Article

Factors Militating against the Efficacy of the Mutual Agreement Procedure: A Comparison between South Africa, Kenya, Uganda and Ghana

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Abstract

The effective resolution of transfer pricing disputes has been identified as one of the primary challenges to eliminate double taxation and/or double non-taxation as well as to enhance the free flow of trade and investment. This article investigates the unique challenges faced by selected African countries, including South Africa, Kenya, Uganda and Ghana, which militate against the use of the mutual agreement procedure (MAP) as a preferred Organisation for Economic Co-operation and Development (OECD) transfer pricing dispute resolution mechanism. The research used a qualitative legal review of existing literature in the selected regimes by comparing the domestic tax law framework in these countries. Transfer pricing manipulation is a significant source of illicit financial flows of capital as identified in the research by Global Financial Integrity on Africa, which drew from Ghana, Kenya and Uganda as case studies. South Africa and Kenya are considered as the gateways to Africa with many multinational enterprises (MNEs) taking residence in them before expanding to the rest of Africa. The article focuses specifically on a number of guidelines that should be in place for the effective use of the MAP in the resolution of tax treaty disputes. It also demonstrates how the absence of guidelines, or the lack of clarity thereof, discourages both taxpayers and revenue authorities from effectively using the MAP to resolve transfer pricing disputes. The absence of guidelines has resulted in many aggrieved taxpayers opting to approach the courts as opposed to using the MAP as a mechanism to resolve tax treaty disputes. Furthermore, it highlights the importance of how resolved transfer pricing disputes eliminates double taxation. The article recommends that the same benefits enjoyed under the domestic dispute resolution process be incorporated into the MAP. It also makes recommendations on how jurisdictions with a low tax treaty network can address this challenge to enable them to effectively use the MAP as a tax treaty dispute resolution.

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Introduction

There are many avenues for tax minimisation by multinational enterprises (MNEs). Transfer pricing manipulation is used most actively to minimise taxes and maximise profits.[1] When two or more enterprises that are part of the same multinational group trade as one another, the price which they place on the services being offered, or the goods being sold, is referred to as the transfer price.[2] Transfer pricing is not in itself illegal nor necessarily abusive. What is illegal or abusive rather is transfer mispricing, also known as transfer pricing manipulation or abusive transfer pricing.[3] Transfer mispricing is a form of a more general phenomenon known as trade mispricing.[4] This occurs when the set price is way higher or way lower than what the market prescribes or what the arm's length principle dictates.[5] Transfer pricing manipulation, as one of the components of illicit financial flows, robs the African continent of an estimated US$70 billion each year, which could be used for development.[6]

In 2011, the African Union (AU) and the United Nations Economic Commission for Africa (UNECA) tabled a report which summarised three components, notably, commercial, criminal and corrupt, that give rise to illicit financial flows.[7] The report identified transfer pricing manipulation as one of the contributors to illicit financial flows within the commercial component. Revenue authorities internationally have demonstrated an increasingly vigilant approach against MNEs, focusing on transfer pricing and on expanding their transfer pricing capabilities.[8] Many of them embark on

1 African Monitor, 'Report 1, State of Illicit Financial Flows in South Africa – A Scoping Exercise' <IFF-Report-1.pdf (africanmonitor.org)> accessed 1 July 2024. K Mansori and A Weichenrieder, 'Tax Competition and Transfer Pricing Disputes' (2001) 58(1) Public Finance Analysis 1.

2 S Pak, S Zanakis and J Zdanowicz, 'Detecting Abnormal Pricing in International Trade: The Greece-USA Case' (2003) 33(2) Interfaces 54–64 <https://doi.org/10.1287/inte.33.2.54.14473>

3 M Els, 'Transfer Pricing Disputes on the Rise' (Deloitte, 2017) <https://www2.deloitte.com/content/dam/Deloitte/za/Documents/tax/za_Transfer_Pricing_Disputes_on_the_Rise.pdf> accessed 17 September 2022.

4 Internet Public Library, 'Advantages and Disadvantages of Transfer Mispricing' <https://www.ipl.org/essay/Advantages-And-Disadvantages-Of-Transfer-Mispricing-PCHFRXAWU> accessed 26 February 2022.

5 L Harms and P van der Zwan, 'Alternatives for the Treatment of Transfer Pricing Adjustments in South Africa' (2016) 49(2) De Jure 288.

6 G Nicolson, 'Fighting Africa's Illicit Financial Flows: A 14-Step Guide Revealed' (*Daily Maverick*, 9 January 2017) <https://www.dailymaverick.co.za/article/2017-01-29-fighting-africas-illicit-financial-flows-a-14-step-guide-revealed> accessed 17 September 2022.

7 United Nations. Economic Commission for Africa (UN.ECA), 'Illicit Financial Flows: Report of the High Level Panel on Illicit Financial Flows from Africa' (2015) <https://hdl.handle.net/10855/22695> accessed 4 March 2023.

8 UN, 'UN Manual on Transfer Pricing, Managing the Transfer Pricing Function in a Multinational Enterprise' (TP-G, 2017) <https://tpguidelines.com/a-4-managing-the-transfer-pricing-function-in-a-multinational-enterprise> accessed 17 September 2022.

transfer pricing audits to increase revenue collection. The said transfer pricing audits have resulted in transfer pricing adjustments thereby leading to many MNEs being aggrieved and lodging disputes with revenue authorities. Transfer pricing is currently one of the more important international tax considerations,[9] and with it, the attendant challenge of the resolution of disputes arising therefrom.

Disputes usually arise where two different jurisdictions claim the right to tax the same transactions or income, which result in the imposition of an excessive tax burden on the taxpayer. The mutual agreement procedure (MAP), as provided for in Article 25 of the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention (MTC),[10] is the preferred mechanism for the resolution of transfer pricing disputes between states. It is therefore important for states to have in place guidelines on the operationalisation of the MAP to ensure the effective resolution of transfer pricing disputes. Where transfer pricing disputes remain unresolved, confidence in the certainty, fairness and integrity of the international tax system is undermined.[11] The absence of the effective operationalisation of a MAP mechanism deprives taxpayers of the contracting states of opportunities for resolving tax treaty disputes that might lead to double taxation. It is worth mentioning that the existence of a MAP mechanism is undesirable without a clear definition of the content of taxpayers' rights because it does not create the conditions for trust as well as confidence between taxpayers and competent authorities.[12]

Mutual Agreement Procedure

The MAP is one of the adopted dispute resolution mechanisms under which transfer pricing disputes can be resolved. Article 25(1) of the OECD MTC states as follows:

> where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those

9 IBFD, 'The Role and Importance of Transfer Pricing in International Tax Planning' <https://www.ibfd.org/shop/training/role-and-importance-transfer-pricing-international-tax-planning> accessed 7 March 2024.

10 OECD, 'Model Tax Convention on Income and on Capital 2017' (2017) <https://www.oecd.org/ctp/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm> accessed 7 March 2024.

11 M Markham, 'International Tax Treaty Arbitration – Fighting an Uphill Battle in the Global Arena' (2017) 28 Australasian Dispute Resolution Journal 162 169. Unresolved cross border tax disputes create unnecessary uncertainty on the part of business, and these uncertainties make business to be reluctant to transact with foreign jurisdictions particularly if they are not certain on how disputes will be resolved in the other state. Even with good tax experts it will always be a challenge for MNEs to pre-empt the tax position and plan accordingly, the situation becomes worse when there is no clearly defined mechanism, as they even cannot prepare for a dispute as part of tax risk management.

12 B Al-Rawashdeh, 'Mutual Agreement Procedure, Double Taxation Treaties and Protection of Taxpayers' Rights in the BRICS Countries' 261 (*The Lawyer Quarterly*, 7 September 2020) <https://tlq.ilaw.cas.cz/index.php/tlq/article/view/413> accessed 18 January 2024.

> 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.[13]

Once the affected competent authorities of the two states resolve the transfer pricing dispute by reaching an agreement under Article 25, they must eliminate double taxation by making an adjustment under Article 9(2) of the OECD MTC to reflect the terms of the agreement so reached. This (corresponding) adjustment can only be made if the double tax agreement (DTA) between the two contracting states contains Article 9(2), making provision for such an adjustment. Article 9(2) of the OECD MTC states that:

> Where 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.[14]

Both Article 25(1) and Article 9(2) are tightly connected for the elimination of double taxation. Most of the older DTAs entered into by the majority of African states do not contain Article 9(2). However, the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration accentuate the application of Article 25 regardless of whether Article 9 is missing.[15] Article 9 will be referred to from time to time in order to demonstrate the effectiveness or non-effectiveness of disputes resolution mechanisms, since it is only when the subservient corresponding adjustment is effected under Article 9(2) that double taxation is eliminated. While Article 25 may be used to resolve any tax treaty dispute, the focus will be on its effectiveness in resolving transfer pricing disputes and the resultant elimination of double taxation. Article 9(2) provides

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13 Article 25 OECD Model Tax Convention (MTC) <https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf> accessed 17 September 2022.

14 Article 9 OECD MTC deals mainly with transfer pricing cases and it is intended to eliminate economic double taxation, unlike art 25 which is said to be dealing with the elimination of juridical double taxation. I Hofbauer, 'Settlement of Tax Disputes in Austrian Tax Treaty Law' in M Lang and M Zuger, *Settlement of Tax Disputes in Tax Treaty Law* (Kluwer Law International 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 state, the affiliate in the second state will pay too high taxes. As a result, art 9(2) requires that the other contracting state adjust its profits appropriately to the amount of the correction in the first state provided it agrees to the reason and to the amount of the adjustment. The argument is strong that art 25 and art 9(2) are closely connected for the elimination of double taxation.

15 OECD, 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration' <https://www.oecd-ilibrary.org/> accessed 7 March 2024.

for a corresponding adjustment in that upon the resolution of the transfer pricing dispute and upon reaching a mutual agreement under Article 25(1), either one of the contracting states will effect the corresponding adjustment in order to eliminate double taxation. The existence of a DTA between states is helpful when states engage with one another to resolve a tax treaty dispute. It can only be through an existing DTA with guidelines or a framework in place that states may engage one another, and use the MAP to effectively resolve tax disputes and ultimately eliminate double taxation.

African Tax Treaty Network

Most African states have more DTAs with European states than with other African states.[16] As such, most African states have a better chance of engaging with non-African states than they do with other African states. It is only possible to refer to the MAP or its use as a dispute resolution mechanism if there is a DTA between the two states.

It can also be noted that because of the low tax treaty network between African states, it is possible for MNEs to exploit this gap to their benefit since they are aware that with no DTA in place, the much talked about international tax co-operation is either non-existent, or if it exists, its existence is inadequate to counter transfer pricing manipulation. MNEs are aware that it would be impossible for African states to engage one another and exchange information and address the mismatch in tax rules to curb the artificial shifting of profits by MNEs unless there is a DTA in place.

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 DTAs.[17] There is need for tax certainty which is a principle or canon upheld in South Africa's tax legislation; however, tax certainty can only be achieved when there are domestic guidelines formulated including signing DTAs which clearly indicate to the taxpayer, the state, the method and manner in which tax is to be collected.[18] The absence of such guidelines, including MAP guidelines, will militate the efficacy of the use thereof as an effective tax treaty dispute resolution mechanism.

16 OECD, (*www.oecd.org*) <https://www.oecd.org/tax/treaties/> accessed 4 November 2022.

17 R Rhohatgi, *Basic International Taxation* (2nd edn, Richmond 2005) 25. He goes on to argue further that it is only in a bilateral agreement that states can achieve a balanced allocation of taxing rights. Also, states may agree to grant relief in a situation where juridical double taxation arises. Most of all, states want reciprocity; otherwise, one state's taxable base could be largely eroded.

18 J Haase, N Grimm and E Versfeld, *International Commercial Law from a South African Perspective* (Shaker 2003) 68. The comment was made to refer to advance pricing arrangements and the tax certainty that they intend to provide, however, it can be argued that a tax treaty also provides for such certainty to the taxpayer to at least understand in which state will they pay tax; hence the absence of tax treaty network in Africa deprives taxpayers of such certainty.

Even with a DTA in place, for a person to effectively use the MAP as a transfer pricing dispute resolution mechanism, the taxpayer should be able to understand the domestic framework governing the process which will include inter alia:

- Are there existing guidelines governing the MAP process?
- Is the competent authority handling the MAP request independent?
- Can the taxpayer institute a judicial action during the MAP and vice-versa?
- What are the timeframes for the MAP process?
- Can the payment of tax due be suspended pending the MAP outcome?
- Will there be a transfer pricing adjustment to eliminate double taxation?

South Africa

The Existence of Guidelines Governing the MAP Process

In 2020, the South African Revenue Service (SARS) issued the *Guide on Mutual Agreement Procedures* (hereafter the SARS guide). This document intends to provide guidance to taxpayers and competent authorities when using the MAP process to resolve international tax disputes. However, in its preface it is stated that the document is not to be used for legal reference when it comes to the interpretation of precise technical and legal detail that is often associated with tax.[19] It is further stated that the SARS guide is not an official publication as defined in section 1(1) of the Tax Administration Act 28 of 2011 (TAA) and accordingly does not create a practice generally prevailing under section 5 of that Act.[20] This means that while it makes provision for the MAP process, SARS may deviate from the process set out in the SARS guide.

According to one of the OECD instruments, specifically paragraph 25 of the 'Minimum standard, best practices and monitoring process' to make dispute resolution more effective, 'countries should develop and publish rules, guidelines and procedures for their MAP programmes, which should include guidance on how taxpayers may make requests for competent authority assistance'.[21] Based on the foregoing, SARS has no compelling guidelines for the use of the MAP.

19 SARS, 'Guide on Mutual Agreement Procedures', Issue 3 (SARS, 2020) <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-IT-G24-Guide-on-Mutual-Agreement-Procedures> accessed 13 August 2022. This preface should be seen as a concession by South Africa that the guide itself will be unable to address may not be able to address other technical aspects of the MAP process that which relates to tax and the interpretation of tax statutes.

20 ibid. Since this is said not to be an officially published guideline, it then says that South Africa stands a risk like that which happened in *Unilever Kenya Ltd v Commissioner of Income Tax* (2005) eKLR, (Income Tax Appeal No 753 of 2003) where the court ruled that in the absence of guidelines within Kenya, the OECD guideline will prevail.

21 OECD/G20, 'Base Erosion and Profit Shifting Project' (2013) <https://www.oecd-ilibrary.org/taxation/oecd-g20-base-erosion-and-profit-shifting-project_23132612> accessed 18 September 2022.

The Independence of the Competent Authority

The SARS guide issued in 2020 refers to the Commissioner for SARS as the competent authority with MAP duties being delegated to designated representatives, the Legislative Research and Development, a subdivision within SARS Legal Counsel.[22] The OECD recommendation on Action 14 of the Base Erosion and Profit Shifting (BEPS) Project Plan also amplifies the required independence of the competent authority. It 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 the policy that the country would like to see reflected in future amendments to the treaty.[23]

The issue of whether those at SARS should be part of the competent authority and be part of the negotiations during the MAP process has been clarified. Therefore, SARS staff should not be part of the MAP process, to ensure the effectiveness of the MAP process. When a MAP request is made, it must be referred to an independent and separate unit that deals with the MAP and not to the transfer pricing audit unit.[24]

The Institution of Judicial Action during the MAP Process

According to the commentary to Article 25 of the OECD, one of the grounds upon which the competent authority may refuse and/or reject the MAP application is that there is a court decision already made on the matter which is binding on the competent authority.[25] There is a distinction between administrative decisions (decision made by

22 OECD, 'Making Dispute Resolution More Effective – MAP Peer Review Report, South Africa (Stage 2): Inclusive Framework on BEPS: Action 14' <https://www.oecd-ilibrary.org/docserver/bdae3e57-en.pdf?expires=1663859955&id=id&accname=oid044961&checksum=7157BC85E948920CEE7E8F818147240F> accessed 22 September 2022; OECD/G20, 'Base Erosion and Profit Shifting Project' (n 21). Since this subdivision is within SARS, it then says in South Africa, the competent authority is located within the revenue service, unlike in other jurisdictions where the role of a competent authority is located within 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 diplomatic mandate at treasury, just to ensure independence.

23 OECD/G20, 'Base Erosion and Profit Shifting Project' (n 21).

24 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' <https://www.taxcom.org.za/docs/New_Folder3/13%20BEPS%20Final%20Report%20-%20Action%2014.pdf> accessed 27 August 20222.

25 OECD, 'Commentary on Article 25 of the Model Tax Convention' (2010) <http://www.oecd.org/berlin/publikationen/43324465.pdf> accessed 20 July 2022. In cases where there is a court case pending, the taxpayer will be advised to suspend the impending litigation as this will result in a duplication and/or a parallel process. More often some jurisdictions allow and waive prescription of any domestic litigation and allows the taxpayer to bring an action in court if not

SARS on an objection against an assessment) and judicial decisions (i.e. decisions made by the courts).

In South Africa, the position as stated in the SARS guide 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.[26] There is an argument by some authors that equates the decisions of the court to that of the administrative tribunals, to say that a decision made by the administrative tribunal has the same weight to that made by a court of law and similarly a MAP cannot be initiated.[27]

However, there is a dissenting view that it should not be an automatic refusal simply because there has been a court decision already, but rather 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 to be requested from the other contracting state. Once there is prima facie evidence of such an adjustment, then 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.

Since the MAP cannot override a judicial decision in the domestic context, it is therefore recommended that in a case where a domestic legal remedy such as an appeal has been lodged such appeal should be suspended until the MAP is concluded. If the taxpayer does not agree to the suspension of a judicial action, the competent authorities may defer the MAP until all domestic remedies have been exhausted.[28]

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satisfied with the outcome of the MAP process. The taxpayer will enjoy their rights to approach the domestic courts. OECD, 'South Africa Dispute Resolution Profile' (2021) <https://www.oecd.org/tax/dispute/south-africa-dispute-resolution-profile.pdf> accessed 23 September 2022.

26 SARS, 'Guide on Mutual Agreement Procedures' (n 19) 14. It appears 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 (an appeal court) within South Africa, appealing the decision of the court a quo.

27 M Rasmussen, *International Double Taxation* (Kluwer Law International 2011) 102. However, this is not the position in South Africa as the forums, such as the Tax Board established under s 108 of the TAA, are not regarded as courts of law.

28 SARS, 'Guide on Mutual Agreement Procedures' (n 19) 14. A distinction is made between an objection lodged to SARS and litigation against SARS lodged with the courts. The SARS 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 request MAP assistance. However, once the court has ruled on the matter, the MAP assistance will be limited to only assist in engaging the other contracting state to make a corresponding adjustment in eliminating double taxation but not for SARS to anything beyond that as it will be bound by the court decision. 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

Timeframes for the MAP Process

An instrument on MAP would generally contain a period by which a MAP request must be submitted. Article 25(1) of the OECD MTC states that a MAP application should be presented within three years from the first notification of the action resulting in taxation 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 guidelines to govern the MAP process and acceptance of such applications. According to the Davis Tax Committee (DTC), there is a need for SARS to clarify the timing of when a competent authority will entertain a MAP application, that is, whether it is once the taxpayer's objection has been disallowed or when the appeal is dismissed.[29]

The recommendation from the DTC is that a taxpayer becomes aware of the taxation not in accordance with the Convention when an assessment is issued by the revenue authority and not when the objection is disallowed. The fact that they may have lodged an objection, or an appeal does not postpone their knowledge of the taxation not in accordance with the Convention. The timing of their awareness and knowledge will remain the date on which SARS issues an assessment.

Also worth noting is that nowhere does Article 25(1) prescribe the timeframe for the completion of the MAP request, it is only in paragraph 5 where it states that 'in a case where the competent authorities are unable to reach an agreement under paragraph 2

requests under their treaties or domestic laws, by so doing allowing 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. Developing states are said to be limited in terms of resources hence a developing state like South Africa will find it difficult to provide for two parallel processes.

29 DTC, 'Second Interim Report' (n 24) 95. The challenge with the timing for bringing a MAP application has always raised a question of whether it is the time immediately after assessment or the time immediately after the taxpayer has exhausted all the dispute resolution process within SARS. It may be tempting to agree with the DTC that notification of taxation not in accordance with the DTA will be the occasion on which the taxpayer is issued with an assessment. This position is taken from the fact 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 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. 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. Also, there is no time limit within which the MAP application should be finalised neither are there timeframes and/or turnaround times for every action step that the competent authority is to take and/or to follow once the MAP application has been received and/or accepted. The absence of turnaround times makes it even difficult for the taxpayer to monitor the process particularly as the taxpayer is not involved in the process. The least would have been to have a turnaround time which would have been a mechanism for the taxpayer to monitor the progress, which aspect will ensure confidence on the competent authority to resolve the dispute.

within two years, the unresolved issues will, at the written request of the person who presented the case, be solved through an arbitration process'.[30]

It can then be assumed that paragraph 5 directs the competent authorities to complete the MAP within two years, failing which it must then be escalated to arbitration. However, the majority of the DTAs entered into between South Africa and other contracting states, both within the continent and beyond, do not contain the paragraph 5 'arbitration clause'.[31] The South African position is that there is neither a timeframe towards the completion of the MAP application, nor any turnaround timeframe on the steps to be taken during the MAP process. The absence of timeframes may potentially result in the MAP application taking much longer than preferred by the parties involved.

Although South Africa has not endorsed the BEPS Project Plan in its entirety, it has endorsed parts thereof including the commitment to address BEPS in a comprehensive manner.[32] This will also include minimum standard in the Action 14 Report,[33] which consists inter alia of the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes. From the statistics provided by the OECD on MAP cases reported by all members of the Inclusive Framework on BEPS committed to the implementation of the Action 14 minimum standard, between 2016 and 2020, South Africa has reported 13 MAP cases, with eight initiated and none concluded.[34]

Most of the DTAs signed by South Africa and other African states contain Article 25(2) which states as follows:

30 OECD, 'Model Tax Convention' (n 9) art 25 para 5.

31 The absence of para 5 in the majority of DTAs entered into by South Africa has the effect of prolonged MAP processes. Since most of the DTAs between African countries inter se do not contain para 5 in art 25 which implicitly compels competent authorities to resolve tax disputes within two years, the results have been long and unresolved MAP applications. This situation has triggered a lack of appetite by both the taxpayers and competent authorities on the usage of the MAP to resolve transfer pricing disputes.

32 OCED, 'Making Dispute Resolution Mechanisms More Effective, Action 14: 2015 Final Report' (2015) <https://www.oecd.org/tax/beps/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report-9789264241633-en.htm> accessed 22 September 2022. 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, effective and efficient manner. The said commitment will remain purely academic if it is not reduced in writing or incorporated in the DTA itself. 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 guide and make that guide governing the MAP a public document.

33 ibid. OECD, 'MAP Peer Review Report' (n 22); OECD/G20 'Base Erosion and Profit Shifting Project' (n 20). South Africa is one of the countries that signed the inclusive framework on BEPS.

34 OECD, 'Mutual Agreement Procedure Statistics' (2020) 1 <http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm> accessed 4 September 2022.

> The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.[35]

There is nothing in the above paragraph that compels the South African competent authority to resolve the tax dispute, except 'to endeavour', meaning that there is nothing legally compelling the competent authority let alone the time limit within which that transfer pricing dispute should be resolved.[36]

The Suspension of Tax Payment Pending the MAP Outcome

In South Africa, there is a principle of 'pay now, argue later' contained in section 164 of the TAA that is applied by 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.[37] South Africa, unlike other African states, does not even allow for a part payment of the tax amount disputed.

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.[38] According to subsection (3)(a) to (e) of section 164, a senior SARS official may suspend payment of the disputed tax having regard to:

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35 The problem with art 25(2) is that the word 'endeavour' appears twice, the first time it is used is where the competent authority can unilaterally resolve the dispute and secondly as reference to an engagement between the resident's competent authority and 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 neither because of the lack of co-operation between contracting states nor the absence of tax treaty network especially in Africa but rather the lack of peremptory provisions in the MAP art itself that compels competent authority to resolve the dispute. Except for the above cited position, commitment to resolve MAP cases timeously is also not peremptory; there is no time limit to complete the MAP process. Also, there is no turnaround time for various phases involved in the MAP process, that the taxpayer can use to hold the competent authority accountable for their failure to act.

36 DTAs between South Africa and Uganda, Botswana, Namibia, Ghana and Kenya <https://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/default.aspx> accessed 8 May 2022.

37 B Johannes, 'Pay Now, Argue Later' Principle: When Must You Pay SARS?' (*News & Press: Tax Talk*, 2016) <https://www.thesait.org.za/news> accessed 3 September 2022. *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2000 62 SATC 84 85.

38 DTC (n 24). South Africa does not have clear policy or guideline about how to deal with tax payment or the suspension thereof pending the MAP outcome.

(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.[39]

It is submitted that SARS should be cognisant of the fact that not permitting the suspension of payment pending the MAP outcome can be extremely detrimental to the taxpayer. There are other suggestions from the DTC of a system whereby an independent body looks at the preliminary facts to determine whether or not the payment could be suspended. According to the SARS 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, that is if it meets the requirement of section 164 of the TAA.[40] The MAP process alone will not allow the taxpayer to request for suspension of payment. Nowhere in the SARS guide is there any reference for the payment of any fees to lodge a MAP request. The absence of the benefits that are there in ordinary domestic dispute resolution mechanisms in the MAP process have made aggrieved taxpayers choose not to use it as a tax treaty dispute mechanism, thereby rendering the MAP ineffective.

39 Section 164 of the TAA.

40 Rhohatgi (n 17) 24. The implication is that a MAP alone is not recognised in terms of the domestic revenue laws to be a dispute to enable 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, the taxpayer must also lodge an objection in terms of s 104 of the TAA before they can qualify. Even the guide on the MAP makes reference to s 164 of the TAA rather than giving recognition of the MAP as a dispute on its own to warrant an application for suspension of payment. From a South African perspective, it would mean a MAP application per se would not enable the taxpayer to request or make an application for the suspension of payment. A dispute for SARS purposes is considered and regarded as such only when brought in terms of ch 9 of the TAA. It must be noted that nowhere in ch 9 is reference made to the MAP or any tax treaty dispute. Reference to 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. A MAP process does not have a specific turnaround time, it can go for two years and beyond, while an objection under s 104 has a turnaround time. Thus, the question that arises subservient to this is what happens if the objection lodged concomitant with the MAP is disallowed before resolution of the MAP, what will be the effect of the disallowed objection on the suspension of payment since the suspension was reliant on the objection lodged in terms of s 104 of the TAA?

Transfer Pricing Adjustments to Eliminate Double Taxation

The prime objective of every DTA is to eliminate double taxation; this should be contained in each agreement.[41] The MAP itself addresses juridical double taxation and not economic double taxation. It is therefore important that the DTA contain Article 9(2) to ensure that the spirit of the DTA, the elimination of economic double taxation is achieved. That can be achieved if after a MAP process, Article 9(2) is fully implemented.[42] Article 9(2) as referred to above becomes relevant especially as a means to eliminate double taxation. South Africa has several DTAs which do not have a provision such as Article 9(2) of the OECD MTC. Other such DTAs include Brazil, Germany, Zimbabwe and Zambia.[43]

Kenya

The Existence of Guidelines Governing the MAP Process

Kenya does not have specific (guidelines) to address transfer pricing disputes.[44] It also does not have MAP guidelines in place yet, nor any guide on how to resolve its tax treaty disputes. However, according to the *Kenya Dispute Resolution Profile – Preventing Dispute*, the MAP Procedures Manual is in the process of being finalised and once this is done, the rules, guidelines and procedures will be made publicly available.[45] Currently, there are no guidelines on how taxpayers can use and/or access the MAP. The only available document that will give the taxpayer some form of

41 The preamble in the DTA between South Africa and Ghana (n 36). The MAP request is completed once all parties to the dispute reach an agreement, then a corresponding adjustment to reflect the agreement must be made. This can be made by the resident state unilaterally or by the other contracting state which was party to the tax treaty dispute.

42 M Markham, 'New Developments in Dispute Resolution in International Tax' (2017) 25 1 RLJ 6 <https://doi.org/1053300/001c.6753>. Here 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 the MNE one or more tax administrations.

43 The effect of the absence of art 9(2) in DTAs is that even when there can be an agreement reached in a MAP process, which will require one of the states listed, to effect an adjustment as a way to eliminate double taxation, it will not be legally possible. While 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 avoidance of juridical double taxation can be reached while it may be difficult to avoid economic double taxation which is the one more relevant in transfer pricing cases.

44 EuropeAid, 'Transfer Pricing and Developing Countries – Kenya' Final Report (*EuropeAid*, implementing the tax and development policy). 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.

45 OECD, 'Kenya Dispute Resolution Profile – Preventing Dispute' (June 2022) <https://www.oecd.org/tax/dispute/Kenya-Dispute-Resolution-Profile.pdf> accessed 21 May 2023. It may have been thought that the ruling in the *Unilever* case would have demonstrated the importance of having guidelines in place.

guidance on tax treaty disputes is the *Kenya Dispute Resolution Profile*.[46] The absence of guidelines has rendered the MAP ineffective as a tax treaty dispute resolution mechanism.

The adjudication of tax treaty disputes by the competent authority has not been used widely in Kenya. This can be attributed to the limited number of DTAs Kenya has entered into with other jurisdictions hence the use of the MAP as a dispute resolution mechanism to resolve disputes will be problematic. Unlike SARS, the Kenya Revenue Authority (KRA) has not issued any guiding document.

In Kenya, the Income Tax Act[47] allows the Minister for Finance to enter into a Tax Information Exchange Agreement with other governments, which allows the KRA to exchange information with other tax jurisdictions and enhance the audit of MNEs. The information so exchanged can be vital to conduct audits on MNEs. However, any adjustment giving rise to a dispute will become problematic as there is no framework through which Kenya can engage other jurisdictions to resolve the said dispute and eliminate double taxation.

The Independence of the Competent Authority

In Kenya, the application for a MAP request is made to the Commissioner of the KRA. Like in South Africa, the independence of the competent authority in adjudicating the MAP case is not guaranteed.[48] The lack of independence is some of the aspects that discourages aggrieved taxpayers to use the MAP as a tax treaty dispute resolution mechanism.

The Institution of Judicial Action during the MAP Process

In Kenya, a taxpayer may not have both processes going on simultaneously. MAP assistance cannot be initiated in cases where the taxpayer has sought to resolve the issue at dispute via the judicial or administrative remedies provided by the domestic law.[49] In terms of Kenya's policy, as contained in the *Kenya Dispute Resolution Profile* that deals with the availability of and access to the MAP, taxpayers are not allowed to make a MAP request in cases where the taxpayer has sought to resolve the issue disputed via the judicial and administrative remedies under the domestic law.[50]

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46 ibid 5.

47 Income Tax Act, CAP 40 Revised Edition 2022.

48 KRA, 'Treaties and International Policy' (August 2021) <https://www.kra.go.ke/about-kra-footer/treaties-international-policy> accessed 25 September 2022.

49 OECD, 'Kenya Dispute Resolution Profile' (n 45) 8. 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 of a quo.

50 Kenya goes beyond South Africa, in that the permission to request 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. The

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 commissioner's determination of the objection. Most transfer pricing appeal cases end up in the Tax Appeal 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 have on several occasions indicated that transfer pricing issues are too complex for their current level of skills in tax.[51] This poses a risk in the sense that some decisions made by the tribunal may not be founded upon sound reasoning, or, even if they are, the rationale may not have been clearly expressed.[52]

Timeframes for the MAP Process

In Kenya, the MAP request must be filed within three years from the date of notification of the act.[53] Kenya has so far only concluded one MAP case, the *Unilever* case.[54] As a result, a model timeframe is yet to be developed. Kenya's policy is such that once a MAP request or application has been heard by the competent authority and a mutual agreement is reached by all parties through MAP, it can be implemented notwithstanding any time limitation under domestic law.

The implementation of the MAP means that the KRA will then issue a revised assessment in line with the MAP agreement. Alternatively, if it was unilateral in that it did not involve the other contracting state, then tax relief will be granted by way of an adjustment by the local revenue authority. As regards the timelines for the request of the MAP, Kenya is guided by the provisions of the treaty relied on to make a MAP request.[55] As of 2020 only two cases were closed through unilateral relief, meaning there were no cases adjudicated by the competent authorities of the two or more

application will not be rejected outright, however, the taxpayer making the MAP request will be advised to put and/or suspend the judicial or administrative remedy sought in abeyance pending the outcome of the MAP process.

51 A Waris, 'How Kenya Has Implemented and Adjusted to the Changes in International Transfer Pricing Regulations: 1920–2016', ICTD Working Paper 69 <https://www.ictd.ac/publication/how-kenya-has-implemented-and-adjusted-to-the-changes-in-international-transfer-pricing-regulations-1920-2016/> accessed 14 March 2024.

52 G Maina and M Ikiara, 'Tax Dispute Resolution in Kenya' (*Rödl & Partner*, 27 March 2018) <https://www.roedl.com/insights/tax-dispute-resolution-kenya-kra> accessed 7 September 2019.

53 OECD, 'Kenya Dispute Resolution Profile' (n 45).

54 SARS, 'Guide on Mutual Agreement Procedures' (n 19). It may have been thought that the outcome of the case would have compelled Kenya to expedite the development of a domestic framework and guidelines to deal with tax treaty issues.

55 OECD, 'Kenya Dispute Resolution Profile' (n 45) 7. The timeline or timeframe contained in every individual treaty will guide the timeline for bringing the MAP application. In the absence of specific timeframes that address the issue of timeframes, Kenya stands a risk again of having to end up with a situation similar to the judgement in the *Unilever* case (n 19). 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.

countries affected and secondly there was no agreement fully reached under the MAP to eliminating double taxation.[56]

The Suspension of Tax Payment Pending the MAP Outcome

According to the *Kenya Dispute Resolution Profile*, once a taxpayer initiates a MAP application, tax collection procedures are suspended until the MAP case is resolved.[57] It has been established that despite what is stated in the *Kenya Dispute Resolution Profile*, unlike South Africa, Kenya in its tax objections and appeals to Tax Appeal Tribunals, requires taxpayers to pay a non-refundable fee of Shs700 000, before a dispute is heard.[58]

Transfer Pricing Adjustments to Eliminate Double Taxation

Like South Africa, not all DTAs contain a provision which would oblige Kenya to make a corresponding adjustment in terms of Article 9(2) or a similar provision.[59] Article 9(2) is more relevant with transfer pricing cases. As the MAP generally caters for juridical double taxation, the provision of Article 9(2) responds to economic double taxation. The provision affords financial recourse for taxpayers by eliminating double taxation that may otherwise result from a primary transfer pricing adjustment, Article 9(2) of the OECD MTC.[60] Currently, there are no records of transfer pricing cases that have been resolved under the treaties; either by way of a corresponding adjustment under Article 9(2),[61] only a total of two cases were resolved by way of unilateral relief.[62]

56 OECD, 'Mutual Agreement Procedure Statistics per Jurisdiction for 2020' (2020) <https://www.oecd.org/tax/dispute/2020-map-statistics-kenya.pdf> accessed 25 September 2022.

57 OECD, 'Kenya Dispute Resolution Profile' (n 45) 5.

58 I Ladu, 'Tax Appeals Tribunal: Is It an Enabler or Barrier to Business' (10 April 2018) <https://www.monitor.co.ug> accessed 16 June 2021.

59 Article 10 of the DTA between the Government of Kenya and the Government of the Republic of the United Kingdom of Great Britain <https://assets.publishing.service.gov.uk/media/5a7f9d8a40f0b6230269090e/uk-kenya-dta-consolidated_-_in_force.pdf>

60 The implementation of corresponding adjustment will be dependent on the contracting states and its willingness to uphold not only the art of the DTA 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 both states in the negotiation process to provide not only the foreign, but also the local, MNEs with the ability to avoid double taxation when possible. It is also said this position also impedes the work of the revenue authority, and its ability to access data in states with whom there is no DTA or TIEA in place. A Waris (n 50) 33.

61 OECD, 'Kenya Dispute Resolution Profile' (n 45).

62 OECD, 'Mutual Agreement Procedure Statistics per Jurisdiction for 2020' (n 56).

Uganda

The Existence of Guidelines Governing the MAP Process

Uganda has only nine DTAs and many of them are with European states, only two are with African states, namely, South Africa and Zambia.[63] Its DTAs are in line with the OECD MTC. This means that in cases of tax treaty interpretation disputes, the interpretation articulated by the OECD in line with the Vienna Convention on the Laws of Treaties will be applicable.[64] Uganda is a more frequent participant at the OECD's annual tax treaties forum than at the UN.

Uganda has set up a specialised court to provide taxpayers with easily accessible, efficient and independent arbitration in tax disputes with the Uganda Revenue Authority (URA).[65] The Tax Appeals Tribunal is a quasi-judicial forum that seeks to reduce case backlog resulting from tax disputes.[66] As a partner state of the East African Community (EAC), Uganda is signatory to the EAC DTA which in Article 26 prescribes the use of MAP as a mechanism to resolve tax treaty disputes. It also provides a forum for taxpayers to protest actions which are not in accordance with the treaty and a mechanism for the elimination of double taxation in cases not provided for by the treaty.

The Independence of the Competent Authority

Due to the absence of guidelines, it is even unclear whether the competent authority is independent or not. There is no information to refer to, and with no information to refer to, the independence of the competent authority cannot be guaranteed.

The Institution of Judicial Action during the MAP 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.[67] Uganda puts emphasis on the fact that 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).

63 PWC, 'Uganda, Individual – Tax Relief and Foreign Treaties' (PWC, September 2022) <https://taxsummaries.pwc.com/Uganda/Individual/Foreign-tax-relief-and-tax-treaties> accessed 1 November 2022.

64 AW Oguttu, 'Tax Disputes in Uganda' in E Baistocchi (ed), *A Global Analysis of Tax Treaty Disputes* (Cambridge University Press 2017) 1196 1200.

65 URA, Ministry of Finance, Planning and Economic Development, 'Tax Appeals Tribunal' <https://www.finance.go.ug/mofped/tax-appeals-tribunal-tat> accessed 14 March 2024.

66 PWC, 'Uganda, Individual – Tax Relief and Foreign Treaties' (n 63). It is not clear how the MAP as contained in the DTAs entered into by Uganda and other contracting states will be factored into this Tax Appeal Tribunal.

67 *Heritage Oil Plc, and Tullow Oil Plc* [2013] 2175 (unreported).

Timeframes for the MAP Process

With no guidelines governing the MAP process, Uganda relies on what is contained in the DTA with the other affected country. In terms of the DTA between South Africa and Uganda,[68] a MAP application should be brought within three years of the first notification of taxation not in accordance with the DTA. The mere notification or communication is sufficient for the taxpayer to submit an application for a MAP request.[69] Like South Africa there is neither clear timeframes for the completion of the MAP process nor any pressure on the part of the competent authority to resolve the dispute. The absence of clear timeframes has discouraged the use of the MAP as an effective tax treaty dispute resolution mechanism.

The Suspension of Tax Payment Pending the MAP Outcome

Uganda requires the taxpayer to pay a refundable amount which is equal to thirty per cent of the disputed amount. Some businesses attempt to by-pass the tribunal, preferring their tax matters and related issues to be handled by the courts. The main reason that one trader stated, was that the mandatory deposit ties down a substantial amount of operating capital and renders a considerable amount of money idle while awaiting completion of the case.[70] Like South Africa, nowhere is there reference for the payment of any fees to lodge a MAP request.

Transfer Pricing Adjustments to Eliminate Double Taxation

The effect of a transfer pricing adjustment is that the taxpayer's state of residence will be obliged to allow the taxpayer a deduction equal to the amount of income tax paid in the other partner state in respect of the same income.[71] Like South Africa, Uganda has a treaty that does not contain Article 9(2).[72] However, unlike South Africa, Uganda makes provision for the commissioner upon request by the person subject to tax in Uganda to determine whether the adjustment is consistent with the arm's length

68 DTA between South Africa and Uganda (n 36).

69 The EAC DTA itself acknowledges the OECD Manual on Effective Mutual Agreement Procedures (MEMAP), that in dealing within disputes through the MAP, parties need to adhere to best practices and do so with speed and within reasonable timeframes. It is the EAC DTA itself that concedes that these are only recommendations not binding on member states.

70 PWC, 'Uganda, Individual – Tax Relief and Foreign Treaties' (n 62). 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.

71 D Kakembo, 'EA Community Treaty in the Offing' (*The Observer*, 2011) <https://www.observer.ug> accessed 1 November 2022.

72 DTA between the Government of the 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 2022. The matter of transfer pricing adjustment then becomes the discretion of the competent authority.

principle and where it is determined to be 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.[73]

Ghana

The Existence of Guidelines Governing the MAP Process

Ghana does not have specific MAP guidelines in place yet, but 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.[74] Most if not all of the DTAs it has entered into are along the OECD MTC and they all contain the MAP as a mechanism to resolve tax treaty disputes. Ghana has 11 DTAs and only two of them are with African states, namely, South Africa and Mauritius.[75] The DTAs with Liberia and Morocco are not yet in force.[76] In 2011, Ghana signed the OECD Convention on Mutual Administrative Assistance in Tax Matters, which is now in force.[77]

The absence of guidelines in Ghana negatively affects the effectiveness of the use of the MAP, since the convention does not lay down any special rule as to the form and manner in which a MAP request is to be brought before the competent authorities. The competent authorities may prescribe special procedures which they deem appropriate. If no special procedure has been specified, the request may be presented in the same way as objections regarding taxes are presented to the tax authorities of the state concerned.[78]

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73 Paragraph 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 October 2022. Even though the provision deals with advance pricing arrangements, it is argued that the corresponding adjustment will apply *mutatis mutandis* to the MAP.

74 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 the Agreement 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 <https://www.iras.gov.sg/media/docs/default-source/dtas/singapore-ghana-dta-(ratified)(12-apr-2019).pdf?sfvrsn=3adbaa8f_0>, and 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/wp-content/uploads/2020/09/Ghana_Denmark-DTA.pdf>

75 GRA, 'Double Taxation Agreements' <https://gra.gov.gh/double-taxation-agreements/> accessed 10 June 2022.

76 ibid.

77 OECD, 'Convention on Mutual Administrative Assistance in Tax Matters' (July 2022) <https://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm> accessed 2 November 2022.

78 OECD, 'Commentary on Article 25 of the MTC' (n 25). The absence of specific MAP guidelines depicts the very reason why the treaty was 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

The Independence of the Competent Authority

Like South Africa, the body responsible for the adjudication of transfer pricing cases is housed with the Ghana Revenue Authority (GRA). *Ghana's Double Taxation Treaty Administration Manual*, which is still in draft form, makes reference to the establishment of the Treaties Unit of the GRA.[79] As such, the forum to adjudicate transfer pricing disputes will remain within the GRA.

The Institution of Judicial Action during the MAP Process

The GRA has established a committee to review cases where there is a dispute with the taxpayer. This committee comprises seven officials including the head of legal services at the GRA and the head of the transfer pricing unit. 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 taxpayer still disputes the matter, the matter will go to court.[80] This is the reason why the judiciary were also trained on transfer pricing, so that they would be able to adjudicate such disputes.[81] This was done with the assistance of the OECD and other tax administrations.[82]

Timeframes for the MAP Process

Ghana allows the taxpayer to file for the MAP request within three years from the date of notification of taxation not in accordance with the Convention.[83] However, only taxpayers whose states have DTAs with Ghana will be able to bring forward a MAP

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will have to file their request as an objection to the revenue authority or it would mean that they will file their MAP request to the competent authority in a manner similar to that recognised and applicable in their domestic processes. A MAP is considered internationally as a special procedure, a non-adversarial procedure, what would then be special about it, if there are no specific guidelines for such. 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 or litigation, which can be cumbersome and uncertain. The procedure that is there domestically may not be available in both states as a result it may lead to different results in each state, thus failing to resolve the double taxation. S Bokobo, S Govind, C Pimentel and others, 'Tax Treaty Mechanisms to Resolve Cross Border Tax Disputes, Chapter 5: The Mutual Agreement Procedure' (2018) <https://www.un.org/esa/ffd/wp-content/uploads> accessed 1 November 2022.

79 Republic of Ghana, 'Ghana's Double Taxation Treaty Administration Manual (Draft)' <https://qrfy.com/api/storage/gcs/pdf/qrfyprod/38155720-9510-49ed-84d3-9fa35f1ce0e5.pdf> accessed 4 March 2023.

80 Ernst & Young, 'Global Tax Alert, News from Transfer Pricing, Ghana Commences Transfer Pricing Audits – Ghana Revenue Authority Reveals That over 250 Transfer Pricing Audits Have Been Initiated' (16 February 2015) <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 2022.

81 ibid.

82 ibid (n 80).

83 DTA between Ireland and the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion <https://www.revenue.ie/en/tax-professionals/documents/double-taxation-treaties/g/ghana.pdf> (n 72).

request. All the benefits available in the tax treaty, including corresponding tax treaty relief, will only be enjoyed by taxpayers only if they are resident in those jurisdictions which have DTAs with Ghana. According to *Ghana's Double Taxation Treaty Administration Manual*, which is still in draft form, it refers to the establishment of the Treaties Unit which shall complete the evaluation of a request and issue a decision on the request within 30 days from the date the request is submitted on the online taxpayer's portal.[84]

The Suspension of Tax Payment Pending the MAP Outcome

In the absence of specific MAP guidelines, it is common cause that domestic law would apply whenever a taxpayer lodges an objection and/or applies for a MAP process. The position in Ghana is that when a taxpayer initiates a MAP request, they must concomitantly lodge an objection under paragraph 21 of the Income Tax Act 896 of 2015 for the MAP to be heard.[85] The fact that one has to lodged parallel applications, both the MAP request and an objection with the revenue authority on the same matter has discouraged taxpayers to use the MAP as a tax treaty dispute resolution mechanism, as taxpayers would rather go the route of an objection. Subservient to paragraph 21, paragraph 24(1) of the Income Tax Act provides as follows:

> where 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:

84 ibid (n 72) 9.

85 In Ghana, 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 896 of 2015. Although the Act does not specifically refer 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 are no specific guidelines 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 the decision of the commercial division of the High Court on 13 July 2018 in the case of *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. Thus, 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 the minimum (30%) 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.

> an 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.

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 state where all its DTAs have a provision for a corresponding transfer pricing adjustment.[86] According to *Ghana's Double Taxation Treaty Administration Manual*:

> Where a taxpayer is of the opinion that a primary transfer pricing adjustment in a State with which the Republic of Ghana does not have a DTT will result in double taxation, the taxpayer the taxpayer must complete an application in a prescribed form, attach the required documents and submit the completed application through the taxpayer's online portal. The Treaties Unit of GRA shall upon receipt of such a request, evaluate the request and obtain information from the competent authority of the other State to determine the merits or otherwise of the request. Where the Treaties Unit of GRA determines that the request has merits, it shall inform the appropriate Unit within GRA to undertake a corresponding adjustment to eliminate the double taxation on the item of income.[87]

Again, it should be noted that this is still a draft which is not yet approved for implementation.

Concluding Observations and Recommendations

The effective resolution of transfer pricing disputes using the MAP as an OECD dispute resolution mechanism is a challenge in many African states. Of the four states, only South Africa has resolved two of its ten MAP cases currently underway. The fact that only ten MAP requests have been made is evidence that taxpayers do not have the appetite to use it as tax dispute resolution mechanism. Many cases are settled. South Africa still lacks clear MAP guidelines, including to incorporate the MAP into its domestic tax dispute processes so that the benefits available and enjoyed by an aggrieved taxpayer just like under the domestic tax dispute resolution rules, for instance, the suspension of tax payment as provided for under section 164 of the TAA.

Countries like Kenya, Uganda and Ghana do not even have MAP guidelines. With no timeframes in place, MAP cases take longer to be resolved and, in all four countries, the

86 Y Asante-Boadi, 'Transfer Pricing – Ghana' (*News & Press: Tax Talk*, 4 March 2011) <https://www.thesait.org.za/news/101872/Transfer-Pricing---Ghana.htm> accessed 18 January 2024.

87 Republic of Ghana (n 79) 11.

existing frameworks are ineffective and do not encourage taxpayers to make use of the MAP, nor do they see it as an effective tool to resolve their transfer pricing disputes.

It is suggested that domestic tax legislation of African states should recognise and include the MAP as a dispute resolution mechanism in their domestic legislation. This should include the adoption of clear guidelines with clear timeframes on the MAP process. Clear guidelines will also avoid parallel applications that a taxpayer has to institute, the MAP request and an objection under domestic law. It will also ensure that with the MAP request only, the applicant will be able to make an application for the suspension of tax payment without having to lodge another objection on the same case under domestic rules.

It is recommended that all four countries, namely, South Africa, Kenya, Uganda and Ghana. develop clear guidelines, as an effective legal framework that will encourage taxpayers to use the MAP and have confidence in the MAP as an effective dispute resolution mechanism. They all should align their domestic dispute resolution rules with the MAP so that the same platform and benefits that are enjoyed by taxpayers who use domestic dispute resolution process are also enjoyed and available to taxpayers who opt for the use of a MAP as a tax dispute mechanism such as the suspension of tax pax payment pending the outcome of the MAP process.

In all four countries, aggrieved taxpayers can lodge both MAP request concomitantly with other available domestic dispute resolution process such as lodging a parallel objection with the revenue authorities or the courts. What is recommended is that rules must be developed to discourage the lodging of tax treaty disputes through these parallel processes. At times taxpayers discard the MAP request that has been lodged because they can also have the courts as a plausible forum to resolve the tax treaty disputes. Because of the delays experienced with the MAP process, some aggrieved taxpayers do not even try utilising it all.

All four countries should develop a legal framework making the MAP the forum of first instance in the event of a tax treaty dispute particularly as the MAP is the dispute resolution mechanism provided for under the tax treaty. This will also compel all affected parties, revenue authorities, competent authorities and tax practitioners and business to work hard at the development of MAP guidelines understanding that it is an important dispute resolution process, as the forum of first instance.

It is also recommended that there be a complete separation of the competent authority from the revenue administration. This will 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, and the same revenue authorities are involved in the resolution of transfer pricing dispute that was audited by them, they may not be objective; hence the delay in the resolution of transfer pricing disputes.

For African revenue authorities to effectively use the MAP in resolving transfer pricing disputes, first they should expand their tax treaty network. But because it may be a challenge to negotiate DTAs to increase their tax treaty network, the recommendation is that African states, such as South Africa, Kenya, Ghana and Uganda, should not just sign and ratify the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting Status (MLI) to expand their tax treaty network but should develop guidelines to be able to meet the obligations that come with the signing thereof.[88] This is especially important since it is the MLI that deals with the resolution of tax treaty disputes. The signing and ratification of the MLI will address some of the gaps that have been identified from the old DTAs and assist these African states with issues of the timeframe within which the MAP must be resolved together with the issue of transfer pricing adjustment that is missing from the majority of these old DTAs.

The signing and ratification of the MLI will also address the Article 9(2) adjustment which is absent in many of the old DTAs so that there can be a transfer pricing adjustment once an agreement is reached and the MAP is finalised to ensure a complete elimination of double taxation.

Also recommended is the need to train those making up the competent authority in transfer pricing disputes so that revenue officials are not used in any way during the MAP request. This independence will at least give aggrieved taxpayers confidence in the MAP process, as those who triggered the audit that resulted in the disputes will not be the same people who handle and process the MAP request.

The presence of clear guidelines will bring give both the taxpayers and revenue authorities some confidence in the process and also enhance the timely resolution of tax treaty disputes by the competent authority. The presence of clear guidelines will result in knowledge and the understanding of the process by taxpayers, the one thing that has been missing in many African countries. It is this knowledge that is needed by any aggrieved taxpayers before initiating the MAP request where they will know and understand the timeframe, the requirements and the benefits that are available. It is only when such clear guidelines are in place that taxpayers will be encouraged to use the MAP as a tax treaty dispute mechanism and the MAP itself will become effective.

88 OECD, 'Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting Status as of 21 February 2023' (2023) <https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf> accessed 4 March 2023.

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