the tax authority. However, it can lead to injustice and frustration for taxpayers.[63]

Lack of technical skills to adjudicate transfer pricing matters

The dearth of resources and expertise in the field of transfer pricing may make it impossible to have experts in both the audit program and in the MAP process. Due to this, the probability of having the same experts being used in both processes is high, especially in developing countries. Experience has shown that the MAP program works best if the competent authority

[61] I Hofbauer 'Settlement of tax disputes in Austrian tax treaty law' in M Lang & M Zuger *Settlement of disputes in tax treaty law* (2002) 51. It is argued here that the objective right of the taxpayer will be restricted if the resultant double taxation was caused by the taxpayer or if the taxpayer was aware of the double taxation but did not take steps against it.
[62] B Terra & P Wattel *European tax law* (2001) 414; PC Rooney & N Suit 'Competent authority' (1996) 49 *The Tax Lawyer* 678. It would seem that the obligation to settle only arises at the stage of arbitration. It is argued here that in any stage prior to arbitration the competent authority only has the obligation to negotiate. The absence of an obligation to resolve has the potential to affect the spirit and impetus with which the case is handled. The results can easily be that many of the cases never get resolved.
[63] Stroud & Masters (n 2 above) 80.

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implementing it is able to make decisions independently from those who were part of the audit program and are free from political influence and interference.[64]

Uncertainty with the 'pay now argue later' principle in MAP cases

In order to avoid duplication, it is important for the taxpayer to choose either the MAP or the domestic recourse but not both at the same time. Choosing the domestic recourse before the MAP may hinder the process as court decisions will be binding on the competent authority and prevent the competent authority from affording any other relief through the MAP. It is important that once the taxpayer opts for the MAP, any domestic proceedings be halted until the finalisation of the MAP.[65]

Many domestic provisions are based on the pay now argue later principle. It is important that contracting states should include in the MAP article a clause that addresses the suspension for the payment of tax pending the finalisation of the MAP process.[66] In the absence of a binding arbitration clause, a MAP can take a very long time to resolve.[67] This obviously has cash flow implications for taxpayers.

The length of time taken in resolving MAP cases

Research by the OECD conducted in 2017 shows that out of approximately 8 000 MAP cases reported in January 2016 only 25 per cent of them were finalised.[68] This shows that there are challenges in relation to the amount of time it generally takes to resolve MAP cases. Double taxation or double non-taxation can be eliminated only by a corresponding adjustment in line with the MAP agreement. Some countries provide a time limit for the resolution of the MAP, the expiration of which bars a corresponding adjustment from being made. In a transfer pricing

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[64] Political interference in a tax dispute which is purely legal can lead to unjust and legally incomprehensible outcomes for taxpayers. Political system and administrations change from time to time and it is paramount that a MAP be free of political influence. On the independence of persons involved in the MAP, this is critical in order to ensure that they are as objective as possible and also that they negotiate in good faith. If the persons are the same persons that conducted the audit there is a distinct possibility that they may be adumbrated by the conclusions of their own audit findings.

[65] Alternatively, the competent authority may opt out of the MAP on the grounds that it has filed a matter to its courts in an attempt to obtain judicial precedence therefrom.

[66] Caution should be exercised in suspending payment of tax because an automatic suspension may result in abuse of the MAP process by MNEs that will initiate it simply to postpone the payment of tax. It is recommended that the suspension of payment should be granted after a consideration of the likelihood of the taxpayer to succeed in the process after the first meeting with the competent authority of the other contracting state.

[67] Miller & Oats (n 2 above) 390. It has been established through the years that the absence of a clause that binds the contracting states to resolve disputes may result in disputes taking longer to resolve. This inevitably causes cash flow challenges for taxpayer who is aggrieved by upward adjustments.

[68] See generally OECD Mutual agreement procedure (MAP) released statistics for 2016 http://www.oecd.org/tax/beps/oecd-releases-mutual-agreement-procedure-statistics-for-2016.htm (accessed 30 July 2017). Transfer pricing cases account for more than 60% of the MAP cases and it is clear that there are still challenges with the resolution of disputes in transfer pricing.

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case, a country may be unable to legally make a corresponding adjustment if the time for the finalisation of the tax liability of the relevant associated enterprise has expired. OECD member countries are encouraged to adopt domestic laws that would allow for the suspension of time limits on determining tax liability until the discussions have been concluded.

6.2 The Advance Pricing Agreement

An advance pricing agreement (APA) also known as MAP APA is governed by the MAP article of the applicable DTA namely, article 25 of the OECD MTC. It is negotiated and administered at the discretion of the relevant tax administrations under article 25(3) of the OECD MTC.[69] An APA is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time.[70]

The OECD transfer pricing guidelines describe an APA as a means to resolve, in a cooperative manner before the business takes place, the potential transfer pricing disputes between parties. There are three types of APA programs namely:

i) unilateral APA, or an agreement between a taxpayer and one revenue authority;
ii) bilateral APA, or an agreement between the taxpayer and two revenue authorities; and
iii) multilateral APA, or an agreement between the taxpayer and three or more revenue authorities.

It is formally initiated by a taxpayer and requires negotiations between the taxpayer, one or more associated enterprises, and one or more tax administrations. It is intended to supplement the traditional administrative, judicial, and treaty mechanisms for resolving transfer pricing issues. An APA may be most useful when traditional mechanisms fail or are difficult to apply.[71]

Transfer pricing is a top priority for MNEs regardless of the transactions that they engage in.[72] Unexpected adjustments by revenue authorities create a lot of uncertainty in MNEs doing

[69] M Heilminen *EU tax law: direct taxation* (2009) 243.
[70] OECD Transfer pricing guidelines for multinational enterprises and tax administrations (2010) OECD 168. An APA, whether bilateral or multilateral, is a special type of dispute resolution mechanism in that it is only entered into by the parties in order to avoid a dispute and not to directly resolve a dispute. This is because at the time of entering into an APA, no dispute would be in existence and no assessment would have been made by the revenue authority. An APA is by its very nature *ex ante* in the sense that it enables the resolution of a dispute before the dispute crystallizes.
[71] as above.
[72] M Markham *Advance pricing agreements past, present and future* (2012) 2. Transfer pricing regulation has brought a lot of uncertainty in the global economic space and the utilisation of the APA is seen by many as a tax controversy management tool that will bring and ensure

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business and brings with it a high tax risk that requires tax risk management. One of the principles of taxation is that there ought to be certainty as regards the time of tax payment, the manner of payment and the amount to be paid. All those issues ought to be clear and plain to the taxpayer. Those canvassing for the use of APAs find comfort in the fact that it is able to offer certainty on all the issues mentioned above.

With the exception of a unilateral APA, an APA program is dependent on the existence of a DTA between the two states involved in the transaction in question. The MAP article in the DTA is the one through which an APA program can be facilitated. In the agreement, the revenue authority agrees not to make any adjustment in relation to the covered years of assessment as long as the taxpayer follows the terms of the agreement.[73]

A unilateral APA can be entered into when the governments of the countries involved do not have a DTA in place or if the other government does not have an APA program in place. Another instance where a taxpayer may choose a unilateral APA even when there is a DTA between the two countries is where the taxpayer weighs the costs of a bilateral APA and its complexities against the low tax which may be imposed by the other country.

Some countries like the United States of America, recommend the use of a pre-filling conference before an APA application to ensure that the application is appropriate and focuses on relevant issues.[74] A pre-filing conference provides taxpayers with a forum to receive the preliminary views and guidance on potential APAs and related issues. It is intended to lead to a more productive and efficient APA process for taxpayers that participate in them and that subsequently elect to file for an APA request.[75]

Companies opt to enter into bilateral APAs especially if they are not certain of the transfer pricing method adopted and would not want to deal with the penalties that come concomitantly

certainty in an uncertain environment. Not only does an APA addresses the agreed pricing method and or the liability to tax, it also exonerates the taxpayer from the risk of penalties.

[73] M Johnson et al 'Best practices' in AM Heimert & TJ Michaelson *Guide to international transfer pricing: law tax and compliance strategies* (2010) 64. It is important to note that that a unilateral APA is not binding on the other state, but only on the state that has signed the agreement. In essence a unilateral APA gives certainty only to the one side of the transaction. As a result, a unilateral APA cannot guarantee the avoidance of double taxation. Only a bilateral or multilateral APA can guarantee the elimination of double taxation.

[74] Internal Revenue Service 'Internal revenue code 482: allocation of income and deductions among taxpayers' (2006-9) https://www.irs.gov/pub/irs-drop/rp-06-9.pdf (accessed 17 October 2017) 6. The advantages of a pre-filing conference can be seen in the way it addresses the fear of making an APA application that exists in many companies. Many companies are wary of the full disclosures that they need to make when submitting an APA application because of the possibility of the revenue authority rejecting the application and using the information already submitted as justification to trigger an audit. The fact that a request for a pre filing conference can be made on an anonymous basis safeguards the taxpayers' identity. One can agree that a forum such as the pre-filling conference enables both parties to assess the probability of the application to succeed and also to ensure that the application is brought in the manner and form required by the revenue authority as such issues will be covered during the conference.

[75] APMA request for APA pre-filing conference or consultations https://www.irs.gov/pub/irs-utl/apaprefilingconferencesandconsultations.pdf (accessed 4 November 2019) 1.

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with an upwards adjustment. The conclusion of APA is seen as a favoured tool to avoid any such dispute that may be brought by adjustments and consequently penalties that may arise therefrom.

The primary legal effect of an APA is that the taxpayer secures a binding agreement with the revenue service.[76] Once concluded, the revenue authority will monitor the taxpayer's compliance with the terms and conditions of the APA. The taxpayer must ensure the maintenance of records and books in a manner that will enable the revenue authority to examine his compliance with the APA.[77] Another aspect of the APA is that it may contain procedures that allow the taxpayer to effect those minor changes as they relate to the product and its performance in the market.

6.2.1 Advantages of an APA

Unlike with the MAP, an APA application allows the taxpayer to fully participate in the process, mostly because it is the taxpayer who initiates it. It has been seen by many as a non-adversarial mechanism to resolve transfer pricing cases. Bilateral APA's are very useful as they provide international certainty and equity in ensuring the elimination of double taxation. They reduce the transfer pricing system compliance costs for the taxpayers and for the tax administrations. An APA has been seen to be the most cost-effective way to achieve certainty and manage transfer pricing risk.[78] Long-term costs of an APA will be lower than the cost of compliance and having to defend transfer pricing method adopted. The presence of An APA may avoid fiscal costs and audit times, as well as lawsuits for the taxpayers and the tax administrations.[79] The taxpayer is in a better position to predict his fiscal debt, thereby allowing a favourable fiscal environment for investment. An APA once signed allows the revenue authority to deploy and focus resources on other taxpayers or risk areas.

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[76] AM Snyder 'Taxation of global trading operations: use of advance pricing agreements and profit split methodology' (1995) 48 *The Tax Lawyer* 1066.

[77] Failure by the taxpayer to comply with the terms of the APA may result in the cancellation of the agreement. The same will apply if it is later found that the taxpayer failed to disclose material facts in his application. However, as regards cancellation for failure to comply with the terms of the agreement, the impending cancellation may be waived if the taxpayer is able to demonstrate good faith and reasonable cause behind the failure comply with the terms of the APA.

[78] See generally SC Wrappe & M Kramer 'Insight: seriously considering an advance pricing agreement' (2020) https://news.bloombergtax.com/transfer-pricing/insight-seriously-considering-an-advance-pricing-agreement (accessed 28 October 2020).

[79] Amongst other advantages of an APA is that it provides a taxpayer with greater security towards international tax treatment. A taxpayer will be able to know and understand the tax treatment of its transaction ex post facto and thereby all the parties including the tax administrator will conduct proper tax planning in line with the agreement.

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6.2.2 The weakness and challenges of the APA

Inflexibility

Once agreed upon, the taxpayer must comply with the letter and the spirit of the agreement. Any deviation may result in the cancellation of the agreement by the revenue authority. This cancellation may trigger financial consequences for the taxpayer. The same will occur if it can be later found that the taxpayer did not disclose all material facts when making the application.

Duration of an APA may hinder a taxpayer's business aspirations

With APAs, that tax considerations precede business considerations.[80] Since APAs are entered into for a fixed number of years ex ante, it has been argued that this may be disadvantageous to the taxpayer if the period is too long. The reason is that in the course of time the taxpayer may not be flexible in making business decisions in line with changing business circumstances. The taxpayer may be obligated to abide by the agreement and not consider business opportunities that may arise during the duration of the agreement.

Complexity of the APA application

An APA application is highly technical in nature and requires costly specialist transfer pricing skills. This makes the application costly, but once it is agreed upon it provides more higher benefits during its term than the costs incurred of making the application. APA process involves a series of negotiations between experts from different disciplines including legal, tax, accounting and economics who possess varying familiarity with the taxpayers' affairs. These experts will command high fees that render the whole process costly for taxpayers.

Cancellation of an APA agreement

An APA agreement is a product that emanates from negotiations; it is not a ruling enforceable by courts. It can be cancelled if there was a material change to one or more critical assumptions, or there was a change in tax law, including a treaty provision materially relevant to the MAP

[80] SO Lodin 'Is the American approach fair? - some critical views on the transfer pricing issues' (1995) *Intertax* 243. A huge tax consideration is ascertained prior and such tax consideration has the potential to affect the normal flow of business. What would emerge from this is that it will create doubt on inward foreign direct investment on the part of multinationals and developing countries will be the ones most affected by any reluctance to invest.

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APA.[81] Any party to the agreement may repudiate it at any time, thereby making the agreement ineffective towards the resolution of transfer pricing disputes.

6.3 The Mandatory Binding Arbitration

Article 25(5) of the OECD MTC makes provision for arbitration as a transfer pricing dispute resolution mechanism. In order to avoid an additional procedure, a supplementary dispute resolution technique was introduced which was aimed to reduce costly, time-consuming and possibly conflicting domestic judicial proceedings.[82] According to this article, in the event that a case referred to a competent authority through a MAP process is unresolved within two years, any party (taxpayer) who so wishes may request for the matter to be referred to arbitration and any decision by the arbitrator shall be binding on all the affected parties to the dispute. In making the request the requesting party must also submit a written statement to the effect that no decision on the same issues has already been rendered by a court or administrative tribunal of the states. Chief amongst the recommendations was that the mandatory resolution of unresolved MAP issues should be developed.

Most international disputes are resolved by way of negotiations but, 'if negotiations seem not to be successful, the state could refer to other means of disputes settlement international law provides for.'[83] This may include the use of an impartial third party, an arbitrator who gives an advisory opinion on resolving the dispute. Despite resistance, there are countries that are in favour of its use. For instance, the United Kingdom made a commitment to the use of binding arbitration in transfer pricing dispute resolution in its 2016 budget speech.[84] As of 1 January 2018, United Kingdom adopted new regulations implementing the EU arbitration directive. A move which has resulted in a record levels of settle MAP cases.[85]

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[81] OECD Guidelines for conducting advance pricing arrangements under the mutual agreement procedure (1999) http://www.oecd.org/tax/transfer-pricing/38008392.pdf (accessed 10 July 2017) 49. See Deloitte transfer pricing: advance pricing agreements (2015) https://www2.deloitte.com/content/dam/Deloitte/al/Documents/tax/2015-4-15-al-tax-leaflet-apa-v5.pdf (accessed 22 April 2020) 4.

[82] OECD Progress report (2004) OECD commentary to art 25 read with the paras 8-14 *Public discussion draft* (2006) https://www.oecd.org/tax/dispute/proposals-for-improving-mechanisms-for-the-resolution-of-tax-treaty-disputes-2006.pdf (accessed 15 August 2017) 5.

[83] M Lang & M Zuger *Settlement of disputes in tax treaty law* (2002) 121. As there are mechanisms provided for under international rules, parties to a dispute could embark on any other mechanism that could resolve the dispute.

[84] See generally G Osborne 'Oral statement to parliament budget 2016: George Osborne's speech' https://www.gov.uk/government/speeches/budget-2016-george-osbornes-speech (accessed 22 December 2019).

[85] See generally KPMG 'UK: Arbitration directive-related rules; enhancing cross-border dispute resolution' (2020) https://home.kpmg/us/en/home/insights/2020/02/tnf-uk-arbitration-directive-related-rules-enhancing-cross-border-dispute-resolution.html (accessed 22 April 2020). These measures, together with binding arbitration provisions coming into UK bilateral treaties, are viewed as giving taxpayers better prospects of achieving resolution of double taxation issues than ever before. Giving business additional confidence that engaging in the MAP or arbitration process will deliver timely and effective results.

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As a result of the weaknesses alluded to above in relation to the MAP and the APA, some modern bilateral treaties contain an arbitration clause for cases in which the authorities do not succeed in reaching a mutual agreement. The parties may initiate arbitration subject to the approval of other tax authorities and allow the authorities to appoint arbitrators.[86]

In its commentary of article 25, the OECD added arbitration as an alternative solution within the MAP along the lines of the European Commission Convention (ECC) under which the competent authorities may refer a dispute to binding arbitration.[87] In 1984, the International Chamber of Commerce (ICC) strongly endorsed compulsory arbitration as part of a wider resolution that envisages the improvement of the general MAP. It supported obligatory referral to arbitration, with the taxpayer's consent, if the competent authorities fail to reach agreement after one year.[88]

The European Economic Community (EEC) concluded in 1990, a bilateral convention, the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises. Together with its related Protocols the convention provides for mandatory binding arbitration (MBA) in the resolution of transfer pricing disputes.[89] According to this convention there is no standing arbitrator; he or she is usually appointed on an ad hoc basis for each individual case.[90] Once presented with the case and the facts at dispute, the arbitrator will apply the law reasonably to arrive at a decision. Once a decision is made, the arbitration board will then give a recommendation to the two competent authorities, who have six months to come with an alternative solution to the one reached by the board.

Should they fail to come with an alternative solution within a six months' period, the recommendation of the board becomes binding on both authorities. Once the recommendation

[86] Terra & Wattel (n 62 above) 405. Some European members e.g. Germany and Austria whose previous tax treaty did not contain an arbitration clause have entered into a pre-dispute commitment to arbitrate disputes between member's states. At times it may be more than one arbitrator. It is recommended that they be three, with the third being the Chair of the proceedings and whose independence must at least be guaranteed.

[87] OECD (n 41 above) para 48. This would mean that in the absence of an agreement between the competent authorities, a third party who is independent form the competent authorities and who is considered to be neutral will preside over the matter and make a ruling after considering the facts and the applicable laws. Unlike the OECD and other structures that provide for two years, arbitration provides for one year.

[88] International Fiscal Association *Resolution of tax treaty conflicts by arbitration proceedings of a seminar held in Florence, Italy 1993 during the 47th congress of the International Fiscal Association* (1994) 89.

[89] It must be noted that this convention will only be applicable to those MNEs that are resident in the EU. Again, the convention makes reference to the MAP in that once a MAP has been initiated countries have two years to resolve the dispute, failing which they must establish an arbitration board which shall deliver an advisory opinion six months from the date of its inception. It is interesting to see the wording used e.g. shall and must, making the establishment of the arbitration board peremptory rather than directory.

[90] The arbitration board may comprise of representatives from both competent authorities and a number of independent persons and a Chairperson, who may be selected from a list of competent and independent persons knowledgeable in the field of transfer pricing dispute resolution. What should be noted is that the affected MNE has no say as to who makes the list of independent persons. The rationale for this is simply because the dispute is between the two contracting states regarding the correct application of the arm's length principle. This does not mean that taxpayers cannot participate in the process. Unlike the MAP, the taxpayer is allowed to make representations to the advisory board which they feel may be helpful for the board to arrive at an informed decision. Taxpayers are obliged to furnish the board with information, evidence and documents at the request of the board.

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is made by the arbitration board, it becomes binding and both authorities must then give effect thereto. This means that the tax administrations must amend any tax assessment and make such adjustments in line with the decision of the board. Article 13 of the Arbitration Convention waives domestic time limits that hinder such alterations.[91]

A distinction should be made between the OECD and the UN article on arbitration. According to the OECD, a matter must be referred to arbitration after two years of a failed MAP process while under UN; it can only be referred to arbitration after three years.[92] The OECD allows the taxpayer to initiate the arbitration process while under the UN; it can only be initiated by any of the competent authorities.[93] Under the OECD article 25(5), once the arbitration decision has been reached and communicated, the competent authorities are required to follow the decision in reaching a MAP. Under the UN provision, the competent authorities can deviate from the decision of the arbitrators if they are able to reach an alternative agreement within six months of the arbitration decision.

The arbitration award is binding on the competent authorities only in respect of the specific issues submitted to the tribunal and not on anything else not dealt with by the arbitration board. Another important aspect of the arbitration board decision is that it has no precedential effect in that it cannot be used as precedence in any preceding or impending cases.[94] However, once published, the decision made by the board may be used by other competent authorities when dealing with transfer pricing issues involving the same taxpayer who was part of the matter.

Central to the arbitration decision is that there must be reasons for arriving at the said decision. Interestingly, the competent authorities may also submit a case to an independent commission in order to obtain an expert opinion instead of a decision.[95] Even though it looks like the use of binding arbitration is gaining support, it is important to mention that an arbitration convention

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[91] The existence of the arbitration board not only ensures taxpayer participation and the resolution of the dispute, it also ensures through article 13 the decision of the board will be implemented.

[92] Para 70 UN Model double taxation convention between developed and developing countries' (2017) https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf (accessed 28 October 2017) 592.

[93] H Ault 'Dispute resolution: the mutual agreement procedure' in A Trepelkov et al *United Nations handbook on selected issues in administration of double tax treaties for developing countries* (2013) 330. If a competent authority does not itself refer the matter for arbitration it would mean that there is possibility that the case will remain unresolved, a position that will result in double taxation on the part of the taxpayer.

[94] The debate internationally is to ensure that taxpayers and tax authorities have certainty vis-à-vis the taxpayer's obligations and the consistent treatment of all taxpayers. But one could argue that if the decisions of the board have no precedential effect, consistency cannot be guaranteed. If a different board can arrive at a conclusion without an obligation to refer to any decision by another board then it would mean that that it is possible for different boards to arrive at different conclusions on the same facts. In as much as there is talk of global economy and international trade, consistency in the interpretation and application of rules might have a global effect. A taxpayer who was never a party to a dispute should be able to rely on a decision of another board in order to prepare his case.

[95] K Vogel et al *Klaus Vogel on double taxation conventions: a commentary to the OECD - UN- and US Model conventions for the avoidance of double taxation of income and capital* (1991) 1199.

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is restricted to transfer pricing issues only and is therefore not applicable to other disputes that may arise under tax treaty law. It can also be used in a triangular case in disputes that involve more than two competent authorities. There have been questions on the interest that would be payable on the adjustment arising out of the decision of the board. However, in the absence of a clear provision in the convention dealing with such interest, it has been the standard to allow the domestic rules of the contracting states to prevail.

6.3.1 Advantages of mandatory binding arbitration

Amongst the advantages of MBA are the avoidance of uncertainty and delay inherent in the present system of the MAP. It also reduces expenses linked with the lengthy MAP process. It seeks to resolve the matter while the information is still fresh with a speedy decision making process and allows the taxpayer an opportunity to present evidence and arguments which can be used as an opportunity to correct any misunderstanding in the information given to the tax authorities.[96]

Arbitration culminates in an arbitration award. This award may be converted into a court order which is final and binding on all parties involved. If the award is found to be unenforceable for one reason or the other, the request for arbitration shall be considered not to have been made and the arbitration process shall be considered not to have taken place.

It should be noted that arbitration is only available for cases that competent authorities were unable to resolve in terms of the MAP. It is against this background that arbitration is seen as a safety net for unresolved MAP cases. Its presence has also been labelled as an inducement, putting pressure on competent authorities to resolve the dispute on their own rather than it being a dispute resolution mechanism.[97]

[96] Stroud & Masters (n 2 above) 81. It is generally true that when principles of natural justice such as the *audi alteram partem* rule are observed in tax arbitration cases the taxpayers are likely to be comfortable with the decision of the arbitrator. It can also be argued that parties to the dispute are more receptive of the decision if it comes from a person that they believe to be neutral. Another positive of the binding arbitration is that the taxpayer will be satisfied that the case was dealt with meritoriously unlike in the MAP where a competent authority might ignore the merits of the case in order to achieve a more successful result for other taxpayers.

[97] Tillinghast D 'Arbitration of disputes under income tax treaties: a panel overview' (2003) 97 *American Society of International Law* 108. The fact that the competent authorities are aware that failure to resolve the dispute may cause the invitation of third parties unknown to them to resolve the dispute has the potential to put pressure on the authorities to resolve the dispute.

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6.3.2 The weaknesses and challenges of the mandatory binding arbitration

Resistance to MBA as a dispute resolution mechanism

As a new concept, the MBA has had challenges, chief of which is the resistance to its inclusion in DTAs. OECD and G20 countries did not reach consensus on the adoption of arbitration as a mechanism to ensure the resolution of MAP cases. Only a group of about 20 countries had committed to adopt and implement the MBA. It is clear that even within the group there are differing views on the scope of such provision.[98]

Confusion regarding the role of the taxpayer in choosing the arbitrator

Another challenge with the MBA is whether the taxpayer should play any part in appointing an arbitrator. Allowing a taxpayer as well as the two governments to choose an arbitrator could result in an even number of arbitrators, unless if one of the three is chosen to act as chairman. This is undesirable because it is important that the chairman be and be seen to be impartial. Another challenge relates to the institution which will have the authority to name arbitrators when the parties to the dispute fail to agree on the appointed arbitrator. In other systems such as the UN, if no third arbitrator is selected within three months, the Chair of the UN Committee of Experts shall select the third arbitrator.[99]

The perception that MBA seizes the sovereignty of the states in question

Another challenge with the MBA under the MAP is the perceived surrender of fiscal sovereignty to the arbitrators to resolve tax disputes. The notion of fiscal sovereignty maintains that there should never be any delegation or relinquishment of a country's power and authority to tax, to third parties.[100] Revenue authorities view the introduction of arbitration as removing control from the competent authorities and handing it to the third parties.

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[98] K Chung et al 'Dispute resolution mechanisms' (2015) *Deloitte Global Transfer Pricing* https://www.us-tax-beps-changes-transfer-pricing-dispute-resolute-mechanisms.pdf (accessed 3 November 2019) 2.
[99] UN Model (n 90 above) 614.
[100] M Markham 'International tax treaty arbitration – fighting an uphill battle in the global arena' (2017) 28 *Australasian Dispute Resolution Journal* 164. Fiscal sovereignty means that a country will takes care of its own internal issues independent of any foreign forces. In terms of this, no country or third party should impose solutions to a tax dispute on another country. Hence, the view that binding arbitration in transfer pricing disputes is a threat to the sovereignty of the countries so affected. However, one can argue that when the countries that are party to the dispute consent to arbitration, they effectively surrender their sovereignty and open themselves to external intervention for the purpose of resolving the dispute. R Barents 'The single market and national tax sovereignty' in S Jansen *Fiscal sovereignty of the member state in an internal market* (2011) 58. He states that there is no such thing as tax sovereignty and argues that tax sovereignty is a false paradigm.

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7 OECD BEPS Project Plan

From the discussion above it is clear that all the dispute resolution mechanisms have their distinctive challenges, an aspect that triggered the world to come together with an attempt to deal with specific challenges. The creation of the BEPS Action Plan by OECD members was, amongst others, to deal effectively with the resolution of disputes. Action 14 of the 15 Action Point plan specifically deals with transfer pricing disputes. As mentioned before there are more than six of the Actions that are related either directly or indirectly with the resolution of transfer pricing disputes.

The OECD launched an 'Action Plan' in 2013 to plug gaps in international tax regulations that are exploited by MNEs to reduce taxes. The plan identified 15 specific actions 'that will give governments the domestic and international instruments to prevent corporations from paying little or no taxes.' The OECD's Action Plan on base erosion and profit shifting, also known as (the BEPS Action Plan), was compiled at the request of the G20 countries.[101]

The OECD recently embarked on a 15 Points Action Plan, the prime objective of which is to address a number of concerns relating to international corporate tax planning.[102] The BEPS initiative in relation to transfer pricing attempts to prevent aggressive profit-shifting strategies by amending the current transfer pricing guidelines to better align transfer pricing outcomes with value creation.[103] This will be achieved by giving business greater certainty by reducing international disputes over the application of international tax rules and standardising requirements.[104] This will be accomplished by placing more emphasis on the allocation of profits to the jurisdiction where substantive functions are performed, including the control functions related to risks assumed and capital employed.

The common theme in all the dispute resolution mechanisms discussed in this chapter namely, the MAP, the APA and the MBA, is that the competent authorities need to collaborate with each other. The importance of such collaboration is visible in article 25, in that paragraphs 2, 3, 4, and 5 thereof refers to 'the other contracting state.' It is clear from the wording as contained

[101] I Lamprecht 'OECD action plan to close tax gaps' (2013) *Moneyweb's Tax Breaks* 7.
[102] See generally OECD Countering harmful tax practices more effectively taking into account transparency and substance (2015) https://www.oecd.org/ (accessed 29 October 2017). It is discussed here that the most concerning issue in the tax industry is BEPS.
[103] See generally OECD BEPS Project Plan http://www.oecd.org/tax/beps-about.htm (accessed 28 August 2017).
[104] as above.

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in these paragraphs that once the MAP request has been accepted, the competent authority to which the taxpayer is resident must start to engage the other contracting state.[105]

It is necessary for competent authorities to engage and communicate with one another. It is obvious that such communication will mean the exchange of information with the aim of resolving the dispute at hand. For a competent authority to adjudicate and decide on the matter before it, it needs to fully understand all the facts related to the dispute. The absence of such information may delay the competent authority from arriving at a decision or cause it to make an incorrect decision. The OECD has through the BEPS project attempted to address bank secrecy in tax matters through changes to article 26. After conceding that the exchange of information by request is ineffective, it moved to the automatic exchange of information as an international standard.

Automatic exchange of tax information is one of the most important tools that are used to enable the competent authorities to resolve transfer pricing disputes. However, for such exchange of tax information to happen there needs to be a framework in place, an instrument that emanates from a bilateral or multilateral agreement that will guide such international co-operation. The absence of such framework to guide the co-operation amongst competent authorities will obviously affect the efficacy of these transfer pricing disputes mechanisms.

8 Supporting Tools Available for the Effective Resolution of Transfer Pricing Disputes.

There are tools that are meant to ensure that appropriate tax administration processes are in place and that an environment that is conducive for the effective resolution of disputes is created and that disputes are dealt with in a fair and consistent manner.[106] It is anticipated that these tools will assist in the resolution of transfer pricing dispute or if not, at least assist in the timely conclusion of cases.[107]

The OECD has highlighted the need for information as a critical part of an effective risk management strategy. The absence of data is a principal impediment to the successful tackling

[105] Helmein (n 69 above) 249. Even if the competent authority to which the taxpayer is resident would have preferred to offer unilateral relief, it would still require confirmation from the other contracting state before deciding on the unilateral relief. With exchange of information and other tools related thereto such as the master file, the competent authority can offer unilateral relief without any hindrances since it will already have information on the global operations of the MNE.

[106] Chung (n 98 above) 1. However, research shows that these tools do not only assist in the administration of taxes on cross border transactions. They are also valuable when international tax disputes arise.

[107] DN Shaviro *Fixing U.S. international taxation* (2014) 179.

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of tax evasion.[108] Success in the adjudication of transfer pricing dispute cases brought before competent authorities is dependent on information in the possession of the affected competent authorities. The OCED dispute resolution mechanism such as the MAP, APA and MBA all require that all contracting states that are party to the dispute, exchange information in an attempt to ascertain the facts before them.[109] This will assist in expeditiously resolving the cases as the only issue to be debated will be more about the interpretation and application of the law to the agreed facts.

8.1 Exchange of Information

Exchange of information is a framework for tax authorities to request and obtain information from their international partners on the offshore affairs of their taxpayers.[110] It is viable as a tool to complement and reinforce tax transparency, further enhancing international cooperation to ensure tax compliance. Through exchange of information jurisdictions will automatically have greater levels of information on the overseas financial activities and wealth of their taxpayers, including individuals and entities.

There are various tools that the OECD and other world bodies have come up with to assist countries with the taxation of cross border transaction. The exchange of information has been identified as one of the issues that militate against the effective implementation of OECD rules and mechanisms. The fact that revenue authorities have difficulty accessing taxpayer information from other jurisdictions renders them unable to develop a full picture of a company's global operations.[111] The OECD Committee on Fiscal Affairs has defined the lack of an effective international exchange of information as one of the characteristics of tax havens.[112] In the year 2020 the exchange of information on request alone has enabled the recovery of nearly 7.5 billion Euros of additional tax revenue.[113] Generally speaking, developed countries have larger networks of information exchange and DTAs than developing countries.

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[108] S Phua 'Convergence in global tax compliance' (2015) *Singapore Journal of Legal Studies* 81.

[109] Para 22 of the guidelines for the MAP APAs (1999) http://www.oecd.org/tax/transfer-pricing/38008392.pdf (accessed 7 October 2017) 27.

[110] OECD Global forum on transparency and exchange of information for tax purposes automatic exchange of information implementation report (2018) https://www.oecd.org/tax/transparency/AEOI-Implementation-Report-2018.pdf (accessed 4 December 2019) 2. See also CH Gustafson 'Tax treaties in the Americas: the United States' in A Amatucci *International tax law* (2012) 224.

[111] A Readhead 'Preventing tax base erosion in Africa: a regional study of transfer pricing challenges in the mining sector' (2016) https://resourcegovernance.org/analysis-tools/publications/preventing-tax-base-erosion-africa-regional-study-transfer-pricing (accessed 13 August 2017) 2.

[112] OECD *Harmful tax competition: an emerging global issue* (1998) https://read.oecd-ilibrary.org/taxation/harmful-tax-competition_9789264162945-en#page4 (accessed 30 October 2017) 23.

[113] OECD Global forum on transparency and exchange of information for tax purposes multilateral co-operation changing the world' (2020) http://www.oecd.org/tax/transparency/global-forum-10-years-report.pdf (accessed 2 November 2020) 3.

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Over the last five years, developing countries have grown their awareness of the risk of significant tax loss through transfer pricing and the importance of developing their skills and expertise to meet this challenge. These are skills which could be shared to good effect with them.[114] Many MNEs invest significantly to ensure that transactions which do not take place in an open market are priced properly. However, the majority of developing African countries do not. There are growing concerns that the economies of most African developing countries are disadvantaged by their failure to do so.

Many of the issues faced today by developing countries share common features and have previously been addressed by others. It follows that the best source of support for developing countries in the context of transfer pricing lies in closer international collaboration amongst developing countries in comparable situations and more widely in the international community.

Mutual assistance through exchange of information will help tax administrations in developing countries to improve their transfer pricing skills and knowledge while at the same time levelling the trade playing field across the globe.[115] There are three ways in which information may be exchanged namely:

i) on request;[116]
ii) automatically;[117] and
iii) spontaneously.[118]

8.1.1 On request

In its module on the exchange of information by request, the OECD encourages member states to use it only as a last resort after having exhausted all the locally available information from

[114] OECD *Dealing effectively with the challenges of transfer pricing* (2012) https://www.oecd.org/publications/dealing-effectively-with-the-challenges-of-transfer-pricing-9789264169463-en.htm (accessed 30 October 2017) 76. As has been stated before, most African countries have no DTAs with other African countries. This means that tools such as the exchange of information will not be utilised as their usage is reliant on treaties that allow the flow of bilateral or multilateral information.
[115] as above.
[116] Art 26(1) OECD MTC http://www.oecd.org/tax/exchange-of-tax-information/Manual-implementation-EOI-provisions-tax-purposes.pdf (accessed 20 June 2017). Another state may make an application to the other (the requested state) requesting it to make available information relating to a particular case. The request must be specific and cannot just be seen to be a fishing expedition which is unfounded. Another reason is that taxpayer information is generally confidential and must only be disclosed when necessary.
[117] Art 26(3) OECD MTC (as above). This is possible in cases where countries have agreed during a bilateral or a multilateral engagement that they will from time-to-time exchange information periodically or on the occurrence of a specific event. Automatic exchange of information (also called routine exchange by some countries) involves the systematic and periodic transmission of 'bulk' taxpayer information by the source country to the residence country.
[118] Art 26(4) OECD MTC (n 113 above). This may be mandatory or voluntary and would take place on the occurrence of an event warranting a reasonable suspicion of a tax loss by another member state, a reduction or exemption which will trigger a corresponding increase in another state. It also applies to the violation of the arm's length transfer pricing within MNEs. See OECD Manual on the implementation of exchange of information provisions for tax purpose 'Module 2 on spontaneous exchange of information' http://www.oecd.org/ctp/exchange-of-tax-information/36647914.pdf (accessed 30 October 2017) 3.

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sources such as the internet and, where practical, commercial databases. Member states can also obtain information by engaging diplomatic staff located in the taxpayer's country of residence to obtain publicly available information. The application for request of information should be in writing, but in cases where there is an urgent need for information, it may be made orally on condition that a follow up formal written application would be submitted. Details in relation to the method of formalising the request and the crafting thereof is dealt with in Chapter 6 wherein the efficacy and the effectiveness of the abovementioned ways through which information can be exchanged will be discussed in full.

8.1.2 Automatically

Automatic exchange of information involves the systematic and periodic transmission of 'bulk' taxpayer information by the source country to the residence country concerning various categories of income. Automatic exchange can also be used to transmit other useful types of information such as changes of residence and the purchase or disposition of immovable property. Such information can be automatically matched against what has been reported by the taxpayer in the receiving country.

8.1.3 Spontaneously

Spontaneous exchange of information relies on the active participation and co-operation of local tax officials. Information provided spontaneously is usually effective since it concerns particulars detected and selected by tax officials of the sending country during or after an audit or other type of tax investigation.

Any exchange of information must be between the competent authorities. The confidentiality thereof must at all times be guaranteed by the requesting state and be dealt with in a manner that is similar to information obtained under the requesting country's domestic legislation. Only persons involved in the assessment or those involved in the judicial or quasi-judicial administration of any sanctions of the said tax assessment should have access to the information.[119]

[119] Terra & Wattel (n 62 above) 468. It should be noted that persons involved in the recovery of tax claims and those in the criminal prosecution of tax offences are not mentioned as being amongst the persons to whom information may be transmitted. Prohibition is not blindly made. The requesting state may use the information provided for another purpose with the permission of the requested state. The permission to use information so acquired for another purpose must be for a purpose that is permissible f in the requested state. The requested state cannot act ultra vires by giving permission to do what it cannot do itself.

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Statistics on the information so exchanged will be published in annual reports. The publication has the potential to embarrass a country if it can be found at a later stage to have knowingly withheld information which could have been used by a treaty partner. Not only will it sour diplomatic relations with the said partner but also with other contracting states and discourage other states from sharing tax information with a country which was found to have deliberately withheld tax information.

8.2 Automatic Exchange of Information

The OECD has through its BEPS Project identified the need to ensure that taxes are paid in the jurisdictions where they are due. This was done by recommending that countries should be equipped with the necessary legal, administrative and information technology (IT) tools for verifying the compliance of their taxpayers. It was against this background, that the enhancement and co-operation between tax authorities through an updated and enhanced version of Automatic Exchange of Information (AEOI) was established.

An automatic exchange can be done either by agreement or through a memorandum of understanding (MoU). Such an agreement or MoU will typically set forth the types of information to be exchanged automatically, details about the procedures of sending and receiving the information and the appropriate format to use. The OECD has through its BEPS Project reaffirmed its commitment to global tax transparency and to the free flow of tax information between states. It has stated that the automatic exchange of information is crucial in bringing national tax administration in line with the globalised economy.[120]

On 7 June 2017, Ministers and other high-level representatives from over 76 jurisdictions participated in the signing ceremony of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). A number of jurisdictions have also expressed their intention to sign the MLI as soon as possible and other jurisdictions are also actively working towards signature.[121] Only a handful of about 25 countries of those who singed have agreed to the MBA as provided for in the MLI.

[120] It should be noted that the exchange of information or rather the automatic exchange thereof will always depend on the MCAA between the countries, which goes back to the discussion above on the importance of the DTA. The agreement in the bilateral or multilateral convention will define the terms of engagement between countries inters se. Even if it is said that the competent authority should automatically exchange information it receives from the reporting entity, it can only do so with a competent authority to which it has an agreement in force. The obligation to provide or exchange information should be a legal obligation for it to be effective in achieving the intended results. It cannot merely be a moral one on which a country would not be held to account.

[121] Mere verbal expressions or intentions to sign the binding arbitration means nothing if countries do not sign, because countries are bound by what they have signed, mere intentions to sign have no legal standing whatsoever.

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8.3 Country-by-Country Reporting (CbCR)

In an attempt to increase tax transparency, the OECD has also implemented a package for Country-by-Country reporting (CbCR) through Action 13 of the BEPS project, published on 8 June 2015.[122] The CbCR as outlined in BEPS Action 13, requires MNEs to include detailed financial and tax information relating to the global allocation of their income and taxes, among other indicators of their economic activity.[123]

Its prime objective is to foresee that tax authorities automatically exchange key indicators (such as profits, taxes paid, employees and assets of each entity) of MNEs with each other, therewith allowing tax authorities to make risk assessments as to the transfer pricing arrangements and BEPS-related risks, which may then serve as a basis for initiating a tax audit. The OECD guideline states that:

> [i]nformation contained in CbCR may be used for high level transfer pricing risk assessment but should not be used by itself as a basis for proposing changes to transfer prices or adjusting a taxpayer's income using global formulary apportionment. However, there is nothing to prevent a tax authority from using CbCR information in into the group's transfer pricing arrangements or other tax matters, in the course of an audit planning a tax audit or as the basis for making further enquiries.[124]

A survey conducted by Thomson Reuters, in association with TP Week, shows that the majority of transfer pricing practitioners are wary of fact that transfer pricing documentation and CbCR are the biggest challenges among all of the BEPS Actions.[125] Transfer pricing documentation in itself requires a lot of time and effort but there is sense to its existence. Transfer pricing documentation has three objectives namely:

i) to ensure that taxpayers give appropriate consideration to transfer pricing requirements in establishing prices and other conditions for transactions between associated enterprises and in reporting the income derived from such transactions in their tax returns;

[122] Another reason for the country-by-country reporting is to improve access of respective tax authorities to information regarding the global allocation of the income, the taxes paid, and the economic activities of MNEs with the objective of identifying transfer pricing risks. The availability of these tools is also relevant not only for ensuring that tax is paid where it is due but also for effectively dealing with the resolution of transfer pricing disputes.

[123] Its prime object is to ensure that taxes are paid in the jurisdiction where profits are generated, where value is added, and where risk is taken. Consequently, it will then promote tax transparency and accuracy in tax reporting.

[124] OECD 'BEPS Action 13 on country-by-country reporting: guidance on the appropriate use of information contained in country-by-country reports' (2017) https://www.oecd.org/tax/beps/beps-action-13-on-country-by-country-reporting-appropriate-use-of-information-in-CbC-reports.pdf (accessed 29 August 2017) 5.

[125] See generally Thomson Reuters '2016 global BEPS readiness survey report' (2016) https://tax.thomsonreuters.com.au/wp-content/anz-docs/Benchmarking-BEPS.pdf (accessed 29 August 2017).

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ii) to provide tax administrations with the information necessary to conduct an informed transfer pricing risk assessment; and

iii) to provide tax administrations with useful information to employ in conducting an appropriately thorough audit of the transfer pricing practices of entities subject to tax in their jurisdiction, although it may be necessary to supplement the documentation with additional information as the audit progresses.[126]

The transfer pricing documentation has ways and means through which documents, information and or reports are occasioned. A provision is made for a master file and a local file. A master file should provide an overview of the MNE group business, including the nature of its global business operations, its overall transfer pricing policies, and its global allocation of income and economic activity in order to assist tax administrations in evaluating the presence of significant transfer pricing risk.[127] A local file provides more detailed information relating to specific intercompany transactions. It focuses on information relevant to the transfer pricing analysis related to transactions taking place between a local country affiliate and associated enterprises in different countries and which is material in the context of the local country's tax system.

8.4 Simultaneous Tax Examination

A simultaneous tax examination (STE) is an arrangement by two or more countries to examine simultaneously and independently, each on its territory, the tax affairs of taxpayer they have a common or related interest with a view to exchanging any relevant information they so obtain.[128] STEs are conducted separately within the framework of the national laws and practice by tax administration officials of each country. The examination is done through a DTA to share and exchange of information so collected. Again it goes back to the importance of a DTA as collected information can only be used through the utilisation of the relevant article in the DTA It is suggested that in complex transfer pricing cases, the use of STEs could serve a broader role

[126] OECD/G20 Base erosion and profit shifting project *Action 13 guidance on the implementation of transfer pricing documentation and country-by-country reporting* (2014) https://www.oecd.org/ctp/beps-action-13-guidance-implementation-tp-documentation-cbc-reporting.pdf (accessed 14 October 2017) 14. Transfer pricing audit is about the establishment of facts. The existence of transfer pricing documentation assists in the evaluation and comparison of cross border transactions and performance of MNEs both within and beyond the borders of countries. The said documentation will provide a detailed analysis of financial, factual and other industry information.

[127] The master file is there to provide high level information about an MNE's transfer pricing practices in its global economic, legal, financial and tax context. This information will assist when one starts to assess the available information when faced with transfer pricing disputes. A cross reference of information contained in the master file and in the local file is recommended. It is also recommended that transfer pricing documentation be periodically reviewed in order to determine whether functional and economic analyses are still accurate and relevant and to confirm the validity of the applied transfer pricing methodology. In general, the master file, the local file and the country-by-country report (CbCR) should be reviewed and updated annually. It is the responsibility of the various tax authorities to ensure that the information so provided is confidential.

[128] Para 5 OECD Manual on the implementation of exchange of information provisions for tax purposes 'Module 5 on conducting simultaneous tax examinations' (2006) http://www.oecd.org/ctp/exchange-of-tax-information/36648057.pdf (accessed 30 October 2017) 10.

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since they seem to provide adequate data by tax administrations in the analysis of transfer pricing documents.

The other reason the STE is preferred is that if the potential for double taxation arises during the examination, those conducting the examination can be addressed on the issues that trigger double taxation immediately, and the following may take place:

i) the taxpayers will be able to present a request for the opening of the MAP much earlier than he would but for the simultaneous tax examination; [129] and

ii) the competent authorities will be able to compile more complete factual evidence for those tax adjustments for which the mutual agreement procedure may be requested.

Even though it is conducted by the tax authorities operating independently, the authorities will from time to time work together and engage one another on common issues. Designated representatives participating in the examination should attempt, as far as is practicable, to synchronise their work schedules and communicate on an agreed, regular basis. Meetings should be held where the need arise and during such meetings exchange of information must take place in accordance with the exchange of information article of the instrument between the countries participating in the STE. It is therefore essential that STE coordinators attend all meetings where information may be exchanged to ensure any exchange will be done legally and in conformity with the tax administrations' procedures regarding exchange of information.

An STE should, unless there is a withdrawal by the other countries, be concluded only after coordination and consultation between the designated representatives of each participating country.[130] During this consultation, the designated representatives should attempt to agree on a common position regarding the taxpayer's tax affairs.[131] At the end of the STE, the competent authorities of each country will produce a comprehensive report that contains a summary and the manner and the form in which the results were achieved.

[129] In consideration of the reasons mentioned above it goes without saying that the STE is able to assist in the speedy resolution of issues as they emerge during the examination. One can also argue that as the tax authorities will be working together during the STE, this may ensure that taxation that is not in accordance with the convention is avoided. This ensures a reduction is transfer pricing disputes and provides adequate information should a dispute arise.

[130] It then means that until such consultation occurs, the STE cannot be said to be concluded.

[131] The consultation and the consolidation of the taxpayer's affairs by the relevant authorities should be done through a formal meeting between the competent authorities. And any issues that are unresolved should be addressed through the use of a MAP as provided in the DTA.

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9 Conclusion

What has been found is that MNEs still embark on transfer pricing manipulation in order to get tax benefits and that despite tax benefits, there are other economic benefits they receive as a result of this manipulation. Also found is the economic effects suffered by many countries as a result of the transfer pricing manipulation. Also found was the importance of states to have DTAs in place for tax co-operation to prevent both double taxation and double non-taxation and most importantly to prevent BEPS. While recognising the importance of DTAs it has also been found that many African states have a less tax treaty network. The absence of DTAs is also one of the factors that militate against the successful resolution of transfer pricing disputes. The said absence of DTAs undermines the work of the OECD and other global and regional organisations in that, the effective utilisation of the designed dispute resolution mechanisms depends largely on the existence of DTAs.

While the OECD have distinct conventions and goals to ensure fairness in the allocation of income, it appears that its preferred arm's-length principle together with its transfer pricing methods, has challenges as regards the foundation for transfer pricing policy resulting in many disputes.[132] The development and improvement of transfer pricing regulation, the initiation of transfer pricing audits resulting in transfer pricing adjustments have triggered multiple transfer pricing disputes. Many African states rely on and take direction from the guidance provided by organisations such as the OECD for transfer pricing regulation and for the resolution of transfer pricing disputes arising from such transfer pricing adjustments.[133]

As regards transfer pricing dispute resolution, the dispute resolution mechanisms provided for by the OECD namely, the MAP, APA and MBA still demonstrate gaps in the resolution of transfer pricing disputes as there are a lot of unresolved transfer pricing cases. The application of the MAP as a dispute resolution mechanism has its own advantages, but are unfortunately outweighed by its challenges, and as a result many disputes remain unresolved.

As regards the APA it has also been found that it has advantages, but it also has disadvantages, leading to it lacking efficacy in the resolution of transfer pricing disputes. The same goes to the MBA which has been seen by many countries as the mechanism to improve and make efficient the whole MAP process however, like the other two above-mentioned dispute resolution

[132] A Curtis et al 'Transfer pricing in Africa: the final frontier' (2012) 21 *Tax Management Transfer Pricing Report* 383.
[133] M Hewson & L Domenico 'Practical considerations in managing transfer pricing across Africa' *South African Tax Talk* 9.

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mechanisms it has it disadvantages and challenges towards providing the requisite efficacy in the resolution of transfer pricing disputes.

The OECD's efforts like the BEPS Action Plan is designed to provide countries with domestic and international instruments that will better align the rights to tax with the economic activity. Exchange of information will be important also to ensure speedy resolution of transfer pricing disputes. With less tax treaty network by African countries, the signing of multilateral conventions will be important to expand tax treaty network.

As the world is coming together to resolve global commercial challenges, trade partners need to act in unison in the adoption and application of internationally adopted principles and mechanisms. Even though the concept of sovereignty should at all times be respected, it is important for countries to understand that other issues such as aggressive international tax planning by MNEs can be curbed only through international co-operation and such co-operation will at times usurp the sovereignty of individual countries.

This should be done for obvious reasons, the consequence of failure to curb tax evasion by MNEs through transfer pricing causes more harm on the tax base of developing countries. Resolving transfer pricing disputes will be equally important as it is linked directly towards revenue collection which ultimately provides basic socio-economic needs. Chapter 3 focuses on the MAP as a dispute resolution mechanism, its efficacy in the resolution of transfer pricing disputes in an African context.

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CHAPTER 3

The Mutual Agreement Procedure and its Efficacy as an OECD Dispute Resolution Mechanism in Africa

1 Introduction

This chapter focuses on the mutual agreement procedure (MAP) as a transfer pricing dispute resolution mechanism in Africa by reference to the selected countries studied in this research. Reference is made to article 25 of the OECD MTC, which deals with the MAP as a dispute resolution mechanism. This reference will include, inter alia, useful and related OECD commentaries.[1] These commentaries are of importance in relation to the application and interpretation of both the MAP and associated enterprises, specifically to transfer pricing cases.[2] These commentaries, which are regularly updated, are also helpful in the interpretation of tax treaties. [3]

In this chapter, the discussion focuses on the MAP framework, the time frame and the guidelines in jurisdictions like South Africa in comparison to jurisdictions like Kenya, Uganda and Ghana. It also looks at other existing factors in the abovementioned jurisdictions that militate against the usage of the MAP as a transfer pricing dispute resolution mechanism.

2 The Mutual Agreement Procedure

The MAP as defined under article 25 of the OECD MTC is a remedy provided to a taxpayer that considers that the actions of one or both of the contracting jurisdictions result or will result in taxation of the taxpayer that is not in accordance with the provisions of the tax treaty.[4] It

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[1] J Swartz *Swartz on tax treaties* (2013) 114.

[2] DA Ward 'The role of the commentary on the OECD model in the tax treaty interpretation process' (2006) 3 *Bulletin for International Taxation* 97. See also MJ Ellis 'The influence of the OECD commentaries on treaty interpretation' (2002) 54 *Bulletin for International Taxation* 618.

[3] OECD commentaries are useful and have been relied upon in court decisions and, as such, should be considered to be relevant in addressing some of the challenges regarding the interpretation of the terms of a treaty. Commentaries have also been used by the courts in getting clarity on the interpretation of various articles, as stated in the EACDTA: *Handbook* 38. In the SARS 'Guide on the mutual agreement procedure' (2018) 4-5 it is stated that commentaries that are intended to illustrate and interpret the articles drafted and agreed upon by the OECD states provide an accurate assessment on the interpretation of the articles. In interpreting the MAP article, reference should be made to the OECD Model convention with respect to taxes on income and on capital (MTC) read with the OECD commentaries on the article of the model tax convention http://www.oecd.org/berlin/publikationen/43324465.pdf (accessed 20 September 2018). Reference should also be made generally to the OECD Manual on effective mutual agreement procedures (MEMAP) (2007) https://www.oecd.org/ctp/38061910.pdf (accessed 28 March 2018). K Burt 'The OECD commentaries: on what basis and to what extent are they relevant to treaty interpretation?' (2017) 8 *Business Tax and Company Law Quarterly* 18 accentuates the relevance of OECD commentaries and states that OECD commentaries adopted after the conclusion of the tax treaty may be used in the interpretative process, but only where there is clear evidence that the parties' common understanding was that the treaty term in question is to be interpreted dynamically.

[4] Art 25(1) of the MTC.

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allows the taxpayer, irrespective of the remedies provided by the domestic law of the jurisdictions, to present its case in the first instance to the competent authorities of the jurisdiction of residence.[5] The MAP as a dispute resolution mechanism in transfer pricing cases is contained in article 25(1) of the OECD MTC that states:

> [w]here 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 the Contracting State of which he is a resident or, if his case comes under paragraph 1 of article 24, to that of the Contracting State of which he is a national. 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.[6]

The taxpayer will initiate the MAP process by submitting all information required to the competent authority. It is only after all the required information has been submitted can the competent authority consider if there is an applicable tax convention covering the issue or transaction. Secondly the competent authority then examines the taxpayer's contentions that the actions of one or both countries result or will result in taxation that is not in accordance with the provisions of the tax convention. The competent authority must be notified of the taxpayer's complaint within the time limits in the applicable tax convention.

3 Associated Enterprises and Transfer Pricing Adjustments

As mentioned in Chapter 2, transfer pricing adjustments often trigger transfer pricing disputes. Article 9(1) of the OECD MTC states that:

> [w]here an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to

[5] as above. It is the main article that deals with the MAP and other related tax treaty disputes which will be dealt with in later chapters.
[6] n 4 above. It should be noted that para 5 thereof has been excluded from this chapter and not mentioned as it deals with the binding arbitration in cases where the parties to an application brought under art 25 cannot reach an agreement within the time limit stipulated in the said tax treaty. Art 25(5) will be dealt with in Chapter 5 of this research.

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> one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly. [7]

Articles 25, 9(1) and 9(2) work closely towards the elimination of double taxation. This connection is based on the fact that once article 9(1) is implemented and a dispute arises, the MAP will be initiated under article 25. Once a MAP agreement is reached, article 9(2) will have to be implemented to reflect the agreement. This means that the other contracting state will make an appropriate adjustment to the amount of the tax charged therein on those profits.

Most of the older DTAs do not have article 9(2), however, the OECD commentaries on the articles of the Model tax convention (OECD commentary) and the OECD guidelines on transfer pricing state that article 25 is applicable regardless of whether or not the DTA is missing article 9(2) in it. Article 9 will be referred to from time to time in order to demonstrate the effectiveness of dispute resolution mechanisms and the subservient corresponding adjustments to eliminate double taxation.

4 African Tax Treaty Network

The existence of a tax treaty between states is helpful when the states need to resolve a tax treaty dispute. It can only be through the existing DTA containing the MAP that countries may engage one another and develop a platform to avoid and eliminate double taxation. What is noticeable with most African countries is that they have more DTAs with non-African countries than with fellow African countries. Research shows that this could be because of trade relations and foreign direct investment from European countries which requires clarity on the allocation of taxing rights.[8]

The implication of this situation is that most African countries have a better chance of resolving tax disputes with non-African countries than they have with fellow African countries. One cannot make reference to the MAP or its use in the absence of a DTA between the two

[7] This article deals mainly with transfer pricing cases and it is intended to eliminate economic double taxation, unlike art 25 which deals with the elimination of juridical double taxation while not making provision for economic double taxation. See also I Hofbauer 'Settlement of tax disputes in Austrian tax treaty law' in M Lang & M Zuger *Settlement of tax disputes in tax treaty law* (2003) 55. Hofbauer argues that if transfer prices are only adjusted for on the level of a parent company in a negative way in one country, the affiliate in the second country will pay taxes that are too high. In this regard, art 9(2) requires that the other contracting state adjust profits appropriately to the amount of the correction in the first country provided they agree on the reason and the amount of the adjustment.

[8] E Quak & H Timmis 'Double taxation agreements and developing countries' https://assets.publishing.service.gov.uk/media/5b3b610040f0b645fd592202/Double-Taxation-Treaties_and_Developing_Countries.pdf (accessed on 2 November 2020) 8. A country like Ghana has 11 DTAs, ten of which are with European countries and only one with an African country, namely South Africa.

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respective countries inter se. The MAP as a mechanism is only available as an article within the DTA. Its use can only be between two countries that are signatories to a DTA.

One can also note that there is scope for MNEs to exploit this absence of a substantial tax treaty network amongst African countries to their benefit. They are aware that the much talked about international tax co-operation is non-existent in Africa or if it exists, its existence is not enough to counter their transfer pricing manipulation. This is because without a substantial tax treaty network, it is not possible for African countries to engage one another, exchange tax information and address the mismatch in tax rules in an attempt to curb the artificial shifting of profits by MNEs. According to Cooper et al, 'the scope of countries' treaty networks matters since treaties provide the legal basis for MAPs. Without a treaty, a MAP is simply impossible.'[9]

A transfer pricing adjustment made through article 9(1) above will give rise to economic double taxation if the resident taxpayer who is affected by such an adjustment does not get a corresponding adjustment from the other country involved. This scenario will occur if multiple tax authorities assert the same right to tax the income.[10]

For tax treaty disputes to be resolved, there must be a tax treaty in place. Many African countries do not have a comprehensive treaty network. A typical African country only has a handful of tax treaties with other African countries and several with non-African countries. The absence of a comprehensive tax treaty network places most African countries at a disadvantage in comparison with developed countries.[11] South Africa only has DTAs with 22 of the 54 African countries.[12] Some countries such as Kenya, Uganda have two and three DTAs with other African countries, respectively.[13]

DTAs are necessary because they allow taxpayers to have certainty regarding the tax consequences of any given transaction in advance and also to know which country has the taxing rights. Tax certainty is important for legitimate tax planning purposes and it is also a recognised principle that guides the drafting of tax legislation. Outside drafting, tax certainty is

[9] See generally Cooper et al 'Avoiding and resolving transfer pricing disputes' (2017) https://elibrary.worldbank.org/doi/full/10.1596/978-1-4648-0969-9_ch7 (accessed 30 May 2020).
[10] A Waegenaere et al 'Using bilateral advance pricing agreements to resolve tax transfer pricing disputes' (2007) 2 *National Tax Journal* 173.
[11] A Curtis & O Todorova 'Transfer pricing perspective: taking a detailed look at Africa. Spotlight on Africa's transfer pricing landscape' https://www.pwc.com/transferpricingperspectives (accessed 30 July 2017) 10.
[12] This would mean that South Africa can enter into negotiations with only 22 of the 54 African states. Also see EACDTA (n 3 above) 14 where it is reiterated that DTAs assist contracting states to mutually agree to limit their taxing rights and to allocate the jurisdiction to tax.
[13] See generally W Kiburi 'Double taxation agreements in Kenya' https://www.taxkenya.com/double-taxation-agreements-kenya (accessed 10 October 2017).

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achieved by formulating rules including signing DTAs and conventions which clearly indicate the country, the methods and manner in which tax is to be collected.[14]

Another key concept in international taxation is the principle of reciprocity, which has raised the question of fairness in cross-border transactions. Such a principle, can only be fulfilled by way of a DTA.[15] According to Ogley:

> [a]lthough the principal purpose of a double tax agreement is to promote trade by giving assurance to investors that they will not be subject to double taxation; the tax legislation of major capital exporting countries usually contains provisions which grant a measure of relief from double taxation even in the absence of a double tax agreement; so called unilateral relief.[16]

It remains a very important developmental aspect for African countries to conclude as many DTAs within Africa, in order to curb the erosion of Africa's tax base by MNEs and to obtain some of the benefits associated with DTAs.

5 Mutual Agreement Procedure in South Africa

5.1 Background

South Africa has only 22 DTAs with other African countries. Beside fewer transfer pricing dispute cases, shortage of skills has made South Africa unable to effectively utilise the MAP and other international available tools such as the exchange of information to request information from those other African states. Even though there are attempts to advance tax transparency in Africa,[17] such efforts will not yield the desired results if they cannot be enforced as a result of Africa's low tax treaty network.

The low tax treaty network between African countries means that, regarding international taxation, there cannot be exchange of tax information between African countries. This will force

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[14] JW Haase et al *International commercial law from a South African perspective* (2003) 68. It can also be stated that a tax treaty also provides certainty on which country the taxpayer will be liable for tax. The absence of tax treaty network in Africa deprives taxpayers of such certainty.

[15] R Rhohatgi *Basic international taxation* (2005) 25 Rhohatgi argues further that it is only in a bilateral agreement that countries can achieve a balanced allocation of taxing rights. As provided for in the EACDTA (n 3 above) 7. Countries may agree to grant relief in a situation where juridical double taxation arises. Most of all states want reciprocity otherwise one country's tax base could be eroded.

[16] A Ogley *Principles of international tax: a multinational perspective* (1993) 26. The question that arises is whether or not African countries can, in the absence of DTAs, be in a position to offer such a unilateral relief while they are simultaneously reliant on the importation of capital for economic sustenance. The problem with unilateral relief is that some countries do not grant such relief at all. At times such a relief is left to the discretion of the revenue authority, with no legal certainty to the investors as specified in the EACDTA (n 3 above) 7.

[17] OECD Global forum on transparency and exchange of information for tax purposes: tax transparency in Africa 'Africa Initiative Progress Report' (2018) https://www.oecd.org/tax/transparency/africa-initiative-report-2018.pdf (accessed 20 September 2018) 11. Even though the prime objective of this forum was to intensify the fight against tax evasion and illicit financial flows from Africa, it remains to be seen whether its action points will be actioned. This concern is raised against the background that commitments made at such multilateral forums tend to be mere commitments that are not legally enforceable unless they are agreed to by countries by way of DTAs and ratified domestically for them to have a force of law.

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the South African Revenue Service (SARS) to estimate tax liability and issue an estimate assessment, which could either result in double taxation or double non taxation as an estimate assessment is by its nature inaccurate.[18]

5.2 The Framework for the MAP

South Africa recently issued a document with intent to provide guidance to competent authorities when resolving international tax disputes. However, in its preface the same document, which is said to be a MAP guide, states that it cannot be used as legal reference when dealing with precise technical and legal detail that is often associated with tax.[19] The taxpayer cannot use it in advancing or adopting a specific legal position. The same preface states that it is not a binding general ruling and is also not an official publication as defined in section 1(1) of the Tax Administration Act 28 of 2011 (TAA) and accordingly does not create generally prevailing practice under section 5 of the Act.[20]

According to this guide, South Africa uses the MAP as a mechanism to resolve its tax treaty disputes. It also states that South Africa follows the OECD and the Vienna Convention on Diplomatic Relations[21] in its interpretation of its DTAs. The guide also refers to the Commissioner for SARS as the competent authority with MAP duties being delegated to designated representatives in the Legislative Research and Development subdivision within SARS's Legal Counsel.[22]

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[18] Sec 95 of the Tax Administration Act 28 of 2011 (TAA). In such instances the avoidance or elimination of double taxation will be reliant on the discretion of the revenue authority meaning that the avoidance of double taxation cannot be guaranteed. It is the exercise of this discretion that creates tax uncertainty with investors. It is important for investors to know and understand the possible tax consequences as that will then part of their tax planning and tax risk management.

[19] Preface to the SARS 'Guide on mutual agreement procedures' (2018) https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-IT-G24%20-%20Guide%20on%20Mutual%20Agreement%20Procedures.pdf (accessed 12 February 2018). This preface can be seen as a concession by SARS that certain technical aspects of the MAP process and aspects that relate to tax and the interpretation of tax statutes that may arise are not addressed in the guide and it cannot be used a reference.

[20] as above. Since this is said not to be an officially published guideline, it then says that South Africa risks having what occurred in Kenya in *Unilever Kenya Ltd v Commissioner of Income Tax* (2005) eKLR (Income Tax Appeal No 753 of 2003) occurring in South Africa. In this case the court ruled that in the absence of guidelines, the OECD guideline will prevail.

[21] See generally the Vienna Convention on Diplomatic Relations 1961 https://legal.un.org/ilc/texts/instruments/english/conventions/1961.pdf (accessed 13 May 2020).

[22] Since this subdivision is within SARS it can be said that in South Africa, the competent authority is located in the revenue service, unlike in other jurisdictions where the role of a competent authority is designated to the treasury which has a policy function. In other jurisdictions a distinction is made between those that are doing the audit and collection of revenue and those with a diplomatic mandate at treasury. This is done to ensure independence. There is some debate on whether those at a revenue service should be part of the competent authority. To ensure the effectiveness of MAP, when an application for MAP is made, it must be referred to an independent and separate unit that deals with MAP, not to the transfer pricing audit unit because this unit would have made the finding that is disputed in the first place. This is in line with the OECD recommendation in Action 14 which states that countries should ensure that the staff in charge of MAP processes have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty, in particular without being dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of a policy position that the country would like to see reflected in future amendments to the treaty. See generally Davis Tax Committee (DTC): 'Second interim report on base erosion and profit shifting (BEPS) in South Africa summary of DTC report on Action 14: make dispute resolution mechanisms more effective' (2010) https://www.taxcom.org.za/ (accessed 20 September 2018) 3-4.

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This means that there is no structural independence between those who conduct the transfer pricing audit and those who are part of the MAP process. Transfer pricing is highly technical with limited skilled personnel in the discipline. The fact that the function to negotiate the MAP is designated within the revenue service or the tax administration, poses a strong possibility that the same people who were part of the audit will be part of the negotiation and as a result, their objectivity cannot be guaranteed.

5.2.1 Minimum information requirements

The taxpayer can access the MAP by way of instituting a MAP request with the competent authority. Essentially a MAP request is the means by which a taxpayer informs or notifies a competent authority that it believes that there is an action by one of the treaty countries involved that has resulted or will result in taxation that is not in accordance with the relevant tax convention. Information to be contained in the MAP request includes the following:

i) taxpayer details;
ii) the basis for the request;
iii) facts of the case;
iv) analysis of the issue(s) requested to be resolved via MAP;
v) a statement indicating whether the taxpayer has submitted the MAP request to the other jurisdictions or to another authority. If so, the taxpayer should provide:
    - the date of such submission.
    - the name and the designation of the person or the office to which the MAP request was submitted.
    - a copy of the submission which includes all documents filed with the submission unless, exactly the same as this MAP request.[23]

5.3 Mutual Agreement Procedure and the Judicial Process

According to the commentary on article 25 of the OECD, one of the grounds upon which the competent authority may refuse or reject the MAP application is the presence of a court decision already that has been taken on the matter that is binding on the competent authority.[24] There is

[23] SARS (n 19 above) 16.
[24] OECD commentaries (n 3 above) 366. In cases where there is a court case pending, then the taxpayer will be advised to suspend the impending litigation as this will result in a duplication or a parallel process. Some jurisdictions waive the prescription of any domestic litigation and allow the taxpayer to bring an action in court if not satisfied with the outcome of the MAP. The taxpayer will enjoy the right to approach the

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a distinction between administrative decisions, 'by SARS on an objection against an assessment', and judicial decisions which are 'decisions made by the tax courts.'

In South Africa, the position is that if a domestic court has already reached a decision on the case at issue; the competent authority is bound by the decision of the domestic court and may not provide unilateral relief.[25] There is an argument by some authors that equates the decisions of the court to that of the administrative tribunals, to say that once a decision has been made by the administrative tribunal a MAP cannot be initiated.[26]

However, there is a dissenting view that there should not be an automatic refusal simply because there has been a court decision already. In terms of this view, the competent authority of the resident state where the application is brought should assess if the taxpayer has a case on which there are probabilities of an adjustment being requested from the other contracting state.[27] Once there is prima facie evidence of such adjustment the competent authority should agree to the application to initiate the MAP with the objective of assisting the resident into getting the other contracting state to effect a corresponding adjustment in order to avoid double taxation.[28]

Since a MAP cannot override a judicial decision in the domestic context it is recommended that in cases where a domestic legal remedy such as an appeal has been lodged, or where Rule 31 and Rule 32 statements have been filed, a choice has to be made by the taxpayer on either to pursue the dispute through domestic proceedings or through the MAP request. These are rules issued under section 103 of the TAA and were created to prescribe the procedures to be followed in lodging an objection and appeal against an assessment or a decision subject to objection and appeal.[29] The administrative domestic proceedings instituted under these rules should be suspended until the MAP is concluded. Rule 31 is a statement of grounds of appeal and requires amongst others:

- a clear and concise statement of the grounds upon which the appellant appeals

domestic courts. See also South Africa dispute resolution profile (2018) https://www.oecd.org/tax/dispute/South-Africa-Dispute-Resolution-Profile.pdf (accessed 14 November 2018) 5.

[25] SARS (n 19 above) 14. It would appear that once a decision is made, the taxpayer will not have a recourse under the MAP. The decision of the court will be final. The only plausible and available remedy will be for the taxpayer to approach a higher court within South Africa to appeal the decision of the court a quo.

[26] M Rasmussen *International double taxation* (2011) 102. However, this is not the position in South Africa as the forums such as the Tax Board established under section 108 of the TAA are not regarded as courts of law.

[27] OECD '2017 update to the OECD model tax convention' http://www.oecd.org/ctp/treaties/2017-update-model-tax-convention.pdf (accessed 2 November 2020) 176.

[28] Rasmussen (n 26 above) 177.

[29] Public notice 550 (2014) *Government Gazette* No. 37819.

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- the material facts and the legal grounds upon which the appellant relies for such appeal; and
- the disputed facts and legal grounds in the grounds of assessment and the disallowance of the objection.

Rule 32 is a statement of grounds of opposing appeal and requires amongst others:

- a clear and concise statement of the grounds upon which the appellant's appeal is opposed;
- the material facts and legal grounds upon which SARS relies; and
- the facts and legal grounds alleged in the statement of the grounds of appeal under Rule 31 that are admitted and that are disputed.

If the taxpayer does not agree to such a suspension of the domestic judicial proceedings, the competent authorities may defer the MAP until the domestic remedies have been exhausted.[30] As set out in the SARS guide, MAP provides an avenue for the taxpayer that is in addition to the domestic law objection and appeal procedures.[31]

5.4 The Timeframes for the MAP Process

The MAP article in a DTA would generally contain a period by which a MAP request must be submitted. The OECD MTC in article 25(1) states that a MAP application should be presented within three years from the first notification of the action resulting in taxation that is not in accordance with the provisions of the convention. In South Africa, the timing is not clear, and it appears that there are no domestic rules to govern the process and acceptance of such applications. The fact that there is no clear timing has the potential to confuse an aggrieved taxpayer who intended to initiate a MAP request. According to the Tax Review Committee also known as Davis Tax Committee (DTC), SARS needs to clarify the time when a competent authority will entertain a MAP application, that is, whether it is once the taxpayer's objection

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[30] SARS (n 19 above) 14. A distinction is made between an objection lodged to SARS and litigation against SARS lodged with the courts. SARS in its guide also refers to a parallel process where the MAP is allowed and initiated while there is an administrative objection. What is noteworthy is that SARS will not necessarily reject the MAP application but rather defer it, meaning that the taxpayer will still have the opportunity to request MAP assistance. However, once the court has ruled on the matter, the MAP assistance will be limited and will only assist in engaging the other contracting state to make a corresponding adjustment in eliminating double taxation. Other tax administrations are flexible in the time within which a MAP application can be brought in that they do not set a deadline for MAP requests under their treaties or domestic laws. By so doing, they allow space for the exhaustion of domestic remedies before an aggrieved taxpayer can initiate a MAP application. Some tax administrations like South Africa prefer instead to set a deadline for the filing of a MAP request.

[31] J Carr 'Mapping out the MAP procedures' (2018) *Tax & Exchange Control Alert* https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2018/Tax/Downloads/Tax-Exchange-Control-Alert-14-September-2018.pdf (accessed November 2018) 5. This confirms the conclusion that the taxpayer must lodge an objection first under the domestic rules in terms of sec 104 before making an application for the MAP. It is very interesting that the word used in the guide is that of an 'addition' and not an 'alternative' as the former would mean that the taxpayer has to file an objection under domestic rules and request for the MAP at the same time while the latter would mean that the taxpayer can file the MAP request without lodging an objection under domestic rules.

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has been disallowed or when the appeal is dismissed.[32] One may argue that this clarification is irrelevant because article 25(1) states that:

> [w]here a person considers that the actions of one or both of the Contracting States results 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 the Contracting State of which he is a resident.

It is submitted that a taxpayer becomes aware of the taxation that is not in accordance with the convention when an assessment is issued. The fact that he may have lodged an objection, or an appeal does not postpone his knowledge of the taxation that is not in accordance with the convention. The timing of his awareness and knowledge will remain the date on which SARS issues an assessment. It is also worth noting that article 25(1) of the OECD does not prescribe the timeframe for the completion of the MAP request. It is only in paragraph 5 where it is stated that:

> [i]n a case where the competent authorities are unable to reach an agreement under paragraph 2 within two years, the unresolved issues will, at the written request of the person who presented the case, be solved through an arbitration process.

Article 25(5) of the OECD MTC directs the competent authorities to complete the MAP within two years, failing which it must be then escalated to arbitration. It is worth noting that the majority of the DTAs entered into between South Africa and other states do not contain paragraph 5.[33] Reference to paragraph 5 is made in this chapter just to illustrate its implication on the timeframe within the MAP framework. Paragraph 5, which deals with arbitration, is discussed in detail in Chapter 5 of this research.

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[32] DTC report (n 22 above) 95. The issue with the timing for bringing a MAP application has always been about whether the application can be made immediately after assessment or immediately after the taxpayer has exhausted all the dispute resolution process within SARS. One may argue that the notification of taxation not in accordance with the DTA is the time when the taxpayer should bring a MAP application. This position is taken from the fact that the framework does appreciate the existence of the difference between administrative decisions by the revenue service and pending decisions by the court of law wherein, with the former the taxpayer can bring a MAP application while waiting for the finalisation of an administrative decision, while it will not be the case with the latter. SARS (n 19 above) 12 states that South Africa regards the first notification as being the finalisation of an enquiry or audit resulting in the raising of an assessment which gives rise to double taxation.

[33] At face value it may look like para 5 only addresses the issue of a mandatory binding arbitration (MBA) upon failure to reach an agreement under the MAP. A further analysis of this paragraph shows that it actually prescribes the timeframe within which the MAP must be concluded and failing which, it compels the competent authorities to discard the MAP and elevate the tax treaty dispute by beginning another dispute resolution process which will involve the MBA. The mere presence of para 5 in the article dealing with the MAP automatically gives the competent authorities timeframe within which they need to complete the case. As a result, when dealing with the MAP, both competent authorities are under pressure to endeavour not only to reach an agreement, but to do so within two years. However, this paragraph is absent from the DTAs that South Africa has entered into and this takes away this implied timeframe and gives rise to prolonged MAP processes. Also, most of the DTAs between African countries *inter se* do not contain such a paragraph to compel competent authorities to resolve tax disputes within two years hence long and unresolved MAP applications.

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According to the South African position there is no timeframe on the completion of the MAP application. There is no turnaround time on the steps to be taken during the MAP process. The absence of time frames and turnaround times could mean that it is possible for the MAP application to take substantial time for an agreement to be reached and the taxpayer will not have any recourse. South Africa is amongst other countries that actively participated in the OECD BEPS Project Plan which identified 15 Action Items to address BEPS in a comprehensive manner.[34] The minimum standard in the Action 14 report consists of three core elements for tax dispute resolution namely:

a) that treaty obligations related to the MAP are fully implemented in good faith and that MAP cases are resolved in a timely manner;
b) the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and
c) that taxpayers can access the MAP when eligible.[35]

There is statistics provided by the OECD on MAP cases reported by all members of the Inclusive Framework on BEPS. These are members who had committed to the implementation of the Action 14 minimum standard which includes timely and complete reporting of the MAP statistics pursuant to an agreed reporting framework. As of 2016, South Africa reported ten MAP cases with only two concluded and the other eight outstanding.[36]

The current position between South Africa and other African countries vis-à-vis the MAP is governed by what is contained in article 25(2) which states as follows:

> [t]he 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

[34] See generally OECD Making dispute resolution mechanisms more effective Action 14 (2015 final report) *OECD/G20 base erosion and profit shifting project (2015)* https://www.wu.ac.at/fileadmin/wu/d/i/taxlaw/institute/WU_Global_Tax_Policy_Center/Arbitration/arb_2/Action_14.pdf (accessed 13 May 2018). See generally S Temkin 'SA expected to continue its support of OECD action plan to address BEPS' https://www.pwc.co.za/en/press-room/oecd-tax-sa.html (accessed 20 August 2018). Through the adoption of the Action 14 report, countries have agreed to important changes in their approach to dispute resolution by implementing a minimum standard to ensure that they resolve treaty-related disputes in a timely and efficient manner. The said commitment will remain purely academic if it is not reduced in writing or incorporated in the domestic laws. It is understood that it takes years to negotiate and or re-negotiate a treaty. However, for South Africa to take this commitment seriously, it should incorporate it in its official guidelines and make the guide governing the MAP a public document.

[35] OECD Making dispute resolution mechanisms more effective Action 14 2015 final report https://www.oecd.org/tax/beps/beps-actions/action14/ (accessed 13 May 2018) 13-15. South Africa is one of the countries that signed the inclusive framework on BEPS.

[36] See generally OECD Mutual agreement procedure (MAP) released statistics (2016) http://www.oecd.org/tax/beps/oecd-releases-mutual-agreement-procedure-statistics-for-2016.htm (accessed 30 July 2017).

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> accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.[37]

There is nothing in the above paragraph that compels the South African competent authority to resolve the tax dispute. The prescription is to 'endeavour,' meaning that there is nothing legally binding the competent authority in South Africa to resolve let alone the time limit within which that transfer pricing dispute should be resolved.[38] This are some of issues militating against the use of the MAP by taxpayers.

5.5 Suspension of Tax Payment Pending a MAP Outcome

In South Africa there is a principle of 'pay now, argue later' contained in section 164 of the TAA which is applied by the SARS in dealing with the payment of tax pending an objection. According to this principle, payment of tax is not suspended simply because the taxpayer has lodged an objection or an appeal, unless directed otherwise.[39] The reason for the existence of this principle is to ensure effective and prompt collection of taxes. The question that arises is what happens if a MAP request takes years before it is resolved. Will SARS allow for a suspension of the tax bill while the MAP process takes a long time to resolve, more so as South Africa, unlike other African countries does not even allow for a part payment of the tax amount disputed?

The South African position in relation to the suspension of payment is that it is either denied or granted. If granted, the whole tax amount under dispute is suspended. This position may be subjected to abuse by taxpayers and MNEs. If not granted, it may be detrimental to a genuine taxpayer with a legitimate claim to a tax treaty dispute if his application for suspension of

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[37] The problem with art 25(2) is that the word 'endeavour' appears twice. In the first appearance it is used where the competent authority can unilaterally resolve the dispute. In the second appearance, it is used in the second part of para 2 in reference to an engagement between the resident competent authority with the competent authority of the other contracting state. The effect of the first part of para 2 is that even when the competent authority may unilaterally resolve, there is no obligation to do so. One can argue that the effectiveness or lack thereof of the MAP to resolve disputes is not limited to the lack of co-operation between contracting states or the absence of a comprehensive tax treaty network especially in Africa but is also due to the lack of peremptory provisions in the MAP article itself.

[38] See art 25(2) of the DTA between the government of the Republic of South Africa and the government of the Republic of Uganda for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; Art 24(2) of the DTA between the Republic of South Africa and the government of the Republic of Botswana for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; Art 25(2) of the DTA between the Republic of South Africa and the Republic of Namibia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains; Art 26(2) of the DTA between the Republic of South Africa and the government of the Republic of Ghana for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains; See also art 25(2) of the DTA between the government of the Republic of South Africa and the government of the Republic of Kenya for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income https://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/default.aspx (accessed 28 January 2018).

[39] See generally B Johannes 'Pay now, argue later principle: when must you pay SARS?' (2016) *News & Press: Tax Talk* https://www.thesait.org.za/news/292287/Pay-Now-Argue-Later-Principle-When-Must-You-Pay-SARS.htm (accessed 28 January 2018); See also *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2000 62 SATC 84-85. See also C Fritz 'Payment obligations of taxpayers pending dispute resolution: approaches of South Africa and Nigeria' (2018)18 *African Human Rights Law Journal* 176.

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payment is denied. Taxpayers will be required to pay the tax debt due in full if a suspension of payment is not granted.

South Africa seems to use the domestic law provision in order to cater for the payment or the suspension of payment even during a MAP application. Suspension can only be granted once and only if the provisions of section 164 of the TAA are met.[40] While one is obliged to make reference to section 164 which lists a number of requirements, for the purposes of this chapter, reference will be made to sub-section (3)(a) to (e) of section 164 which states that: senior SARS official may suspend payment of the disputed tax having regard to-

(a) the compliance history of the taxpayer;
(b) the amount of tax involved;
(c) the risk of dissipation of assets by the taxpayer concerned during the period of suspension;
(d) whether the taxpayer is able to provide adequate security for the payment of the amount involved;
(e) whether payment of the amount involved would result in irreparable financial hardship to the taxpayer.

According to the South African MAP guide, a taxpayer is advised to lodge an objection or appeal concurrently with the MAP process to enable him or her to make an application for a suspension of payment, because it is only then that a suspension of payment can be granted. This is subject to the requirements of section 164 of the TAA being met.[41]

Taking a closer look at what is more confusing but more interesting to note is that section 104 of the TAA provides that 'a taxpayer who is aggrieved by an assessment made in respect of the

[40] SARS (n 19 above). South Africa does not have clear policy or guideline about how to deal with tax payment or the suspension thereof pending the MAP outcome. The effect is that while the MAP is said to be a special procedure catered for under international tax law by including it in DTAs, it looks like it is not given the speciality so purported, since its operation is mixed with the provisions of domestic law principles. The taxpayer will not only need to understand the DTA and its interpretation but also has to be familiar with the domestic law principles. One would have expected that specific provisions for the suspension of payment if tax would be less cumbersome than provided for in sec 164 of the TAA. One of the requirements should include the acceptance of the MAP request by the competent authority. Another requirement should be that for the application for the suspension of tax payment to be dealt with in a manner that is congruent with the spirit of the DTA it must be made to the competent authority itself. The OECD recommended best practice on Action 14 to ensure taxpayers can access MAP is that countries should take appropriate measures to provide for a suspension of collections procedures during the period a MAP case is pending.

[41] SARS (n 19 above) 24. The implication of this position is that a MAP alone is not recognised in terms of the domestic revenue laws to be a dispute that enables the taxpayer to make a request for suspension of payment. In drafting the TAA, the drafters did not include a tax treaty dispute in their dispute resolution procedures. Hence, for the taxpayer to enjoy the benefits and the right to make an application for a suspension of payment pending the MAP outcome, he or she has to lodge an objection in terms of sec 104 of the TAA before he can qualify. Even the SARS MAP guide makes reference to sec 164 of the TAA but does not recognise the MAP as a dispute on its own that can warrant an application for the suspension of payment. A dispute for SARS purposes is considered and regarded as such only when brought in terms of Chapter 9 of the TAA. Reference of the MAP as an international dispute resolution mechanism that is provided for by the OECD is purely academic from a South African perspective, since it does not enjoy the same status and or meaning in the domestic context.

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taxpayer may object to the assessment.' Secondly, section 105 of the same TAA provides the forum for a dispute of an assessment. It provides as follows:

> [a] taxpayer may not dispute an assessment or 'decision' as described in section 104 in any court or other proceedings, except in proceedings under this Chapter or by application to the High Court for review. [42]

It is interesting to note that nowhere do any of the two sections 104 and 105 refer to the competent authority. The MAP guide makes reference to the TAA, while the TAA in its guidance and clarifications of dispute resolution forums does not makes any reference to the MAP as one of the dispute resolutions mechanism.

5.6 Transfer Pricing Adjustments to Eliminate Double Taxation

One of the main objectives of a DTA is to avoid or eliminate double taxation. The dispute resolution framework within a DTA must be that once the dispute is resolved, the affected competent authorities must make the requisite adjustment so as to give effect to the outcome of the MAP agreement. The making of an adjustment by competent authorities after the dispute has been resolved is key to the whole dispute resolution process, as the aggrieved taxpayer who successfully initiated the process will be recompensed.

It is important to note that the elimination of double taxation is typically contained in the preamble of every DTA.[43] The MAP itself addresses juridical double taxation and not economic double taxation hence it is important that DTAs contain article 9(2) in order to ensure that the spirit of the DTA is achieved. This is the avoidance of economic double taxation which is a common issue with transfer pricing disputes.

The avoidance of economic double taxation can be achieved if after a MAP process, article 9(2) is fully implemented.[44] Article 9(2) provides as follows:

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[42] Sec 105 of the TAA. What is problematic with secs 104 and 105 and the MAP guideline is that the objection by way of a MAP request to the competent authority is not listed as one the dispute mechanisms. Neither is the competent authority listed as a dispute forum. The TAA itself failed to recognise the MAP and the competent authority as a dispute resolution procedure and a dispute resolution forum respectively while the MAP guide refers to the provisions of the TAA.

[43] See the preamble in the DTA between South Africa and Ghana (n 34 above) https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2012-06%20-%20DTA%20Ghana%20GG%2029856.pdf (accessed 28 January 2018) 1. The MAP request, once completed with all parties to the dispute reaching an agreement, leads to corresponding adjustments that reflect the agreement. This can be made by the resident state unilaterally or by the other contracting state which was party to the tax treaty dispute.

[44] M Markham 'New developments in dispute resolution in international tax' (2017) 25 *Revenue Law Journal* 6 where it is stated that most cases considered under the MAP have in fact involved double taxation, with the majority of cases relating to economic double taxation arising from a transfer pricing adjustment to the intra-group transactions of associated enterprises in a MNE by one or more tax administrations.

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> [w]here a Contracting State includes in the profits of an enterprise of that State and taxes accordingly profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.

Article 9(2) is relevant especially as a means of eliminating double taxation. South Africa has a number of DTAs in which the above article is absent and does not have a provision that is the same or substantially the same as article 9(2) of the OECD MTC.[45] South Africa has signed about 84 DTAs, however, the DTAs listed below have been entered into by South Africa and do not have the article 9(2) provision:[46]

	Country	**Year signed**
1	Brazil	2006
2	Germany	1975
3	Grenada	1960
4	Israel	1980
5	Italy	1999
6	Malawi	1971
7	Sierra Leone	1960
8	Zambia	1956
9	Zimbabwe	1965

[45] South African dispute resolution profile (2018) https://www.oecd.org/tax/dispute/South-Africa-Dispute-Resolution-Profile.pdf (accessed 14 November 2018) 9. The effect of the absence of art 9(2) in the listed DTAs is that even when there can be an agreement reached in a MAP process, which will require one of the countries listed to effect an adjustment as a way to eliminate double taxation, it will not be legally possible. The absence of art 9(2) in the listed tax treaties will mean that even South Africa cannot, despite the agreement reached under a MAP application, request the other contracting state to make an adjustment since such an adjustment is not included in the said DTAs. This inability to request the other contracting state to make an adjustment will be prejudicial to the taxpayer. The question would be how the absence of art 9(2) affect MNEs from investing simultaneously in African countries like South Africa and Zambia if the two do not have an adjustment clause in their DTA.

[46] n 38 above. Even if the very purpose of a DTA is to eliminate double taxation, with the above listed countries it may be easy to use the MAP process to reach an agreement on which the avoidance of juridical double taxation can be reached while it may be difficult to avoid economic double taxation which is more relevant in transfer pricing cases. One can argue that even in the absence of art 9(2) or a similar provision in a DTA, parties to a tax treaty dispute should always make the requisite adjustment in line with the MAP agreement reached and in line with the preamble and the spirit with which the DTA was entered into, which is to avoid double taxation including economic double taxation as is the case with transfer pricing disputes.

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The use of article 25 can be expanded further than to merely resolve tax treaty disputes.[47] Article 25(3) states that:

> [t]he 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.

Article 25(4) states that:

> [t]he competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs

Based on the above, South Africa can capacitate its competent authority to engage in communications with its trade partners or contracting states. This can be done even in the absence of disputes in order to establish good relations and agree on the framework to resolve disputes and other issues pertaining to the interpretation of the DTA between the two contracting states.

5.7 Country Summary: South Africa

Even though South Africa has more DTAs than many African countries, its existing tax treaty network does not cover the whole of Africa. This would mean that a gap still exists for MNE's to explore or abuse. The MAP guide issued in its current form does not provide the requisite confidence in the taxpayer to actively participate in the MAP process particularly as it cannot be used for legal reference. A lot of reliance is made on the TAA while the TAA itself makes no mention of the MAP as a dispute resolution process. There is no adequate framework in place which provides any taxpayer who may choose to opt for the MAP with a clearly established procedure, the adherence or non-adherence of which will be legally binding on both the competent authority and the taxpayer.

As regards the suspension of tax payment pending the resolution of the dispute, the taxpayer whose MAP request has been accepted, still does not qualify from the MAP alone to request SARS for a suspension of tax payment. The taxpayer will still have to file an objection or an

[47] Art 25(3) and (4) of the MAP further expand the engagements between the contracting states to beyond the resolution of tax treaty disputes as brought by the taxpayer under art 25(1) 1. Contracting states can use art 25(3) to discuss any other aspect, including that which is outside the convention and para 4 of the same article can be used to establish forums including joint commissions to address any other tax related issues.

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appeal under the domestic provisions as a suspension for payment of tax can only be made once the provisions of section 164 of the TAA are met. There is no provision to cater for a suspension if a dispute is lodged under the MAP. In a nutshell, the MAP as an OECD mechanism cannot independently be explored by the taxpayer as it has gaps and does not in itself exclusively accord the taxpayer of the right to request for a suspension of tax payment. The fact that the taxpayer will have to file an objection domestically and also initiate a MAP request with the competent authority might be costly to the taxpayer as he will have to fulfil the administrative and procedural requirements of both processes.

South Africa has nine DTAs which do not have article 9(2). As a result, it is unable to give effect to an adjustment on the outcome of the mutual agreement in case the agreement reached requires an adjustment. This would mean that the very reason for the existence of the convention which is the elimination of double taxation may be thwarted if the successful taxpayer from the said contracting states is not granted an adjustment. The taxpayer may therefore suffer double taxation since it is not possible to make an adjustment.

The other issue identified as a pitfall in South Africa's MAP process is the fact that the competent authority is located within SARS, which has the responsibility of revenue collection and not treasury that deals with policies. The shortage of transfer pricing skills within African countries, South Africa included, will mean that the very same team that was involved in the transfer pricing audit that triggered the dispute may be the same team to handle and process the MAP request. Even if it may not be the same individuals but the fact that it will still be SARS whose mandate is to collect revenue is problematic because SARS's attitude towards the process will be to collect revenue for the state and it may be subjective in the process as it is already conflicted. The limitation of taxpayer participation is also an issue which will be of concern to taxpayers. The limitation for taxpayer participation would have been seen differently if the competent authority was located within treasury as that will then be an executive issue between governments.

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6 Mutual Agreement Procedure in Kenya

6.1 Background

Kenya is increasingly being seen as the African base of choice for many MNEs.[48] In this regard, transfer pricing regulation in Kenya has taken on increased significance over the past few years. The Kenya Revenue Authority (KRA) has aggressively sought to clamp down on illicit transfer pricing practices by conducting a raft of transfer pricing audits on MNEs in Kenya. These audits have resulted in the recovery of billions of shillings in tax revenue.[49]

Kenya is one of the African countries that have seen a lot of tax disputes with various MNEs.[50] This is because since 2003 it has been undertaking transfer pricing audits and its economy is largely driven by private sector with significant presence of MNEs. The KRA has been aggressive in pursuing transfer pricing malpractices and has issued huge assessments against non-compliant taxpayers.[51] The number of tax disputes will increase in the near future due to an increasingly aggressive and sophisticated approach by the revenue authorities. This is a trend seen in many countries worldwide due to greater co-operation between different tax authorities as well as advanced information technology facilitating deeper and faster investigations into companies' tax matters.[52]

Kenya is a participant in OECD forums, and it is one of the more than 100 countries and jurisdictions under the OECD's inclusive framework. This framework seeks to enhance collaboration to implement BEPS measures and to tackle the erosion of tax base and the shifting

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[48] Unpublished: LPA Mugeni 'Factors influencing MNC's in choosing Nairobi Kenya as Africa regional headquarters' unpublished MBA Dissertation, University of Nairobi (2013) http://erepository.uonbi.ac.ke/handle/11295/60157 (accessed 30 January 2018) 29. The author goes on to argue that market potentiality is the main factor that has led to setting up of MNE headquarters in Kenya, and that the Kenyan market is a ready market for many products and services.

[49] See generally G Mania 'Transfer pricing in Kenya and East Africa (2016) https://www.roedl.com/insights/transfer-pricing/kenya-est-africa-transfer-pricing (accessed 30 January 2018).

[50] PWC Appendix D: Country study Kenya https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/trpr_dev_count_app_d.pdf (accessed 8 November 2020) 1.

[51] See generally G Maina 'A glance at the Kenyan transfer pricing requirements for multinationals' (2020) https://www.roedl.com/insights/kenya-transfer-pricing-requirement-multinationals (accessed 2 November 2020).

[52] See generally G Maina & M Ikiara 'Tax dispute resolution in Kenya' (2018) https://www.roedl.com/insights/tax-dispute-resolution-kenya-kra (accessed 27 July 2018). Action Plan 14 of OECD's BEPS initiative relates to increasing the effectiveness of dispute resolution mechanisms. The OECD recommends that disputes being handled on the basis of MAP should be resolved within a period of 24 months. Kenya has two DTAs with other African countries namely, South Africa and Zambia. Kenya also has a multilateral tax agreement with other east African countries namely: Uganda, South Sudan, Rwanda, Burundi and Tanzania which has not yet been ratified. This agreement is called the double taxation avoidance agreement of the East Africa Community. See the EACDTA *Handbook* http://eacgermany.org/wp-content/uploads/2014/12/EAC_DTAmanual_screen.pdf (accessed 12 June 2018). The majority of Kenya's DTAs are with countries outside Africa and like South Africa it will be unable to negotiate and utilize art 25 of the OECD effectively in cases of tax treaty disputes and transfer pricing disputes with other African countries. MNEs conducting business in Kenya can do business in other African countries and Kenya will be unable to engage with those other African countries to initiate a MAP process to eliminate double taxation.

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of profits.[53] Kenya has signed the multilateral convention to implement tax treaty related measures to prevent BEPS (MLI) to off-set for its low tax treaty network.[54] On BEPS Action 14 dealing with the improvement of MAP, Kenya is one of the countries listed as members of the OECD/G20 inclusive framework.[55] Kenya is also a member of the East Africa Community Double Taxation Avoidance Agreement (EACDTA).[56]

6.2 The Framework for the Mutual Agreement Procedure

Initially Kenya did not have a specific mechanism to address transfer pricing disputes.[57] However, most of the DTAs that Kenya has signed have MAP as a mechanism to resolve tax treaty disputes. Unlike countries such as South Africa that has the MAP as contained in article 25 of its DTAs, Kenya's MAP is found in articles 26 and 27 of the majority of its DTAs.[58] In some, like the DTA with the UK, it is contained in article 29. From its DTAs, Kenya has the MAP as its adopted tax treaty dispute resolution mechanism.

Kenya does not have a guideline for its MAP in place yet. Neither does it have any guide on how to resolve its tax treaty disputes. It only has transfer pricing rules that govern the transfer pricing regime.[59] KRA handles transfer pricing dispute cases through the normal income tax administrative procedures.[60] However, according to its dispute resolution profile, the MAP manual is in the process of being finalised. Once this is done, its rules, guidelines and procedures will be publicly available.[61] At the moment there are no guidelines on how taxpayers can use and access the MAP.

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[53] See generally KA Bell 'Five things to know about the OECD's multilateral instrument' https://www.bna.com/five-things-know (accessed 16 June 2017). Like the OECD, the signing of such multilateral agreements that are regarded by some as master treaties is helpful for countries with low tax treaty networks. See also SA Waris 'How Kenya has implemented and adjusted to the changes in international transfer pricing regulations: 1920-2016' (2017) https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/13401/ICTD_WP69.pdf (accessed 30 January 2018) 6. Kenya is often cited as an African developing country that has been successfully using the OECD transfer pricing regulations to increase revenue collection since 2010.

[54] See generally Orbitax 'Kenya and Oman sign BEPS MLI' https://www.orbitax.com/news/archive.php/Kenya-and-Oman-Sign-BEPS-MLI-40249 (accessed 12 October 2020)

[55] OECD/G20 Inclusive framework on BEPS progress report (2017-2018) http://www.oecd.org/tax/beps/inclusive-framework-on-beps-progress-report-july-2017-june-2018 (accessed 28 August 2018) 36.

[56] For Kenya, once the treaty is operational it will be able to promote free movement of capital, goods, services.

[57] Transfer pricing and developing countries: a country study – Kenya https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/trpr_dev_count_app_d.pdf (accessed 11 June 2018) 15. Transfer pricing disputes were at the time of the study dealt with in the same manner as other disputes arising under other income tax areas. In general, prior to reaching the courts, a dispute will usually be heard by an administrative (or quasi-judicial) tribunal constituted by the Ministry of Finance.

[58] Double taxation relief (United Arab Emirate Kenya Subsidiary Legislation (2016). See art 27 of the DTA between Republic of Kenya and the government of the Republic of India for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income https://www.treasury.go.ke/agreements/Legal%20Notice%20No.%20147%20india%20double%20taxation.pdf (accessed 1 February 2019).

[59] The income tax (transfer pricing) rules (2006) http://www.drtp.ca/wp-content/uploads/2015/02/The-Income-Tax-Transfer-Pricing-Rules.pdf (accessed 21 April 2018).

[60] n 50 above, 15.

[61] Kenya dispute resolution profile (2018) https://www.oecd.org/tax/dispute/Kenya-Dispute-Resolution-Profile.pdf (accessed 11 June 2018) 5. One would have thought that the ruling on the *Unilever* (n 20 above) case in Kenya would have demonstrated the importance of having guidelines in place. In *Unilever,* it was ruled that the absence of domestic guidelines will mean the application of OECD guidelines. Even

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The only available document that will give the taxpayer some form of guidance on tax treaty disputes is the Kenya Dispute Resolution Profile.[62] The competent authority as a forum stipulated in DTAs for the adjudication of tax treaty disputes have not been widely used in Kenya.[63] According to this published dispute resolution profile, member states will use the MAP as a mechanism to resolve arising transfer pricing disputes or any tax treaty dispute between contracting states.

The Kenya Income Tax Act[64] allows the Minister of Finance to enter into tax information exchange agreements (TIEA) with other governments. These agreements will allow the KRA to exchange information with other tax jurisdictions and thereby enhance the audit of MNEs. The information so exchanged is vital in conducting audits on MNEs. However, once an audit is completed and result in a transfer pricing adjustment, giving rise to a transfer pricing dispute, there will be a need for a mechanism through which Kenya can engage other jurisdictions to resolve the dispute and eliminate double taxation.

6.3 Mutual Agreement Procedure and Judicial Process

In Kenya, a taxpayer may not have two processes going on simultaneously. MAP assistance cannot be initiated in cases where the taxpayer has sought to resolve the issue under dispute via the judicial and administrative remedies provided by the domestic law.[65] According to Kenya's dispute resolution profile that deals with the availability and access to the MAP, taxpayers are not allowed to request MAP assistance in cases where the taxpayer has sought to resolve the issue under dispute through the judicial and administrative remedies under the domestic law.[66]

Due to the complexity of transfer pricing cases, almost every additional assessment raised following transfer pricing audits ends up being objected. Pursuant to section 86(1)(b) of the Income Tax Act, a taxpayer may appeal to the Tax Appeal Tribunal against the Commissioners' determination of the objection. Most transfer pricing appeal cases end up in the Tax Appeal

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though more is done in Kenya vis-à-vis the transfer pricing regime, more should be done also on the guidelines governing the resolution of tax treaty disputes.

[62] as above.

[63] International Transfer Pricing 'Africa Regional' (2012) https://www.pwc.com/gx/en/international-transfer-pricing/assets/kenya.pdf (accessed 13 May 2020) 172. This can be equated to the shortage of skill and experience. Another contributing factor may be the limited number of DTAs entered into with other jurisdictions hence the use of the MAP as a dispute resolution mechanism to resolve disputes will be problematic.

[64] Chapter 470 of 2017 https://eregulations.invest.go.ke/media/Income%20Tax%20Act.pdf (accessed 21 April 2018).

[65] n 52 above. The rationale is that it will be futile to proceed with the MAP since the decisions of the courts are binding and can only be overturned by a higher court from the court a quo.

[66] as above. Kenya goes beyond South Africa in that the permission to request for the MAP may be denied if there is an administrative remedy sought by the taxpayer. Not only will the application be rejected because there is a pending court case but also when there is an administrative decision pending. However, the application will not be rejected outright as the taxpayer making the MAP request will be advised to suspend the judicial or administrative remedy sought pending the outcome of the MAP.

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Tribunal previously referred to as the Local Committee. However, since the decisions remain private, data on this remains inaccessible. Tribunal members are not trained in transfer pricing, and on several occasions have indicated that transfer pricing issues are too complex for their current level of skills in tax.[67] This poses a risk in the sense that some decisions made at the Tribunal may not be founded upon sound reasoning, or, even if they are, the rationale may not have been clearly expressed.[68]

6.4 Timeframes for the MAP Process

Kenya has so far only concluded one MAP case, as such, there is no data on the timeframe for the conclusion of the MAP process.[69] According to Kenya's dispute resolution profile, a model timeframe is yet to be developed. Also, according to Kenya's dispute resolution profile, once a MAP request or application has been heard by the competent authority and a mutual agreement is reached by all parties through the MAP, the agreement can be implemented notwithstanding any time limitation under domestic law. As regards the timelines for the request of the MAP, these are guided by the provisions of the treaty relied on to make a MAP request.[70]

By implementation it would mean that the KRA will then issue a revised assessment in line with the MAP agreement. Alternatively, if it was bilateral in that it involved another contracting state tax relief will be granted by way of an adjustment by either the local revenue authority or the revenue authority of the other contracting state.

6.5 Suspension of Tax Payment Pending a MAP Outcome

According to Kenya's dispute resolution profile, once a taxpayer initiates a MAP application, tax collection procedures are suspended until the MAP case is resolved.[71] With the absence of a MAP guide on how to address tax treaty dispute, a strong reliance will have to be on its domestic provisions. Despite what is stated in the dispute resolution profile, Kenya, in its tax

[67] Waris (n 53 above) 23.

[68] Waris (n 53 above). It is also said that rather than putting more emphasis on the MAP, Kenya's response to the OECD Action plan on effective resolution of disputes was the establishment National Centre for International Arbitration (NCIA). With Kenya increasingly being seen as a preferred destination to be the African base for many MNEs, coupled with KRAs increased focus on their practices, the NCIA may prove useful in resolving tax disputes involving MNEs. See also Maina & Ikiara (n 52 above).

[69] n 61 above 7.

[70] n 61 above. The timeline contained in every individual treaty will guide the timeline for bringing the MAP application. In the absence of specific timeframes, Kenya stands a risk again of having to end up with a situation similar to the judgement in the case of *Unilever* (n 20 above). There is a need for Kenya to have those set timeframes otherwise should a dispute arise the taxpayer will be entitled to rely on that which is contained in the DTA.

[71] as above.

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objections and appeals to Tax Appeal Tribunals, requires taxpayers to pay a non-refundable fee of Shs700 000 before a dispute is heard.

6.6 Transfer Pricing Adjustments to Eliminate Double Taxation

As is the case in South Africa not all DTAs contain a provision which would oblige Kenya to make a corresponding adjustment in terms of article 9(2) of the OECD MTC or a similar provision.[72] The DTA between Kenya and United Kingdom has no article 9(2).[73] The article is more relevant with transfer pricing cases. As the MAP generally caters for juridical double taxation, the provisions of article 9(2) respond to economic double taxation. The provision affords recourse for taxpayers in cases where double taxation may otherwise result from a primary transfer pricing adjustment.[74] The absence of a provision of adjustment in some DTAs poses a threat for double taxation.

6.7 Country Summary: Kenya

Despite it being a destination of choice by many MNEs, Kenya has a very low tax treaty network. Kenya has signed the multilateral convention to implement tax treaty related measures to prevent BEPS (MLI) to off-set for its low tax treaty network, however, it is not yet ratified it.[75] As such Kenya still does not enjoy the benefits to dispute resolution that are provided for by the MLI. These benefits will include the use of other OECD transfer pricing dispute resolution mechanisms. Unlike South Africa, Kenya does not allow for a MAP request where the taxpayer has already initiated judicial or administrative proceedings.

The Tax Appeal Tribunal, which is a forum to adjudicate transfer pricing disputes, is made up of people who do not have experience in transfer pricing. This may be one of the reasons that militate against taxpayers making MAP requests. Secondly, there are no guidelines on how taxpayers can use and or access the MAP. The current dispute resolution profile is not even

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[72] See the DTA between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Kenya for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/498381/uk-kenya-dta-consolidated_-_in_force.pdf (accessed 24 June 2018).

[73] as above.

[74] The implementation of a corresponding adjustment will be dependent on the contracting states and their willingness to uphold not only the article of the convention in their literal form but also to extent the terms by taking into consideration the preamble and the spirit which is to eliminate not only juridical double taxation but also eliminate economic double taxation. Many DTAs have been pending in negotiations for several years, some more than a decade. This is seen as a sign of lack of political will from countries in the negotiation process to provide not only the foreign, but also the local enterprises with the ability to avoid double taxation when possible. It is also said that this position also impedes the work of the revenue authority, and its ability to access data in countries with whom there is no DTA or tax information exchange agreements (TIEA) in place as noted by Waris (n 53 above) 33.

[75] OECD Signatories and parties to the multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting: status as of 18 December 2020 http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (accessed 29 December 2020) 2.

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adopted yet. A model timeframe is yet to be developed. Its presence will assist taxpayers in understanding the timeframes and enable them to decide on the process to pursue between judicial and administrative processes or making the MAP request.

There is still confusion regarding the issue of suspension of tax collection procedures pending the resolution of the MAP case. Even though the policy under construction states that tax collection should be suspended pending the outcome of the MAP, the fact that MAP cases end up with the tax appeals tribunal which requires payment of a non-refundable amount of Shs700 000 before a dispute is heard, means that the position that tax collection is suspended when there is a MAP request is purely academic. Particularly as the fee is non-refundable, it would mean that whether the taxpayer is successful or not in the dispute the amount so paid will be forfeited to the revenue authority.

Not all DTAs contain article 9(2) that will enable Kenya to effect a transfer pricing adjustments should the competent authority reach an agreement that requires such. The taxpayer may still suffer double taxation even after a mutual agreement is reached between the competent authorities as the revenue authority may not be legally able to make the requisite corresponding adjustment to reflect the terms of the agreement.

7 Mutual Agreement Procedure in Uganda

7.1 Background

Uganda has accepted OECD model clauses in the design of its DTAs. This means it may find itself bound in any treaty disputes by the interpretation of the treaty as articulated by OECD members. It also means that when negotiating partners bring the OECD model to the table, Uganda cannot point to an internationally recognised articulation of its own response to that model. Uganda participates more at the OECD's annual tax treaties forum than at the UN.

People, whether in the private sector or in government or even at the Uganda Investment Authority (UIA), believe that DTAs have an effect on the amount of inward investment into the country.[76] As regards its treaty network Uganda is part of the EAC which includes Rwanda,

[76] M Hearson & JA Kangave 'A review of Uganda's tax treaties and recommendations for action' (2016) *LSE Research Online* https://www.ictd.ac/publication/a-review-of-uganda-s-tax-treaties-and-recommendations-for-action/ (accessed 1 February 2018) 9. The reason for this conclusion is that once there is certainty on which country has taxing rights, investors are able to invest. Not only do tax treaties provide certainty as to the right to tax but subservient to that they offer contracting states a platform to resolve any arising tax treaty disputes. Another argument often touted is that investor confidence is boosted by the inclusion of the MAP in Uganda's tax treaties, which provides a procedure for resolution of claims of double taxation

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Tanzania, South Sudan, Burundi and Kenya. However, this inclusive multilateral treaty is not yet operational.

On 4 November 2015, Uganda became the 95th country to sign the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAAC). This led to an increase in Uganda's exchange of information treaty network from nine DTAs to 104 countries with whom it can now send and receive requests for information currently. The deposit of the instrument of ratification was done on 25 May 2016 and the MAAC came into force in Uganda as law on 1 September 2016. This means that the URA can now request for information about taxpayer operations in 104 countries around the world to facilitate audits and investigations with a view of combatting tax evasion through transfer pricing schemes, BEPS by MNEs as well as trade-based money laundering.[77]

7.2 The Framework for the Mutual Agreement Procedure

Uganda has through an Act of Parliament set up a specialised court to provide taxpayers with easily accessible, efficient and independent resolution of tax disputes with the URA.[78] The tax appeals tribunal is a quasi-judicial forum that seeks to reduce case backlogs resulting from tax disputes.[79] Uganda as part of the EAC it is a member of the EACDTA which prescribes the use of MAP as a mechanism to resolve tax treaty disputes.[80] Uganda is not benefiting from this treaty as this treaty is not yet operational. While not yet operational, it contains a provision for a forum for taxpayers to protest actions that are not in accordance with the treaty and a mechanism for the elimination of double taxation in cases not provided for by the treaty. In itself Uganda's bilateral treaty network is somewhat patchy in its provision of some of these benefits.[81] It is important to observe that in Uganda, the terms of the treaty or international agreement prevail over the provisions of the Income Tax Act.[82]

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[77] The effect of signing the MAAC on the exchange of information only enables Uganda to have the information which it can only use for audit purposes, but the question that remains unanswered is what then happens with the adjustments emanating from those audits, particularly if the adjustments trigger disputes? What mechanism can Uganda use with all those more than hundred countries which it does not have DTAs with?

[78] Ministry of finance, planning and economic development 'Tax appeals tribunal' https://www.finance.go.ug/mofped/tax-appeals-tribunal-tat (accessed 2 November 2020).

[79] See generally IM Ladu 'Tax appeals: is it an enabler or barrier to business' (2018) *Daily Monitor* https://www.monitor.co.ug/Business/Prosper/Tax-Appeals-Tribunal-enabler-barrier-business (accessed 15 December 2018). It is not clear on how the MAP as contained in the DTAs entered into by Uganda and other contracting states will be factored into this tax appeal tribunal.

[80] See EACDTA (n 52 above) 123.

[81] Hearson & Kangave (n 74 above) 13. One can argue that this lack of tax treaty network by Uganda is not helping as bilateral tax treaties are the fundamental building blocks of the international tax regime, contracting states will be factored into this Tax Appeal Tribunal.

[82] Taxation handbook 'A guide to taxation in Uganda'https://www.ura.go.ug/Resources/webuploads/INLB/TAXATION%20HANDBOOK%20.pdf (accessed 20 June 2018) 139. This would mean that in tax treaty disputes, the rules inherent in the DTA will be applicable. In tax treaty disputes, the MAP as the mechanism to resolve disputes including transfer pricing disputes will supersede domestic provisions. In *White Sapphire Ltd/Crane Bank Ltd vs the*

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7.3 Mutual Agreement Procedure and Judicial Process

The DTAs signed by Uganda contain MAP provisions, although these are rarely invoked as only the competent authorities can start a MAP. To date, there are no records of specific cases that have been resolved under the MAP.[83] In Uganda, taxation is a statutory matter, not a contractual matter. Therefore, the Supreme Court of Uganda is the highest court for resolving tax disputes, unless there are statutory provisions recognising other dispute resolution mechanisms such as those referred to in DTAs.

7.4 Timeframes for MAP Process

The current DTA between Uganda and South Africa stipulates that a MAP application should be brought within three years of first notification of taxation that is not in accordance with the convention. However, the DTA between Uganda and the United Kingdom does not make any provision for the timeframe within which the taxpayer may make a MAP request.[84]

7.5 Suspension of Tax Payment Pending the MAP Outcome

Uganda requires the taxpayer to pay a refundable amount which is equal to 30 per cent of the disputed amount. Some businesses attempt to by-pass the tribunal, preferring their tax and related issues to be handled by the courts. The main argument is that the mandatory deposit ties down a substantial amount of operation capital and renders a considerable amount of money idle.[85]

7.6 Transfer Pricing Adjustments to Eliminate Double Taxation

Like South Africa, Uganda has a treaty that does not contain article 9(2).[86] However, the commissioner shall upon request by the person subject to tax in Uganda determine whether the adjustment is consistent with the arm's length principle and where it is determined to be

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Commissioner General of Uganda Revenue Authority HCT-00-CC-CS-0106-2009, the court referred the case between the URA and the Mauritius Revenue Authority (MRA) to be resolved by the MAP.

[83] However, Uganda participated in arbitration proceedings in the UK with respect to the taxation of transactions between *Heritage Oil Plc and Tullow Oil Plc* (unreported) as there was an arbitration clause in the agreement between the parties

[84] See art 25 of the DTA between the government of Republic of Uganda and the government of the United Kingdom of Great Britain and the government of the Republic of Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains https://www.ura.go.ug/Resources/webuploads/INLB/Double%20Taxation%20Agreement%20Uganda%20United%20Kindgdom%20Income%20Tax%20Treaty.pdf (accessed 5 July 2018).

[85] Ladu (n 79 above). The argument raised is that the deposit money could be generating much more than the interest it would accrue should the matter end up in their favour.

[86] See the DTA between Uganda United Kingdom (n 84 above). The matter of transfer pricing adjustment then becomes the discretion of the competent authority.

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consistent; the commissioner shall effect a corresponding adjustment equal to the amount of tax charged in Uganda on the income or profits so as to avoid double taxation.[87]

7.7 Country Summary: Uganda

Even with its low tax treaty network, Uganda has failed to take advantage of the existence of multilateral convention such as the MLI and the benefit that comes automatically with the signing and ratification thereof resolving tax treaty disputes with multiple jurisdictions without having to negotiate and to re-negotiate individual bilateral tax treaties. Uganda has announced the suspension of negotiations towards all its DTAs pending the review of treaty terms.[88] Uganda seems to be more focused on the EACDTA than the OCED, even though as a country it does show interest and participates in OECD tax forums.

There are neither guidelines nor a framework in place to assist taxpayers who may wish to request the MAP on what process to follow. The absence of guidelines makes it difficult for taxpayers even with the presence of a DTA containing a MAP article to initiate a MAP request. However, unlike Kenya the requested amount to be paid before a dispute can be heard is refundable, meaning that the taxpayer may only be temporarily affected but once successful in the MAP application the money so paid will be refunded to him.

Even though it is stated regarding article 9(2) that deal with transfer pricing adjustment that the commissioner can make a corresponding adjustment, the fact that there are DTAs where the said paragraph does not exist remains a concern. The issue is not only with Uganda having to make an adjustment but the existence of article 9(2) that will enable Uganda to also request the other contracting state through competent authority to effect a corresponding adjustment.

8 Mutual Agreement Procedure in Ghana

8.1 Background

Ghana only has one DTA with one African country, namely South Africa.[89] DTAs with Liberia and Morocco are not yet in force. In 2011, Ghana signed the OECD MAAC. However, Ghana

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[87] See para 10 of the Income Tax (Transfer Pricing) Regulations http://www.drtp.ca/wp-content/uploads/2015/02/Uganda-Transfer-Pricing-Regulations-2011.pdf (accessed 23 April 2018). Even though the provision deals with advance pricing arrangements, it is argued that the corresponding adjustment will apply mutatis mutandis to the MAP.

[88] A W Oguttu 'Tax disputes in Uganda' in E Baistocchi *A global analysis of tax treaty disputes* (2017) 1202.

[89] See the DTA between the government of the Republic of South Africa and the government of the Republic of Ghana for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains https://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/default.aspx (accessed 12 June 2018).

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has yet to establish any relationships with tax administrations in signatory countries other than South Africa.[90] The absence of a tax treaty network with other African countries militates against the effectiveness of the MAP and its use with tax treaty disputes with other African countries. Not only is Ghana unable to use the MAP as a dispute resolution mechanism in disputes involving African countries, but it is also unable to use other international tools such as the exchange of information (EoI) which is vital in the resolution of tax treaty disputes.[91] Currently, the Ghana Revenue Authority (GRA) receives no information from other tax jurisdictions on the parent companies or affiliates of local companies registered in Ghana.

8.2 The Framework for the Mutual Agreement Procedure

Ghana does not have a specific MAP guideline in place yet but when looking at its current DTAs with various countries, it is clear that it uses the MAP as a mechanism to resolve its tax treaty disputes.[92] Most if not all of its tax treaties entered into are along the OECD MTC guidelines and they all contain the MAP as a mechanism to resolve tax treaty disputes.

There are no guidelines to direct the taxpayer when making a MAP request. The absence of guidelines in Ghana negatively affects the effective use of the MAP, since the DTAs do not lay down any special rules as to the form and manner of the MAP to be brought before the competent authority. The competent authorities may prescribe special procedures which they feel appropriate. If no special procedure has been specified, the MAP may be presented in the same way as any objections regarding taxes presented to the tax authorities of the state concerned.[93]

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[90] A Readhead 'Transfer pricing in the extractive sector in Ghana' (2016) case study https://www.resourcegovernance.org (accessed 12 December 2018) 18. The signing of the MAAC becomes purely academic if it is not followed by engagements with other tax administrations. The effectiveness of this convention is reliant on Ghana having to give credence to its obligations and or expectations emanating therefrom by way of engagements with individual countries.

[91] Ghana-Netherlands Memorandum of Understanding (MoU) to fight tax evasion (2015) https://www.ghananewsagency.org/economics/ghana-and-netherlands-sign-agreement-to-fight-tax-evasion-87512 (accessed 24 April 2018). Even though Ghana has a DTA with Netherlands signed in 2008. It had to enter into an MoU on automatic exchange of information that was signed on 24 March 2015 in Accra, and in the Netherlands on 3 April 2015 in The Hague. The MoU entered into force on 3 April 2015 and will apply for the first time to information concerning the 2014 calendar year. The goal of the MoU was to effectuate the Council of Europe-OECD Mutual Assistance Treaty (1988). The signing of this MoU illustrates that it is important that countries even though they can commit to multilateral agreements it will be very important to reduce such commitments into DTA in order to ensure the furtherance of the multilateral commitment is achieved.

[92] See the DTA between the government of the Republic of South Africa and the government of the Republic of Ghana for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains. See the DTA between the Republic of Singapore and the Republic of Ghana for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. See also the DTA between the Kingdom of Denmark and the Republic of Ghana for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains https://gra.gov.gh/double-taxation-agreements-in-force/ (accessed 10 June 2019). Only three were selected but all such DTAs between Ghana and other countries contain the MAP as a mechanism to resolve any dispute arising out of the convention.

[93] OECD commentaries on art 25 (n 3 above). The absence of a clear MAP guideline depicts the very reason why the treaty is signed in the first place. If parties to a MAP application are to use the domestic processes in order to address a tax treaty dispute, then it would mean that they will have to file their request as an objection to the revenue authority. It might render the existence of the tax treaty futile. It is also said more specifically that the MAP provides taxpayers with an alternative, bilateral remedy as opposed to domestic tax administrative remedies

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8.3 Mutual Agreement Procedure and Judicial Process

GRA has established a committee to review cases where there is a dispute with the taxpayer. This committee is comprised of about seven officials including the head of legal services at the GRA and the head of the transfer pricing unit.[94] Where there is a transfer pricing dispute the case will go to the committee for adjudication. If the committee approves the findings of the transfer pricing unit and the taxpayers still disputes the claim, the matter will go to court. This is the reason why the members of the judiciary were trained on transfer pricing, to give them the ability to adjudicate transfer pricing disputes.[95] Government officials do not view DTAs as particularly useful. DTAs are subsidiary to Ghanaian law when it comes to determining disputes concerning transfer pricing and thin capitalization.[96]

8.4 Timeframes for the MAP Process

Ghana appears to also allow the taxpayer to file for the MAP request within three years from the date of notification of taxation that is not in accordance with the convention.[97] However, only taxpayers whose countries have DTAs with Ghana will be able to bring forward a MAP request. All the benefits available in the tax treaty including corresponding tax treaty relief will only be enjoyed by taxpayers if they are resident in those jurisdictions which have DTAs with Ghana. The countries that have such DTAs with Ghana are the United Kingdom, France, Germany, Italy, South Africa and lately Belgium. Based on this, South Africa is the only African country that a MAP can be used in case there is a transfer pricing dispute between it and Ghana. There is also no alternative mechanism to eliminate double taxation.

8.5 Suspension of Tax Payment Pending a MAP Outcome

In the absence of specific guidelines vis-à-vis the MAP, it is common course that domestic law would apply whenever a taxpayer lodges an objection or submits an application for a MAP process. The position in Ghana is that when a taxpayer initiates a MAP request he or she must

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or litigation, which can be cumbersome and uncertain. The procedure that is there domestically may not be available in both states and as a result this may lead to different results in each state and a failure to resolve the double taxation.

[94] Readhead (n 90 above) 19.

[95] EY Global Tax Alert 'Ghana commences transfer pricing audits' (2015) *News from Transfer Pricing* https://www.ey.com/gl/en/services/tax/international-tax/alert--ghana-commences-transfer-pricing-audits---ghana-revenue-authority-reveals-that-over-250-transfer-pricing-audits-have-been-initiated ((accessed 30 January 2020) 1.

[96] as above.

[97] See the DTA between the Swiss Confederation and the Republic of Ghana for the avoidance of double taxation with respect to taxes on income, on capital and on capital gains https://gra.gov.gh/wp-content/uploads/2020/02/Ghana_Swiss-DTA.pdf (accessed 12 July 2018).

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concomitantly lodge an objection under paragraph 21 for the MAP to be heard. Paragraphs 21 and 24(1) of the same Act[98] provides as follows:

> [w]here a person has lodged an objection to a notice of assessment under paragraph 21, an amount of thirty percent of the amount payable as contained in the notice of assessment, shall be paid pending the determination of the objection.

Paragraph 24(2) provides that:

> [a]n application, action, or appeal shall not be entertained by the court in respect of an objection under paragraph 21 unless the person whom the decision relates has paid the amount specified under paragraph 1.

The above-mentioned provisions compel the taxpayer to lodge both the MAP and the objection under domestic rules and to pay the thirty percent before the MAP can be heard.

8.6 Transfer Pricing Adjustments to Eliminate Double Taxation

Even though it has a low tax treaty network, unlike South Africa, Kenya and Uganda, Ghana is the only country where all its DTAs have a provision for a corresponding transfer pricing adjustment.[99] It should be noted that a corresponding adjustment is not intended to provide a benefit to the MNEs group greater than would have been the case if the controlled transactions had been undertaken at arm's length conditions in the first instance. A corresponding transfer pricing adjustment can be a very effective means of obtaining relief from double taxation resulting from transfer pricing adjustments.[100]

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[98] See the Income Tax Act 896 of 2015. A taxpayer who is aggrieved by an assessment is afforded an opportunity to object in writing to the Commissioner in terms of para 21 of the Income Tax Act. Although the Act is not specifically referring to the objection by the taxpayer under the MAP, it would be understood that the objection lodged through a MAP process will be treated the same; more so as there is no specific guideline for the MAP. The legal provisions as stated in the Income Tax Act will apply *mutatis mutandis* with the objection lodged through a MAP application. See also *Beiersdorf Ghana Limited v/s the Commissioner General of the Ghana Revenue Authority* (CM/TAX/0001/2018), which ruled that the payment of at least a quarter of the tax liability contained in a disputed notice of assessment in the first quarter of the year of assessment is a prerequisite for filing a tax appeal in accordance with Rule 4 of Order 54 of the High Court (Civil Procedures) Rules 2004. The fact that the initiation of the MAP process is linked with the filing of an objection would then mean that the taxpayer would first have to pay thirty percent of the amount under dispute before the request for the MAP can be heard. Although the case mentioned above dealt with the payment of a quarter of the amount disputed in an appeal and not in an objection, the ruling should be seen as an accentuation of the fact that a minimum payment of an amount under dispute is an inherent requirement before an objection or an appeal can be heard.

[99] See all Ghana DTAs in force https://gra.gov.gh/double-taxation-agreements-in-force/ (accessed 14 May 2020).

[100] OECD 'OECD transfer pricing guidelines for multinational enterprises and tax administrations' (2017) https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm (accessed 16 February 2018) 184.

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8.7 Country Summary: Ghana

Ghana has a low tax treaty network and as such the resolution of transfer pricing disputes emanating from MNEs may be a huge challenge in the absence of DTAs.[101] Ideally, tax administrators should be able to obtain information about intra-firm transactions from the home country in which the transnational enterprise is located.[102] However, the absence of tax treaties will make it difficult for Ghana to access such information, which is necessary to resolve transfer pricing disputes.

The other issue with Ghana is the absence of transfer pricing guidelines that address the usage of the MAP as a mechanism to resolve transfer pricing disputes. This shows that tax treaty disputes are not given priority. Transfer pricing guidelines are necessary to determine how to deal with transfer pricing manipulation,[103] but most importantly to assist in dealing with transfer pricing audits, related adjustments and the dispute that may arise. The fact that the committee established to deal with transfer pricing disputes may adopt its own guidelines is problematic as a change in the composition of the committee members may trigger a change in the guidelines. Such change in guidelines may create uncertainty in those who wish to choose it as a forum to resolve their transfer pricing disputes.

Reference is made of the existence of a committee that will adjudicate transfer pricing disputes but not much is mentioned on how it will engage with competent authorities of other contracting states. This creates the impression that transfer pricing manipulation is a domestic issue while it is a matter that requires multilateral co-operation to be resolved. Also, this requirement to pay 30 per cent of the tax amount disputed even before a matter can be entertained is a problem to those who genuinely have a strong case.

9 Conclusion

DTAs are designed to prevent double taxation and curb BEPS. This chapter found that the low tax treaty network is a serious challenge for African countries. The MAP and its efficacy is reliant on the DTA providing for its usage as a dispute resolution mechanism. However, its efficacy is also reliant on its incorporation into the domestic dispute resolution framework and guidelines. There is also a lack of sufficient guidelines to assist taxpayers who may opt to

[101] OECD Multilateral instrument status tracker (2019) https://www2.deloitte.com (accessed 14 October 2019) 6.
[102] CR Irish 'Transfer pricing abuses and less developed countries' (1986) 18 *The University of Miami Inter-American Law Review* 112.
[103] as above.

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initiate the MAP in the resolution of their transfer pricing disputes. Hence taxpayers lack the appetite to approach competent authorities to utilise the MAP but use domestic forums to resolve international tax disputes.

There is also a need for uniformity between what is signed in the DTAs and what countries implement to resolve transfer pricing disputes since the research shows that other countries use other forums and platforms that are not known even by their treaty partners. Some states are consistently less cooperative in the MAP than other states, which may have more to do with their cultural inclinations and administrative organization than with their tax and legal system.[104]

Countries like Kenya, Uganda and Ghana do not even have MAP guidelines in place. Kenya's dispute resolution profile is not yet adopted. There is nothing in the domestic framework of these countries to encourage taxpayers and revenue authorities to use the MAP. While cross border disputes are on the rise, the MAP is still underused, even though the number of MAP cases has increased internationally. This is mainly due to the lack of understanding of the MAP process and perceived legal and practical obstacles.

Except for Ghana there are some instances, where there is no article 9(2) in place and as such, the other contracting state will not be able to effect a corresponding adjustment in line with the mutual agreement reached. There is a need for African countries to adopt applicable rules and standards that will enable taxpayers to effectively use the MAP as a transfer pricing dispute resolution mechanism.[105] The unilateral introduction of domestic legislation in anticipation of global reforms could result in a tax environment that is not investor friendly and may place African countries at a disadvantage when compared to European countries.

In all jurisdictions the competent authority that deals with transfer pricing disputes is housed with the tax administration or the transfer pricing unit within the revenue authority. For the MAP to be effective it would need the competent authority's officials who deal with the MAP

[104] LV Wien 'About the jurisdiction of international courts to settle tax treaty disputes' in M Lang & M Zuger *Settlement of disputes in tax treaty law* (2002) 6. But what is ultimately important is for African countries to ensure that there is training for transfer pricing units and those involved in international tax matters within revenue authorities, to ensure that the issue of tax avoidance is dealt with and profits are taxed where economic activities generating profits are performed and where value is created.

[105] A Christians 'Hard law, soft law, and international taxation' (2007) 25 *Wisconsin International Law Journal* 325-332 notes, African countries should understand the importance of reducing signed international agreements into domestic laws by incorporating the rules and principles agreed upon into actual laws. R Creyke, 'Soft law and administrative law: a new challenge' (2010) 61 *Australian Institute of Administrative Law Forum* 16 he states that 'the OECD is often described as a source of soft law, rather than a legally binding instrument of hard law. A central criticism of soft law is that it involves subjective discretion and is therefore of limited value in compelling compliance: it is 'often unenforceable because the parties retain discretion over the content of the obligation or over its eligibility.'

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to be separated from frontline tax examination staff in order to promote independence.[106] An advantage of MAP is that, when properly applied, it can take the dispute out of the hands of local auditors and provide a fresh perspective to examine the issue from a different perspective.[107] To ensure the effectiveness of MAP, when an application for MAP is made it must be referred to an independent and separate unit that deals with MAP.[108]

Research shows that most taxpayers prefer to use domestic means instead of utilising the MAP as they can only enjoy the benefit of suspension of tax payments if an objection is made under domestic dispute rules. In relation to the 'pay now, argue later' principle currently applied by the SARS, if a MAP matter take years to resolve, SARS should be cognisant of the fact that disallowing the suspension of payment pending the outcome of MAP can be extremely detrimental to the taxpayer. The OECD's recommended best practice on Action 14 is that taxpayers can access MAP and that countries 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 at least be available under the same conditions as those that apply to a person pursuing a domestic administrative or judicial remedy. [109]

The practical prevention of double taxation and BEPS is in the hands of individual auditors and revenue administrations that decide the extent to which they wish to enforce the policies and dispute resolution clauses in those treaties.[110] The issue with double taxation is not how the laws are written but how they are enforced by various tax authorities.[111] Laws and bilateral treaties alone cannot prevent double taxation. The lack of effective means of dispute resolution is where multilateral efforts appear to be breaking down.[112] It is incumbent upon all tax administrations to develop and make available such models and to work together to improve

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[106] S Picciotto 'What have we learned about international tax disputes?' (2016) 7 *International Centre for Tax Development* 6.

[107] See generally Cooper J et al 'The mutual agreement procedure: a taxpayer's tool reinvented' (2017) https://www.israelglobalgateway.com/2017/07/the-mutual-agreement-procedure-a-taxpayers-tool-reinvented/ (accessed 29 July 2017). Thus, MNEs faced with disputes concerning cross-border transactions are well advised to proactively consider the use of MAP where available, while at the same time pursuing their options under the usual domestic avenues. It is anticipated that the MAP process will become more effective in the future as competent authorities interact more closely as a result of BEPS. MAP-related meetings and conferences taking place at the international level have broadened and strengthened bilateral competent authority relationships.

[108] DTC (n 22 above) 92; OECD/G20 (2015) Final report on Action 14 in para 50.

[109] DTC (n 22 above) 95.

[110] See generally M Herzfeld 'Beyond BEPS: the problem of double taxation' (2014) http://www.taxhistory.org/www/features.nsf/Articles/E6E987F4B72389EA85257C7C0050EE52?OpenDocument (accessed 18 July 2018). One may argue that the efficiency of the system depends on the skills of the people tasked with implementing it. This would mean the recruitment of qualified and skilled personnel with an in depth understanding of transfer pricing disputes.

[111] as above.

[112] Herzfeld (n 110 above). It is incumbent upon all tax administrations to develop and make available such models and to work together to improve and expand programs designed to resolve tax issues effectively and efficiently in order to allow businesses to operate in an environment of greater tax certainty. As seen in this chapter, African countries seem to be far behind in developing guidelines, let alone developing detailed frameworks to deal with the challenges that arise out of the effective use of the MAP as a dispute resolution mechanism.

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and expand programs designed to resolve tax issues effectively and efficiently so that business can operate in an environment of greater tax certainty.

ATAF needs to play a central role in the development of guidelines for its member states. If African countries agree on a unitary approach to the taxation of MNEs based on clear criteria for allocating their total profits, there would be fewer conflicts and any disputes would be easier to resolve by transparent and principled decisions.[113]

[113] There is a need for African countries through their revenue authorities to adopt a common approach.

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CHAPTER 4

The Advance Pricing Agreement as an OECD Dispute Resolution Mechanism in Africa

1 Introduction

The previous chapter established that the MAP has certain challenges in resolving transfer pricing disputes. However, as shown in Chapter 2 above, there are other dispute resolution mechanisms that can, and have been, implemented by various countries. Unlike the MAP, the advance pricing agreement (APA) as a mechanism was adopted in an attempt to address not only the resolution of transfer pricing disputes but also to allow competent authorities of contracting states to enter into transfer price agreements in advance. The prime objective of the APA is to avoid the subsequent occurrence of dispute on the pricing of the transferred goods or services. This chapter deals with the APA[1] as a transfer pricing dispute resolution mechanism within the African states that are the subject of this research namely, South Africa, Kenya, Uganda and Ghana. This chapter also addresses the presence of any existing mechanism in the above-mentioned countries with characteristics similar to the APA that are or could be used to avoid and resolve transfer pricing disputes.

Again, reference will be made to the OECD guidelines vis-à-vis the APA which will include inter alia, commentaries thereon. OECD commentaries on various articles are useful and they remain as such in the resolution of disputes in transfer pricing cases by way of APA. In this chapter, the focus is on the existing APA framework and the conditions that affect or enhance its efficacy as a transfer pricing dispute resolution tool in Africa.

2 Background

As mentioned in previous chapters, there is continuous pressure on governments to maximise tax revenue. Tax authorities around the world are consequently focusing on transfer pricing enforcement as a source of additional revenue.[2] The OECD has warned that the changes that

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[1] Art 25 of the OECD Model convention with respect to taxes on income and on capital (MTC). It is important to note that the advance pricing agreement, also known as the advance pricing arrangement, in certain jurisdictions does not exist as a separate dispute resolution mechanism. It is to be found within art 25 of the OECD MTC specifically para 4 thereof which makes provision for contracting states to engage and communicate.

[2] A Curtis et al 'Transfer pricing in uncertain economic time: embracing opportunities' (2010) *Transfer pricing perspectives thriving through challenging times* https://www.pwc.com (accessed 28 September 2018) 39.

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will be effected through the BEPS Project will cause an increase in transfer pricing disputes and has encouraged dispute resolution through the MAP and APAs. Practitioners warn of an increasing level of transfer pricing audit activity as well as increasing international disputes as many tax authorities demonstrate their intent to seek penalties more frequently and at higher levels. There is a greater need for MNEs to manage their transfer pricing effectively.[3] This justifies the need for more dispute resolution mechanism than just the MAP.

To date, traditional administrative, judicial and other treaty mechanisms such as the MAP have been unable to adequately cope with the exponential increase in the number of transfer pricing disputes arising between MNEs and revenue authorities. Tax authorities around the world are mounting aggressive legislative, regulatory and enforcement efforts on transfer pricing, including penalty provisions for inadequate documentation and or unsupported transfer pricing methods. Litigating a tax case in any court is costly, time consuming and unpredictable. The fact that the cases are heard in public courts has the potential to damage the reputation of affected taxpayers. For companies with disclosure responsibilities, litigation is often not viewed as a plausible alternative.[4] Entering into adversarial litigation proceedings with one or more revenue authorities can be an expensive and protracted process that exposes the company's internal affairs in public. As a way of reducing the likelihood of costly transfer pricing disputes, many commentators recommend the use of APA as a transfer pricing dispute resolution mechanism.[5]

3 Definition of an Advance Pricing Agreement

An APA is defined by the OECD as an arrangement that determines an appropriate set of criteria for the determination of the transfer price for transactions over a fixed period of time in advance of controlled transactions.[6] It determines the method, comparables and appropriate adjustments

[3] T Borstell & J Hobster 'Global transfer pricing survey tax authority insights: perspective, interpretations and regulatory changes' (2014) https://www.ey.com/global-transfer-pricing-tax-authority-survey (accessed 13 October 2018) 6.

[4] CJ Klotsche 'United States: jousting with the tax man: an extreme makeover' (2009) *Inland Revenue Service Edition* https://www.irs.gov/forms-pubs/ebook (accessed 21 June 2020) 19 states that "judicial mechanisms such as litigation are also not an optimal way to resolve transfer pricing disputes. Entering into adversarial litigation proceedings with one or more revenue authorities is an expensive and protracted process."

[5] OECD Transfer pricing guidelines for multinational enterprises and tax administrations (2017) https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations (accessed 16 February 2018) 215 states that APA predictions have more specific conclusions and rely on predictions about future events. The reliability of any predictions used in an APA depends both on the nature of the prediction and the critical assumptions on which the prediction is based. J Cooper & R Fox APA & MAP country guide 'Managing uncertainty in the new tax environment' (2017) https://www.dlapiper.com/en/us/insights/publications/2017/05/apa-map-country-guide-2017/ (accessed September 2018) 2.
state that APAs were first negotiated in the 1980s as a way for taxpayers to prospectively apply approved transfer pricing methods without the risk of future adjustments or double taxation.

[6] n 5 above, 217 states that one of the key objectives of the MAP APA process is the elimination of potential double taxation. Also see generally PR Maccanico 'A new framework for state aid review of tax rulings' (2015) 14 *European State Aid Law Quarterly* 374.

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thereto, critical assumptions of future events. It is formally initiated by the taxpayer against one or more tax administrations.

APAs are binding agreements that are entered into between the taxpayer and the tax authorities on:

i) the relevant facts;

ii) the arm's length pricing method to be used to appropriately reimburse the taxpayer for its intercompany transactions;[7] and

iii) the arm's length result for the taxpayer's functions performed, assets used, and risks incurred while performing its functions.

An APA is intended to supplement any judicial and treaty mechanisms to resolve transfer pricing issues.[8] The primary legal effect of an APA is that the taxpayer secures a binding agreement with the revenue service.[9] Once entered into, the agreement is binding on both parties. For as long as the taxpayer complies with the terms and conditions of the APA, the revenue authority will not contest the arm's length principle or the transfer pricing method to the covered transactions contained therein in the years to which the APA specifically relates.

APAs were first introduced in the United States of America in 1991.[10] After their initial success, bilateral and multilateral APAs were implemented with America's major trading partners in 1994.[11] The guideline for conducting an APA under the MAP APA was adopted first in October 1999. The MAP is the process by which the APA is initiated and negotiated.

According to ATAF,[12] tax disputes that take substantial time to resolve may:

i) affect taxpayer trust in the tax administration and in the judicial system;

[7] JM Nielsen 'Advance pricing agreements: the what, why and how from the valuation analyst perspective' (2015) *Insights* 13.
[8] See generally SC Wrappe 'Are you considering an advance pricing agreement?' (2016) https://taxexecutive.org/are-you-considering-an-advance-pricing-agreement/ (accessed 24 August 2018). On average taxpayers experience inconsistent interpretation and enforcement of transfer pricing rules from country to country, with the attendant risk of double taxation. This exposure can be prospectively eliminated by negotiating a bilateral APA. Companies that opt for a new Internal Revenue Service (IRS) program called the APA can avoid a transfer pricing audit by getting the IRS to approve their pricing policies in advance. The APA constitutes a legally binding agreement between a company and the IRS and governs specific transactions between that company and its overseas subsidiaries.
[9] AM Snyder 'Taxation of global trading operations: use of advance pricing agreements and profit split methodology' (1995) 48 *The Tax Lawyer* 1066.
[10] See generally M Bernard 'Advance pricing agreements: an alternative practical strategy' (2007) https://www.aicpastore.com/Content/media/PRODUCER_CONTENT/Newsletters/Articles_2007/CorpTax/Strategy.jsp (accessed 8 November 2020).
[11] AW Oguttu 'Resolving transfer-pricing disputes: are advance pricing agreements' the way forward for South Africa?' (2006) 18 *South African Mercantile Law Journal* 392.
[12] The African Tax Administration Forum (ATAF) is an entity launched in 2009 by 34 African tax commissioners to create a platform to promote and facilitate mutual cooperation among African tax administrations with the aim of improving the efficiency of their tax legislation and administration. See generally https://www.ataftax.org/ (accessed 20 June 2019).

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ii) lead to integrity challenges for the tax authorities; and

iii) lead to high costs for taxpayers, potentially making the country or jurisdiction unattractive for conducting business.[13]

The canons of taxation entail equality, certainty, convenience, and economy.[14] APAs, by their nature, offer taxpayers some certainty regarding their tax affairs.

4 Certainty

The importance of providing greater tax certainty to taxpayers to support trade, investment and economic growth has become a shared priority of governments and businesses. APAs provide a greater level of certainty in both treaty partner jurisdictions. APAs lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes.[15] Theoretical studies show tax uncertainty is likely to have negative effects on investment and growth under realistic assumptions.[16]

An APA provides taxpayers with some level of certainty before a transaction is consummated. It ensures that taxpayers do not justify pricing after a transaction is consummated. It gives the taxpayer the option to evaluate whether or not to take the transaction at a particular price.[17] Another argument has been that the global economy has entered a dangerous and uncertain phase.

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[13] See generally the UN-ATAF workshop on transfer pricing administrative aspects and recent developments: dispute avoidance and resolution Ezulwini Swaziland 4-8 December 2017 https://www.ataftax.org/past-events (accessed 17 November 2018).

[14] See generally A Smith 'Canons/principles of taxation' https://economicsconcepts.com/canons_of_taxation.htm (accessed 2 November 2020).

[15] M Markham *Advance pricing agreement: past present and future* (2012) 17. Writing in respect of the economic situation in 2012, Markham stated that as the economic climate will remain unstable for the next several years, MNEs urgently require mechanisms that will abolish double taxation, assist in meeting financial reporting requirements and safeguard them from penalties while providing certainty of the treatment in international cross border transfer pricing transactions in the decade ahead. From various authors and commentators, there is a strong argument in favour of tax certainty APAs also appeal to tax administrators since they provide for a smoother enforcement of transfer pricing taxation, mitigate administrative burdens and provide tax administrations with flexibility and the discretion they need to administer taxes. They appeal to taxpayers because they prevent transfer pricing controversies. See generally ED Ryan & MF Patton 'IRS advance pricing agreements: are they a practical means to resolve' (1991) 20 *Tax Management International Journal* 115 where it is said that while an APA may not be appropriate for all taxpayers, it offers significant advantages such as certainty in both jurisdictions and administrative convenience for taxpayers and tax administrations.

[16] A Caiumi, in a presentation about tax certainty made at the platform for tax good governance in Brussels (2017) https://ec.europa.eu/taxation_customs/business/company-tax/tax-good-governance/platform-tax-good-governance-old_en (accessed 12 July 2019). He is of the view that tax uncertainty has the effect to reduce the level of investment.

[17] RL Doerberg *International taxation in a nutshell* (2012) 321; See generally the OECD Secretariat 'Advance pricing arrangements, approaches to legislation' (2012) http://www.oecd.org/ctp/tax-global/4.%20Advance_Transfer_Pricing_Arrangements.pdf (accessed 4 November 2018). Doerberg states that an APA provides comfort to a taxpayer that it will not be subject to a costly audit, with an uncertain outcome, in relation to the relevant transaction(s) that fall within the APA, and over the period of the APA. But most importantly a bilateral APA will successfully prevent and eliminate double taxation.

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According to Largade:

> [i]f we do not act and act together, we would enter a downward spiral of uncertainty, financial instability and a collapse in global demand. Ultimately, we could face a lost decade of low growth and high unemployment.[18]

Hence the need for the certainty that APAs provide. The level of uncertainty inherent in transfer pricing disputes encourages taxpayers to use dispute prevention mechanisms and improve the certainty of the transaction.[19] According to Markham:

> [i]n a global economy where national revenue authorities are simultaneously adopting new multilateral initiatives to exchange information about taxpayers while aggressively pursuing transfer pricing enforcement through an increase in audits, disputes, tax adjustments, transfer pricing penalties, litigation, transfer pricing risk management, the pursuit of transfer pricing certainty has assumed a priority role.[20]

Without certainty, neither governments nor taxpayers can effectively budget or plan their future actions. Uncertainty over the tax outcome will have an opportunity cost as the prudent taxpayer has to reserve funds against any impending potential liability. This restricts alternative investments. The move in many of the world's jurisdictions especially in OECD countries to use APA has been described as a governance change from bureaucracy to cooperation.[21] There is a need for countries to come up with a mechanism that will prevent or avoid transfer pricing disputes in advance rather than trying to resolve them when they are already in existence. As businesses inevitably operate with many uncertainties, their decisions do not need absolute certainty in tax matters but an environment where they are able to manage the risk associated with tax uncertainty.[22]

Effective dispute resolution mechanisms have a critical role to play in establishing certainty. Dispute resolution mechanisms should be fair, independent, accessible and effective in resolving disputes in a timely manner.[23] Lack of clear and timely dispute resolution mechanisms and processes is likely to generate on-going uncertainty. Lingering, unresolved tax questions

[18] C Largade (then) Managing Director (MD) of International Monetary Fund (IMF) during her address to the 2011 International finance forum: Beijing (2011) https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp110911(accessed 12 July 2019).

[19] The remark made by C Silberztein: Former head of Transfer Pricing Unit at the OECD Centre for Tax policy and Administration; see in Markham (n 15 above) 276. One can argue that an APA is more of a dispute avoidance mechanism than a dispute resolution mechanism since at the time of the agreement *ex ante*, there exists no dispute yet but rather the parties thereto aim to ensure that there is no dispute in future. Also see Ryan & Patton (n 15 above) 115.

[20] Markham (n 15 above) 17.

[21] Markham (n 15 above) 18. Also see generally R Nyiri 'Transfer pricing: the drumbeat to improving tax efficiency for companies' (2016) https://www.bdo.co.za/en-za/news/tax/transfer-pricing (accessed 14 June 2018).

[22] IMF/OECD report for the G20 Finance Ministers 'Tax certainty' (2017) https://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf (accessed 6 November 2018) 11. Certainty cannot be absolute as a result of fluctuating economies and profitability of investments and probably the success of certain innovations, but of importance is an environment where MNE's are able to deal and mitigate the tax risk, hence in many big corporation's tax risk management is part of the boardroom planning.

[23] as above.

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may not only cause commercial difficulty in themselves when they occur but the possibility of them arising may, as stated above, deter investment.[24]

5 The Nature of the APA

An APA can be in a number of forms namely unilateral, bilateral and multilateral APA. Unilateral APAs are those between the taxpayer and the tax administration of residence. A bilateral APA includes the other contracting state. A multilateral APA's could include three or more contracting states.

An APA particularly serves to avoid transfer pricing disputes by reviewing and agreeing on the appropriate arm's length return prospectively.[25] Unilateral APAs are easy to conclude but they subject the taxpayer to the risk of double taxation.[26] However, with a bilateral APA the negotiation often requires the consent of the competent authority of the other contracting state. In some cases, the taxpayer will take the initiative by making simultaneous requests to the affected competent authorities. In other cases, the taxpayer may file a request with the jurisdiction in which he is resident under the relevant domestic procedure and ask the resident country to contact the other affected jurisdiction to ascertain the possibility of an APA.[27]

An APA can be concluded with the competent authority of a treaty partner through the MAP.[28] The importance of a tax treaty network as stated in Chapter 2 again is emphasised as there are possible exchange of information problems. However, this can possibly be overcome by not only relying on treaty information exchange provisions, but instead, by asking the taxpayer to assume the responsibility for providing information to all the affected tax administrations.[29]

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[24] as above. This can be triggered by the differences between the legislators and associated guidance provided by tax administrations on the one hand, and the decisions of the courts on the other. This can be compounded by the fact that some of the court decisions that tend to clarify the law are not publicised. The decisions made by competent authorities during the MAP and various tax treaty disputes are also not published.

[25] UN-ATAF workshop (n 13 above).

[26] ZD Altman *Dispute resolution under tax treaties* (2006) 302. Unilateral APA can only guarantee the existence of an agreement with the revenue authority of that one state which is party to the agreement. It is only binding to the agreeing state and may be expose the taxpayer to double taxation by the other contracting state which was not party to the APA negotiation. However, one can argue that though not binding on the other contracting state, the fact that it was negotiated with the resident state and agreed to, may capacitate the competent authority of the resident state to persuade the other contracting state using its diplomatic channels to agree to the pricing method and terms of the agreed unilateral APA. It must be noted that it cannot always be guaranteed that the other contracting state will agree hence a unilateral APA always poses the risk of double taxation; The OECD (n 5 above) states that 'unilateral APAs give rise to considerable concerns in this area, which is why most countries prefer bilateral or multilateral APAs.'

[27] n 5 above, para 15. The reason why the taxpayer has to go through the competent authority of his country of residence is that, if the request is to be negotiated through the MAP the taxpayer is not allowed to deal directly with the competent authority of the other contracting state.

[28] Again, this statement further reiterates the importance of the tax treaty as was alluded to in Chapter 3. It is important for African countries to enter into DTAs *inter se*. This will ensure better international tax cooperation amongst African countries.

[29] OECD Guidelines for conducting advance pricing arrangements under the mutual agreement procedure para 25 ("MAP APAs") (1999) https://www.oecd.org/tax/transfer-pricing/38008392.pdf (accessed 10 July 2018). The taxpayer may give different information to different competent authorities. One is of the view that through the exchange of information article in the DTC, the competent authority to which the taxpayer is resident should be the one that provides all the information that was submitted to it to all other competent authorities that are party to the APA request.

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Even though this is possible, one can see the risk if the provision of information to the competent authority of the other contracting states is left solely to the taxpayer. The MAP in itself makes provision for the contracting states to communicate and to enter into a specific agreement. Article 25(3) of the OECD MTC states that:

> [t]he competent authorities 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.[30]

Since the existence of the APA has its origin in the MAP article, it would then mean that most African countries have a platform for the implementation of APA as a dispute resolution mechanism. This is because most of their DTAs have the article 25 (MAP article) of which most of them contain the above quotation.[31]

5.1 Contents of an APA

A request for an APA must at least contain certain basics that include, inter alia:

i) an explanation of the proposed transfer pricing method;

ii) description of the business operations of the taxpayer and related parties with supporting financial and tax documents;

iii) an analysis of the taxpayer and the taxpayers' competitors;

iv) data on the taxpayer's industry showing pricing practices and rates of returns on comparable transactions between related persons; and

v) critical assumptions.[32]

As regards critical assumptions, the taxpayer is required to provide extensive evidence supporting the appropriateness of its proposal. This evidence includes a functional analysis, and the so-called critical assumptions made in reaching the proposed methodology.[33] A critical

[30] Art 25 of the OECD MTC. The OECD (n 5 above) preface para 17 states that 'these guidelines are also intended primarily to govern the resolution of transfer pricing cases in mutual agreement proceedings.' Cooperative Relationship Programs (also called enhanced compliance) between taxpayers and tax administrations may assist in avoiding disputes on transfer pricing. These programs serve to improve the discussions and reporting relationships between taxpayers and tax authorities, as noted in the UN-ATAF workshop (n 13 above). Bilateral APAs should fall within this provision because they have as one of their objectives the avoidance of double taxation.

[31] Many of the DTAs entered into by many African countries are line with the OECD MTC and have in them, a MAP article. However, African countries do not make full use of the mechanisms that are available. African countries could also make use of art 26 of the various DTAs which deals with the exchange of information on tax matters, as another mechanism to facilitate an APA. Art 26 allows for and creates a platform for cooperation between competent authorities to exchanges any form of information related to tax matters.

[32] This is a mechanism whereby the parties identify, in advance, the changes in circumstances that may be so significant enough that the parties may need to re-examine the agreement as a whole or to continue with an APA under different rules.

[33] Markham (n 15 above) 79 states that a critical assumption is one that is central to the choice of a particular transfer pricing method (TPM) and which would materially affect the TPM if it is changed. APA predictions are more specific conclusions that rely on predictions about future events. The reliability of any predictions used in an APA depends both on the nature of the prediction and the critical assumptions on which the prediction is based, as stated by the OECD (n 5 above) 125. The OECD also suggests that it is better to rely on the appropriateness of a method rather than on unpredictable and unreliable future events. See generally FA Horner 'International co-operation and

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assumption may change or fail to materialize due to changes in the economic circumstances. Failure to meet this critical assumption will cause an APA to be either revised or cancelled. However, an APA should contain a clause that makes provision for a change in the critical assumption to be included in order to cater for any unforeseen changes. There can also be a compensating adjustment in cases where a critical assumption changes, rather than a review of the whole business transaction.[34] Critical assumptions might include, inter alia, assumptions regarding:

i) the relevant domestic tax law and treaty provisions;
ii) the tariffs, duties, import restrictions and government regulations;
iii) the economic conditions, market share, market conditions, end-selling price, and sales volume;
iv) the nature of the functions and risks of the enterprises involved in the transactions;
v) the exchange rates, interest rates, credit rating and capital structure;
vi) the management or financial accounting and classification of income and expenses; and
vi) the enterprises that will operate in each jurisdiction and the form in which they will do so.[35]

It may also be helpful to set parameters for an acceptable level of divergence for some assumptions in advance in order to provide the necessary flexibility.[36]

5.2 Multilateral APA

The desire for certainty has resulted in taxpayers seeking multilateral MAP APAs to cover their global operations.[37] In a multilateral APA the taxpayer, through the competent authority of his country of residence, approaches each of the affected jurisdictions with an overall proposal and

understanding: what's new about the OECD's transfer pricing guidelines' (1996) 5 *University of Miami Law Review* 593. The OECD states that the taxpayer should include a discussion of the availability and use of comparable pricing information. According to the said OECD guidelines this would include a description of how the search for comparables was carried out including the search criteria employed, the data relating to uncontrolled transactions that was obtained and how such data was accepted or rejected as being comparable. The taxpayer should also include a presentation of comparable transactions along with adjustments to account for material differences, if any, between controlled and uncontrolled transactions.

[34] The taxpayer should be able to explain how the chosen methodology will satisfactorily cope with any changes in those assumptions. The assumptions are defined as 'critical' if the actual conditions existing at the time the transactions occur could diverge from those that were assumed to exist, but what is important is that despite the changes that may occur the transfer pricing method chosen will still be able to give an arm's length price. The critical assumptions should not be drawn so tightly that the certainty that is inherently provided by the APA is jeopardised but should encompass as wide a range of variation in the underlying facts as the parties to the agreement feel comfortable with.

[35] Deloitte 'Advance pricing agreement frequently asked questions' https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/thoughtpapers/in-tax-deloitte-apa-faqs-noexp.pdf (accessed 4 December 2018) 4.

[36] OECD n 29 above, 35.

[37] P Balkus & M Heath 'Australia' in A Bakker & M Levey *Transfer pricing and intra-group financing* (2012) 90.

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suggests that it would be desirable if the negotiations could be conducted on a multilateral basis involving all the affected jurisdictions, rather than through a series of separate negotiations with each tax authority.[38] The downside of a multilateral APA is that all competent authorities must be willing to cooperate and reach agreement in order to avoid double taxation and provide certainty for the taxpayer. This can be a time-consuming and costly exercise, but it is generally worth the effort.[39]

5.3 Advantages of an APA

The advantages of APAs outweigh the criticisms thereof. Although APAs may not resolve all transfer pricing problems, they might be the most feasible approach to resolving transfer-pricing disputes.[40] A prominent feature of APAs is that they are tailored to each request.[41] It is up to the taxpayer to decide which group entities and which transactions should be included in the APA application. However, it is the decision of the tax administration whether it accepts the taxpayer's application.[42]

An APA has the advantage of familiarising the competent authority with the business operations should other tax treaty issues arise.[43] The process also allows the tax authorities to get-to-know the taxpayer based on the ample up-front information supplied about the taxpayers business model, revenue drivers and competitors.[44] The MAP APA may cover all of the transfer pricing issues of a taxpayer (the members of a MNE group) or may be more limited to a particular transaction, sets of transactions, product lines or to only some members of a MNE group.

[38] A multilateral APA is more beneficial as it guarantees tax certainty and the complete elimination of double taxation on all the global operations of the taxpayer. One may argue that it is also more cost effective in that once a multilateral APA is reached with the taxpayer, it saves the taxpayer time and expenses incurred in negotiating with other jurisdictions.

[39] It may not be as easy to get all the competent authorities of all the contracting states in one room to negotiate, even though the use of technology and other means of distance communication may make it easier for all competent authorities to engage. The other challenge will be to reach an agreement on the substance of the matter based on the fact that they may all have different views, and each may be negotiating for the best interests of their own country. The presence of DTAs may present a challenge because DTAs are generally between two contracting states. An agreement between country A and country B may differ from that between country A and country C, so bringing all three countries to agree on the APA may be a huge challenge.

[40] See C Rolfe & A Casley 'Towards reconciliation in transfer pricing' (1996) *Corporate Finance* 39. G Campos 'Transfer pricing of major trading nations (1996) 50 *Bulletin for International Fiscal Documentation* 217 where it is said that the major reason behind the increase in the number of countries offering APAs, particularly among OECD member countries, is that less manpower is generally required on the part of the tax authorities in negotiating and monitoring the compliance with an APA than conducting a fully-fledged audit of a transfer-pricing issue. This has allowed tax authorities to better utilise their scarce resources in other areas of tax administration.

[41] With an APA a taxpayer is free to participate and in fact choose the most suitable transfer pricing method provided that the method chosen leads to an arm's length remuneration for the specific transactions or activities for which certainty in advance has been requested.

[42] M Helmein *EU tax law: direct taxation* (2009) 250.

[43] R Fox & J Cooper 'Managing uncertainty in the new tax environment' (2017) https://www.dlapiper.com/en/us/insights/publications/2017/05/apa-map-country-guide-2017/ (accessed 22 July 2018) 8. See generally R Fox & J Cooper 'Advance pricing agreements: a new era' (2016) https://www.dlapiper.com (accessed 22 July 2018).

[44] UN-ATAF workshop (n 13 above). The existence of a roll-back within an APA framework also clarifies the arguments that have been raised by some commentators on whether an APA is a dispute resolution mechanism or a dispute prevention mechanism. Because of its prospective nature, some commentators have said that it does not resolve but prevents disputes from taking place in the first place. However, the fact that a roll-back on an impending unresolved dispute could be granted in an APA negotiation makes it a dispute resolution mechanism.

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Another advantage is that being part of a government's bilateral APA program can help provide for smoother access to MAP if challenges to previous years arise. An APA also provides for a roll-back, which is a mechanism to incorporate previous years of assessment. A roll-back provides an additional incentive to both the taxpayer and the tax authority. This is because once granted the terms of the same APA can be used to address any previous years that may be under examination.[45] As a result both parties can be pleased with the fact that the resources that would have been used in the resolution of disputes in the previous years under audit can now be used elsewhere. Not only is the APA dealing with the transfer pricing issues ex ante but also deals with those pending ex post facto issues.[46]

Another advantage of an APA is that it eliminates the risk of transfer pricing audit and the costs of long drawn and time-consuming litigation. Since it is costly to keep and maintain records, an APA reduces the burden of record keeping because the taxpayer knows the required documentation to be maintained to substantiate the agreed terms and conditions of the agreement in advance.[47] It remains more cost effective and efficient. According to Silberztein, the global use of APAs will increase in future.[48]

5.4 Disadvantages of an APA

The chief concern with regards to an APA is the issue of secrecy. There is concern that things are done in secret and that agreements are not publicised. The fact that things are done in secret gives rise to the perception that some well-resourced MNEs can enter into hidden deals with

[45] ER Larkins *International applications of US income tax law: inbound and outbound transactions* (2004) 378, reaffirming the position that the rollback application of the APA gives effect to the ex post facto application thereby making it a dispute resolution mechanism for disputes that were already in existence.

[46] In a rollback the parties may agree on the use and application of the TPM agreed to in the APA for previous years of assessment. Of course, there has to be a factual determination of a similarity between the preceding years and the succeeding years in which the APA will be applicable.

[47] RS Avi-Yonah *International tax as international law: an analysis of the international tax regime* (2007) 118. What is perhaps required for APAs to be implemented is neither a change in legislation nor the current DTAs entered into by African countries but rather, the effective usage of the current tax treaties particularly art 25 (MAP). Also see India Tax Income Department 'Advance pricing agreement guidance with FAQs' 43 *Taxpayer Information Series* 4. Despite the benefits, many MNEs in Africa do not make use of these mechanisms, and many tax authorities do not make use of the MAP APA to either prevent and or resolve transfer pricing disputes. It could be that the companies are afraid of initiating the process or to influence the adoption and implementation of the APA program simply because they are not in compliance with the transfer pricing documentation requirements or some other domestic requirements.

[48] Markham (n 15 above) 276. As stated above, African countries are improving on their transfer legislation and this will potentially trigger a lot of transfer pricing audits. From these audits, transfer pricing disputes are likely to arise and the plausible thing for African countries in preparation for such an eventuality is to implement the APA in their transfer pricing dispute resolution rules so as to give effect to the prevention of disputes rather than to rely only on the MAP. This is especially the case where there is evidence that shows that the MAP can be ineffective in resolving transfer pricing disputes timeously. With the economic changes and increase in global trade, it will be necessary for African countries to keep pace with the global developments, so as to match their trade partners. This is something that African countries cannot avoid as most of the African countries enter and have entered into a lot of trade agreements with European and western countries.

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the tax authorities.[49] A counter to this argument is that an APA is an agreement with a specific taxpayer; hence, it will not ordinarily be available in the public domain.[50]

There are also concerns regarding the exclusion of certain transactions from the APA. Some countries recognise the need for flexibility in the process but have concerns over the appropriateness of specific APA issues. It may be difficult to evaluate some issues in isolation, for example where the transactions covered by the proposal are highly interrelated with transactions not covered by the proposal. The taxpayer will now have to explain the reasons why certain enterprises and transactions should be excluded from the scope of the APA and why certain enterprises and transactions should be included.[51]

Another disadvantage of APAs emanates from the duration of the APA. While it is desirable to have a sufficiently long binding period for an APA for the purposes of certainty, a long binding period has the potential to make the predictions of future conditions on which the mutual agreement negotiations are based less accurate. This causes doubt on the reliability of the MAP APA proposals.[52]

6 Post Advance Pricing Agreement

Once the MAP APA has been agreed upon, the participating tax authorities must give effect to the agreement in their own jurisdiction. The tax administrations should enter into a confirmation or agreement with their respective taxpayers that is consistent with the mutual agreement entered into by the participating competent authorities.[53] The implication of the agreement is that it automatically reduces the use of resources from the revenue authority for at least the next five years. The only engagement between the tax administration and the taxpayer is to ensure

[49] It is perhaps superfluous to raise the issue of secrecy as a concern because all matters relating to taxpayers and taxpayer information are generally treated as confidential almost across all revenue authorities. In fact, some countries make it an offence to publicise any information about the tax affairs of a taxpayer. Sec 69 of the TAA deals with the ‘secrecy of taxpayer information and general disclosure.’ In terms of the said section and its subservient subsection (1), a person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official. Certain exceptions can be made in terms of secs 70, 71 & 73 of the TAA in terms of which taxpayer information may be released, but the general rule is that taxpayer information is confidential. These sections and subsections demonstrate that the concern about secrecy of an APA cannot be an issue since secrecy is a fundamental principle in the administration of tax laws.

[50] However, it may be important, in an effort to encourage other MNEs to make APA applications, to publicise APAs reached with other MNEs. This can be done without exposing the identity and confidential details of the taxpayer involved. For instance, the date on which the request was made, a summary of the facts and the date on which the APA was reached may be published in order to show other taxpayers the efficiency and the benefits of the program and that it is possible to agree with the revenue authority on the tax position. According to C Waerzeggers & C Hillier ‘Introducing an advance tax ruling (ATR) regime’ (2016) 1 *Tax Law International Monetary Fund Technical Note* 5, the publication of edited versions of private advance rulings issued may be best practice from a transparency perspective.

[51] Helmein (n 42 above) 247.

[52] Experience has shown that an APA may last for three to five years. The period will depend on the number of factors, including the nature of the industry, the transactions involved and the economic climate.

[53] The countries that are party to the agreement will then individually enter into a confirmation with the taxpayer within their jurisdiction. This confirmation gives the local tax authority jurisdiction to enforce the terms of the APA and to tailor it in line with its other domestic rules to ensure taxpayer compliance.

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compliance with the terms of the APA. The revenue authority will ensure compliance with the APA without having to re-evaluate the transfer pricing method. It is important to note that the main issue that triggers transfer pricing disputes is mostly disagreement regarding the transfer pricing method applied by the taxpayer.

In cases where the agreed APA is a bilateral APA each revenue authority will monitor compliance with the APA within its jurisdiction as a way of enforcing the terms and conditions of the agreement. The existence of a DTA between the parties to a bilateral APA enables the contracting states to easily exchange information amongst themselves, making it easy for them to monitor the taxpayer's compliance with the terms of the APA. From the taxpayer's point, what is required to ensure compliance is to file annual reports that demonstrate compliance with the terms and conditions of the APA.[54]

Again, reference is made to the importance of a DTA between countries. Bilateral or multilateral APAs extend that assurance or certainty on the tax position beyond a single country. The success of the MAP APA process depends to a large extent on the commitment of all the participants. The ability of the relevant competent authorities to reach agreement in a prompt manner will be determined by their actions and importantly by the willingness of the taxpayer to provide all the necessary information as promptly as possible.[55]

7 Advance Pricing Agreements in Africa

As stated in Chapter 2 above, African research by the Global Financial Integrity, which used, amongst other African countries, countries like Ghana, Kenya and Uganda as case studies, found that trade mis-invoicing was a significant source of illicit outflows of capital in each country. As a result, countries like South Africa and Kenya are said to have cultivated well-established regimes that tend to serve as models for the region,[56] hence their inclusion in this research. Revenue authorities like the Kenya Revenue Authority (KRA) and the Uganda Revenue Authority (URA) have taken steps by putting in place transfer pricing regulations.

[54] The taxpayer will have to file such annual reports to the countries that were party to the agreement. An audit could be done on the taxpayer concerned, however, the audit in question will only be to verify if the taxpayer is still compliant to the APA terms. Also, an audit can be conducted to check whether the circumstances and assumptions necessary for the reliable application of the chosen methodology continue to exist.

[55] OECD (n 5 above) para 52. The question that arises is whether the competent authority have a discretion or a legal obligation to participate in the APA process. The answer to this question is reliant on the application of the DTA in place and how it has been reduced to law within the domestic rules so as to make its adherence a legal obligation. This may happen either at the request of the taxpayer or the revenue authority may choose to make use of the TPM agreed to in the APA and apply it to previous years. The existence or possible existence of a rollback in an APA program provides the taxpayer and the revenue authority with the forum to resolve all the transfer pricing issues at once and in an accelerated manner.

[56] R Nyiri 'International tax: transfer pricing-15 by 2015?' (2015) *Tax Professional* 27.

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However, there are still inefficiencies in those regulations. As such there is scope for MNEs to confirm their intercompany pricing position with opportunities for advance agreement to ensure certainty.[57] The potential cost of uncertainty regarding a transfer price has risen significantly as the revenue authorities in the region have intensified their transfer pricing enforcement efforts.[58]

Various countries particularly those that are discussed in this chapter namely, South Africa, Kenya, Uganda and Ghana have DTAs with other countries. However, this is not enough to either address or deal completely with tax treaty disputes particularly transfer pricing dispute resolution challenges. In the said DTAs, reference is made to the concept of competent authority. However, it appears that there is no effort on the part of African countries to capacitate the competent authorities in order to make them more effective.[59] In seeking to establish certainty in transfer pricing matters, the ATAF makes the following recommendations for the avoidance of transfer pricing disputes:

(i) clear legislative guidance on transfer pricing to avoid unexpected taxpayer behaviour and disputes from arising;

(ii) advance rulings such as advance pricing agreements (APAs) may be helpful in avoiding transfer pricing disputes;

(iii) cooperative relationship programs (also called enhanced compliance) between taxpayers and tax administrations may assist in avoiding disputes on transfer pricing. These programs serve to improve the discussions and reporting relationships between taxpayers and tax authorities;

(iv) joint or simultaneous audits may assist with avoiding extended disputes (and double taxation).[60]

8 Similarities between an APA and Advance Tax Rulings

An advance tax ruling (ATR) is defined as 'any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on which they are entitled to rely.'[61] Whilst the terms of a ruling may be relied upon by the taxpayer, this is typically subject to the condition that the facts on which the ruling is based have been accurately presented.[62]

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[57] See generally D Gichuru 'APAs key to resolve transfer pricing disputes' (2015) https://www.theeastafrican.co.ke/business/APAs-key-to-resolve-transfer-pricing-disputes/2560-2748186-3miy3uz/index.html (accessed 28 October 2018).

[58] Nyiri (n 56 above) 27.

[59] The failure of African countries to capacitate their competent authorities leads to a failure to fully take advantage of the existing guidelines and to fully utilize the current OECD dispute resolution mechanisms.

[60] UN-ATAF workshop (n 13 above).

[61] OECD Countering harmful tax practices more effectively taking into account transparency and substance Action 5 Final Report (2015) https://www.oecd.org/tax/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5 (accessed 5 December 2019) 47. See also Waerzeggers & Hillier (n 50 above) 1.

[62] as above.

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An advance ruling is personally beneficial to the taxpayer to whom the ruling is issued. Other taxpayers with the same or similar circumstances cannot derive legal rights from it. For instance, an ATR cannot formally be cited as an authority by another taxpayer in their own court proceedings. This common key feature of a private tax ruling system is important because it limits the systemic revenue risk if an incorrect tax ruling is issued or published as the benefit of that ruling is confined to the taxpayer to whom the ruling has been issued.

Generally, an ATR can be considered an effective dispute avoidance tool that allows the tax authorities to consider if a transaction is consistent with their interpretation of the applicable law and rules in advance.[63] An ATR operates similarly to an APA and in particular can serve as an efficient dispute avoidance tool, provided the tax authorities have resources to implement and operate an ATR program. Thus, APAs and ATRs have similarities and the basis of these similarities is that they are both ex ante. Like APAs, ATRs are also determinations made by tax administrations of what the future tax treatment of a certain transaction or activity will be.[64]

The advantages of an ATR practice include inter alia:

i) Promotion of clarity and consistency regarding the application of the tax law for both taxpayers and the tax authority.
ii) Enhancement of certainty of tax treatment of transactions and dealings, thereby also increasing taxpayer/ investor confidence in the tax system.
iii) Fostering compliance with the tax law to ensure the proper functioning of a self-assessment system
iv) Strengthening of relationships between taxpayers and the tax authority.
v) Reduction in conflict.[65]

The APA differs from the ATR procedure in that it requires a detailed review and, to the extent appropriate, verification of the factual assumptions on which the determination of legal consequences is based. Though different from traditional private rulings that tax administrations issue to taxpayers, APAs generally deal with factual issues, whereas traditional ATRs tend to be limited to addressing questions of a legal nature based on facts presented by the taxpayer.[66]

[63] UN-ATAF workshop (n 13 above).
[64] Altman (n 25 above).
[65] Waerzeggers (n 50 above) 6. The ruling will only be typically issued in the context of a proposed transaction in circumstances where that transaction will be entered into in the near future or is under serious contemplation by the taxpayer. Rulings reduce tax disputes, and a reduction in tax disputes will allow the revenue authority to execute its main and primary function, namely revenue collection.
[66] With ATR, the taxpayer presents a set of facts upon which the tax authority gives the tax implications in line with the presented facts, while in an APA the tax authority may require more from the taxpayer and they are the ones who may even impose the TPM that should be used. The taxpayer must comply with the transfer pricing documentation as prescribed by the tax authority. However, having considered the difference between APA and ATR one still believes that the effective use of ATRs in cross border transactions and also in transfer pricing cases can be of help to introduce the APA especially within Africa.

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ATRs involve a program which gives to individual taxpayers' valuable guidance as to the tax consequences of their proposed transaction.[67]

8.1 Exchange of Advance Tax Rulings between Jurisdictions.

There are strong arguments in favour of the exchange of tax rulings. This is because ATRs issued by one jurisdiction can have an adverse revenue impact on other jurisdictions. For example, a preferential ruling in one country may provide tax planning opportunities whereby a taxpayer seeks to arbitrage that tax preference by shifting profits from a high tax jurisdiction to the first preferential jurisdiction. However, the basis of such an exchange, even if generally justified on transparency grounds, would still typically need an accommodative legal framework. The exchange can be done only between jurisdictions potentially involved in the transaction.[68] To be effective, the framework needs to be broad enough to encompass all rulings that exhibit the same essential features that give rise to the concerns underlying the need for greater transparency in this area. Private rulings have not traditionally been exchanged as a matter of course between partner countries, nor indeed between different levels of government within federal states.[69] To 'address transparency and base erosion concerns that cannot be fully addressed through the 'sanitized' domestic publication of rulings.'[70]

One of the recent international initiatives that stand out was the OECD's work on improving transparency in relation to ATRs through the Forum on Harmful Tax Practices and Action 5 of the BEPS Project Plan.[71] Some of the reasons in favour of the exchange of ATRs is that it:

i) helps non-residents in planning their income tax affairs well in advance;
ii) gives clarity to the local partners of non-residents vis-à-vis their liabilities under the tax laws;
iii) brings certainty in the determination of tax liability;

[67] SM Goodman 'The availability and reviewability of rulings of the internal revenue service' (1964) 113 *University of Pennsylvania Law Review* 82.
[68] HM Revenue & Customs 'Unilateral bilateral or multilateral agreement http://www.uk/manuals/intmanual/INTM422030.htm (accessed 6 June 2020).
[69] OECD BEPS Action 5 on harmful tax practices: transparency framework peer review documents (2017) https://www.oecd.org/tax/beps/beps-action-5-harmful-tax-practices-peer-review-transparency-framework.pdf (accessed 6 December 2019) 12. Contracting states within Africa may in the absence of an APA program, use the current DTAs as a legal framework through the MAP (art 25) and the exchange of information article (art 26) as contained in the various treaties as a conduit within which they can exchange rulings, in attempt to curb BEPS. It will be insufficient if African countries work together towards curbing BEPS by MNEs from Europe without adjusting to the global fiscal environment by not implementing mechanisms and tools such as the APA that are used by revenue authorities around the globe.
[70] Waerzeggers (n 50 above) 9.
[71] as above. The advantage with rulings is that they may be exchanged between more than one country. Another advantage is that the countries, so exchanging do not have to seat and negotiate but they just exchange what has been found domestically to be the tax position. The taxpayer only has to familiarise himself with the rulings from countries of interest and establish and identify factual aspects ruled upon by the revenue authority that may trigger double taxation. The exchange of rulings involving more than two jurisdictions has a similar effect to multilateral APAs because it protects the taxpayer from adjustments and possible penalties.

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iv) helps in avoiding drawn out and expensive litigation; and
v) is inexpensive, expeditious and binding.[72]

The one disadvantage with the exchange of rulings is that it has the potential of materially eroding the tax base. Because of their binding nature once an incorrect ATR is issued it can be relied upon by the taxpayer thereby giving rise to a loss in tax revenue. Despite the said disadvantage if it is in the public interest, an ATR can be withdrawn. Part of the outcome of the OECD's BEPS Action 5 on harmful tax practices was an approved framework for the compulsory and spontaneous exchange of information regarding rulings. This exchange of information includes six categories of taxpayer specific rulings namely:

i) rulings relating to preferential regimes;
ii) unilateral APAs or other cross-border unilateral rulings in respect of transfer pricing;
iii) cross-border rulings providing for a downward adjustment of taxable profits;
iv) permanent establishment rulings;
v) related-party conduit rulings; and
vi) any other type of ruling agreed by the OECD Forum on Harmful Tax Practices that in the absence of spontaneous information exchange gives rise to BEPS concerns.[73]

From an African perspective there are still questions on whether those who are responsible for tax treaty or international tax dispute resolution have the requisite capacity to address relevant technical issues. There are still issues of administrative and institutional challenges.[74]

9 Advance Pricing Agreement in South Africa

As regards South Africa, SARS in its guide on the MAP explicitly states that it does not have an APA program.[75] Moreover, it has been stated that due to various factors, the APA process will not be made available to South African taxpayers in the foreseeable future.[76] It is interesting

[72] Waerzeggers (n 50 above) 3. See generally the European Parliament 'report on tax rulings and other measures similar in nature or effect' (2015) https://www.europarl.europa.eu/doceo/document/TA-8-2015-0408_EN.html (accessed 28 December 2018).
[73] OECD (n 69 above).
[74] A Jallow 'Demystifying the ontology of taxation rulings in the Gambia: issues and challenges' (2016) *Social Science Research Network* 10.
[75] SARS Guide on mutual agreement procedures (2018) https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-IT-G24%20-%20Guide%20on%20Mutual%20Agreement%20Procedures.pdf accessed 28 December 2018) 25. See generally the South African dispute resolution profile (2018) https://www.oecd.org/tax/dispute/South-Africa-Dispute-Resolution-Profile.pdf (accessed 14 December 2018). There are no specific reasons provided against the express exclusion of the APA as one of the dispute resolution mechanisms. It is not clear also if an APA program will be considered in future.
[76] Para 16.2 SARS Practice note 7 https://www.sars.gov.za/Legal/Interpretation-Rulings/Pages/Find-a-Practice-Note.aspx (accessed 12 December 2018).

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to note that in the very same guide, South Africa recognises that certainty and predictability for business are needed in the effort to counter BEPS.[77] In the same guide reference is made to the minimum standard in the OECD BEPS Action 14 Report, which consists of three core elements, namely, to ensure following:

i) that treaty obligations related to the MAP are fully implemented in good faith and that MAP cases are resolved in a timely manner;
ii) the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and
iii) that taxpayers can access the MAP when eligible.[78]

Specific consideration is made to paragraph (ii) of the minimum standard listed above which refers to 'the implementation of administrative processes that promote the prevention and timely resolution of treaty related disputes.'[79] The only OECD mechanism that has proved to prevent and or avoid transfer pricing disputes is the APA. It is the only mechanism that provides:

i) certainty,
ii) freedom from adjustments,
iii) freedom from penalties, and
iv) freedom from the risk of double taxation and having to deal with transfer documentation.[80]

The successful functioning of an economy requires that the business (taxpayers) must be certain about the sum of tax that they have to pay on their income from work or investment.[81] Tax certainty is a principle that is upheld in South African tax legislation. The tax contribution which

[77] SARS (n 75 above) 5. This commitment to ensure certainty for business should be understood to also include cross-border transactions and transfer pricing and its related dispute resolution challenges.
[78] These are the OECD minimum standards to which South Africa agreed to. It must be noted that South Africa is amongst the countries that endorsed the BEPS Project Action Plan. South Africa is also one more than 100 countries that form part of the inclusive framework which should implement the minimum standards. However, the fact that South Africa does not have an APA program in place works against the implementation of these minimum standards, specifically para ii of the minimum standards in the Action 14 OECD report that deals with the promotion of the prevention of treaty related disputes. This is so because an APA is the only OECD mechanism that can prevent and or avoid tax treaty related disputes, other mechanisms such as the MAP and arbitration cannot prevent but rather strictly resolve ex post facto.
[79] South Africa needs to do more to demonstrate its commitment to implement administrative processes that promotes the prevention and the timely resolution of tax treaty and or transfer pricing disputes, because the only dispute resolution mechanism currently available is the MAP which is aimed at resolving transfer pricing disputes but does not prevent tax treaty related disputes. As a result, it would mean that South Africa is failing to action its commitment as referred to in para ii of the minimum standard in the Action 14 OECD report.
[80] DJ Canale & SC Wrappe 'Advance pricing agreement - a strategic tool in a global transfer pricing management' (2008) 60 *Tax Executive* 194.
[81] A Smith, *An inquiry into the nature and causes of the wealth of nations* (1976) 665 also reiterates that 'the tax which each individual is bound to pay ought to be certain and not arbitrary.'

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each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment and the amount to be paid, ought to be clear and plain to the contributor.[82] The degree of certainty required is achieved by formulating rules which clearly indicate the methods and manner in which tax is to be collected by SARS.[83] There are no such rules within SARS from cross border transactions or tax treaty disputes prevention and or resolution.

There has been talk, for some years, of South Africa implementing APAs. The main inhibiting factor has been the administrative and technical capacity of SARS to implement and maintain such a program.[84] It is recommended that SARS should not indefinitely postpone the introduction of APAs in South Africa on account of its alleged administrative incapacity to deal with them. Rather, South Africa should consider investing in training personnel to learn how the APA process works.[85] In terms of section 80(1)(a)(iii), transfer pricing matters are expressly excluded from the ATR system. There has never been a specific reason given by the SARS and National Treasury, a structure responsible for the formulation of fiscal policies, as to why there was a need to specifically exclude the pricing of goods from the advance tax ruling framework.

9.1 Advance Tax Rulings in South Africa

From a South African view, a 'ruling' refers to a letter in the form of a complete written statement that SARS issues through the ATR unit of the Legal and Policy Division: Interpretation and Rulings. It sets forth SARS's interpretation of the relevant tax laws and how they would apply to the proposed transaction it describes.[86]

Section 76 of the TAA, set out the details of the working of the ATRs. [87] Section 76 which deals with the purpose of ATRs, states that, 'the purpose of the advance ruling system is to promote

[82] AS Silke 'Tax avoidance and tax evasion within the framework of the South African income tax legislation with specific reference to the effect on the fiscus and to current anomalies and inequalities' (1958) https://open.uct.ac.za (accessed 23 November 2018) 561. This is necessary so that the taxpayer knows the tax consequences of any given transaction in advance. Tax planning and budgeting would be impossible if the parameters within which the tax law operates were not clearly defined. According to K Huxham & P Haupt *Notes on South African income tax* (2019) 4. South Africa owes its taxpayers a corresponding obligation to create and make available an enabling environment conducive for certainty. Since certainty is an inherent principle of tax legislation, mechanisms such as the APA and ATRs to a certain extent have to be put in place in order to guarantee the said certainty. This is particularly the case because the absence of such certainty may cause non-compliance, which in turn triggers costly adjustments and penalties, double taxation and protracted dispute settlement procedures.

[83] IMF/OECD Report for the G20 Finance Ministers and central bank governors 'progress report on tax certainty' (2019) 6 www.oecd.org/tax/tax-policy/g20-report-on-tax-certainty-htm (accessed 31 October 2109).

[84] See generally B Joubert 'Prospects for a South African APA system' (SA 2015-2016 Budget) https://www2.deloitte.com (accessed 20 March 2019).

[85] Oguttu (n 11 above) 404. Although another issue of concern is the cost attributable to an APA application many MNEs would consider it to be a worthwhile investment because the cost and disruption associated with transfer pricing disputes is generally significantly greater. Many MNEs would find it worthwhile to spent time to secure an APA and get certainty for the next five years with the possibility of roll-back relief than to operate without an APA.

[86] SARS comprehensive guide to advance tax rulings (2013) https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TAdm-G02%20-%20Comprehensive%20Guide%20to%20Advance%20Tax%20Rulings.pdf (accessed 8 January 2019) 3. Advance rulings provide certainty to taxpayers in connection with the application and interpretation of the tax laws.

[87] Sec 76 of the TAA.

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clarity, consistency and certainty regarding the interpretation and application of a tax Act by creating a framework for the issuance of advance rulings.'

Section 80 of the TAA deals with the circumstances under which SARS may reject an application or an advance ruling. There are circumstances listed but for purposes of this chapter reference is made only to section 80(1)(a)(iii) and section 80(1)(d)(iii). According to the selected sub-sections respectively SARS will reject the application if the application is:

> [i]s regarding the pricing of goods or services supplied by or rendered to a connected person in relation to the 'applicant' or a 'class member'[88] and
> [i]nvolves an issue which would be more appropriately dealt with by the competent authorities of the parties to an agreement for the avoidance of double taxation.[89]

To ensure certainty, it is suggested that APAs should be introduced on a limited scale initially to cater for situations involving relatively straightforward issues such as those involving tangible property, services and routine intangibles. As administrative capacity builds up, APAs may be employed to deal with more complex situations.[90]

9.2 Country Summary: South Africa

There are no separate legislative aspects or administrative procedures regarding transfer pricing. An APA programme would be most suitable to South Africa as a developing country. The absence of an APA programme in South Africa creates uncertainty for the taxpayers and an unstable investment climate, at a time when the country needs to attract inbound investments as another way of growing an already ailing economy.[91] There are some issues that get to be exposed during the pre-filing conference with developed countries who are already using APA to resolve their transfer pricing disputes.

Since tax certainty is one of the principles in South Africa, an APA should be considered as one of the transfer pricing dispute resolution mechanisms.[92] As regards the application of ATRs as

[88] Sec 80 of the TAA. This sub-section rules out advance ruling in transfer pricing matters.
[89] This provision is quite controversial in the sense that even if there is a DTA and it contains the MAP article with para 3 which is used by other competent authorities to prevent transfer pricing disputes, the fact South Africa does not effectively utilise para 3 makes the presence of this sub-section futile.
[90] Oguttu (n 11 above) 404.
[91] See generally S Khumalo 'IMF wants South Africa to create an investment friendly environment' (2019) https://www.fin24.com (accessed 7 December 2019).
[92] N Gosai 'Transfer pricing: evolution or revolution' (2018) 73 *Tax Talk* 13. See also Nyiri (n 56 above).

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a transfer pricing dispute avoidance mechanism to use as an alternative for APA, it has been expressly stated that transfer pricing matters are excluded from the ATR system.

10 Advance Pricing Agreements in Kenya

Kenya is one of the African countries that have been playing a huge role in the development of transfer pricing legislation, dating as far back as 1941 leading to the formulation of the East Africa Tax Management Act.[93] The Act was designed as a response to deal with taxation issues amongst East African countries on the issue of the shifting of profits by MNEs.
Listed below are the principles of taxation applicable in Kenya, noticeably certainty is not one of them:

i) Equity;
ii) Adequacy;
iii) Simplicity;
iv) Neutrality.[94]

In Kenya there is presently no mechanism in the Kenya Income Tax Act[95] for an APA between the KRA and a taxpayer. Kenya has no procedures in place by which a taxpayer might achieve an advance agreement to its transfer pricing policy.[96] However, unlike South Africa, Kenya does not explicitly exclude the APA but rather it is just not provided for in its transfer pricing rules. One of the principles of taxation in Kenya as listed above is that of 'simplicity.' This principle and the observation thereof, is to ensure that the tax system has simple rules for citizens to understand and at the same time ensure that the cost of tax collection and administration is not higher than the actual tax raised. For example, a tax system is complex if it is voluminous and contains many complex provisions. The complexity is likely to increase the cost of collection and administration.[97]

The wording in section 18(3) of the Kenyan Income Tax Act deals with transfer pricing matters but only in so far as the ascertainment of gains of profits of business in relation to certain non-resident persons. Section 18(8) deals with the issuance of guidelines for the determination of

[93] Act of 1952. It includes other East African countries, Tanzania being part thereof. The co-operation emanating from this Act gave rise to the East African Community, which is a regional inter-governmental organisation of six member states.
[94] JM Mutua *A citizen's handbook on taxation in Kenya* (2012) *Institute of Economic Affairs* 10. From the listed canons, it is clear that Kenya does not have certainty as a principle in its tax system. However, simplicity can be expanded further to include simple rules that will not be costly to taxpayers. With transfer pricing disputes that are frequently costly and time consuming there is, under the principle of simplicity, a corresponding obligation on the part of Kenya to make dispute resolution mechanisms that are simple and cost effective available to taxpayer.
[95] Act 2 of 1975 Chapter 470.
[96] International transfer pricing: Africa regional (2012) https://www.pwc.com/gx/en/international-transfer-pricing/assets/kenya.pdf (accessed 13 May 2020) 172.
[97] Mutua (n 94 above) 11.

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the arm's length value of a transaction by the minister. Still from transfer pricing rules by the minister under section 18(8) there is no reference of an APA program.[98] Meaning that should there be a dispute, the only instrument to be relied upon will be the DTA which only refers to the MAP as the only dispute resolution mechanism.[99]

The KRA is in the process of drafting APA regulations and is taking into account input from various stakeholders before issuing the regulations. According to Maina 'The APA regulations will come as a welcome relief for all parties involved as it should foster a more cooperative relationship between the taxman and the taxpayers and also reduce incidences of costly and often hostile transfer pricing audits.'[100] Currently the process of a transfer pricing audit is conducted only by the 12-member transfer pricing unit, which falls under the large taxpayers' office. No other department in the (KRA) looks into this issue. The current unit is divided into two teams of five members, with a sixth member as supervisor. As it is still a very new unit, its personnel only have limited training and experience relative to the demands of the job.[101]

10.1 Advance Tax Rulings in Kenya

In terms of section 65 Kenya Tax Procedure Act;[102]

> [a] taxpayer may apply to the Commissioner for a private ruling which shall set out the commissioner's interpretation of a tax law in relation to a transaction entered into, or proposed to be entered into, by the taxpayer.

In Kenya, an applicant can apply for a tax ruling in respect of:

i) tariff classification;
ii) determination of the origin of the goods; and

[98] The income tax (transfer pricing) rules 2006 http://www.drtp.ca/wp-content/uploads/2015/02/The-Income-Tax-Transfer-Pricing-Rules.pdf (accessed 21 June 2020).
[99] as above. The transfer pricing rules are silent on the applicable transfer pricing dispute mechanism or method. It is an opportunity missed by the KRA not to capacitate its piece of legislation specifically drafted with rules governing transfer pricing. However, it appears to be the trend across many African countries to attempt to address the transfer pricing regime without adequately addressing transfer pricing dispute resolution mechanisms.
[100] See generally G Maina 'Transfer pricing in Kenya and East Africa' (2016) https://www.roedl.com/insights/transfer-pricing/kenya-est-africa-transfer-pricing (accessed 28 September 2019).
[101] A Waris 'How Kenya has implemented and adjusted to the changes in international transfer pricing regulations' (2017) 69 *International Centre for Tax and Development* 25.
[102] Act 29 of 2015. The section is similar to sec 76 of the TAA.

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iii) determination of the appropriate valuation methodology or criteria and the application thereof, to be used for determining the customs value under a particular set of facts.[103]

Section 66 of the Kenya Tax Procedure Act deals with the refusal of an application for an advance private ruling, but unlike South Africa, Kenya does not have an express exclusion nor reference to refusal to make an ATR on the pricing of goods.[104] However, since the KRA is 'reluctant to give binding rulings regarding practices or policies adopted by a particular taxpayer or group of taxpayers, this same reluctance is to be expected in connection with agreements or rulings on transfer pricing matters.'[105]

10.2 Country Summary: Kenya

In Kenya there is presently no mechanism in the Act for an APA between the KRA and a taxpayer. While there is no express exclusion of the APA, it is just not provided for in the Income Tax Act and in its transfer pricing rules. The absence of APA has been seen as one of the weaknesses of Kenya's current transfer pricing legislation.[106] Kenya as one of the countries that participates in the transfer pricing discussions at various platforms should be learning from its trade partners who have APA in place, on how to effectively use it in address transfer pricing dispute challenges.

11 Advance Pricing Agreements in Uganda

Uganda is one of the few countries in the African continent that has transfer pricing regulations making provision for an APA program. The primary legislation regulating transfer pricing in Uganda is the Income Tax Act.[107] The existence of APA in Uganda is found in the Income Tax (Transfer Pricing Regulations). Regulation 9(1) thereof states that:

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[103] Kenya Revenue Authority (KRA) https://www.kra.go.ke/en/helping-tax-payers/faqs/advance-ruling (accessed 30 May 2020).
[104] The question that one can pose is whether the fact that there is no exclusive reference to transfer pricing cases means that an advance private ruling can be issued for transfer pricing cases.
[105] International transfer pricing (n 96 above).
[106] Maina (n 100 above).
[107] Cap 340 of the laws of Uganda https://www.finance.go.ug/sites/default/files/Publications/Income%20Tax%20Act.pdf (accessed 21 June 2020).

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> [a] person may request that the Commissioner enter into an advance pricing agreement to establish an appropriate set of criteria for determining whether the person has complied with the arm's length principle for certain future controlled transactions undertaken by the person over a fixed period of time.[108]

Regulation 9(2) states that a request under sub regulation (1) shall be accompanied by:

a) a description of the person's activities, controlled transactions, and the proposed scope and duration of the advanced pricing agreement;
b) a proposal by the person for the determination of the transfer prices for the transactions to be covered by the advanced pricing agreement setting out the comparability factors, the selection of the most appropriate transfer pricing method to the circumstances of the controlled transactions; and the critical assumptions as to future events under which the determination is proposed;
c) the identification of any other country or countries that the person wishes to participate in the advanced pricing agreement; and
d) any other information which the Commissioner may require as specified in a practice note on transfer pricing.[109]

The commissioner shall consider a request made by a person under sub regulation (1) and after taking account of the matters specified in the request and the expected benefits from an APA in the circumstances of the case, the commissioner may decide to enter into an APA or to reject the request.[110]

The fact that Uganda has a small tax treaty network may render their principle of tax certainty futile especially when it comes to transfer pricing cases. A treaty will be required in order to make effective use of an APA program to resolve transfer pricing disputes. According to Uganda's taxation handbook, the principle of certainty is there to ensure that the time and reason of payment as well as the amount to be paid by an individual should be well documented and certain or known.[111] The engagement that may lead to that certainty in transfer pricing cases can only be achieved if there is a bilateral convention in place. Uganda has not ratified some of the multilateral agreements signed.

Unless a DTA exists, no bilateral APA would be possible and since Uganda has only a few DTAs in force, it can only use APA as a transfer pricing mechanism against those few contracting states. The fact that it has an APA program may not be beneficial to its transfer

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[108] Regulation 9(1) The income tax (transfer pricing regulations) (2011) http://www.drtp.ca/wp-content/uploads/2015/02/Uganda-Transfer-Pricing-Regulations-2011.pdf (accessed 21 June 2020).
[109] Regulation (n 108 above).
[110] Regulation 9(3) (n 108 above).
[111] Taxation handbook *A guide to taxation in Uganda* (2015) https://www.ura.go.ug/Resources/webuploads/INLB/TAXATION%20HANDBOOK%20.pdf (accessed 20 June 2018) 7.

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pricing disputes.[112] Secondly, like many African countries, Uganda does not have existing guidelines specifically dealing with the resolution of transfer pricing disputes. Uganda's current rules do not offer guidance on the APA process. Uganda has also not built capacity within the revenue authority to negotiate an APA timeously, fairly and most importantly to produce consistent results.[113]

11.1 Advance Tax Rulings in Uganda

ATRs are provided for in Uganda in terms of section 161(1) of the Income Tax Act.[114] In terms of section 161(2), if the taxpayer has made a full and true disclosure of the nature of all aspects of the transaction relevant to the ruling and the transaction has proceeded in all material respects as described in the taxpayer's application for the ruling, the ruling shall be binding on the commissioner with respect to the application to the transaction of the law as it stood at the time the ruling was issued.

Unlike South Africa, Uganda does not have a provision in its legislation which specifically excludes the use of ATRs in transfer pricing matters. Transfer pricing matters are generally about the allocation of income between two or more countries. For ATRs to be effective to resolve transfer pricing disputes there will need to be a framework that allows for such rulings to be shared with affected countries in order to eliminate double taxation.

11.2 Country Summary: Uganda

Uganda is one of the few countries that have transfer pricing regulations making provision for an APA program. It however does not have guidelines to assist taxpayers on how to make use of the program. The absence of guidelines makes it difficult even for those who may have intended on initiating the negotiation of APA program. The existence of guidelines assists the taxpayer in the preparation of its application. But most importantly they provide a practical framework for both the taxpayer and the competent authority and they also ensure adherence to consistency.

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[112] SC Wrappe 'Are you considering an advance pricing agreement? Companies need to conduct benefit analysis to determine if APA is best approach' (2016) *Tax Strategy* 38.
[113] Gichuru (n 57 above).
[114] Cap 340 (n 107 above). The Act makes reference to the private ruling as opposed to the ATR. However, their application is almost the same. A private ruling is also ex ante in nature. In layman's terms, a private ruling enables a 'dry-run' without necessarily attracting a tax liability in the form of an assessment. Also see generally F Kamulegeya 'When not sure ask Uganda Revenue Authority' (2010) *Daily Monitor* https://www.monitor.co.ug (accessed 23 October 2019).

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Uganda's low tax treaty network affects the usage of the APA program to avoid and resolve transfer pricing disputes as one would need a tax treaty in place to start an APA negotiation. Uganda announced in 2014 that it had suspended all of its extant double-tax treaty negotiations pending a review into the treaty terms that the nation should seek in such negotiations.[115] As part of this review it would be prudent for Uganda to consider crafting guidelines that will form part of its future treaty negotiations on the resolution of transfer pricing disputes and most importantly the development of dispute resolution mechanisms.

Even though Uganda has a provision for ATRs there is no specific provision excluding their usage in transfer pricing matters. For ATRs to be effective in transfer pricing matters they will have to be exchanged between affected jurisdictions. Even if Uganda was to consider using ATRs in transfer pricing matters and exchanging them with other jurisdictions, its low tax treaty network will still affect any such exchange of ATRs. Because its current framework does not make provision for use of ATRs in transfer pricing cases, to take the discussion further regarding the use of the exchange of information article with its treaty partners on the exchange of ATRs will be purely academic.

12 Advance Pricing Agreements in Ghana

Ghana does not have an APA program in place. It also does not have guidelines on how to deal with transfer pricing disputes. It has incorporated in its Income Tax Act[116] section 31(3) as its anti-transfer pricing manipulation provision. The said section also empowers the Minister to enact regulations specifically dealing with transfer pricing and the application of the arm's length standard. According to Readhead 'the finance ministry considered the option of providing APAs to taxpayers during the development of the 2012 transfer pricing regulations. However, the proposal was rejected on the basis of capacity constraints.'[117]

The only separate and existing piece of legislation that deals with transfer pricing issues is the Transfer Pricing Regulation.[118] The relevant part for purposes of this chapter is regulation 4(1)

[115] See generally IM Ladu 'Govt suspends double taxation pacts' *Daily Monitor* (2014) https://www.monitor.co.ug/Business/Govt-suspends-Double-Taxation-pacts/688322-2338432-dkw4jwz/index.html (accessed 28 May 2019). M Hearson 'Tax treaties in Sub-Saharan Africa: a critical review' (2015) https://martinhearson.net/2015/11/23/tax-treaties-in-sub-saharan-africa-a-critical-review/ (accessed 25July 2019) 24. See generally TreatyPro.com 'Latest treaty updates: Uganda' (2014) http://www.treatypro.com/treatiesbycountry/uganda.asp (accessed 26 July 2018).
[116] Act 896 of 2015 https://gra.gov.gh/wp-content/uploads/2018/11/INCOME-TAX-ACT-2015-ACT-896.pdf (accessed 21 June 2020)
[117] A Readhead 'Transfer Pricing in the Extractive Sector in Ghana' (2016) https://resourcegovernance.org/sites/default/files/documents/nrgi_ghana_transfer-pricing-study.pdf (accessed 12 January 2020) 8.
[118] Transfer pricing regulations of 2012 http://www.drtp.ca/wp-content/uploads/2015/02/Ghana_Transfer_pricing_regulations_-2012L.I2188.pdf (accessed 21 June 2020).

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of the transfer pricing regulations.[119] Regulation 4(1) thereof deals with the choice of appropriate transfer pricing method. Regulation 4(2) reads as follows:

> [d]espite sub-regulation (1), the person who intends to enter into the transaction may apply to the Commissioner-General for permission to use a method other than a method specified in Regulation 3, if considering the nature of the transaction, the arm's length price cannot be determined by the person by the use of any methods specified in regulation 3.[120]

It is a contradiction for the Ghana Revenue Authority (GRA) not to have an APA program in place while it has a DTA with other jurisdictions like the Netherlands that has an APA program in place.[121] It could be using paragraphs 4 and 5 of article 26 of its DTA with the Netherlands as appropriate mechanism to facilitate an APA, as the two paragraphs provides a platform for communication for the purpose of reaching an APA.

Article 26(4) of the Ghana–Netherlands DTA states that:

> [t]he competent authorities of the Contracting States may by mutual agreement settle the mode of application of the Convention and, especially, the requirements to which the residents of a Contracting State shall be subjected in order to obtain, in the other Contracting State, the tax reductions or exemptions and other advantages provided for by the Convention.

Article 26(5) of the Ghana–Netherlands DTA state that:

> [t]he competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.[122]

Ghana has another DTA with the United Kingdom (UK).[123] Article 27(4) of the DTA between Ghana and the UK states that 'the competent authorities of the contracting states may

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[119] This is because it makes provision for a list of transfer pricing methods that have been approved by the Commissioner-General.

[120] Regulation 4(2) Transfer pricing regulations (n 118 above). According to the wording in this regulation, it is clear that there is a possibility for the taxpayer to apply to the Commissioner-General before the transaction takes place. Even though according to the wording in the said regulation, the application will be for the method other than the ones specified in regulation 3. What the application under this regulation brings about is the creation of a platform that can be used for an APA. Once an application is brought under regulation 4(2), the only prudent and plausible thing the Commissioner-General can do, taking into consideration the possibility of double taxation, is to engage the other tax authority before granting such an application. Otherwise, it will be an exercise in futility if the taxpayer will be granted an application under regulation 4(2) but still face taxation in the other contracting state vis-à-vis his or her TPM.

[121] Art 26(4) of the DTA between the Kingdom of the Netherlands and the Republic of Ghana for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains. https://www.gra.gov.gh/wp-content/uploads/2020/02/Ghana_Netherlands-DTA.pdf (accessed 14 January 2020).

[122] Netherlands uses para 5 effectively by granting MNEs a provision of an APA program. The absence of a corresponding program in Ghana renders the existence of the convention, particularly para 5 of art 26 ineffective. Again, it would mean that in any transfer pricing dispute between the two competent authorities, the Netherlands cannot be in the position to utilise the APA to resolve the matter. One is then of the view that African countries like Ghana, who have tax treaty partners that have an APA program should use the experience of their treaty partners in the matter to design and develop a similar program within their tax treaty disputes mechanisms.

[123] Art 27(4) of the DTA between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Ghana for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains https://gra.gov.gh/wp-content/uploads/2020/02/Ghana_UK-DTA.pdf (accessed 14 January 2020). The same arguments that were made vis-

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communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.'[124] The UK APA program has been in place within a statutory framework since 1999. Ghana could, through article 27(4) of the DTA with the UK take advantage of these engagements and communications with the UK to learn from them on how to effectively utilise the MAP article for other treaty issues such as the use of an APA program as a dispute resolution mechanism.

12.1 Advance Tax Rulings in Ghana

Section 4(1) of the Ghana Income Tax Act[125] makes provision for binding rulings and states that:

> [t]he Commissioner may on application in writing made by the person, issue to that person a private ruling setting out the position of the Commissioner regarding the application of this Act to the person in respect of a transaction proposed or entered into by that person. As well as the assumptions that affects the ruling.

Ghana, unlike South Africa, does not have an exclusion clause rejecting the application of advance rulings to transfer pricing or the pricing of goods. The absence of a specific exclusion would mean that the matter could be addressed under a DTA if there is one between Ghana and the other contracting state.

12.2 Country Summary: Ghana

Ghana, unlike many countries, has legislation that deals only with transfer pricing. However, there is nothing in the said legislation that makes mention of an APA as a dispute resolution mechanism neither does it have a framework or a guidance of an APA in its tax treaty dispute resolution process. The fact that an APA was once considered in 2012 should build some confidence on their revenue authority to test its implementation particularly with treaty partners like the Netherlands and the UK who have APA as a transfer pricing dispute resolution mechanism.

à-vis the Netherlands can be made in respect of the UK, since the UK has a developed APA program in place. Ghana should use the exiting DTAs with European countries to put in place an APA as a dispute resolution program and develop it enough to engage with its treaty partners in order to resolve transfer pricing disputes.

[124] as above.

[125] Act 896 of 2015 (n 116 above). No exclusion is provided, unlike in South Africa where a specific exclusion is made for the pricing of goods and for transfer pricing matters. One can assume that an application for a private binding ruling can be made in terms of section 4(1) in respect of transfer pricing matters even though, unlike a normal APA, the ruling so made will not translate into an agreement that is can be enforced to cover future similar transactions but only in relation to the present case for which the ruling was issued for. If a ruling was to be made on a transfer pricing matter under section 4(1), it will still assist both the taxpayer and the tax authority on understanding the facts at issue vis-à-vis the tax affairs of the taxpayer and if possible, assist in resolving any pending disputes from previous years.

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Since there is no exclusion on the use of ATRs on transfer pricing matters, with no APA in place, Ghana may also consider having to use the ATRs to address and avoid transfer pricing disputes. As regards the exchange of ATRs Ghana may use some of this exchange of information as contained in its DTA to exchange ATRs on transfer pricing cases as a way of addressing challenges posed by the absence of APA.

13 Conclusion

The last 30 years have been an era of trial-and-error approach for governments attempting to regulate tax avoidance by MNEs through profit shifting.[126] It is clear that litigation and court proceedings alone will not solve the issue of transfer pricing controversy.[127] Even though an APA itself as a program has some pitfalls, it can only be through its implementation by African countries that those weaknesses and specific areas of concern can be identified and be improved.

An APA program is seen as a solution, after all it is at the initiation of the taxpayer himself and more cooperation will be expected from him than during an audit which at times puts the taxpayer in a defensive mode. It also prevents long and expensive drawn-out audits, queries and controversies which often results in expensive transfer pricing disputes; less manpower is required by tax authorities in negotiating and monitoring compliance to APAs than conducting a fully-fledged transfer pricing audit.[128]

The introduction of APA in African countries will considerably alleviate the uncertainty regarding the arm's length pricing of international transactions. MNEs that have suffered transfer pricing adjustment before may consider the use of an APA as an effective dispute avoidance strategy.[129] The use of APA could be the best option to curb the BEPS from Africa and the resultant transfer pricing disputes could be reduced.[130] In case a bilateral or multilateral

[126] A Tomohara 'Inefficiencies of bilateral advanced pricing agreements (BAPA) in taxing multinational companies' (2004) 4 *National Law Journal* 863. One of the policy adjustments that were effected to counter and curb profit shifting that occurs because of the discrepancies in the tax laws of different countries was the APA, particularly the bilateral APA.
[127] R Deanehan et al 'Making better use of APA & MAP programs' (2008) 19 *Journal of International Taxation* 32.
[128] Oguttu (n 11 above) 402.
[129] Advance pricing agreement, frequently asked questions (2012) Deloitte India https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/thoughtpapers/in-tax-deloitte-apa-faqs-noexp.pdf (accessed 20 August 2018) 4. With the implementation of an APA program within Africa the taxpayers with pending transfer pricing disputes will be able to use their resources to make an APA request. The objective would be to agree on the arm's length ex ante but also to consider a roll back which will resolve pending disputes.
[130] Avi-Yonah (n 47 above) 119.

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APA is in place, it is to be expected that the transactions or issues covered by the APA will not be subject to disputes and double taxation.

What has been found which is concerning is that of the countries under study, Uganda have APA as a transfer pricing dispute resolution mechanism. However, it has also been found that it has not yet utilised it as a transfer pricing dispute resolution mechanism.[131] The other three countries do not have APA at all as a dispute resolution mechanism. Many African countries deprive themselves the tax certainty that comes concomitant with the conclusion of an APA, the avoidance of transfer pricing dispute and benefit of a rollback accorded by an APA in the resolution of impending transfer pricing disputes.

What has also been found is that all four countries do not effectively use paragraphs 3 and 4 of article 25 of the OECD MTC as it is these two provisions that are relevant for implementation of APA. The challenge identified in many African countries is that they do not have the administrative capacity and the technical acumen in their revenue authority to implement an APA program. It is seen as a program of high technical nature a factor militating against its usage in transfer pricing matters. But since all the four African countries under study have DTAs with some European countries that use APA as a dispute resolution mechanism, a lot could be learnt from those European countries during engagements and communications provided for under paragraphs 3 and 4 of the OECD MTC.

Commonly in use in all the four countries under research are ATRs. As stated before, ATRs has characteristics similar to that of an APA, however, what is noticed is that they are not used in transfer pricing cases. African countries should take advantage of the similarities between APAs and ATRs to extent the application of ATRs to cover even transfer pricing cases. Except South Africa, there is no express exclusion in other countries against the usage of ATRs in transfer pricing cases. What then can be done as an alternative in the absence of APA is to test the application of ATRs in transfer pricing matters.

For ATRs to be effectively used in transfer pricing cases there is a need for a framework for jurisdictions to exchange information that will be contained in the ATR. What has been found is that there is nothing in the legislation of the four countries that prevents the exchange of ATRs. What is needed is a framework for such information exchange. With such low tax treaty

[131] There is a need to make the APA attractive to taxpayers while ensuring that it is not abused. If a country like Uganda was using its APA program, it could be sharing expertise acquired in the application process with fellow African countries.

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network the plausible solution may be the conclusion of TIEAs which are easy to complete while countries are still looking at ways and means to improve their tax treaty network and the development of appropriate guidelines to govern transfer pricing dispute resolution mechanisms.

It has been recommended on exchange of information regarding tax rulings, that revenue authorities should notify their contracting states on a timely and spontaneous basis, of the existence of a binding private ruling relating to the headquarter company regime. Also, on any harmful tax practice, or uncertainty, which affects residents in another country. This is especially so where such a ruling provides for a downward adjustment that would not be directly reflected in the company's financial accounts.[132]

It will be important for countries such as South Africa, Kenya and Uganda, which are leading the African continent at OECD forums on transfer pricing discussions including the debates on BEPS, to assume the lead role in terms of implementing APA programs and also in the use of ATRs in transfer pricing cases. This can even be by way of phases, either per sector or per nature of the affected transactions.

[132] Davis Tax Committee: *Second interim report on base erosion and profit shifting (BEPS) in South Africa*: 'summary of DTC report on Action 5: counter harmful tax practices more effectively, taking into account transparency and substance' https://www.taxcom.org.za (accessed 20 September 2018) 7.

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CHAPTER 5

Arbitration as an OECD Transfer Pricing Dispute Resolution Mechanism in Africa

1 Introduction

The MAP in article 25 of the OECD in its current form has been unable to effectively resolve African transfer pricing disputes. It has been basically sedentary most of its life in the African scene.[1] As stated in Chapter 3, the challenges surrounding the MAP are such that an alternative transfer dispute resolution mechanism should be sought. To date, traditional administrative, judicial and other treaty mechanisms such as the MAP have been unable to adequately cope with the exponential increase in the number of transfer pricing disputes arising between MNEs and revenue authorities.

Chapter 4 showed that many African countries do not have an APA program, another mechanism that is used by OECD members to avoid and resolve transfer pricing disputes. Arbitration of transfer pricing cases within the MAP is seen as a supplementary and a more effective dispute resolution mechanism.[2] Arbitration itself is an integral part of the MAP and should not constitute an alternative method to solving tax treaty disputes between states. Treating it as an alternative could risk undermining the effectiveness of the MAP.[3]

Developing countries have always been committed to policies of attracting foreign investment on favourable and flexible terms and to creating a positive investment climate for multinationals and encouraging substantial capital inflows. More recently the sentiment has shifted and developing countries are now more circumspect about the conduct of the MNEs and are now more focused on claiming substantial and even inflated taxes from those investors. One

[1] A Christians 'Your own personal tax law: dispute resolution under the OECD Model Tax Convention' (2009) 17 *Willamette Journal of International Law and Dispute Resolution* 173.

[2] Para 220 of the OECD Explanatory statement on multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf (accessed 11 April 2019) 56. This is so because its existence is found within the MAP in art 25(5). The arbitration process is an extension of the MAP that serves to enhance the effectiveness of the MAP in that once an arbitration decision is reached it will then be implemented through the mutual agreement concerning a particular case. This means that following the decision of the arbitration panel, the competent authorities will enter into a mutual agreement that reflects the outcome of the arbitration decision.

[3] Para 12 OECD 'Improving the resolution of tax treaty disputes' (2007) *Centre for Tax and Policy Administration* https://www.oecd.org/ctp/dispute/38055311.pdf (accessed 11 April 2019) 4. The existence of this mechanism must be available so that competent authorities can offer a taxpayer supplementary recourse on the case that has been presented in case the initial MAP process fails to reach an agreement. The current framework causes taxpayers to hesitate in making the resource commitment to enter into the MAP and likewise provides no incentive to competent authorities to take all steps necessary to ensure a speedy resolution of the issues involved. There was a need to effect improvement towards the resolution of disputes. Arbitration is a mechanism that will reduce the number of unresolved cross-border tax disputes.

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explanation could be the multi-billion dollars annual 'tax gap' which is the difference between collected tax revenue and potential revenue which has caused tax authorities from developing countries to become even more aggressive in revenue collection. Tax authorities around the world are mounting aggressive legislative, regulatory and enforcement efforts on transfer pricing, including penalty provisions for inadequate documentation and or unsupported transfer pricing methods.

As shown in Chapter 2 the use of the MAP as a dispute resolution mechanism has inevitably, resulted in competent authorities being unable to reach satisfactory results in resolving transfer pricing disputes, as such there is need for an alternative mechanism. These cases will typically arise when the countries involved cannot agree in a particular situation that the taxation by both states is not in accordance with the convention. The MAP as currently structured does not require the countries to come to a common understanding of the treaty, but only that they 'endeavour' to agree. The result can be unrelieved double taxation or taxation that is inconsistent with the convention.

The MAP process itself does not provide for an enforcement mechanism. It is against this background that arbitration is seen as a viable option that guarantees certainty in the resolution of transfer pricing disputes. This chapter focuses on arbitration as an OECD mechanism in the resolution of tax treaty disputes;[4] particularly transfer pricing disputes within Africa. This chapter also looks at the scope and efficacy of arbitration in the countries under study and at whether the signing of the MLI, which has arbitration as a dispute resolution mechanism, can improve the resolution of transfer pricing disputes among African countries, or not.

2 Background

The inability of the current MAP as stated in Chapter 3 to provide steps to facilitate a final resolution of disputes arising under treaties was pointed out by both private sector

[4] Art 25(5) of the articles of the OECD Model convention with respect to taxes on income and on capital (MTC). It should be noted that arbitration as a tax treaty dispute mechanism is not independent in its existence, but rather it is found in the article governing the MAP, in fact it starts to take effect as soon as the MAP has failed to resolve the matter. It is not a mechanism of first instance in that the taxpayer should first exhaust the MAP process and it is only after no agreement has been reached by the competent authorities that a taxpayer can invoke para 5 and request for arbitration. See generally KA Bell 'BNA International transfer pricing forum examines MAP and arbitration procedures' (2011) 20 *Tax Management Transfer Pricing Report* 400. In 2008 the OECD added para 5 to art 25, which provides for the arbitration of competent authority cases that remain unresolved after they have been in the MAP for two years. The suggestion first emanated from the 2004 progress report which indicated a proposal related to the mandatory resolution of unresolved MAP issues should be developed. See OECD report 'Improving the process for resolving international tax disputes http://www.oecd.org/dataoecd/44/6/33629447.pdf (accessed 7 June 2020).

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representatives and tax officials as one of the principal obstacles to ensuring an effective MAP.[5] Much of the economic advancement of the African continent is credited to cross-border and international trade with African nations and increased interest from outside the continent.[6] International arbitration is the most popular method of resolving and concluding international disputes arising out of both commercial and investment transactions.[7]

According to article 25(5) of the OECD MTC:

> [a]taxpayer who has presented a case to the competent authority of a Contracting State pursuant to paragraph 1 of Article 25 on the basis that the actions of one or both of the Contracting States have resulted for that person, in taxation not in accordance with the provisions of this Convention, may request that any unresolved issues arising from the case be submitted to arbitration.[8]

In essence, article 25(5) of the OECD MTC in existing DTAs states that if a case which has been submitted to the competent authorities for resolution under the MAP has not resulted in an agreement within a specific period of time either of the competent authorities may submit the matter to binding arbitration.[9] What is important to note is that the arbitration process does not per se replace the existing competent authority process under the MAP, but rather supplements it in cases where the competent authorities have failed to resolve the dispute. It is part of the MAP in that once the arbitration decision is delivered; the competent authorities of the countries involved would enter into a mutual agreement that implements the arbitration decision.

[5] OECD Improving the process for resolving international tax (2004) https://www.oecd.org/ctp/treaties/33629447.pdf (accessed 1 June 2020) 3. Unresolved disputes in matters governed by tax treaties can distort patterns of trade and investment and lead to increased administrative and compliance costs.

[6] See generally DW Velde 'Economic transformation in Africa: key trends in 2019' (2019) https://www.odi.org/blogs/10719-economic-transformation-africa-key-trends-2019 (accessed 14 December 2019). See also African Economic Outlook 'External financial flows and tax revenues for Africa' (2017) *African Development Bank* 47. Britain, China, the United States, France and the European Union have all launched initiatives to strengthen bilateral trade and investment relationships with Africa.

[7] See generally 'International arbitration in Africa' https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/sectors/downloads/International-Arbitration-In-Africa-Brochure.pdf (accessed 20 August 2018). It is this increase that has resulted in a high risk of commercial disputes, including tax treaty and particularly transfer pricing disputes. One may argue that such an increase in international trade by African states with western states or with other African states inter se will require tax administrations to put specific attention on these cross-border transactions. This attention coupled with the inability by revenue authorities to reach their tax collection target t will see many multinationals being subjected to transfer pricing audits and adjustments. It is common course that such adjustment will bring a new era of multiple transfer pricing disputes.

[8] OECD MTC (n 4 above).

[9] DR Tillinghast 'Arbitration of disputes arising under income tax treaties: has the time come?' (2003) 32 *Tax Management International Journal* 370. See also M Clayson & C Young 'The changing face of international tax arbitration' (2017) https://www.lexology.com/library/detail.aspx?g=4aa2c0e9-3267-49a9-9916-328771b5ba31 (accessed 20 July 2018) 6. The success of arbitration as a mechanism will still have to rely on the efficiency of the MAP process. If a contracting state considers a taxpayer's request to be unjustified then one of the conditions to the MAP process is not met and, thus, it follows that the issues in dispute cannot proceed to MBA.

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3 Definition of Arbitration

Arbitration may be defined as 'a formal process of having an outside person, chosen by both sides to a disagreement, to help with the settlement of the disagreement.'[10] It is defined as an 'autonomous transnational system, the functions of which transgress the pragmatic yet minimalistic logic of the *casu ad casum* resolution of isolated commercial disputes.'[11] Arbitration in international tax cases is, per se, nothing new. Some existing DTAs already include arbitration as a method of resolving disputes arising out of the interpretation of the provisions of the applicable tax treaty.[12] As mentioned above, arbitration can be found within the MAP article of DTAs. Not all DTAs contain arbitration in their MAP article. The rules regarding the request for arbitration apply mutatis mutandis with those of an ordinary MAP. Like the MAP, it must be proved that the issues submitted for arbitration have not already been resolved through any administrative or domestic litigation process of either State.[13]

Article 25(5) of the MAP 'arbitration clause' states that:

> [w]here a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities, any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.[14]

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[10] Oxford South Africa Dictionary (2010) 30. The process referred to is non-judicial as what was a disagreement between the parties is resolved without the need for to go to court.
[11] J Jemielniak & L Nielsen 'Global citizens in international commercial arbitration and WTO dispute resolution' in J Jemielniak et al *Establishing judicial authority in international economic law* (2016) 273.
[12] See generally M Clayson et al 'European Union international tax arbitration: OECD and EU developments' (2018) *Deringer* https://www.lexology.com/library (accessed 27 July 2018).
[13] The person so requesting must be able to show that a judicial decision has not been reached by the courts of either state. The rationale is that it would then be futile for the parties to refer the matter for arbitration and decide while there is a binding court order already. The contracting state to which the request to arbitrate is made may require the taxpayer to waive the right to pursue domestic legal remedies before arbitration can take place.
[14] OECD MTC (n 4 above). This paragraph to the MAP article was inserted as a way of making dispute resolution more effective. At its meeting on 30 January 2007, the OECD Committee on Fiscal Affairs adopted the Report Improving the Resolution of Tax Treaty Disputes (OECD Report) https://www.oecd.org/ctp/dispute/38055311.pdf (accessed 14 August 2018). It provides for the insertion of an arbitration agreement in art 25 of the OECD MTC. See AE Gildemeister 'Arbitration of tax treaty disputes: The 2008 OECD model for income tax treaties will contain an arbitration clause' (2007) *Transnational Dispute Management* https://www.transnational-dispute-management.com/article.asp?key=1143 (accessed 11 November 2019) 4.

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A request for arbitration may only be made after two years from the date on which a case presented to the competent authority of one contracting state under article 25(1) has also been presented to the competent authority of the other state. Within three months after the request for arbitration has been received by both competent authorities, the competent authorities shall agree on the questions to be resolved by the arbitration panel and communicate them in writing to the person who made the request for arbitration.[15] The arbitration decision is only binding with respect to the specific issues submitted to arbitration.[16]

There has always been a belief, that tax disputes are not arbitrable, meaning that they cannot be subjected to arbitration as they deal with revenue collection which is an issue of national interest.[17] While this may be correct with regards to domestic cases it is incorrect with international cases involving another sovereign state. What should be noted is that by entering into a DTA a country is by so doing already ceding some of its rights and obligations to the other contracting state. The contracting states cannot then raise sovereignty when disputes are to be referred for arbitration.

In ensuring the efficiency and effectiveness of arbitration as a dispute resolution mechanism there has been a requirement for certain essentials and these entails:

i) Contracting states must make irrevocable commitments to arbitrate rather than a mere expression of good intention from which parties may back away.
ii) The taxpayer must have the right to participate in arbitration.
iii) The result must bind the taxpayer and the fiscal authorities alike, with res judicata effect if contested in national administrative or judicial proceedings.
iv) Some control mechanisms must safeguard the integrity of the arbitral process against erratic or procedurally unfair decisions. [18]

[15] OECD (n 3 above) 13.
[16] OECD (n 3 above) 11.
[17] TE. Carbonneau & AW. Sheldrick 'Tax Liability and in-arbitrability in international commercial arbitration' (1992) 1 *Journal of Transnational Law & Policy* 23.
[18] WW Park 'Income tax treaty arbitration' (2002) 22 *Tax Management International Journal* 220.

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3.1 The Advantages of Arbitration

In 1984, the OECD Committee on Fiscal Affairs adopted the usage of arbitration for the resolution of international tax disputes.[19] Arbitration in the transfer pricing dispute resolution context has certain advantages and these are as follows:

i) It would prevent uncertainty and delay inherent in the present system.
ii) The expense associated with the lengthy tax treaty dispute procedure would be reduced.
iii) The matter would be dealt with while the relevant information was still fresh in the minds of both the taxpayer and the competent authorities.
iv) Arbitration proceedings would probably be expeditious as a result of the absence of administrative or procedural rules.
v) The taxpayer would be allowed to present evidence and arguments and to correct any misunderstandings in the information given to the tax authorities.[20]
vi) The decision would be based less on a strict interpretation of national transfer pricing rules but rather on the what the arbitrator considers a fair solution based on his experience.[21]

One arbitration advantage that is specifically highlighted by the OECD is flexibility in the method of application.[22] The so-called 'streamlined procedure' where the competent authorities put forth the whole case or one unresolved element of the case for determination through the baseball arbitration model seems to be well suited for transfer pricing disputes.[23] Some commentators have also identified other additional advantages and are of the view that the

[19] OECD Transfer pricing and multinational enterprises: three taxation issues (1984) http://dx.doi.org/10.1787/9789264167803-en (accessed 27 May 2020) 43. See OECD *Transfer pricing guidelines for multinational enterprises and tax administrations* (1995) 55.

[20] Even though the taxpayer has a right to participate by making representations at the tribunal, he does not have the right to appoint an arbitrator. The two competent authorities appoint the arbitrator. The elimination of double taxation or taxation that is not in accordance with the DTA remains the responsibility of the competent authorities. As arbitration is within the MAP article the dispute remains between the two contracting states. Once an arbitral award is agreed to, it is signed under the MAP. While the taxpayer is not party to the dispute itself, the position of the taxpayer invariably aligns with one state, meaning that in important respects one state operates in the shoes of the taxpayer. See 'Taxation rights slipping through the cracks: How developing countries can get better deal on their tax treaties' (2015) *Report by ActionAid UK* https://actionaid.org/publications/2015/taxation-rights-slipping-through-cracks-how-developing-countries-can-get-better (accessed 12 August 2018) 13.

[21] Y Hadari 'Resolution of international transfer-pricing disputes' (1998) 46 *Canadian Tax Journal* 53. See D Francescucci & S Keshvani 'Canada' in A Bakker & MM Levey *Transfer pricing and dispute resolution: aligning strategy and execution* (2011) 228. See also L Maktouf 'Resolving international disputes through arbitration' (1988) 4 *Arbitration International* 35-51.

[22] OECD Hearings: arbitration and competition (2010) https://www.oecd.org/daf/competition/abuse/49294392.pdf (accessed 26 May 2020) 8.

[23] See generally P Mulvihill 'International tax disputes' (2008) https://www.europeanceo.com/finance/international-tax-disputes/ (accessed 12 August 2018). Draft art 25A of the International Chamber of Commerce (ICC) https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_25 (accessed 14 April 2019). The advantages of such flexibility is for the competent authorities not to start the case from *de novo*, but rather to focus on the unresolved element which they cannot agree on. In that way, the process will add speed into the conclusion of transfer pricing cases. The taxpayer may not have any recourse if the two competent authorities reach an agreement and will not be able to utilise arbitration since there is no double taxation; See generally the It makes arbitration available in cases where the two competent authorities fail to reach an agreement. If the two competent authorities reach an agreement eliminating double taxation, even if the taxpayer may be unhappy with the agreement so reached.

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presence of arbitration in the DTA creates pressure on the affected competent authorities to timeously settle the dispute.[24]

3.2 Certainty

There is a belief that with the MAP some cases are resolved as business arrangements with neither regard nor consideration of the merits of the case under the applicable treaty provision. This creates uncertainty. The uncertainty that exists regarding the MAP causes taxpayers to duplicate dispute resolution procedures by having to file for both the MAP and an objection under the domestic dispute resolution procedures. There will always be a considerable delay in that the process would have included the time spent on the failed MAP process with an added subsequent domestic proceeding which normally takes several years.[25] A need for the existence of a mechanism that will encourage taxpayer participation was identified.

The lack of certainty in the current MAP discourages taxpayers from investing time and money in the process as many MAP articles do not have arbitration. The existence of arbitration in the MAP process enables parties to commit and agree to arbitration from the beginning of the MAP immediately after the competent authority accepts the MAP request. In that way the taxpayer will be guaranteed certainty, thereby making the MAP process effective.[26] The signing of the arbitration agreement ex ante, prior to the competent authority's adjudication of the MAP case, will in itself bring an end to the use of the phrase such as 'shall endeavour' as contained in article 25(2) as the competent authority will now be under pressure to resolve the dispute within two years.

The very purpose of arbitration is to enhance the effectiveness of the MAP. Certainty in resolving double taxation cases is the most obvious advantage to the inclusion of arbitration within MAP.[27] Failure by the MAP to produce a satisfactory result usually brings about one or more lawsuits in the concerned states. The fact that competent authorities have only two years within which they need to resolve the case before it be elevated to arbitration provides some

[24] DD Stewart 'New arbitration provisions accelerate dispute resolution' (2009) *Worldwide Tax Daily* https://www.pwc.com/gx/en/transfer-pricing-tax-news/assets/wtd-3-20-09.pdf (accessed 20 August 2018) 1.

[25] DR Tillinghast 'Issues in the implementation of the arbitration of disputes arising under income tax treaties' (2002) 56 *Bulletin for International Fiscal Documentation* 90 discusses a mutual agreement case between the US and Japan which was unresolved after more than ten years. The threat of arbitration, while generally effective, has not led to an improvement in the number and timing of some MAP disputes.

[26] Although it is referred to as optional arbitration, once agreed upon and signed into by the affected competent authorities it becomes binding and enforceable. It will also give confidence to the parties of the intention to resolve the transfer pricing dispute. This will increase confidence in the MAP process. One may argue that the contracting states can use art 25(4) to enter into an arbitration agreement if the DTA itself does not have para 5. Para 4 engagements may be used to give effect to any such OECD developments that have not yet been renegotiated as renegotiation may take long. The competent authorities may take advantage of this engagement and enter into an arbitration agreement. This agreement can be on an *ad hoc* basis and only bind the states only binding in as far as the current case under adjudication.

[27] Mulvihill (n 23 above).

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guarantee of certainty not only on the resolution of a transfer pricing dispute but also certainty regarding the time within which it is likely to be resolved.[28]

The unwarranted delays emanating from the MAP have also triggered some comments and considerations from African states. According to the ATAF, tax disputes that take a long time to resolve may:

i) affect taxpayer trust in the tax administration and in the judicial system;
ii) lead to integrity challenges for the tax authorities; and
iii) lead to high costs for taxpayers, potentially making the country/jurisdiction unattractive for conducting business.[29]

The ATAF also identified that the need for stability offered by tax treaties or other investment agreements to protect investments encourages investor confidence and harnesses the potential for inbound investment.[30] Compulsory arbitration as a means of resolving double taxation disputes in general and transfer pricing issues with MNEs in particular, is gaining more support within the international community. This momentum is evident within the European Union (EU) with respect to transfer pricing conflicts and the OECD concerning all tax issues under the MAP article.[31] It is expected to be included in some recent bilateral DTAs and many more recent multilateral agreements and is expected to be included in additional treaties in the future.[32]

3.3 The Challenges of Arbitration

3.3.1 Sovereignty over tax collection

As stated before, arbitration in the context of article 25(5) of the OECD MTC is an agreement between the contracting parties to a treaty where the parties submit certain unresolved disputes

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[28] See generally M Camilo 'Tax arbitration: the preferred solution' https://lawahead.ie.edu/tax-arbitration-the-preferred-solution (accessed 6 November 2019).

[29] UN-ATAF workshop on transfer pricing administrative aspects and recent developments: dispute avoidance and resolution, Ezulwini, Swaziland 4-8 December 2017 https://www.un.org/esa/ffd/wp-content/uploads/2017/11/2017TP_02_EN_Background-note.pdf (accessed 20 April 2019) 3. The availability of arbitration as a transfer pricing dispute resolution mechanism in a DTA provides certainty as regards the duration of the resolution of the dispute.

[30] This goes back to the importance of the DTA, which is the only available tool to offer investors the referred stability regarding issues of taxation. The inclusion of arbitration in the DTA could then be the tool to deal effectively with arising tax treaty disputes.

[31] See generally 'International trade in goods statistics' https://ec.europa.eu/eurostat/statistics- explained/index.php (accessed 4 November 2019) where it is stated that the EU was the largest partner for both exports (36 %) and imports (33 %). Trade among African countries accounted for 15 % of exports and 16 % of imports.

[32] H Yitzhak 'Compulsory arbitration in international transfer pricing and other double taxation disputes' (2009) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483621 (accessed 19 August 2018) 9.

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to a neutral party or panel for decision.[33] Many states are reluctant to adopt and include arbitration in their DTAs simply because they do not want to lose control of the process to manage and adjudicate over their taxes.[34] They wish to protect their fiscal sovereignty to collect taxes.[35]There are policy objections to mandatory binding arbitration (MBA). Amongst them is the assertion that the private resolution of fiscal matters threatens national sovereignty. In some states, national law, policy or administrative considerations may not allow or justify the type of arbitration process provided for in article 25(5).[36] For example, there may be constitutional barriers preventing arbitrators from deciding tax issues. In addition, some countries may only be in a position to include this paragraph in treaties with particular states. For these reasons, paragraph 5 should only be included in the DTA where each state is able to guarantee that the process is capable of effective implementation.[37]

The said sovereignty may not be completely lost as some states may claim that the OECD MTC in itself provides that the arbitration decision is only binding with respect to the specific issues submitted to arbitration. It still leaves contracting states with some scope to independently agree on other aspects of the MAP process. Those other aspects that competent authorities agree on which are not referred to arbitration, will then ultimately be merged with the opinion being offered and made by the arbitrator.[38]

3.3.2 Lack of taxpayer participation

Arbitration is still a state-to-state process which does not provide the taxpayer with the usual procedural rights which are accorded to private parties who use arbitration as an alternative

[33] See generally Alston & Bird 'Resolving international tax disputes: APAs mutual agreement procedures and arbitration' (2012) https://www.alston.com/en/insights/publications/2012/09/resolving-international-tax-disputes (accessed 19 August 2018).

[34] International arbitration in Africa (n 7 above) and Stewart (n 24 above). They see revenue collection as pivotal to the well-being of their existence and as something which must be within their remit to execute and decide upon. The situation may even be worse for African states since they need the said revenues under dispute more than European states hence the necessity to control the process may be very important to them.

[35] JJM Jansen 'The future of fiscal sovereignty: some closing thoughts' in JJM Jansen *Fiscal sovereignty of the members' states in an internal market: past and future* (2011) 234. See also HM Oortwijin 'Dispute resolution in cross-border tax matters' (2016) *International Bureau of Fiscal Documentation* 163.

[36] OECD Model tax convention on income and capital: condensed version (2008) https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2008_mtc_cond-2008-en (accessed 12 June 2019) 323.

[37] As stated above by signing a DTA that contains a MAP article a state will have acceded to the role that international law will play in the adjudication of tax treaty disputes. Secondly another argument against the position taken by many states is that in the case of international tax disputes, where two sovereign states lay claim to the right to tax the same income or profit, such tax cannot be said to be a particular country's tax because more than one state claims the right to it. The dispute is no longer a domestic dispute involving one country's tax because it involves the taxing rights of two sovereign States. See generally FO Akinla 'BEPS Action 14 - arbitration of tax disputes: a Nigerian perspective' https://www.pwc.com/ng/en/assets/pdf/tax-arbitration-in-Nigeria.pdf (accessed 20 August 2018). What one state sees as a pure domestic case on which it can exercise sovereignty will then metamorphose into an international dispute between the two countries, as the other state will be claiming the same rights.

[38] Para 83 of the OCED commentaries on the articles of the Model tax convention. The challenge is that many jurisdictions see arbitration as a process that interferes with their sovereignty in that in arbitration the dispute is adjudicated on by a private person or body that is independent. However, this misgiving may not be completely correct in that only those issues that were unresolved during that MAP negotiation are to be arbitrated upon. It will not be a complete loss of control of the case by the competent authorities because the arbitration award will be based on what they may have agreed upon during the initial MAP negotiations.

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form of dispute resolution.[39] Arbitration is not subject to the authority of any particular state court and exists as an autonomous forum for the resolution of disputes.[40]

3.3.3 Lack of consensus on the appointment of third arbitrator

Another concern by some states is that in an arbitration procedure each competent authority appoints one arbitrator. The two will then appoint a third arbitrator who will function as chair. If no appointment has been made within four months, the director of the OECD Centre for Tax Policy and Administration will appoint the arbitrator within ten days from the day of the request to appoint.[41] The appointment of the third arbitrator by a third party is seen by revenue authorities as taking away the powers of the affected states to appoint, particularly because the third arbitrator will be entrusted with a very vital role of chairing the proceedings.

3.3.4 Arbitral award being subjected to review by courts

Another disadvantage is the possibility of a review by the national courts, as stipulated by paragraph 18 of the OECD commentary.[42] However, it must be noted that the courts can only review the 'integrity' of the procedure that was followed and not the substance or the merits that give rise to the decision. The courts can also review the decision or the award if it is found to be unenforceable by the courts of one of the contracting states either because of a violation of article 25(5) or the terms of the agreement preceding arbitration. Arbitration should not be seen as a forerunner to future litigation and must be binding on all parties, foreclosing alternative judicial and administrative action by taxpayer and government alike. National government must feel confident that procedural safeguards exist to minimise the prospects of erratic awards rendered by perverse, dishonest or incompetent arbitrators.[43]

[39] K Perrou *Taxpayer participation in tax treaty dispute resolutio*n (2014) 168.
[40] International arbitration in Africa (n 7 above).
[41] PK Sidhu 'Is the mutual agreement procedure past its best-before date and does the future of tax dispute resolution lie in mediation and arbitration?' (2014) 68 *Bulletin for International Taxation* 596. The fact that the appointment of the arbitrators can be made by someone such as the Director of the OECD Centre for Tax Policy and Administration and not by the affected parties leaves the parties with some apprehension about the threat to their sovereignty.
[42] OECD (n 38 above) para 18. It should be noted that the official OECD Commentary is a widely recognised guide for the interpretation of DTAs. Thus, it plays an important role in the harmonisation of international tax law, even if it is not formally binding from a perspective of public international law.
[43] Park (n 18 above). There must be a commitment by all parties to be bound by the arbitration award. The terms of the agreement must be such that they are clear and certain

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3.4 Baseball Arbitration

The OECD commentary on arbitration provides for a streamlined procedure also known as baseball arbitration.[44] The streamlined procedure is meant to be leaner, cheaper and quicker than the 'ordinary' arbitration procedure. The competent authorities only appoint one arbitrator. Once appointed the parties must within two months, submit each competent authority's position to the arbitrator and propose a solution. In a 'baseball arbitration' process once the competent authorities submit their proposals to the arbitrator he will, after hearing final representations from all parties, choose one award from those submitted without modification. This type of baseball arbitration is increasingly used in commercial disputes.[45] At the international law level, final offer arbitration was first introduced in the DTA between the United States and Canada in 2006.[46]

Arbitration has had its fair share of challenges, enough to trigger a response from the international community. From these challenges the OECD and G20 members identified a need to come together with the prime objective of resolving international tax challenges giving rise to BEPS. However, for the purposes of this thesis and this chapter in particular, the focus will be on how those improvements have influenced arbitration as a transfer pricing dispute resolution mechanism.

4 Multilateral Approach to Resolve Transfer Pricing Disputes

After recognising that governments lose substantial corporate tax revenues because of aggressive international tax planning and BEPS, the OECD came up with a convention to work on a multilateral basis in preventing BEPS.[47] This convention is known as the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, the 'multilateral instrument' (MLI).[48] Member states are advised on the use of

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[44] OECD (n 38 above) para 6.

[45] B Barin et al *The osler guide to commercial arbitration in Canada: a practical introduction to domestic and international commercial arbitration* (2006) 9. The submitted proposal is a party's final offer for consideration by the arbitrator. An offer will be submitted by both states accompanied by representations including oral arguments justifying the basis of the offer. A party cannot just make an offer without the support of such representations, as these representations from both parties that will assist the arbitrator when confronted with the responsibility of having to make a choice between which offer to agree with as an arbitral award. The arbitrators may not adopt a compromise between the two proposals nor otherwise substitute their own third proposal for those submitted by the opposing governments. In this type of arbitration, the decisions do not state rationales and have no precedential value. Baseball arbitration is an attempt to make the arbitration process faster and less protracted.

[46] G Barshovi 'Arbitration provisions in US tax treaties' in A Majdanska & L Turcan *OECD arbitration in tax treaty law* (2018) 361.

[47] Amongst others was to ensure that profits are taxed where substantive economic activities generating the profits are carried out and where value is created and to have a swift, co-ordinated and consistent implementation of the treaty related BEPS measures in a multilateral context.

[48] See the MLI https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (accessed 20 August 2018). The MLI was partially intended to transpose results from the OECD/G20 BEPS Project into more than 3 000 treaties worldwide. It will implement minimum standards to counter treaty abuse and to improve dispute resolution mechanisms while providing flexibility to accommodate specific tax treaty policies, as noted in the SARS guide on mutual agreement procedures

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arbitration in the resolution of transfer pricing disputes. This multilateral convention operates to modify DTAs between two or more parties to the convention. It will not function in the same way as an amending protocol to a single existing treaty, which would directly amend the text of the covered tax agreement (CTA); instead, it will be applied alongside existing DTAs, modifying their application in order to implement the BEPS measures.

While, for internal purposes, some parties may develop consolidated versions of their CTA as modified by the convention, doing so is not a prerequisite for the application of the convention. In its preamble the convention describes its overall purpose, which is to implement tax treaty-related measures produced as part of the final BEPS package in a swift, co-ordinated and consistent manner across the network of existing tax treaties without the need to bilaterally re-negotiate each treaty.[49] Member states have acknowledged and recognised the need for an effective mechanism to implement agreed changes in a synchronised and efficient manner across the network of existing agreements for the avoidance of double taxation on income without the need to bilaterally re-negotiate each agreement.

Although it is intended that the convention would apply to the maximum possible number of existing agreements, there may be circumstances in which a party prefers not to include a specific agreement in the scope of application of the convention. For example, a party may wish not to include an agreement in the scope of application of the convention based on the fact that the agreement has been recently renegotiated to implement the outcomes of the BEPS Project, or is currently under renegotiation with the intent of implementing those outcomes in the renegotiated agreement.[50]

The application of the mandatory binding arbitration (MBA) provision of the MLI will be for those countries that choose to implement it. The MBA provisions of the MLI would also apply to all DTAs that do not have such a provision. However, countries may reserve the right not to

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https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-IT-G24%20-%20Guide%20on%20Mutual%20Agreement%20Procedures.pdf (accessed 13 October 2018) 6.

[49] OECD (n 2 above) para 21. The literal interpretation of this preamble would be that the MLI and its terms will apply to the existing African treaty network. There is no need for various African countries to re-negotiate the existing treaty to include the terms of this multilateral convention MLI. Of course, this will happen after compliance with the domestic legal requirements including ratification and approval by the relevant domestic structures. Once completed, an instrument of ratification, acceptance or approval must be deposited with the depositary. It is only after such depositary compliance that the convention will come into force in terms of art 34 of the convention. Clayson (n 9 above) 8 states that the MLI is designed to modify existing DTAs in a synchronised and efficient manner, and to avoid a lengthy period of ad hoc negotiation.

[50] OECD (n 2 above) para 13. Also see C von Haldenwang 'Involve developing countries more in international tax co-operation' (2016) *Tax Justice Network* https://www.taxjustice.net/category/corporate-tax/tax-treaties (accessed 21 August 2018). Another argument in favour of the MLI is that a multilateral approach that places the taxation of companies on a uniform basis and ensures that the necessary data is collected and made available at an international level would help to promote this development. Such an approach would have the potential to align taxation towards economic activities, render tax evasion and impermissible avoidance more difficult and at the same time ease the burden on less capable countries.

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apply the MBA provision of the MLI to some or all of its DTAs that already have an MBA provision.

According to the MLI, the MBA provision will apply to all cases of taxation that are contrary to the relevant DTA unless a country has made a reservation specifying a more limited scope. The MLI provides flexibility for countries to bilaterally agree on the mode of application of the MBA, including the form of arbitration. The default rules defined in the MLI will apply if countries do not reach such an agreement before a case that is eligible for arbitration materialises.[51] The MBA rules are therefore meant to apply only if both countries that are signatories to the MLI notify the OECD of their willingness to subscribe to the rules.

The MLI constitutes an unprecedented change in international taxation and it will have a significant impact on the taxation of MNEs. One of the implications of its implementation is if the proposed changes are adopted, taxpayers would have more certainty and predictability in the resolution of their transfer pricing disputes. The MLI also provides for baseball arbitration as the default option.[52] Given that the problems identified in the BEPS Project are caused mainly by the ease with which the MNEs are able to operate in a multilateral manner, attempting to address those problems unilaterally under the domestic law or bilaterally through the existing DTA network, would seem to be a fatally flawed approach.[53]

4.1 Changes brought by the Multilateral Instrument

These include:

- (i) a clearly defined time-frame;
- (ii) binding decisions;
- (iii) arbitration method;
- (iv) mandatory arbitration; and
- (v) the role of the taxpayer under MLI arbitration

[51] See generally Ernest & Young Global Tax Alert ‘Mandatory binding treaty arbitration under OECD’s multilateral instrument’ (2016) https://www.ey.com/gl/en/services/tax/international-tax/alert--mandatory-binding-treaty-arbitration-under-oecd-s-multilateral-instrument (accessed 21 August 2018).

[52] J Pauwelyn ‘Baseball arbitration to resolve international law disputes: hit or miss?’ (2018) 22 *Florida Tax Review* 52. It is said that parties who fail to compromise during the MAP negotiations have a greater risk of loss at this type of arbitration.

[53] A Miller & A Kirkpatrick ‘The use of multilateral instruments to achieve the BEPS Action Plan agenda’ (2013) 5 *British Tax Review* 685. Recognising that bilaterally renegotiating each of the more than 3 000 worldwide tax treaties would take years, if not decades, one of the other items in the OECD Action Plan (Action 15) was development of a multilateral instrument to swiftly modify DTAs to implement BEPS tax treaty-related measures, as stated in the OECD Action 15: a mandate for the development of a multilateral instrument on tax treaty measures to tackle BEPS https://www.oecd.org/tax/beps/beps-action-15-mandate-for-development-of-multilateral-instrument.pdf (accessed 4 September 2019).

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While taking note of the changes listed above, a multilateral instrument may have tax policies that differ from one another, that could not be harmonised amongst all the parties to the instrument. They may not be ready to accept the same precise commitments vis-à-vis all other parties. These changes are described in detail below:

4.1.1 Clearly defined timeframe

The 'MLI and the directive do not allow for "open ended" proceedings, as is frequently experienced under the existing rules.' Instead, it is expected that future MLI arbitration or Alternative Dispute Resolution (ADR) proceedings will be resolved in shorter timeframes.[54] The directive takes this one step further by allowing the taxpayer to take recourse to national courts in order to 'unblock' arbitration procedures. This will increase the practical relevance of arbitration.

4.1.2 Mandatory arbitration

If a MAP on the disputed issue which precedes both the MLI arbitration and the alternative dispute resolution ADR is unsuccessful the MLI arbitration will in the future be a mandatory second stage for the states involved in the dispute.[55]

4.1.3 Binding decisions

A decision by the arbitration panel or other decision-making body will be binding for the states involved. Together with the mandatory nature of the MLI arbitration or ADR proceedings, this will incentivise the contracting states to settle cases already at the MAP stage, leading to even shorter proceedings. In addition, the directive also enables the taxpayer to enforce the implementation of the decision by resorting to national courts.[56]

4.1.4 Arbitration method

The novel aspect of the new rules is found in the recommended arbitration decision making model. Both the directive and the MLI arbitration provide for a 'final offer' arbitration or so-

[54] See generally 'International tax arbitration: OECD and EU developments' (2018) http://knowledge.freshfields.com/cp/Global/r/3704/international_tax_arbitration_oecd_and_eu_developments (accessed 28 August 2018).
[55] as above. See also OECD Multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf (accessed 21 August 2018) 29.
[56] OECD (n 2 above) 30.

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called 'baseball arbitration as one of the arbitration methods, with baseball arbitration being the default method under the MLI. Under the 'final offer' arbitration method, the panel only has to decide between one of the offers presented to it by the competent authorities of the states.[57] There is no need to substantiate the decision or supplement it with any reasoning. Consequently, it is anticipated that this will be a quicker and more cost-effective resolution mechanism than other typically used mechanisms, arbitration or ADR awards will take precedence over national judicial decisions. Depending on the states involved, it might be possible for the taxpayer to address a dispute both in national tax proceedings as well as in MLI arbitration.

4.1.5 The role of the taxpayer under MLI arbitration

Within the procedural rules of the MLI, the role of the taxpayer in MLI arbitration cases is limited. Although it is the taxpayer that initiates the proceedings, it will mostly be a proceeding between the relevant competent authorities. It, therefore, remains to be seen if the contracting states and their competent authorities will encourage taxpayer involvement and also how the draft procedural rules to be published by the OECD will deal with this issue. In practice, a taxpayer should aim to make the best use of its possibilities. This can, for example be done through the submission of a legally well-argued application especially in cases where the arbitration method is the 'independent opinion' method. This could support the competent authorities in their position and facilitate the decision by the arbitration panel which, under the 'independent opinion' method, is required to submit a reasoned and well-founded decision.

It is important for one to see the efficacy of arbitration as a tax treaty dispute resolution mechanism in the African context. Most importantly, observe how the new changes to arbitration as brought by the MLI will effectively influence tax treaty disputes resolution in the four countries referred below, namely: South Africa, Kenya, Uganda and Ghana.

5 Arbitration of International Tax Disputes in South Africa

Majority of the DTAs signed by South Africa outside of the African continent do not contain paragraph 5 in their MAP article. All of the DTAs between South Africa and other African countries do not have an arbitration paragraph in their MAP article, meaning that any transfer

[57] International tax arbitration (n 54 above).

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pricing dispute with other African countries under the MAP, will not be resolved through arbitration.

5.1 Arbitration clauses in DTA

There are few of South Africa's DTAs that make provision for arbitration as a mechanism for unresolved issues that have prevented competent authorities from reaching a mutual agreement in two years.[58] South Africa only has three DTAs that contain arbitration as part of their MAP article. These are DTAs with the Netherlands, Canada and Switzerland.[59] According to article 26 of the DTA with the Netherlands, the two competent authorities can use arbitration in cases where there is no agreement reached after exhaustion of remedies under paragraphs 1 to 4 of the MAP article.[60] The DTA between South Africa and Australia has article 24(5) while it is not an arbitration clause, it has similar features like those of arbitration since it makes provision to refer unresolved issues relating to the case under the MAP to the Council for Trade in Services.[61] Article 24(5) of the DTA between South Africa and Australia states that:

> [f]or the purposes of paragraph 3 of article XXII (consultation) of the General Agreement on Trade in Services, the Contracting States agree that, notwithstanding that paragraph, any dispute between them as to whether a measure falls within the scope of that agreement may be brought before the Council for Trade in Services, as provided by that paragraph, only with the consent of both Contracting States. Any doubt as to the interpretation of this paragraph shall be resolved under paragraph 3 of this article 24 or, if the Contracting States fail to resolve that doubt, pursuant to any other procedure acceptable to both Contracting States. [62]

Even though the convention does not use the word arbitration, it makes reference to a Council. This Council performs a role with characteristics similar to those of arbitration. The Council is a third party to be used should the contracting states fail to reach a mutual agreement.

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[58] South Africa dispute resolution profile https://www.oecd.org/tax/dispute/south-africa-dispute-resolution-profile.pdf (accessed 14 November 2018) 8.

[59] Art 26(5) of the DTA between the Republic of South Africa and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital; Art 24(6) of the DTA between South Africa and Canada for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; the DTA between the Republic of South Africa and the Swiss Confederation for the avoidance of double taxation with respect to taxes on income https://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/default.aspx (accessed 21 June 2018).

[60] Pauwelyn (n 52 above).

[61] Art 24(5) of the DTA between the Republic of South Africa and government of Australia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income https://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/default.aspx (accessed 13 August 2018). The Council of Trade in Services will have powers similar to those of an arbitration panel. It operates under the guidance of the general council and is responsible for facilitating the operation of the general agreements.

[62] as above.

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5.2 Arbitration Act

Having appreciated the absence of such a clause in the majority of its DTA, it will be very interesting to see how South Africa will respond to tax treaty disputes and transfer pricing disputes specifically since it has recently enacted a law to deal with international arbitration, namely; the International Arbitration Act.[63] This Act incorporates the United Nations Commission on International Trade Law, (UNCITRAL), into South African law. The model law is the current international benchmark for arbitration laws developed by the UNCITRAL in order to address the wide divergence of approaches taken in international arbitration throughout the world and to provide a modern and easily adapted alternative to outdated national regimes.[64]

This Act is important in the sense that it introduces a new arbitration regime which will assist South African businesses in resolving their disputes speedily and cost effectively, while keeping up with the times on the resolution of international commercial disputes front.[65] Another important feature of the Act is that a foreign arbitral award may be recognised in South Africa as required by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York in 1958, the New York Convention (NYC).[66] The NYC is one of the key instruments in international arbitration. It applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.[67]

5.3 Recognition and enforcement of arbitration agreements

According to this Act, a foreign arbitral award is binding between the parties to that foreign arbitral award, and may be relied upon by those parties by way of defence, set-off or otherwise in any legal proceedings.[68] A foreign arbitral award must, on application, be made an order of court and may then be enforced in the same manner as any judgment or order of court.[69] The

[63] Act 15 of 2017. The Act is aimed at facilitating the use of arbitration as a method of resolving international commercial disputes. One of the purposes of the Act is to ensure that South Africa has a reformed and modernised law on international arbitration

[64] United Nations Commission on International Trade Law http://www.newyorkconvention.org/uncitral (accessed 10 July 2020). The South African Act also recognises the need for the enforcement of arbitral awards and amongst its key features is that a foreign arbitral award must, on application, be made an order of court and be enforced in the same manner as any judgment or order of court, provided it complies with the provisions of the clauses of the Act dealing with the recognition and enforcement of foreign arbitral awards.

[65] Golegal Department of Justice 'International arbitration Act now operational' (2018) https://www.golegal.co.za (accessed 16 January 2018).

[66] The convention deals with the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought. See generally https://www.newyorkconvention.org/english (accessed 3 September 2019).

[67] United Nations 'Convention on the recognition and enforcement of foreign arbitral awards' (1958) https://www.newyorkconvention.org/ (accessed 13 August 2019).

[68] Sec 16(2) of the International Arbitration Act.

[69] According to sec 16(3), such a court order can only be made subject to the provisions of secs 17 and 18 respectively. The former deals with the originality of the award and the original arbitration agreement in terms of which an award was made and the authenticity thereof. Sec 18

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reforms contained in the Act will place the South African arbitration legislation in line with international arbitration best practices. The question is, will South Africa extend the application of the International Arbitration Act in tax disputes to those DTAs which do not have paragraph 5 'arbitration clause' in their MAP article?

The question that can be posed is whether South Africa, will utilise this new International Arbitration Act together with paragraph 4 of its MAP article to have an optional arbitration? Section 18(1)(a)(ii) of the International Arbitration Act answers the two questions. It states that a court may only refuse to recognise or enforce a foreign arbitral award if it finds that reference to arbitration of the subject matter of the dispute is not permissible under the laws of the Republic. Based on this section, it can be argued that the Act cannot be applied in tax matters as nowhere in the South African tax laws is there mention of arbitration as a dispute resolution mechanism.

5.4 Optional Arbitration

Paragraph 4 of the DTA between South Africa and countries like Portugal and Ethiopia to mention but a few states that:

> [t]he competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a commission consisting of representatives of the competent authorities of the Contracting States. [70]

Most of the South Africa's DTAs contain the above-mentioned paragraph in their MAP article. The presence of paragraph 4 in the MAP article may allow South Africa to use the engagements with other contracting states to effectively refer unresolved MAP issues. Baseball arbitration is

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deals with whether the matter under dispute can be subjected to arbitration under South African law and whether the recognition or enforcement of the award is contrary to the public policy of the Republic.

[70] Art 25(4) of the DTA between South Africa and Portuguese Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; Art 24(4) of the DTA between South Africa and the Federal Democratic Republic of Ethiopia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2012-65%20-%20DTA%20Portugal%20GG%2031720.pdf (accessed 21 June 2018). Most of South Africa's DTAs contain para 4 in their MAP article. The argument for an optional arbitration is that its usage will bring a number of advantages. Firstly, because of its ad hoc nature, only certain cases can be chosen, the terms and the process thereof can be structured to suit the inexperienced competent authority while ensuring that the object of the process is not jeopardised. Secondly, an ad hoc arbitration agreement can be entered into in not so complex transfer pricing cases so as to test the competent authority's readiness for arbitration as a mechanism to resolve tax treaty dispute cases. The South African competent authority can through the effective utilisation of para 4 during MAP negotiations enter into agreement with the other competent authority to resolve any unresolved issues particularly if the other competent authority has arbitration as a mechanism within the MAP article or under a corresponding paragraph. B J Arnold 'The scope of arbitration under tax treaties' https://www.ibfd.org (accessed 12 November 2019) 116 is of the view that contracting states have the option of extending arbitration to art 25(3) issues in that even if a treaty does not provide for arbitration, the competent authorities have the authority through the MAP to implement an arbitration procedure that would apply generally or just in a particular case. However, he further argues that it may be unlikely at this stage in the development of arbitration that a competent authority would do so in the absence of an explicit decision by its government to adopt arbitration in its treaties as a mechanism for resolving tax disputes.

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one of the available options that can be considered under this paragraph. It must also be noted that in the majority of South African's DTAs the paragraph provides for a wider purpose that includes the exchange of opinions between the competent authorities.[71]

Optional arbitration is when parties sign an agreement on a case by case basis. The consent requirement in 'optional arbitration' allows each contracting state to exclude cases which it considers unfavourable to its interests from the arbitration procedure.[72] South Africa can enter into such an agreement in order to avoid a mismatch in the resolution of its transfer pricing disputes, more so if the other competent authority has arbitration clause or a corresponding paragraph 4 in its MAP article.

The freedom and broad discretion accorded by paragraph 4 does not prevent the competent authorities from agreeing on the voluntary referral of their exchanged opinions to an arbitrator who will then make a final decision. Treaty clauses that create the space and option of arbitration would be beneficial to developing countries and allow them to build experience before deciding whether mandatory and binding arbitration is right for them.[73]

Some of South Africa's trade partners are EU states which have already adopted mandatory arbitration for tax disputes within the EU community. South Africa is a signatory to the MLI, however, it is not clear when will it comply with its internal ratification process as required by the Constitution in order to give full effect of the application of the MBA as stipulated in the MLI. It is also not clear when South Africa will make a reservation regarding the adoption of the MBA.[74]

Any reservation towards the MBA will create a mismatch in the tax regime regarding resolution of transfer pricing dispute between South Africa and its tax treaty partners. This mismatch will

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[71] Art 25(4) of the DTA between South Africa and government of the Republic of Uganda for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2012-20%20-%20DTA%20Uganda%20GG%2022313.pdf (accessed 21 June 2018).

[72] Competent authorities with no arbitration provisions in their MAP article may in their engagements and correspondences with other competent authorities take advantage of such communications to develop an agreement for voluntary arbitration. It is important to note that although its initiation is not mandatory, voluntary arbitration can also result in a binding decision. The advantages of a voluntary arbitration clause would be that it allows the competent authorities greater control over the types of issues that will proceed to arbitration. With no arbitration clause in a DTA, para 4 may be used to achieve what a voluntary clause would have achieved. However, this may be on an ad hoc basis. Particularly if a country has agreed to the adoption of the minimum standards under the BEPS Project Plan but has not yet renegotiated the tax treaty agreements with other member states and has also not complied with internal ratification requirements to make use of the MLI. Para 4 of the MAP as contained in South African DTAs gives the competent authorities an opportunity to have a memorandum of understanding to agree on a baseball arbitration on those unresolved issues during the MAP negotiation.

[73] M Forstater 'Tax and development: new frontiers of research and action CGD policy' (2018) https://www.cgdev.org/sites/default/files/tax-and-development-new-frontiers-research-brief.pdf (accessed 20 March 2019) 118.

[74] Secs 231(2) and (3) of the Constitution of the Republic of South Africa, 1996. Constitutional requirements governing the ratification of international agreements before they can be regarded as laws applicable to the Republic need to be complied with. Sec 231(2) requires ratification while subsection 3 of sec 231 deals with international agreements of a technical, administrative or executive nature which do not require ratification, but still require to be tabled before the National Assembly for approval.

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increase uncertainty within MNEs and could potentially result in a decline in foreign investments into South Africa. One can look at paragraph 4 and the fact that it has been crafted intentionally in order to give the competent authorities some discretion on how to deal with any unresolved issues.

Research conducted on five commodity-dependent countries, including South Africa and Zambia has shown that little gold appears in South Africa export data while the country's trade partners in Europe report substantial amounts of gold imports from South Africa.[75] South Africa can no longer afford this existing mismatch as regards the resolution of disputes through arbitration especially since the MAP has in itself proved to be ineffective as a mechanism to resolve transfer pricing disputes.

There is a need for South Africa to move with speed in its policy position on the MLI. There are 75 CTAs that will be included by their signing of the MLI. The DTC has also recommended that instead of having to re-negotiate all DTAs to which South Africa is a party, the costs and challenges of re-negotiating can be avoided by signing the MLI that is recommended under Action 15 which will act as a simultaneous re-negotiation of all its DTAs.[76]

OECD members have acknowledged that instead of negotiating and signing protocols to include arbitration, countries may just skip the negotiating stage entirely and opt for the establishment of an arbitration process via a memorandum of understanding (MoU) under their existing MAP article. South Africa could be using the suggested MoU option under its MAP articles to make use of arbitration as a mechanism to resolve its transfer pricing disputes.

[75] See generally United Nations Conference on Trade and Development Report (UNCTAD) titled 'Trade mis-invoicing in primary commodities in developing countries: the cases of Chile, Cote d'Ivoire, Nigeria, South Africa and Zambia' (2016) https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1581 (accessed 29 April 2019). This report points towards a systematic practice of mis-invoicing and under-invoicing among mining companies in these countries. For South Africa, the report calculated cumulative under-invoicing over the period 2000-2014 to have amounted to USD 102.8 billion (2014 US dollars): USD 600 million for iron ore; USD 24 billion for silver and platinum; and USD 78.2 billion for gold. It is against reports such as this that one would encourage the South African competent authority to keep abreast with the OECD developments because any such reports may trigger audits which may results in transfer pricing adjustments. It is these adjustments that trigger disputes, without arbitration and with the ineffective MAP, South Africa may end up with multiple unresolved cases with MNEs who are engaged in activities that erode South Africa's tax base.

[76] Hogan Lovells 'What is the 'MLI and why is it important in the context of the South African tax system?' *Tax Newsletter* (2018) https://www.hoganlovells.com/en/pdfdownload?page={98E0CDE3-AD20-4B5A-A260-7BEB3979447A}&p=1 (accessed 22 March 2019). What should be understood with the MLI and how its signing by member states affects its operation is that for a DTA to be amended by the MLI, both parties to the DTA must have signed the MLI and both states must have agreed that the DTA in question would be covered by the MLI and both countries must have the same stated position on the MLI article in question. Where at least one party has made a reservation in respect of a certain MLI article or the parties did not choose to apply the same optional provision, that reservation or difference in optional provisions will block the modification of the DTA in question but only in respect of that specific MLI article.

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5.5 Country Summary: South Africa

South Africa has more DTAs than many African states. However, it only has arbitration as a dispute resolution mechanism in three of those DTAs. The presence of an arbitration clause in the three DTAs shows that South Africa is prepared to allow an independent third party to resolve its revenue or transfer pricing disputes.[77] The same is also seen in its DTA with Australia where such disputes may be referred to the Council for Trade and Services.

Even though South Africa has the International Arbitration Act which is said to bring about a new regime with the use of arbitration to speedily resolve business disputes, it is not applicable to resolve transfer pricing disputes. Most of the South Africa's DTAs contain paragraph 4 in their MAP article which gives space for competent authorities to communicate and exchange opinions. This platform can be used for optional arbitration. South Africa's use of optional arbitration may be good as it will assess the country's readiness for binding arbitration.

Most of South Africa's trade partners are EU States. They have already adopted mandatory arbitration for tax disputes within the EU community. It will be important for South Africa to adopt and have similar transfer pricing dispute resolution mechanisms as its trade partners so that when disputes arise both contracting states are able to speedily resolve them.

Since South Africa is a signatory to the MLI, it will be good to gain the extended scope that comes with such multilateral agreements and the improved mechanisms that are contained in it. What is not clear is when South Africa will comply with its internal ratification process as required by the Constitution to give full effect of the application of the mandatory binding arbitration as stipulated in the MLI.

6 Arbitration of International Tax Disputes in Kenya

In 2013, the OECD warned that replacement of the current consensus-based framework by unilateral measures could lead to global tax chaos marked by the massive re-emergence of double taxation. In Kenya, there are no statutory law that limits the use of arbitration to a particular subject matter, the enforcement of foreign arbitral awards will be based on public

[77] Perrou (n 39 above) 184 is of the view that the only way to guarantee an effective remedy for the resolution of international tax disputes is to grant individual access to the international system provided for the resolution of international tax disputes.

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policy considerations.[78] It is important to note that Kenya has suspended the operation of some of its DTAs.[79]

6.1 Arbitration Clauses in Double Tax Agreements

Kenya does not have the arbitration clause in the majority of its DTAs.[80] Of the fourteen DTAs, only the one between Netherlands has an arbitration clause.[81] Paragraph 5 of the DTA between Kenya and Netherlands states that:

> [w]here the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 of this Article within two years from the presentation of the case to the competent authority of the other Contracting State, any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph. [82]

As stated before, Kenya is a participant at the OECD and is one of the 100 hundred countries and jurisdictions that is part of the OECD's inclusive framework which seeks to enhance collaboration to implement the BEPS measures and tackle BEPS.[83] Action Plan 14 of OECD's BEPS initiative relates to increasing the effectiveness of dispute resolution mechanisms. The OECD Action Plan on effective dispute resolution also includes an option for arbitration for willing countries.

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[78] N Kariuki 'Arbitration in Kenya' (2018) https://www.lexology.com/library/detail.aspx?g=65f704c5-d59b-4f5b-ba27-e060132bbf09 (accessed 1 June 2020).
[79] Status of list of reservations and notifications at the time of signature http://www.oecd.org/tax/treaties/beps-mli-position-kenya.pdf (accessed 31 May 2020) 2. The DTA between Kenya and Mauritius.
[80] Kenya dispute resolution profile (2018) https://www.oecd.org/tax/dispute/Kenya-Dispute-Resolution-Profile.pdf (accessed 28 April 2019) 7 where it is said that the decision not to use arbitration as a mechanism in their MAP proceedings when resolving tax treaty dispute is a policy decision.
[81] Art 25(5)(b) of the DTA between the Kingdom of the Netherlands and the Republic of Kenya for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income http://vivaafricallp.com/wp-content/uploads/2017/03/Kenya-Netherlands-DTA.pdf (accessed 12 October 2019).
[82] as above.
[83] OECD *Background Brief – Inclusive Framework on BEPS OECD* (2017) http://www.oecd.org/tax/beps/background-brief-inclusive-framework-on-beps.pdf (accessed 3 May 2019) 7. In the executive summary of this document it is stated that members of the framework work on an equal footing to tackle tax avoidance, to improve the coherence of international tax rules and to ensure a more transparent tax environment.

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6.2 Arbitration Act

Kenya has domestic legislation that deals with arbitration, namely the Arbitration Act 4 of 1995.[84] Due to the fact that it is a domestic law, it cannot be used to effectively resolve international disputes especially tax treaty disputes, as tax treaty disputes are between two or more states, all with sovereignty. Also, to be noted is that for the Arbitration Act to be applicable the initial agreement between the parties must provide for some form of an arbitration clause in a contract or in the form of a separate agreement.[85]

6.3 New Developments to the Formal Arbitration Framework

Kenya has established the National Centre for International Arbitration (NCIA). Some commentators have suggested that arbitration including the arbitration of tax disputes should be utilised in Kenya through the recently inaugurated NCIA.[86] With Kenya increasingly being seen as the preferred African base for many MNEs, coupled with the KRA's increased focus on their tax practices, the NCIA may prove useful in resolving international tax disputes involving MNEs since it is specifically focused on international arbitration.

Section 2(5) and 2(6) of the Constitution of Kenya dispensed with the requirement for the domestication of conventions, treaties and other international instruments that Kenya has ratified by providing that such instruments form part of the laws of Kenya.[87] The effect of this would be that Kenyan courts can now readily apply the provisions of conventions, treaties and international instruments that have been ratified by Kenya, including those that deal with arbitration, without requiring that they first be adopted as an act of Parliament through an elaborate and lengthy domestication process.[88]

According to the recent report on signatories issued by the OECD, Kenya has signed the MLI but has not yet ratified nor put it into force.[89] By virtue of the fact that it has not ratified and

[84] This Act was revised in 2012. Even though in its short title it is said that it applies both to domestic and international disputes, the Act does not make reference to its use in dealing with tax treaty disputes.
[85] Sec 4(1) Arbitration Act. The said agreement must be in writing in the form of (a) document signed by the parties; (b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.
[86] The centre is a neutral venue for the conduct of international arbitration with commitment to providing institutional support to the arbitral process. In addition, the NCIA caters for domestic arbitration and other forms of dispute resolution such as mediation. Hence the suggestion that the centre can be used as a forum to also address international tax arbitration cases with MNEs.
[87] Kenya Constitution of 2010 https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke019en.pdf (accessed 9 July 2020).
[88] A Abdallah & M Karega 'Kenya' in J A Carter *The International Arbitration Review* (2019) https://www.thelawreviews.co.uk (accessed 24 September 2019) 286.
[89] OECD Signatories and parties to the multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting status as of 27 May 2020 http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (accessed 3 June 2020) 2. The report is updated regularly as member states sign the convention to implement tax treaty related measures to prevent BEPS.

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entered it into force, the improvements to dispute resolution as intended by the MLI will not be effected in Kenya particularly with reference to arbitration of its tax treaty disputes.

6.4 East African Community

Kenya is part of the EAC[90] whose member states have an agreement that deals with regional transfer pricing issues including the resolution of disputes. The EAC comprises of Burundi, Kenya, Rwanda, South Sudan, Tanzania, and Uganda. The partners have developed a document that seeks to deal with cross border transactions between partners inter se, the said document also addresses dispute arising therefrom namely, the EAC Model Investment Treaty.[91] Paragraph 22.1 of the EAC Model Investment Treaty states that:

> [d]isputes between the State Parties concerning the interpretation or application of this Treaty shall, as far as possible, be resolved through the use of consultations, good offices, mediation, conciliation, or any other agreed dispute resolution mechanism.

Paragraph 22.2 of the EAC Model Investment Treaty states that if a dispute between the parties cannot be settled within six months from the time the dispute arose, it shall upon the request of either party be submitted to an arbitral tribunal. The arbitration referred to in these paragraphs is only applicable in relation to the interpretation of the EAC Model Investment Treaty. The existing arbitration framework is not used to substitute and or make efficient the OECD arbitration framework.

The objective of the EAC Model Investment Treaty is to promote, facilitate, protect and increase investments between investors of one state party into the territory of the other state party that support:

- i) employment generation;
- ii) increased production and productivity;
- iii) technology and skills transfer for local value addition;
- iv) synergies with local firms; and
- v) ultimately contribute to poverty reduction in the host state in a sustainable way.[92]

[90] This regional intergovernmental organisation of 6 partner states signed by east African countries namely Burundi, Kenya, Tanzania, Rwanda, Uganda and South Sudan. Its prime objective is to deepen co-operation among the partner states in various key spheres for their mutual benefit. These spheres include the political, economic and social spheres. The treaty agreement will only operate within the region and only to members' states.

[91] See the EAC Model Investment Treaty https://www.eac.int/documents/category/investment-promotion-private-sector-development (accessed 10 April 2019).

[92] Part 1 of art 1 of the EAC Model Investment Treaty commentary. Although taxation or tax treaty issues are not explicitly referred to in its preamble and its objective, when one reads the objective carefully, it would look like the elimination of double taxation and double non taxation, including the collection of revenue where it is due and payable is inherent in its objective. See also art 14 of the EAC Model

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There are no legal limitations in Kenya not to include MAP arbitration in its DTAs; the decision not to have arbitration in DTAs is purely a policy decision. The policy expressly prohibits inclusion of MAP arbitration.[93] In its dispute resolution profile Kenya does make a concession that some of the issues and provisions that were not included in its DTAs shall be remedied by the MLI.[94] Even though Kenya has signed the MLI, Kenya has not yet ratified it. Kenya should be benefiting from article 25(5) of the MTC which provides for arbitration, an integral part of the MAP as a means of resolving specific issues that prevent competent authorities from reaching a satisfactory resolution of the case.[95]

6.5 Country Summary: Kenya

Kenya has a small tax treaty network. Of the 18 signed DTAs only 16 have been ratified and are in force. The quickest way to broaden this treaty network will be through the ratification of the MLI that has arbitration as a dispute resolution mechanism. Even though Kenya's signed DTA with Netherlands contains an arbitration clause, this DTA has not been ratified yet and as result, it is not in force.[96]

Since Kenya has just recently signed the MLI but because not yet ratified it will not be able to expand its low tax treaty network and benefit from the OECD dispute resolution improvements arising out of being signatory to this MLI.[97] Consequently, Kenya will not yet be able to adopt arbitration as a transfer pricing dispute resolution mechanism. It will have to only rely on its DTAs, the majority of which do not have an arbitration clause. Kenya's Arbitration Act, which is a domestic law, cannot be used effectively to resolve international disputes especially tax treaty disputes.

Kenya is part of the EAC community which has a treaty agreement that makes reference to an arbitral tribunal as a dispute resolution mechanism.[98] This treaty has traces of the OECD and UN Model Tax Conventions (MTC). In its introduction the EACDTA states that with regard to the most prevalent cross-border scenarios occurring therein, the OECD and UN MTCs are

Investment Treaty that deals with Transparency of Contracts and Payments read with art 9 para 9(3) (g) of the treaty, that deals with payments of taxes.

[93] Kariuki (n 78 above) 8.

[94] Kariuki (n 78 above) 9. This was stated in response to the question around corresponding adjustments.

[95] See generally United Nations Economic Commission for Africa 'Base erosion and profit shifting in Africa: reforms to facilitate improved taxation of multinational enterprises' (2018) https://www.uneca.org/sites/default/files/PublicationFiles/base-erosion_rev.pdf (accessed 12 June 2018) 18.

[96] Kenya double tax agreement status: (2016) https://www.icpak.com/wp-content/uploads/2016/06/Kenya-DTA-Status.pdf (accessed 20 August 2018) 2.

[97] OECD (n 89 above).

[98] Paragraph 22.2 of the EAC Model Investment Treaty.

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important reference points. It goes on to state that the OECD and UN MTCs and their respective commentaries remain the most important sources and points of reference.[99]

Unlike South Africa, Kenya does not have a similar provision to paragraph 4 of the MAP article in the majority of its DTAs as contained in most of South Africa's DTAs. Paragraph 4 in the South African DTA context is a provision that enables contracting states to exchange opinions during the MAP negotiation. It is the presence of this provision that may give rise to parties opting for a voluntary optional arbitration.

7 Arbitration of International Tax Disputes in Uganda

Uganda has DTAs with some countries such as the United Kingdom, Netherlands, South Africa, Denmark, Mauritius, India and Italy.[100] Uganda announced in 2014 that it had temporarily suspended all its on-going DTA negotiations pending a review of the treaty terms that it should seek in such negotiations.[101] In Uganda, the parties to the dispute in an objection or appeal process have access to the utilisation of an independent tax tribunal in accordance with the law.[102] However, that is only in as far as domestic disputes are concerned.

7.1 Arbitration Clauses in DTA

Article 25(5) of Uganda's DTA with the Netherlands provides as follows:

> [i]f any difficulty or doubt arising as to the interpretation or application of the Convention cannot be resolved by the competent authorities of the Contracting States in a mutual agreement procedure pursuant to the previous paragraphs of this Article within a period of two years after the question was raised, the case may, at the request of either Contracting State, be submitted for arbitration, but only after fully exhausting the procedures available under paragraphs 1 to 4 of this Article and provided the taxpayer or taxpayers involved agree in writing to be bound by the decision of the arbitration board. The decision of the arbitration board in a particular case shall be binding on both Contracting States and the taxpayer or taxpayers involved with respect to that case.[103]

[99] See the EACDTA *Handbook* 1-2.
[100] Taxation Handbook *A guide to Taxation in Uganda* https://www.ura.go.ug/Resources/webuploads/INLB/TAXATION%20HANDBOOK%20.pdf (accessed 12 June 2019) 139.
[101] M Hearson & J Kangave 'A review of Uganda's tax treaties and recommendations for action' (2016) 50 *International Centre for Tax Development* 3.
[102] See generally BC Kangyenda & O Kamusilime 'Tax litigation in Uganda' https://ukpracticallaw.thomsonreuters.com (accessed 28 June 2019).
[103] Art 25(5) of the DTA between the Kingdom of the Netherlands and the Republic of Uganda for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income https://www.ura.go.ug/openFile.do?path=//webupload//upload//download//staticContent//RGTMENU//458//462_Netherlands-Uganda_DTA.pdf (accessed 3 June 2019).

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Article 26(4) states that:

> [t]he competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.[104]

Article 25(4) states that 'the competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.'[105] In Uganda's DTA with Norway, there is a provision that 'when it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a Commission consisting of representatives of the competent authorities of the contracting states.'[106]

The importance of a DTA was stated in Chapter 2, and also what has been stated is that the absence of a widespread DTA network hampers its utility as a tool for resolving transfer pricing disputes. Uganda is currently developing a national policy framework to articulate the minimum standards and benchmarks for negotiating DTAs to ensure that they are good for the country. This framework seeks to ensure that any DTAs concluded by Uganda are well positioned to support the attainment of economic development without compromising Uganda's ability to collect tax revenue needed to invest in socio-economic development for the benefit of its citizens.[107] It will be important for the adoption of effective dispute resolution mechanisms as they are necessary for the attainment of economic development.

7.2 Arbitration Act

The Arbitration and Conciliation Act of Uganda (ACA)[108] applies to both domestic and international disputes. The most important feature of the Act with respect to its application is that there must be an arbitration agreement. Section 41 of the ACA states that:

[104] See the DTA between the Kingdom of Denmark and the Republic of Uganda for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income https://www.ura.go.ug/openFile.do?path=/webupload/upload/download/staticContent/RGTMENU/458/459___IBFD_-_DENMARK_-_UGANDA_INCOME_TAX_TREATY.pdf (accessed 16 April 2019).

[105] See the DTA between the Republic of South Africa and the government of the Republic of Uganda for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on incomes https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2012-20%20-%20DTA%20Uganda%20GG%2022313.pdf (accessed 16 April 2019). The para does not give enough discretion or scope for the two contracting states to deviate and opt for arbitration.

[106] Art 25(4) of the DTA between the Republic of Uganda and the Kingdom of Norway for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income https://www.ura.go.ug/Resources/webuploads/INLB/Double%20Taxation%20Agreement%20Norway%20Uganda%20Income%20Tax%20Treaty.pdf (accessed 20 September 2019).

[107] Abdallah (n 88 above) 23.

[108] Cap 4 of 2000.

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> [w]hen enforcing a foreign award, the New York Convention shall be applied in that any award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, setoff or otherwise in any legal proceedings in Uganda; and any references in this Part to enforcing a foreign award shall be construed as including references to relying on an award.

Section 42 read with section 43 of the ACA, which deals with the conditions for enforcement of the NYC[109] award, it states that such an award shall be recognised and enforced pursuant to section 35 and that once the court is satisfied, the award shall be enforceable. Once the court is satisfied the award shall be deemed to be a decree of that court.[110] The NYC is one of the key instruments in international arbitration. It provides for the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.[111]

Uganda has some experience with the use of arbitration in tax disputes that is based on a $404 million tax arbitration case which it won against Heritage Oil.[112] The case dealt with the arbitration of a tax disputes regarding capital gains tax on the sale of oil assets by Heritage Oil and Gas in Uganda to the UK's Tullow Oil in 2010. However, it appears that Uganda has not used the opportunity and the exposure from this case to learn and develop arbitration as a tax dispute resolution tool. There is also a pending case of French energy company Total which is seeking international arbitration over a tax disagreement with Uganda.[113] These are the cases that Uganda should be using to develop the use of arbitration in international tax disputes. Of the four countries under study, if Uganda used the two cases towards the development of arbitration of tax disputes, it would be leading as regards its use as a mechanism to resolve international tax disputes.

Uganda is not a signatory to the MLI. It has also not expressed an intention to sign this multilateral convention. As a result, it does not have the platform and the framework to resolve its transfer pricing disputes with over 100 jurisdictions that comes automatically with the signing and ratification of the MLI. Also, it does not gain an expansion towards its transfer pricing dispute resolution mechanisms and the improvements to those mechanisms that is provided for in the MLI. Uganda like many African countries have not gained experience on

[109] New York Convention (n 64 above).
[110] These sections, one can say deals with the conversion of what was a foreign award into a court order or decree in Uganda to give the award a binding effect.
[111] Art 26(5) (n 59 above).
[112] See *Heritage Oil & Gas Ltd vs Uganda Revenue Authority* Civil Appeal No 14 of 2011 [2011] UGCOMMC (12 September 2011) 97. This is the type of case that Uganda should use to gain experience in tax and specifically international tax disputes.
[113] See generally E Biryabarema 'Total Seeks Arbitration Over Uganda Tax Dispute' (2015) https://www.rigzone.com/news/oil_gas/a/137916/total_seeks_arbitration_over_uganda_tax_dispute/ (accessed 1 June 2020).

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how some global multilateral tax conventions operates. Significant work in administrative capacity building is still required if they are to reap the full benefits of this multilateral convention,[114] the MLI that can immediately enhance their resolution of transfer pricing disputes through the mechanisms in it.

7.3 Country Summary: Uganda

In Uganda, disputes in the form of an objection and appeal are resolved through the utilisation of an independent tax tribunal. The usage of an independent tax tribunal creates an environment that is conducive for the use of arbitration in that it demonstrates both the taxpayer and the revenue authority's trust to a third party to preside over tax disputes. Uganda's DTA with Norway has a provision for oral exchange of opinions through a Commission consisting of representatives from both contracting states. Such an exchange of opinion makes an avenue for optional arbitration available.

The ACA, which applies to both domestic and international disputes has not been tested on tax treaty disputes specifically transfer pricing disputes. The most important feature of the Act in respect of its application is that there must be an arbitration agreement. Since the effective application of the Act is more reliant on the existence of an arbitration agreement, Uganda's small tax treaty network could be a hindrance to its efficacy.

Uganda's failure to sign the MLI means that it is not benefiting from the huge network that comes with the signing thereof. Also missed is the improvement pertaining to the resolution of transfer pricing disputes and the usage of other transfer pricing dispute resolution mechanisms such as arbitration and or binding arbitration as provided for in the MLI.

8 Arbitration of International Tax Disputes in Ghana

Ghana does have a small DTA network. To date it has signed only 11 DTAs.[115] Most of its DTAs do not have arbitration as a mechanism in their MAP article, except the DTA with the Netherlands.

[114] as above.
[115] Ghana revenue authority https://gra.gov.gh/double-taxation-agreements-in-force/ (accessed 2 November 2020).

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8.1 Arbitration in Double Tax Agreements

Article 26(6) of the DTA between the Netherlands and the Republic of Ghana states that:

> [i]f any difficulty or doubt arising as to the interpretation or application of the Convention cannot be resolved by the competent authorities of the Contracting States in a mutual agreement procedure pursuant to the previous paragraphs of this Article within a period of two years after the question was raised, the case may, at the request of either Contracting State, be submitted for arbitration, but only after fully exhausting the procedures available under paragraphs 1 to 5 of this Article and provided the taxpayer or taxpayers involved agree in writing to be bound by the decision of the arbitration board.[116]

Also the DTA between Italy and Ghana provide for dispute resolution by way of arbitration for issues pertaining to the interpretation or application of the DTA when competent authorities of the contracting states cannot resolve the dispute through MAP within the required timeframe.[117] Either contracting state may submit the issue for arbitration, provided the taxpayer agrees in writing to be bound by the decision of the arbitration board.[118] The decision of the arbitration board is binding on both contracting states.[119] Arbitration is increasingly becoming a common mode of dispute resolution in Ghana, especially for large-value international disputes.[120]

8.2 Arbitration Act

Ghana has a domestic law that deals with arbitration of disputes namely the Alternative Dispute Resolution Act. This Act culminated in the creation of the alternative dispute resolution centre.[121] However, not all disputes can be arbitrated. The Alternative Dispute Resolution Act stipulates that the Act applies to matters other than those that relate to:

(a) the national or public interest;
(b) the environment;
(c) the enforcement and interpretation of the Constitution; or

[116] Art 26(6) of the DTA between the Kingdom of the Netherlands and the Republic of Ghana for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains. As above.
[117] Article 26(5) of the DTA between the government of the Italian Republic and the government of the Republic of Ghana for the avoidance of double taxation with respect to taxes on income and the prevention of fiscal evasion.
[118] APA & MAP Country Guide – 'Ghana: connecting the dots of international tax controversy' (2019) https://www.dlapiper.A00091_APA_and_MAP_Country_Guides_Ghana_Highres_WOCM_V1%20(2).pdf (accessed 29 July 2019) 7.
[119] as above.
[120] See generally K Ntrakwah 'Arbitration in Ghana' (2018) https://www.lexology.com/library/detail.aspx?g=02eed885-3a6f-4fbc-8ac1-a303f5fffe6e (accessed 10 November 2018). The Alternative Dispute Resolution Act 798of 2010. The Alternative Dispute Resolution Act is the law governing arbitration in Ghana. The same law applies for domestic and international arbitrations. Ghana has adopted the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the Geneva Convention and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
[121] Unlike South Africa's International Arbitration Act, or the Kenya Arbitration Act, or the Uganda Act, the Ghana Alternative Dispute Resolution Act makes no reference to international dispute resolution.

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(d) any other matter that by law cannot be settled by an alternative dispute resolution method.

In the settlement of disputes through arbitration, Ghana follows the rules of the statutes of the European Court of Justice (ECJ) and its arbitration of disputes is to be conducted under the statutes of the International Court of Justice (ICJ). The usage of these statutes by Ghana in dealing with its international arbitration demonstrates the inefficiency of the OECD MTC from a Ghanaian perspective. Otherwise, Ghana would have incorporated paragraph 5 of article 25 of the OECD MTC in its DTAs.

The challenges most African countries face in taxation pertain to underdeveloped tax laws, low enforcement of tax laws and general administrative weakness. These are essential to ensuring effective tax collection.[122] The lack of a treaty network coupled with passive participation in multilateral forums aimed at developing tax administration and importantly the prevention of BEPS by MNEs compounds the problem. Ghana has been one such country that has not been that active in the OECD tax and international tax discussions. Ghana is not a signatory to the MLI and it has not expressed any intention to sign it. It has only signed the MAAC that has more to do with the administration of taxes than the resolution of tax treaty or transfer pricing disputes.

8.3 Country Summary: Ghana

Like many other African countries, Ghana has only a handful of DTAs. However, unlike the other three countries under study, Ghana's involvement in the development of transfer pricing and the prevention of BEPS is the least as compared to the others. It has not yet signed the MLI and it has not expressed any intention to do so. The MAAC signed by Ghana has more to do with the documentation, co-operation and exchange of tax information; Ghana will need to sign the MLI because that will address the disputes that will arise from the information so exchanged.

9 Conclusion

Arbitration as a mechanism has been in use from 1990 within the EC with states concluding DTAs providing for the use of compulsory arbitration in international taxation disputes

[122] Abdallah (n 88 above) 7.

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concerning transfer pricing. Even though it is said that the Arbitration Convention represents a valuable precedent which merits consideration in framing the appropriate terms for international arbitration provisions in general, none of the four countries use arbitration as a mechanism for the resolution of transfer pricing disputes.

What has been identified in all the four African countries apart from South Africa is that they have a small tax treaty network. With the small tax treaty network majority of their DTAs do not contain an arbitration clause, with only two or three having paragraph 5 of article 25 of the OECD MTC, but most importantly is that arbitration as a mechanism is not used to resolve transfer pricing disputes. The mismatch between many African countries and their European trade partners of not adopting arbitration to resolve their transfer pricing disputes has resulted in the MAP being ineffective.

Many developing countries are wary or opposed to the use of binding arbitration. Majority are still wary of the issue of sovereignty. They are still not willing to hand over the adjudication of revenue matters to an independent third party. They do not want to lose control of the process to manage and adjudicate over their taxes.[123] They want to protect their fiscal sovereignty to collect taxes.[124]

All four countries have arbitration Acts and have adopted the UNCITRAL, a model law developed in order to address the wide divergence of approaches taken in international arbitration throughout the world, however, the said arbitration Acts are not used for international tax arbitration and specifically of transfer pricing disputes. At the moment, though there are no laws against the use of arbitration in the four countries, there appears to be a mere policy position taken not to resolve tax treaty disputes through arbitration.

The MLI in its current form encourages countries to commit to resolve tax disputes through MAP within two years or go for binding arbitration. Not only does it grant access to more than 100 jurisdictions but also provide for improvement on the resolution of tax disputes. Even a country like South Africa, signed the MLI in 2017 but has still noy yet ratified it. It has however, made reservations towards binding arbitration. The delay by many African countries to sign but not ratify the MLI particularly South Africa and Kenya while countries like Uganda and Ghana

[123] See generally International arbitration, https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/sectors/downloads/International-Arbitration-Brochure.pdf (accessed 19 August 2018).
[124] Jansen (n 32 above) 234.

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has not even signed the MLI, hinders the effective usage of arbitration to resolve transfer pricing disputes. Kenya only signed the MLI recently in December 2019, but it is still not yet ratified. What has been established is their lack of commitment to the MLI, a position that affect the effectiveness of arbitration as the OECD transfer pricing dispute resolution mechanism.

Amongst the challenges is the monstrous legal fees, uncertainty and foreign currency demands associated with arbitration, even a threat to arbitrate may lead to costly settlements in which the less well-resourced country gives up valuable revenue.[125] Also identified is the challenge on the appointment of arbitrators. ATAF should be taking a leading role towards the establishment of a regional panel for arbitrators to adjudicate over regional disputes and avail some of those arbitrators to preside over global disputes involving OECD members outside of the continent.

Of course, there is a need for African countries to align their respective rules and procedures with international best practice. There is a need to establish a central body or commission that will be common with inherent jurisdiction to facilitate and preside over the resolution of transfer pricing disputes which will include the appointment of arbitrators who will adjudicate over tax treaty disputes, hence the recommendation for ATAF to lead in the establishment of such a commission. Arbitration itself is an integral part of the MAP to solving tax treaty disputes between states. It should not be treated as an alternative as that could risk undermining the effectiveness of the MAP.[126]

[125] See the ActionAid report 'Taxation rights slipping through the cracks: how developing countries can get better deal on their tax treaties' (2015) https://actionaid.org/sites/default/files/advocacy_brief_final.pdf (accessed 10 September 2018) 13. Arbitral costs are often paid for in foreign currencies, which is not always readily available to developing countries. Every time a party settles, there is some loss suffered, the party ends up with less than what was due and payable to it. For developing countries, especially African countries, such settlements could be a blow to their socio-economic prospects. Settlements are by their very nature uncertain as they depend on the negotiating parties and this uncertainty vis-à-vis dispute resolution may affect the investment from foreign in particular affect cross border trade, which will negatively affect African countries. Hence a need for certainty.

[126] Para 12 OECD 'Improving the resolution of tax treaty disputes' (2007) https://www.oecd.org/ctp/dispute/38055311.pdf (accessed 11 April 2019) 4. This mechanism must be available so that competent authorities can offer a taxpayer supplementary recourse if the initial MAP process is failing to reach an agreement. The current framework denies taxpayers an alternative and provides no incentive to competent authorities to take all steps necessary to ensure a speedy resolution of the issues involved. Arbitration can be seen as a mechanism that will reduce the number of unresolved cross-border tax disputes. Its existence can encourage greater use of the MAP since both governments and taxpayers will know at the outset that the time and effort put into the MAP will be likely to produce a satisfactory result.

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CHAPTER 6

The Role of OECD Information Sharing Mechanisms in the Resolution of Transfer Pricing Disputes

1 Introduction

The current OECD transfer pricing disputes resolution mechanisms namely, the MAP, APA and MBA, have their own challenges especially in Africa. Despite those challenges their efficacy is also reliant on certain supporting tools that are intended to enhance the dispute resolution process. One such important tool is the exchange of information, particularly as the availability of information will not only assist the competent authority to arrive at a just and fair decision but will also assist in the effective and speedy resolution of the disputes before it.[1]

There are a number of important OECD tools that support the transfer pricing regime and international tax cooperation in general. However, the focus in this chapter will be on those tools that are linked to and affect the resolution of transfer pricing disputes. The exchange of information as part of international tax transparency is critical in a number of ways including the prevention of BEPS and the elimination of double taxation and double non taxation. While the development of transfer pricing rules is important for the prevention of BEPS, tax transparency is equally important in assisting competent authorities particularly in the resolution of transfer pricing disputes.

When MNEs perform activities in multiple countries, tax authorities do not have a complete picture of the MNE's overall business activities and may not be able to determine whether the

[1] It is only when in possession of adequate information that competent authorities who are party to the dispute will be able to expeditiously resolve transfer pricing disputes and arrive at just and legally sound decisions that taxpayers will be encouraged to have trust in the process. One of the challenges as stated in Chapter 2 was that taxpayers were concerned with the poor decisions made simply because they did not comprehend the information at the disposal by competent authorities as provided during the MAP process. It is common cause that the taxpayer requesting the MAP, an APA or arbitration will provide the competent authority with information necessary for both competent authorities to make a determination of the case before it. However, tax transparency is intended to ensure amongst others that the competent authority is capacitated with enough information *ex ante*, so as not to rely only on what the taxpayer presents at the time of making the request but also to compare against that which it is already in its possession. One of the reasons for taxpayer to lack confidence in the MAP process is because taxpayers are not part of the process hence, they are not certain whether the competent authority when engaging with the other contracting state understands and comprehend the facts as the competent authority may not be familiar with the transfer pricing structure of the MNE. The availability of information to the competent authority through the suggested tools aimed at tax transparency grants the revenue authority enough time to peruse the information even before a taxpayer initiates a request under art 25 for a MAP process. The availability of information is also important in a non-judicial process as the taxpayer is not involved to present his case fully to his satisfaction as the matter remains between the two contracting states. Most of the time consumed during the MAP process is wasted by competent authorities struggling to familiarise themselves with the MNE's foreign trade and transfer pricing arrangements in other jurisdictions. The availability of information through these suggested tools is important for an understanding of the taxpayer's international trade and most importantly his transfer pricing affairs. This will lead to less time spent on the article 25 dispute resolution process.

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allocation of profits to the entity in their country is correct.[2] Tax transparency makes reliable and up-to-date information available to the various affected revenue authorities.[3] In the BEPS Action Plan, the OECD stated that:

> [t]he rules to be developed would include a requirement that MNE's provide all the relevant tax authorities with the necessary information on their global allocation of income, economic activity and taxes paid among countries in a common template.[4]

This will provide evidence that intragroup transactions follow the arm's length principle and provide certainty to taxpayers against transfer pricing adjustments. The aim is to minimize the risk of double taxation. Such information improves the means by which tax authorities control taxpayers' compliance with the arm's length principle.

2 Background

In a globalised world with widespread international financial flows, international cooperation on tax compliance has become the norm. 'Central to this is information sharing between tax authorities.'[5] The role of the competent authority in this instance includes, inter alia, the effective implementation of the provisions of DTAs and other international taxation instruments. In particular, the competent authority is responsible for the communications with

[2] AJ Bakker 'Transfer pricing from the perspective of substance and transparency: is the OECD on the right track?' in AJ Bakker *International Tax Structures in the BEPS Era: An Analysis of Anti- Abuse Measures* (2015) 70. It is this lack of transparency that tax authorities are confronted with that hinders the effectiveness of the resolution of transfer pricing disputes. It is only when taxpayers initiate a MAP request that competent authorities see the information regarding the foreign activities of the MNE for the first time.

[3] OECD Global forum on transparency and exchange of information for tax purposes 'Tax transparency in Africa' (2018) *Africa Initiative Progress Report* https://www.oecd.org/tax/transparency/Tax-transparency-in-Africa-2018-progress-report.pdf (accessed 20 September 2019) 9.

[4] OECD Action plan on base erosion and profit shifting (BEPS Action Plan) (2013*)* https://www.oecd.org/ctp/BEPSActionPlan.pdf (accessed 21 September 2019) 21. This way, tax authorities worldwide would have the bigger picture of the value chain of MNE's and would be able to determine the taxable income that should be allocated to entities in their jurisdiction. See also Bakker (n 2 above) 69. Whether the taxpayer choses the MAP, APA or MBA? the availability of adequate information will always be important to the competent authorities in the processing of the case before them. The exchange of information is needed for the implementation of the arm's length pricing mechanism between associated enterprises operating from different jurisdictions. See also H Asif et al *International Economic Law* (2011) 597.

[5] OECD Standard for automatic exchange of financial information in tax matters (2018) https://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf (accessed 20 September 2019) 2. Exchange of information not only ensures the ability of jurisdictions to ensure tax compliance but also ensures smooth adjudication and the efficient usage of OECD mechanisms in the resolution of transfer pricing disputes.

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the treaty partner and for maintaining effective working relationships with competent authorities in other countries.[6]

The need for proper facilitation of cross-border tax transparency has been identified by the G20 and the international community at large.[7] This will equip tax authorities with an effective tool to tackle offshore tax evasion by providing a greater level of information on their residents' wealth held abroad. The challenge is that countries that act alone cannot close the gaps and address the mismatches that arise in the interaction between the tax systems of multiple countries.[8]

For African countries, the need for access to the world's information exchange systems is proportionately greater. This is because for them the adopted OECD dispute mechanisms are less effective in the resolution of transfer pricing disputes in African countries than elsewhere. This has been demonstrated by the inability to use the adopted OECD dispute resolution mechanisms to resolve their transfer pricing disputes. It is therefore important to see how these OECD supporting tools can assist the process of resolving transfer pricing disputes. The information exchange systems are becoming more open and tax authorities may need to know how issues are handled in other African countries in order to understand a MNE's tax affairs.[9]

It has become a practice that during the MAP dispute resolution process, the competent authorities exchange information through the use of paragraph 3 read with paragraph 4 of article 25 OECD MTC. Article 25(3) of the OECD MTC states that:

> [t]he 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.[10]

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[6] OECD Exchange of information working manual: global forum on transparency and exchange of information for tax purposes https://www.oecd.org/tax/transparency/ (accessed 29 September 2019) 4. The exchange of information will be between taxpayers and revenue authority and between revenue authorities *inter se*. The sharing of information forms an integral part of the tax transparency widely spoken about globally. There is as a result a need for a framework within which competent authorities will exchange information smoothly in order to further the said objectives of tax transparency.

[7] OECD (n 3 above) 7. These will include the global activities of MNEs. A commitment of such a nature by both tax authorities and MNE's will ease some of the challenges encountered in resolving tax treaty disputes and improve the efficacy of OECD transfer pricing dispute resolution mechanisms such as the MAP, APA and arbitration. Besides maximising efficacy, it will also minimise costs, something which had been identified as one of the factors that militate against the effective use of the available OECD dispute resolution mechanisms.

[8] South African Revenue Services (SARS) 'Country-by-country and financial data reporting'(2017) https://www.sars.gov.za (accessed 28 September 2019) 13.

[9] It will look like African countries will benefit from improvements in global tax cooperation which in turn will support their domestic resource mobilisation efforts. See OECD (n 3 above) 3; EA Seemann 'Exchange of information under international tax conventions' (1983) 17 *The International Lawyer* 333.

[10] Art 25(3) of the OECD MTC.

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Article 25(4) of the OECD MTC states that:

> [t]he competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs. [11]

The competent authorities should in the course of executing their duties entrusted by the DTA as they endeavour to reach an agreement resolving the transfer pricing dispute, utilise any other available bilateral and multilateral instruments at their disposal. With the transfer pricing documentation requirements, revenue authorities will now be in possession of information with or without the cooperation of the taxpayer.[12]

3 OECD Exchange of Information Tools

In addition to article 25(4) of the OECD MTC, there are other measures and tools available under the bilateral and or multilateral tax conventions that will, if implemented effectively, assist in ensuring that the above referred tax transparency is attained. These include amongst others:[13]

- i) article 26 of the OECD MTC;[14]
- ii) tax information exchange agreements (TIEA);
- iii) BEPS Action 13 (transfer pricing documentation); and the
- iv) Multilateral Convention on Mutual Administrative Assistance on Tax Matters (MAAC) amended Protocol that includes:
    - a) country by country reports,
    - b) master file,
    - c) local file,

[11] Art 25(4) of the OECD MTC.

[12] M Stelloh 'Transfer pricing documentation now compulsory' (2017) 29 *Tax Professional* 27. Previously, competent authorities in the adjudication of cases initiated under the MAP process relied on the co-operation of the taxpayer to make available information that will assist in the resolution of transfer pricing disputes. Taxpayers may take advantage and deliberately withhold the information required and delay the conclusion of the case so as to frustrate the spirit of art 25.

[13] The abovementioned list of OECD tools is not the complete list of all available international tools to enhance tax transparency but have been selected as those that have been demonstrated to be directly relevant towards the effective resolution of transfer pricing disputes.

[14] Art 26 of the DTA between the government of the Republic of South Africa and the government of the Republic of Kenya for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. See also art 27 of the DTA between the government of the Republic of South Africa and the government of the Republic of Ghana for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains. See also art 26 of the DTA between the government of the Republic of South Africa and government of the Republic of Uganda for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income https://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/DTAs-and-Protocols-(Africa).aspx (accessed 17 October 2019). Research shows that even those countries that are actively participating in global tax discussions i.e., Uganda and Kenya, have fewer tax treaties. This affects and limits the usage of art 26 as the exchange of information tool, limiting it only to those fewer countries. This also means that there are a lot of countries across the world that cannot share and exchange tax information with majority of African countries. There is a need for reciprocal exchange pursuant to a pre-defined legal procedure. See C Garbarino & S Graufi 'Transparency & exchange of information in international taxation' in A Bianchi & A Peters *Transparency in international law* (2013) 175.

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d) simultaneous tax examination and,
e) tax examination abroad

3.1 Article 26 - OECD Model Tax Convention

This article is typically applied for two purposes. Firstly, it is applied for information exchange in order to ascertain the facts in relation to which the rules of an income tax convention are to be applied. Secondly, it is applied to assist the contracting state in administering or enforcing its domestic tax law.[15] Its operation arises on the basis of a bilateral agreement between the contracting states. Due to the principle of sovereignty, one state may not without invitation enter the jurisdiction of another to investigate the taxpayer's affairs.[16] The two powerful tools in the collection and enforcement of taxes are the exchange of information in article 26 and assistance in the collection of taxes provided in article 27. For the purposes of this thesis, the focus is more on article 26 which states that:

> [t]he competent authorities of the Contracting States shall exchange such information as is necessary foreseeably relevant for carrying out the provisions of this Convention or of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States….[17]

There must be a legal basis or mechanism which emanates from an obligation imposed by article 26. Such a legal basis will owe its existence from the DTA entered into between contracting states. Most DTAs include article 26 which authorizes and mandates the exchange of tax-related information between the contracting states.[18] From the wording in article 26 of the OECD MTC, the competent authorities 'shall exchange' tax information, it is understood that the intention is to establish an obligation between contracting states. The article covers all possible exchange options between states and thus also applies to information exchanged in the context of MAP as mentioned in article 25 of the OECD MTC.[19] If during consultation, it is the opinion of the authorities that they should exchange information, they should do so by taking into

[15] OECD Manual on the implementation of exchange of information provisions for tax purposes (2006) https://www.oecd.org/ctp/exchange-of-tax-information/36647823.pdf (accessed 24 September 2019) 4.
[16] K Vogel *Double tax treaties and their interpretation* (1986) 13. Contracting states are at the mercy of the other state to assist them with information. The obligation to exchange information between treaty partners is based on the fact that essential foreign information can be obtained only with the assistance of another foreign state; T Schenk-Geers *The international exchange of information and the protection of taxpayers* (2009) 79.
[17] Art 26(1) of the OECD MTC. There have been amendments to the wording of the article to broaden its scope. The word 'necessary' has been replaced by the words 'foreseeably relevant'. The standard foreseeably relevant is intended to provide for the exchange of information to the widest possible extent but indicates at the same time that states are not entitled to request information that that is unlikely relevant, see generally M Rasmussen *International double taxation* (2011) 102 and P Malherbe 'Exchange of tax information: a view from Belgium' (1992) 26 *The International Lawyer* 375.
[18] as above. The OECD MTC provides guidance to contracting states entering into DTAs.
[19] Schenk-Geers (n 16 above) 79.

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consideration the demands and conditions of the exchange of information provision especially the requirement of confidentiality.[20]

There have been additional efforts by the international community to enhance tax transparency and information. For African countries, the challenge regarding the use of information so provided in the resolution of transfer pricing disputes is the non-existence of a legal framework like the MAP which, in as far as bilateral treaties are concerned, is housed only in the DTA. It must be emphasised that the exchange of information between tax authorities is necessary for the correct application of the DTAs.

The tax treaty network between African countries is small, as repeatedly mentioned in this thesis. The implication is that only a handful of African countries can exchange tax and tax related information amongst themselves. There is a likelihood that MNEs doing business in two or more African countries can avoid paying taxes (double non-taxation) or suffer double taxation simply because there is no mechanism giving rise to a legal basis for exchange of information. The absence of a substantial tax treaty network in Africa has resulted in a lot of unresolved transfer pricing disputes. This has not only been between African countries and European countries but also between African countries inter se. This has resulted in a lot of double taxation and at times double non-taxation which consequently erodes Africa's tax base. Article 26 consequently has a limited scope for developing African countries with a low tax treaty network. There is a need for another instrument that can be used to cater for some of the gaps created by article 26. [21]

3.2 Tax Information Exchange Agreements

These new developed tools known as the TIEAs are not intended to change the traditional OECD exchange of information article but are intended to supplement current rules and measures and most importantly to enhance their efficiency. The TIEAs are largely based on the 2002 OECD Model Agreement on Exchange of Information on Tax Matters (hereafter Model TIEA).[22] Another key issue that was identified by the OECD in its BEPS Action Project Plan

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[20] Art 25 OECD Commentary on the articles of the convention (2005) http://www.oecd.org/berlin/publikationen/43324465.pdf (accessed 20 September 2017) 22.

[21] S Meyer-Nandi 'International cooperation in tax matters: a gap analysis of the legal instruments of Ghana, Nigeria and South Africa' (2017) *Inter-agency Cooperation and Good Tax Governance in Africa* 132-133. The disadvantage of solely relying on such a provision in a DTA is that DTAs might not represent the newly developed and changing international standards as they require tedious bilateral negotiations to do so. The tax information exchange agreements were seen as alternatives.

[22] This agreement is a non-binding instrument that serves as a model for assisting contracting states in their bilateral or multinational negotiations aimed at finalizing actual TIEA. The conclusion of TIEAs has been seen as another procedural development in the drive towards tax compliance. See B Zagaris 'International tax law' (1992) *The International Lawyer* 298.

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in the administration of transfer pricing rules was the need for consistent information between taxpayers and tax administrations.[23] TIEAs differ from the DTA in that they are only concerned with exchange of information. Their sole purpose is to exchange tax information between partner countries.[24] The presence or absence of a DTA is not a pre-requisite for states to enter into a TIEA.[25]

3.3 BEPS Action 13

Action 13 of the BEPS Action Plan requires the development of rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The consistent implementation of Action 13 that relates to country-by-country reporting (CbCR) will not only ensure a level playing field, but also provide certainty for taxpayers and improve the ability of tax administrations to use CbC reports in their risk assessment work.[26]

Prior to the introduction of the 2017 edition of the guidelines, there was little specific guidance on the content of a transfer pricing documentation package. Since the reasonableness requirement was subjective, the direct consequence was that in order to meet compliance obligations, some taxpayers provided scant information and analysis which were not entirely useful to tax authorities. Insufficient information also meant that tax authorities were unable to conduct a transfer pricing risk assessment or quickly obtain information required for an audit enquiry.[27]

Despite Action 14 of the BEPS Action Plan which deals specifically with dispute resolution and its commentary on making transfer pricing dispute resolution more effective, there are other

[23] OECD (n 4 above).
[24] The TIEA is used for nothing else but the exchange of information, unlike the normal DTAs on income and capital. The general purpose of these DTAs is to enable the exchange of information between countries where there has previously been no existing legal basis to do so. This means that where there was no DTA in place there could not be any exchange of information. See the sixth meeting of the OECD Joint Forum on Tax Administration, Istanbul (15-16 September 2010) *Joint Audit Report* http://www.oecd.org/ctp/administration/46026232.pdf (accessed 14 October 2019) 11. The TIEA are aimed at promoting actual methods of information cooperation in tax matters through exchange of information in more detail than canvassed by art 26 of the OECD. The TIEA has about 16 arts and it has a more specific scope than the general scope provided for in art 26.
[25] See the TIEA between government of the Republic of South Africa and the government of Belize for the exchange of information relating to tax matters; The TIEA between government of the Republic of South Africa and the government of Jersey for the exchange of information with respect to taxes https://www.sars.gov.za/Legal/International-Treaties-Agreements/Pages/Exchange-of-Information-Agreements-(Bilateral).aspx (accessed 12 July 2019). All countries mentioned have no DTA with South Africa. The only challenge with the TIEA as an instrument in the absence of a DTA is that should a dispute arise in the process of exchanging information, which dispute may if unresolved lead to double taxation, the treaty partners will have no recourse as there is not platform for the mutual resolution of disputes, unless if both parties are signatories to the MLI and have ratified its article 16 or 17 that deals with the MAP.
[26] OECD Guidance on the implementation of country-by-country reporting BEPS Action (13 September 2018) https://www.oecd.org/ctp/guidance-on-the-implementation-of-country-by-country-reporting-beps-action-13.pdf (accessed 15 September 2019) 5. Such CbCR will be handy when it comes to the resolution of transfer pricing disputes, as the availability of information may assist competent authorities in their understanding of the case before it before any of the dispute resolution process is initiated.
[27] See generally O Alabi & O S Adu 'Master file, local file; what you need to know' (2018) *PwC's Transfer Pricing Series* https://www.pwc.com/ng/en/assets/pdf/tp-masterfile-localfile.pdf (accessed 28 September 2019).

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Actions that are also of importance for the effective resolution of transfer pricing disputes. The proposed standardized three-tiered approach to transfer pricing documentation for multinational enterprise groups was formulated by replacing the former Chapter V of the OECD Transfer Pricing Guidelines in July 2017, and it consists of the following:

i) country-by-country reporting (CbCR);
ii) a master file; and
iii) a local file.

3.3.1 Country by country reports (CbCR)

Given the global operations of MNEs, tax authorities may not have sufficient information to combat BEPS and to effectively resolve transfer pricing disputes as intended by Action 14 of OECD Project Plan.[28] One of the aims of transfer pricing documentation as laid down is to ensure that taxpayers take into account transfer pricing requirements when establishing prices and also give appropriate consideration to reporting the income derived from transactions with related parties. This includes providing tax authorities with useful information for transfer pricing audits.[29]

CbCR is required to be presented in a tabular format, setting out information about the functions performed, assets owned, personnel employed, revenue generated, profits earned, taxes paid, capital structure and retained earnings with respect to each entity of the MNE group located in different countries.[30] However, a CbCR is only required when the MNE has an annual global turnover of 750 million euros (EUR).

Jurisdictions have agreed that implementing CbCR is a key priority in addressing BEPS risks.[31] All OECD and G20 countries have committed to implementing the minimum standard of CbCR agreed in the Action 13 report. The Action 13 report recommended that countries implement a

[28] Bakker (n 2 above) 87.
[29] OECD Guidance on transfer pricing documentation and country by country reporting (2014) https://www.oecd.org/tax/guidance-on-transfer-pricing-documentation-and-country-by-country-reporting (accessed 31 September 2019) 14. One of the aspects that have been identified as time consuming during the MAP proceedings is the request that has to made by competent authorities, wherein they request information from the taxpayer and from the other competent authority of the other contracting state regarding the matter before it and also taxpayer information on global activities for it to make a comparison on the used transfer pricing method. It will be very helpful, even prior to the initial request by the taxpayer of the MAP, for tax authorities to have to have such information available.
[30] See KPMG BEPS Action Plan 13 'Master file and country by country reporting: navigating challenges with tax, accounting and IT service offerings' (2016) https://assets.kpmg/content/dam/kpmg/pdf/2016/06/BEPS-Action-Plan-13.pdf (accessed 28 September 2019) 2. This information will assist competent authorities when adjudicating in transfer pricing disputes on the pricing method used as they will have information about the MNEs applied pricing method in other jurisdictions.
[31] OECD (n 26 above) 6.

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legal requirement for CbC reporting with respect to MNEs' fiscal periods commencing on or from 1 January 2016.

3.3.2 Master file

A master file may even enable tax authorities to detect double taxation before the taxpayer initiates a MAP process, as the tax authority will already have an understanding of the global operations of the MNE. A master transfer pricing file should provide the following:

i) the MNE's organisational structure;
ii) a description of the MNE's business;
iii) the MNE's intangibles;
iv) the MNE's intercompany financial activities; and
v) the MNE's financial and tax positions. This includes a list of APAs and ATRs.[32]

The question is how the competent authority, once in possession of the above information, will effectively use it towards the resolution of arising transfer pricing disputes.[33] One of the challenges with regard to transfer pricing has been the lack of comparable transactions and data to authenticate the adoption of a specific transfer pricing method. This challenge has resulted in a lot of unresolved transfer pricing disputes for competent authorities during the MAP process. However, the availability of the master file and the information contained therein will respond positively towards the said challenge. A master file is prepared centrally at the ultimate parent entity of the MNE and submitted with tax authorities of all countries.[34]

3.3.3 Local file

Unlike the master file, the local file provides more detailed information relating to specific intercompany transactions for the respective domestic taxpayer to which the local file applies.[35] The information can be exchanged on request, which request emanates from an existing DTA,

[32] OECD (n 29 above) 18. It is important to note that other master files of other MNEs will be provided and this information will enable the competent authority to have an understanding of the sector for the purposes of comparing data. Lack of adequate comparable transactions within existing databases has always been a problem for most African countries.
[33] KPMG (n 30 above) 3. The master file is prepared at group level and applies to all group companies. It is generally prepared at a high level to explain the business and group operations and it may be used by a tax administration for the purposes of obtaining information for an audit. Once a competent authority is in possession thereof it may be fruitful for usage in the MAP proceedings. Its objective is to provide tax administrators with a high-level overview of the MNE group's global operations and policies.
[34] KPMG (n 30 above) 2.
[35] The local file is entity specific and sets out details about the relevant taxpayer and the specific cross border connected person transactions. Its purpose is to give appropriate information regarding the setting of the intercompany prices. A local file comprises of information relevant to a detailed transfer pricing analysis for the relevant taxing authority for each country in which the MNE group is situated.

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multilateral exchange agreement or TIEA.[36] This, in turn, provides the competent authorities with sufficient documentation in connection with risk assessment and transfer pricing inquiries. In this regard, 'tax authorities will have more insight in the value drivers of the MNEs, the global value chain and key functions.'[37] Also to be added in the local files are the following:

i) a summary of important assumptions made in applying the transfer pricing methodology;
ii) a description of reasons for concluding that relevant transactions were priced at an arm's length basis based on the application of a selected transfer pricing method;
iii) a summary of financial information used in the transfer pricing methodology; and
iv) a copy of existing unilateral, bilateral and multilateral APAs and other tax rulings to which the local revenue authority is not party to and which are related to the controlled transactions mentioned above.[38]

It is important for MNEs to ensure that the information provided in the CbC report, master file and local file is aligned. Any inconsistency in the reports and the files will raise red flags for tax authorities.[39] However, confidentiality, consistency and appropriate use are necessary conditions underpinning the obtaining and the use of CbC reports.[40]

3.4 Multilateral Convention on Mutual Administrative Assistance on Tax Matters

This convention was developed jointly by the OECD and the Council of Europe in 1988 and was amended in 2010 to respond to the call by the G20 to align it to the international standard on exchange of information and to open it to all countries, thus ensuring that developing countries could benefit from the new and more transparent environment.[41] There is a need for an international legal framework to exchange information automatically which will form a legal basis for automatic exchange of information (AEOI). An operative-level competent authority

[36] International Monetary Fund 'Practical toolkit to support the successful implementation by developing countries of effective transfer pricing documentation requirements' https://www.imf.org/external/np/EXR/key/pdf/EN_draft-toolkit-transfer-pricing-documentation-platform-for-collaboration-on-tax.pdf (accessed 5 November 2020) 57.
[37] See generally the European Parliamentary Research Service 'Multinational enterprises, value creation and taxation: key issues and policy development' (2019) https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637971/EPRS_BRI(2019)637971_EN.pdf (accessed 29 May 2020) .
[38] as above.
[39] Bakker (n 2 above) 89.
[40] See generally the OECD BEPS Action 13 Report https://www.oecd.org/tax/beps/beps-actions/action13 (accessed 28 September 2019). Once a competent authority has determined that there is or there has been significant non-compliance by the other competent authority, it is encouraged to take into account factors including the frequency and severity of non-compliance and whether other remedies are available in deciding whether to temporarily suspend the exchange of information. A lot will depend on how the non-compliance has affected any adjustment made by the competent authority in the MAP process.
[41] Its objective is to enable each party to the convention to combat international tax evasion and to better enforce its national tax laws. This includes capacitating the competent authority vis-a-vis its adjudication of the disputes before it.

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agreement that contains the details of the exchanges for jurisdictions to use the multilateral instrument (MLI), and the MAAC has so far been an option.

The amending protocol also provides for the opening of the convention on mutual administrative assistance to non-OECD members.[42] Inherent in the concept 'mutual' is the notion of reciprocity which is a legal concept meaning that both countries are prepared and able to provide similar information to each other.[43] The convention has, as one of its objectives, administrative assistance between states in tax matters. Such assistance comprises of all mutual assistance activities in tax matters which can be carried out by the public authorities, including the judicial authorities.[44] The principle of reciprocity is another element of balance in the implementation of the convention, since a state cannot ask for a form of assistance that it is not ready to grant to other states.

The OECD commentary on article 12 and 13 of the MAAC lists different forms of administrative assistance which the parties may provide for each other, namely:

i) exchange of information including simultaneous tax examinations and tax examinations abroad;
ii) assistance in recovery, including measures of conservancy and service of documents.

Considering that a new co-operative environment has emerged, it is desirable that the MAAC is made available to allow the widest number of states to obtain the benefits and the highest international standards of co-operation in the tax field.[45] The convention caters for various forms of assistance. For the purpose of this thesis focus will be on those forms of assistance considered relevant to the resolution of transfer pricing disputes namely:

i) the exchange of information on request (article 5);
ii) the automatic exchange of information (article 6);
iii) the spontaneous exchange of information (article 7);
iv) simultaneous tax examinations (article 8); and

[42] OECD & Council of Europe (2011) The multilateral convention on mutual administrative assistance in tax matters amended 2010 protocol https://www.oecd-ilibrary.org/docserver (accessed 30 September 2019) 26.
[43] This may be a challenge for most African countries as they may receive more than they give, something which is contrary to the principle of reciprocity.
[44] Art 1 OECD para 1 'The scope of the convention' OCED Commentary on the multilateral convention on mutual administrative assistance on tax matters https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf (accessed 12 October 2019) 2.
[45] as above (Preamble) 1.

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v) tax examinations abroad (article 9).

3.4.1 Exchange of information on request

The exchange of information on request allows tax authorities to obtain specific information from their counterparts in another jurisdiction.[46] In a MAP process, the contracting states may invoke paragraphs 3 and 4 of the MAP article to request information from the other competent authority. If the information available in the tax files of the requested state is not sufficient to enable it to comply with the request for information, that state shall take all relevant measures to provide the applicant state with the information requested.[47] It has been found that non-G20 developing countries have much smaller exchange of information networks, make far fewer exchanges of information requests and, for the most part, do not participate in automatic exchange of information. This observation is more apparent in African countries.[48]

As of 19 March 2020, only a total of 94 countries have sent information with South Africa being the only African country to do so.[49] The problem with information so requested to be exchanged is how it may be interpreted and categorised. The other state may define it in a certain way while the other contracting state may view it differently. At times, the tax information may not be viewed as one of the taxes covered by the treaty to warrant the invocation of article 26 of the OECD MTC.[50]

3.4.2 Spontaneous exchange of information

This is information which is obtained through the exchange of information provisions of a DTA or TIEAs, the transmission of which has not been specifically requested by a foreign competent authority. In spontaneous exchange of information, the providing authority deems that the information may be of interest to a foreign partner for tax purposes.[51] By its nature, a

[46] OECD (n 3 above) 9.
[47] Art 25(2) of the OECD (n 20 above).
[48] OECD (n 3 above) 3.
[49] OECD Signatories and parties to the multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting status as of 28 February 2020 http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (accessed 19 March 2020) 1-4.
[50] Schenk-Geers (n 16 above) 42. Any such mismatch in the interpretation and categorisation of the information requested may render this tool less effective and cause it to be of no assistance in the resolution of transfer pricing disputes as the requesting state may as a result of the differing categorisation, not receive the information it requested.
[51] The spontaneous exchange of information is relevant for transfer pricing dispute resolution in that despite the fact that the MAP request under art 25 of the OECD is initiated by the taxpayer, it remains a process between two contracting states. Such spontaneous exchange of information will assist the receiving tax administration in initiating a well-founded and justified transfer pricing audit that will specifically focus on those issues that were flagged by the other contracting state. Should the receiving competent authority arrive at the same finding and effect a transfer pricing adjustment which gives rise to a dispute, it will be easy for both competent authorities to reach an agreement since the other contracting state is aware of the issues giving rise to the adjustment. It has been said regarding the MAP that it is costly and time consuming. The spontaneous exchange will address this as the affected competent authorities will be familiar with the facts at issue and will be quick to reach an agreement that prevents tax avoidance while eliminating double taxation.

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spontaneous exchange of information relies on the active participation and co-operation of local tax officials.[52]

3.4.3 Automatic exchange of information

The OECD defines the AEOI as the systematic and periodic transmission of 'bulk' taxpayer information by the source country to the residence country in a common reporting format or standard. The increasing internationalisation will also mean revenue bodies will need to cooperate and collaborate more closely in order to optimise compliance with international and national tax rules.[53] The types of cooperation between revenue bodies may vary from the traditional exchange of information under a DTA to include the use of other multilateral instrument.

Three primary elements are needed to implement the AEOI Standard:

i) putting in place the complete domestic legal framework containing the due diligence and reporting rules;
ii) putting in place and activating the legal and operational framework for exchanges: An underlying legal gateway for exchange should be in place for the period of the exchange, which can be multilateral. Example, the MAAC or bilateral in a form of a DTA or a TIEA providing for AEOI; and
iii) the technical operation of the exchanges. This element includes ensuring the IT and operational aspects are in place to receive the information from financial institutions and to transmit it to each exchange partner.

3.4.4 Simultaneous tax examination

At the request of one of them, two or more parties shall consult together for the purposes of determining cases and procedures for simultaneous tax examinations (STE). Each party involved shall decide whether or not it wishes to participate in a particular STE.[54]A STE is defined in Part A of the OECD model agreement for the undertaking of STE as:

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[52] OECD (n 15 above) 3. The reason why it is usually effective is because it is detected by officials while conducting an audit or investigation and they would have perused the existing DTA and examined how it affects the other contracting state hence they would have found reason to provide it. However, there are still chances that the two competent authorities may fail to reach a mutual agreement from any dispute by the taxpayer in terms of art 25 that may arise out of such cooperation and correspondence.

[53] Sixth meeting of the OECD Joint Forum (n 23 above) 7. The Audit Report goes further to say that recent focus in international cooperation has been on the intensification, streamlining and optimising of the impact of exchange of information.

[54] Art 8(1) of the OECD MTC 'The multilateral convention on mutual administrative assistance on tax matters (2011) https://read.oecd-ilibrary.org/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters (accessed 10 October 2019). A simultaneous tax examination means an arrangement between two or more parties to simultaneously examine, each in its own territory, the

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> [a]n arrangement between two or more parties to examine simultaneously and independently each on its own territory, the tax affairs of a taxpayer in which they have a common or related interest with a view to exchanging any relevant information which they so obtain.[55]

A STE puts the competent authority in a position to exchange information in a shorter time compared to a traditional exchange of information under article 26. Exchanging information during the STE has a structured framework within which two or more revenue bodies work together. The MAAC explicitly provides the building blocks for this framework. It is this kind of international cooperation that will ease some of the challenges previously mentioned that militate against the conclusion of the bilateral and multilateral APAs.

STE requires revenue bodies to co-operate at the practical level.[56] Representatives of the revenue authority and its foreign partners meet to coordinate strategies and discuss technical issues developed during the examinations. There is no exchange of personnel between the revenue authority and foreign partner during a STE, each remain operating within their own jurisdiction. In a STE, the tax administrations will exchange relevant information gained in the individual audits, with the goal of agreeing on a consistent set of facts. It is this agreement on the set of facts that may assist the involved competent authorities to agree and speedily resolve on any emerging and impending transfer pricing dispute.

3.4.5 Tax examinations abroad

At the request of the competent authority of the applicant state, the competent authority of the requested state may allow representatives of the competent authority of the applicant state to be present at the appropriate part of a tax examination in the requested state.[57] Tax examinations abroad reduce the compliance burden for taxpayers by enabling tax administrations to work together, rather than independently, on issues regarding the same taxpayer or taxpayer group. Such cooperation ensures that duplication is minimised or avoided altogether. Costs are reduced and time is saved, all of which flow as advantages to the taxpayer.[58] From an African point of

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tax affairs of a person or persons in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain. See also art 8(2) of the OECD MTC.

[55] Para 5 of the OECD (n 15 above) 4.

[56] During this practical engagement, tax authorities will be better placed to also share their interpretations of the treaty provisions which will assist them in the MAP process and in any DTA dispute; See Ernest & Young 'OECD releases final report on improving the effectiveness of dispute resolution mechanisms under Action 14 (2015) *Global Tax Alert* https://www.ey.com/gl/en/services/tax/international-tax/alert--oecd-releases-final-report-on-improving-the-effectiveness-of-dispute-resolution-mechanisms-under-action-14 (accessed 26 October 2019) where it is said that the minimum standard requires that art 25 is implemented and applied in such a way that it allows competent authorities to discuss and resolve differences or difficulties regarding the interpretation or application of the OECD MTC.

[57] Art 9(1) of the OECD MTC https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf (accessed 17 November 2018) 12.

[58] OECD 'Manual on the implementation of exchange of information provisions for tax purposes: conducting tax examinations broad' (2006) http://www.oecd.org/ctp/exchange-of-tax-information/36648057.pdf (accessed 18 December 2019) 5. It is from this existing cooperation evolving during the examination process that any art 25 request initiated by the taxpayer arising from such tax examination abroad will be

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view this was supported in an attempt to help African countries to rapidly broaden their EOI network while avoiding the complex, long and sometimes unwilling negotiation of taxing rights.[59]

4 Existing OECD Information Exchange Tools in South Africa

4.1 Article 26 - Exchange of Information

South Africa can be said to be the one African state which has a wide tax treaty network and all its DTAs both within and outside of the continent contain both the exchange of information (article 26) and the MAP (article 25). Jurisdictions have to put in place international agreements with each of their partners to deliver the widespread networks necessary for automatic exchange of information.

South Africa has DTA with 19 of the 54 African states.[60] The advantage for South Africa in having a wider tax treaty network is that if during the exchange of information on request, simultaneous examination or tax examination abroad, there arise differences that result in a dispute vis-à-vis the context of information so provided, the competent authorities are immediately able to give effect to the provision of the article in the DTA.[61]

4.2 Tax Information Exchange Agreements

South Africa has sought to enter into TIEAs with countries that it did not have DTAs with but which it has identified a need for exchange of tax information.[62] This framework merely allowed for exchange of tax information. South Africa has adopted a particular version of the international model.[63] South Africa also has a number of tools and instruments in place to ensure

responded to promptly by the competent authorities and resolved without any waste of time as both contracting states were part of the examination and are already familiar with the foundation of the case. In that case the possibilities of the competent authorities reaching an agreement under the MAP is high, particularly when considering the fact that a MAP process is a government-to-government matter between the two contracting states which the taxpayer is not party to.

[59] OECD (n 3 above) 32. Accordingly, by being members of the convention, African countries have extensively expanded their network of mutual administrative assistance partners through one single legal basis. See also Meyer-Nandi (n 21 above) 151.

[60] This would mean that South Africa can only exchange of information through the traditional use of the DTAs with 19 African countries. Despite the pitfalls within the traditional OECD dispute resolution mechanisms South Africa appears to be better as opposed to other African states. However, there is a lot of development that is needed like having to explore the use of other mechanisms such as the APA and MBA to resolve South Africa's transfer pricing disputes.

[61] HA Qureshi & A Ziegler *International economic law* (2011) 602. The intention of global co-operation is to ensure, amongst other things, the elimination of double taxation and the prevention of impermissible tax avoidance, so if in the exchange of information there arise disputes which cannot be resolved, then that will make the whole exercise futile. While countries exchange information, there needs to be a framework that will address those emerging disputes to avoid double taxation.

[62] See generally the TIEAs between South Africa and the Cayman Islands, and the Guernsey and San Marino for the exchange of information relating to tax matters https://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-EIA-2013-01%20-%20Status%20Summary%20of%20all%20Tax%20Information%20Exchange%20Agreements.pdf (accessed 21 October 2019).

[63] See generally the DTAs between South Africa and the UK, Kenya, Serbia, Syria, Mauritius & Zambia. Also see Tax information exchange agreements: briefing' *Parliamentary Monitoring Group* https://pmg.org.za/committee-meeting/12515/ (21 October 2019).

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the exchange of information with other countries which includes the USA Foreign Account Tax Compliance Act (FATCA). FATCA is an American law passed in March 2010 which requires reporting of specified United States (US) persons or entities controlled by specified US persons by certain foreign financial institutions. Its aim is to identify US persons who may be using offshore accounts to avoid US taxation on their income and assets. On 9 June 2014, the government of the Republic of South Africa and the government of the United States of America signed an intergovernmental agreement to improve international tax compliance and to implement the provisions of FATCA (Agreement).[64] The efficacy of this information exchange tool for the resolution of transfer pricing dispute will not be discussed since the focus of the study relates only to OECD tools.

Among other tools that South Africa has adopted is the Common Reporting Standards (CRS). It has committed together with over 100 other jurisdictions to commence exchange of information automatically on a wider front from September 2017, by 2018. These are agreements between the governments (tax administrations) of two or more jurisdictions to enable the competent authorities to exchange information under the CRS. South Africa is also a signatory to the competent authority agreement (CAA), that links the CRS to the legal basis for exchange specifying the financial information to be exchanged. [65]

4.3 Multilateral Convention on Mutual Administrative Assistance on Tax Matters

On 3 November 2011, South Africa signed the MAAC. This convention came into effect in South Africa on 1 March 2014.[66] The convention covers a much wider range of taxes than many of the DTAs, and like the MLI, it extends co-operation to some countries with which South Africa does not have DTAs.[67] Article 4 of the MAAC states that 'parties shall exchange any information that is foreseeably relevant for the administration or enforcement of their domestic laws concerning the taxes covered by this convention.'[68] South Africa will during MAP

[64] SARS Guide on the U.S. foreign account tax compliance act (FATCA) Issue 2 https://juta.co.za/media/filestore/2017/03/15_Guide_on_US_Foreign_Account_Tax_Compliance_Act_FATCA_-_External_Guide....pdf (accessed 5 November 2020) 3.

[65] SARS Information exchange agreements https://www.sars.gov.za/Legal/International-Treaties-Agreements/Pages/Exchange-of-Information-Agreements-(Bilateral).aspx (accessed 5 June 2020).

[66] OECD Jurisdictions participating in the convention on mutual administrative assistance in tax matters status – 9 December 2020 https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf (accessed 29 December 2020) 5. See also Government Notice 113 *Government Gazette* No. 37332 (2014) https://www.greengazette.co.za/pages/national-gazette-37332-of-21-february-2014-vol-584_20140221-GGN-37332-038.pdf (accessed 21 November 2019).

[67] B Strydom 'Mutual assistance and co-operation between the South African Revenue Service and foreign tax authorities' http://www.bowmanslaw.com/article-documents/SARS-And-Foreign-Tax-Authorities.pdf (accessed 25 October 2019) 2. Such cooperation should be expected provided the same countries have also signed and ratified the MLI also.

[68] The relevance of the MLI to the MAAC is that South Africa, having signed and ratified both conventions, enjoys the benefit of an extended coverage in the elimination of double taxation as it will now be able to enter into a MAP with a lot of countries. The benefit to be enjoyed by South Africa will not only be limited to the availability of information from signatories but will include the usage of such information to

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proceedings, even in the absence of a DTA with the other affected state, be able to utilise article 5 thereof to request exchange of information from any member state which is a signatory to the convention as long as the requested information is foreseeably relevant to the dispute. The requested state shall provide South Africa with any information referred to in article 4 which concerns particular persons or transactions.

It goes further to say that if the information available in the tax files of the requested state is not sufficient to enable it to comply with the request for information that state shall take all relevant measures to provide the applicant state with the information requested.[69] What is important is that there must be international legal framework in place allowing for the automatic exchange of the information with all interested appropriate partners within the committed timeline. As at 2020 South Africa had shared more than 60 exchanges of tax information with other signatories of the MAAC.[70]

4.4 BEPS Action 13

South Africa was involved in the work of the OECD which resulted in the BEPS Action 13 Report and, consequently, introduced regulations in line with the BEPS Action 13 Report.[71] With the implementation of these requirements South Africa is the second country on the African continent to fully introduce the BEPS Action 13 requirements.[72] Although there are challenges, the new system of requirements adopted by South Africa is in line with many other countries across the world and includes the latest international standards. South Africa has adopted the transfer pricing documentation and CbCR. It has, in response to the global challenges vis-à-vis international tax co-operation, introduced a domestic legal framework that

be obtained in the improved transfer pricing dispute resolution process provided for by the MLI. See also article 16 of the MLI which aims to improve dispute resolution by making it more effective. The article aims to ensure the consistent and proper implementation of tax treaties, including the effective and timely resolution of disputes regarding their interpretation or application through the MAP.

[69] The latter part of the article extends the role that the requested state must fulfil, that it will have to exhaust every possible avenue within its jurisdiction to ensure that it is able to gather the information so requested. It will not be enough for the requested country to respond by saying that it does not have the information.

[70] OECD Global forum on transparency and exchange of information for tax purposes automatic exchange of information implementation report (2018) https://www.oecd.org/tax/transparency/AEOI-Implementation-Report-2018.pdf (accessed 28 September 2019) 10.

[71] C Wiesener 'South Africa & Africa: transfer pricing documentation in a post-BEPS world' (2018) 73 *South African Tax Talk* 11. See also the public notice issued in the *Government Gazette* 40516 (23 December 2016) and the public notice issued in *Government Gazette* 40375 (2016) https://www.greengazette.co.za/documents/national-gazette-40375-of-28-october-2016-vol-616_20161028-GGN-40375 (accessed 28 September 2019). The gazette imposes transfer pricing documentation retention requirements. After much public consultation and drafting, a third public notice in *Government Gazette* 41196 was published https://www.greengazette.co.za/documents/national-gazette-41196-of-25-october-2017-vol-628_20171025-GGN-41196.pdf (accessed 20 February 2020). The gazette imposes an obligation to file transfer pricing returns for CbC reporting, master file and local file imposing penalties on taxpayers for non-compliance with relevant filing obligations. The attention the subject of CbC reports has been given attention in South Africa shows that the country takes global tax transparency seriously.

[72] South Africa has a fairly advanced tax system, compared with the majority of African countries. As a member of the Group of 20, South Africa is the only African country that acceded to the OECD base erosion and profit shifting project. See UNECA 'Base erosion and profit shifting in Africa: reforms to facilitate improved taxation of multinational enterprises' (2018) https://www.uneca.org/sites/default/files/PublicationFiles/base-erosion_rev.pdf (accessed 8 November 2020) 44-45.

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will enable SARS to receive and where relevant exchange pertinent transfer pricing information provided in the CbC reports and/or master files and local files with other jurisdictions.

4.4.1 Country-by-country reporting

The CbCR is effectively a document setting out jurisdiction and entity specific information on a global basis. It is a report submitted to the tax administration in the country where the ultimate parent entity is located and is automatically exchanged with tax administrations in the other countries, provided a suitable exchange of information agreement exists.[73] The CbCR according to BEPS Action 13 has been implemented for the years starting from 2016. The required threshold is an annual consolidated group revenue exceeding 10 billion Rands or 750 million Euros in the previous financial year. The deadline for the preparation or submission of the CbCR is 12 months after the end of the reporting fiscal year of the MNE.

South Africa has implemented a surrogate filing which is a secondary filing. There is a duty of notification on the part of any constituent entity of an MNE group that is resident for tax purposes in South Africa to notify SARS no later than 12 months after the end of the reporting fiscal year of such an MNE about whether it is the ultimate parent entity or the surrogate parent entity.[74] Where the constituent entity is neither the ultimate parent entity nor the surrogate parent entity, it must notify SARS of the identity and tax residence of the reporting entity, no later than 12 months after the end of the reporting fiscal year of such a MNE group.

4.4.2 The master and local files

The master file concept according to BEPS Action 13 has been incorporated in the domestic legislation, so that in the resolution of transfer pricing disputes, the competent authority will have access to intercompany financial transactions of the MNE. The same will happen with regards to the local file. South Africa will have access to:

i) a summary of important assumptions made in applying the transfer pricing methodology;

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[73] Wiesener (n 71 above) A Waris 'How Kenya has implemented and adjusted to the changes in international transfer pricing regulations 1920-2016' (2017) 69 *International Centre for Tax Development* 34 is of the view that the CbC report and transfer pricing documentation are a diagnostic tool for tax authorities. It provides the competent authority with an understanding of the MNE's transfer pricing policy and the rationale behind the adoption of a specific transfer pricing method on all its global operations. This information is key during the adjudication of the MAP request. It gives different profit level indicators aligned with the transfer pricing policy as stated in the master file and local file.

[74] The tax information that will be contained in the surrogate filling will assist the revenue authority to at least understand what will be in the parent entity's reports. This understanding will be vital for the members of competent authority to familiarise themselves with the background of the MNE's adopted transfer pricing method and other related tax information.

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ii) a description of reasons for concluding that relevant transactions were priced at an arm's and based on the application of a selected transfer pricing method.

It has been suggested that the effective implementation of the BEPS Action 13 transfer pricing documentation encourages tax transparency and in situations where the taxpayer has behaved in a compliant manner and SARS agrees with the position taken, South Africa should consider an APA as one of the mechanisms to resolve disputes and avoid the never-ending audit cycle.[75] Considering the costs and time involved in negotiating or re-negotiating DTAs, the MLI and the MAAC has provided South Africa with the easiest and less costly method of updating its tax treaty network. Reliance on bilateral negotiations to introduce the BEPS measures would cause uncertainty, delays and expenses and would tend to disadvantage developing countries.[76]

4.5 Other Regional Tax Information Exchange tools

South Africa as a member of Southern African Development Community (SADC) has also signed a Southern African Development Community Agreement on Assistance on Tax Matters.[77] This agreement although not part of the study, creates an avenue for Southern African countries to exchange information on request, spontaneously and through simultaneous tax examinations and tax examinations abroad. It also provides for assistance in tax collection. It is unfortunate that the governments of these countries do not regard the adoption of the regulatory framework in the exchange of tax matters as a priority within their societies only focusing on other types of economic matters within their countries.[78]

4.6 Country Summary: South Africa

With its tax treaty network, South Africa has a better chance to make use of the exchange of information (article 26) when confronted with MAP (article 25) dispute resolution process. It has nineteen bilateral tax conventions with other African countries. South Africa has also entered into TIEAs with countries that it never had DTAs with before.[79] However, it should be

[75] N Gosai 'Transfer pricing: evolution or revolution' (2018) 73 *South African Tax Talk Magazine* 13.
[76] A Oguttu 'Should developing countries sign the OECD multilateral instrument to address treaty related base erosion and profit shifting measures?' (2018) 132 *Centre for Global Development* 4.
[77] See generally SADC documents & publications https://www.sadc.int/files/8915/6525/0780/Agreement_on_Assistance_in_Tax_Matters_-_2012_-_English.pdf (accessed 5 June 2020). This is an agreement between SADC members which was signed on 16 August 2012 but is not yet in force. Looking at the wording used in this agreement, one can assume of course without concluding that it owes its origin from the MAAC.
[78] P Letete 'Developments in exchange of information in tax matters within SADC: a move towards tackling tax fraud in Southern Africa' (2018) 17 *International Business & Economics Research Journal* 17.
[79] See generally the TIEAs between South Africa and the Cayman Islands, Guernsey and San Marino (n 62 above).

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noted that the TIEA does not have a dispute resolution framework as it merely allows for exchange of tax information only.

South Africa signed the MAAC. It has also signed the MLI which has a dispute resolution framework. By so doing South Africa will gain access not only to the exchange of tax information from signatories of the MAAC but also to the usage of the MLI to resolve disputes with countries which are signatories to both conventions. However, South Africa has issued a reservation on the use of arbitration as a tax treaty dispute resolution mechanism.

South Africa, being the second country on the African continent to fully introduce the BEPS Action 13 requirements, is able to participate in the latest international standards of transfer pricing documentation. This will include the CbCR, master file and local file for MNE's operating in South Africa. Although there will be challenges, the new tax transparency requirements will enable countries to look at the usage of APA to avoid and resolve transfer pricing disputes.

5 Existing OECD Exchange of Information Tools in Kenya

5.1 Article 26 - Exchange of Information

Kenya has 16 DTAs in force; this means that there is about 194 countries unable to exchange tax information with it in the traditional DTA mechanisms.[80] Of those 16 DTAs Kenya has signed only two with other African states namely; South Africa and Zambia. Kenya has an exchange of information article in most of its DTAs.[81] Most importantly, Kenya recognises the importance and the role that article 26 (exchange of information) can play in the resolution of transfer pricing disputes under article 25 (MAP). This can be seen in its DTA with Netherlands where it is stated that:

> [t]he Contracting States may release to the panel of arbitrators, established under the provisions of paragraph 5 of Article 25, such information as is necessary for carrying out the arbitration procedure. The

[80] See generally the Exchange of information database https://eoi-tax.com/jurisdictions/Kenya (accessed 21 September 2019). See also Kenya: Double taxation agreements (DTAs) & Protocols https://www.taxbaddy.com/applications/academy/internationaltax/dta/dta/ke_default3.php (accessed 11 July 2020). The absence of DTAs may result in double taxation. For instance, Kenya which does not have a tax treaty with Uganda, does not give a credit for taxes paid overseas unless a tax treaty is in place. Instead, it allows Kenyan companies to deduct foreign taxes paid as an expense, which arguably entails some double taxation.

[81] Art 26 of the DTA between the government of the Republic of South Africa and the government of the Republic of Kenya for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income https://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/DTAs-and-Protocols-(Africa).aspx (accessed 22 October 2019).

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> members of the arbitration board shall be subject to the limitations on disclosure described in paragraph 2 of this Article with respect to any information so released.[82]

The exchange of information through bilateral tax treaties has had some challenges. There is information that in other jurisdictions, requests have been ignored completely by some countries, including the United Kingdom (UK).[83] Recently, the UK requested Germany to share information with it, but Germany declined stating that its understanding was that the information requested did not fall within the parameters of what they were expected to share. Having understood the challenges in the above referred exchange of information case, the KRA took the initiative to renegotiate its DTA with Germany. This initiative was done in an attempt to avoid the occurrence of any misunderstanding like it happened between the requests by UK to Germany.[84] The need to renegotiate this DTA with Germany would not be necessary if Kenya was to sign, ratify and implement the existing multilateral conventions that have been adopted by many OECD countries.

5.2 Multilateral Convention on Mutual Administrative Assistance in Tax Matters

Kenya became a signatory to this convention on 8 February 2016 and it was initially expected to commence information sharing with other signatories as of 2018. To date Kenya is one of the developing countries that has not yet set the date for its first automatic information exchanges. Kenya is also a part of the Global Forum on Transparency and Exchange of Information for Tax Purposes and has been rated to be 'largely compliant' with regard to the transparency initiatives.[85] It must be noted regarding these OECD multilateral tools and instruments that Kenya has not yet signed the MLI.[86]

The CbCR according to BEPS Action 13 has not been implemented yet. Kenya's parliament tabled a new Income Tax Bill in May 2018 which proposes that CbCR should be filed with the KRA within 12 months after the last day of the reporting fiscal year of the MNE group. The

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[82] Art 26(3) of the DTA between the Netherlands and Kenya http://vivaafricallp.com/wp-content/uploads/2017/03/Kenya-Netherlands-DTA.pdf (accessed 28 September 2019) 12. The reference to art 25 in art 26 of the convention appreciates the interdependence of the two articles. One may also argue that article 26 of the Kenya-Netherlands DTA recognises the usefulness of the exchange of information for the resolution of transfer pricing disputes.

[83] At times exchange takes much longer than required without sufficient justification. See OECD Global forum on transparency and exchange of information for tax purposes: multilateral co-operation changing the world' (2020) http://www.oecd.org/tax/transparency/global-forum-10-years-report.pdf (accessed 2 November 2020) 24.

[84] Waris (n 73 above) 28.

[85] See generally A Rüegg 'Tax Transparency in Kenya' (2018) https://www.blog.kpmg.ch/tax-legal-news/tax-transparency-kenya (accessed 24 August 2019).

[86] The benefit of the extended coverage accorded by the MLI will not apply to Kenya particularly as the MLI deals directly with the making of dispute resolution mechanisms more effective as it provides a multilateral approach to a universal problem by virtue of its multilateral application to its signatories.

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bill has not yet been enacted into law. As regards the master file concept as coined in the BEPS Action 13, Kenya has not incorporated it in its domestic legislation yet. Based on the preparations so far, it is anticipated that the KRA will implement the master file concept soon.[87] Without the implementation of this tool, Kenya will miss a lot of what is ordinarily contained in the master file which includes the MNE's organisational structure, description of its business, its intercompany financial activities and a list of its APAs and ATRs. This information could be useful during the MAP proceedings in the resolution of transfer pricing disputes.

5.3 Multilateral Competent Authority Agreement

Kenya has applied to join the Global Forum which gave rise to it adopting the Multilateral Competent Authority Agreement (MCAA). This agreement has been signed by about 97 countries.[88] The CRS platform requires participating governments to domesticate MCAA and establish the mechanism for sharing information on a confidential basis. Kenya has not fulfilled the requirements for CRS.[89]

In December 2019 Kenya to signed the MLI but it has not yet ratified it, ratification and entering it into force will be important as it is the MLI in particular that deals with the resolution of transfer pricing disputes by providing more improved dispute resolution mechanisms.[90] Hopefully, with the signed MCAA and CbCR commitments from MNEs and countries, the KRA will be able to draw on exchanged information on MNEs doing business in Kenya.[91] One strategy of the transfer pricing unit has been to only look into companies that are resident in countries that have DTAs with Kenya, from which information could be requested.

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[87] M Scharf 'OECD Master file-concept and CbC reporting – national implementation' (2018) https://www.roedl.net/fileadmin/user_upload/Roedl_Estonia/misc/OECD_Master_File-concept_and_CbCR_-national_implementation_RoedlPartner_....pdf (accessed 5 November 2020) 38.

[88] S Okoth et al 'CRS & Amnesty in Kenya' (2018) *Kenya International Developments* https://www.bdo-ea.com/en-gb/insights/featured-insights/crs-amnesty-news (accessed 21 August 2019) 2. Although the framework is more for financial institutions, such information can also be used by revenue authorities during transfer pricing audits to warrant the transfer pricing adjustments of MNEs and most importantly to support the country's position on the allocation of profits during dispute resolution processes.

[89] Kenya ought to accelerate the process of ensuring compliance with required domestic framework so that it can begin to share and exchange information with other jurisdictions in terms of this MLI. It will serve no purpose to make international commitments and sign multilateral agreements while there is no effort domestically to fulfil the agreed international obligations.

[90] OECD Kenya becomes the 94th jurisdiction to join the most powerful multilateral instrument against offshore tax evasion and avoidance https://www.oecd.org/ctp/exchange-of-tax-information/kenya-becomes-the94th-jurisdiction-to-sign-the-mac.htm#:~:text=Kenya%20today%20signed%20the%20Multilateral,th%20jurisdiction%20to%20join%20it.&text=Since%20then%2C%20the%20Convention%20has%20become%20a%20truly%20global%20instrument (accessed 9 July 2020). Kenya's failure to ratify the MLI means that it will not benefit from the coverage enjoyed by other signatories who have ratified the agreement. With such a low tax treaty network, Kenya will experience challenges when it comes to resolving transfer pricing disputes as the MAAC does not make provision for a dispute resolution framework. Such a framework is only available in terms of the arts 16, 17 and 28 of the MLI. In the absence of a DTA with the other state exchanging information, any mismatch or differences in the interpretation that may be discovered or identified during the STE or tax examination in which both competent authorities are involved will not be resolved since there will be no framework for a MAP in place between the two competent authorities.

[91] Waris (n 73 above) 29. It is important to note that the Multilateral Competent Authority Agreement (MCAA) has to do with financial accounts information, a discussion which is not covered in this thesis. The study is more on MNEs in relation to the transfer pricing disputes arising out of their intercompany transactions.

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5.4 BEPS Action 13

Kenya's implementation of the BEPS Action 13 was expected in 2019. On 22 July 2020, Kenya ratified the MAAC, but it is still not announced its entry into force.[92] It has a draft bill for the CbCR and expressed an intention regarding the master and local files.[93] In Kenya MNEs effectively control and set domestic prices, which then makes it almost impossible for the revenue authority to place any comparison on pricing methods.[94]

5.4.1 Local documentation requirements

Taxpayers are required to disclose their related-party transactions when filing the annual corporation tax return with the KRA. Taxpayers are also required to notify the KRA of any changes in the group structure and related-party transactions and update their transfer pricing policy accordingly. The assessment system in place is already interlinked with all other systems in government and simply requires that the taxpayer confirm or vary the information that the KRA already has in calculating taxes.[95]

5.5 Exchange of Information During Arbitration

There is mention of contracting states having to release information to the panel of arbitrators established under the provisions of article 25(5) of the OECD MTC. Such information as is necessary for carrying out the arbitration procedure.[96] It would look like Kenya will still have challenges in the effective resolution of transfer pricing disputes since it does not have the benefit that is accorded by the MLI (signed but not ratified) and the MAAC ratified but not yet entered into force.

The absence of these supporting tools in Kenya will also hamper the MAP and the arbitration process as the information that comes with the effective use of these supporting tools will not

[92] See generally Ernest & Young 'Kenya deposits its instrument of ratification of the Convention on Mutual Administrative Assistance in Tax Matters with the OECD' https://www.ey.com/en_gl/tax-alerts/kenya-deposits-its-instrument-of-ratification-of-the-convention-on-mutual-administrative-assistance-in-tax-matters-with-the-oecd (accessed 8 November 2020).

[93] KPMG 'BEPS Action 13: Country implementation summary last updated: January 16, 2020' https://assets.kpmg/content/dam/kpmg/be/pdf/2020/01/tnf-beps-action-13-january16-2020.pdf (accessed 8 November 2020) 53.

[94] Waris (n 73 above) 27. It would mean that when the competent authorities are adjudicating over a MAP case, they have no local enterprises to compare and with no CbC report in place since Kenya has not yet ratified the MAAC. The competent authorities will always have challenges in resolving the transfer pricing dispute before them. More so as transfer pricing disputes are around the transfer pricing method adopted and what constituted the price for the goods or services supplied. The same problem of a lack of comparable data required for the resolution of the transfer pricing dispute will also extend to the quantification of the value of the transaction when the competent authority has to effect the art 9(2) corresponding adjustments. The challenge with the BEPS Action plan is that it moves forward on a presumption that the tax systems of all countries are at the same level of sophistication, something of a misnomer for many African countries.

[95] Waris (n 73 above) 31.

[96] Art 26(3) (n 82 above).

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be available to the competent authority during the resolution of transfer pricing disputes. Under the MAAC there it is a requirement for MNEs to prepare and submit information annually and at times spontaneously. The supplied information by the MNE have the potential to reduce the never-ending audit cycle that triggers multiple costly and time-consuming transfer pricing disputes.

5.6 Other Regional Tax Information Exchange Tools

Kenya is part of the EACDTA[97] which is aimed at widening and deepening economic coordination among member states. Again, the EACDTA is based on both the OECD and the UN model. It is a multilateral DTA and contains an article on cooperation in exchange of information.[98] It allows for exchange of information between all six member states on a multilateral basis. The advantage of the article is that it allows and extends the exchange of information to the application of the domestic law and not only the DTA.

5.7 Country Summary: Kenya

Kenya only has signed 16 DTAs in force and only two are with other African countries. Its low tax treaty network in Africa makes its usage of the OECD dispute resolution inefficient as its tax information exchange with other African countries is only limited to those two, namely, South Africa and Zambia. Even though Kenya is a signatory to the MAAC which expands its tax treaty network to more than 100 jurisdictions, that network only relates to exchange of tax information only. Although Kenya has ratified the treaty, it has neither entered it into force nor set the date for its first automatic information exchanges.

Kenya has signed but not ratified the MLI which makes available newly developed OECD disputes resolution mechanisms. As a result, any transfer pricing disputes emanating from the information exchanged under the MAAC will not be resolved since it will not have access to the dispute resolution framework provided for the by the MLI. Since ratification of the MAAC, Kenya will have access to information but will not be able to act towards the resolution of any arising transfer pricing disputes. It will still need to ratify the MLI and incorporate some of the tax dispute resolution mechanisms for it to effectively resolve its transfer pricing disputes.

[97] It is a multilateral treaty for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income between the Republics of Kenya, Uganda, Burundi, Rwanda, South Sudan and Tanzania.
[98] Art 27 of the ECA DTA: *Handbook* 75.

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6 Existing OECD Information Exchange Tools in Uganda

6.1 Article 26 Exchange of Information

Uganda has 12 DTAs, all of which contain the information exchange article. Seven of those DTAs are in force and contain sufficient provisions to enable it to exchange information. Of the seven DTAs in force only one is with another African state. At the most Uganda may be receiving one request per year using the powers of the information exchange in its DTAs. Uganda is part of a pilot automatic tax information exchange project with the UK, but not many gains are expected from this exercise in the short to medium-term.[99] So, while this might be an important tool to combat tax evasion in principle, in practice it is a tool from which Uganda will start to benefit by gaining access to global operations of many MNEs.[100]

Uganda has received nine requests for information, including one request for information exchange in a MAP. It has been able to fulfil its information exchange commitment because its competent authority has direct access to all the data collected as part of the filing requirements applicable in Uganda.[101] From this data it is able to supply tax information requested by its bilateral treaty partners.

Uganda has a small tax treaty network, which means that its ability to exchange information using the traditional DTAs is limited to those 12 countries. Exchange of information and international co-operation is clearly a priority for the URA. However, it is not always achieved looking at Uganda's current DTAs. Such co-operation would be achievable and effective with the assistance of multilateral tax agreements.

6.2 Multilateral Convention on Mutual Administrative Assistance in Tax Matters

Uganda has signed and ratified the MAAC and had deposited its instrument for ratification on 25 May 2016.[102] The signing of the MAAC has widened Uganda's network of exchange of tax information to cover 102 jurisdictions. This includes 12 DTAs, a multilateral agreement with the East Africa Community, and the ATAF mutual administrative assistance in tax matters

[99] M Hearson & J Kangave 'A review of Uganda's tax treaties and recommendations for action' (2016) 50 *International Centre for Tax Development* 14.
[100] Hearson & Kangave (n 99 above) 13.
[101] OECD Global forum on transparency and exchange of information for tax purposes: tax transparency in Africa (2018) https://www.oecd.org/tax/transparency/africa-initiative-report-2018.pdf (accessed 29 September 2019) 54.
[102] See generally Uganda Revenue Authority (URA) https://www.ura.go.ug/readMore.do?contentId=999000000000821&type=TIMELINE# (accessed 2 June 2020).

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(AMATM). Only seven of its 12 DTAs are in force and meet the international standards and contain sufficient provisions to enable Uganda to exchange all the relevant information.

The multilateral convention will give Uganda access to 100 jurisdictions, some of which are those that Uganda already has DTAs with.[103] The multilateral approach adopted by the MAAC will be beneficial also to those states with that have not concluded a tax treaty, particularly as tax treaty network has been identified as challenges for the resolution of transfer pricing disputes within the African continent.

Overall, Uganda has a legal and regulatory framework in place that generally supports the availability, access and the exchange of information for tax purposes in accordance with the international standards. A further commitment to international agreements is seen in its Income Tax Act, where it is stated that any inconsistency between the DTA or TIEA, the DTA or the TIEA will take precedence over the Income Tax Act.[104]

6.2.1 Simultaneous tax examination

Uganda is the only country amongst the four countries under study which has an APA as a dispute resolution mechanism. It may therefore benefit from its APA program during a STE. Upon the conclusion of such examination, the two or more authorities may be encouraged from the co-operation of all participating revenue authorities to enter into a bilateral or multilateral APA. Such an agreement will reduce the number of transfer pricing disputes. An APA can be used in a form of a roll-back to resolve any outstanding disputes.

6.3 BEPS Action 13

Uganda has not yet implemented the BEPS Action 13 on transfer pricing documentation. It has only expressed an intention to do so. A master file will be helpful for a country such as Uganda that has APA as a mechanism to resolve transfer pricing disputes. More so as a master file contains a brief description of the MNE group's existing unilateral advance pricing agreements and other tax rulings relating to the allocation of income among countries.[105]

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[103] OECD Global forum on transparency and exchange of information for tax purposes: Uganda peer review report (2016) http://www.oecd.org/tax/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews-uganda-2016-9789264266209-en.htm (accessed 25 August 2019) 13. Even with those countries that Uganda has DTAs with, the difference will be that as opposed to the art 26 'exchange of information' article, the MAAC provides for an improved way of tax information exchange.

[104] Sec 88(6) of the Income Tax Act Chapter 340.

[105] M Corwin et al 'OECD's transfer pricing documentation guidelines: master file and local file data (2016) *KPMG* https://tax.kpmg.us/content/dam/tax/en/pdfs/2016/beps-master-local-file-data-items.pdf (accessed 21 August 2019) 3. When requested by the same MNE for an APA, Uganda will have some information on any other APA that the MNE has entered into as a reference, particularly on how the pricing was formulated. Such information may make the URAs work much easier and also save time. What makes revenue

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The URA Practice Note of 5 May 2012 sets out the transfer pricing documentation and reporting requirements.[106] It provides a detailed description of what must be included. With Uganda having an APA program in place the master file may be very useful for the resolution of transfer pricing disputes. A proper implementation of the above-mentioned Practice Note coupled with the alignment of actual facts surrounding a specific cross-border connected person's transaction, will prove relevant and of huge assistance particularly when Uganda has to deal with an APA requests. However, its implementation is only limited to MNE's doing business in Uganda.

6.4 Country Summary: Uganda

Like Kenya, Uganda's usage of the OECD traditional bilateral exchange of tax information is limited to only seven countries. Of those seven only one is with an African country, South Africa.[107] Its exchange of information with African countries inter se is only limited to South Africa. Uganda has signed and ratified the MAAC and had deposited its instrument for ratification meaning that it has widened its network of exchange of tax information to 102 jurisdictions. However, since it has not yet signed the MLI as such any transfer pricing disputes arising from the supplying countries will not be resolved because of the absence of the requisite framework, particularly if there is no DTA in place.

Uganda has not yet implemented the BEPS Action 13 transfer pricing documentation; having only expressed an intention to do so. When it does, Uganda will have access to the latest international standards of transfer pricing documentation. This will include CbCR, master file and local file for MNE's operating in Uganda. With an APA program in place in Uganda, the transfer pricing documentation requirements will become very useful more so as the master file contains a list and a brief description of the MNE group's existing unilateral APA and other ATR relating to the allocation of income among various other countries. The Practice Note will

authorities hesitant to reach an APA at times is the availability of comparable data on how the MNE and others in the sector have formulated the transfer price. With the master file and the information contained therein, such information will be accessible to the revenue authority even prior to any APA application. The same will be the case with MAP as the master file will also contain information regarding the transfer pricing policies of the MNE on all its intercompany transactions with associate enterprises. This information will assist Uganda's competent authority and the competent authority of the other contracting state when adjudicating and deciding on the MAP case before them.

[106] BC Kagyenda et 'Transfer pricing in Uganda: overview' https://uk.practicallaw.thomsonreuters.com/w-007-4746?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29&comp=pluk#co_anchor_a799924 (accessed 5 June 2020).

[107] Hearson & Kangave (n 99 above) 7. See also PKF 'Uganda tax guide' (2013) https://www.pkf.com/media/1959023/uganda%20pkf%20tax%20guide%202013.pdf (accessed 26 November 2019) 5.

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not give the global access to information as the master file because it is only enforceable domestically.

7 Existing OECD Information Exchange Tools in Ghana

7.1 Article 26 - Exchange of Information

Ghana has only 11 DTAs that can be said to be in force. As a result, its tax treaty network in as far as the traditional OECD exchange of information is concerned is limited to 11 countries.[108] Governments are not supposed to exchange information unless there is an assurance that the information will be used for the purpose for which it is requested for, confidentiality should be preserved at all times. Though there is assurance of confidentiality; in ten information exchange sent to Ghana, all ten were sent via a regular mail between August 2010 and May 2011. However, of the ten that were sent, nine were not received by the Ghana competent authority at the time when they were originally sent by the requesting states. The Ghana competent authority only became aware of their existence sometime later.[109] The encrypted emails of the requests were then properly sent and received in 2014.[110]

7.2 Tax Information Exchange Agreements

In the absence of a wide DTA network, countries like Ghana should be opting for the usage of TIEA more so as negotiating DTAs has proved to be taking long. The sole purpose of these bilateral agreements is to facilitate the exchange of tax related information between the partner countries. This information may be useful to prevent tax evasion and the elimination of double taxation and double non-taxation. Ghana only has one TIEA with Liberia. As a result, its competent authority will have to rely heavily on multilateral tax conventions and establish whether those countries which are signatories have in fact ratified the signed agreements.[111]

[108] See generally Ghana Revenue Authority https://gra.gov.gh/double-taxation-agreements-in-force/ (accessed 5 June 2020).
[109] OECD Global forum on transparency and exchange of information for tax purposes: peer reviews report on exchange of information on request (2018) Second round https://read.oecd-ilibrary.org/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-ghana-2018-second-round_9789264291119-en#page72 (accessed 5 November 2020) 70.
[110] OECD Global forum on transparency and exchange of information for tax purposes: peer review: Ghana (2014) https://www.oecd.org/tax/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews-ghana-2014-9789264222878-en.htm (accessed 5 June 2020) 95.
[111] Ghana appears to have failed to take advantage of the TIEAs to widen its tax information network. Since it is said that it is a long and tedious process to negotiate a DTA, Ghana should have utilised the TIEA to secure tax information exchange with those countries where no DTAs exists. The good thing with the TIEA is that it is bilateral, and the two contracting states may craft it in a way that caters for their desired intentions.

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7.3 Multilateral Convention on Mutual Administrative Assistance in Tax Matters

Ghana was the second African country after South Africa to sign the MAAC.[112] Despite its small tax treaty network, the signing of this multilateral convention has given Ghana a wide range of administrative assistance and co-operation from an additional 88 jurisdictions. This co-operation includes the exchange tax information. Ghana has however, not signed the MLI and has not expressed any intention to do so.[113]

Ghana is one of the jurisdictions undertaking first exchanges by 2018. Although Ghana was initially expected to exchange information in 2018, it has since postponed its date of first exchange to 2019.[114] The impact of AEOI has been felt in the jurisdictions which are committed to implementing the AEOI standards by 2018 even before any exchanges have occurred.[115]

While not having a framework on the functioning and the exchange of information, Ghana has issued a guide that deals with the common reporting standard for financial institutions.[116] In as far as the general exchange of tax information is concerned; the legal ability of the GRA and its administrations to reach common understandings with other tax administrations in the absence of its active participation in international tax discussions gives rise to a lot of uncertainty.

7.4 Other Regional Tax Information Exchange Tools

As a member of ATAF and a signatory to the AMATM, Ghana will rely on the exchange of information from amongst other members of the forum.[117] This multilateral instrument allows for the exchange of information, sharing of expertise, joint audits and investigations, and mutual administrative assistance among African countries. The AMATM is thus a key instrument in the fight against BEPS in Africa. Cooperation amongst members of ATAF needs to be strengthened by signing the AMATM to enable regional members to fully achieve the aims and objects of the agreement.

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[112] See generally OECD Tax: Ghana signs tax cooperation agreement https://www.oecd.org/tax/exchange-of-tax-information/taxghanasignstaxcooperationagreement.htm (accessed 5 November 2020).
[113] OECD Multilateral instrument status tracker (2019) *Deloitte* https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-global-tax-implementation-of-mli-status-tracker.pdf (accessed 19 August 2019) 6.
[114] OECD (n 7 above) 4.
[115] OECD Global forum on transparency and exchange of information for tax purposes 'The global forum's plan of action for developing countries participation in AEOI' (2017) https://www.oecd.org/tax/transparency/plan-of-action-AEOI-and-developing-countries.pdf (accessed 20 September 2019) 5.
[116] OECD Guidance notes: common reporting standard for automatic exchange of financial account information in tax matters (2014) https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/ (accessed 22 September 2019) 24.
[117] This ATAF agreement owes its origin from the OCED MAAC.

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In addition, ATAF has also developed a practical guide on exchange of information to assist member states in accessing information that would either lead to recovery of lost revenue or forestall such losses.[118] The provisions contained in these multilateral instruments, if implemented, would enable tax administrations to reach agreements with each other to resolve potentially significant transfer pricing disputes for large classes of transactions.[119]

7.5 Country Summary: Ghana

Ghana has only 11 DTAs, and only one of those is with an African country which is South Africa.[120] Its small tax treaty network in as far as the traditional OECD exchange of information is limited to only thirteen countries. Unlike South Africa which has attempted its exchange of tax information network by signing TIEAs, Ghana only has one signed TIEA with Liberia.

Ghana was the second African country after South Africa to sign the MAAC. Despite its low tax treaty network, the signing of this multilateral convention has widened its administrative assistance and co-operation to many jurisdictions. However, it has not yet signed the MLI neither has it expressed any intention to do so.[121] This would mean that like Uganda, Ghana will be able to access tax information but will lack the mechanism to resolve any transfer pricing disputes arising from the sharing countries, particularly if there is no DTA in place. The exchange of information tools in Ghana will still not be efficient towards the resolution of transfer pricing disputes.

8 Challenges for the Effective Application of the OECD Information Exchange Tools in Africa.

The first challenge for African countries in effectively implementing these OECD information exchange tools is associated with resource constraints, including human resources, institutional capacities such as those associated with information and data handling. There are challenging issue of compliance costs and information overload for tax authorities.[122] Each jurisdiction's technical readiness to exchange should be monitored in detail. Developing African countries

[118] ATAF 'A practical guide on exchange of information for developing countries'(2013) http://www.oecd.org/tax/tax-global/practical_guide_exchange_of_information.pdf (accessed 14 September 2019) 2.
[119] R Feinschreiber & M Kent 'Advancing bilateral transfer pricing audit programs' (2012) *Corporate Business Taxation Monthly* 21.
[120] See generally G Kwatia 'Recent double taxation agreements signed between Ghana and other countries (2017) 5 *PWC Tax Alert Tax Services* https://www.pwc.co.za/en/assets/document/tax-alert-issue-5-on-recent-dtas-between-ghana-and-other-countries.pdf (accessed 26 November 2019).
[121] OECD (n 109 above) 6.
[122] S Felt & A Hales 'Country-by-country reporting: challenges and considerations' (2014) *The Tax Adviser* 470. Most African countries will have challenges with the information that may be provided in the CbCR and the management thereof.

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are likely to receive more information than they will be sending abroad. Other costs relate to putting in place the necessary processes and infrastructure necessary for the management of the information. This will include:

i) translating the reporting and due diligence requirements of AEOI into domestic law;
ii) putting in place the administrative and information technology infrastructure and processes required to collect and exchange information under AEOI; and
iii) introducing the necessary safeguards to protect the confidentiality of taxpayer data.[123]

8.1 Technical capacity

In majority of African states, staff members making the transfer pricing unit of various revenue authorities are not trained in transfer pricing, let alone the most recent developments that are challenging even to experienced developed countries. On several occasions African countries have indicated that transfer pricing issues are too complex for their current level of expertise in the field.[124] Transfer pricing expertise differs from the general corporate tax expertise.

There is a lack of specific auditors, economists, tax lawyers with experience in transfer pricing and financial databases used for transfer pricing analyses.[125] This poses a risk in the sense that some decisions made by competent authorities may not be founded upon sound reasoning, or, even if they are, the rationale may not have been clearly expressed. Due to the complexity of transfer pricing cases, almost every additional assessment raised following transfer pricing audits ends up being objected to, increasing the number of transfer pricing disputes.

Some developing countries may receive information including transfer pricing information about the MNE but may not at present have the capacity to provide the corresponding information if the other developed state was to request the same from them. The lack of the

[123] OECD (n 109 above) 6. See also OECD Global forum on transparency and exchange of information for tax purposes 'Tax transparency (2018) *Report on Progress* https://www.oecd.org/tax/transparency/global-forum-annual-report-2018.pdf (accessed 20 September 2019) 25 where it was found that capacity building has emerged as one the challenges to be addressed. More so as many jurisdictions are receiving an increasing number of requests to tackle BEPS.
[124] P Guj et al Stephanie Martin and Alexandra Readhead 'Transfer pricing in mining with a focus on Africa' (2017) http://documents1.worldbank.org/curated/en/213881485941701316/pdf/112344-REVISED-Transfer-pricing-in-mining-with-a-focus-on-Africa-a-briefing-note-Web.pdf (accessed 5 November 2020) 34.
[125] PWC Transfer pricing perspectives 'Spotlight on Africa's transfer pricing' (2012) https://www.pwc.com/gx/en/tax/transfer-pricing/management-strategy/assets/pwc-transfer-pricing-africa-pdf.pdf (accessed 5 June 2020) 9.

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requisite technical skills to interpret and match the information so provided to the taxpayer's local trade activities may be a challenge in many African states.

8.2 Confidentiality

There are also confidentiality issues in that there is a need to put in place administrative policies and practices to protect the confidentiality of information exchanged. Prior to sending information the competent authority should have procedures or processes in place to ensure that the information sent will be kept confidential in the recipient country. This includes confirming that the person who has requested the information was authorised to make the request and to receive the information. Steps should be taken to confirm that the competent authority's name and address are correct before sending any information.

A new global standard on the exchange of tax information intended to raise the bar on international cooperation will make it easier for competent authorities to resolve transfer pricing disputes and fight tax evasion, but the new standard also raises questions around privacy and cost implications, in particular for developing countries in Africa.[126]

Implementation of the BEPS Action 13 as a whole may be a challenge.[127] Many MNEs have raised concern regarding the compliance burden and the non-existence of technological systems that will provide them with the information required for different files. The MNE will need to put systems in place to accumulate the information required, this include having to evaluate their investment in data collection technology.[128] Another concern was that tax authorities with resource constrain may use the master transfer pricing file and the data template as a basis for an actual transfer pricing allocation.[129]

[126] See generally S Temkin 'Global standard on exchange of tax information will help fight against tax evasion' https://www.pwc.co.za/en/press-room/tax-evasion.html (accessed 22 September 2019).

[127] It can also be argued that the knowledge of countries exchanging information will act as a deterrent to taxpayers. The success of the deterrence depends on a country's ability to optimise its exchange of information process and to utilise the information exchanged in the audits. The concept of reciprocity is an important consideration under international agreements. A state may not take advantage of another state's information system where the requested state's information gathering powers are wider than the requesting state. However, a rigorous application of the principle of reciprocity could frustrate effective exchange of information and that reciprocity should be interpreted in a broad and pragmatic manner. Different countries will necessarily have different mechanisms for obtaining and providing information; See exchange of information on tax matters in the EAC Handbook http://eacgermany.org/wp-content/uploads/2014/12/EAC-HandbookEOI_screen.pdf (accessed 23 September 2019) 31 & 48 and D Ring 'Developing countries in an age of transparency and disclosure' (2016) 6 *BYU Law Review* 1815.

[128] S Felt & A Hales 'Country-by-country reporting: challenges and considerations' (2014) 45 *The Tax Adviser* 471.

[129] Wiesener (n 71 above) 11. Many developed countries may feel that they are giving more to developing countries than they are receiving, and this may affect their willingness to exchange information when requests are from developing countries.

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8.3 Socio- political challenge

The other challenges from African's point of view is political, in that whilst many implementation challenges that developing countries face can be remedied through intensive technical assistance, it cannot solve all of the issues. The overriding obstacle is often of a political nature rather than a technical one. One such obstacle could be the lack of willingness from policy makers to introduce information exchange units. There is failure by African political leaders to prioritize the investment needed to make the automatic exchange of tax information a reality.[130] Even if among public officials responsible for tax policy and administration, the importance of engaging in exchange of information may be understood and accepted, obstacles are often encountered at the political level where the same priority may not be given to this topic for a variety of reasons.

9 Conclusion

What has been identified is the importance of the OECD supporting tools that are intended at enhancing exchange of tax information between competent authorities towards the speedy resolution of transfer pricing disputes. Also established is how article 26 of the OECD MTC as contained in the various DTAs in the four countries have proved to be insufficient because of the low African tax treaty network. What is important is for African countries to participate actively in global tax forums and OECD platforms. But importantly to sign, ratify and put into effect these multilateral OECD support tools otherwise they are at risk of losing out in their fight against abusive tax practices.

These OECD supporting tools intend to provide global tax transparency through the exchange of tax information, which is crucial in the effective resolution of transfer pricing disputes. But most importantly they provide African countries with an opportunity to improve their current transfer pricing dispute resolution mechanisms. The MLI provides an improved approach towards the MAP, APA and MBA. On average, from the four countries under study each has a maximum of three DTAs that contain an arbitration clause. The signing of the MLI by African countries expands the mechanisms available towards the resolution of transfer pricing disputes,

[130] N Monkam et al 'Tax transparency and exchange of information (EOI): priorities for Africa' (2018) https://www.g20-insights.org/wp-content/uploads/2018/07/TF5-5.2-Taxation_FINAL-1.pdf (accessed 5 June2020) 7.

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with MBA and APA also becoming added as mechanisms for use to resolve transfer pricing disputes.

The MAAC also provides tools for the improved way to exchange tax information and gives access to information regarding global operations of the MNEs, which can be important for African countries when deciding on the adoption of APA program. All that is required is for African countries to create guidelines regarding transfer pricing documentation. Proper and clear guidelines and framework for the compliance still need to be created so as to guide taxpayers. The highly standardised documentation approaches and legal and transaction descriptions adapted for Europe and North America, although in line with the new BEPS requirements, will often not work well in Africa as the underlying functional and risk profile will not match the description in the documentation. As such MNEs operating in Africa must acknowledge that they might need to implement operating models, transfer pricing policies and documentation that is fit for purpose in Africa.[131]

All four countries have signed and ratified the MAAC, it is important for these African countries to appreciate their low tax treaty network and sign and ratify these multilateral conventions so as to give effect to the intention behind their enactment. However, it is important to note that the MAAC alone cannot assist in the effective resolution of transfer pricing disputes as it only deals with the exchange of information but does deal with the dispute resolution mechanisms. Disputes resolution mechanisms are only found in the MLI. Of the four countries only South Africa and Kenya have signed (but not ratified) the MLI the other two have not yet signed making it difficult for them to make use of the support provided for by the MLI.

Tax transparency is no longer an option if African countries are committed to curb base erosion and profit shifting.[132] Given that there are over one hundred jurisdictions that have now committed to exchanging information; a multilateral approach has proven to be the preferred and most practical manner for putting in place an international automatic exchange framework with all interested appropriate partners.[133] With the increasing global trade African countries cannot afford to negotiate DTAs, but rather should sign and ratify these multilateral conventions that will assist in both the administration and the resolution of tax treaty disputes. Important to

[131] M Leivestad 'Transfer pricing in Africa: observations & reflections' (2018) 73 *South African Tax Talk* 14.
[132] A Pross 'How tax transparency went global in 2014' (2015) *International Tax Review* 10-13.
[133] See art 6 of the MAAC. Automatic exchange of information as one of the envisaged forms of assistance between the respective tax administrations of the over 110 jurisdictions currently participating in the convention. The good thing for the four countries under study is that all four are signatories to the convention.

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note is that lack of effective tax information exchange arrangements contributes to harmful tax practices and a multiplicity of unresolved transfer pricing disputes.[134]

There is a need for African countries to sign these OECD support tools in order to mitigate against their low tax treaty network as it is clear that the resolution of transfer pricing disputes and the correct allocation of taxing rights can only be achieved through multilateral co-operation particularly among African countries *inter se*, if they intent to curb BEPS by MNEs.

[134] See EAC *Handbook* 23.

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CHAPTER 7

Recommendations and Conclusion

1 Introduction

In Chapter 2, this thesis identified transfer pricing manipulation as one of the ways through which MNEs try to minimise their tax liability. It went further to highlight the effects of transfer pricing manipulation and how revenue authorities globally are becoming more vigilant in curbing BEPS through transfer pricing manipulation. Also identified is how this aggressive approach by revenue authorities has resulted in transfer pricing audits and transfer pricing adjustments that have, in turn, triggered multiple transfer pricing disputes.

With the increase in transfer pricing disputes in mind, this thesis identified the importance of the resolution of these disputes to eliminate double taxation and double non-taxation especially for developing African countries. The thesis extensively examined the efficacy of the three OECD disputes resolution mechanisms namely: the MAP, APA and MBA in the resolution of transfer pricing disputes in Africa. It analysed the effectiveness of these adopted OECD dispute resolution mechanisms in four African countries namely: South Africa, Kenya, Uganda and Ghana. It identified various factors that militate against the efficacy of the above-mentioned dispute resolution mechanisms. These factors are described below.

2 Mutual Agreement Procedure

2.1 Double Tax Agreements

The MAP, in article 25 of the OECD MTC is the preferred dispute resolution mechanism found in the majority of the DTAs signed by the above-mentioned African countries. It stands to reason that in order to have the MAP as a dispute resolution mechanism a DTA must exist between the two jurisdictions. This thesis states in Chapter 3 that one of the impediments to the effective usage of the MAP in resolving transfer pricing disputes is the low tax treaty network applicable to African countries. Of the four countries under study, it was found that they all

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have a low tax treaty network, even though South Africa has a better tax treaty network than the other countries.[1]

2.2 MAP Framework

It has been found also that in Uganda and Ghana there are no guidelines at all to assist in the MAP process. In South Africa what was found is that the existing guidelines cannot be relied upon by the taxpayer as they cannot be used as a source of legal reference. The MAP is not recognised as a dispute resolution process by the TAA. In Kenya, the MAP guideline as stated in its dispute resolution profile is yet to be signed. Also found is that in all four countries the taxpayers are discouraged from initiating the MAP process simultaneously with the judicial process. However, the absence of a clear framework for the MAP causes taxpayers to opt more for the judicial process than the MAP.

Also found in the existing frameworks of the four jurisdictions is that the competent authority dealing with the MAP process is found within the revenue service. Transfer pricing is a highly technical and specialised discipline that requires special skills. Due to transfer pricing skills shortages within the continent, there is a strong possibility for those involved in the MAP process to seek clarity from those who were part of the transfer pricing audit process. Another possibility exists that those who were conducting the transfer pricing audit may be directly involved in the MAP process. This has the potential to compromise the independence of the MAP process.

2.3 The Absence of Timeframes

The MAP article does not impose an obligation on the part of competent authorities to resolve disputes through the MAP. It uses the words ‘shall endeavour’ instead of words that impose a direct obligation. This has been shown to be problematic because the competent authorities are under a duty merely to use their best endeavours and not to achieve a result.[2] This thesis has shown that there are no timeframes for the conclusion of the MAP process in the four African countries studied. When deciding which dispute resolution process to initiate, companies prefer

[1] South Africa has 22 DTAs with African countries, Kenya has only two DTAs with African countries while Uganda, like Ghana, has only one DTA with another African country.
[2] Para 37 OECD commentaries OECD Model Tax Convention (MTC) http://www.oecd.org/berlin/publikationen/43324465.pdf (accessed 4 February 2020) 364.

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to have some average predictions about the length of the procedure.[3] The absence of time frames has resulted in many transfer pricing disputes remaining unresolved.

2.4 Suspension of Tax Payment

A taxpayer who has lodged a dispute may request for the suspension of the payment of the tax due pending the outcome of the dispute. However, what has been found in countries like South Africa is that this suspension will only be possible if an objection has been lodged under the TAA and it meets the requirements of section 164 of the TAA. This would mean that by solely initiating the MAP process the taxpayer will still not qualify for the suspension of tax payment unless the taxpayer also files for an objection under the domestic administrative processes. In countries like Uganda and Ghana a part payment is to be made before a dispute can be entertained. No distinction is made between tax treaty disputes and domestic tax disputes. In Kenya a non-refundable payment has to made before a tax dispute can be heard. The MAP does not in itself make provision for the suspension of tax payment and with many transfer pricing disputes taking long to be resolved the taxpayer may suffer huge financial constraints pending the finalisation of the MAP.

2.5 Transfer Pricing Adjustment

This thesis has shown that there are some DTAs signed by the four African countries that do not contain article 9(2) of the OECD MTC. The article allows for the competent authority to effect a corresponding adjustment to give effect to the terms of the MAP agreement and to eliminate double taxation. The absence of article 9(2) of the OECD MTC in those DTAs renders the MAP process futile simply because the competent authorities will not be able to eliminate double taxation, an issue which forms the very essence of the DTA.

2.6 Recommendations on the MAP as a Dispute Resolution Mechanism in Africa

2.6.1 Expansion of tax treaty network

It is recommended that for African revenue authorities to effectively use the MAP in resolving transfer pricing disputes, they should expand their tax treaty network. But because it may be a challenge to negotiate bilateral treaties to increase their tax treaty network, the recommendation

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[3] T Wiertsema 'Council directive on double taxation dispute resolution mechanisms: resolving companies' areas of concern?' (2017) 19 *Derivatives & Financial Instruments* 6.

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is that African countries must sign the MLI in order to expand their tax treaty network while DTAs are being negotiated. The MLI deals with the resolution of tax treaty disputes. Also recommended is that ATAF should enforce the current OECD MLI and inclusive framework to expand the tax treaty network of members states.

2.6.2 ATAF to establish a tax treaty dispute resolution committee

It is also recommended that ATAF[4], as an international organisation which provides a platform for collaboration among African tax authorities, should establish a Tax Treaty Dispute Resolution Committee that will specifically focus on the challenges facing African countries in resolving their tax treaty disputes. Most importantly the committee must focus on assisting revenue authorities with the development of their domestic guidelines which are specific to processes that taxpayers must follow when initiating the MAP. The guidelines need to be specific to the timeframes or turnaround times for various steps to be taken during the MAP process. The guidelines should include available recourse in cases of non-adherence to the agreed guidelines. The guidelines should be able to harmonise domestic legislation with tax treaty obligations. ATAF member states should give ATAF the power to monitor the progress and the conclusion of MAP requests and give assistance to ensure the conclusion of MAP cases.

2.6.3 Creation of an independent and objective MAP forum

It is recommended that there must be a separation of the competent authority as provided in article 25 of the OECD MTC from the revenue administration. This move is to preserve and ensure that those involved in the MAP process remain objective. Those who were involved with the transfer pricing audit or specialists from revenue authority should only address the competent authority when requested to clarify only on the specific parts of the case. The rationale for the separation of the competent authority from the revenue service is that if a transfer pricing audit resulting in taxation not in accordance with the convention has already been made, the revenue authority may not be objective hence the delay in the resolution of transfer pricing disputes. The recommendation to move the MAP process from the revenue authority is in line with the OECD BEPS Project Plan recommendation on Action 14 which states that:

[4] ATAF is an organisation that strives to build efficient and effective tax administrations in Africa with the mandate to improve the capacity of African tax administrations to achieve their revenue objectives See generally https://www.ataftax.org/overview (accessed 5 November 2020).

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> [c]ountries should ensure that the staff in charge of MAP processes have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty, in particular without being dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy that the country would like to see reflected in future amendments to the treaty.[5]

It is problematic to say that the MAP is a diplomatic process between governments that the taxpayer should not be party to while it is led by professionals from the revenue services. If it is a diplomatic process it should be led by diplomats who do not have a mandate to collect revenue and who have a different reporting structure from those that conducted the transfer pricing audit, and it must be carried out through diplomatic channels of the contracting states.[6]

2.6.4 Incorporating MAP in domestic legislation

It is recommended that the domestic tax legislation of African countries should recognise and include the MAP as a dispute resolution mechanism. This should include the adoption of clear guidelines with clear timeframes on the MAP process. This will ensure that the MAP applicant will be able to request for even the suspension of tax payment without having to lodge another objection on the same case under domestic rules. The revenue authority which has taxed and collected what it claims to be due to it may delay the MAP process and reject any attempts to suspend payment, while it ensures that the tax collected is used to achieve its domestic socio-economic challenges.

A problematic scenario could be where both contracting states believe that they have the same taxing rights and they both collect tax. This will be detrimental to the taxpayer. Alternatively, a refundable part payment of 30 percent can be paid by the taxpayer, to be fully refunded to the taxpayer upon failure by the competent authority to resolve the disputes within a period of 24 months. This may compel the competent authorities to speedily resolve the transfer pricing disputes so that they do not have to refund the taxpayer his part payment but most importantly so that they could get the full amount due to them.

[5] Para 27 OECD/G20 base erosion and profit shifting project making dispute resolution mechanisms more effective (2015) *Final Report on Action 14* https://www.oecd-ilibrary.org/docserver (accessed 27 January 2020) 18.

[6] Davis Tax Committee: Second interim report on base erosion and profit shifting (BEPS) in South Africa 'summary of DTC report on Action 14: make dispute resolution mechanisms more effective' https://www.taxcom.org.za/docs/New_Folder3/13%20BEPS%20Final%20Report%20-%20Action%2014.pdf (accessed 27 January 2020) 4.

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3 Advance Pricing Agreement

3.1 APAs in Africa

Chapter 4 of this thesis showed that of the four jurisdictions under study only Uganda has an APA program as a mechanism to resolve its tax treaty disputes. The other three do not have an APA program in place. Also found is that even though Uganda has an APA program, it has not been utilised effectively. A country like South Africa that has committed to making dispute resolution more effective by signing the MLI has not yet adopted APA. The other two have not yet signed the MLI save for Kenya that has only recently signed in November 2019, however, it is still not ratified. This thesis also shows in Chapter 6 that the MAAC and the OECD BEPS Project Plan Action 13 Report will assist revenue authorities through the exchange of information. The master file which contains details of any APA entered into by the MNE will assist with the adoption and development of APAs. All that is needed is for individual countries to create a mechanism and a framework that will be capacitated to deal with the information to be received and to match the multiple information requests from other jurisdictions.

3.2 Lack of Skills

South Africa's argument against the adoption of the APA has been the lack of technical skills and administrative challenges that come with the process thereof. This also applies to Kenya. Ghana has stated that since it is still in the process of developing its transfer pricing rules, it may be premature to adopt APA. What has also been identified is how the four African countries under study are not fully utilising article 25(4) of the OCED MTC, that is contained in their DTAs. Amongst the recommendations listed by ATAF is that:

> [c]operative relationship programs (also called enhanced compliance) between taxpayers and tax administrations may assist in avoiding disputes on transfer pricing. These programs serve to improve the discussions and reporting relationships between taxpayers and tax authorities.[7]

This can be achieved through the effective utilisation of article 25(4) of the OECD MTC. This is the same paragraph that is utilised by competent authorities to engage and communicate with one another through their representatives for the purposes of reaching an agreement as envisaged in the preceding paragraphs. This available tool was found to be under-utilised by

[7] UN-ATAF workshop on transfer pricing administrative aspects and recent developments Ezulwini Swaziland (2017) https://www.un.org/esa/ffd/wp-content/uploads/2017/11/2017TP_D5_01-2_EN_Dispute-resolution.pdf (accessed 27 January 2020) 3.

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African countries as it the one to be used when adopting and embarking on an APA program as a tax treaty dispute resolution mechanism.

3.3 Lack of Certainty as a Result of the Absence of APA

This thesis identified how an APA program can be of assistance not only in the resolution of transfer pricing disputes but also in the avoidance of transfer pricing disputes. By virtue of its nature, it is an ex-ante process providing certainty to the taxpayers for its duration, normally a five-year period. It also enables revenue authorities to deploy their resources elsewhere rather than to conduct transfer pricing audits on MNEs. What was also found with the APA is that once agreed to, its terms can also be used by the competent authorities to resolve disputes about previous years of assessment. This can be achieved by way of a roll-back application to the APA. It was also found that the lack of an APA program in the four African countries deprives both taxpayers and tax administrations of the certainty that it provides.

3.4 The Alternative Use of ATRs

This thesis identified some similarities between APAs and the ATRs in Chapter 4. They can be both considered effective dispute avoidance tools that allow the tax authorities to consider if a transaction is consistent with their interpretation of the applicable law and rules in advance. APAs and ATRs are both *ex ante* in nature. Some jurisdictions use ATRs in the absence of APA as an alternative to assist in the avoidance of transfer pricing disputes. What was also identified in this thesis is that all four African countries have ATRs in their domestic legislation. However, it has also been identified that ATRs have not been used for resolving and avoiding transfer pricing disputes.

In fact, South Africa expressly disallows the use of ATRs in transfer pricing cases. There has never been any reason provided for this express exclusion. Kenya, Uganda and Ghana, unlike South Africa do not have an exclusion clause rejecting the application of ATRs to transfer pricing cases. It is not clear whether the absence of a specific exclusion in the other three jurisdictions regarding the usage of ATRs, would mean that an ATR may be used in transfer pricing cases.

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3.5 Recommendations on the APA as a Transfer Pricing Dispute Resolution Mechanism

3.5.1 The need to sign international agreements on the exchange of information

It is recommended that African countries need to sign, ratify and commit to undertake the exchange of information under the MAAC as the availability of information is key to the conclusion of APAs. Kenya and Uganda need to sign the MAAC and to be part of the global attempts to resolve issues pertaining to global tax transparency. Countries such as Ghana and Uganda also need to adopt the OECD BEPS Project Plan, Action 13 that deals with transfer pricing documentation including, amongst others, the master file. The master file contains, inter alia, various APAs entered into by the MNE. African revenue authorities will learn how other jurisdictions have concluded the APAs when perusing the master file. Access to such information may encourage countries like South Africa, Kenya and Ghana to reconsider their stance regarding the APA and move to adopt it as a dispute resolution mechanism.

Since ATRs are available in all the four countries and it was established that they are not used on transfer pricing cases in all the four jurisdictions, it is recommended that their application be extended to transfer pricing cases. All they need to do is to take one step further and apply ATRs in transfer pricing cases. Once they apply ATRs in transfer pricing cases, it is recommended that competent authorities should through the information exchange article as contained in existing DTAs, exchange such rulings with other competent authorities. Alternatively, the competent authorities can use paragraphs 3 and 4 of article 25 to exchange rulings.

There is currently nothing in the legislations of the four countries that prevents the exchange of ATRs. What is needed is a framework for such exchange once they are applied in transfer pricing cases. This may be a plausible solution through the TIEAs, which are easy to complete while countries are still looking at ways and to improve their tax treaty network. Another alternative to facilitate the exchange of ATRs can, as recommended above, be by way of African countries signing the MAAC thereby expanding their network regarding the exchange of tax information.

For many MNEs, the use of APAs will be very instrumental in alleviating transfer pricing uncertainties. It will provide both taxpayers and revenue authorities with the much-needed

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certainty. The adoption of the OECD BEPS Project Plan Action 13 will be of assistance in that APAs that have been signed by MNEs as contained in master files may be of assistance to those countries that are still learning how to coin and process APAs in their own jurisdictions. But most importantly an APA allows for taxpayer participation, something that should give confidence to the taxpayer in the process.

4 Mandatory Binding Arbitration

4.1 Tax treaty arbitration

What has been found in DTAs signed by the four African countries is that the majority of those DTAs do not have article 25(5) of the OECD MTC that deals with arbitration. Arbitration is found in three European countries that have DTAs with South Africa namely: Netherlands, Canada and Switzerland. Kenya, Uganda and Ghana all have arbitration as a dispute resolution mechanism in their DTAs with only one country namely: Netherlands.

4.2 Sovereignty over Tax Collection

This thesis identified in Chapter 5 that none of the four countries under study, use arbitration as a mechanism to resolve transfer pricing disputes. What has been found is that many African states are reluctant to adopt and include arbitration in their DTAs simply because like any other government, they do not want to lose control of the process to manage and adjudicate over their taxes. They would want to protect their fiscal sovereignty to collect taxes.

4.3 Lack of Taxpayer Participation and Consensus on the Appointment of Third Arbitrator

This thesis also found that many countries are not in favour of arbitration because in an arbitration procedure, each competent authority appoints one arbitrator. The two arbitrators will then appoint a third arbitrator who will function as chair. This is undesirable for African countries as they do not have control on the appointment of the chair of the panel. Another challenge for taxpayers in arbitration as a dispute resolution mechanism is that it is a state-to-state process which does not provide the taxpayer with the usual procedural rights to participate in it.

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4.4 The Binding Effect of the Arbitration Award

Another disadvantage identified is that arbitration can be subjected to review by the national courts. However, the courts can only review the 'integrity' of the procedure that was followed and not the substance or the merits giving rise to the decision. While the whole purpose of arbitration is about reaching a binding result, even against the will of one competent authority, there is nothing that prevents the parties to a case to reach a settlement even after the arbitration award has been rendered.[8] The decision would bind the states but not the taxpayer or other 'affected' persons who can still reject it. This asymmetry is logical, given that the taxpayer was not a party to the procedure.

4.5 The Use of Arbitration Acts

Also identified is that all four countries have arbitration legislation. However, none of the countries use the said legislation to resolve transfer pricing disputes. South Africa has an international arbitration legislation known as the International Arbitration Act.[9] This act is used for the resolution of commercial disputes but not for resolution of tax nor transfer pricing disputes. The arbitration legislation in Kenya is only applicable to domestic disputes, the same goes to Ghana. Uganda also has arbitration legislation and has had an international tax arbitration case, the Heritage Oil & Gas Ltd v Uganda Revenue Authority and has another pending case with the French company Total, which it may use to learn and develop its tax dispute framework on tax arbitration.

4.6 Recommendations on Arbitration as a Transfer Pricing Dispute Resolution Mechanism

4.6.1 Sign and ratify the MLI

It is recommended that since the majority of DTAs signed by the four countries do not have arbitration as a transfer pricing dispute resolution mechanism; these countries should instead of re-negotiating their bilateral agreements, sign and ratify the MLI. The MLI inherently contains MBA as a dispute resolution mechanism. The implementation of the MLI will assist

[8] A Gildemeister 'Arbitration of tax treaty disputes - the 2008 OECD model for income tax treaties will contain an arbitration clause' (2007) *Transnational Dispute Management* 6.
[9] Act 15 of 2017.

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in expanding the low tax treaty network of African countries and, importantly, offer the improved mechanisms that are accorded by the MLI.

It is also recommended that competent authorities should adopt baseball arbitration, a streamlined procedure that is meant to be leaner, cheaper and quicker than the normal procedure. The question of sovereignty that is threatened by a normal arbitration process will be dealt with because, in baseball arbitration, both countries present their arguments and opinion and the appointed arbitrator chooses one of the opinions present by the competent authorities without any modification. This would mean that the dispute being arbitrated upon is still controlled by the two competent authorities as the arbitrator is only there to choose only one of the submitted opinions.

4.6.2 Utilisation of optional arbitration in article 25(4) of the OECD MTC

Another recommendation is that countries may use optional arbitration under paragraph 4 of the MAP article. This is the same paragraph that contracting states use to engage with one another. An optional arbitration is when parties sign an agreement on a case by case basis. An optional arbitration can be used by states that are still new in the arbitration of tax treaty disputes by signing for optional arbitration in cases which they consider favourable. In this case they will be using those favourable cases to learn and improve in preparation for the full-scale usage of arbitration in all tax treaty disputes.

Arbitration provides certainty and predictability for business.[10] Since MBA is viewed by the OECD and taxpayers as a means of speedily resolving MAP, one should call for international measures to be put in place to ensure transparency in the arbitration process. African countries should join the call for an international panel of arbitrators, for instance under the auspices of the UN to be formed that comprises a panel of members from both developing and developed countries. Decisions of such a panel would be considered neutral and fair to the interests of all countries.

At regional level, ATAF should assemble a pool of arbitrators with the necessary skills and qualifications, from among ATAF member states. ATAF member states can then draw on arbitrators from that pool in cases where the MAP is between ATAF-member states. This will

[10] OECD Comments received on public discussion draft BEPS Action 14: make dispute resolution mechanisms more effective (2015) https://www.oecd.org/tax/dispute/public-comments-action-14-make-dispute-resolution-mechanisms-more-effective.pdf (accessed 29 January 2020) 54.

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deal with the challenge of the appointment of arbitrators. Again, ATAF should develop generally acceptable guidelines that will be known and binding to all member states to resolve transfer pricing disputes. Also, the panel of arbitrators so assembled should be capacitated with inherent jurisdictions to preside over transfer pricing cases. This will enhance co-operation between African countries. Such co-operation should assist to prevent the erosion of Africa's tax base. It should also assist in the fair appointment of arbitrators.

One can note in this regard that a similar idea is successfully implemented under the EU Arbitration Convention which establishes a pool of arbitrators appointed from EU member states. What is also important is that the awards reached should be published even if they may be in anonymised versions.

5. The Importance of the Use of Other OECD Support Tools in the Resolution of Transfer Pricing Disputes

5.1 Exchange of Information

This thesis showed in Chapter 6 the relevance of other OECD supporting tools more specifically the importance of exchange of tax information towards the effective resolution of transfer pricing disputes. It has been stated that in the resolution of transfer pricing disputes information sharing is key for the whole MAP process. It is only when the competent authorities involved have access to the much-needed information can they be able to reach an agreement thereby resolving the transfer pricing dispute before them in a fair and just manner. It is important for competent authorities to have a mechanism and a framework for the smooth and speedy exchange of such information to ensure the effective resolution of transfer pricing disputes. The thesis identified the small tax treaty network as a challenge in the four countries under study, thereby rendering article 26 of the OECD MTC as contained in the few DTAs insufficient to have access to the information on global operations of MNEs.

It has been identified that having to rely on the taxpayer to provide information during the MAP application may be time consuming due to, at times, deliberate conduct by the taxpayer to frustrate the process. Exchange of tax information on global operations of the MNEs even before disputes arise may be beneficial to the efficacy of the dispute resolution process. At times it may be an advantage for revenue authorities to have access to the information even

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prior to any MAP request by the taxpayer. Such access will enable the revenue authority to familiarise themselves with the way in which the MNE conducts its business.

5.2 OECD Project Plan BEPS Action 13

Also identified is that of the four countries studied only South Africa and Kenya have introduced the OECD Project Plan BEPS Action 13 requirements. The process in these countries is still at the developmental stage, while Uganda and Ghana have not introduced the OECD BEPS Project Plan Action 13 requirements. Uganda has only expressed intention to do so. In those countries that have introduced the BEPS Action 13, there are challenges regarding infrastructure and capacity building to deal with the safeguarding and management of information.

5.3 The use of Multilateral Conventions

Multilateral conventions can be of assistance especially to the four African countries under study that have been shown to have a low tax treaty network. It was identified that it is only South Africa that has signed and ratified both the MAAC and the MLI. However, South Africa has reservations on the adoption of the MBA. Kenya has signed the MAAC and the MLI but has ratified the MAAC only and has not ratified the MLI. Only the MMAC has been entered into force. Uganda and Ghana have only signed the MAAC but have not yet signed the MLI.

The challenge with the two countries that have not yet signed the MLI is that while the MAAC may provide them with all the information on the global operations of MNEs, it does not provide a platform or a framework for dispute resolution should there be any disputes arising from the information shared. The MLI is the instrument that provides, inter alia, a platform and framework for the resolution of tax treaty disputes.

In exchange of information and multilateral co-operation through multilateral instruments such as the MAAC, tax authorities can expect benefits such as:

i) detection of tax evasion and offshore wealth, something that is critical for developing countries;

ii) deterrence from future non-compliance in that taxpayers will now know that their tax and entity operations reported will be shared with other revenue authorities;

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iii) an opportunity for tax administrations to enhance domestic compliance, building morale among citizens; and to

iv) alert tax administrations to tax evasion that was previously unknown, potentially raising substantial revenue.[11]

5.4 Recommendations on the Use of Other OECD Supporting Tools to Resolve Transfer Pricing Disputes

Amongst the things emphasised is that for developing African countries to effectively resolve their transfer pricing disputes it is recommended that they increase and improve their tax treaty network. Having to negotiate new DTAs and re-negotiate existing ones may take a long time. It is therefore recommended that they need to take advantage of multilateral instruments and sign and ratify them so as to expand their tax treaty network.

Solutions against BEPS practices lie in the introduction of multilaterally coordinated measures.[12] African countries need to sign, ratify and enter into force both the MLI and the MAAC. In doing so they need to fully commit to the cause by adopting these multilateral conventions in full and not with reservations like what South Africa has done with the MLI, particularly with the MBA. The failure by states to ratify and enter into force some of the provisions of the MLI may even result in new inconsistencies between DTAs and provide opportunities for MNEs to design and implement aggressive tax planning schemes.[13]

The exchange of information whether automatic, spontaneous or on request through the MAAC will be beneficial for competent authorities to speedily conclude transfer pricing disputes. CbC reports and master files will also assist in the reduction and avoidance of transfer pricing disputes by encouraging revenue authorities to adopt APA programs as they will be having information on global operations of the MNEs in advance.

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[11] See generally OECD Background brief: the convention on mutual administrative assistance in tax matters and new protocol https://www.oecd.org/ctp/exchange-of-tax-information/backgroundbrieftheconventionon mutualadministrativeassistanceintaxmattersandnewprotocol.htm (accessed 29 January 2020).
[12] N Bravo 'The multilateral tax instrument and its relationship with tax treaties' (2016) *World Tax Journal* 294.
[13] See generally G Maisto 'Shall international tax planning drop dramatically by virtue of BEPS? it depends' (2016) *Kluwer International Tax Blog* http://kluwertaxblog.com/2016/02/03/shall-international-tax-planning-drop-dramatically-by-virtue-of-beps-it-depends (accessed 29 January 2020).

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6 Concluding Remarks

The effective resolution of transfer pricing disputes using OECD disputes resolution mechanism is a challenge in African countries. Of the four countries only South Africa has resolved two of its ten MAP cases currently underway. The others do not even have guidelines for the MAP process. With no timeframes, MAP cases takes longer to be resolved and, in some countries, the existing frameworks do not encourage taxpayers do make use of the MAP in the resolution of their transfer pricing disputes. As recommended above in this chapter, much is expected from the ATAF to assist in the development of uniform MAP guidelines for its member states.

African countries should not only participate in international tax forums without adopting and implementing some of the mechanisms that are applicable to their trade partners. Failure to use some of these adopted mechanisms creates a mismatch in the development of these OECD mechanisms. Of the four African countries, only Uganda has an APA program, and it has still not used it effectively to resolve its transfer pricing disputes.

The OECD has recently been exploring ways to improve dispute resolution mechanisms in the realm of international tax, notably through the use of MBA as part of the MAP in DTAs.[14] MBA as an adopted OECD dispute resolution mechanism is not used by African countries. Even if all the four countries studied here have traces of one or two arbitration paragraphs in their DTAs, its existence as a transfer pricing dispute resolution mechanism is purely academic as there is no framework for its effective usage. It is now up to tax authorities to accustom themselves to the use of arbitration as an ordinary, and in certain circumstances, preferable tool for resolving their disputes.[15]

Due to globalization and an increase in global economies the expansion of tax treaty networks is not an option. It is expected that the number of complex transfer pricing disputes, and revenue interest involved will go up dramatically, exceeding many authorities' capacities, and resulting in MAP cases taking more time to resolve, or remaining unresolved altogether. It is important for African countries to adjust their tax treaty dispute resolution mechanisms to match the international trends.

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[14] M Markham 'Mandatory binding tax arbitration-is this a pathway to a more efficient mutual agreement procedure?' (2019) 35 *Arbitration International* 149.
[15] H Mooij 'Tax treaty arbitration' (2019) 32 *Arbitration International* 195.

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It is submitted that if the recommendations made in this chapter and thesis are implemented, African countries will be better placed to timeously resolve their transfer pricing disputes. They will also be able to avoid the occurrence of disputes by entering into APAs. Lastly, they will have an improved tax treaty network that will enhance access to tax information and have improved ways of resolving transfer pricing disputes that cannot be avoided. Most importantly, they will be able to counter transfer pricing manipulation by MNEs and curb BEPS.

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