



2022 Cambridge - McKinsey Risk Prize Bio-sketch and Photo Page



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Title of Submission: 'MAP'ping the uncharted: proposal to
make international tax dispute resolution more efficient

I am a current candidate for the postgraduate degree:
M.St. (History)

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2022 Cambridge - McKinsey Risk Prize Declaration Form

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I am a current candidate for the postgraduate degree: M.St. (History)

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Department of History

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'MAP'ping the uncharted: proposal to make international tax dispute resolution more efficient

Aditya Panse (ap2305)

1. Introduction

As we look back at the last decade and a half, humankind has experienced a financial crisis, a pandemic, inadequate responses to climate change, two situations that could have escalated into a war but didn't, and one which did. We do live in the proverbial 'interesting times'. It is up to us to try not to make it more 'interesting' by squabbling over international tax rights. It is in our interests to come up with a frictionless and speedy system of resolution of international tax disputes.

The current international tax dispute resolution mechanism known as Mutual Agreement Procedure ('MAP') is inherently inefficient in the sense that it does not always culminate into a resolution of disputes that is acceptable to the parties. This creates significant business risks to Multinational Entities (i.e., the taxpayers) because the taxpayers cannot be certain of the tax treatment of a particular aspect of their business model in a particular country. This paper proposes a solution for reducing the friction in the MAP process. The paper begins by describing the current MAP process, pointing out the issues, and the resultant bottlenecks. The paper then describes the risks to international commerce and proposes a measure to address those risks and make the process more efficient.

2. Brief overview of the existing MAP process

The agreements between two countries ('tax treaties') for ensuring that there is no economic or juridical double taxation are modelled on the Model Tax Convention on Income and Capital published by the Organisation for Economic Cooperation and Development ('OECD')¹ ('OECD MTC'), and the United Nations Model Double Taxation Convention between developed and developing countries, 2021 ('UN MTC').² Article 25 of the OECD MTC and the UN MTC provide the legal authority for resolving tax disputes via the Mutual Agreement Procedure. Although the OECD MTC and the UN MTC differ in a few significant respects (especially relating to arbitration), there is little difference between the two Model Tax Conventions relating to the MAP procedure.³ The Commentaries to the OECD and UN MTC respectively provide the procedural framework, often supplemented by the local procedural regulations made by

¹ OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing. http://dx.doi.org/10.1787/mtc_cond-2017-en

² UN (2021), Model Double Taxation Convention between developed and developing countries, Department of Economic & Social Affairs, ISBN: 9789212591841

³ *ibid.*, Paragraph 1 of the Commentary on Article 25, p.669.

individual countries.⁴ A key point to note is that a MAP is independent of, and is not bound by, the domestic tax dispute resolution mechanisms.⁵

The commonly accepted procedure is that when a taxpayer comes to know that they have been subjected to double taxation, i.e. 'taxation not in accordance with the provisions of the convention', the taxpayer can take his case to the 'Competent Authority' within three years.⁶ A Competent Authority is an officer from the Ministry of Finance of a country designated for such dispute resolution.⁷ The Competent Authority shall, on its own or in collaboration with the Competent Authorities from other countries, endeavour to resolve the case within two years. The Competent Authorities communicate with each other directly, without going through diplomatic channels.⁸ The Competent Authorities are obliged to seek to resolve the case in a fair and objective manner, on its merits, in accordance with the terms of the MTC and applicable principles of international law on the interpretation of treaties (such as the Vienna Convention).⁹ The detailed steps and timelines in a typical MAP case ('MAP Lifecycle') are shown in **Appendix A**. In summary, the MAP Lifecycle can be said to be divided into three phases; viz. filing, negotiation, and disposal.

In practice, the MAP Lifecycle is extremely time consuming and from an outcome perspective, uncertain. There are systemic and practical reasons for this, which are elaborated on in the next section. OECD acknowledged this and commenced work on this under Action 14 of the OECD's BEPS project. OECD recognised that the total inventory of MAP cases has been increasing every year since 2016, despite the tax administrations closing more cases every year.¹⁰ The following graph (**Figure 1**) shows the movement in MAP cases from 2018 to 2020 as reported by OECD.¹¹

⁴ In the case of the UK, please see INTM423010 and Statement of Practice 1(2018) published by Her Majesty's Revenue and Customs. In the case of India, please see MAP Guidance F. No. 500/09/2016-APA-I dated 7 August 2020 issued by the Ministry of Finance of the Government of India.

⁵ Article 25(1) of the OECD MTC and the UN MTC.

⁶ *ibid.*

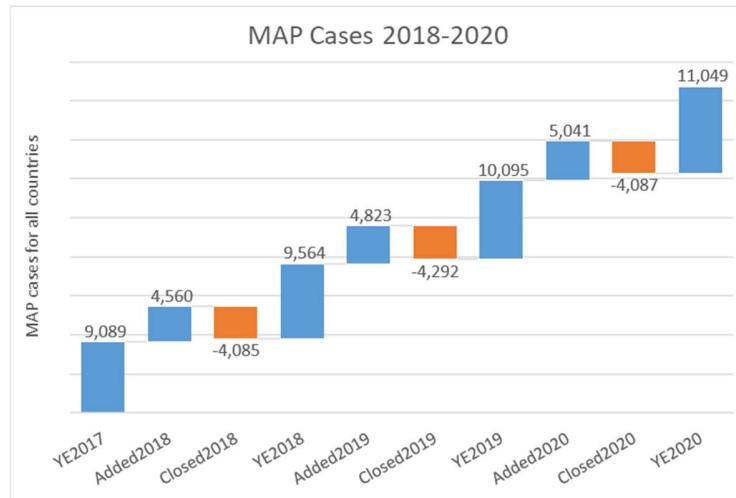
⁷ IBFD Tax Glossary, 4th ed, pp. 236

⁸ OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing. http://dx.doi.org/10.1787/mtc_cond-2017-en, Paragraph 4 of the Commentary on Article 25, p. 429.

⁹ *ibid.*, Paragraph 5.1, p. 429.

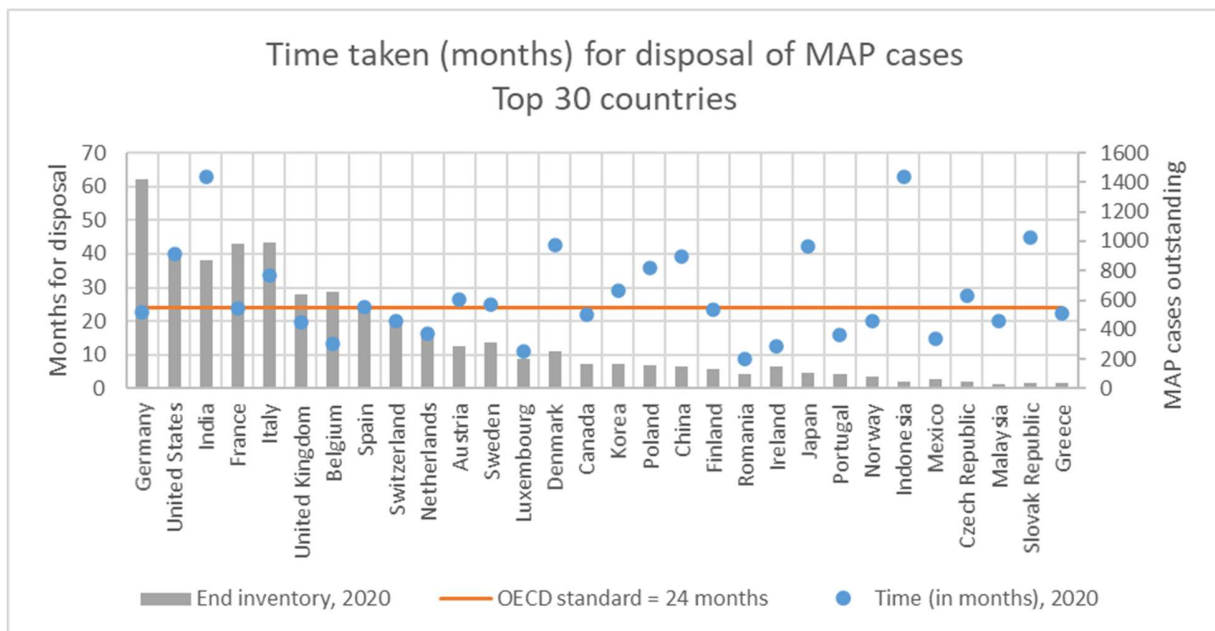
¹⁰ <https://www.oecd.org/tax/beps/beps-actions/action14/> accessed 28 March 2022.

¹¹ Mutual Agreement Procedure Statistics for 2018, 2019, and 2020 published by OECD. <https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm> accessed on 10 March 2022.



It can be seen from the above that the MAP cases have grown with a Compounded Annual Growth Rate ('CAGR') of 6.73%. Simple arithmetic shows that the inventory of open cases will double in c.11 years and will reach c. 78,000 by 2050 if this CAGR is maintained.

Out of the 11,049 cases open as of 31 December 2020, c.95% are reported by the top 30 countries. The following graph (**Figure 2**) plots the time taken by each country (in months) for the resolution of MAP disputes.¹² It can be seen that 14 out of the top 30 countries take more than the OECD-prescribed 24 months to resolve the MAP cases. The simple average time taken across countries is 27 months and if weighted by the outstanding cases, it is 29 months.



¹² Mutual Agreement Procedure Statistics for 2018, 2019, and 2020 published by OECD. <https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm> accessed on 10 March 2022.

3. Issues with the existing MAP process

Several commentators and practitioners have attempted to point out the systemic and logistical problems in the MAP process, and try to propose solutions.^{13,14} OECD's Base Erosion and Profit Shifting ('BEPS') Action 14 attempted to resolve some of the pain points, however, the majority remain. Some of the key pain points are as follows:

- 1) **Opaqueness:** MAP negotiations are held between the Competent Authorities of two countries, without the taxpayer being made part of the process. The taxpayer is, literally and figuratively, kept 'outside of the room', and comes to know of the result only when the negotiations conclude. This creates uncertainty for the taxpayer as the negotiations remain a black box.
- 2) **Uncertain outcomes:** In any dispute resolution, there is always a degree of uncertainty about the outcome for the parties involved. However, MAP adds another layer of uncertainty; given that a MAP negotiation may or may not culminate in a firm outcome. In other words, the CAs could 'agree to disagree.'
- 3) **No central coordinating authority:** There is an absence of a central coordinating authority that (a) manages the MAP negotiation process, (b) works towards removing the hurdles in the MAP process, and (c) implores (if not force) the countries to reach an outcome. The OECD's role, although expanded with the BEPS project, remains that of a 'provider of guidance', and does not assume the character of an overarching arbitrator or even an ombudsman.
- 4) **Lack of 'precedent value':** The value of a precedent (i.e., a previously decided case with similar facts) is undisputed in any dispute resolution. A precedent is a signal of the prevailing thinking on the matter at hand and demonstrates how regulations or legal principles are applied to a specific set of facts. Published precedents typically come out of a legal system, i.e., case law. There is a significant body of tax case law present throughout the world. A precedent need not be relied upon blindly, but it certainly serves as a guiding light for deciding the matter at hand. The opacity of the MAP process extends to the outcomes. Unlike a tax case law, MAP case decisions are not made available in the public domain. MAP outcomes are only talked of anecdotally and based on incomplete information. Taking an example: India and US reached a MAP settlement in 2010 where both countries agreed that India can exercise taxing rights on 17.5% of the Net Revenue of the Indian subsidiaries of the US software companies.¹⁵ The newspaper report was based on the statements of 'an official with the income-tax department', who hoped that 'this would serve as a reference point in future disputes.'¹⁶ It can be seen that the parties 'in the know' are the concerned taxpayer, and the Indian and US Competent Authorities. The facts of the case, the technical reasoning, and the details of the outcome remained opaque to all others. Future MAP cases sharing similar fact patterns cannot benefit from the outcome of the decided MAP case.
- 5) **No consensus building on principles:** The disputes that are subject matters of the MAP Lifecycle typically relate to 'any difficulties or doubts arising as to the interpretation or application

¹³ E.g., see Polyvios Nikolaou, 'Mandatory Binding Arbitration: Avoiding Stalemates Over the Tax Chessboard', (2021), 49, Intertax, Issue 12, pp. 974-985, <https://kluwerlawonline.com/journalarticle/Intertax/49.4/TAXI2021099>

¹⁴ Qiang Cai, Spyridon E. Malamis, 'Digitalization of International Tax Dispute Resolution: Reflection in Light of the Covid-19 Pandemic', (2021), 49, Intertax, Issue 8, pp. 656-673, <https://kluwerlawonline.com/journalarticle/Intertax/49.3/TAXI2021075>

¹⁵ "India, US end row over taxing captive units", The Economic Times, 18 May 2010, https://economictimes.indiatimes.com/news/economy/policy/india-us-end-row-over-taxing-captive-units/articleshow/5942704.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst accessed 22 March 2022.

¹⁶ *ibid.*

of the Convention.¹⁷ In other words, the subject matter of disputes can be complex, leading to more time being taken. From a macro perspective, the manifestation of tax technical principles applied to resolve the decided MAP cases remains under wraps. It does not create a 'body of knowledge' as published court cases do. This creates an information asymmetry, in the sense that the Competent Authorities may have a particular view on resolving a particular type of tax dispute, however, the taxpayer is not aware of it. Moreover, a Competent Authority of a third country who might be having a similar issue at hand may not be aware of the intellectual effort invested by the two Competent Authorities who have already addressed the matter. This could lead the third Competent Authority to reach a completely different solution. Therefore, the current MAP process does not lend itself to building consensus amongst the international tax community on matters of principle.

- 6) **Long process:** As noted earlier, the average time to resolve a MAP case during 2018-2020 was 27 months. The job of the two Competent Authorities is to 'endeavour to resolve by mutual agreement' the dispute.¹⁸ In other words, despite the nomenclature, resolution by mutual agreement is not a mandate, but merely something that is to be given one's best endeavours. Action 14 of the OECD BEPS project sought to adopt a 24 month 'indicative timeline' for the resolution of MAP cases but does not (and cannot) mandate it. MAP is often the final frontier for tax disputes. Therefore, the time taken for MAP resolution further adds to the uncertainties faced by the taxpayer MNEs.

One unfortunate outcome of the issues plaguing the MAP process is the ever-growing inventory of open cases and an increase in the average time taken to resolve the MAP cases. This creates a moral hazard and a risk such that the taxpayer stops seeing MAP as an effective mechanism to relieve international tax disputes.

4. The *easyMAP* proposal

It will be important to define the problem statement before attempting to propose a solution. Of the three phases of the MAP Lifecycle described in **Appendix A**, it is the negotiation phase that is iterative, time-consuming, and resource-heavy from the perspective of the tax administrations. Although OECD does not publish the data, in practice, almost all of the open MAP cases in the inventory are stuck in the negotiation phase in the MAP Lifecycle. It is, therefore, essential that an attempt should be made to make the negotiation phase as efficient as possible, to reduce the iterations, time investment, and resource intensity involved.

The proposed solution can be described as 'a Standard Operating Procedure, enabled by a web-based platform, where anonymised summaries addressing the core technical and factual issues of a MAP case are peer-reviewed, and principled consensus is reached in a cooperative manner.' Condensing the value proposition even further, the proposed solution facilitates a 'double-blind, peer-reviewed, anonymised MAP'. Since even this is quite a mouthful, it is referred to as the '*easyMAP*' process throughout this paper.

A flowchart showing each step in the *easyMAP* process is shown in **Appendix B**. In summary, the *easyMAP* process does not seek to discard or replace the existing MAP process. Instead, it aims at aiding, augmenting, and enriching the existing MAP process; specifically making the negotiation phase

¹⁷ Article 25(3) of the OECD MTC and the UN MTC.

¹⁸ *ibid.*

more efficient. The *easyMAP* process could, potentially, also open a new channel facilitating the unilateral disposal of certain types of MAP cases.

The process would begin with the Competent Authorities of two countries agreeing to put the case into the *easyMAP* process (the 'Consulting Authorities'). This step is called 'opening a Consultation' and would entail the Consulting Authorities sending the documents relating to that specific MAP case to the nodal *easyMAP* team. At the centre of the process is the central *easyMAP* team, whose job would be to receive the case documents from the Competent Authorities, anonymise them, 'strip' the cases to their bare facts, and upload the 'Consultation Brief' to the *easyMAP* web portal. The *easyMAP* web portal can be accessed by the Competent Authorities of the participating countries, who are peers of the Consulting Authorities (the 'Peer Authorities'). The Peer Authorities only see the summarised, anonymised document, which is stripped of the country and taxpayer references. The Peer Authorities shall read the Consultation Brief, and shall comment upon it within a given time frame ('Peer Comments'). The Peer Comments would be opened to the member Competent Authorities (both Peer and Consulting Authorities) after the given time frame (say three weeks). The commenting period would finally close after this, and the *easyMAP* team would be allowed a further period (say two weeks) to publish the Consultation Brief, and summary of the Peer Comments, elaborating on the tax/technical aspects of the case (see the next paragraph for more details). The Consulting Authorities would be required to consider the Peer Comments in the resolution of the MAP case. The default position would be to accept and implement the consensus of the Peer Comments in the MAP dispute resolution. If any of the Consulting Authorities objects to accepting and implementing the consensus of the Peer Comments, they would be expected to provide the reasons for it, which would be uploaded to the *easyMAP* web portal. The Consultation would be marked 'closed' after this point.

Whilst it is not expected that the Peer Authorities lead to a consensus every time; reaching a firm conclusion on the tax/technical matters (such as interpretation or application of a provision of the tax treaty or guidelines to the specific set of facts in the Consultation Brief) would be made compulsory as a part of the *easyMAP* process. It would be the job of the *easyMAP* team to facilitate the consensus, or at least ensure clarity of the comments by indulging in dialogue with the Peer Authorities. It will also be the *easyMAP* team's job to cull the Peer Comments and put them into the perspective of the Consultation Brief.

Defining and managing the expectations of the stakeholders is of prime importance for the *easyMAP* process to work. However, one important stakeholder that will be newly created by the *easyMAP* process is the *easyMAP* team. The *raison d'être* of the *easyMAP* team is to augment international cooperation in the field of tax dispute resolution. Therefore, it stands to reason that the *easyMAP* team would be commissioned by, and operate under the auspices of an organisation like OECD or the UN. (For brevity, OECD has been referred to as the responsible organisation for the rest of this paper.) The *easyMAP* team needs three types of human expertise to deliver its objectives, viz. experts in international taxation (to anonymise and summarise the MAP cases), information systems experts (to maintain the *easyMAP* web portal), and project managers (to run the show.) It is not a tall ask of an organisation like the OECD to acquire, if not already possess, such expertise.

5. An evaluation of the benefits and pitfalls in the *easyMAP* process

It is important to define the success criteria for the *easyMAP* process with a degree of objectivity and precision. But before it is done at a more granular level, some guiding principles can be determined that can serve as guardrails for the evaluation of the *easyMAP* process.

The first fundamental principle is 'make things better.' In this context, it means that the *easyMAP* solution should address the issues and mitigate the risks in the existing MAP process, as described above. The following table describes how the *easyMAP* solution could achieve this:

Issue	Risks	How <i>easyMAP</i> solution addresses the risk
Opacity	The MAP negotiations are between the two Competent Authorities. The taxpayer is not made part of the dialogue and is only made aware of the resolution.	The <i>easyMAP</i> solution does not seek to alter the existing MAP process. Therefore, it does not seek to make the taxpayer part of the process. Having said this, the outcomes of the <i>easyMAP</i> process will be available in the public domain, and therefore the taxpayer community, in the long run, will be benefitted from the Consultation Brief and summary of the Peer Comments made available in the public domain.
Uncertain outcomes	A MAP negotiation may or may not culminate in a firm outcome.	The <i>easyMAP</i> process will be aimed at providing, in the best case, a consensus on the Consultation Brief, and in the worst case, at least a clear articulation of how a tax authority of a particular country addresses the issue at hand. The default position would be to accept the peer comments, and if the Consulting Authorities choose not to accept, they need to provide the rationale for such a departure from the norm. In the long run, such an approach will create a precedent value in the same way as a case law provides.
No central coordinating authority	The existing MAP process does not have a central coordinating authority that can speed up the process.	At a policy level, the mandate of the <i>easyMAP</i> process will be to facilitate the speedy resolution of MAP cases. The <i>easyMAP</i> team will employ project managers who centrally coordinate the <i>easyMAP</i> process.
Lack of 'precedent value'	MAP cases are not published. Therefore, the international community cannot use the old/already decided MAP cases to decide the new/future MAP cases.	The key components of the <i>easyMAP</i> process are the anonymised Consultation Brief and summarised Peer Comments, which will eventually be made available in the public domain. This creates a precedent value in respect of such cases.
No consensus building on matters of principle	MAP cases represent a 'negotiated outcome' against a consensus amongst countries on matters of principle.	Given that the Consultation Brief is an anonymised summary, it will be easier to highlight the principles that should be matters of discussion amongst the international tax community. The responses to such anonymised Consultation Brief would, therefore, address the principles, and thus aid in consensus building.

The second fundamental principle, almost a converse of the first principle, is 'don't make things worse.' The gating questions here are (a) what would happen if the *easyMAP* process doesn't work, and (b) where are the likely areas where the *easyMAP* process could fail? The *easyMAP* process, as noted earlier, does not seek to replace the existing MAP process, and runs alongside it. The answer to question (a) is simply that if the *easyMAP* process fails, the countries still have the existing MAP process to work with. The failure of the *easyMAP* process would simply mean that the OECD would have wasted some time and resources, and while such a thing is not ideal, it is certainly not catastrophic.

The answer to question (b), i.e., what are the likely pitfalls in the *easyMAP* process, is more complex. The likely pitfalls can be categorised in two buckets, viz. (a) non-cooperation by the stakeholders, and (b) failure of certain individual stakeholders. Non-cooperation by the stakeholders includes issues like Consulting Authorities not agreeing to put cases into *easyMAP* or refusing to share all case documents with the *easyMAP* team, Peer Authorities refusing to comment, and Consulting Authorities not implementing a Peer Comments consensus, and so on. Non-cooperation pitfalls can be addressed by OECD implementing a governance framework; i.e., seeking a pre-alignment with the participating countries, defining roles and responsibilities, project management team managing the process, and performing an annual review of the process participants. The second bucket, the individual failure pitfalls, includes experts in the *easyMAP* team failing to anonymise the MAP case, or IT failures relating to the web portals. These pitfalls can be managed by recruiting human resources with appropriate levels of expertise and subjecting them to annual performance reviews.

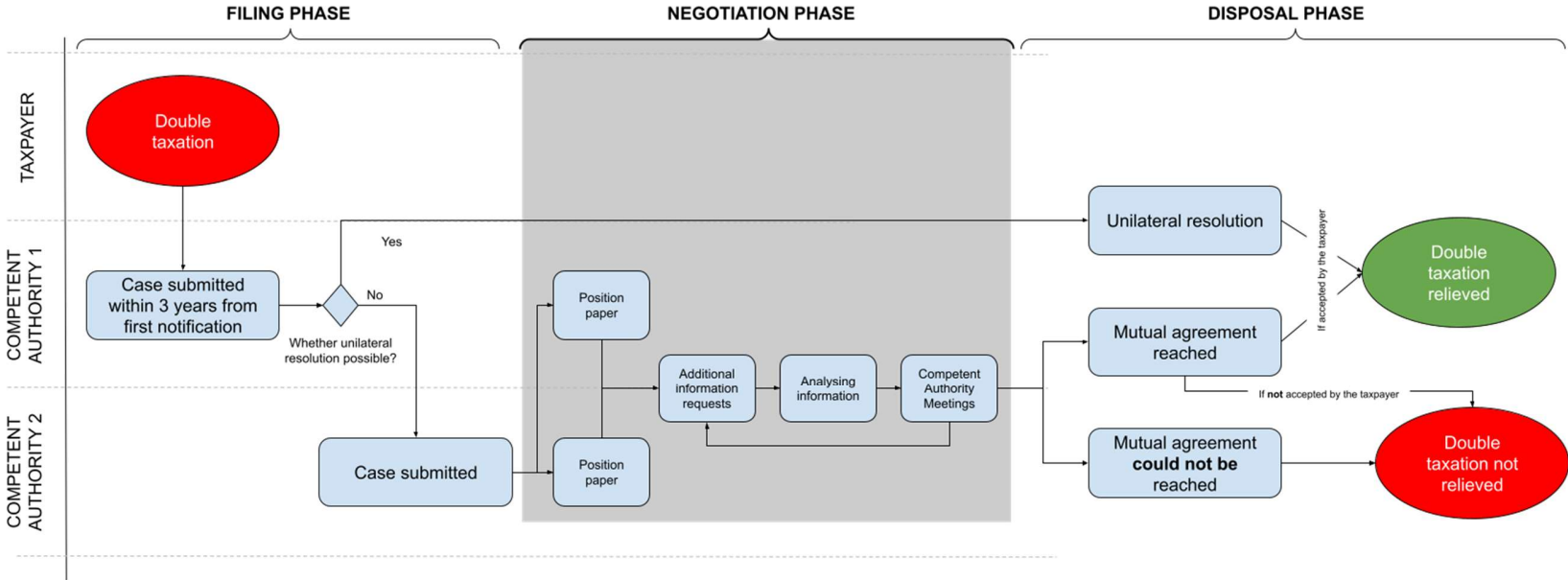
After a certain amount of time, the success of the *easyMAP* solution could be easily measured at a macro level. The *easyMAP* solution should, in theory, (a) help the current cases in the negotiation phase exit it in a speedier manner, (b) reduce the amount of time new cases spend in the negotiation phase, and (c) for cases that share the similar fact patterns as the closed Consultations, the precedent value should assist the Competent Authorities to resolve such MAP cases in minimal time. Therefore, with each successive year of implementing the *easyMAP* solution, the inventory of open MAP cases is expected to shrink.

6. Conclusion

To summarise, the international tax disputes have been showing an upward trend with business models becoming more global and more complex, accentuating risks and creating hurdles for businesses operating in more than one country. It is therefore important to open the hitherto closed avenues of communication and cooperation to better resolve the tax disputes. Whilst there may be scope for fundamentally revamping the dispute resolution system, there is a scope for improving the existing system such that cooperation amongst countries is facilitated. Organisations such as the OECD can play an important role in this. The *easyMAP* solution proposes a Standard Operating Procedure which is augmented by a governance mechanism and a web-based asset facilitating the cooperation. This *easyMAP* solution could ultimately reduce friction in the international tax system, and mitigate tax dispute risks in international commerce.

Appendices

Appendix A



Appendix B

