



TRANSFER PRICING WORKSHOP ON DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

**1. OECD's Work in International Taxation
Objectives of the Course**



Welcome to the event

Let's take a few minutes to discuss...

Lecturers: who are we?

- Ms. Melissa Muhammad (OECD Secretariat)
- Mr. Arnim Hilse (Germany - Federal Central Tax Office)
- Mr. Paul Meaker (Australian Taxation Office)

Proposed organisation of the course

- domestic arrangements and timings
- course materials

Participants:

- who are you; present position and work?
- do you have Transfer Pricing or Competent Authority experience?
- what are your course objectives?



The OECD

Organisation for Economic Co-operation and Development

- Inter-governmental organisation
- 34 member countries to address the economic, social and environmental challenges of globalisation
- Limited membership but global reach



The OECD in December 2013

AUSTRALIA
AUSTRIA
BELGIUM
CANADA
CHILE
CZECH REPUBLIC
DENMARK
ESTONIA
FINLAND
FRANCE
GERMANY
GREECE
HUNGARY
ICELAND
IRELAND
ISRAEL
ITALY
JAPAN
KOREA
LUXEMBOURG
MEXICO
NETHERLANDS
NEW ZEALAND
NORWAY
POLAND
PORTUGAL
SLOVAK REPUBLIC
SLOVENIA
SPAIN
SWEDEN
SWITZERLAND
TURKEY
UNITED KINGDOM
UNITED STATES
+ European Commission

Accession Candidates:

RUSSIA
COLOMBIA
LATVIA

Enhanced Engagement Countries:

BRAZIL
CHINA
INDIA
INDONESIA
SOUTH AFRICA



The OECD Committee on Fiscal Affairs (CFA)

Aims:

- Eliminate tax measures distorting trade and investment flows
- Prevent double taxation
- Counteract tax evasion and avoidance
- Promote good practices in tax policy and administration

Means:

- Encouraging dialogues between governments
- Promoting communication, co-operation and mutual assistance in tax matters
- Guidelines, information papers and models



The CFA's Co-operation with Partner Economies (1)

Why?

- Tax is a borderless issue
- International tax problems require international solutions
- Help develop systems to enable governments to generate revenues for sustainable development and attract FDI

How?

- Use of policy dialogue
- Use of multilateral approach and partnerships
- Global, regional and country programmes



The CFA's Co-operation with Partner Economies (2)

- Global Forum on Taxation (e.g. Tax Treaties, Transfer Pricing)
- Global Forum on Transparency and Exchange of Information for Tax Purposes
- Multilateral Tax Centers
- Country programs
- Regional programs
- Around 75 events a year in more than 20 countries



The CFA's Co-operation with Partner Economies (3)

- Global Forum on Transfer Pricing
 - **Steering Committee:** Yearly meeting Bureau WP6 + invitations to Brazil, People's Republic of China, Colombia, Ghana, India, Indonesia, Kenya, Malaysia, Russian Federation, Singapore, South Africa and Viet Nam. The March Steering Committee meeting was attended by delegates from Brazil, People's Republic of China, Colombia, Ghana, India, Malaysia, Russian Federation, Singapore, and Viet Nam
 - Prepare next meeting of GFTP



CFA Programme Activities in Taxation

- Tax Treaties
- Transfer Pricing
- Exchange of Information
- Special Issues of International Taxation, including
 - Auditing Multinational Enterprises
 - Tax Avoidance and Evasion
 - Taxation of Financial Institutions
 - Tax Incentives and Tax Sparing



The OECD

- More than you will ever want to know about the OECD at its website <http://www.oecd.org/>
- Especially: the “About OECD” section, currently at http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html
- 32 pages OECD brochure can be downloaded at <http://www.oecd.org/dataoecd/63/52/47747755.pdf>



Aim of this course

- Understand the mechanisms to prevent and resolve tax disputes, in particular MAP and APA
- Discuss approaches to efficiently avoid or eliminate double taxation resulting from transfer prices adjustments, largely by looking in detail at the OECD Model Tax Convention, the OECD Manual on Effective Mutual Agreement Procedures (MEMAP), and the OECD Transfer Pricing Guidelines
- Discuss experiences on dispute avoidance and resolution issues:
 - Corresponding adjustments
 - Mutual Agreement Procedures (MAP)
 - Arbitration
 - Advance Pricing Arrangements (APAs)



Structure of this course

- Lectures on theory of structures and context
- Practical case study, role play and questions to consider and discuss in working groups
- Roundtable discussions on experiences and specific problems encountered by participants in the area of transfer pricing
 - *You are invited to informally present experiences / problems*



Questions for Discussion

- 1) What is double taxation?
- 2) Why is the efficient and effective avoidance or elimination of double taxation important?



Q & A



TRANSFER PRICING WORKSHOP ON DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

2. Transfer Pricing Adjustments Economic and Juridical Double Taxation

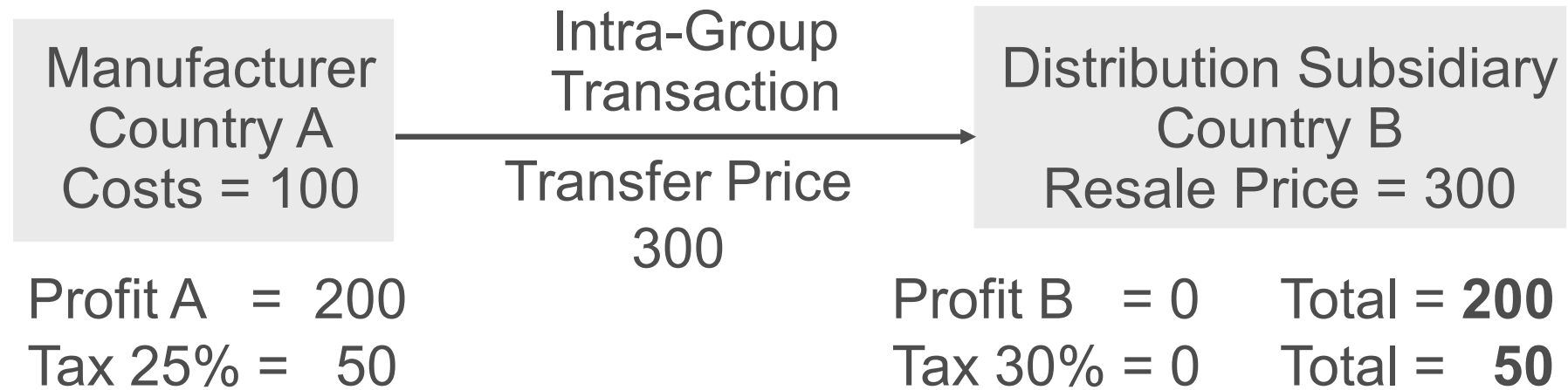


Transfer Pricing Adjustment and Economic Double Taxation

Manufacturer Country A Costs = 100		Intra-Group Transaction	Distribution Subsidiary Country B Resale Price = 300	
<u>Profit A</u>	<u>Arm's Length Transfer Price</u>		<u>Gross Profit B</u>	<u>Total Profit</u>
50	150?		150	200
100	200?		100	200
150	250?		50	200
200	300?		0	200
250	350?		- 50	200

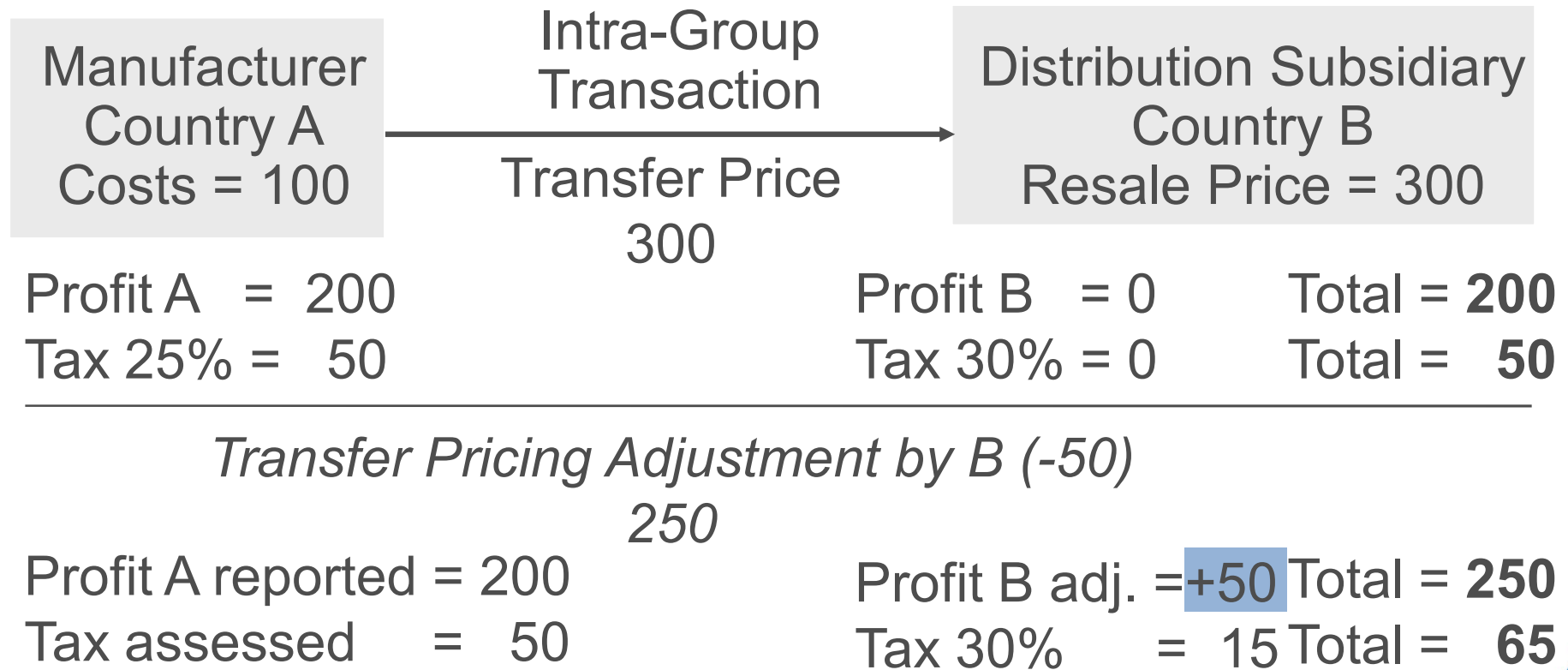


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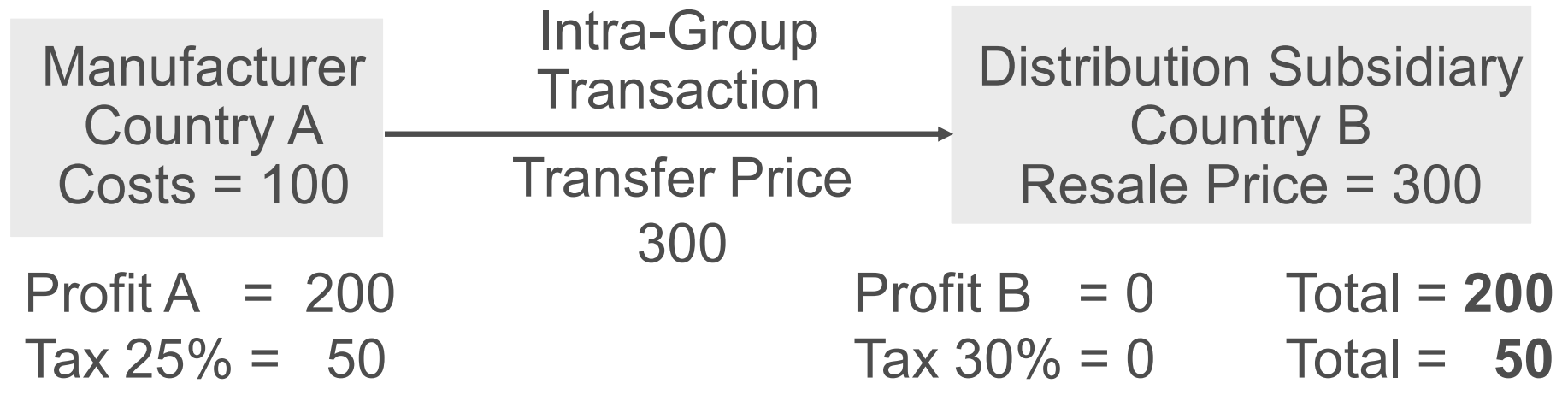


Transfer Pricing Adjustment and Economic Double Taxation





Transfer Pricing Adjustment and Economic Double Taxation



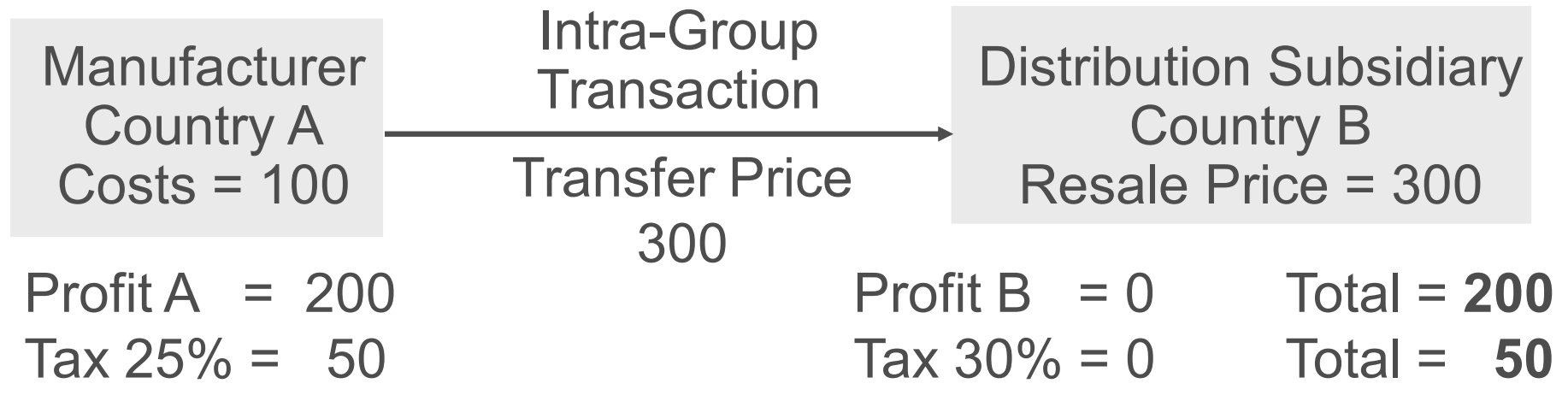
Transfer Pricing Adjustment by B (-50)

Profit A reported = 200 Tax assessed = 50	250	Profit B adj. = +50 Tax 30% = 15	Total = 250 Total = 65
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Economic double taxation?



Transfer Pricing Adjustment and Economic Double Taxation



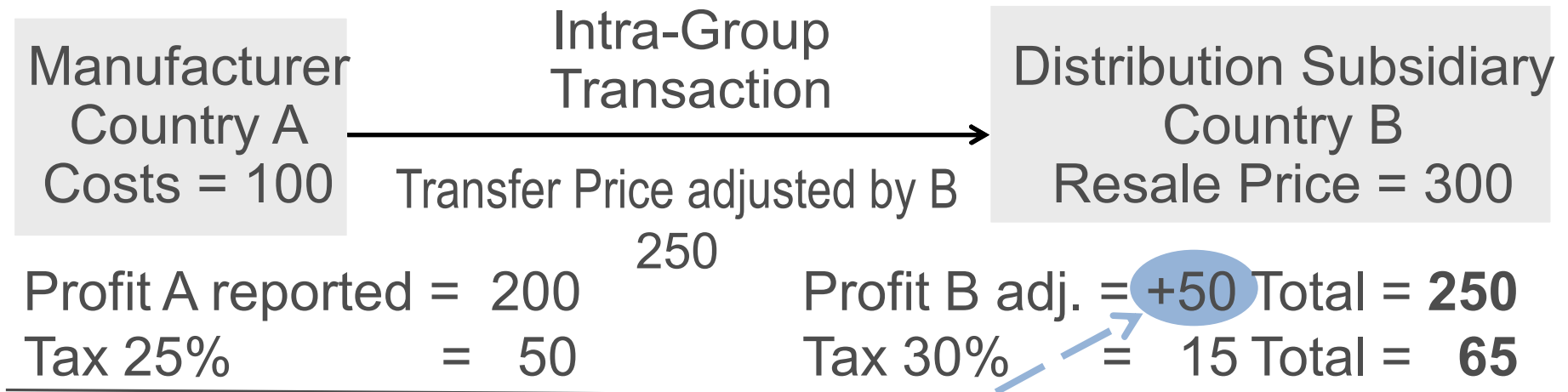
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Profit doubly taxed = 50
Double tax = 15



Elimination of Double Taxation by Corresponding Adjustment



Corresponding adjustment by A (-50)

<p>Profit A reported = 200 Corr. adjustment - 50 Profit A adjusted = 150 Tax 25% = 37,5</p>	<p>Profit B adj. = 50 Tax 30% = 15</p> <p>Total = 200 Total = 52,5</p>
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Transfer Pricing Adjustment - Juridical Double Taxation -

- Company resident in Country A, has a branch/PE in Country B
- Company manufactures products and supplies these to its branch in Country B.
- Branch sells products to third parties in Country B
- Country B taxes the profits relating to the branch
- Country A taxes the whole of the profits arising to the Company including branch profits and allows credit for the overseas tax paid



Transfer Pricing Adjustment - Juridical Double Taxation -

- Manufacturing costs 1000
- “Sales price” to Branch 1500
- Branch sells for 1600
- Branch profits taxed in Country B 100
- Total system profit taxed in Country A
600 less credit for tax paid in country B
say 25 (i.e. 25% of 100)



Transfer Pricing Adjustment - Juridical Double Taxation -

- Transfer pricing adjustment by Country B of 200
- Branch profit increased to 300 but total system profit unchanged at 600.
- Double taxation as Country A only allowed tax credit on profits of 100 (i.e. 25)
- Country A either needs to allow additional tax credit of 50 or Country B needs to withdraw its adjustment (or bit of both)



Q & A

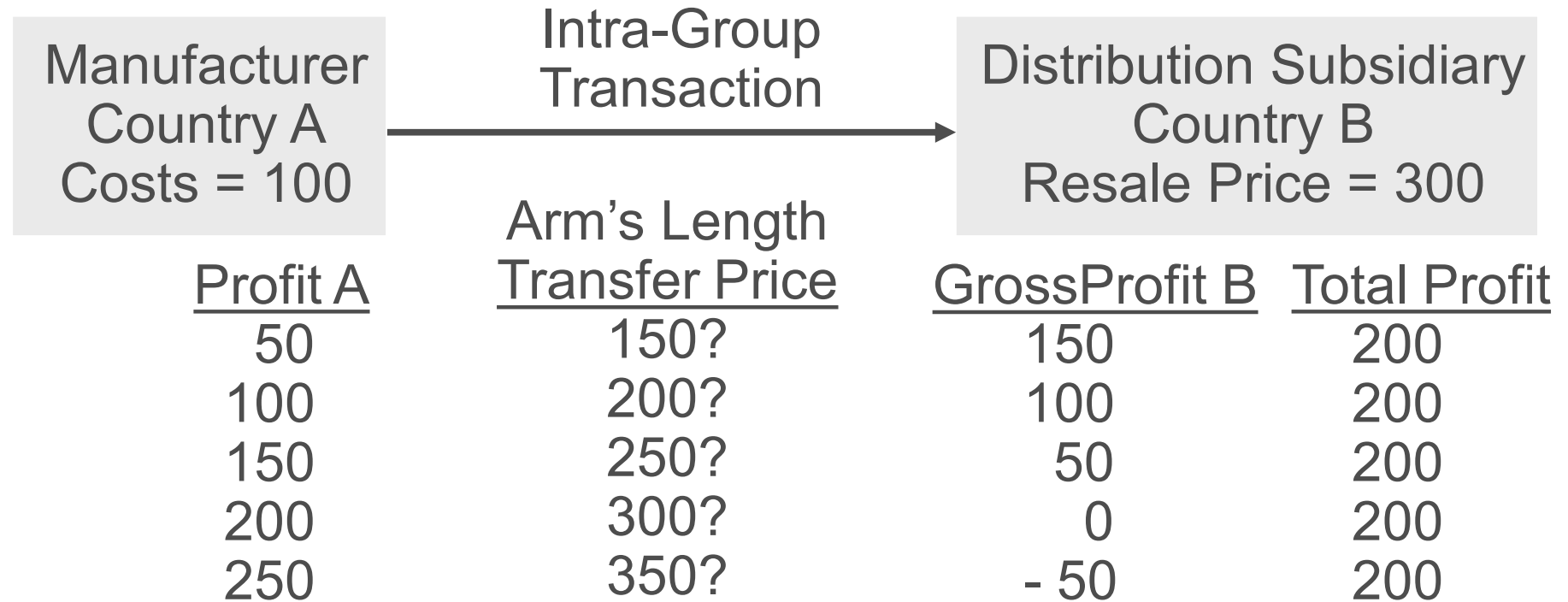


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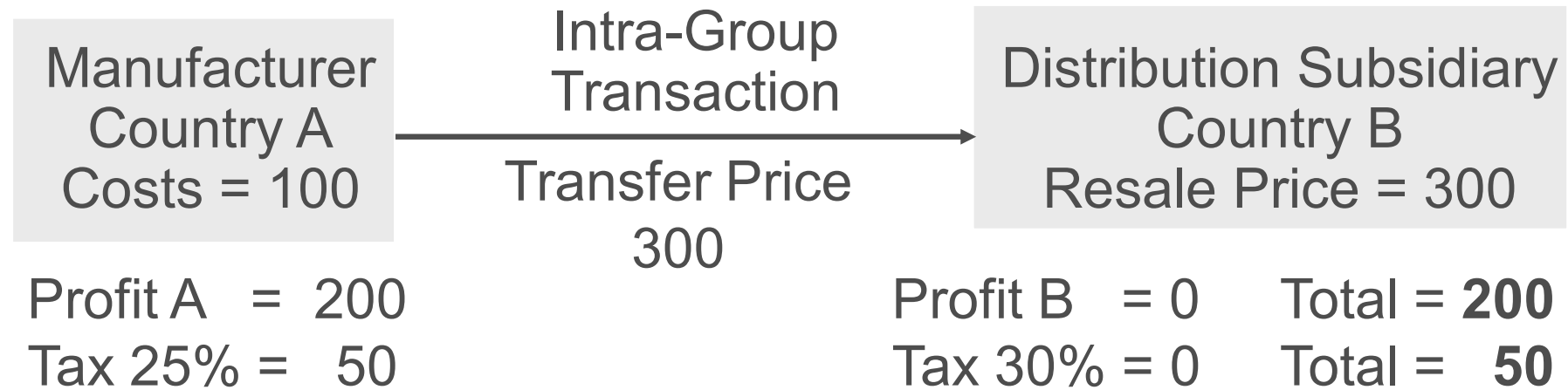


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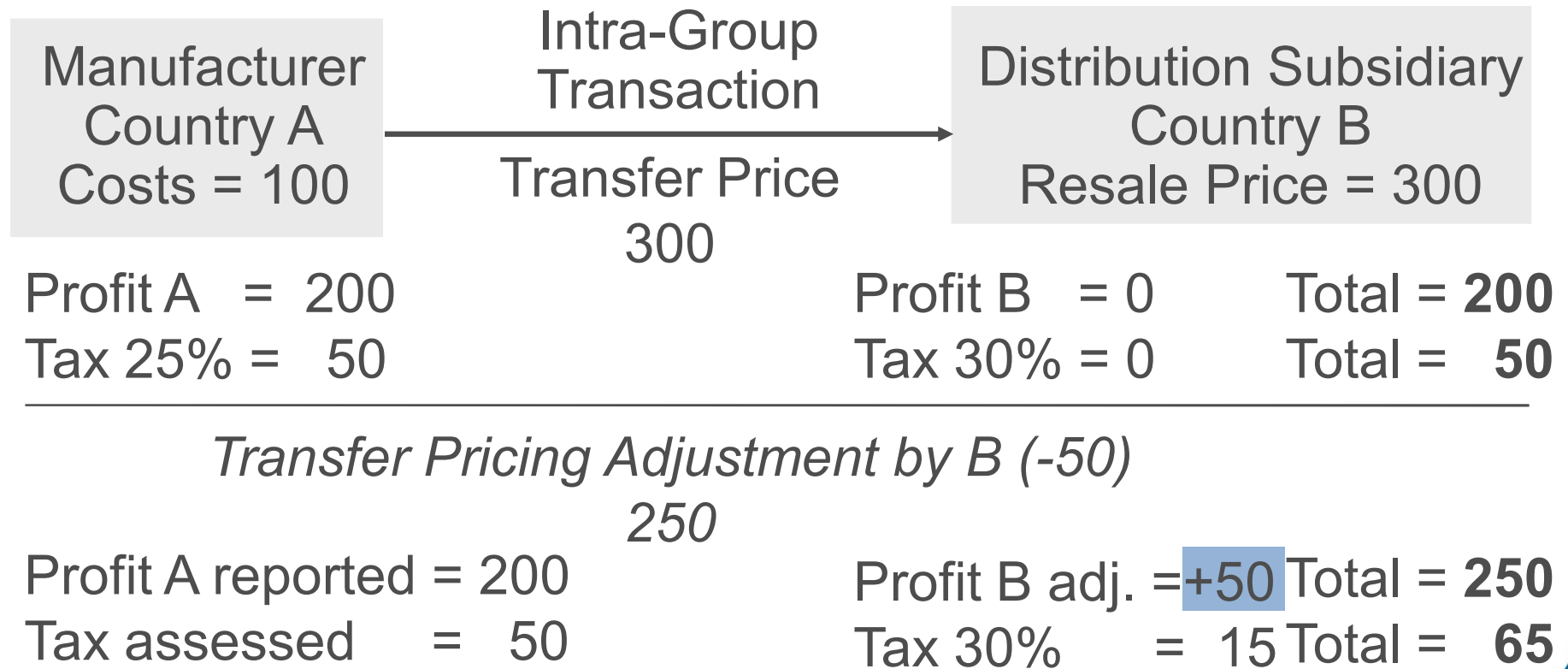


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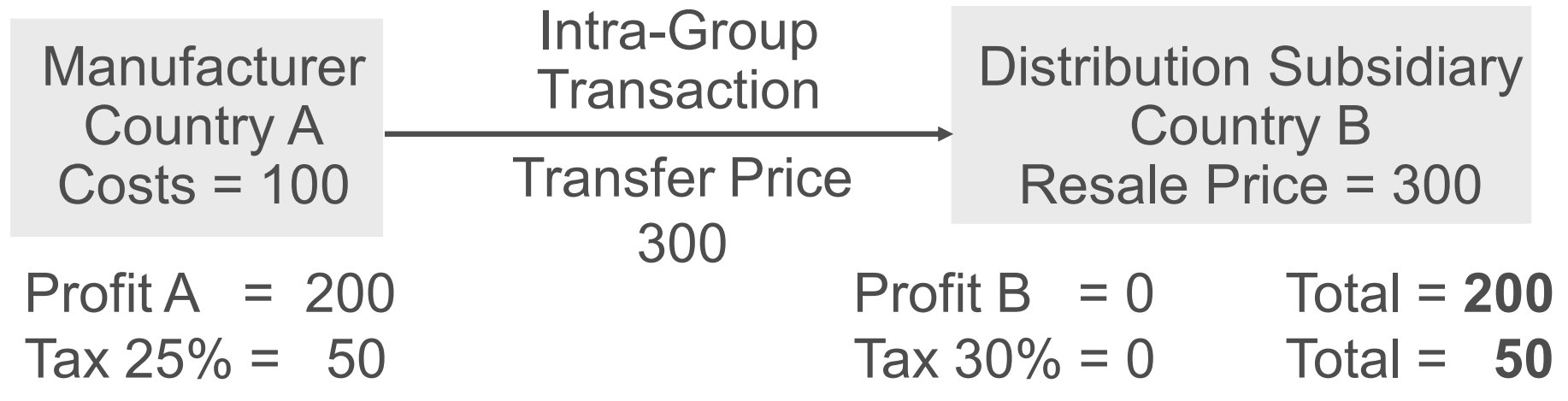


Transfer Pricing Adjustment and Economic Double Taxation





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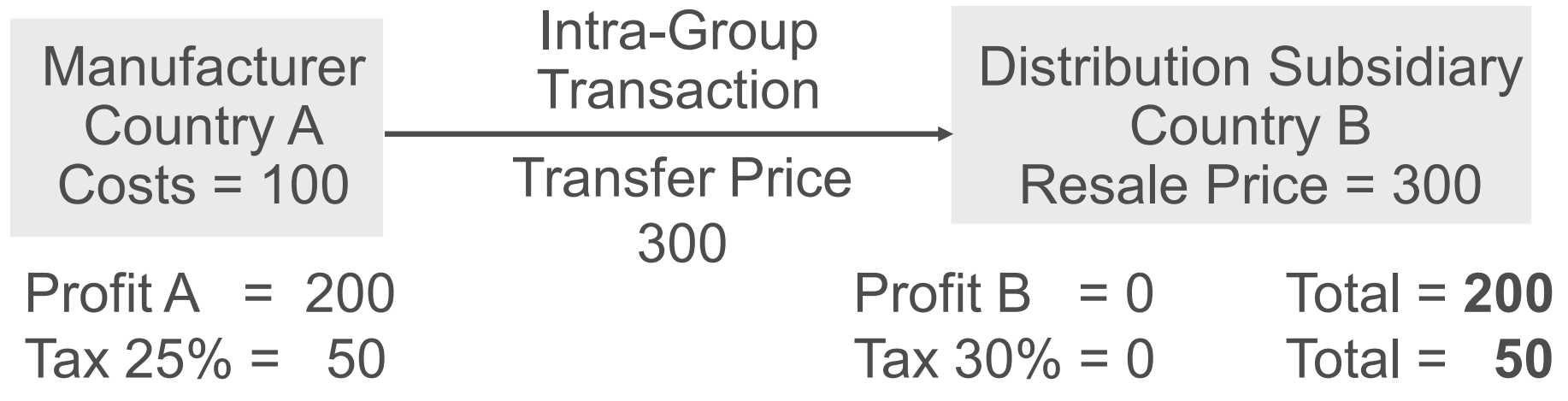
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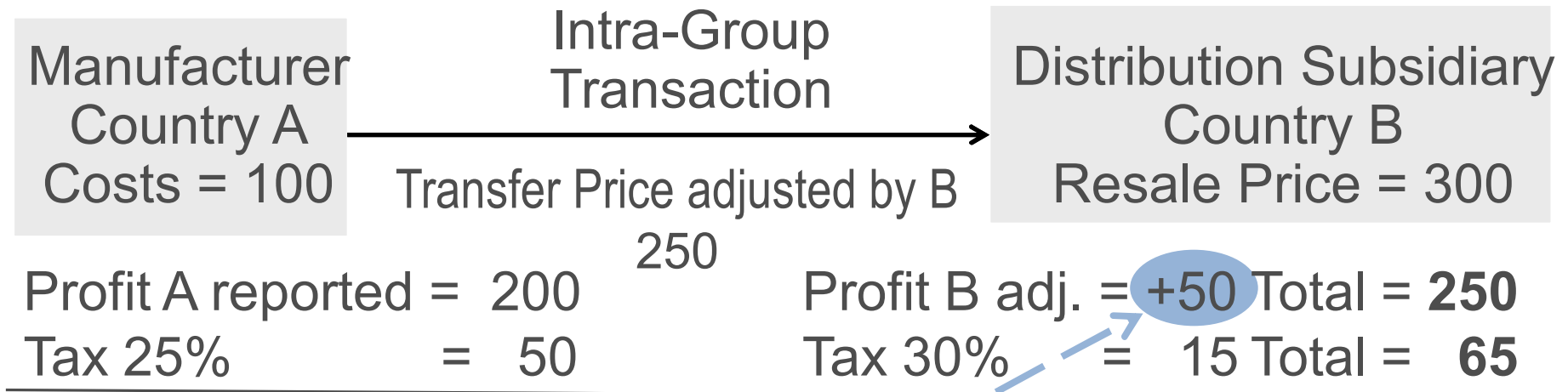
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TRANSFER PRICING WORKSHOP ON DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

4. Bilateral Dispute Resolution Mechanisms (Corresponding Adjustment, MAP, Competent Authority Consultation, Country Approaches to Improve the MAP Process)



Corresponding Adjustment

**ARTICLE 9(2)
OECD MODEL TAX
CONVENTION**



Article 9, paragraph 2

- “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 ... [at *arm’s length*] 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.***”



Corresponding Adjustment

- **Aim:** Elimination of double taxation
- Corresponding adjustment “only if [the State to whom request was made] considers that the figure of adjusted profits correctly reflects what the profits would have been if the transactions had been at arm’s length”
- Transfer pricing adjustment justified?
 - **in principle** and
 - **by amount**



Corresponding Adjustment

- Corresponding adjustment to be made:
 - by giving tax credit or
 - by adjustment of the profits of the associated enterprise
- Time limitations may bar corresponding adjustment



What if double tax treaty does not include Article 9 (2)?

Paragraph 11 Commentary on Art. 25:

- When the bilateral convention does not contain rules similar to those of paragraph 2 of Article 9 [...] the mere fact that Contracting States inserted in the convention the text of Article 9, as limited to the text of paragraph 1 — which usually only confirms broadly similar rules existing in domestic laws — indicates that the intention was to have economic double taxation covered by the Convention. As a result, **most Member countries consider that economic double taxation** resulting from adjustments made to profits by reason of transfer pricing is not in accordance with — at least — the spirit of the convention and **falls within the scope of the mutual agreement procedure set up under Article 25.**



What if double tax treaty does not include Article 9 (2)?

- **Position of Brazil and India** on the Commentary (paras. 11-12) to Art. 25
 - “...in the absence of paragraph 2 in Article 9, economic double taxation arising from transfer pricing adjustments does not fall within the scope of the mutual agreement procedure set up in Article 25.”



Mutual Agreement Procedure

ARTICLE 25 OECD MODEL TAX CONVENTION



Mutual Agreement Procedure

- Where taxation does not accord with the convention, the taxpayer can:
 - under domestic law: **appeal** to the courts, or
 - under treaty: invoke **mutual agreement procedure**
- Under Article 25(1), notification by taxpayer required within 3 years from first notification of the action resulting in taxation...



Mutual Agreement Procedure

- No formal procedure but most countries publish “how-to” guidelines for invoking mutual agreement procedure - see also OECD MEMAP
- Most common areas dealt with:
 - Transfer pricing (Article 9)
 - Allocations of profits to permanent establishments (Article 7)
 - Categorization of income
 - Treaty interpretations and application



Mutual Agreement Procedure: Overview

- para 1-** gives taxpayers 3 years to appeal to tax authorities in residence country where taxation not in accordance with treaty
- para 2-** tax authorities of both countries required to attempt to resolve issue raised in para. 1
- para 3-** authority to consult to resolve problems of treaty interpretation and application and to resolve any problems of double taxation not dealt with in the treaty
- para 4-** allows tax authorities to consult directly rather than go through diplomatic channels
- para 5-** (new from 2008) mandatory binding arbitration



Mutual Agreement Procedures (MAP)

- Article 25 of the Model Convention provides for the interaction of the competent authorities
- Para. 2: “...**endeavour**...to resolve the case by mutual agreement...with a view to the avoidance of taxation which is not in accordance with the Convention.”
= attempt to resolve double taxation (no obligation!)
- No need for taxation to have already taken place (“will result” - Commentary para. 14)



Mutual Agreement Procedure: Process

- **Stage 1** – Involves the taxpayer and the Competent Authority (CA) of its country of residence
- **Stage 2** – Involves the CAs of the two countries endeavoring to resolve the case



MAP: Stage 1

- 1) Taxpayer presents case to CA
- 2) Consideration by CA - is the case justified?
- 3) If CA considers that taxation complained of is due to a measure of its own state which is not in accordance with convention, resolution at this stage without progressing to Stage 2
- 4) If CA cannot resolve in Stage 1, the CA has an **obligation** to move to Stage 2



MAP: Stage 1

- Acceptability of MAP request, esp. time limits for requesting access to MAP



MAP: Stage 2

- CA approaches the other CA in an **endeavour** to resolve the case:
- This involves:
 - demonstrating to the other CA that....
 - providing its position on the facts and the law, e.g. transfer pricing adjustment....
 - discussion of the matter to reach a mutual agreement.



MAP

- Communication between CAs usually through the exchange of position papers
- CAs may meet to discuss significant issues
- Taxpayer not present at these CA negotiations
- Taxpayer should be kept informed during MAP process



Implementation of Mutual Agreement

Article 25, paragraph 2, 2nd sentence:

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



Collection of taxes pending MAP

- Commentary para. 47: “Article 25 gives no absolutely clear answer as to whether a taxpayer-initiated mutual agreement procedure may be denied on the basis that there has not been the necessary payment of all or part of the tax in dispute.”
- Para. 48: “There are several reasons why **suspension of the collection of tax** pending resolution of a mutual agreement procedure **can be a desirable policy.**”



Interest and Penalties

- Commentary para. 49:
 - Different views as to whether covered by the Convention
 - Even if considered not to be covered “a State’s requirements as to payment of outstanding penalties and interest should not be more onerous to taxpayers in the context of the mutual agreement procedure than they would be in the context of taxpayer-initiated domestic law review”.



OECD MANUAL ON EFFECTIVE MUTUAL AGREEMENT PROCEDURES MEMAP



Manual on Effective Mutual Agreement Procedures (MEMAP)

- Available online at www.oecd.org/ctp/memap
- Non-binding guidelines on operation of MAP
- For tax administrations and taxpayers, experienced and first time users
- Goal: enhance transparency, co-operation, timeliness, and overall effectiveness and efficiency of MAP
- Glossary



Key Elements for MEMAP (1)

- MEMAP to set out appropriate practices for
 - Structuring CA function (especially resources and developing indicative timeframes)
 - The involvement of the taxpayer
 - The decision making process



Key Elements of MEMAP (2)

- What is a MAP?
- How to make a MAP request?
- How MAP works?
 - Acceptability of requests
 - Role of the taxpayer
 - Interaction between CAs
- MAP and domestic law
- Guidelines for Competent Authority Operations
- Recommended timelines for a typical MAP process
- 25 “Best Practices”



MEMAP: Making a MAP Request

- What is a MAP request?
- How to make a request for MAP assistance?



MEMAP: How MAP Works?

Best Practice No12: Countries eliminate or minimize “exceptions” to MAP

It would be considered in the best interest of all stakeholders and would better reflect the spirit and purpose of the tax conventions for countries to rectify inconsistencies between domestic laws or policies and their network of tax conventions by eliminating issues that they exclude from MAP considerations. At the very least, these countries should publicise the exclusion so that taxpayers and other tax administrations are aware of the MAP exceptions.

A competent authority relying upon a domestic law or policy impediment as the reason for not allowing a MAP to be initiated by a taxpayer should inform the other competent authority of this and duly explain the legal basis of its position.



MEMAP: How MAP Works?

- Time limits and other barriers to MAP
- Taxpayer's role in the MAP



MEMAP: How MAP Works?

Best Practice No13: Taxpayer presentations to competent authorities

Particularly on fact-intensive, unusual, or complex cases it may be a valuable exercise to have the taxpayer make a presentation to both competent authorities at the same time, typically prior to the commencement of discussions. The purpose of the presentation would be to clarify issues, transactions, etc., and the presentation is typically limited to this type of information. It does not imply taxpayer involvement in the actual negotiations between competent authorities. Such a presentation would normally be pursuant to a mutual agreement by the competent authorities. Whilst such presentations should not be viewed as standard practice for all cases and should not be a substitute for taxpayer cooperation at the examination level, competent authorities are encouraged to consider inviting such presentations in appropriate cases, time and resources permitting.

In addition, experience has shown that proposals for resolution from the taxpayer can sometimes be valuable and constructive. If a proposal for resolution is included, however, there can be the risk that one competent authority may unduly rely upon this position as “the taxpayer’s position” and therefore be unwilling to explore in good faith other options. All parties should bear in mind that the ultimate goal is resolution of the case, which may or may not have elements of a taxpayer’s proposal.



MEMAP: How MAP Works? (2)

- Competent authority analysis and evaluation
- Interaction between competent authorities

Best Practice No15: Face-to-face meetings between competent authorities

Face-to-face meetings may allow for a more open discussion and collegial approach and perhaps a more relaxed environment. A more unified approach towards problem solving may in turn lead to “win-win” solutions in the resolution of MAP cases.

One other benefit of meeting in person is usually it triggers a milestone event in the timeline of any one particular case that often causes a level of activity and progress. In other words, meeting in person usually helps advance a case. Preparation prior to a meeting and the generation of follow up plans afterwards generally produces results. Conference calls can be easily postponed, deadlines can get pushed back, but meetings once committed to and arranged can be difficult to set aside.



MEMAP: How MAP Works? (2)

Best Practice No. 3: Principled approach to resolution of cases

In the resolution of MAP cases, a competent authority should engage in discussions with other competent authorities in a principled, fair, and objective manner, with each case being decided on its own merits and not by reference to any balance of results in other cases. To the extent applicable, the Commentary to the OECD Model Tax Convention and the OECD Transfer Pricing Guidelines are an appropriate basis for the development of a principled approach.

As part of a principled approach to MAP cases, competent authorities should be consistent and reciprocal in the positions they take and not change position on an issue from case to case, depending on which side of the issue produces the most revenue. Although a principled approach is paramount, where an agreement is not otherwise achievable, both competent authorities should look for appropriate opportunities for compromise in order to eliminate double taxation.

To the extent possible, competent authorities who face significant recurring issues in their bilateral relationship may wish to reach agreement on the consistent treatment of such issues.



MEMAP: How MAP Works? (3)

- What happens when an agreement is reached?
- Recommended timelines for MAP (ideally 2 years in total)

MAP timeline

Initiation of MAP by taxpayer (taxpayer submission of MAP request to Competent Authority 1 [residence State])

time limit provided by treaty (OECD Model: 3 years from notification of action giving rise to taxation not in accordance with the Convention)



Competent Authority 1:
Confirm receipt of MAP request & advise Competent Authority 2 of request
within one month after taxpayer's submission of MAP request to Competent Authority 1



time elapsed: 1 MONTH

Competent Authority 1:
Determine eligibility for MAP
Notify taxpayer whether MAP case has been accepted or rejected
Propose to Competent Authority 2 to start MAP discussions
within one month after taxpayer provides necessary information to Competent Authority 1



time elapsed: 2 MONTHS

Competent Authority 2: **Confirm receipt of MAP request from Competent Authority 1**
Preliminary screening for completeness of request
Notification of decision to accept or reject request to initiate MAP discussions
within one month of receiving opening letter from Competent Authority 1



MAP timeline



time elapsed: 3 MONTHS

**Analysis & evaluation by competent authority that initiated the adjustment:
unilateral relief OR issuance of position paper
Initiation of MAP discussions with the other competent authority
within 4 months but no later than 6 months after agreement to enter into MAP discussions**



time elapsed: 7-9 MONTHS

**Review of case by other competent authority: preliminary screening & notification of
missing information; determination regarding unilateral relief
Response to position paper
within 6 months of receiving position paper**



time elapsed: 13-15 MONTHS

**Negotiation between the competent authorities
6 months**

MAP timeline



Agreement between the competent authorities, documented in the form of a memorandum of understanding
within 24 months of the acceptance of the MAP request



Taxpayer's approval of the mutual agreement
taxpayer notified of mutual agreement immediately after its conclusion
1-month deadline for taxpayer to respond



Confirmation of mutual agreement terms and conditions
Exchange of closing letters
as soon as possible after taxpayer's acceptance of mutual agreement



Implementation of mutual agreement
no later than 3 months after exchange of closing letters



RELATIONSHIP BETWEEN MAP AND DOMESTIC REMEDIES



Recourse to Domestic Courts and/or MAP?

- Commentary para. 7: “...paragraph 1 makes available to taxpayers affected, **without depriving them of the ordinary legal remedies** available, a procedure...”
- Commentary para. 25:
 - Some States may wish to allow suspension of the three-year period during the course of domestic law proceedings.
 - If no suspension, approaches may be that MAP request is made but competent authorities do not negotiate or do not settle unless and until the taxpayer agrees to withdraw domestic law actions.
 - “The preferred approach for all parties is often that the mutual agreement procedure should be the initial focus for resolving the taxpayer’s issues, and for doing so on a bilateral basis.”



Implementation of MAP during pending Court Proceedings

- Commentary para. 45:

“The implementation of a MAP should normally be made subject:

 - to the **acceptance of such mutual agreement** by the taxpayer, and
 - to the taxpayer’s **withdrawal of the law suit** concerning those points settled in the mutual agreement.”



Final Court Decision during MAP

- Commentary Para. 35:
 - “**In some States**, the competent authority may be able to arrive at a satisfactory solution which **departs** from the court decision.
 - **In other States**, the competent authority is **bound** by the court decision. It may nevertheless present the case to the competent authority of the other Contracting State and ask the latter to take measures for avoiding double taxation.”
- Commentary para. 39: “Apart from time limits there may exist other obstacles such as “final court decisions” to giving effect to an agreement. Contracting States are free to agree on firm provisions for the removal of such obstacles.”



MAP and taxpayer rights

- Taxpayer's rights in respect of MAP largely depend on domestic law
- Domestic law may (and should) provide the taxpayer
 - the right to have initiation of the MAP enforced
 - procedural rights in the MAP
 - right to consent to its outcome and
 - the right to have the mutual agreement implemented
- MAP should generally be performed **irrespective of any recourse to domestic remedies**



MAP Statistics 2006 – 2012

- OECD Member countries have agreed to publish MAP statistics annually on the OECD website

- New cases and Inventory of cases: see annex and

<http://www.oecd.org/ctp/dispute/mapstatistics2012.htm>

- JTPF: statistics end 2011 (TP only): see annex

Approaches to Improve the MAP Process

- **PATA** “ MAP Operational Guidance for Member Countries of the Pacific Association of Tax Administrators”
http://www.irs.gov/pub/irs-utl/pata_map_guidance_final.pdf
- **European Commission:** Code of Conduct for the effective implementation of the EU Arbitration Convention
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:322:0001:0010:EN:PDF>
- Accelerated competent authority procedures by certain countries, e.g. USA, Belgium



Q & A



TRANSFER PRICING WORKSHOP ON DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

5. Arbitration



Arbitration: Article 25(5) MTC Overview

- Arbitration Procedure is a Supplementary Dispute Resolution Mechanism
- Mandatory, binding arbitration of unresolved issues in Article 25(1) cases after 2-year MAP
 - Flexible – mode of application left to mutual agreement of Contracting States
 - Sample mutual agreement on procedures included in proposal
 - OECD recognizes not all countries are in a position to include this procedure



Article 25, paragraph 5

Where,

- a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have **resulted** for that person **in taxation** not in accordance with the provisions of this Convention, and
- b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 **within two years** from the presentation of the case to the competent authority of the other Contracting State,



Article 25, paragraph 5

- ... any unresolved issues arising from the case shall be submitted to arbitration if the person so requests.
- These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State.



Article 25, paragraph 5 (continued)

- Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be **binding** on both Contracting States and
- ... shall be implemented **notwithstanding any time limits** in the domestic laws of these States.
- The competent authorities of the Contracting States shall by **mutual agreement** settle the mode of application of this paragraph.¹



Article 25, paragraph 5: footnote

“In some States, national law, policy or administrative considerations may not allow or justify the type of dispute resolution envisaged under this paragraph. In addition, some States may only wish to include this paragraph in treaties with certain States. For these reasons, the paragraph should only be included in the Convention where each State concludes that it would be appropriate to do so based on the factors described in paragraph 65 of the Commentary on the paragraph. As mentioned in paragraph 74 of that Commentary, however, other States may be able to agree to remove from the paragraph the condition that issues may not be submitted to arbitration if a decision on these issues has already been rendered by one of their courts or administrative tribunals.”



Arbitration – Key Issues

1. Determination of scope of issues subject to arbitration

- All “**unresolved**” Article 25(1) issues, unless States provide in treaty for more limited scope
 - States may not “agree to disagree” if there is still taxation not in accordance with Convention
 - Taxation must already have resulted (e.g. been paid, assessed, determined, or specifically notified)



Arbitration – Key Issues

2. Interaction with domestic remedies

- No access to arbitration if court or administrative tribunal has already rendered a decision on the issues (unless States agree otherwise)
- No requirement to waive domestic remedies to access arbitration



Arbitration – Key Issues

3. Binding nature of arbitration decision

- Under “no waiver” approach, binding on governments once taxpayer agrees to be bound
- Enforcement through domestic courts

4. Forms of arbitration procedure

- Variety of possible approaches
- Determined by competent authorities in enabling agreements and terms of reference



Arbitration – Key Issues

5. Selection of arbitrators (sample agreement)

- Each competent authority selects one arbitrator, and they select a third “neutral” arbitrator by mutual consent
- OECD CTPA Director to appoint “neutral” arbitrator if arbitrators cannot agree
- Participation of government officials as arbitrators?



Arbitration – Key Issues

6. Procedural issues (sample agreement)

- Rules of evidence to be agreed by arbitrators
- Participation of the taxpayer (written submission, possible oral presentation)
- Applicable legal principles (double tax treaty, domestic laws, Vienna Convention on the Law of Treaties, Commentaries, Transfer Pricing Guidelines)
- Reasonableness of suggested time periods (e.g. 8 months from appointment of last arbitrator to decision)



Arbitration – Key Issues

7. Implementing the arbitral decision (sample agreement)

- Implemented by CAs as a MAP agreement

8. Publication of arbitral decisions (sample agreement)

- Specific consent of all parties (including taxpayer) required
- In any event, reasoned opinion in writing required, unless streamlined option chosen



Design aspects

- The provision is short
- Only deals with issues that directly affect the taxpayer:
 - What can be arbitrated?
 - When can taxpayer ask for arbitration?
 - Relationship with domestic legal remedies?
 - Are States bound by decision?



Design aspects

- Practical application is left to be determined by “procedural mutual agreement” [*“shall by mutual agreement settle the mode of application of this paragraph. ...”*]
- Sample mutual agreement provided in an annex to the Commentary



Design aspects

- The provision is flexible:
 - The Commentary includes many possible variations
 - Practical application details can be modified by changing the procedural mutual agreement; no need to amend the convention
 - Most procedural rules can be adapted to each case through the “terms of reference”
 - Streamlined and normal procedures
 - The “what if they don’t do it?” question is solved by having default rules



Design aspects

- The arbitration process is part of the MAP, not something that happens after unsuccessful MAP:
 - Arbitration is between the CAs
 - Only the unresolved issues are arbitrated, not the whole case
 - CAs can reach an agreement at any time before the decision is rendered
 - The arbitration decision is implemented through a mutual agreement



Key Provisions

- Arbitration proceeding is extension of the regular mutual agreement process to enhance the effectiveness of the MAP
- Available only for cases that the competent authorities cannot resolve within **2 years**
- Two-year period runs from date on which “sufficient information has been presented to the competent authority of the other State to allow it to decide whether the objection underlying the case appears to be justified.”



Sample Mutual Agreement on Arbitration Annex to Commentary on Article 25

1. Request for submission of case to arbitration
2. Time for submission of the case to arbitration
3. Terms of Reference
4. Failure to communicate the Terms of Reference
5. Selection of arbitrators
6. Streamlined arbitration process
7. Eligibility and appointment of arbitrators
8. Communication of information and confidentiality



Sample Mutual Agreement on Arbitration Annex to Commentary on Article 25

9. Failure to provide information in a timely manner
10. Procedural and evidentiary rules
11. Participation of the person who requested the arbitration
12. Logistical arrangements
13. Costs
14. Applicable legal principles
15. Arbitration decision



Sample Mutual Agreement on Arbitration Annex to Commentary on Article 25

16. Time allowed for communicating the arbitration decision
17. Failure to communicate the decision within the required period
18. Final decision
19. Implementing the arbitration decision
20. Where no arbitration decision will be provided



*Case Study
SOFTCO-RIPCO
Arbitration Case*

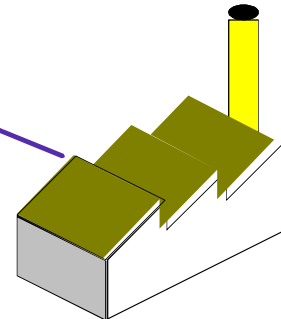
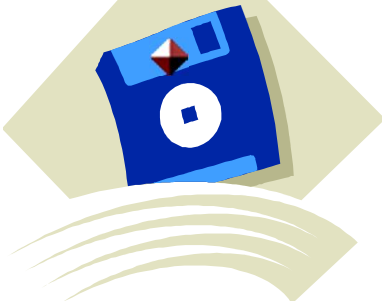
State S

Tax examination in 2004

State R



**Computer
Software**



SOFTCO

RIPCO



Royalties?



State S

State R

2003

06/2004
tax authorities claim 10%
withholding tax on royalties

2004

2004
RIPCO claims tax
credit

2005

03/2005
tax authorities disallow
foreign tax credit

05/2005
RIPCO files
MAP request

08/2005
CA accepts MAP request

2006-2007
MAP

2008

No mutual
agreement

2008
CA suggests arbitration



Implementing an arbitration procedure

Would the national law, policy and administrative considerations in your country allow the implementation of an arbitration process for general application or to deal with a specific case

through the inclusion of a new arbitration provision similar to the new paragraph 5 of Article 25 of the OECD Model Tax Convention in your country's treaty?

by mutual agreement with the other Contracting State?

If yes to either or both of these questions, would a mandatory submission of an unresolved issue to arbitration be legally possible in your country?



EU Arbitration Convention and Code of Conduct



EU Arbitration Convention

- **Mandatory** arbitration
- Applies to
 - ✓ (proposed) transfer pricing adjustments of associated enterprises
 - ✓ Attribution of profits to permanent establishment
 - **Does existence of PE fall under AC? ⇒ No**
- Case must be presented within 3 years of “first notification of the action” that may result in double taxation



EU Arbitration Convention

- Benefits
 - AC also applicable in loss situations
 - Early access possible (...“intends to adjust profits”)
 - Limited time frame to resolve case
 - Mandatory avoidance of double taxation
 - No double taxation in EU in transfer pricing cases!



EU Arbitration Convention

- The problem:
 - Although the AC provides for binding arbitration, its wording sometimes lacks precision and its application is patchy
 - As a multilateral Convention, the AC cannot be enforced under Community law
 - Only very few cases solved through arbitration (phase II) under AC
- The remedy:
 - A Code of Conduct for the effective implementation of the Arbitration Convention (2009/C 322/01 of 30/12/2009)

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:322:0001:0010:EN:PDF>



EU Arbitration Convention

- The Code of Conduct
 - Clarifies the proceedings of
 - the mutual agreement procedure (phase I) and
 - the arbitration procedure (phase II)
 - Recommends a tentative timescale for the 2-year mutual agreement period
 - Clarifies the functioning of the advisory commission
 - Provides for increased transparency for the taxpayer
 - Recommends a suspension of tax collection like in domestic appeals procedures
 - Recommends the application of the same rules for mutual agreement procedures under bilateral tax treaties between MS



Some Comparisons with OECD Approach

OECD approach:

- Broad scope of issues covered – not just transfer pricing or PE profit attribution
- Binding nature – States may not reach different decision after arbitration
- Number of arbitrators (e.g. 3 versus 7)
- Interaction with domestic remedies – no waiver required for access



Existing Arbitration Clauses in DTC



Non-compulsory arbitration

- Provided for in about 100 DTCs concluded by 58 countries (as of 1 July 2011)
- Initiation of arbitration requires consent of both CAs after the dispute has arisen
- Example

"(... the Contracting States may agree (...) to submit a dispute to a court of arbitration, whose decision shall be binding(...)" (Article 41 German-Sweden treaty)

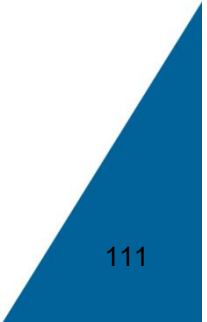


Countries with Arbitration Clause in Double Tax Treaty in force (as of 01/09/2012)

1	Albania	20	France	40	Lithuania	60	Singapore
2	Armenia	21	Georgia	41	Luxembourg	61	Slovenia
3	Australia	22	Germany	42	Macedonia	62	South Africa
4	Austria	23	Ghana	43	Malaysia	63	Spain
5	Azerbaijan	24	Greece	44	Malta	64	Sweden
6	Bahrain	25	Hong Kong	45	Mexico	65	Switzerland
7	Barbados	26	Iceland	46	Moldova	66	Tajikistan
8	Belgium	27	Indonesia	47	Mongolia	67	UAE
9	Bermuda	28	Ireland	48	Namibia	68	Uganda
	Bosnia and	29	Isle of Man	49	Netherlands	69	UK
10	Herzegovina	30	Israel	50	New Zealand	70	Ukraine
11	Canada	31	Italy	51	Norway	71	Uruguay
12	Chile	32	Japan	52	Pakistan	72	USA
13	Croatia	33	Jersey	53	Peru	73	Uzbekistan
14	Denmark	34	Jordan	54	Poland	74	Venezuela
15	Ecuador	35	Kazakhstan	55	Portugal		
16	Egypt	36	Kuwait	56	Qatar		
17	Estonia	37	Latvia	57	Romania		
18	Ethiopia	38	Lebanon	58	Russia		
19	Finland	39	Liechtenstein	59	San Marino		



Arbitration in tax conventions





World Trade Organisation



World Trade Organisation

- WTO provides for compulsory dispute settlement
- exception in respect of disputes which fall within the scope of a DTC
- in case of doubt, however, WTO's dispute settlement mechanism may determine its jurisdiction
- OECD Commentary para. 93 offers a clause to make the reference to the GATS' dispute settlement mechanism conditional to the consent of both contracting states (i.e. to exclude compulsory dispute settlement for tax issues)



Conclusion



Conclusion

- Arbitration supplements MAP
 - alleviates weaknesses of MAP
 - thereby legal protection of taxpayer is improved
 - thereby quality of treaty network is improved



Q & A



TRANSFER PRICING DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

**6. Unilateral and Bilateral Dispute Resolution Mechanisms
Country Presentations (ATO)**



Unilateral and Bilateral Dispute Resolution - ATO

- Competent Authority work and structure currently under review; looking at expanding the number of CAs nationally
- Extensive tax treaty network
 - 44 income tax treaties (DTAs)
 - 36 Tax Information Exchange Agreements (TIEAs)
 - Convention on Mutual Administrative Assistance in Tax Matters
 - Intergovernmental Agreement (US) – FATCA
 - <http://www.treasury.gov.au/Policy-Topics/Taxation/Tax-Treaties/HTML>
- Australia's income tax treaties are given the force of law by the *International Tax Agreements Act 1953*



Unilateral and Bilateral Dispute Resolution - ATO

- Relief from double taxation and MAP is set out in TR 2000/16 and TR 2000/16A
- MAP process strongly influenced by OECD MEMAP guidelines and previously PATA (Pacific Association of Tax Administrators) guidance
- The MAP article in most of Australia's DTAs permits a taxpayer to present a case to the Competent Authority within three years from the first notification to the taxpayer of the actions giving rise to taxation not in accordance with the DTA (in accordance with para 18 of the Commentary to Article 25 of the OECD Model Tax Convention – interpreted in the way most favourable to the taxpayer).



Unilateral and Bilateral Dispute Resolution - ATO

- APA process guidance in PS LA 2011/1 (currently under review) to embed best practice and improve relationships; 4 steps:
 - Pre-lodgement
 - Formal application lodgement
 - Analysis and evaluation
 - Negotiation and agreement
- Simplified APA (low value/risk and unilateral, 9 months)
- Standard APA (less complex, can be collateral issues, 12 months)
- Complex APA (high value/risk, no comps, profit shifting/significant collateral issues, 2 years)
- Mutual expectations – co-operation, open and ongoing dialogue, agreed scope



TRANSFER PRICING DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

**6. Unilateral and Bilateral Dispute Resolution Mechanisms
Country Presentations**



International Tax Disputes

- Please describe the unilateral and bilateral dispute resolution processes in your country including:
 - The organizational structure of the competent authority/ tax treaty group
 - Your tax treaty network
 - A flow chart of unilateral dispute and bilateral dispute mechanisms
 - Describe the MAP process
 - Describe the APA process
 - For APA and MAP, how many cases do you have a year?
 - What are the most common dispute issues?
 - With which countries are your most common disputes?



TRANSFER PRICING DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

Unilateral and Bilateral Dispute Resolution Mechanisms

Presented by : Ju Baochun

People's Republic of China



International Tax Disputes

1. The organizational structure of the competent authority :

International Tax Department, SAT

- Comprehensive division
- Division of International Tax Treaty
- Division of Anti Tax Avoidance(in charge of APA and MAP)**
- Division of Non-resident Tax Administration
- Division of International Tax Collection Cooperation
- Division of Foreign Affairs
- Division of Taiwan, Hongkong and Macao Affairs
- Division of International Cooperation



International Tax Disputes

2.Expanding Tax Treaty Network

China began its first tax treaty negotiation in 1981.

As of December 2013, China has signed tax treaties with 99 countries and has implemented special tax arrangements with the HK and Macao SAR.

Of these, 96 tax treaties and both two arrangements are in force.

Bilateral Tax Treaty:

Country	Signed on	Effective from
JAPAN	1983.9.6	1984.6.26

Multinational Tax Treaty:

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters

2013.8.27

uneffective



International Tax Disputes

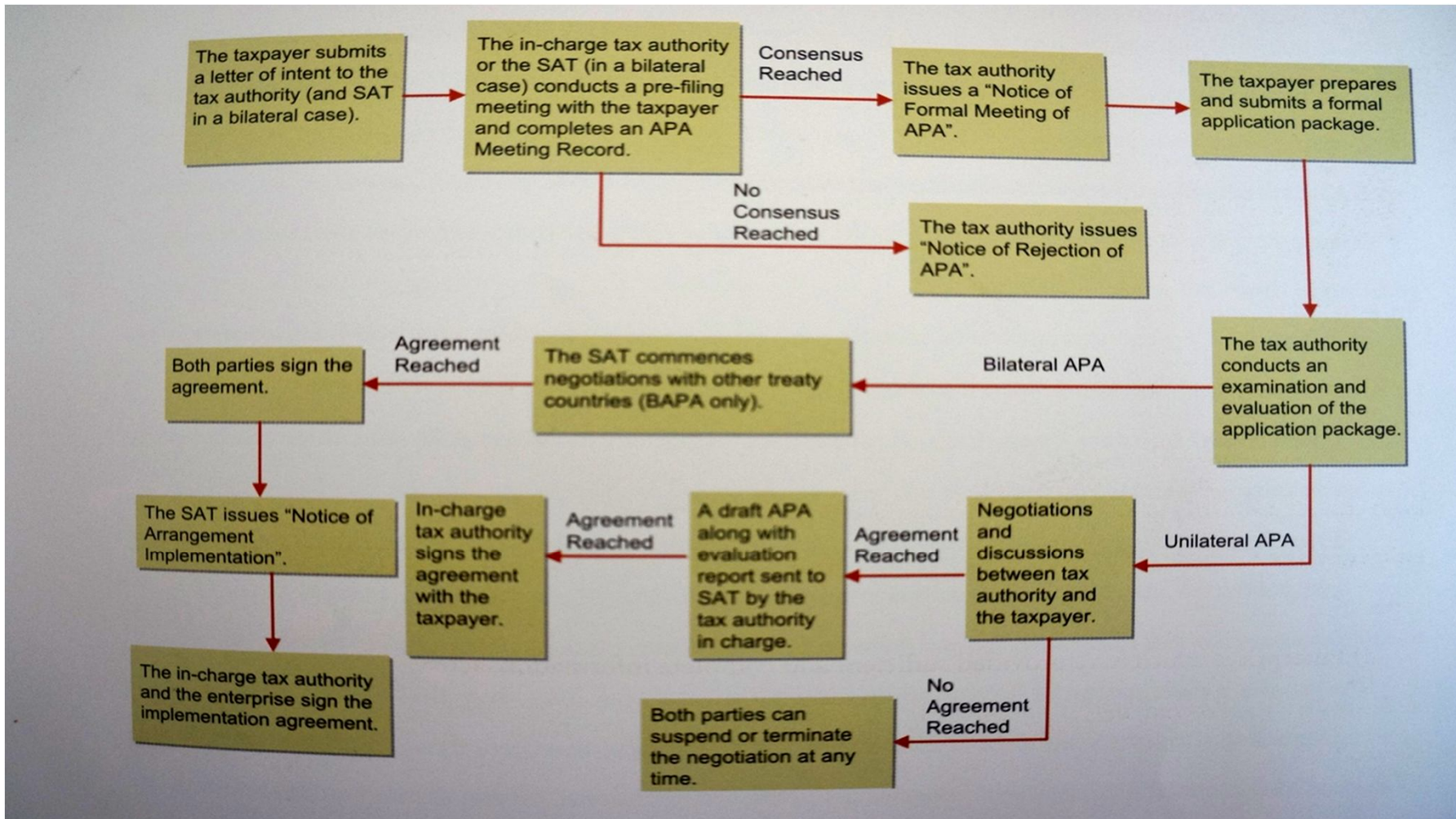
3. Describe the MAP process

- 1 、 Taxpayer submits a written Application;
- 2 、 Receipt by Provincial office, SAT and examination
 - acceptance**: application meets all requirements;
 - notice taxpayer to supplement the materials**: insufficient information;
 - rejection**: not satisfy the requirement;
- 3 、 report to the SAT within 15 working days ;
- 4 、 SAT examines and confirms if the MAP meet all requirement(initiate MAP or rejection) within 20 working days;
- 5 、 reaching consensus, the SAT informs the in-charge Provincial office the result in written.



International Tax Disputes

4. Describe the APA process





International Tax Disputes

5. For APA and MAP, how many cases do you have a year?

APA:

As of December 2013, China has totally signed 39 bilateral APAs.

2010 : signed 4 unilateral APAs and 4 bilateral APAs

2011 : signed 8 unilateral APAs and 4 bilateral APAs

2012 : signed 3 unilateral APAs and 9 bilateral APAs

MAP :

The Measures for the implementation of MAP under Tax Treaties was put in to force on November 2013, but the specific number of MAP case is not available.



International Tax Disputes

6. What are the most common dispute issues? With which countries are your most common disputes?

The most common dispute issues occurred was about TP concerning manufacturing enterprises during tax avoidance investigation.

The disputes mainly occurred between China -- Japan 、 China--South Korea.

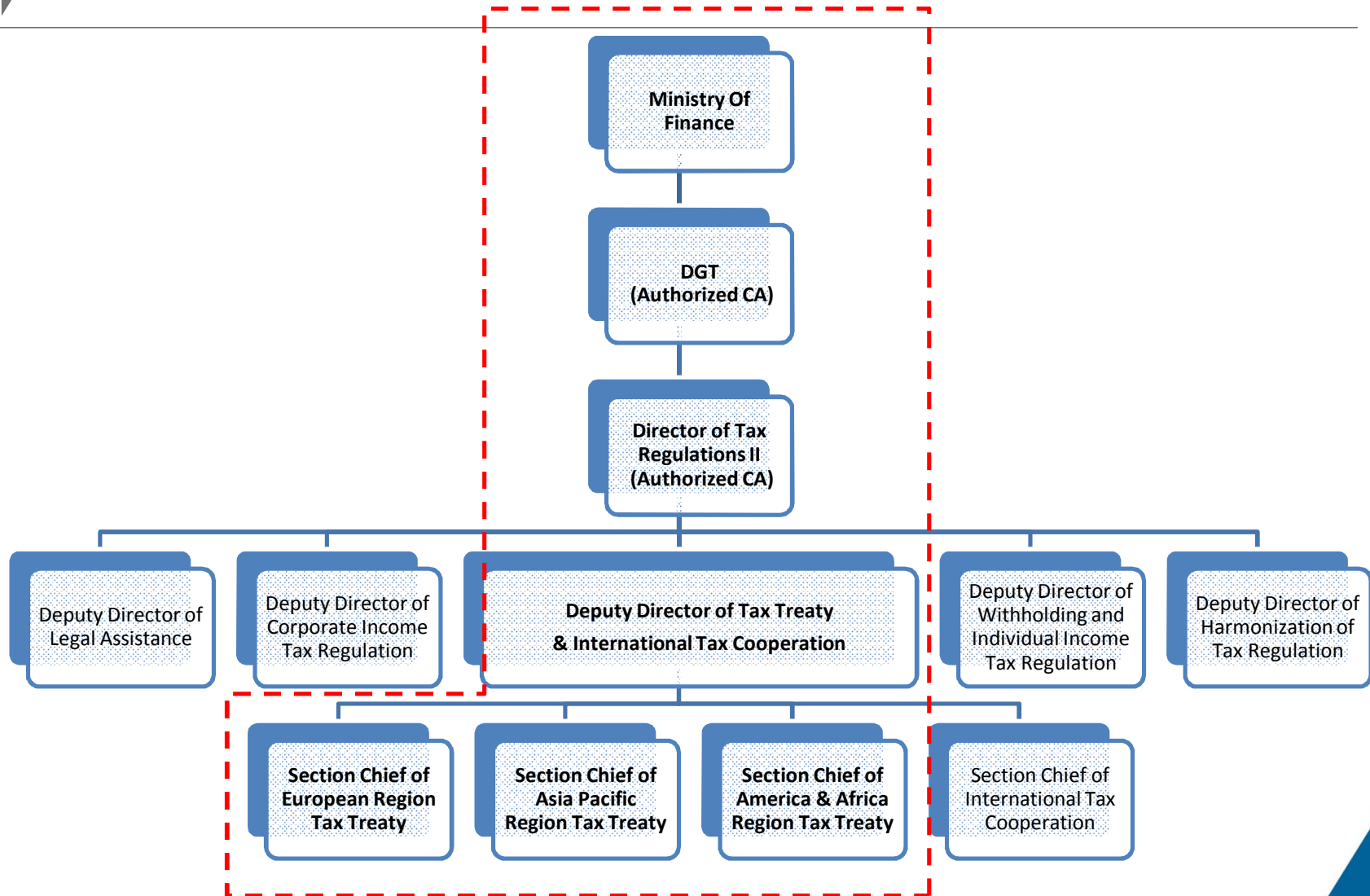


TRANSFER PRICING DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

6. Unilateral and Bilateral Dispute Resolution Mechanisms In Indonesia

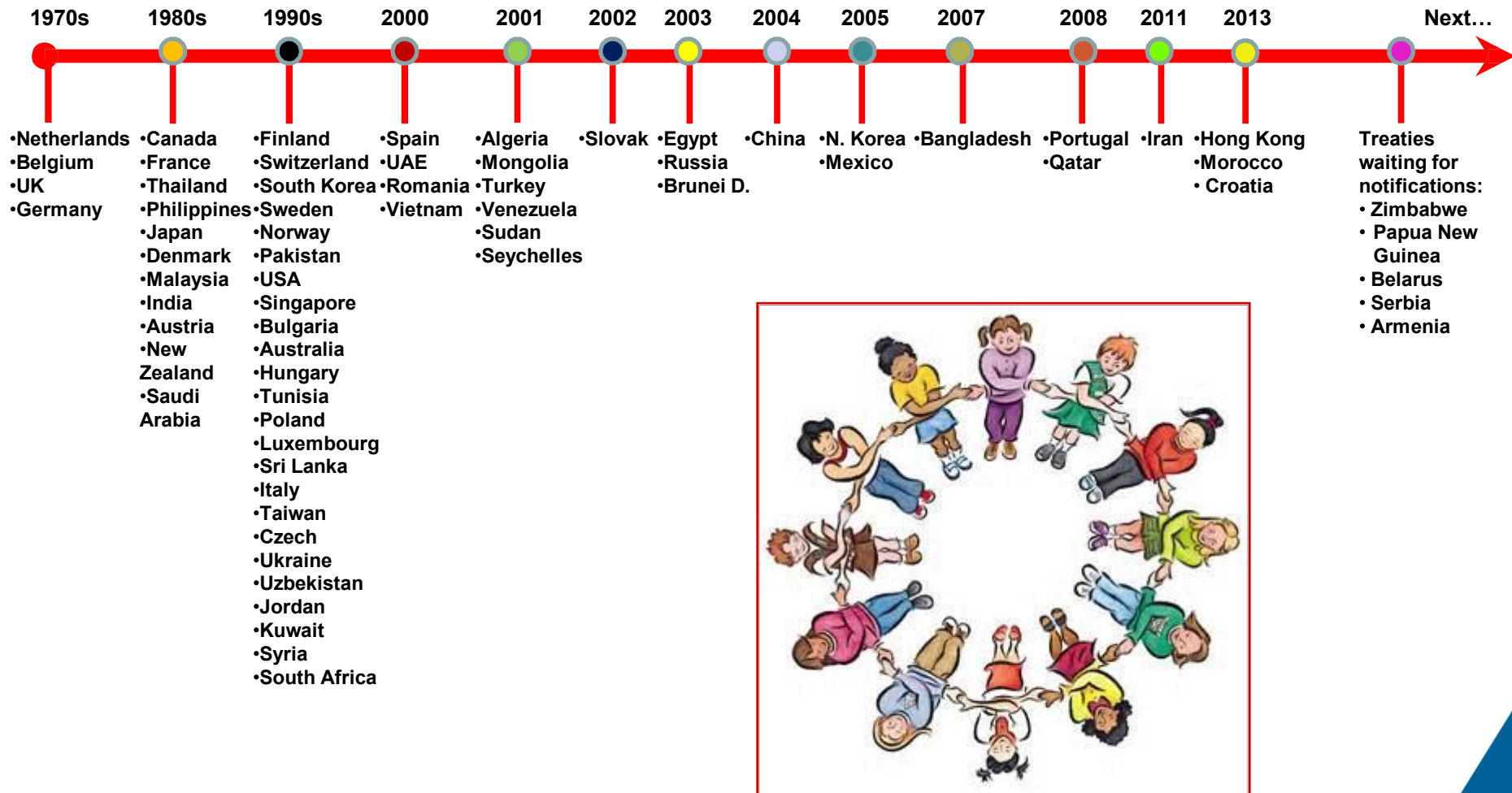


The organizational structure of the CA





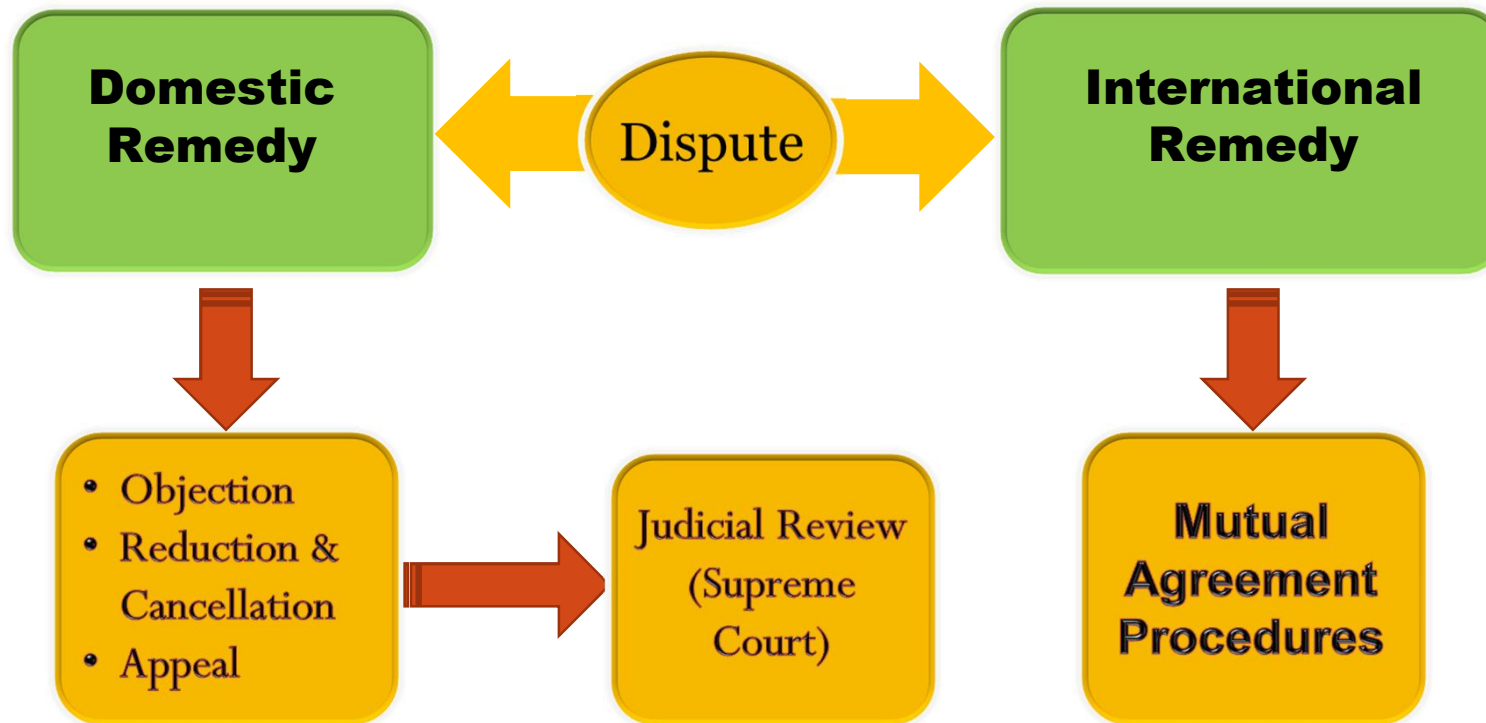
Tax Treaty Network



Since 1974, there are 64 treaties in force



Unilateral & Bilateral Dispute Mechanisms





MAP Process

- When taxation not in accordance with the DTA arise, the taxpayers may resolve their case through Mutual Agreement Procedures
- MAP conducted in the case of:
 - ✓ Request for MAP submitted by Indonesian Tax Resident
 - ✓ Request for MAP submitted by Indonesian National who subsequently becomes a Tax Resident of the treaty partner in relation to Non-Discrimination Provision
 - ✓ Request for MAP submitted by the treaty partner country
 - ✓ MAP Request based on DGT Initiative



APA Process

❖ Steps of APA Process:

- ✓ Pre-lodgement meeting;
- ✓ Lodgment of Formal APA Application;
- ✓ APA Discussion Meeting;
- ✓ Issuance of APA Letter; and
- ✓ APA Implementation and Evaluation.

❖ APA Submission Process:

- ✓ Taxpayer submits a written application to the DGT for pre-lodgment meeting (APA Form-01).
- ✓ Upon the application, DGT:
 - analyses and evaluates in order to consider the feasibility of the application in question;
 - may request information from the Taxpayer, conducts a review into the business activities of the Taxpayer and undertakes interviews with the taxpayers;
 - notifies the tax authority of treaty partner country(ies) to conduct joint evaluations if the Taxpayer also applies to hold a bilateral or multilateral agreements.
- ✓ Maximum 3 months after the receipt of complete application, DGT should inform the Taxpayer about the result of the application (rejected or accepted).



APA and MAP Cases

Region	MAP							APA
	Transfer Pricing	Permanent Establishment		Branch Profit Tax	Royalty	Transparent Entity	Others	
		Article 5	Article 7					
Asia Pacific	9	2	2	1	-	-	3	12
Europe	2	2	-	11	1	2	2	1
America & Africa	2	-	-	-	4	1	-	2
Total	13	4	2	12	5	3	5	15

- ✓ In average, there are 4 MAP cases and 10 APA cases a year;
- ✓ The most common disputes is with Japan



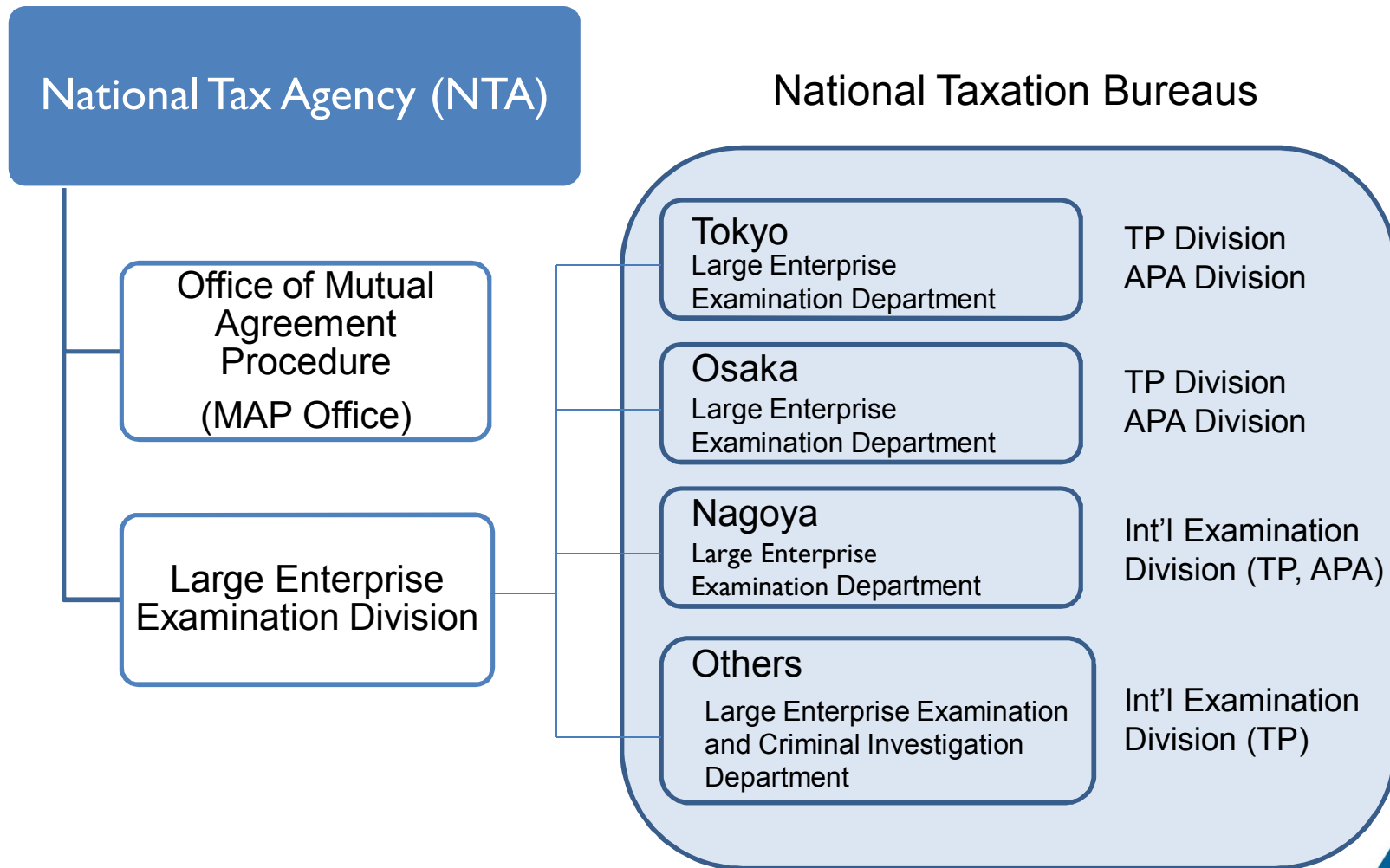
TRANSFER PRICING DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

7. Unilateral and Bilateral Dispute Resolution Mechanisms

Presented by : Aya Yabuuchi (Japan)
Hideaki Umehara (Japan)



Organization Structure (abstract)





Japan's Tax Treaty Network

- 62 tax treaties, applicable to 85 jurisdictions (As of September 1, 2014)
 - East and Southeast Asia (11)
 - South Asia (4)
 - Pacific (4)
 - North America (2)
 - Central and South America (9)
 - Europe (33)
 - Russia and New Independent States (12)
 - Middle East (5)
 - Africa (5)





Unilateral Dispute Resolution

➤ Domestic Appeal

- Request for Reinvestigation (to the Tax Office etc.)



Request for Reconsideration (to the National Tax Tribunal)



Litigation (to the court)

➤ Domestic Administration

- Unilateral APA





Bilateral Dispute Resolution

- Mutual Agreement Procedure (including bilateral APA)
 - Efforts to make MAP process more efficient

- Arbitration
 - Japan-Hong Kong Tax Agreement (with effect from Aug. 2011)
 - Japan-Netherlands Tax Convention (with effect from Dec. 2011)
 - Japan-Portuguese Tax Convention (with effect from Jul. 2013)
 - Japan-New Zealand Tax Convention (with effect from Oct. 2013)
 - Japan-Sweden Tax Convention (with effect from Oct. 2014)
 - Japan-US Tax Convention (not yet effected)
 - Japan-UK Tax Convention (not yet effected)





Thank you



TRANSFER PRICING DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

Unilateral and Bilateral Dispute Resolution Mechanisms

Presented by :

Mohd Ramli A Wahid

Malaysia



a) Organization structure of the competent authority in Malaysia

- Competent authority appointed by the Minister of Finance
 - ✓ Head of Tax Analysis Division, MOF ;
 - ✓ Director General of Inland Revenue (DGIR) ;
 - ✓ Deputy DGIR of Compliance ;
 - ✓ Deputy DGIR of Policy ; and
 - ✓ Director of the Department of International Tax, IRBM



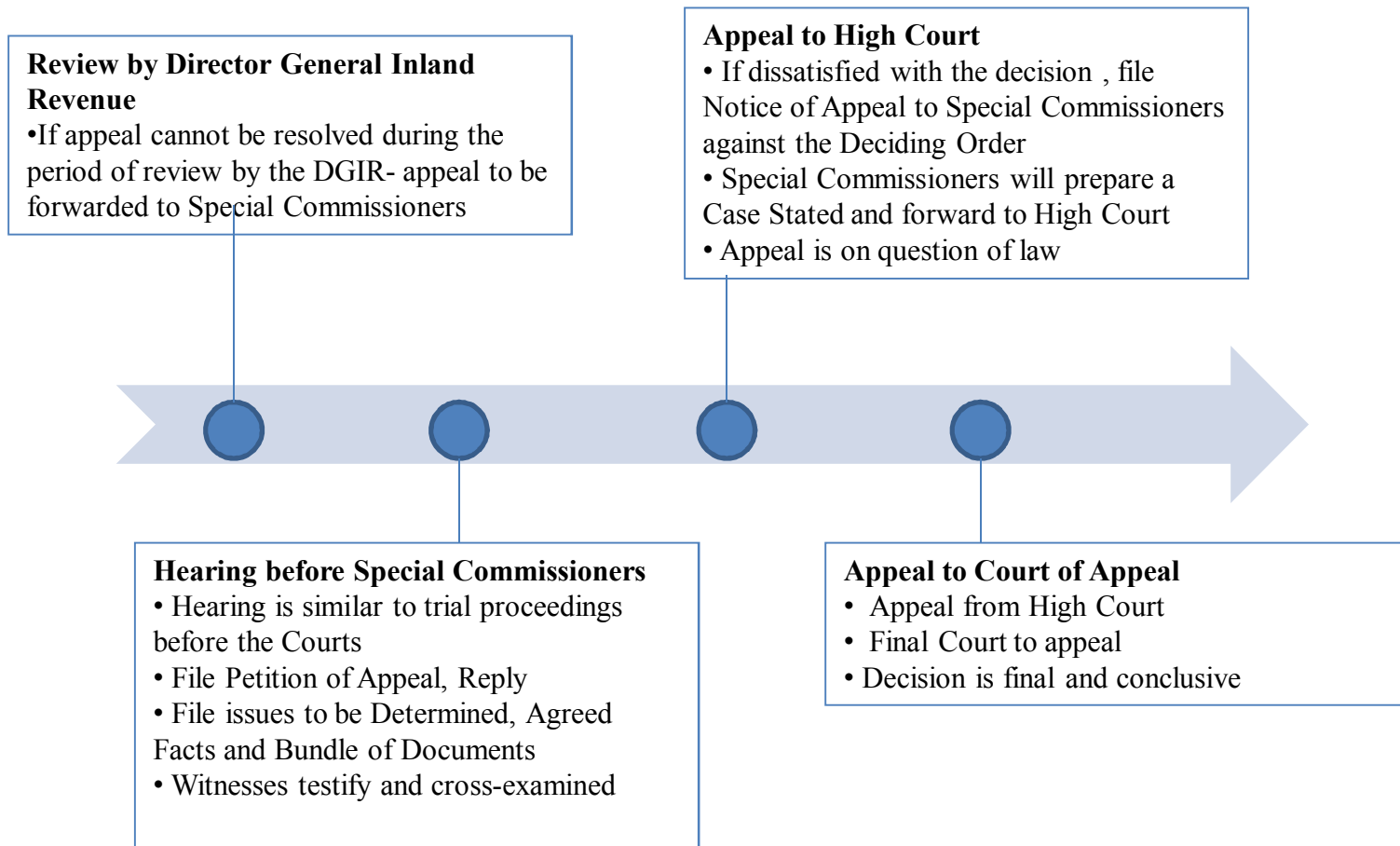
b) Tax treaty network in Malaysia

➤ Treaty network

- ✓ Treaties with 74 Jurisdictions (71 are effective)
- ✓ Numbers growing
- ✓ Coverage similar to other developed countries
- ✓ Latest treaties : India, Hong Kong, Korea, Poland
- ✓ Oldest Treaties : Denmark, France, New Zealand, Sri Lanka, Sweden, Switzerland

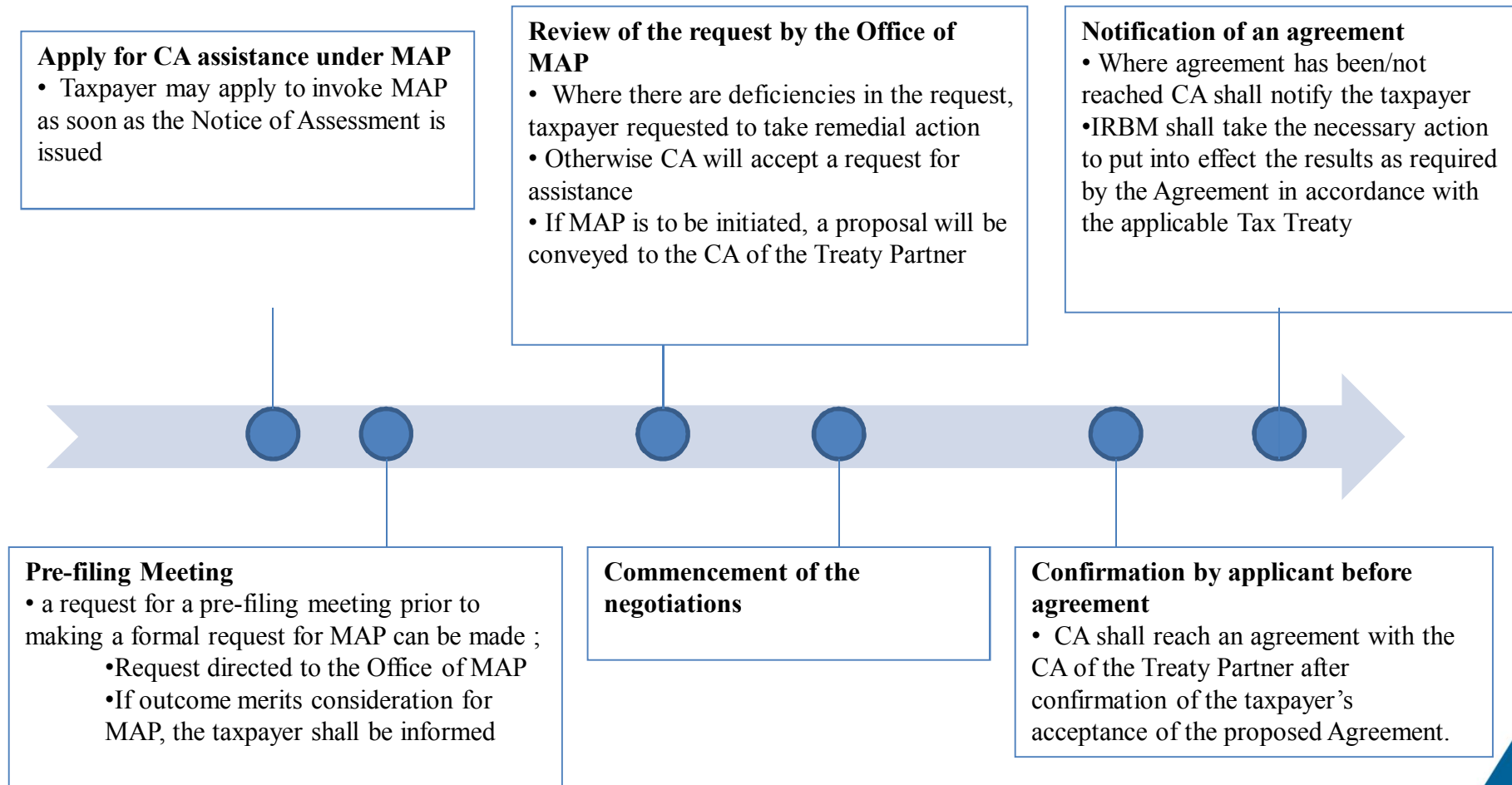


c) Unilateral dispute mechanisms





d) Bilateral dispute mechanisms





e) APA and MAP cases in Malaysia

- **APA**
 - ✓ 27 applications as of 30 September 2014
(3 Unilateral APA signed)

- **MAP**
 - ✓ 5 cases (4 cases settled)
 - ✓ most common disputes on MAP with Japan
 - ✓ common dispute issues – on royalty payment.



Unilateral and Bilateral Dispute Resolution Mechanisms

Thank You



Korea

**TRANSFER PRICING
DISPUTE RESOLUTION AND AVOIDANCE
(MAP AND APA)**

**6. Unilateral and Bilateral Dispute Resolution Mechanisms
Country Presentations**



International Tax Disputes

Organizational Structure of CA

Tax Treaty Network

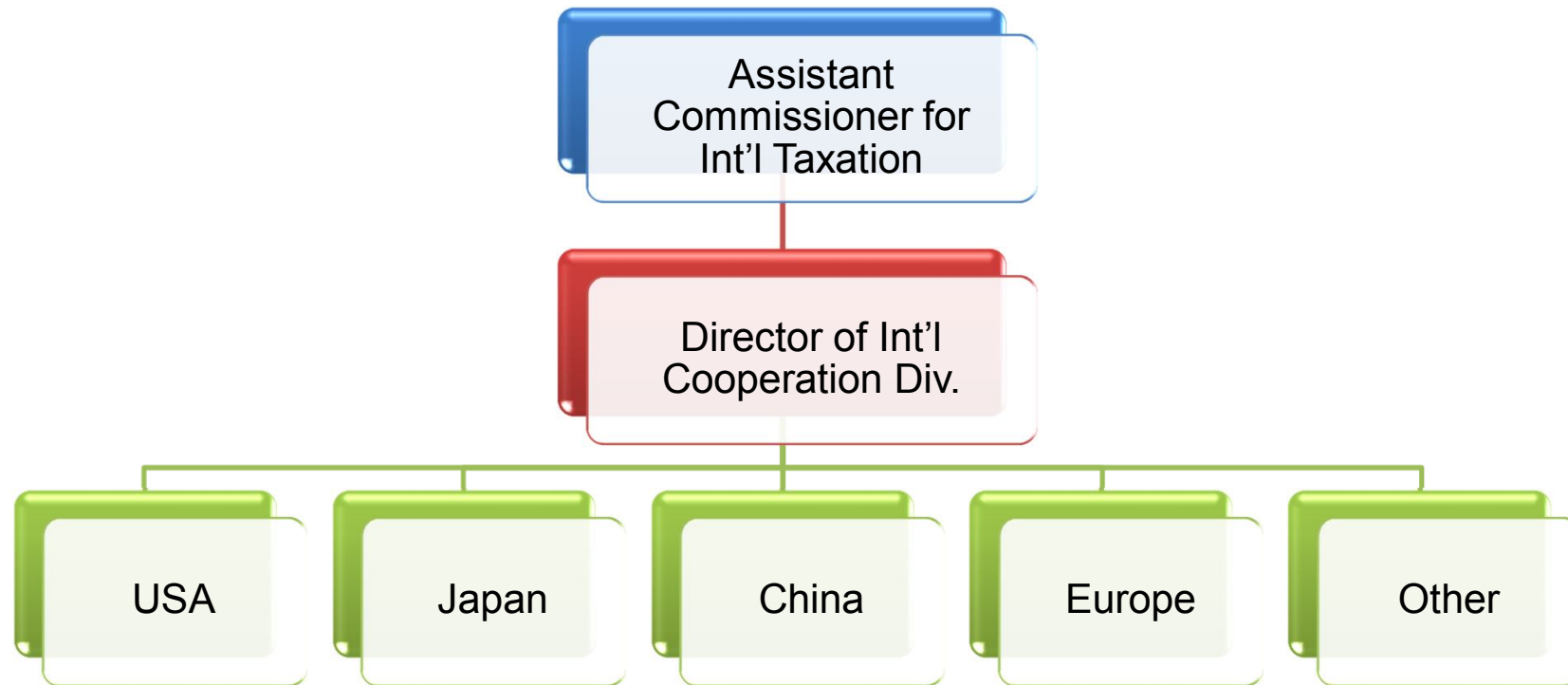
Flow Chart of Unilateral Dispute and
Bilateral Dispute Mechanisms

APA and MAP Process

APA Statistics



Organizational Structure of CA



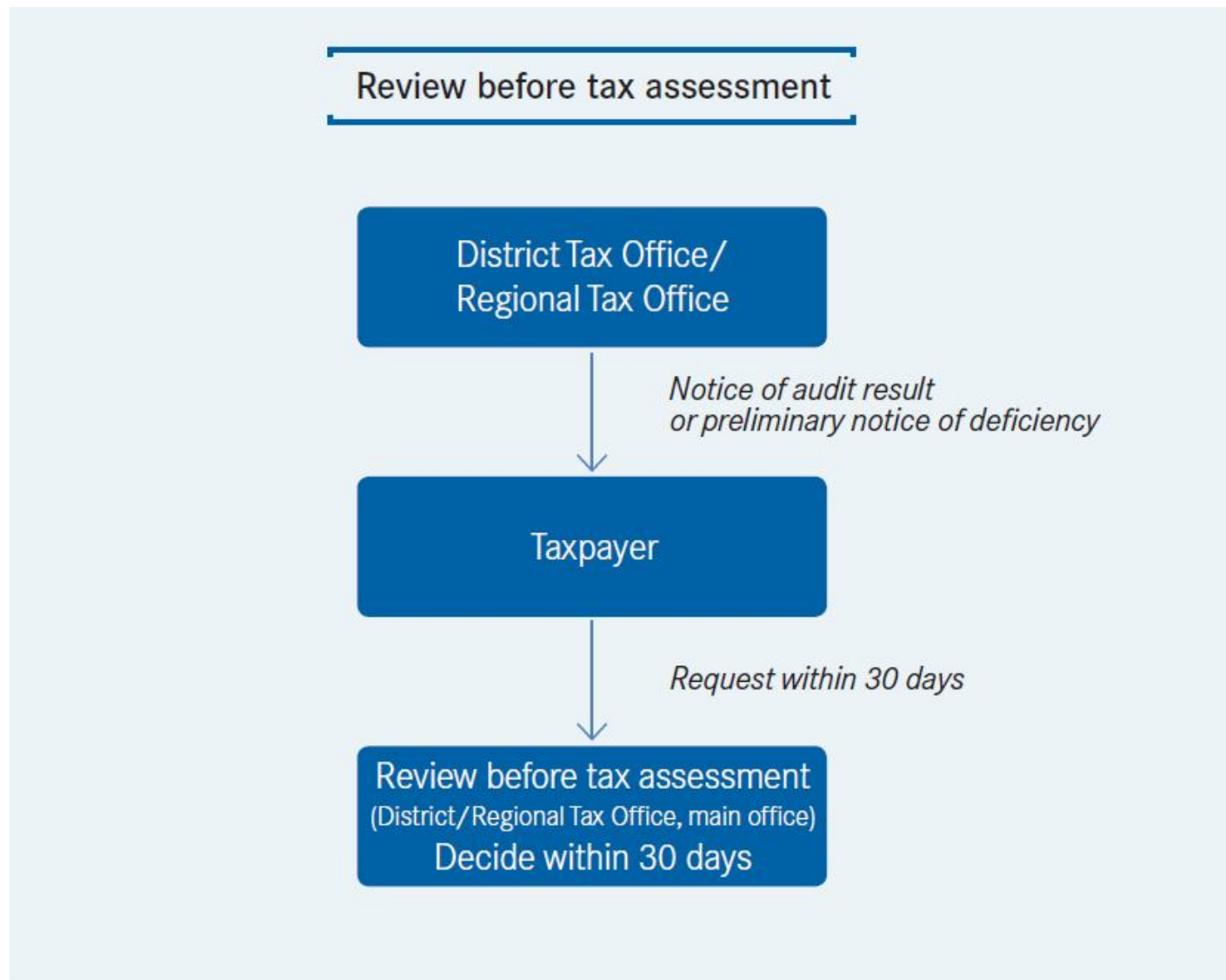


Tax Treaty Network



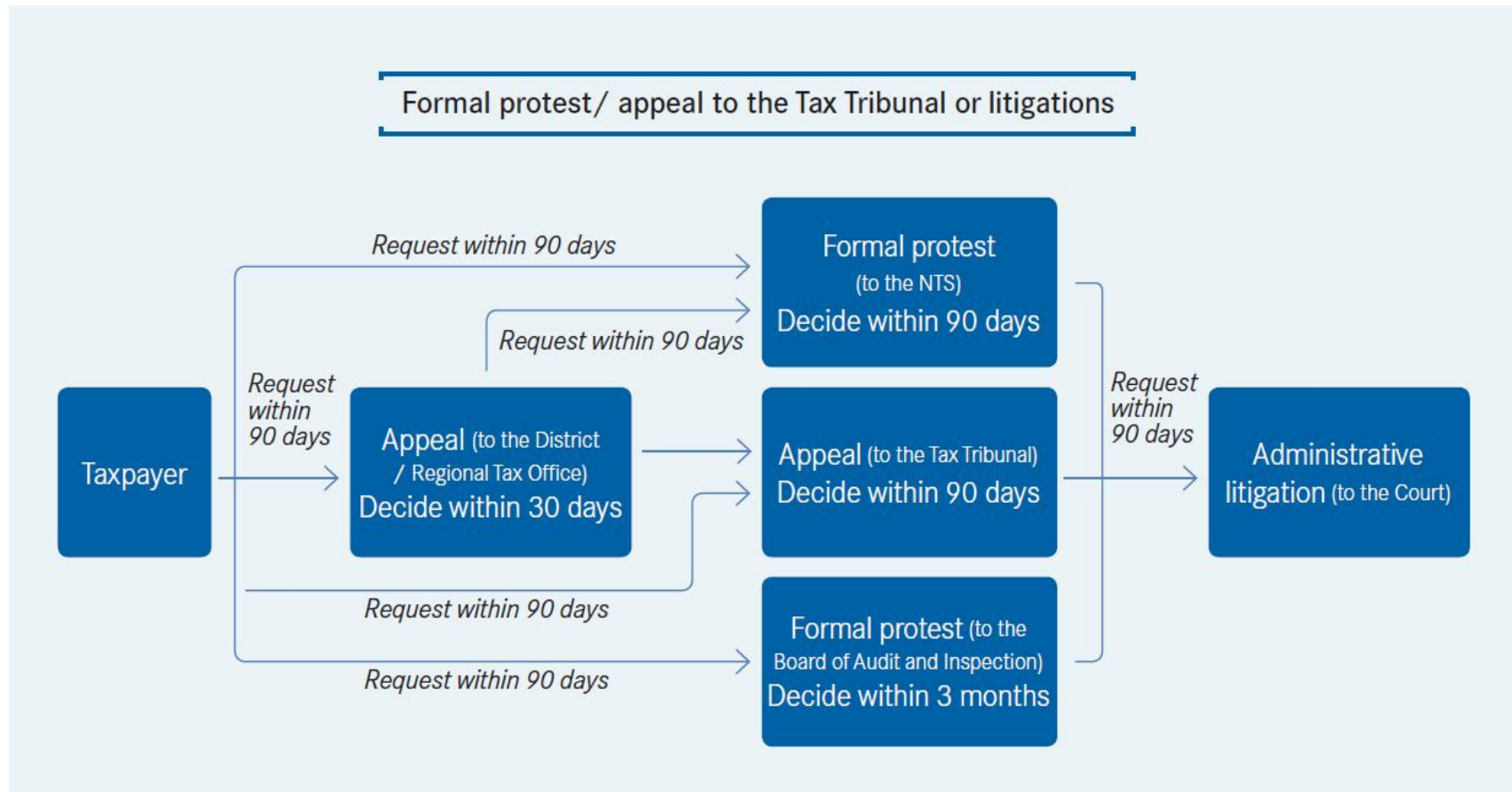


Unilateral Dispute Mechanisms



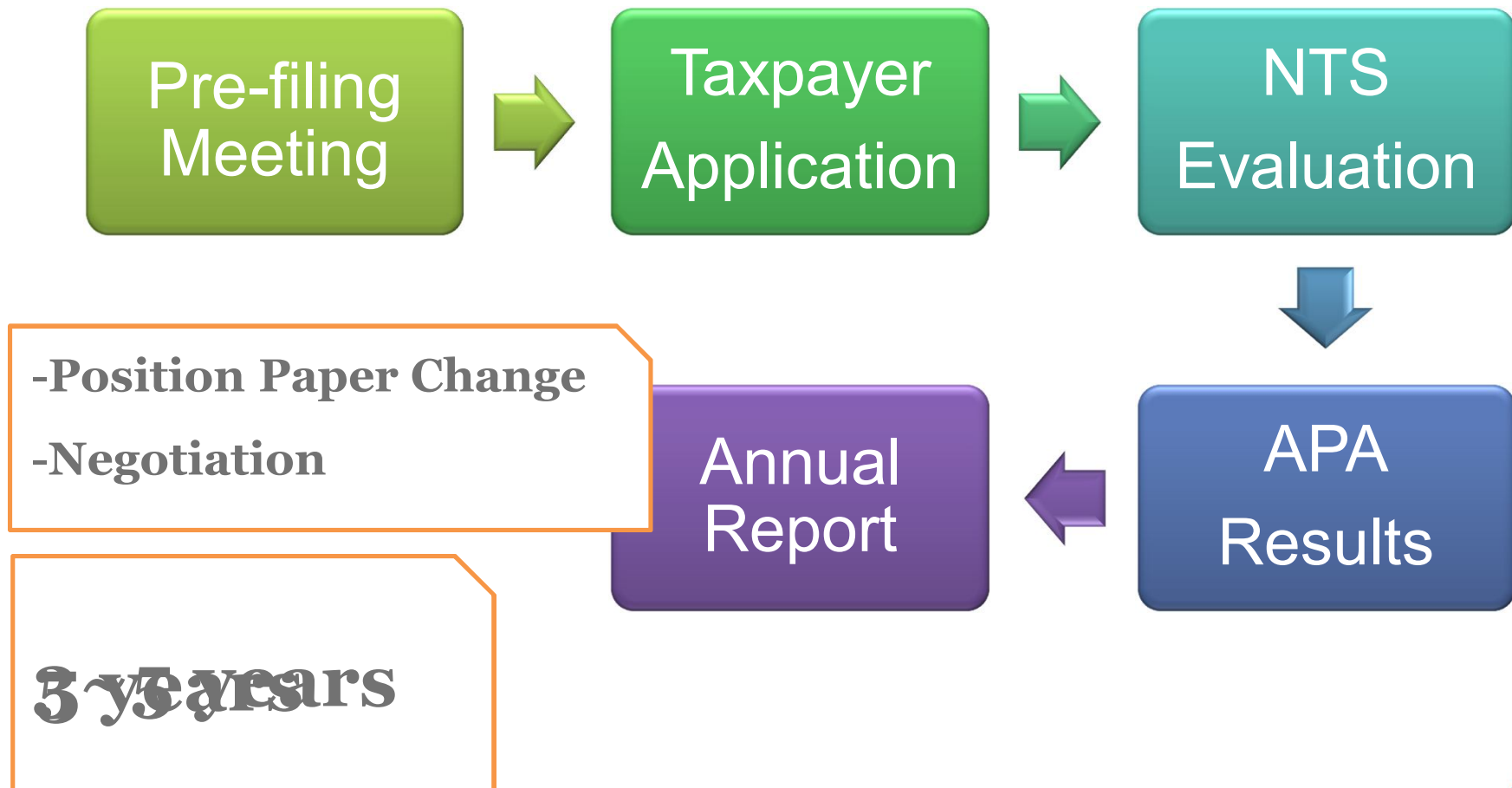


Unilateral Dispute Mechanisms





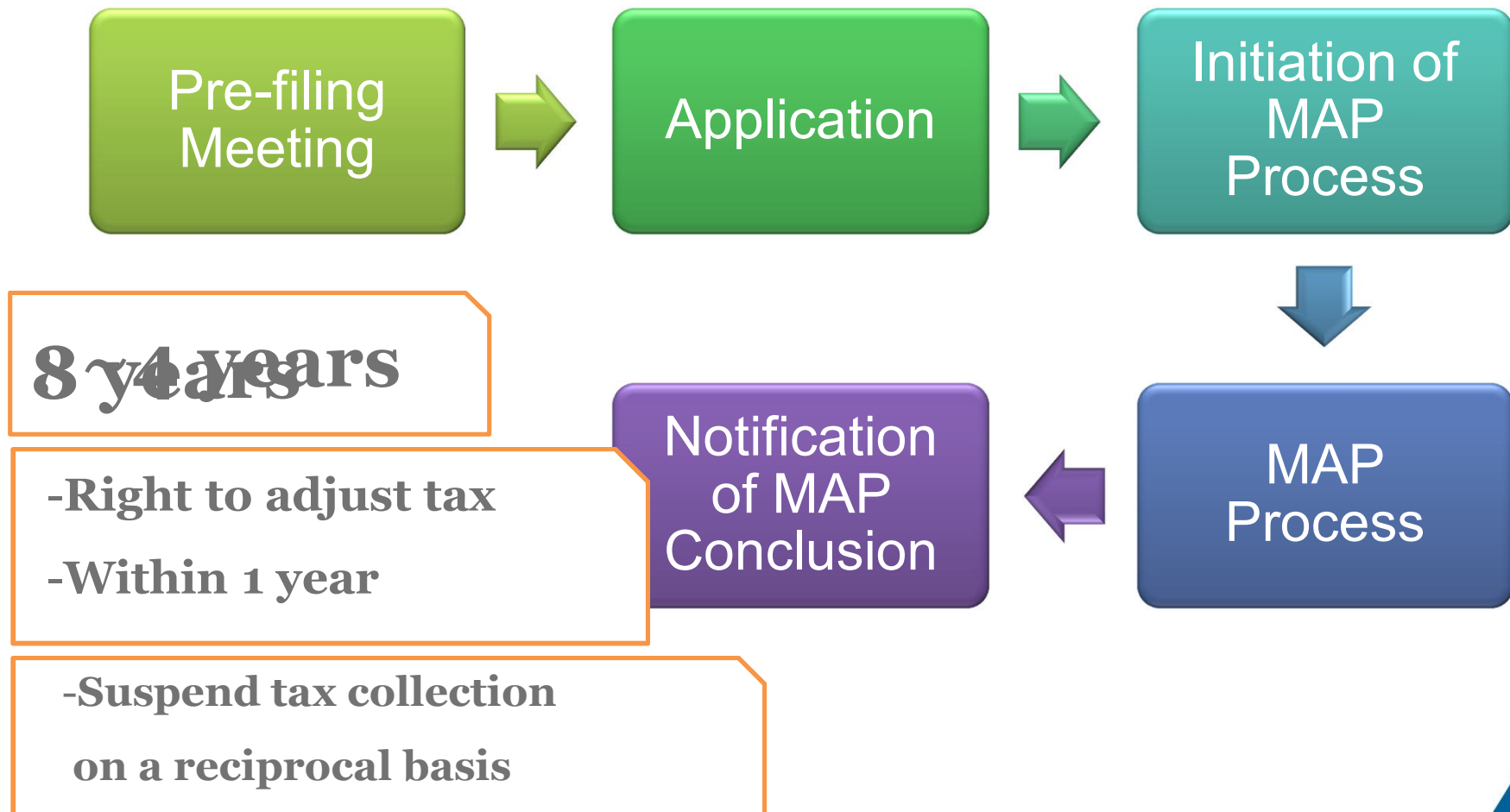
Unilateral APA Process





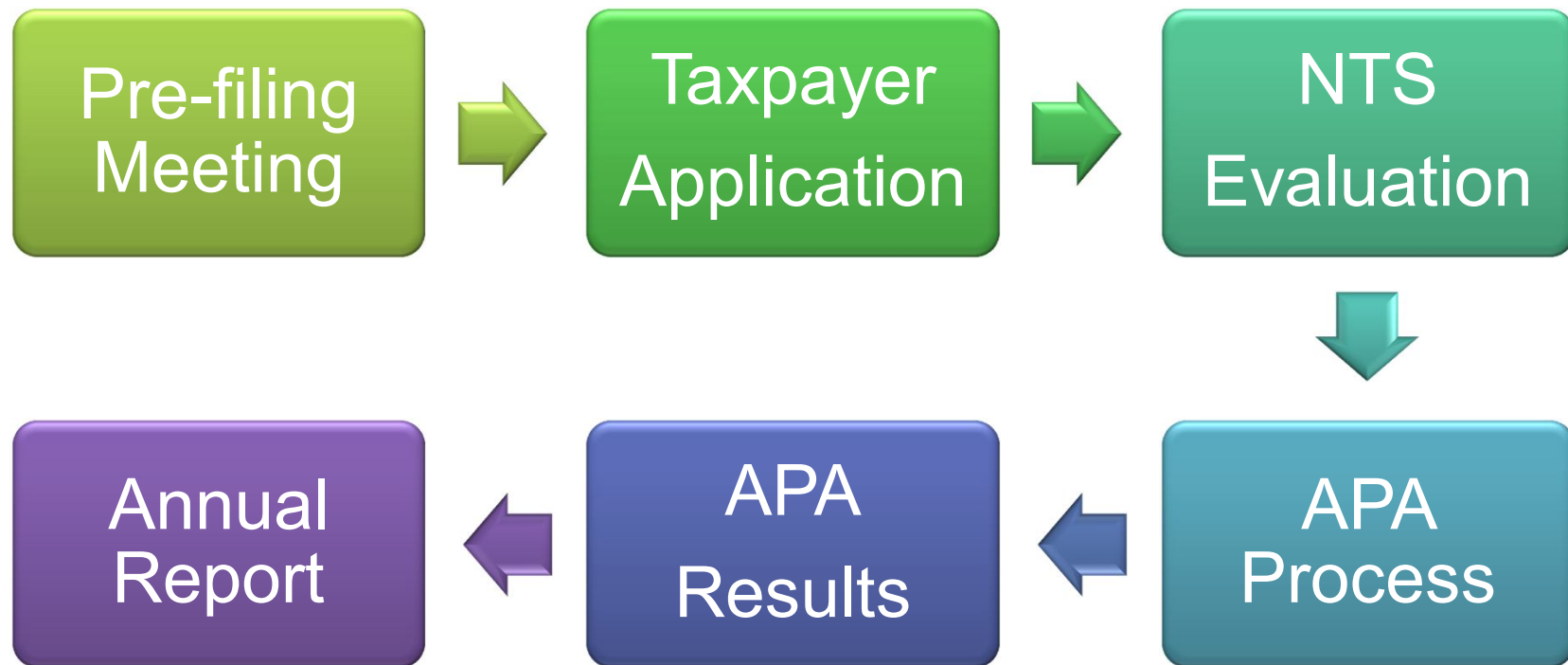
Bilateral Dispute Mechanisms

MAP Process





Bilateral APA Process



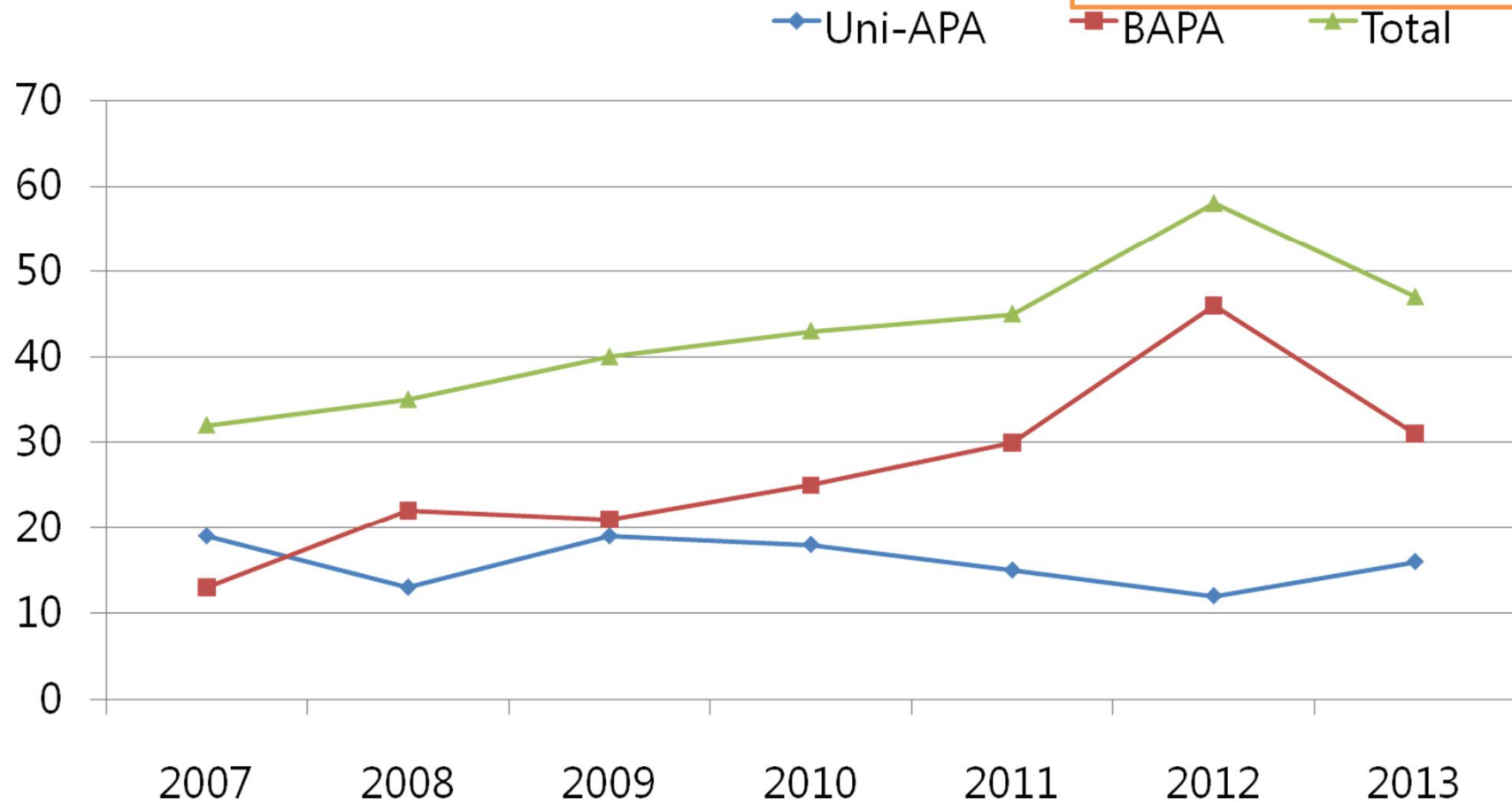


APA Statistics

(2013)

47-received

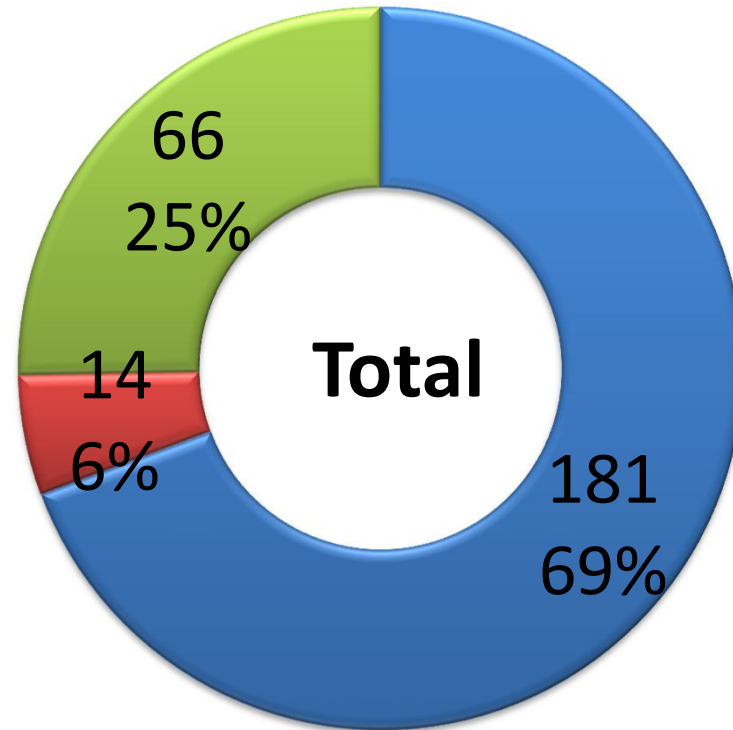
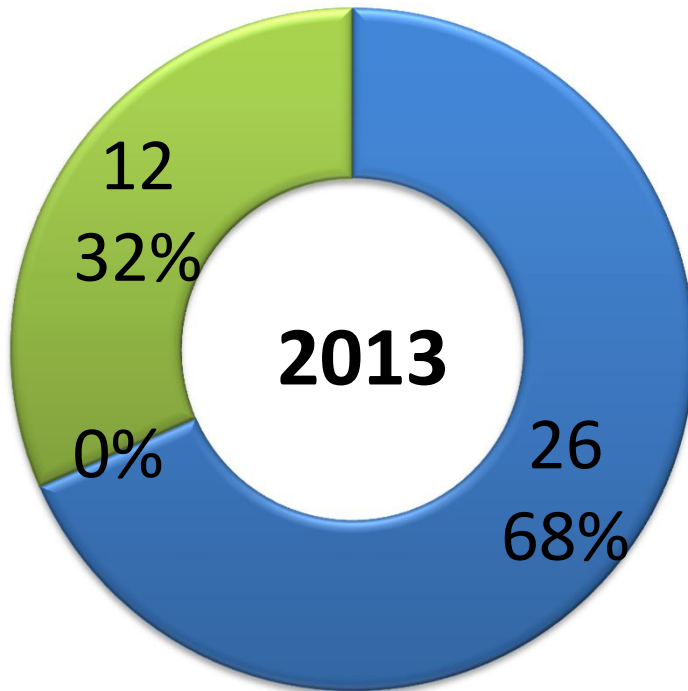
38-concluded





APA Statistics

■ Tangible ■ Intangible ■ Service





APA Statistics

- **Manufacturing after purchasing the raw materials**
- **Semi-finished goods from the related parties**
- **Purchasing and reselling finished goods.**

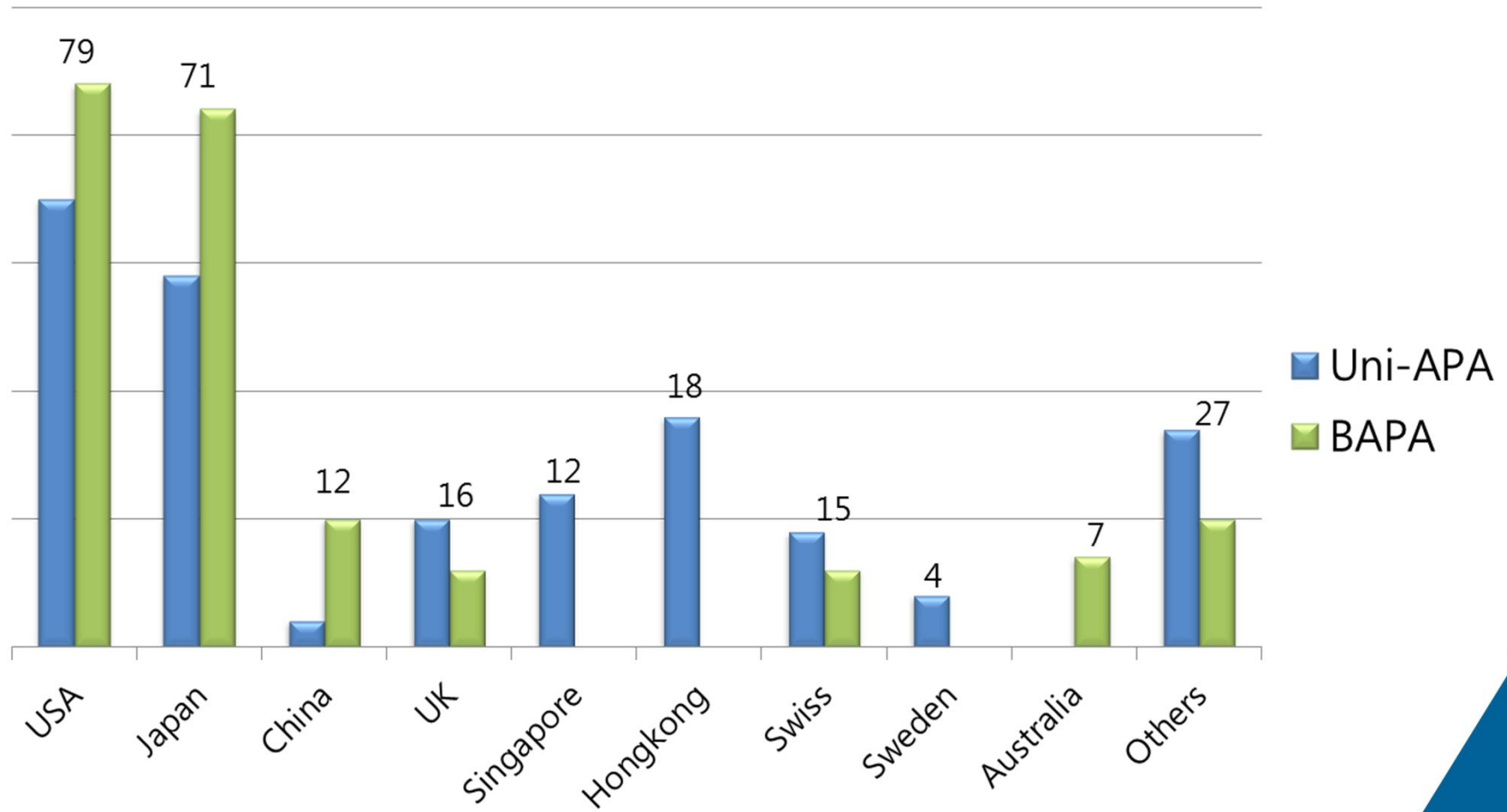
- **Payment of royalties for use of technology**
- **Trademark**
- **License fee**

- **Sales support**
- **Technical assistance service between related parties**



APA Statistics

(As of the end of 2013)





Thank you



TRANSFER PRICING DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

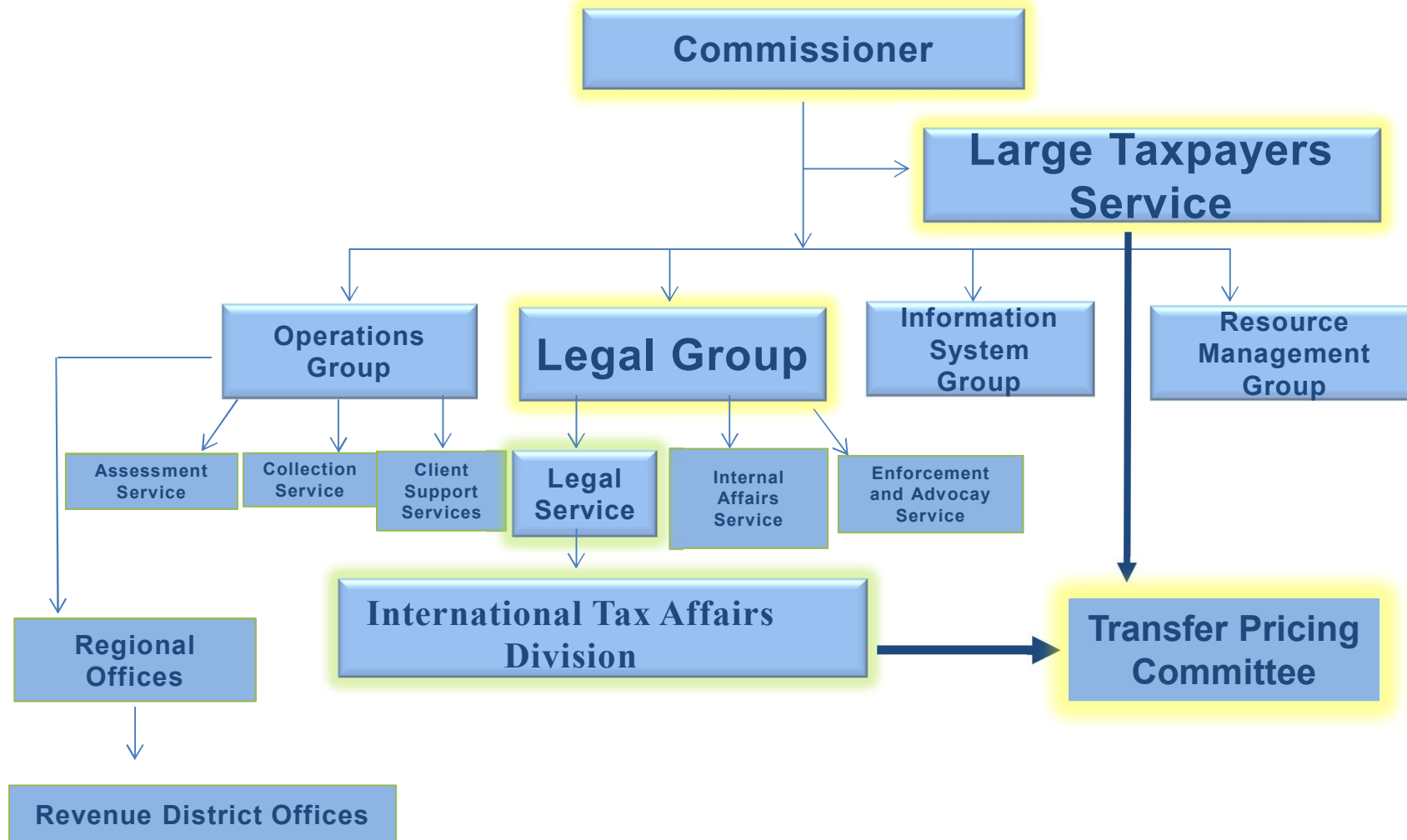
7. Unilateral and Bilateral Dispute Resolution Mechanisms

Presented by :

**Teresita M. Angeles
Katrina C. Dapula-Balbastre
PHILIPPINES**



Organizational Structure





International Tax Affairs Division: Office Structure (RAO No. 2-2014)





Tax Treaty Network

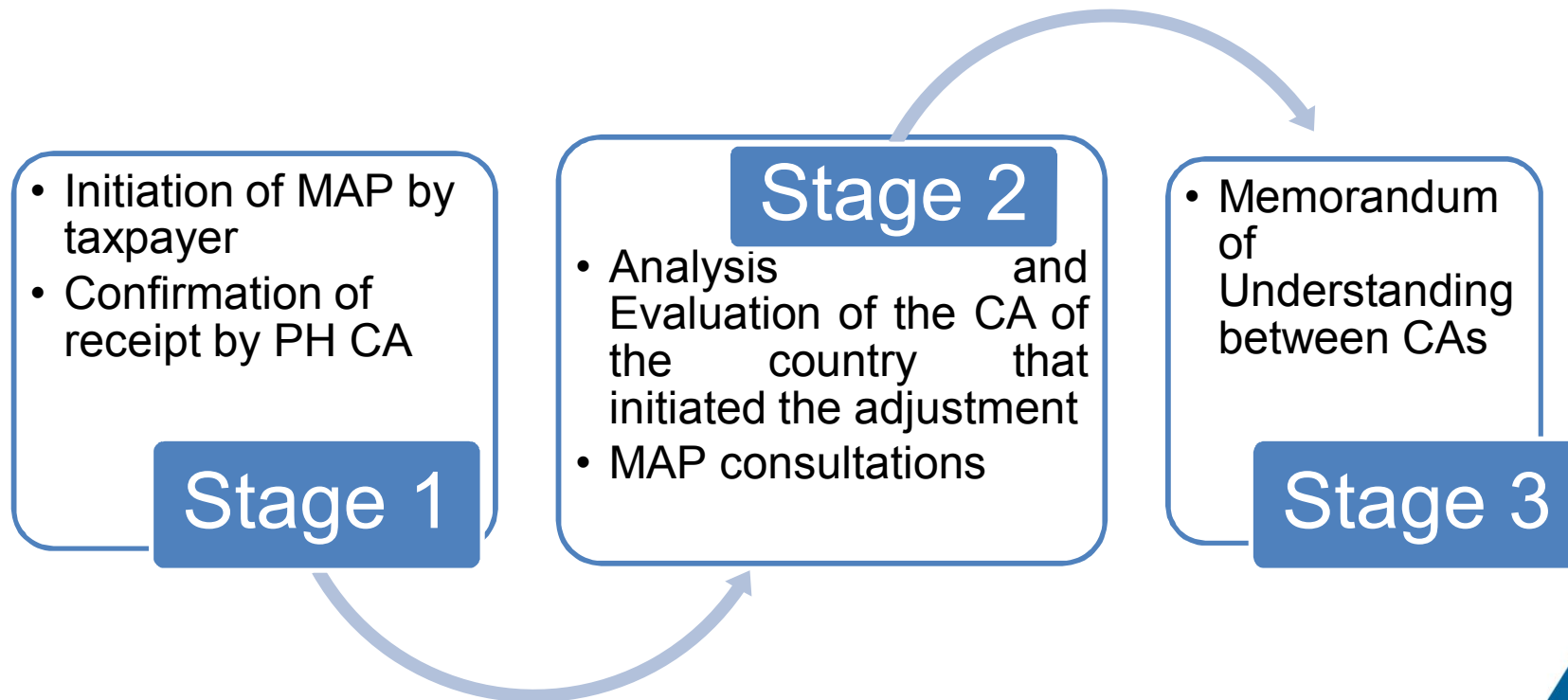
Presently, there are already 39 effective Philippine tax treaties:

- 1. Australia
- 2. Austria
- 3. Bahrain
- 4. Bangladesh
- 5. Belgium
- 6. Brazil
- 7. Canada
- 8. China
- 9. Czech
- 10. Denmark (renegotiated)
- 11. Finland
- 12. France
- 13. Germany
- 14. Hungary
- 15. India
- 16. Indonesia
- 17. Israel
- 18. Italy
- 19. Japan
- 20. Korea
- 21. Kuwait
- 22. Malaysia
- 23. Netherlands
- 24. New Zealand
- 25. Nigeria
- 26. Norway
- 27. Pakistan
- 28. Poland
- 29. Romania
- 30. Russia
- 31. Singapore
- 32. Spain
- 33. Sweden (renegotiated)
- 34. Switzerland
- 35. Thailand
- 36. United Arab Emirates
- 37. United Kingdom of Great Britain and Northern Ireland
- 38. United States of America
- 39. Vietnam



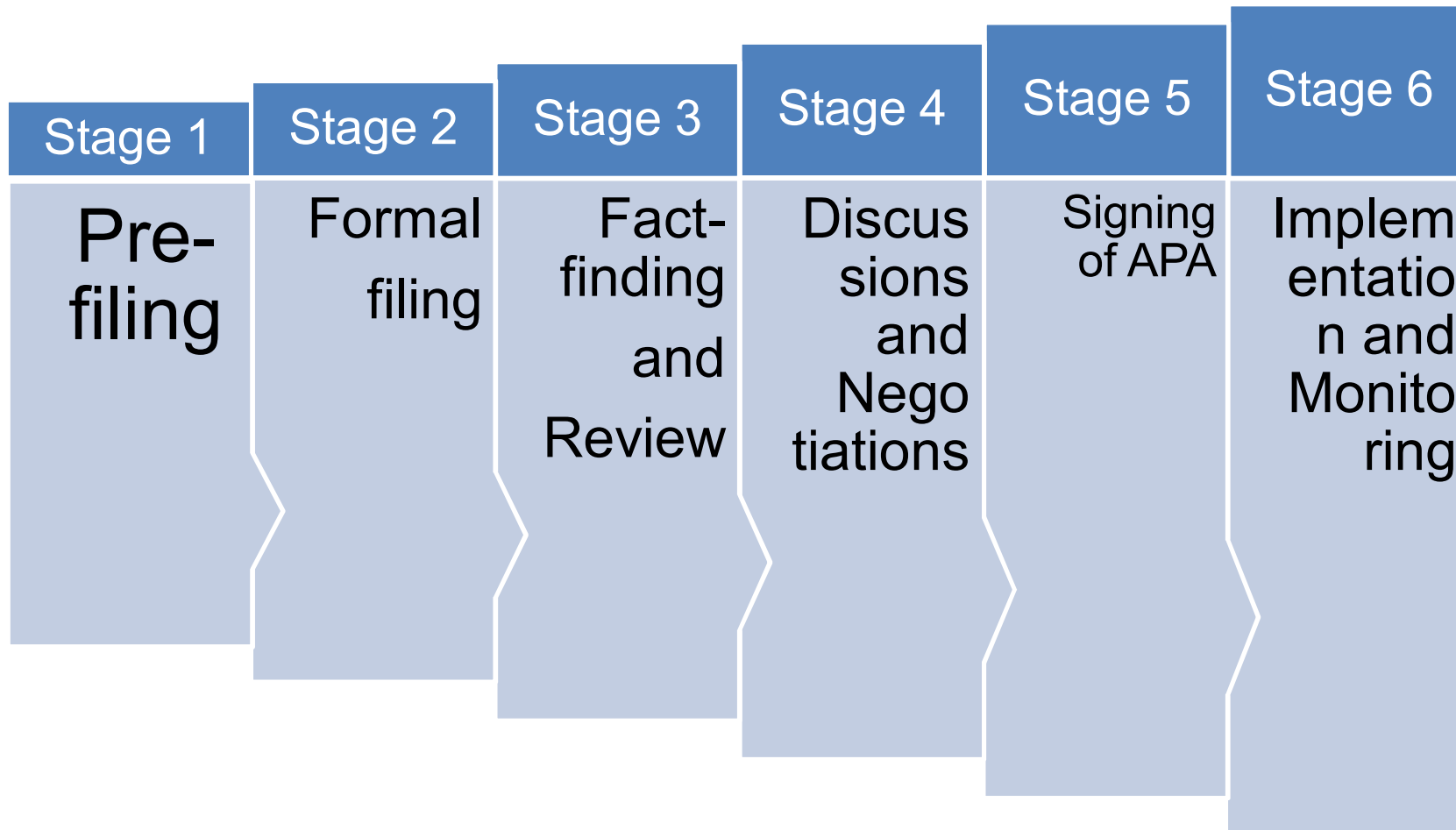
MAP Process & Dispute Mechanisms

Presently, there is no formal or clear-cut regulations. However, resort can be made by filing with ITAD, being the technical team of the Philippine Competent Authority:



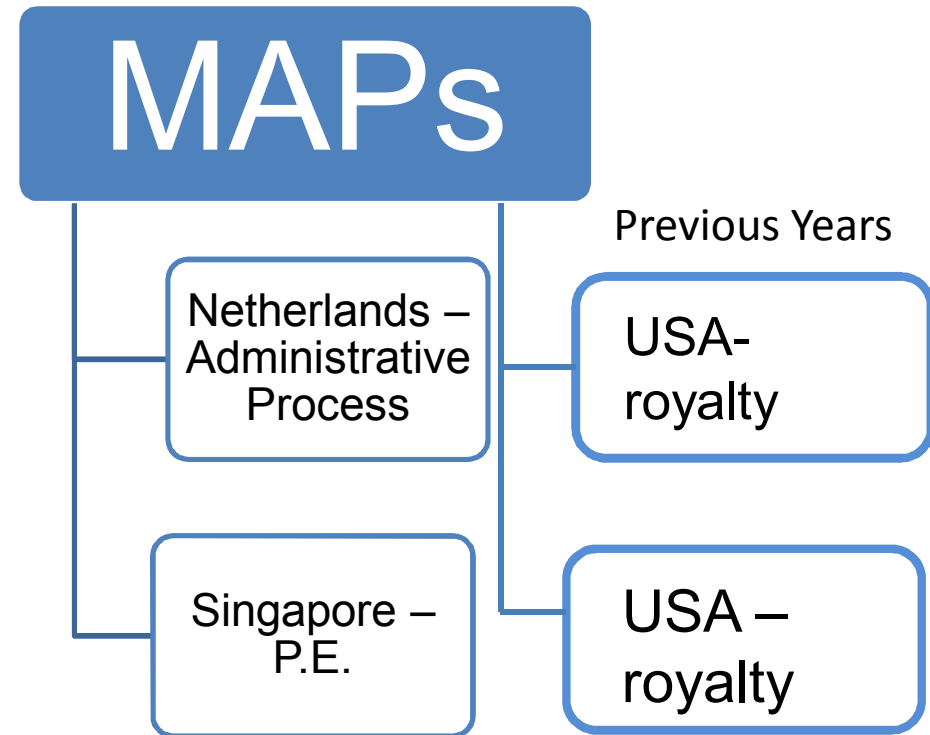
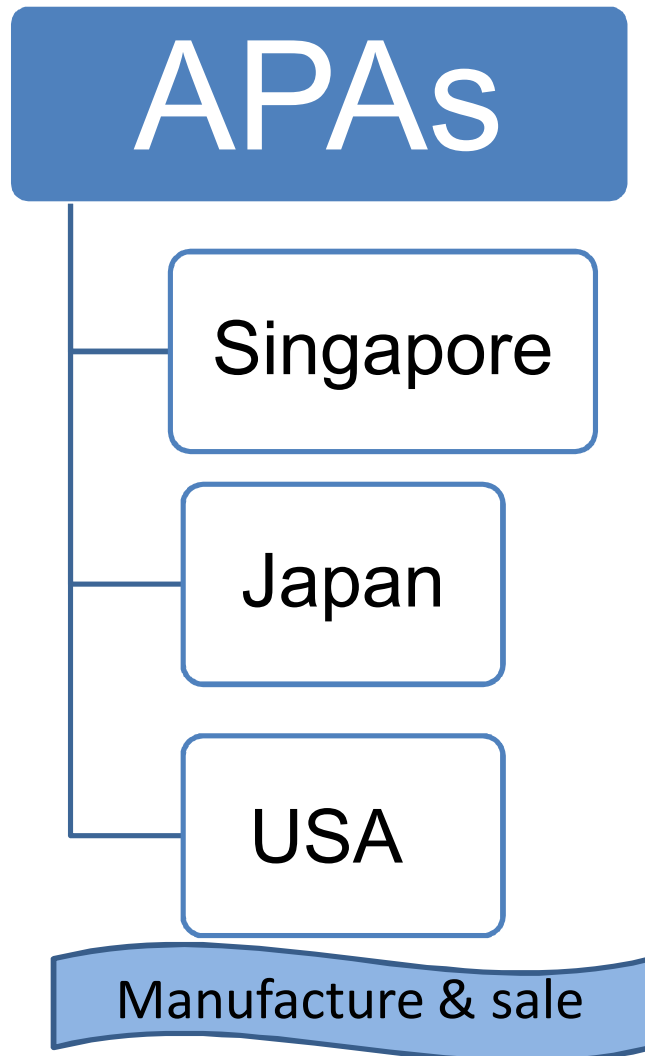


APA Process Workflow (proposed)





APA and MAP requests for 2014





TRANSFER PRICING DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

7. Unilateral and Bilateral Dispute Resolution Mechanisms

Presented by : Nicholas Neo

Singapore



Organisation of MAP/APA Function in IRAS

- **International Tax Branch, Inland Revenue Authority of Singapore (IRAS)**
 - Competent Authorities:
 - Deputy Commissioner, Assistant Commissioner and Tax Director
 - Staff Members: 11 full-time officers
 - Transfer Pricing - 7; Treaty - 4

- **Main Functions**
 - Represent Singapore at international tax forums
 - Formulate international tax policies
 - Negotiate tax treaties
 - Advise operational branches on interpretation of tax treaties
 - Resolve international tax issues through CA discussions on MAPs/ APAs



Singapore's Tax Treaty Network

76 comprehensive DTAs in force

Europe (40)

Albania, Austria, Belarus, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Guernsey, Hungary, Ireland, Isle of Man, Italy, Jersey, Kazakhstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, Uzbekistan

Americas (4)

Barbados, Canada, Mexico, Panama

Middle East/ Africa (12)

Bahrain, Egypt, Israel, Kuwait, Libya, Mauritius, Morocco, Oman, Qatar, Saudi Arabia, South Africa, United Arab Emirates

Asia (16)

Bangladesh, Brunei, China, India, Indonesia, Japan, South Korea, Malaysia, Mongolia, Myanmar, Pakistan, Philippines, Sri Lanka, Taiwan, Thailand, Vietnam

Pacific (4)

Australia, Fiji, New Zealand, Papua New Guinea



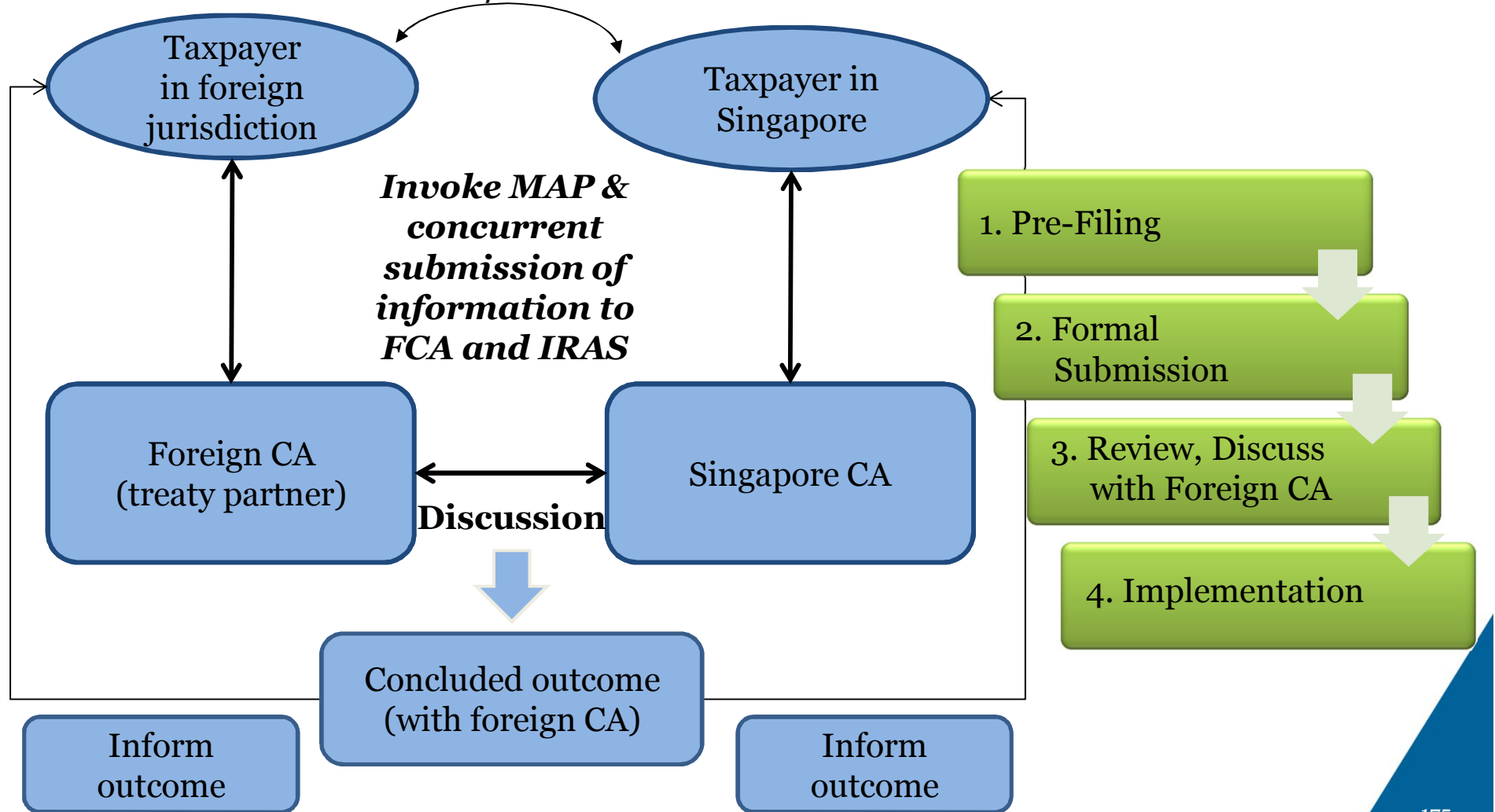
Unilateral and Bilateral Dispute Resolution Mechanisms

	Domestic	International
Prevention	<ul style="list-style-type: none">• Clarification on treaty application• Unilateral APA	<ul style="list-style-type: none">• Clarification of treaty application between CAs• Bilateral or Multilateral APA
Resolution	<p>Litigation</p> <p>Appeal</p>	<p>MAP</p> <p>Arbitration</p>



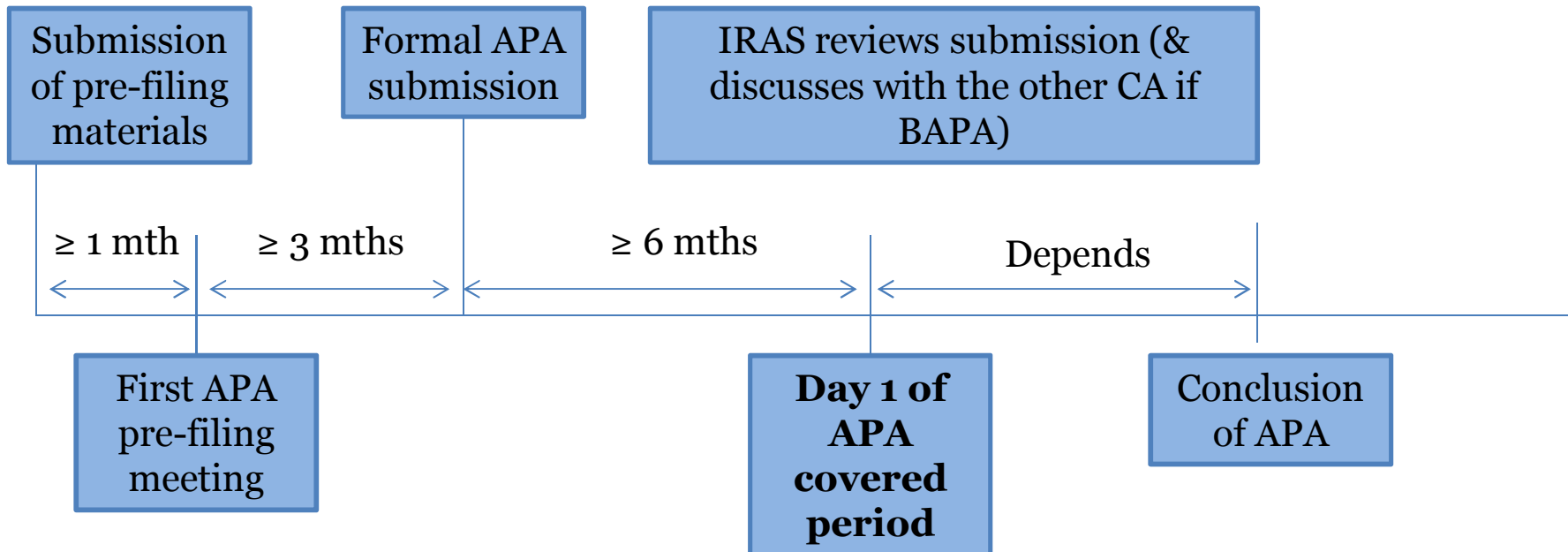
MAP Process

Double Taxation / Potential Double Taxation





APA Process





MAP and APA Cases

	FY2009/10	FY2010/11	FY2011/12	FY2012/13	FY2013/14
Number of APAs concluded	10	10	11	6	11
Number of MAPs concluded	0	1	3	1	2
Number of ongoing APAs as at the end of the FY	18	19	18	38	33
Number of ongoing MAPs as at the end of the FY	8	11	6	13	17

Source: IRAS Annual Reports



Singapore's Experience

- **Issues**

- Application of DTAs: Permanent Establishment, Independent Personal Services, Dependent Personal Services and Royalties Articles
- Transfer pricing of related party transactions involving tangibles, intangibles and services

- **Jurisdictions**

- Australia, Canada, China, France, Finland, Germany, India, Indonesia, Israel, Japan, Korea, Luxembourg, Malaysia, Netherlands, Sweden, Taiwan, Thailand, UK and Vietnam



TRANSFER PRICING DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

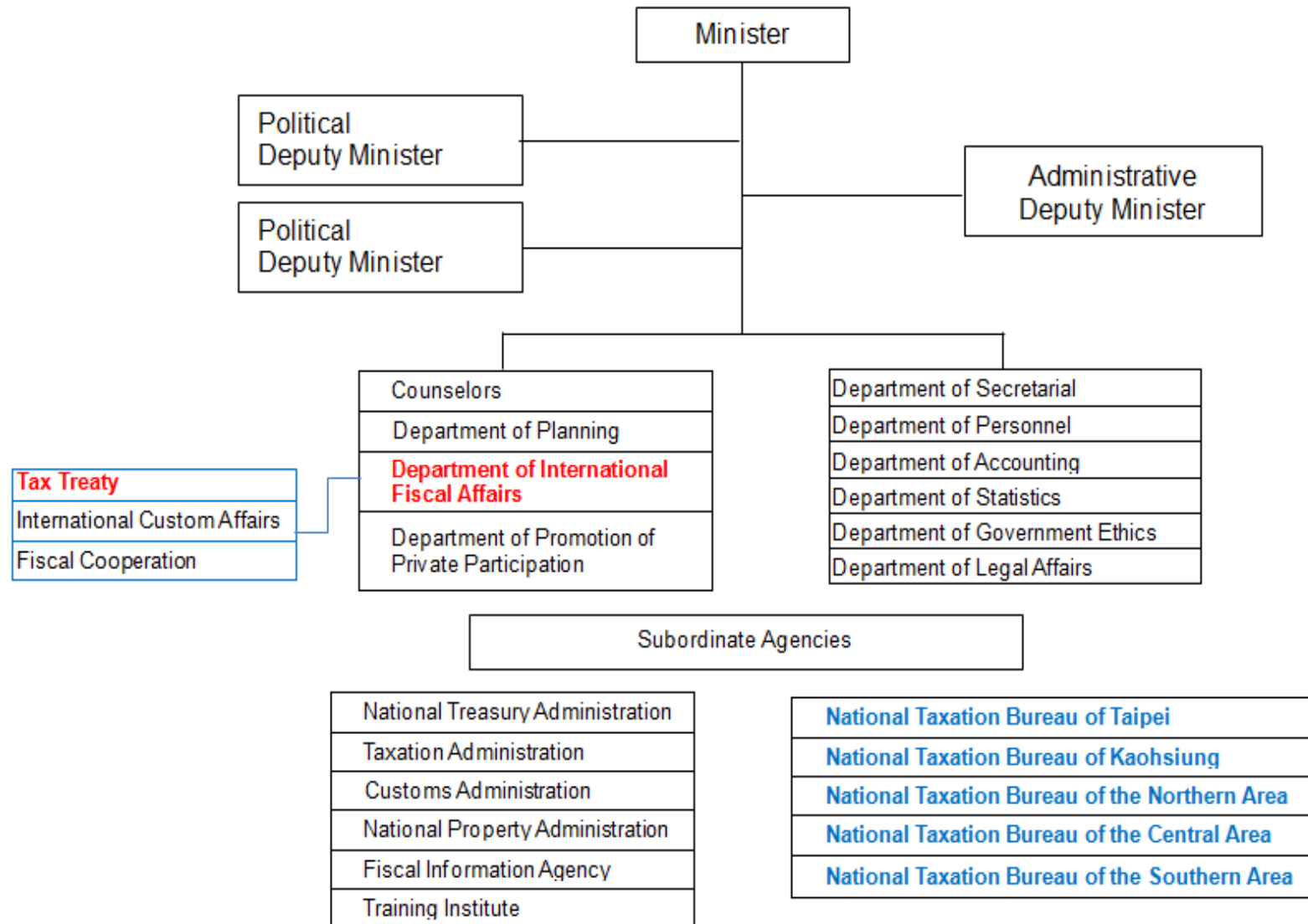
7. Unilateral and Bilateral Dispute Resolution Mechanisms

Presented by :

Chien-Wen HSIAO (Taiwan)



The Organizational Structure





Tax Treaty Network

As of 31 September, 2014, there are 27 comprehensive income tax treaties and 14 international transportation income tax agreements which have been signed and brought into force:

Continent	Country
Asia (7)	India, Indonesia, Israel, Malaysia, Singapore, Thailand, Vietnam
Oceania (3)	Australia, Kiribati, New Zealand
Europe (12)	Belgium, Denmark, France, Germany, Hungary, Luxembourg, Macedonia, the Netherlands, Slovakia, Sweden, Switzerland, UK
Africa (4)	Gambia, Senegal, South Africa, Swaziland
America (1)	Paraguay

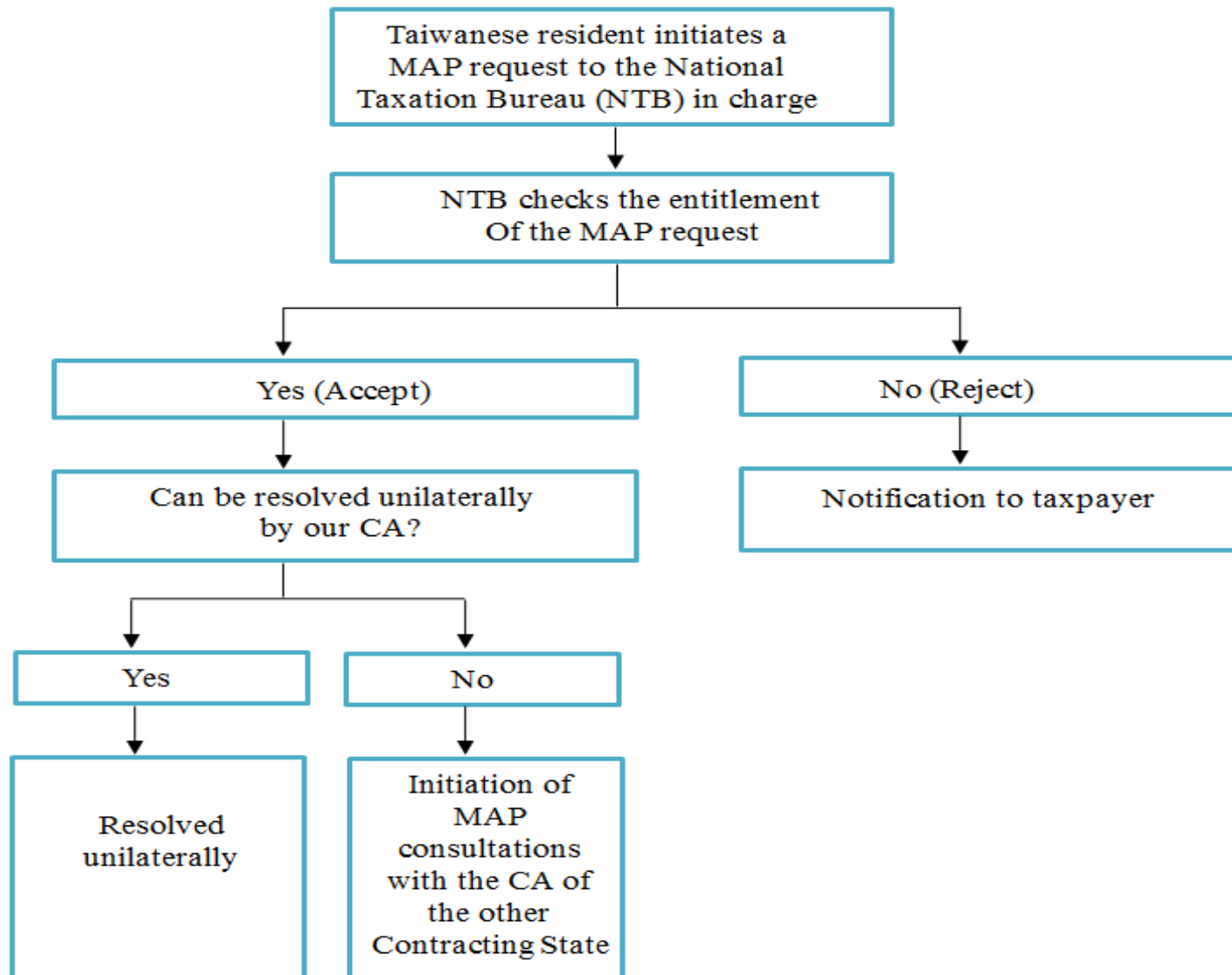


Legal Basis for MAP and APA

- **MAP**
 - Tax Treaty
 - The Regulations Governing the Application of Agreements for the Avoidance of Double Taxation with Respect to Taxes on Income
- **APA**
 - The Regulations Governing Assessment of Profit-Seeking Enterprise Income Tax on Non-Arm's Length Transfer Pricing
 - The Directions Governing the Application for an Advance Pricing Arrangement by a Profit-Seeking Enterprise

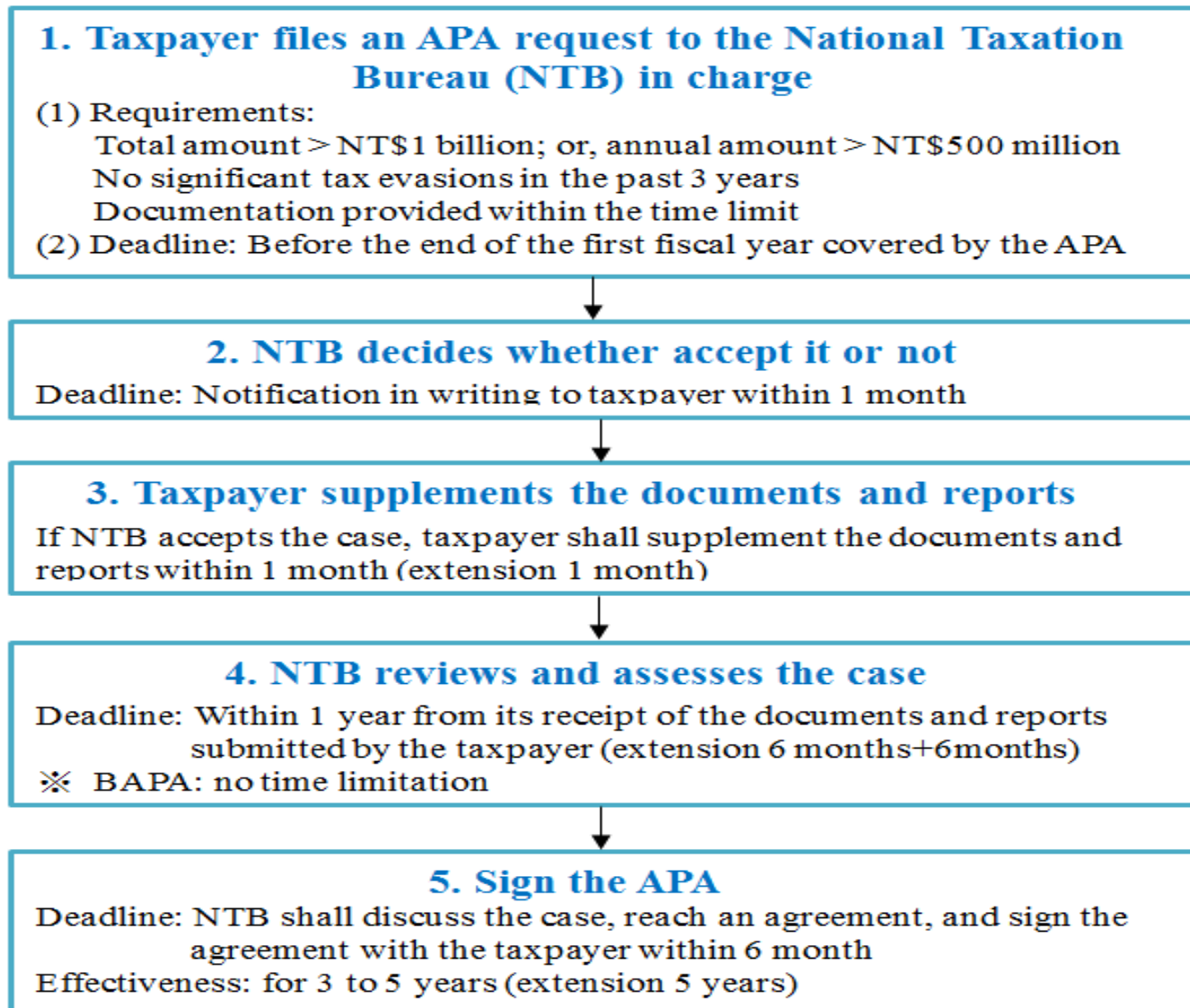


MAP Process





APA Process





Cases

1. MAP

	Type of MAP case		Number
1	Taxation not in accordance with the provisions of the Convention (OECD Model Tax Convention Article 25 paragraphs 1 and 2)	Transfer pricing cases	4 (3 BAPA cases)
		Non-transfer pricing cases	5
2	Interpretation or application of the Convention (OECD Model Tax Convention Article 25 paragraph 3 sentence 1)		2
3	The elimination of double taxation in cases not provided for in the Convention (OECD Model Tax Convention Article 25 paragraph 3 sentence 2)		0
TOTAL (As of 31 September, 2014)			11

2. APA

Category	Condition	Number
Bilateral APA (BAPA)	Signed	1
	On the process	2
Unilateral APA	Signed	7
	Withdrew	3
	On the process	1
Total (As of 31 September, 2014)		14



TRANSFER PRICING DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

7. Unilateral and Bilateral Dispute Resolution Mechanisms

Presented by :

**Jidtar Neesanun
Nattachai Rangpholsamrit**

The Revenue Department of Thailand



Outline

- Organization Structure in relation to MAP
- Current MAP process
- Strengths and Weaknesses of MAP Implementation
- Improving Efficiency of MAP Implementation



Organization Structure





Organization Structure

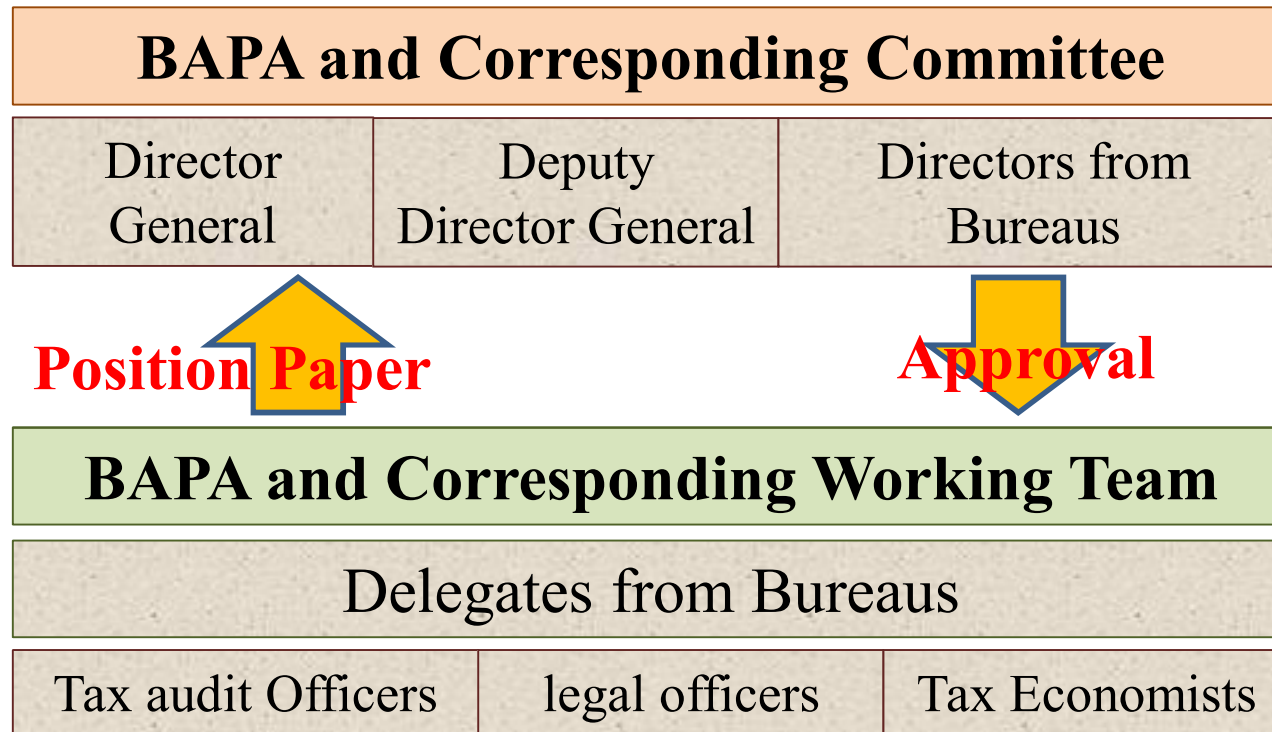
International Tax Division

- MAP for resolving difficulties arising from the application of tax convention
 - Interpretation or application of tax convention
 - Discrimination issue
 - Amendment of tax convention



Organization Structure

- MAP cases involving “Transfer Pricing”





Competent Authority

MAP	MAP in relation to Transfer Pricing Issue	
	BAPA	Corresponding Adj.
Minister of Finance		
Director-General		
Fully Authorized Representative	Fully Authorized Representative	Authorized representative limited to discuss with foreign CA



Current MAP Process

	MAP	BAPA	Corresponding Adj.
Tax Convention	Article 25 Para.1 &2	Article 25 Para.3	Article 9 Para.2 & Article 25
Competent Authority	Director General	Director General	Minister of Finance
Responsible Unit	International Tax Division	BAPA and Corresponding Adjustment Committee/ Working Team	
MAP Approach	1) Exchange of Letter 2) Competent Authority Discussion		
Implementation	Tax reliefs and refunds resulting from MAP agreement ought to remain linked to <ul style="list-style-type: none"> - Domestic time limitation - Domestic taxation procedures 		



Strengths and Weaknesses of MAP Implementation

Strength	Weakness
Promoting trade and investment	Subject to Domestic time limitation
Increasing taxpayer's cooperation	Subject to Domestic taxation process
Updating tax planning techniques	Insufficient officials
Upgrading collaboration between treaty partners	No Corresponding Adjustment / MAP guidance



Improving Efficiency of MAP Implementation

- **Competent authority designation**
- **Amendment of Reservation on MAP Article**
- **Taxation process development**
- **Organizational development**
- **MAP guidance development**
- **Increasing the number of CA discussion**



TRANSFER PRICING DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA)

7. Unilateral and Bilateral Dispute Resolution Mechanisms

Presented by : TU THI THANH HA & HIEN PHAM

Vietnam



Organizational Structure of Tax Treaty Group in Vietnam

Minister of Finance

- Competent Authority (CA)

GDT

- Authorized Representative by CA

ITD
in GDT

- 4 groups in charge of tax treaty issues (including MAP) and APA

- So far Vietnam has signed 69 treaties with other countries and territories



Unilateral Dispute Mechanism

- Legal basis: Law on Complaints & Law on Administrative Procedure
- 2 forms for taxpayers to have their disputes resolved:

Complain

under Law on Complaints

- First complaint
- Second complaint

Bring to court

under Law on Administrative Procedure

- Court of first instance
- Court of appeals



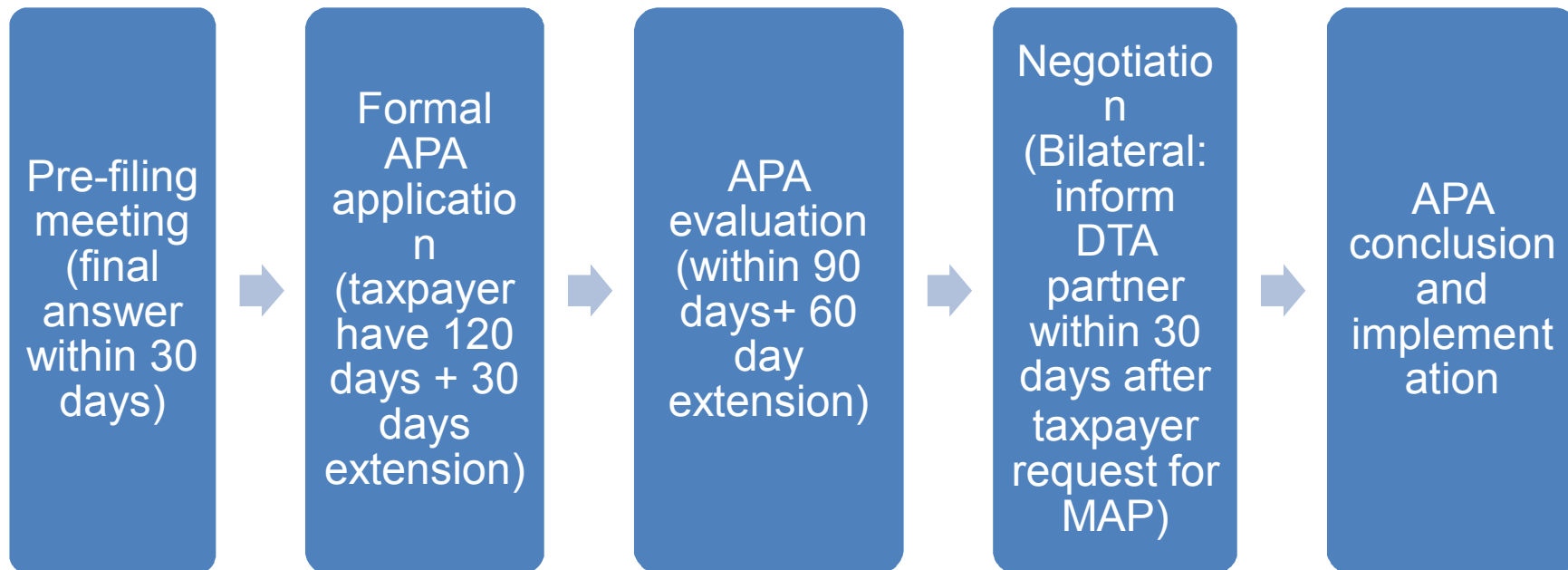
Bilateral Dispute Mechanism

- There is no regulation or guidance on mutual agreement procedures when it comes to bilateral dispute mechanism under Vietnam's domestic law
- At present, provisions on MAP is only provided in DTAs between Vietnam and its partners
- So far GDT has not been asked about MAP from other tax authorities yet



APA process in Vietnam

- Legal basis: **Circular No 201/2013/TT-BTC** dated 20/12/2013)
- There are 5 stages to conduct an application to APA:





SOME FEATURES ON APA IN VN

- APA period: up to 5 years
- APA types: unilateral, bilateral and multilateral type available
- APA threshold: No
- Anonymous pre-filing: No
- Rollbacks: no rollback prior to the APA application date
- Fees for APA applications: No



APA APPLICATION STATISTICS

- At present there are 2 APA applications being reviewed and analyzed under pre-filing stage
- There are also several other companies expressing their interest in APA program. It means that the number of companies engaging in APA are going to increase in the near future.



THANK YOU



TRANSFER PRICING (DISPUTE RESOLUTION AND AVOIDANCE (MAP AND APA))

Unilateral and Bilateral Dispute Resolution Mechanisms

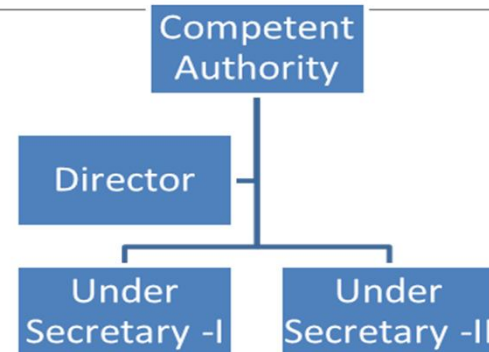
Presentation by

- Sumit Kumar Varma, Under Secretary, FT&TR-II(2), CBDT, New Delhi
- Kuldeep Sharma, ACIT, APA, New Delhi



Mutual Agreement Procedure

Organizational structure of CA



CA responsibility delegated to Joint Secretaries to the Government of India (FT&TR Division)

- **JS(FT&TR-I)** – Handles North America (including countries of Central America and Caribbean), Europe
- **JS(FT&TR-II)** – Handles Rest of the World



Treaty Network

Wide network of tax treaties

➤ 86 DTAAAs in force

➤ 13 TIEAs (Tax Information Exchange Agreements) in force

More under negotiation





Salient Features of MAP in India

- MAP is a redressal mechanism in addition to remedies available under domestic Courts.
- Generally, the time frame for MAP resolution is 2-3 years.
- MAP order by the CA is binding on Revenue, but the taxpayer may not accept it and continue with the domestic tax law appeal.
- With USA, UK, Denmark, there is provision to suspend collection of taxes till the MAP proceedings are in progress upon submission of a bank guarantee.
- Taxpayer to apply for MAP within 3 years of the first action initiated by tax authorities.





Countries involved in MAP with India

- USA
- UK
- Japan

Issues raised under MAP

- Generally Transfer Pricing issues are involved





MAP Process

- CA of the resident taxpayer verifies whether there is *prima-facie* a case for invoking MAP
- If satisfied, the CA will contact the CA of the other state concerned
- CA of the Contracting State that has made adjustments shall submit position paper to the CA who has invoked the MAP, where justification for the adjustments made are spelt out
- Position paper is prepared after taking inputs from the field dispensation
- Exchange of correspondence occur between the CAs and face to face meetings between the CAs are also held
- In MAP meetings taxpayer is generally not present but is kept well informed so that effective agreement can be reached
- Minutes are drawn in respect of each meeting



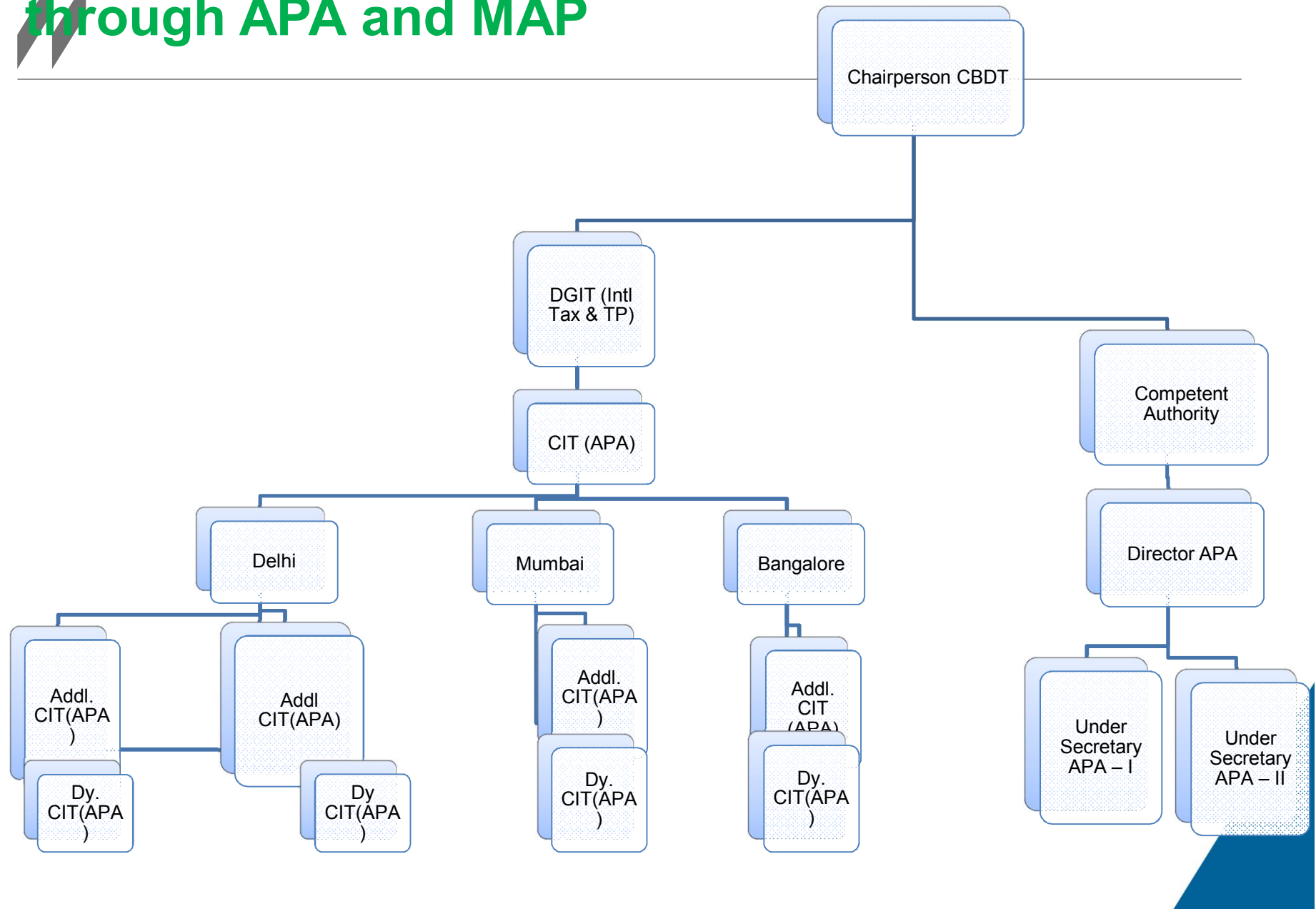


MAP Process cont....

- Once an agreement is reached, upon approval of Chairman, CBDT, the resolution is communicated to the other CA and a closing letter is drawn
- Occasionally, the CAs may disagree and the case is closed
- In India, as per rule 44H, the decision of CA is given effect within a period of 90 days of its receipt in the office of Chief Commissioner or Director General
- In India there is no fee for filing a MAP request
- Rule 44H provides that once the applicant accepts the MAP agreement, he has to withdraw the appeal filed in domestic courts.



Unilateral/Bilateral Dispute Resolutions through APA and MAP



Introduction of APA

- **It is an agreement between the Central Board of Direct Taxes (CBDT) and the Taxpayer which determines Arm's Length Price (ALP), or manner of determination of ALP, in relation to an international transactions between the Associated Enterprises, in advance.**
- **Legal Basis**
 - Transfer Pricing Provisions were introduced in India with effect from 1.4.2002 (Finance Act, 2001)
 - APA provisions inserted by Finance Act, 2012 w.e.f. 01.07.2012.
 - Rules 10F to 10T of Income Tax Rules, 1962 came into effect from 30.08.2012.
 - Finance Bill, 2014 seeks to further strengthen the system of APAs in India by allowing rollbacks of APAs (upto 4 years) to further curtail *ongoing litigation* for *existing transactions* also.
- **Agreement can be for a maximum period of 5 years.**



Types of APA

Indian APA program envisages three types of APAs: unilateral, bilateral and multilateral.


APA Applications filed in form 3CED	FY 2012-13	FY 2013-14
Unilateral	119	206
Bilateral	27	26
Total	146	232

Indian law does not give preference to any type of APA. Choice lies with the taxpayer.





Process involved in APA

- Pre-filing consultations
 - Furnishing of APA Application with fee
 - Acceptance/Rejection of Application
 - Amendment to APA Application
 - Processing of APA Application
 - Preparation of Position Paper
 - Negotiations
 - Drafting and signing the Agreement
 - Action by various persons post Agreement
 - Annual Compliance report/Compliance Audit
 - Cancellation/Revision of APA
- 



ISSUES IN APA APPLICATIONS

- **Margins for IT/ITES Companies**
- **Intra-group services –
Management Services**
- **Market Intangibles – Bright line
Concept**





THANK YOU