

Effective and Efficient Arbitration: Administrative Best Practice

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25. March 2021

Outline

- 1. Introduction**
- 2. Legal aspects of the CA role**
- 3. Practical aspects of the CA role**
- 4. Key takeaways**

1. Defining the topic

- **Effectiveness** – MAP and MAP arbitration are effective, if (and insofar as) **all** occurring disputes can be **resolved** ↔ **access to MAP / arbitration** & guarantee of a **resolution**
- **Efficiency** - MAP and MAP arbitration are efficient, if they can be concluded within a the prescribed time period or within a **reasonable period of time**

Role of the tax administration (Competent Authority):

- Legal aspects: duties imposed by the respective legal instrument(s)
- Purely administrative aspects: legally not regulated but practically important aspects (e.g. use of technology)

2. Legal aspects of the CA function – Classification

The arbitration process is under the control of the CA.

- **By type of action:**
 - **Regulatory functions**: concern the framework for arbitration under a given instrument, e.g. negotiation of CAAs according to Art 19 para 10 MLI
 - **Gatekeeping functions**: granting or restricting access to a given instrument and to the arbitration process under that instrument
 - **Procedural functions**: e.g. submission of position papers and responses
 - **Postal functions**: e.g. forwarding information and documents from the taxpayer to the other CA and /or to the arbitral panel; communication with domestic courts etc.
- **By timing:**
 - **Functions predating actual cases**: most regulatory functions (e.g. completing different lists)
 - **Functions in a given case**: procedural & postal functions (e.g. serving on the arbitral panel)

2. Regulating the arbitration process – the choice of process type

Final Offer (Baseball) Arbitration	Independent Opinion Arbitration
Choice between two proposed solutions by the CAs	Arbitrators make an independent decision based on facts submitted
Decision does not necessarily reflect the arbitrators' interpretation of the treaty	Arbitrators issue a decision based on their interpretation of the treaty; more accountability for decision
No reasoned written decision (e.g. US-CA MOU)	Reasoned decision
No hearings (e.g. US-CA MOU)	Generally hearings with competent authorities and perhaps even the taxpayer
Lower costs	More costly
Speedier resolution (less need for evidence)	Slower process (arbitrators need to hear enough evidence to form their own opinion)
Requires a thorough understanding of the issues and goal of the procedure from the competent authorities	Less preparation necessary on the part of the competent authorities
Confidential	Confidential, but easier to make allowances for transparency
No precedence	No precedence but consistency easier to ensure

2. Gatekeeping access to arbitration

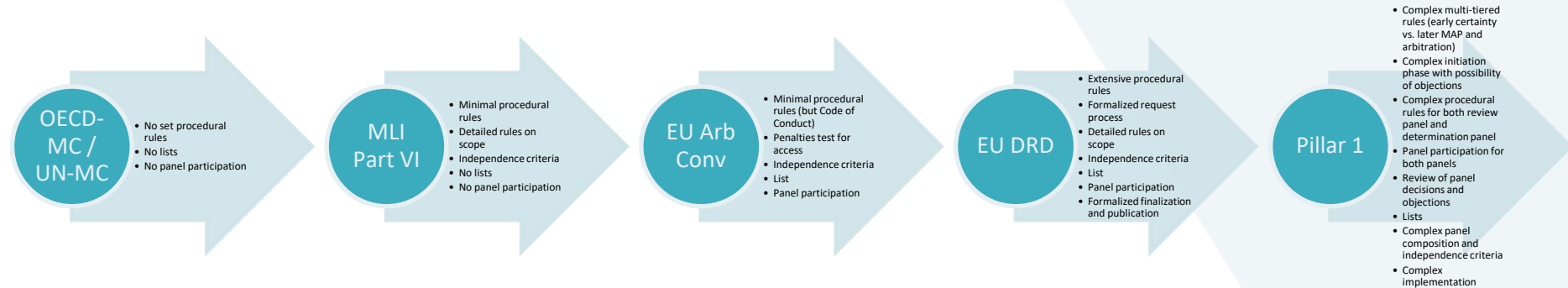
Preliminary questions: choice of instrument & access to MAP

	Art. 25 OECD-MC	Art. 25B UN-MC	Art. 25 US-MC	MLI Part VI (Arts. 18-26)	EU AC	DRD
MDS trigger / conditions	Taxpayer request, 2yrs	Competent authority request, 3 yrs	Taxpayer request; 2 years (possibility to change on a case-by-case basis)	Art. 19: taxpayer request; 2 or 3 yrs; each individual case diff.	Art. 7: automatic; exception: Art. 7 para. 4: taxpayer agrees to delay; 2 yrs	Art. 6 para. 1: taxpayer request within 50 days of end of MAP without full resolution; 2 years; can be extended to 3
MDS scope	Unresolved issues	Unresolved issues	Whole case but previous agreements between the CAs are part of position papers	Unresolved issues	Whole case, but prior agreements of CA have to be taken into account (7.2.f of the 2009 CoC)	Whole case but prior agreements aka “terms of reference” part of the Rules of Functioning (Art. 11 para. 2b)
Exceptions	Court decision	Court decision	Opt-out clause	Depends on reservations according to Art. 19 para. 12; Art. 28 para. 2	Art. 7 merely delay for court decisions, unless binding Art. 8: „serious penalties“	Art. 16 para. 4: court decision may terminate procedure; Art. 16 para. 5: Member States may opt to deny access in the case of penalties for “tax fraud, wilful default and gross negligence” Art. 16 para. 7: Member States may opt to exclude cases not concerning double taxation (special definition in Art. 3 DRD)

2. Procedural functions as the key to efficiency

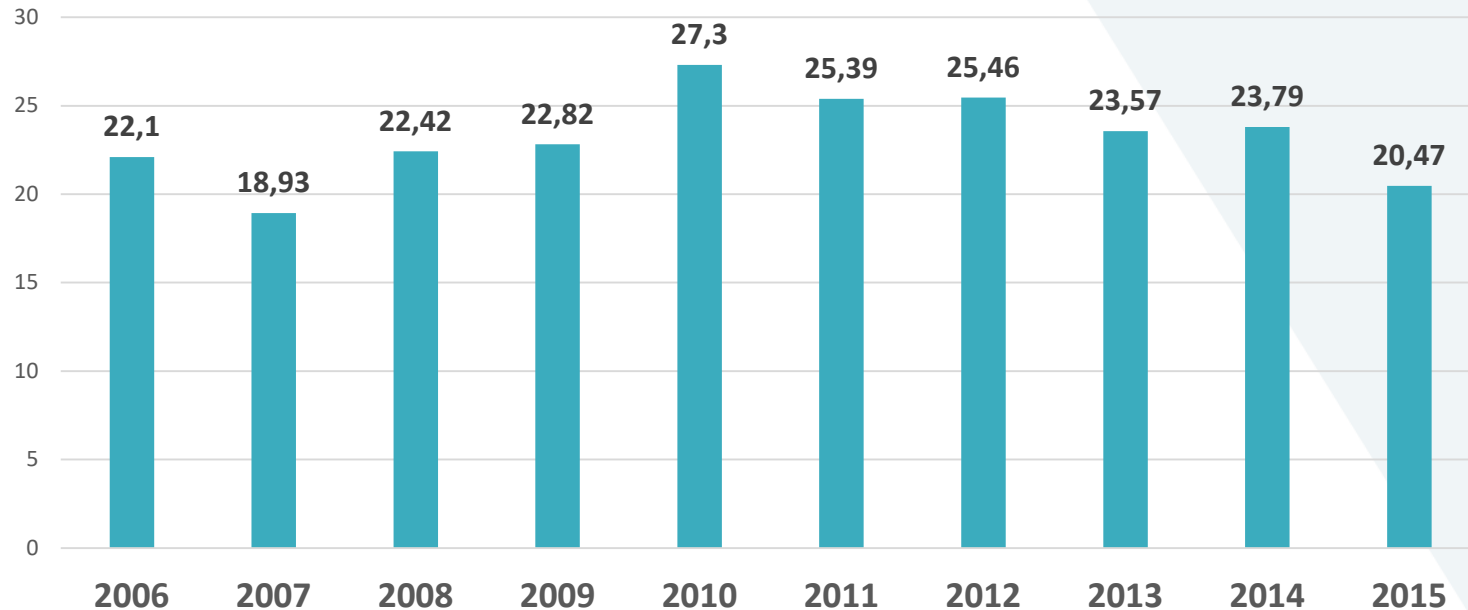
- Procedural functions in a given arbitration case:
 - ❖ **set-up of the arbitral panel;**
 - ❖ **position papers & responses;**
 - ❖ **information and documents;**
 - ❖ **managing taxpayer participation;**
 - ❖ **implementation**
- + **establishing the rules of procedure** in a given case
- **Baseline length** of procedure:
 - *OECD-MC*: Max. 11 months (baseball) / 17 months (independent opinion) [after request]
 - *UN-MC*: Max. 15 months (baseball) / 20 months (independent opinion) [after request]
 - EU AC: Art. 11: 6 months [after panel was set up]
 - DRD: Art. 14 para. 1: 6 months, can be extended to 9 months [after panel was set up]
 - *US-MC, MLI*: depends on MoU / CAA

2. Complexity of the CA functions under different dispute resolution mechanisms



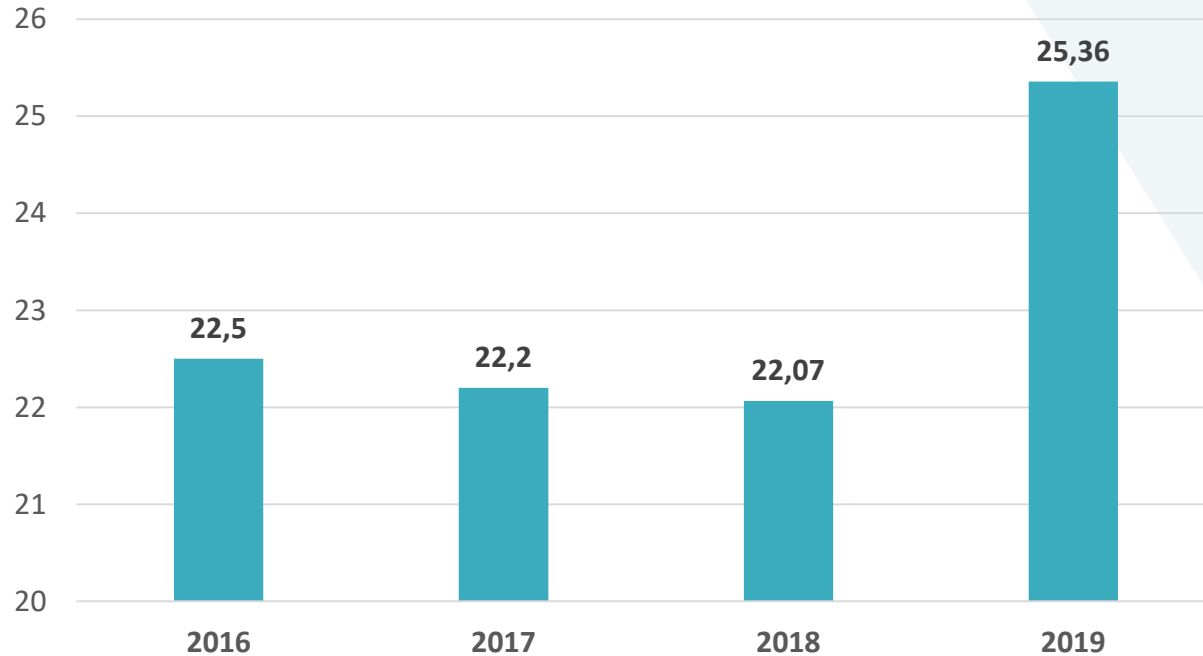
3a. MAP Statistics

Efficiency – Average duration pre-2016 (months)



3a. MAP Statistics

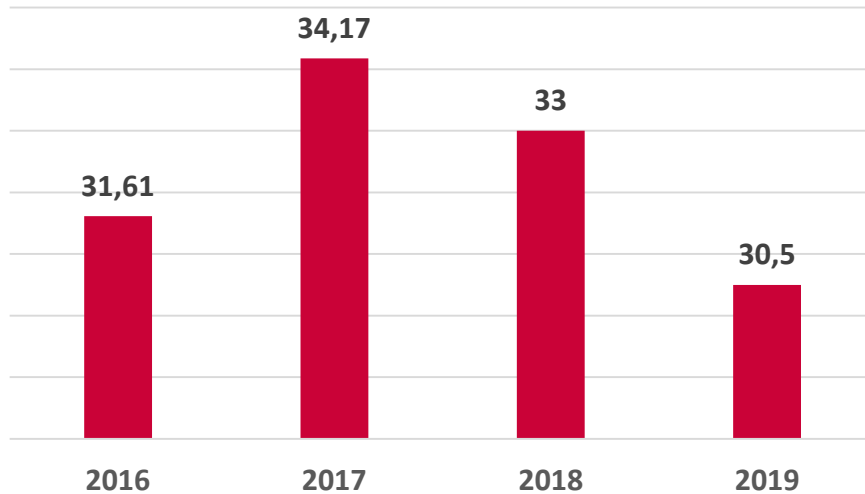
Efficiency – Average duration post-2015 (months)



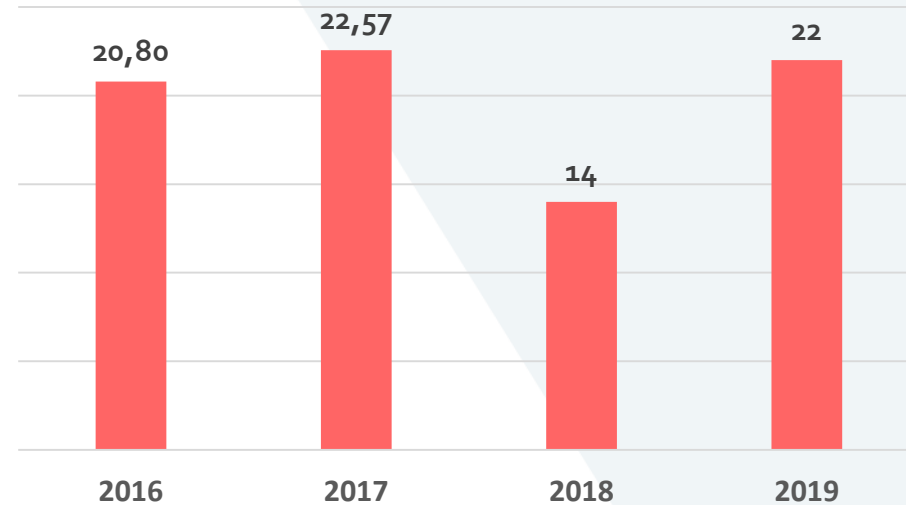
3a. MAP Statistics

Efficiency – Duration post-2015 by case type (months)

Average duration TP cases post-2015

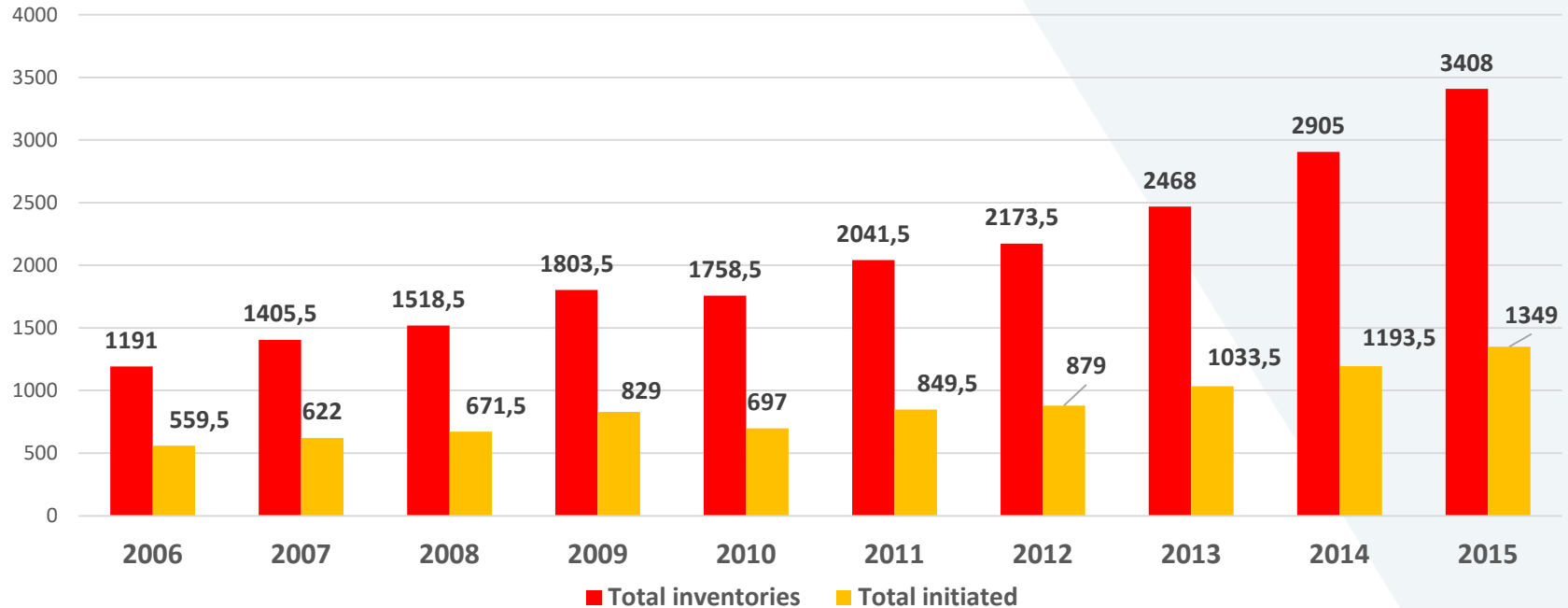


Average duration other cases post-2015

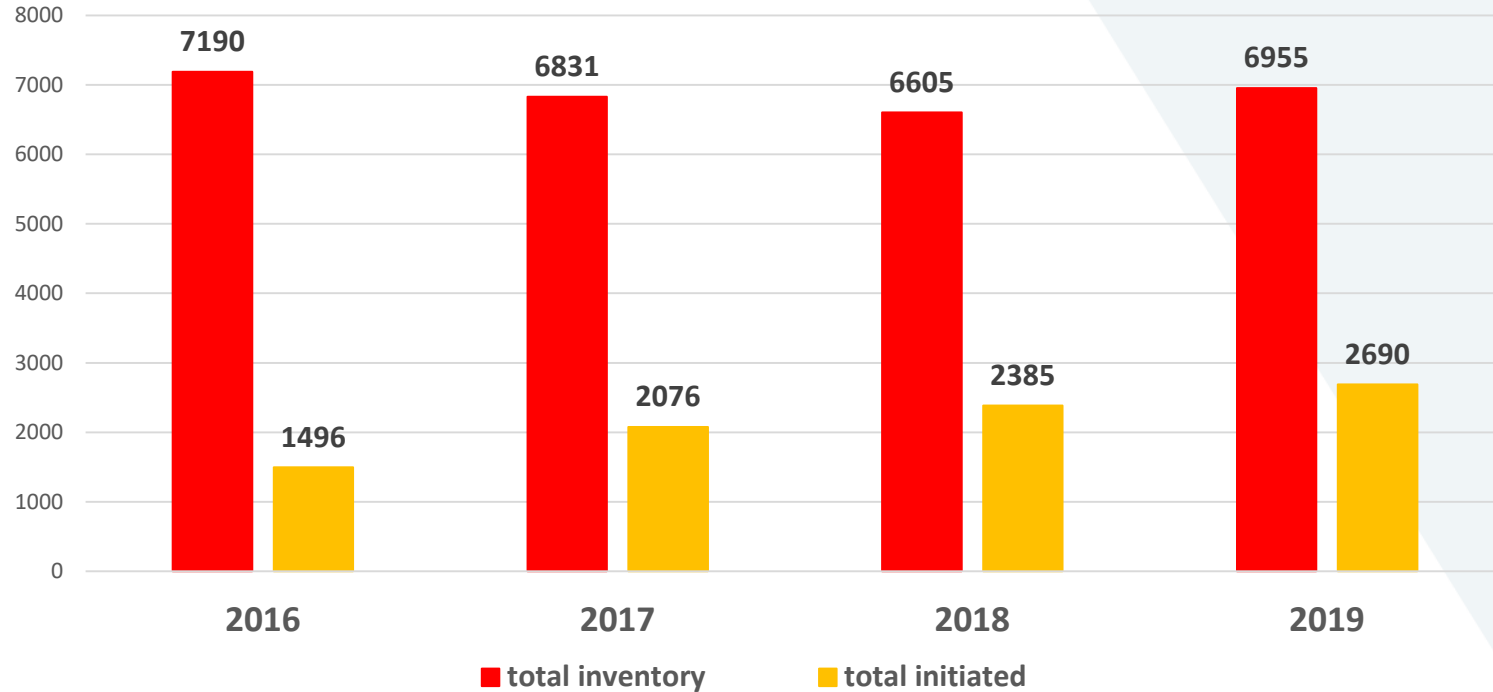


3a. MAP Statistics – Inventories pre-2016

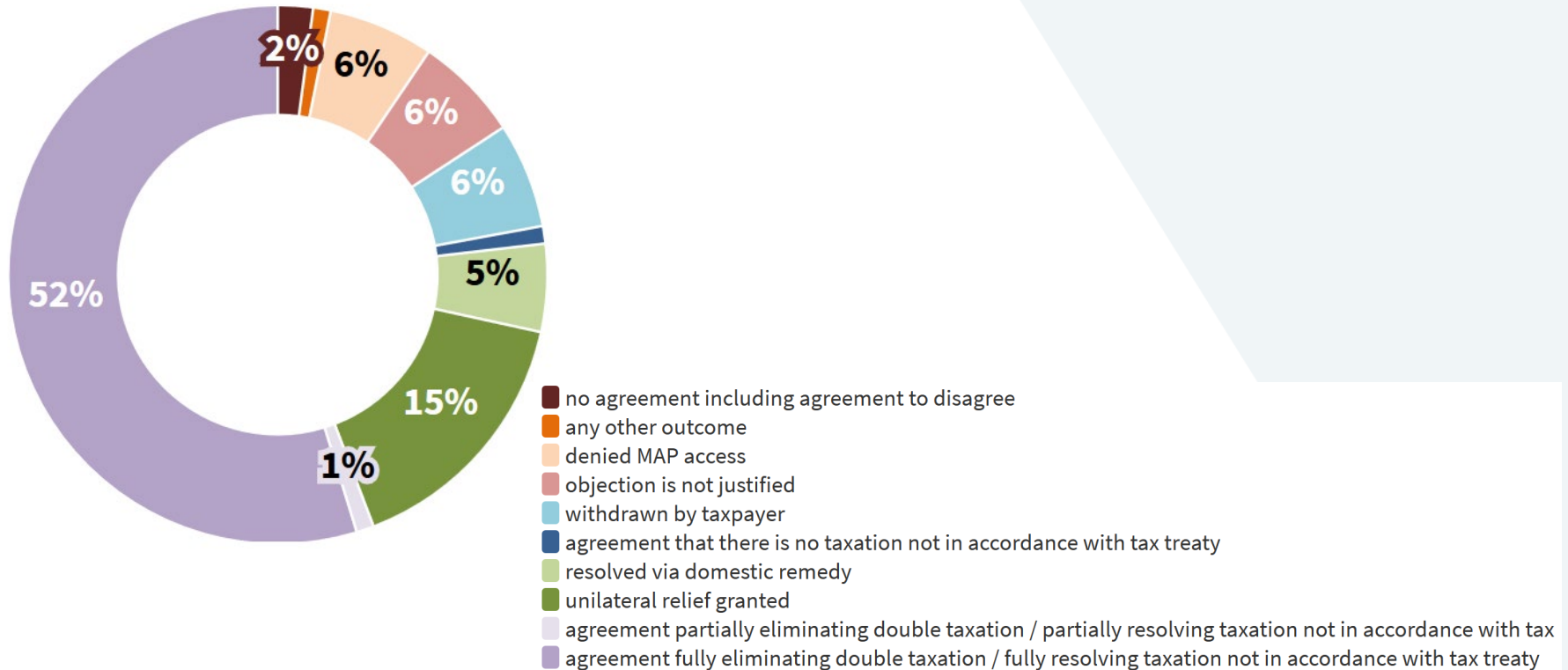
Increase 341%
Increase 141%



3a. MAP Statistics – Inventories post-2015



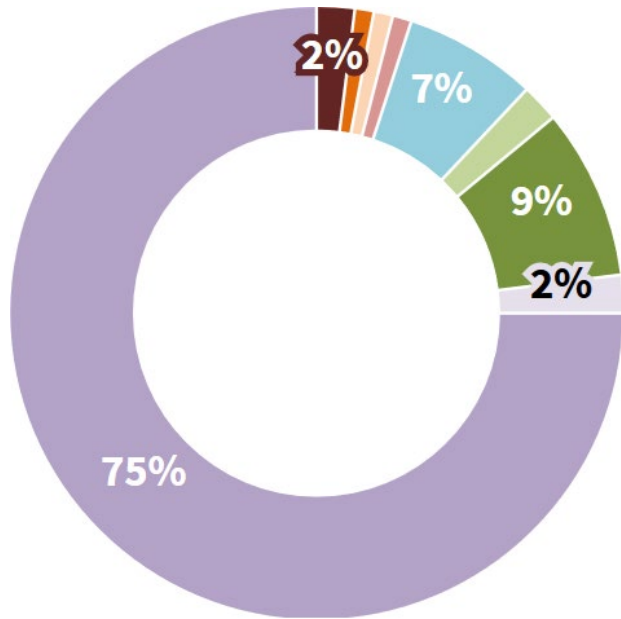
3a. MAP Statistics Effectiveness – Outcomes (2019)



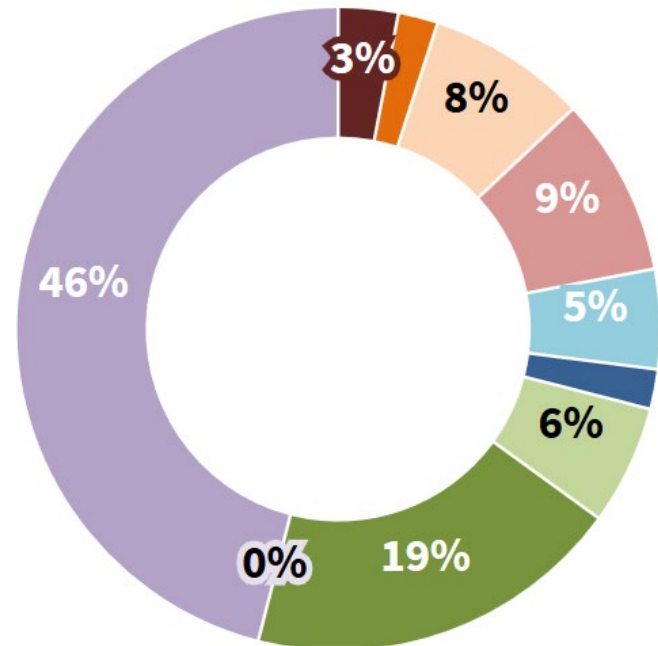
3a. MAP Statistics

Effectiveness – Outcomes (2019) by case type

TP Cases



Other Cases



3b. The Action 14 Peer Review Process

- 1st stage of the 1st batch was launched on December 5th 2016
- 60 Stage 1 reports and 21 Stage 2 Reports finalized and published
- the tested elements (Terms of Reference, ToR) shed light on some aspects of effectiveness and efficiency
 - **Effectiveness:** B.3. (access for TP cases); B.4. (access for anti-abuse rule cases); B.5. (access in case of audit settlements); B.6. (information requirements for access); C.4. (independence of staff); C.5. (performance indicators)
 - **Efficiency:** C.2 (conclusion within an average of 24 months); C.3. (adequate resources in the CA)

Sources:
[Peer Review website](#)
[Peer Review Documents](#)
[Schedule of reviews](#)

3b. Peer Review Results

- **Almost all** jurisdictions have a **recommendation (8)*** or at least a **monitoring point (10)**** with respect to the adequacy of staffing (**C.3.**) based on average case duration
 - Only **Belgium, Canada** and **Luxembourg** lack any recommendations
 - Many competent authorities increased their staff
- Almost no other recommendations issued:
 - **No recommendations** for **C.2., C.4.** and **C.5.**
 - 1 recommendation for B.3. (**Poland**)
 - 1 recommendation for B.4. (**Korea**)
 - 1 recommendation for B.5. (**Italy**)
 - 1 recommendation for B.6. (the **Czech Republic**)

* Austria, Czech Republic, Germany, Italy, Korea, Norway, Poland and Spain.

** Denmark, Finland, France, Liechtenstein, the Netherlands, Singapore, Sweden, Switzerland, the UK, the US

4. Key messages

- The arbitration process is largely **under the control of the CA** ↔ efficiency and effectiveness depend on the conduct of the CA
- **Effectiveness (access and resolution guarantee)** mostly legally regulated; **efficiency** still strongly dependent on non-regulated practical aspects
- Based on empirical data, **dispute resolution is effective, but largely inefficient.**
- There is an increasing tendency to legally (over?)regulate the role of the CA in newer legal instruments.
- Improvements in efficiency require investment of additional financial resources in: staff, training, equipment etc.

Thank you for your attention!

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