AN EXAMINATION OF THE DISPUTE RESOLUTION MECHANISMS UNDER DOUBLE TAX TREATIES FOR RESOLVING INTERNATIONAL TAX DISPUTES*

Abstract

The purpose of a Double Tax Treaty is to promote international trade by eliminating double taxation that could arise when two sovereign countries decide to tax the same income and capital of a taxpayer under their respective domestic tax laws. Nonetheless, differences in opinion between two sovereign countries as to the interpretation and application of the provisions of the Double Tax Treaty can create an international tax dispute as to who between the two sovereign countries has the right to impose tax on the income and capital. An unresolved international tax dispute has the potential of exposing cross-border income and capital to double taxation which can undermine and discourage international trade and investment. It is in this regard that Double Tax Treaties contain certain dispute resolution mechanisms to resolve international tax disputes without necessarily going through lengthy litigation proceedings which can be uncertain, expensive and time consuming. The objective of this article is to examine the dispute resolution mechanisms under the Organisation for Economic Co-operation and Development (OECD)'s Model Double Tax Convention for resolving international tax disputes. The article also examined the resolution of international tax disputes in Nigeria.

Key words: Dispute Resolution, Double Taxation, Double Tax Treaty, International Taxation, Tax Dispute

1.0 Introduction

A Double Tax Treaty (tax treaty) is a bilateral agreement between two countries for the avoidance of double taxation.[1] Thus, it can be said that double tax treaties are usually entered between countries for the purpose of mitigating or preventing double taxation problems that could occur when two sovereign countries seek to tax cross border income and capital under their domestic tax laws in their respective jurisdictions. A double tax treaty determines how such cross-border income and capital should be taxed for the benefit of both countries.[2]Double Tax Treaty is therefore an important policy tool to facilitate cross-border trade and increase foreign

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1 Organisation for Economic Co-operation and Development (OECD), 'Glossary of Tax Terms' *OECD Publishing* (2020) <https://www.oecd.org/ctp/glossaryoftaxterms.htm> accessed 8 August 2020.

2 Andersen Tax, 'A Review of the Nigerian Double Taxation Treaty Network' (2019) <https://www.andersentax.ng/a-review-of-the-nigerian-double-taxation-treaty-framework> accessed 8 August, 2020.

direct investments (FDI) by eliminating double taxation which can be an impediment to these cross-border flows.[3]

However, differences of opinion between two sovereign countries as to the interpretation and application of the provisions of a double tax treaty can create an international tax dispute as to who between the two countries has the right to impose tax on the income and capital of a taxpayer. An international tax dispute is defined as a dispute between tax authorities of two different countries resulting from differing interpretations and application of the provisions of a tax treaty to the income and capital of a taxpayer.[4] The taxpayer in this regard is usually a Multinational Corporation (MNC) that has cross-border economic activities in the two countries. The OECD defined a MNC as a corporation comprising of two or more companies situated in more than one country but under the same ownership, management and control.[5]

The most common scenarios where countries can have differing opinions as to the interpretation and application of double tax treaties which can result in international tax disputes and double taxation include: cases of transfer pricing adjustment; attribution of profits to a permanent establishment, excess interest or royalties; cases of thin capitalisation; cases of misapplication of the rules governing residency, or the existence of a permanent establishment and so on.

In any of the above scenarios, where the two sovereign countries are unwavering as to their interpretation and application of the double tax treaty and they decide to exert their authority to tax the income and capital of the taxpayer in their respective jurisdictions, the income and capital of the taxpayer will be exposed to double taxation thereby defeating the basic purpose of double tax treaty. This means that the two countries will tax the same income and capital of the taxpayer in their respective jurisdictions. This will have the implication of discouraging international trade and disrupting foreign direct investments (FDI).

Traditionally, an aggrieved taxpayer can approach the domestic courts of each of the countries to resolve the international tax dispute in this regard. However, litigation has a disadvantage of uncertainty and can be expensive and time consuming. In order not to defeat its purpose of

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[3] Brian J. A., 'An Introduction to tax treaties' United Nations Primer on Double Tax Treaties <http://www.un.org/esa/ffd////capacity-development-tax/primer-dtt.html> accessed 8 August, 2020.

[4] International Centre for Tax and Development, 'Improving International Tax Dispute Settlement' (2016) <https://www.ictd.ac/blog/improving-international-tax-dispute-settlement> accessed 10 August, 2020.

[5] OECD, 'Concepts and Principles of Multinational Enterprise' *OECD Publishing* (2000) <http://www.oecd.org/daf/investment/guidelines/mnetext.htm> accessed August 2020.

preventing double taxation, double tax treaties contain certain dispute resolution mechanisms to resolve international tax disputes that could arise when two countries have differing opinions on the interpretation and application of the provisions of double tax treaties.[6]

The objective of this article is to examine the various dispute resolution mechanisms provided under the Organisation for Economic Co-operation and Development (OECD)'s OECD Model Double Tax Convention which countries can explore to resolve international tax disputes. The article also examined the resolution of international tax disputes in Nigeria.

2.0 Mutual Agreement Procedure (MAP)

The Mutual Agreement Procedure (MAP) is a special dispute resolution mechanism provided under Article 25 of the OECD Model Double Tax Convention.[7]The MAP is a process of consultation rather than litigation.[8]The MAP allows two sovereign countries to consult and interact with each other with the intent of coming to a mutual agreement to resolve international tax dispute where the income or capital of a taxpayer is exposed to double taxation.[9]

2.1 Administration of MAP

MAP under Article 25 of the OECD Model Double Tax Convention 2017 involves two stages. The first stage allows the taxpayer to commence MAP proceedings with the tax authority of either country. This is a unilateral MAP proceeding known as 'Taxpayer MAP Proceedings'. The second stage allows the taxpayer to request the tax authorities of the two countries to commence a MAP proceeding between themselves. This is a bilateral MAP proceeding known as 'Tax Authorities' MAP proceedings'. The two stages are considered below:

i. Taxpayer MAP Proceedings (Unilateral MAP Proceeding)

A taxpayer is allowed to initiate a MAP proceeding where it considers that the actions of one or both of the countries results or will result in a taxation that is not in accordance with the provisions of the double tax treaty.[10] In such a situation, the taxpayer may, irrespective of the

[6] Brian J. A., *International Tax Primer*,(3rdedn, Kluwer Law International 2016).
[7] OECD, 'Model Tax Convention on Income and on Capital: Condensed Version' *OECD Publishing* (2017) <http://dx.doi.org/10.1787/mtc_cond-2017-en> accessed 12 August, 2020.
[8] Tolley Study Manual, *Principles of International Taxation* (Lexis House 2019).
[9] Revenue Service Online, 'Transfer Pricing (Including MAP Requests)' <https://www.revenue.ie/en/companies-and-charities/international-tax/transfer-pricing/mutual-agreement-procedure-map.aspx> accessed 12 August 2020.
[10] OECD Model Tax Convention on Income and on Capital 2017A. 25(1).

remedies provided by the domestic law of the two countries, present its case to the tax authorities.[11]This means that a MAP Proceeding can be set in motion by a taxpayer without waiting until the potential double taxation has been charged against or notified to it.[12]

However, in order to be able to set the MAP in motion, the taxpayer must fulfil three conditions as stipulated under Article 25 of the OECD Model Double Tax Convention. The first condition is that a taxpayer must present its case before the tax authority of either country. This is a significant departure from the previous version of Article 25(1) under the OECD Model Double Tax Convention of 2014 which requires a taxpayer to present its case in the country where it is resident.

According to the OECD, the option provided to the taxpayer to present its case to the tax authority of either country is intended to reinforce the general principle that access to mutual agreement procedure should be as widely available as possible and to provide for flexibility.[13] This option is also intended to ensure that the decision as to whether a case should proceed to the second stage of the mutual agreement procedure (i.e. MAP proceeding between the tax authorities of both countries) is open to consideration by both tax authorities.[14]

The second condition is that the taxpayer must present its case within three years of the first notification of the action which gives rise to taxation which is contrary to the double tax treaty. According to the OECD, the time limit of three years set by Article 25(1) of the OECD Model Double Tax Convention for presenting MAP is intended to protect tax authorities against late objections. This time limit is to be regarded as a minimum while countries are free to agree to a longer period in their double tax treaty in the interests of taxpayers.

The third condition in this regard is that the taxpayer must be able to establish that the actions of one or both countries will result in taxation contrary to the double tax treaty and that this taxation appears as a risk which is not merely possible but probable.[15] Such actions have been held to include all acts or decisions, whether of a legislative or a regulatory nature, and whether of general or individual application, having as their direct and necessary consequence the charging

[11] Ibid.
[12] OECD, 'Commentary on the Model Tax Convention on Income and on Capital: Condensed Version' *OECD Publishing* (2017)<http://dx.doi.org/10.1787/mtc_cond-2017-en> accessed 12 August, 2020.
[13] Ibid.
[14] Ibid.
[15] Ibid.

of tax against the taxpayer contrary to the provisions of the double tax treaty.[16] It is to be noted that the question of whether or not the actions of one or both countries will result in taxation contrary to the double tax treaty is one that must be determined from the perspective of the taxpayer. Nonetheless, the taxpayer's belief that there will be such taxation must be reasonable and must be based on facts that can be established and the tax authorities cannot refuse to consider such request merely because they consider that it has not been proven that such taxation will occur.[17]

Once the taxpayer fulfils the above three conditions, the MAP proceeding has commenced. The tax authority of the country approached by the taxpayer is under an obligation to consider whether the taxpayer's objection is justified.[18]The determination whether the objection appears to be justified requires the tax authority to which the case is presented to make a preliminary assessment of the taxpayer's objection in order to determine whether the taxation in both countries is consistent with the terms of the double tax treaty.[19]

Where it is established that the taxpayer's objection is justified, the tax authority must take an action with a view of preventing taxation which is not in accordance with the double tax treaty. In this situation, the issue can be resolved without moving beyond the first stage (unilateral MAP proceeding) of the mutual agreement procedure.[20] However, if it appears to the tax authority that the taxation complained of is due wholly or in part to a measure taken in the other country, it will be incumbent on it to set in motion the second stage (bilateral MAP proceeding) of the mutual agreement procedure.[21]

ii. Tax Authorities' MAP Proceedings (Bilateral MAP Proceeding)

[16]Ibid.
[17]OECD Model Tax Convention on Income and on Capital 2017 A. 25(1).
[18] Ibid.
[19] OECD, 'Commentary on the Model Tax Convention on Income and on Capital: Condensed Version' *OECD Publishing*(2017) <http://dx.doi.org/10.1787/mtc_cond-2017-en>accessed 12 August, 2020.
[20]Ibid.
[21]OECD Model Tax Convention on Income and on Capital 2017 A. 25(1).

The MAP allows tax authorities to resolve, where possible, difficulties in the application or interpretation of double tax treaty.[22] In this regard, where a tax authority of a country to which a taxpayer has presented its case cannot by itself arrive at a satisfactory solution, such tax authority shall endeavour to resolve the case by mutual agreement with the tax authority of the other country with a view of preventing taxation which is not in accordance with the double tax treaty.[23] This MAP proceeding is a procedure between the tax authorities of the two countries and as such, the taxpayer is not a formal party to this MAP proceeding.[24]

Where an agreement is reached between the tax authorities of the two countries, the mutual agreement is documented in the form of a 'memorandum of understanding' which will be submitted immediately after conclusion of the mutual agreement. After acceptance of the mutual agreement by the taxpayer, it is implemented not later than three months after the exchange of closing letters.[25]

It can deduced from the above that the key advantage of the MAP is that it provides a dispute resolution channel for resolving international tax disputes to prevent double taxation on the cross-border income and capital of taxpayers. The consultation process provided under MAP therefore has the potential to eliminate the need for lengthy litigation proceedings which can be uncertain and expensive.[26]

It is however important to note that the operative word 'endeavour' as used in Article 25(2) of the OECD Model Double Tax Convention 2017 is an indication that there is no mandatory requirement for the tax authorities of the two countries to come to a formal agreement to resolve a case of international tax dispute submitted by a taxpayer. This means that the tax authorities can only 'endeavour' to resolve the case, but may not actually, do so.[27]The implication of this is that the issue under dispute may never actually be resolved by MAP as seen in the United States'

[22] Tolley Study Manual, *Principles of International Taxation* (Lexis House, 2019).
[23] OECD Model Tax Convention on Income and on Capital 2017 A. 25(2).
[24] OECD, 'Commentary on the Model Tax Convention on Income and on Capital: Condensed Version' *OECD Publishing* (2017) <http://dx.doi.org/10.1787/mtc_cond-2017-en> accessed 12 August, 2020.
[25] Ibid.
[26] Tolley Study Manual, *Principles of International Taxation* (Lexis House, 2019).
[27] Ibid.

case of *Pierre Boulez v Commissioner*[28] and the GlaxoSmithKline's out of court settlement with the United States' Internal Revenue Service (IRS).[29]

In the case of *Pierre Boulez v Commissioner,* Mr Boulez was a famous music director and conductor, German resident at the relevant time. He entered into a contract with CBS (UK subsidiary of CBS Inc) with regard to all master recordings from concerts and all performances embodied on such recordings which were to be owned by CBS and applications for the copyrights were filed by CBS Inc in the US. The contract in particular covered performances with US orchestras, including the New York Philharmonic. German tax authorities said any payments under the contract were royalties, subject to tax only in Germany. The IRS said any payments under the contract were for personal services performed in the US and so subject to US tax (Mr Boulez himself did not retain a copyrighted interest in the recording and payments were not for the right to use the recording). The Mutual Agreement Procedure was initiated to attempt to resolve the issue. The parties (US and Germany) endeavoured to come to a resolution but could not agree. The US courts considered the matter and concluded the evidence pointed to a contract for personal services, rather than one involving the sale of property rights.

The GlaxoSmithKline's out of court settlement case is a transfer pricing dispute between the United States (US) and the United Kingdom (UK). The US Internal Revenue Service inquired into profits of GlaxoSmithKline's US subsidiaries and queried the transfer pricing applied between the UK and US companies. GlaxoSmithKline initiated MAP proceeding under the UK-US treaty in the hope that the matter could be resolved. However the two tax authorities could not agree. GlaxoSmithKline eventually settled with the US tax authority by paying the sum of $3.4 billion.

The above cases are indicative of the fact that there is no guarantee that MAP proceedings can resolve international tax disputes particularly when the tax authorities of the two countries do not reach a consensus mutual agreement. This was what necessitated the need to include a mandatory arbitration in double tax treaties in order to ensure mandatory settlement of

[28] (1984) 83 TC 584.

[29] Internal Revenue Service, 'IRS accepts settlement offer in largest transfer pricing dispute' <https://www.irs.gov/pub/irs-news/ir-06-142.pdf> accessed on 12 August, 2020.

international tax disputes to prevent double taxation. The mandatory arbitration clause under the OECD Model Double Tax Convention is considered below.

3.0 Mandatory Arbitration Procedure

As state earlier, there is no guaranty that MAP proceedings can resolve international tax disputes particularly when the tax authorities of the two countries are unable reach a consensus mutual agreement. It was in this regard that the OECD introduced a mandatory arbitration clause in its Model Double Tax Convention. The mandatory arbitration clause was added to the OECD Model Double Tax Convention as Article 25(5) on 17 July2008.[30]

By virtue of this mandatory arbitration clause, where the tax authorities of the two countries are unable to reach an agreement within two years of the case, the unresolved issues will, at the written request of the taxpayer who presented the case, be resolved through an arbitration process.[31]This means that once there is an unresolved issue that prevents the conclusion of a mutual agreement, the taxpayer can submit such issue to arbitration. Such an arbitration can only be requested where there are unresolved issues.

The arbitration process in Article 25(5) of the OECD Model Double Tax Convention is an extension of the mutual agreement procedure (MAP) that serves to enhance the effectiveness of MAP by ensuring that where the tax authorities of the two countries cannot reach an agreement on one or more issues that prevent the resolution of a case, a resolution of the case will still be possible by submitting those issues to arbitration. The objective of the arbitration process in Article 25(5) of the OECD Model Double Tax Convention is therefore meant to address only issues which the tax authorities were unable to reach a decision through MAP, rather than focusing on the overall case itself.[32] This makes the resolution of the case to continue through the mutual agreement procedure while the resolution of a particular issue which is preventing agreement in the case is handled through an arbitration process. This distinguishes the process established in Article 25(5) of the OECD Model Double Tax Convention from other forms of

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[30] OECD, 'The OECD approves the 2008 Update to the Model Tax Convention' *OECD Publishing* (2008) <https://www.oecd.org/ctp/treaties/the-oecd-approves-the-2008-updates-to-the-model-tax-convention.html> accessed 12 August 2020.

[31] OECD Model Tax Convention on Income and on Capital 2017 A. 25(5).

[32] Tolley Study Manual, *Principles of International Taxation* (Lexis House, 2019).

commercial or government-private party arbitration where the jurisdiction of the arbitration panel extends to resolving the whole case.[33]

It is however important to note that a taxpayer's request for an arbitration will not be granted where a decision has already been rendered by a court or administrative tribunal of either State.[34] In this regard, a taxpayer will not be allowed to pursue the arbitration process if the issues intended to be submitted to arbitration have already been resolved through the domestic litigation process of either State.[35]

4.0 Reforms Introduced by BEPS Action Plan 14 on Mutual Agreement Procedure

Base Erosion and Profit Shifting (BEPS) is a term generally used to refer to various tax avoidance schemes and strategies usually employed by taxpayers to artificially shift profits from high tax jurisdiction to low or no-tax locations.[36] BEPS schemes enable taxpayers to move profits from where they are taxed at higher rates to where they are taxed at lower rates which has the implication of reducing potential revenue accruable to the government.[37]

Addressing the issue of BEPS was therefore a key priority of governments around the globe. It was in this respect that in 2012, the OECD countries and the G20 countries working together embarked on the most significant and ambitious objective of re-writing of the international tax rules in a century.[38] This ambition was to revise the existing international tax rule and align it to developments in the world economy to ensure that profits are taxed where economic activities are carried out and where value is created.[39]

On 12th February 2013, the OECD issued a lengthy report to address BEPS known as the BEPS Report.[40] This was followed by the publication of a concrete 15-Action Plan on BEPS on 19th

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[33] OECD, 'The OECD approves the 2008 Update to the Model Tax Convention' *OECD Publishing* (2008) <https://www.oecd.org/ctp/treaties/the-oecd-approves-the-2008-updates-to-the-model-tax-convention.html> accessed 12 August, 2020.

[34] OECD Model Tax Convention on Income and on Capital 2017 A. 25(5).

[35] Brian J. A., *International Tax Primer*,(3rdednKluwer Law International 2016).

[36] OECD, 'Base Erosion and Profit Shifting' *OECD Publishing* (2015) <http://www.oecd.org/tax/beps/>accessed 13August, 2020.

[37] Ibid.

[38] OECD, 'OECD/G20 Base Erosion and Profit Shifting Project 2015 Final Reports: Information Brief' *OECD Publishing* (2015) <http://www.oecd.org/ctp/beps-reports-2015-information-brief.pdf> accessed 13 August, 2020.

[39] Ibid.

[40] OECD, 'Addressing Base Erosion and Profit Shifting' (2013) <http://www.oecd.org/ctp/beps.htm>*OECD Publishing* (2013) accessed 13 August, 2020.

July 2013 (Action Plan).[41] The 15-Action Plan otherwise known as the BEPS Package equips the governments with the domestic and international instruments needed to tackle BEPS and was eventually endorsed by the G20 Finance Ministers during their meeting of 8th October 2015 in Lima while the G20 Leaders followed suit by endorsing the BEPS package during their summit held in Antalya, Turkey between 15 and 16 November, 2015.[42]

The 15-Action Plan as contained in the final report published in October 2015 are: (1) Address the tax challenges of the digital economy; (2) Neutralise the effects of hybrid mismatch arrangements; (3) Strengthen Controlled Foreign Company rules;(4) Limit base erosion via interest deductions and other financial payments;(5) Counter harmful tax practices more effectively, taking into account transparency and substance;(6) Prevent treaty abuse;(7) Prevent the artificial avoidance of PE status;(8) Assure that transfer pricing outcomes are in line with value creation- Intangibles;(9) Risk & capital;(10) Other high-risk transactions;(11) Establish methodologies to collect and analyse data on BEPS and the actions to address it;(12) Require taxpayers to disclose their aggressive tax planning arrangements;(13) Re-examine transfer pricing documentation;(14) Make dispute resolution mechanisms more effective;(15) Develop a multilateral instrument.[43]

4.1 BEPS Action Plan 14 on Mutual Agreement Procedure

Action Plan 14 (Make dispute resolution mechanisms more effective) of the BEPS Package is a specific proposal and measures developed to strengthen the effectiveness and efficiency of the MAP process.[44]It aims to minimise the risks of uncertainty and unintended double taxation by ensuring a consistent and proper implementation of tax treaties, including an effective and timely resolution of disputes arising from the interpretation or application of the double tax treaties through the mutual agreement procedure.[45]

According to the OECD's final report on Action Plan 14, the objective of Action Plan 14 of the BEPS Package is to: '*Develop solutions to address obstacles that prevent countries from solving*

[41] OECD, 'Action Plan on Base Erosion and Profit Shifting' (2013) <http://www.dx.doi.org/10.1787/9789264202719-en> accessed 13 August, 2020.
[42] Ibid.
[43] Ibid.
[44] OECD, 'OECD/G20 Base Erosion and Profit Shifting Project: Executive Summaries 2015 Final Reports' *OECD Publishing* (2015) <http://www.oecd.org/tax/beps.html> accessed 13 August, 2020.
[45]Ibid.

treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases'.[46]

To achieve this objective, the BEPS Final report sets out three core proposals to be adopted by countries. The first core proposal requires countries to commit to minimum standards on the resolution of international tax disputes. This proposal is to be adopted by all countries.[47] The minimum standards have three main objectives:

i. To ensure that countries implement Article 25 of the OECD Model Tax Treaty in good faith. This would mean that countries should ensure the inclusion in their tax treaties, a version of the MAP in Article 25(1)–(3) of the OECD Model Double Tax Convention, modified to allow the taxpayer to present its case to either country and to ensure that MAP is available for transfer pricing disputes and anti-treaty abuse provisions. As stated earlier, the previous version of Article 25(1) required the case to be presented in the country where the taxpayer is resident.

ii. To ensure that domestic administrative procedures do not block access to the MAP process and to promote timely resolution of treaty-related disputes.

iii. To allow access to the MAP process once the taxpayer fulfils the three conditions meant to set the MAP in motion.[48]

The second core proposal relates to recommended 'best practices' to complement the agreed minimum standards. However, these 'best practices' are voluntary which means that countries can decide not to commit to them.[49] The BEPS Final report contains 11 best practices which include:

i. **Best Practice 1**: Countries should include paragraph 2 of Article 9 in their tax treaties to make corresponding adjustment possible in transfer pricing dispute.

ii. **Best Practice 4**: Countries should implement bilateral Advance Pricing Agreement (APA) programs. Bilateral agreements present an increased level of certainty for both governments and taxpayers and can prevent transfer pricing disputes.

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[46] OECD, 'Action Plan on Base Erosion and Profit Shifting' (2013) *OECD Publishing* (2013) <http://dx.doi.org/10.1787/9789264202719-en> accessed 13 August, 2020.

[47] OECD, 'OECD/G20 Base Erosion and Profit Shifting Project: Executive Summaries 2015 Final Reports' *OECD Publishing* (2015) <http://www.oecd.org/tax/beps.html> accessed13 August, 2020.

[48] Ibid.

[49] Ibid.

iii. **Best Practice 8:**Countries should publish MAP guidance which should include an explanation of the relationship between MAP and domestic law administrative and judicial remedies.

iv. **Best Practice 11**: Countries' MAP guidance should provide guidance on multilateral MAPs and APAs.[50]

The third core proposal relates to the need for a compulsory and binding arbitration procedure. This is to make arbitration compulsory for countries and to make the result of the arbitration binding on countries and to guarantee that treaty-related disputes will be resolved within a specified timeframe. As at October 2015 when the Final BEPS Report was published, 20 countries declared their commitment to provide for mandatory binding MAP arbitration in their bilateral tax treaties as a mechanism to guarantee that treaty-related disputes will be resolved within a specified timeframe.[51] These countries include: Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States.[52]

The BEPS Action Plan 14 also recommended that countries should publish MAP guidelines in their respective jurisdictions.[53] This recommendation is meant to ensure that taxpayers are provided with the requisite guidance to have seamless access MAP in their respective jurisdictions.

4.2 Dispute Resolution in the Multilateral Instrument (MLI)

The Multilateral Instrument (MLI) is an outcome of BEPS Action Plan 15 of the OECD/G20 BEPS Project, which offers solutions for governments to plugs loopholes in international tax treaties by transposing results from the BEPS project into bilateral tax treaties worldwide.[54] MLI

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[50] Tolley Study Manual, *Principles of International Taxation* (Lexis House, 2019).

[51] OECD, 'OECD/G20 Base Erosion and Profit Shifting Project: Executive Summaries 2015 Final Reports' *OECD Publishing* (2015) <http://www.oecd.org/tax/beps.html> accessed13 August, 2020.

[52] OECD, 'MAP Statistics' (2015) <https://www.oecd.org/ctp/dispute/map-statistics-2013.html>*OECD Publishing* (2015) accessed 13 August, 2020.

[53] OECD, 'Commentary on the Model Tax Convention on Income and on Capital: Condensed Version' *OECD Publishing* (2017) <http://dx.doi.org/10.1787/mtc_cond-2017-en> accessed 12 August, 2020.

[54] Deloitte, 'Multilateral Instrument (MLI) Ratification Impact on Indian tax treaties' (2019) <https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/Tax/IE_Tax_Multilateral%20Instrument%20(MLI)%20Ratification.pdf> accessed on 13 August, 2020.

allows governments to modify application of their network of bilateral tax treaties in a synchronised manner without needing to renegotiate treaties again.[55]

The MLI implements BEPS recommendations in several areas including dispute resolution. Article 16 of the MLI provides that the modified version of MAP will apply to treaties in place of, or in the absence of, MAP provisions. Countries are allowed to make limited reservations in this regard, as such, allowing claims to be made to either Country and implementing a process whereby the country receiving the taxpayer's notification will notify or consult with the other country, if it does not consider the taxpayer's case to be justified.[56]

Article 19 of the MLI sets out a mechanism for mandatory binding arbitration (MBA) where tax authorities are unable to reach agreement under MAP. This is however optional and will only apply to treaties where both countries choose to apply it. Countries can choose to allow three years (rather than two years) for agreement to be reached under MAP before MBA is possible and can choose to exclude issues which have already been decided by a court.[57] Countries can reserve the right for the MBA provisions in the MLI not to apply to treaties which already provide for MBA.[58]

Under the MLI, the arbitration panel will consist of three independent and impartial members with expertise or experience in international tax. Each tax authority will appoint one member and then those two members will appoint a third member to chair the panel, who cannot be a national or resident of either state. There are provisions for an OECD official to appoint panel members, if states or the panel members do not make the necessary appointments.[59]

Countries are allowed under the MLI to choose which type of arbitration they want to adopt. This can either be:

i. **'Final Offer' or last best offer arbitration ('baseball arbitration')**: This is the default option, under which each tax authority will submit to the arbitration panel its

[55] Ibid.

[56] Multilateral Convention to Implement Tax Treaty Related Measures To Prevent Base Erosion and Profit Shifting A. 16 *OECD Publishing* (2019) https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm> accessed on 13 August, 2020.

[57] Multilateral Convention to Implement Tax Treaty Related Measures To Prevent Base Erosion and Profit Shifting A. 19*OECD Publishing* (2019) https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm> accessed on 13 August, 2020.

[58] Ibid.

[59] Ibid.

proposed resolution; and (if it chooses) a supporting paper and a response to the other state's proposed resolution. The panel will decide, by simple majority, which resolution to accept. It will not give any reasons for its decision and the decision will have no precedent value; or

ii. **'Independent opinion' arbitration**: under this option, each country provides the panel with 'any information that may be necessary for the arbitration decision'. The panel decides the issues and provides a reasoned decision. Again, the decision is by simple majority and it does not set a precedent.

If one party to the treaty has chosen independent opinion arbitration and the other has chosen final offer, independent opinion will apply to the treaty, unless the country which has chosen final offer has chosen not to apply MBA to treaties with countries that have chosen independent opinion arbitration.[60] In that case, MBA will not then apply unless the parties reach agreement on the type of arbitration process that will apply to that treaty.[61] The arbitration decision will be binding on both countries unless the taxpayer does not accept the decision. It will also not be binding if a court holds that the decision is invalid or if a person directly affected by the decision pursues litigation in relation to the issues.[62]

5.0 Impact of BEPS Action Plan 14 on Mutual Agreement Procedure

In September 2017, the OECD published the results of the first peer reviews assessing the performance of participating tax authorities with regard to the new MAP processes. The reports were broadly positive and it is hoped that this will push taxpayers to engage more with the MAP process.[63]

A July 2020 OECD progressive report revealed that 82 members of the OECD/G20 Inclusive Framework have been peer reviewed and 46 members have qualified for deferral, with another nine pending deferral.[64] The report indicated that there is a significant increase in the number of closed Mutual Agreement Procedure (MAP) cases in almost all jurisdictions under review and an increasing number of jurisdictions have introduced or updated comprehensive MAP guidance to

[60] Ibid.
[61] Tolley Study Manual, *Principles of International Taxation* (Lexis House, 2019).
[62] Ibid.
[63] Tolley Study Manual, *Principles of International Taxation* (Lexis House, 2019).
[64] OECD, 'OECD/G20 Inclusive Framework on BEPS Progress report July 2019 – July 2020' *OECD Publishing* (2019) <http://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2019-july-2020.pdf> accessed 13 August, 2020.

provide taxpayers with clear rules and guidelines on MAP.[65] Results from the second stage of the peer reviews also indicated that most of the jurisdictions reviewed thus far reduced the amount of time needed to close MAP cases.[66]

The report further indicated that Action Plan 14 of the BEPS Package is already having a broader impact on MAP. It was reported that there is a significant increase in the number of MAP profiles published on the OECD's website which now covers over 100 jurisdictions. Another significant impact is that an increasing number of jurisdictions have introduced or updated comprehensive MAP guidance to provide taxpayers with clear rules and guidelines on MAP.[67]

The 2018 MAP statistics released in September 2019 by the OECD showed that much progress has been made. It is shown that in 2018, jurisdictions closed 12% more cases than in 2017, and over 50% more than in 2016. More than 80% of MAP cases dealing with transfer pricing issues were closed in 2018, compared to 75% for other cases.[68] Several tax authorities also became more responsive and cases that were in the inventory for many years are now coming to a positive conclusion.[69]

All of the above are indicative of the fact that the reforms introduced by BEPS Action 14 have been very effective and have been well received by various countries.

6.0 Mutual Agreement Procedure in Nigeria

The Federal Inland Revenue Service (FIRS), on 21February 2019, released and published the guideline on Mutual Administrative Procedure (MAP) in Nigeria.[70] This is a highly commendable act on the part of the FIRS as this is in line with the reforms introduced by BEPS Action Plan 14 to ensure an efficient and effective administration of MAP. The guidelines are briefly examined below.

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[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Federal Inland Revenue Service, 'Guidelines on Mutual Agreement Procedure (MAP) in Nigeria' *FIRS Information Circular* (2019) <https://www.firs.gov.ng/sites/Authoring/contentLibrary/9d150136-b0e5-413e-d7da-539058cbeb19Guidelines%20on%20Mutual%20Agreement%20Procedure%20in%20Nigeria%20-%20201901.pdf> accessed 14 August, 2020.

6.1 Purpose of the Map Guidelines

The MAP guideline was issued to provide guidance to all taxpayers, taxpayers' representatives or advisers, tax officers, all other stakeholders and the general public on the procedure for accessing Mutual Agreement Procedure (MAP) as a means of dispute resolution pursuant to the Double Taxation Agreements between Nigeria and other countries.[71]Thus, it can be posited that the purpose of the MAP guidelines is to provide assistance to taxpayers on how best to access MAP in Nigeria to resolve international tax disputes involving double taxation and inconsistencies in the interpretation or application of the provisions of a Tax Treaty.[72]

6.2 When MAP Will Be Necessary

The MAP guideline gave examples of scenarios of disputes that may warrant taxpayers to request MAP assistance. These include: transfer pricing disputes, dual residence status (where a Nigerian resident taxpayer may also be considered to be a resident of a Treaty Partner, under that country's domestic law), withholding tax (where a withholding tax is levied beyond what is allowed within an applicable Tax Treaty by a Treaty Partner on a payment to a Nigerian resident), permanent establishment, characterisation or classification of income.

6.3 Time Limits for Requesting Access to MAP

According to the MAP guideline, the time limit for presenting a MAP depends on the specific terms as contained in the MAP article of the particular tax treaty under which the MAP is invoked. However, where the time limit for presenting a case to invoke MAP is not specified in the relevant tax treaty, the tax authorities of the two countries will agree on the applicable time limit. Nonetheless, the case must be presented to the FIRS within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the double tax treaty.

6.4 Pre-Filing Consultation

The MAP guideline stipulated that a taxpayer seeking a MAP is expected to first carry out a pre-filing consultation with the FIRS which could be in form of a meeting or via written correspondence. All pre-filing consultation or request for a meeting in this regard is expected to

[71] Ibid.
[72] Ibid.

be directed to the FIRS. Relevant units, departments or groups of FIRS or States Boards of Internal Revenue (SBIRS) may participate in a pre-filing consultation.

It is a requirement under the MAP guideline that a request for a meeting for such consultation or a written correspondence thereof should be accompanied by documents providing a summary of the taxation that is the subject of a MAP request, facts that led to such taxation and the reason for the MAP request. Where the documents are in language other than English, an English translation of such document must be attached. If the outcome of a pre-filing consultation merits MAP, the FIRS shall inform the taxpayer to submit a formal request.

6.5 Submitting a Formal Request

All formal requests for MAP are to be made in writing and addressed to the office of the Executive Chairman, Federal Inland Revenue Service (FIRS). The request shall be signed by the taxpayer, or its authorised representative, confirming the accuracy and completeness of the facts and information presented in the request. The taxpayer is responsible for the completeness and accuracy of any information included in the request irrespective of the signatory. The FIRS however reserves the right to deny any request where the taxpayer has failed to provide complete and accurate information or has made any misrepresentation.

6.6 Interaction Between MAP and Domestic Process Appeal

It is stated in the MAP guideline that presenting a case to the FIRS to invoke MAP will not deprive a taxpayer of its right of appeal under the relevant Nigerian tax laws. The usual procedures for appeal under the Nigerian tax laws shall apply. However, while the domestic legal remedies are still available, the FIRS will require that the taxpayer agrees to the suspension of these remedies if the MAP request is accepted.

Where the taxpayer is not satisfied with an MAP ruling, it may thereafter seek a legal remedy. When an Administrative panel has taken a decision on a tax matter, it does not hinder the taxpayer from pursuing a MAP. However, if a court decision has been made concerning a tax matter, the decision becomes final and binding; hence, the taxpayer can no longer invoke a MAP.

6.7 Confidentiality of Taxpayer's Information

All information obtained or generated during the MAP process is protected by the confidentiality provisions of the Nigerian tax laws and the provisions of the applicable tax Treaty. However, MAP rulings of a general nature may be published. A request for MAP does not affect the requirement of payment of the tax liability or collection action by the relevant tax authority. The guidelines stipulate that the FIRS is committed to ensuring confidentiality regarding taxpayer information under the tax Treaties and relevant laws.

7.0 Effectiveness of MAP in Nigeria

The application of MAP is predicated on the existence of double tax treaty between two countries. The implication of this is that a taxpayer will not be able to access MAP in a situation where there is no double tax treaty between the two countries.

Currently, Nigeria has double tax treaties with 13 countries namely: Belgium, Canada, China, Czech Republic, France, Korea (ROK), Netherlands, Pakistan, Philippines, Romania, Slovakia, South Africa and the United Kingdom.[73] This means that the MAP process in Nigeria is limited only to the 13 countries which have tax treaty with the country.

This means that countries such as India, Spain and the United States of America that are Nigeria's major trading partners[74] will be excluded from the MAP process as these countries do not presently have a ratified double tax treaty with Nigeria. Accordingly, MNCs in these countries will be wary of investing in Nigeria bearing in mind that they will be susceptible to double taxation due to the unavailability of MAP to resolve international tax dispute. In the long run, the Nigerian government will lose potential foreign direct investment needed for providing basic and social amenities for the citizens of the country.

It can therefore be said that MAP may not be very effective in Nigeria at the moment since the country does not have double tax treaties with its major trading partners. It is therefore important for the Nigerian government to ensure that the country has double tax treaties with its major trading partners and increase the number of double tax treaties to encourage international trade into the country.

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[73] PWC, 'Worldwide tax Summaries- Nigeria Corporate Withholding Taxes' (2019) <http://www.taxsummaries.pwc.com/ID/Nigeria-Corporate-Withholding-taxes> accessed 14 August, 2020.

[74] National Bureau of Statistics (NBS), 'Foreign Trade in Good Statistics' (2019) <https://www.nigerianstat.gov.ng/download> assessed 14 August, 2020.

8.0 Conclusion and Recommendation

The article provides an in-depth understanding of dispute resolution mechanisms under the double tax treaties to resolve international tax disputes. The finding of the article reveals that international tax disputes usually arise from differing interpretation and application of the provisions of double tax treaties by two sovereign countries. Furthermore, it is found that Mutual Agreement Procedure (MAP) is a special dispute resolution mechanism under the double tax treaties to resolve international tax disputes. While the MAP has the advantage of resolving international tax disputes by eliminating the need for lengthy litigation proceedings, there is no guarantee that the dispute will be resolved between the two countries thereby defeating the objectives of the MAP.

The OECD Model Double Tax Convention has however introduced a mandatory arbitration procedure to ensure that in a situation where two countries are unable to reach an agreement within two years of the case, a taxpayer may request in writing that the unresolved case be solved through an arbitration process. Furthermore, the OECD, through Action 14 of the BEPS project, introduced various reforms to make MAP an effective and efficient international tax disputes resolution mechanism.

The article also reveals that the Nigerian government through the FIRS published MAP guidelines to provide guidance to all taxpayers, taxpayers' representatives or advisers, tax officers, all other stakeholders and the general public on the procedure for accessing Mutual Agreement Procedure (MAP) as a means of dispute resolution pursuant to the Double Taxation Agreements between Nigeria and other countries. This is in line with the recommendation introduced by BEPS Action Plan 14 to ensure an efficient and effective administration of MAP. While this is a highly commendable act, the article reveals that the MAP process is limited only to the 13 countries that currently have double tax treaties with Nigeria. This can discourage international trade from countries that do not have double tax treaties with Nigeria.

It is therefore the recommendation of this article that the Nigerian government and its policy makers should, as a matter of urgency, ensure that the country increases its number of double tax treaties. In particular, the country should also ensure that it has double tax treaty with its major trading partners such as India, United States and Spain in order to make MAP more significant and to encourage international trade into the country.