



# Prevention of transfer pricing disputes : an OECD view

Caroline Silberztein  
Head of Transfer Pricing Unit  
OECD Centre for Tax Policy and  
Administration

[www.oecd.org/ctp/tp](http://www.oecd.org/ctp/tp)

# Introduction

- TP disputes increase in number, complexity, amounts at stake.
- Time-consuming and resource intensive for taxpayers and for tax administrations; create significant uncertainty and can often lead to double taxation.
- How can the situation be improved?



## Enforcement and compliance are key:

- Case selection and examination processes;
  - TP documentation and compliance behaviour;
  - Efficient and principled administrative appeals mechanisms;
  - Cross-border dispute resolution to eliminate double taxation.
- OECD response:
    - Actively promote more efficient MAPs (see [www.oecd.org/ctp/memap](http://www.oecd.org/ctp/memap)), arbitration, APAs;
    - Examination of TP administrative practices.



More clarity on substantive issues is critical:

- Most efficient dispute prevention and resolution: clear domestic and international guidance supported by a large international consensus.
- OECD response:
  - Develop consensus guidance on comparability and TP methods (2010 TPG) and on complex issues (2010: PE attribution, business restructurings; 2011: start new project on intangibles);
  - Promote a more consistent implementation of the ALP and TP Guidelines;
  - Actively engage non-OECD countries in TP work.



# OECD guidance on administrative aspects

- Administrative issues for transfer pricing are discussed in Chapter IV of the OECD TP Guidelines;
- Link with broader initiatives:
  - Forum on Tax Administration,
  - Study into the Role of Tax Intermediaries / “Enhanced relationship”;
  - Joints or simultaneous examinations;
  - Etc.



In this session, focus on two administrative aspects (but not forget the others!):

- Administrative simplification regimes (including, but not limited to safe harbours);
- Advance Pricing Arrangements.

# **ADMINISTRATIVE SIMPLIFICATION REGIMES**



## Current review by the OECD of TP simplification regimes

- In progress; preliminary results show that more than half of OECD countries have TP simplification regimes in place.
- Mostly directed to:
  - Small transactions or SMEs;
  - Low value-added services.
- Thin capitalisation rules sometimes construed as a simplification regime.



## Various types of simplification measures

- Alleviated TP documentation requirements *e.g.* for small taxpayers or small transactions;
- Streamlined APA procedures *e.g.* for SMEs;
- Optional proxy for ALP pricing: *e.g.* cost plus method for low value-added services.
- Different from:
  - Exempting certain categories of taxpayers or transactions from the requirement to follow the ALP; or
  - Fixed price or profit margin with no possibility for taxpayers to opt out and use ALP (formulary taxation).

# What is a safe harbour?

- Circumstances in which taxpayers could follow a simple set of rules under which transfer prices would be automatically accepted by the national tax administration.
- Binding on tax administration; taxpayers retain the option to use AL pricing.
- Domestic measure: no effect on foreign tax authority => risk of double or less-than-single taxation; access to MAP?



# Factors supporting the use of safe harbours according to the OECD TP Guidelines:

- Compliance relief;
- Certainty;
- Administrative simplicity.

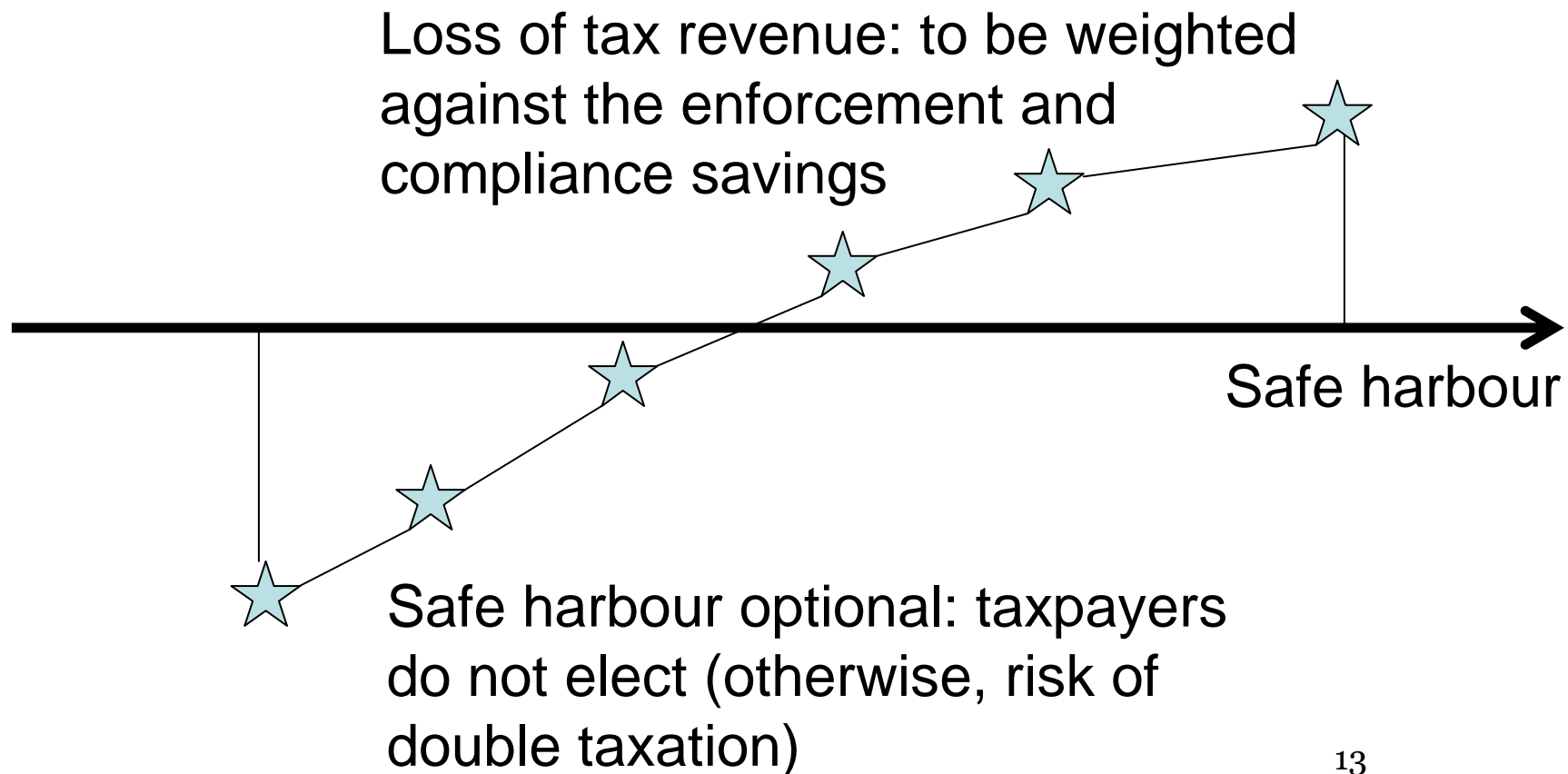


## Problems presented by use of safe harbours according to the OECD TP Guidelines:

- Possibly a negative impact on the tax revenues of the country implementing the safe harbour as well as on the countries whose associated enterprises engage in controlled transactions with taxpayers electing a safe harbour;
- Risk of double taxation and mutual agreement procedure difficulties;
- Possibility of opening avenues for tax planning;
- Likely to be arbitrary;
- Equity and uniformity issues.

# Safe harbours: an illustration

★ Arm's length outcomes





Safe harbours may present a number of advantages and drawbacks;

- Cost/benefits analysis might be positive for transactions that carry a limited tax risk and a potentially disproportionate compliance burden: *e.g.* low-value added or small transactions (experience of many OECD countries).
- Less likely to be positive for core activities that carry significant profit potential.
- They should not be confused with formulary taxation; beware of risks of double taxation.
- Other administrative simplification measures, as indicated above, can alleviate compliance and enforcement burdens and improve certainty.
- OECD review to be continued in 2011.

**ADVANCE PRICING  
ARRANGEMENTS:  
MORE THAN 20 YEARS OF  
HISTORY, INTEREST STILL  
GROWING**


# Advance Pricing Arrangements ("APAs"): OECD definition


- “An arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (*e.g.* method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.”
- Chapter IV of the OECD TP Guidelines + 1999 Annex



# OECD definition of APA


An APA can be unilateral, bilateral or multilateral:

Unilateral APA  Agreement between taxpayer and one tax administration (on the basis of domestic rules of procedure)

Bilateral APA  At the request of a taxpayer, tax administration of country A agrees with tax administration of country B (on the basis of international law – tax treaty, OECD TP Guidelines etc.)

Multilateral APA      A series of bilateral APAs involving more than two tax  administrations

## APAs: more than 20 years old

- 1987: Pre-confirmation procedure in Japan
- 1991 : World's first APA between the U.S. and Australia (Apple  ). Formal APA program established in the United States.
- 2010: approximately 30 countries have formal APA programs, including:
  - Belgium (2002), Czech Republic (2006), France (1999), Germany (2006), Hungary (2007), Italy, Netherlands (2004), Poland (2006), Spain, Turkey (2007), United Kingdom (1999),
  - Canada, Mexico, United States,
  - Australia, China, Japan, Korea,...
  - Expected in India soon.



Over the years, regional / multilateral efforts have been made to develop harmonised APA procedures:

- In 1999 the **OECD** published its “Guidelines for conducting Advance Pricing Arrangements under the Mutual Agreement Procedure” (“MAP APAs”).
- The **Pacific Association of Tax Administrators** released operational guidance to conduct bilateral APAs in 2004.
- In February 2007 the **European Commission** adopted a Communication that contains proposed Guidelines for APAs within the EU.



# Evolution of the number of APA requests

In Australia, Canada,  
Japan, United States

# China

- 1998: the APA concept is introduced in China's transfer pricing regulations
- 1998-2007: approx. 160 unilateral APAs completed in China
- 2005: first bilateral APA between China and Japan
- 2007: first bilateral APA between China and the United States

# The success of APAs is due to a combination of factors



- Multinational enterprises are under pressure
  - From tax authorities: increasing audit activities in the TP area, huge amounts at stake, heavy penalties, lengthy process, uncertainty
  - From boards / auditors / financial markets: ETR must be explained and should be sustainable, tax risks increasingly disclosable => do not like double taxation, do not like uncertainty

# APAs can be part of a more constructive dialogue between taxpayers and tax authorities

- Voluntary process
- Non adversarial (each party can withdraw at any time)
- In advance of the transactions (in principle!)  
=> not an archive digging
- Only TP, agreed scope of selected transactions => more focused than general tax examinations
- If bilateral or multilateral: eliminate risk of double taxation
- Can provide certainty for up to 5 years (renewable)

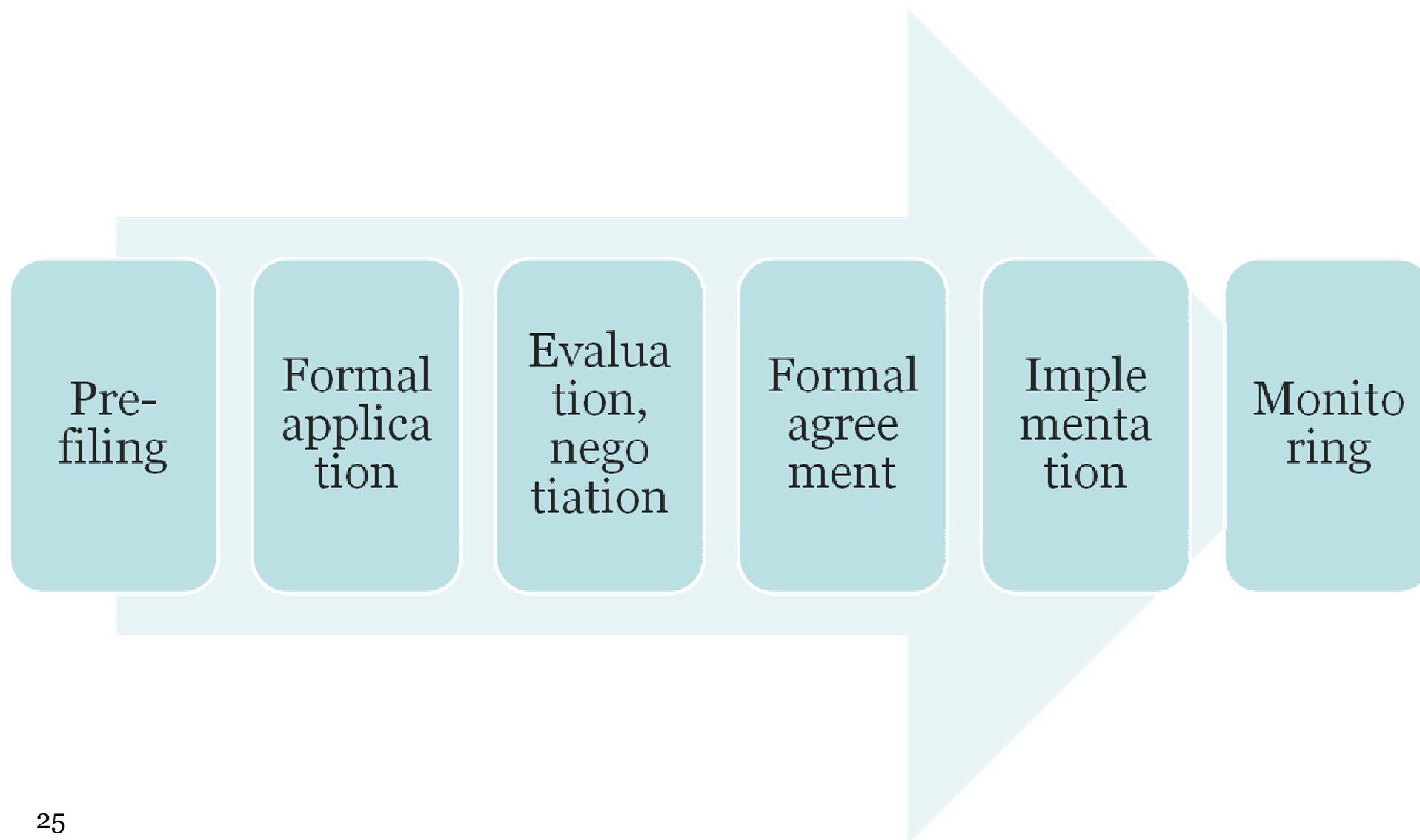


A couple of possible barriers to APAs:

- Confidentiality of information disclosed in APA processes is a key concern for taxpayers; must be protected by tax authorities.
- APAs still involve a lengthy and resource intensive process (especially for bilateral ones), but still shorter than the combination [TP examinations + litigation + mutual agreement procedure] to resolve double taxation



# Typical process for bilateral APAs





## Monitoring is an essential feature of the MAP APA procedure

- Record keeping and annual reports required from taxpayers
- Examinations limited to whether the terms of the APA were respected and critical assumptions still valid
- Consequences of non compliance or changes in circumstances:
  - a) Revoking a MAP APA (retrospectively)*
  - b) Cancelling a MAP APA (for the future)*
  - c) Revising a MAP APA*

# CONCLUSION

# Prevention of TP disputes is an important objective

- Business and governments need greater predictability and certainty; disputes are costly and lengthy.
- Need to make progress both on substantive guidance and on the enforcement / compliance front.
- Substantive guidance: strive for international consensus
- Enforcement and compliance: a variety of initiatives by countries all over the world; lessons to be learned.



*Thank you for your attention.*

*Any questions ?*

Following and Engaging in Our Work:

Visit our transfer pricing webpage:

[www.oecd.org/ctp/tp](http://www.oecd.org/ctp/tp)

Sign up for OECD Tax News e-mail alerts through  
“OECDdirect” in the online services portion of the  
OECD home page: [www.oecd.org](http://www.oecd.org)