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Where Have All the Transfer Pricing Safe Harbors Gone? A Plea for Reinvigoration

The author argues for the resurrection of the OECD's work on safe harbors, which was swept aside when the organization took on its ambitious rewrite of the global tax rules under the Action Plan on Base Erosion and Profit Shifting. The need to get ''easy'' transfer pricing issues off the table has become more acute given the continued focus and challenge of thorny issues such as intangibles, tax havens and cash boxes, she says.

By Patricia Gimbel Lewis, Caplin & Drysdale Chartered

In May 2013, the OECD finalized guidance on transfer pricing safe harbors that had been first proposed a year earlier.[1] The guidance substantially revised a chapter in its transfer pricing guidelines and appended model memoranda of understanding that could be adapted among governments to establish bilateral safe harbor arrangements. Use of safe harbor MOUs could enable taxpayers to achieve cross-border transfer pricing certainty and minimize governmental administrative costs for many common transactions involving low-risk functions. Practitioners, taxpayers and public officials hailed the guidance. The concept particularly caught the fancy of the Internal Revenue Service, which established a working group on the subject and formally requested public comment. IRS officials were predicting that ground-breaking bilateral agreements might emerge within a few years.

Three and a half years later, there are no such creatures. But it has hardly been a quiet period in the international tax and transfer pricing world. Chief among the culpable distractions has been the OECD's monumental Action Plan on Base Erosion and Profit Shifting, kicked off in 2013 just weeks after the safe harbor guidance was issued. (The project, rather than its target per se, is referred to as BEPS.) In an intense, tightly compressed effort, the BEPS team by year-end 2015 issued definitive reports on 15 major ''actions'' designed to minimize international tax avoidance and broadly reset the standards for cross-border transactions in the most

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[1] See the Organization for Economic Cooperation and Development's revised Section E on safe harbors in Chapter 4 of its *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, May 16, 2013, available at http://src.bna.com/l1l. The new section finalized the 2012 discussion draft proposing the revision of the safe harbor section, which included draft sample memoranda of understanding for competent authorities to establish bilateral safe harbors. (The discussion draft and MOUs are available at 21 Transfer Pricing Report 371, 8/9/12.)

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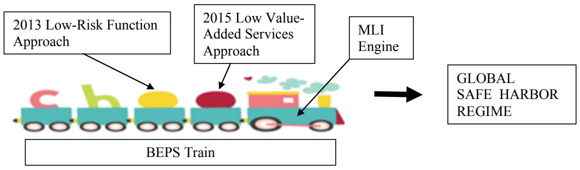
problematic situations. Tax authorities' participation in this and other global compliance endeavors[2] gobbled up both resources and attention in almost unimaginable fashion. Safe harbor initiatives fell by the wayside.

This article will evaluate the current state of play around transfer pricing safe harbors. A particular inquiry is whether the BEPS project itself can transform the safe harbor concept into a better mousetrap. The OECD's 2015 final reports on BEPS Actions 8-10[3] propose that tax administrations adopt an elective, simplified approach for low-value-adding services in the nature of support services. There is no overlap between these services and the low-risk functions covered in the 2013 model safe harbor MOUs; interestingly, the 2013 drafters found low-value-adding services too challenging at the time. However, the BEPS approach to those services has many of the hallmarks of a safe harbor—and if widely implemented, it could result in effectively multilateral conformity and benefit, not just unilateral (as on its face) or bilateral. Might the 2015 approach to low-value-adding services serve as a prototype for broader, widely accepted safe harbor categories?

Even more intriguingly, BEPS Action 15 contemplates a multilateral instrument (MLI) to efficiently implement various tax treaty measures developed in the course of the project, and the related ad hoc group in 2016 produced an MLI covering four BEPS topics. Might this type of instrument eventually provide a vehicle for a comprehensive global safe harbor measure?

Wishful thinking, perhaps. But a proactive view is that a confluence of factors provides a unique opportunity for the culmination of the safe harbor odyssey. The stars may be aligned in a way that could accelerate achievement of a significant, beneficial, global regime. The formula (double entendre intended) is:

2013 LRF TPG + 2015 LVAS + 2016 MLI + BEPS → Global Safe Harbors


2013 Low-Risk Function Approach
2015 Low Value-Added Services Approach
MLI Engine
GLOBAL SAFE HARBOR REGIME
BEPS Train

Underlying all is this author's strong conviction about the mutual value of properly designed safe harbors, and a desire to advance the cause.[4] In view of the continued focus and challenge of the ''hard'' transfer pricing issues, such as intangibles, tax havens, cash boxes and the like, as well as governmental resource constraints, the need to get the ''easy'' transfer pricing issues off the table has become increasingly acute.[5]

The Safe Harbor Concept—Thing One[6]

The OECD's 2013 safe harbor guidance described a transfer pricing safe harbor as ''a provision that applies to a defined category of taxpayers or transactions and that relieves eligible taxpayers from certain obligations otherwise imposed by a country's general transfer pricing rules. A safe harbor substitutes simpler obligations for those under the general transfer pricing regime.''[7]

As part of the effort that led to the 2013 guidance, the OECD undertook a survey of existing transfer pricing simplification measures to evaluate potential improvements in the administrative aspects of transfer pricing. This study[8] identified and analyzed five categories of simplification measures:

1. exemptions from transfer pricing rules or from transfer pricing adjustment;
2. simplified transfer pricing methods, safe harbor arm's-length ranges or rates and safe harbor interest rates;
3. exemptions from or simplified documentation requirements;
4. exemptions from or alleviated penalties; and
5. simplified advance pricing arrangement procedures or reduced APA charges.

Existing measures in several of these categories (1, 3 and 5) involved simplifications directed at small or medium-sized enterprises, primarily from an administrative standpoint. Penalty exemptions (category 4) had the objective, as in the U.S., of encouraging contemporaneous documentation so as to improve taxpayer preparation and facilitate tax authority examination.

The *substantive* simplifications (category 2) encompassed almost entirely cost and cost-based regimes for support services (such as the U.S. services cost method under Treasury regulations Section 1.482-9(b)) and interest rate levels for loans that are based on the comparable uncontrolled price method (such as the U.S. safe haven range of between 70 percent and 130 percent of the applicable federal range under regulations Section 1.482-2(a)(2)(iii)).[9] The survey only uncovered *one* safe harbor measure for more central business operations, even those of relatively routine nature—the maquiladora regime and related agreement between Mexico and the U.S.[10] Moreover, it was the only one that was bilateral; all of the other simplification measures identified, whether administrative or substantive, were unilateral.[11]

There is no doubt that simplification measures for small taxpayers (or small transactions) are important. But in the scheme of things, they are not inordinately

[2] A prime example: the Foreign Account Tax Compliance Act, enacted in 2010.

[3] ''Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10—2015 Final Reports,'' OECD, available at http://src.bna.com/tx.

[4] See, for example, Patricia G. Lewis, ''Short Cuts for Small Fry: Why the IRS Should Reconsider Transfer Pricing Safe Harbors for Small Taxpayers, Transactions,'' 19 Transfer Pricing Report S-3, 4/21/11; Patricia G. Lewis, ''Safe at Last? Transfer Pricing Safe Harbors on the Horizon,'' 21 Transfer Pricing Report 450, 9/6/12.

[5] This article does not address the potential impact on transfer pricing of possible U.S. tax reform under the new Trump administration, as its direction is currently unclear and the potential effects both complex and myriad.

[6] Apologies to Theodor Geisel (a.k.a. Dr. Seuss), The Cat in the Hat (1957).

[7] 2013 safe harbor guidance, para. 4.100.

[8] OECD Center for Tax Policy and Administration, ''Multi-Country Analysis of Existing Transfer Pricing Simplification Measures—2012 Update, June 6, 2012.

[9] Approximately eight countries had safe harbors for low-value-adding intragroup services, and six had them for loans.

[10] An updated bilateral competent authority understanding was just announced reflecting recent changes in the Mexican transfer pricing rules. See IRS News Release IR-2016-133 (Oct. 14, 2016), at http://src.bna.com/joZ. Also see 25 Transfer Pricing Report 739, 10/27/16.

[11] The Australian and New Zealand low-value-adding services provisions discussed below do, however, incorporate a symmetry condition.

difficult to design and implement, and may not carry enormous tax risk for subject countries or companies. Moreover, since the consequences to the counterpart country are similarly minor and of low enforcement interest, serious bilateral dichotomies or inequities and double taxation are unlikely to be created.[12]

In terms of scale and potential global impact, the low-hanging fruit of cross-border related-party commerce consists of relatively straightforward, low-risk intercompany functional services (for example, distribution, manufacturing) and support services. This article focuses on them. Both have now been addressed by the OECD: low-risk functions in the 2013 safe harbor guidance and low-value-added support services in the 2015 BEPS recommendations.

A Unilateral Sidebar—Indian Safe Harbor Rules

Shortly after the OECD safe harbor study, one country—India—explicitly addressed substantive low-risk function safe-harbors, albeit on a unilateral basis. What can be learned from this?

The Indian rules[13] cover a broad swath of business operations important in Indian cross-border commerce: software development services, information technology-enabled services, knowledge process outsourcing services, contract research and development and manufacture and export of auto components.[14] All but the auto component-related activities must involve ''insignificant risk,'' which is explained in terms of the functions of the foreign principal (must perform economically significant functions and provide capital and other economically significant assets) and those of the Indian entity (works under supervision, no economically significant risks). Specific cost-plus margins are assigned to each category, ranging from 8.5 percent for non-core automotive parts to 30 percent for software development-related contract R&D. Eligibility for the safe harbors is not limited to taxpayers or transactions below a particular size, though for the first two categories the markup is slightly lower for small transactions. Use of the safe harbors is elective, and may extend for up to five years. The tax authorities have a short period of time to object to the election, absent which the election is considered valid. The benefit is not available if the foreign affiliate is in a no-tax or low-tax country—one with a rate of less than 15 percent. One drawback is that an electing taxpayer is ineligible for treaty mutual agreement procedures (MAP) in the event the margin is questioned by the counterpart country.

This was a very ambitious and first-of-its-kind undertaking, and was much heralded as an important advance by the Indian tax authority. In practice, however, it has reportedly been largely ignored because the safe harbor rates are considered too high. Developments relating to the introduction of unilateral and bilateral APAs, as well as resolution of long-contended MAP cases—all reportedly at lower markups—have undoubtedly undermined enthusiasm for the safe harbors. Rumor has it that the Indian tax authority is reconsidering the safe harbor levels in an attempt to increase their appeal.

So the lesson of the Indian safe harbors is that, however thoughtful and comprehensive the endeavor, use of arm's-length returns is essential.

IRS Interest in the 2013 OECD Safe Harbor Recommendations

The 2013 safe harbor guidance encouraged bilateral MOUs between willing treaty partners to establish safe harbors for frequently encountered, unexciting functions involving fairly consistent arm's-length returns. Sample MOUs annexed to the guidance specifically addressed limited-risk distribution, manufacturing and research services. Eligibility conditions and an agreed transfer pricing method and level or range would be established and published. The safe harbor would be elective by taxpayers, and could cover multiple years.

While the safe harbor guidance was pending in draft form, the IRS requested public comment on how to design a safe harbor MOU for simple distribution activities.[15] The author of this article commended the OECD approach and offered a number of specific structural recommendations along with a mocked-up model MOU. The author stressed the following points:

- The approach should aim for an approximate arm's-length result, not only to harmonize with the underlying legal rules but also to minimize adverse selection and unanticipated consequences.
- Inclusion of an anti-abuse provision, accompanied by a statement of bilateral principles and objectives, could reduce the need for detail and complexity in the MOU.
- Conditions for eligibility should be fairly broad, recognizing that rough justice may be necessary to achieve the resource efficiency objectives.

Suggested modifications to the OECD sample MOU included:

- elimination of size constraints or industry limitations;
- a minimum period of residency to minimize ''safe harbor shopping'';
- eligibility should not be limited to single-purpose entities and segmentation should be permissible (with qualified public accountant confirmation);
- jurisdictions could choose whether to require election uniformity for all similarly situated local members of the multinational group;
- a range, rather than a point, should be used to minimize annual adjustments and could be developed from a convergence of several profit level indicators;
- a streamlined advance eligibility determination process should be made available (mandatorily for large taxpayers) to minimize subsequent controversies and enhance certainty for taxpayers.

These suggestions—which remain the author's recommendations—were intended both to address ar-

[12] This is not to say that measures for small or medium-sized enterprises are not a topic worthy of careful analysis and promotion, but that is not the focus of this article.

[13] Rules 10TA to 10TG of Income-tax Rules, 1962 (Sept. 18, 2013), authorized by section 92CB of the Income-tax Act, 1961, added by Finance Act 2009, available at 22 Transfer Pricing Report 1020, 12/12/13.

[14] There are also safe harbors for interest on intragroup loans and for corporate guarantees.

[15] IRS News Release IR-2013-30 (March 15, 2013). See 21 Transfer Pricing Report 1088, 3/21/13.

eas of potential concern and to simplify negotiation of a safe harbor.

MOU Progress at IRS?

The IRS initially evidenced clear enthusiasm for the OECD MOU approach, and was tentatively exploring this approach with several treaty partners, including Canada.[16] The administrative savings from such an approach obviously appealed to the IRS.

Little has been said publicly about the subsequent evolution of this project or its current prospects, but several intervening factors can be observed:

1. Organizational changes. Restructuring and turnover in the IRS' international tax operations in the last few years has left few of those involved in the 2013 effort in place. However, a key member of the 2013 safe harbor working group is currently the acting director of the IRS Advance Pricing Mutual Agreement office within the Treaty and Transfer Pricing Operations Practice Area of the Large Business & International (''LB&I'') division. One could envision new momentum behind concepts of this type as the need for tax certainty grows; see discussion *infra* in part E.

2. Other priorities, especially BEPS. The BEPS project, launched in mid-2013, has demanded enormous time and attention from LB&I as well as Treasury international tax personnel. Moreover, the amped-up focus on multinational tax avoidance has diverted attention from business-friendly simplification measures. And this continues, exacerbated by the recent spate of attention-grabbing European Commission ''state aid'' cases. FATCA has been another drain on IRS international resources. Yet IRS budgets have been cut, not expanded, during this period. The Deputy Commissioner (International) of LB&I[17] said in 2015 that the IRS hadn't lost interest in bilateral safe harbors, but the topic had lost *priority* due to budget constraints. ''We are doing the best we can and know that is something important, but it is a little bit further down on the priority list.''[18] Counterpart tax administrations undoubtedly have been facing the same choices.

3. Agreement challenges. It is not unexpected that reaching agreement with treaty partners on coverage, rate and definitions for an MOU approach would be challenging. Canada, for example, worried that determining eligibility for low-risk frameworks might use inordinate compliance resources, or that transactions might be too complex to sort out.[19] However, the recently announced understanding between U.S. and Mexican competent authorities updating their 1999 bilateral agreement establishing maquiladora safe harbors[20] is a very promising development, demonstrating real-time feasibility of bilateral arrangements.

4. Effectiveness questions. It certainly makes sense to explore MOUs with governments with which the U.S. has extensive dealings, repetitive transactions and good relationships. A bilateral approach is a dramatic improvement on a unilateral regime, and one would hope that a handful of MOUs (for example, for low-risk distributors) would make a meaningful dent for U.S. taxpayers and also lay the groundwork for easier negotiations on other topics and with other countries.[21] Yet one could envision some underlying skepticism of the long route through a vast treaty network to wider acceptance and application. This is precisely the kind of frustration that has generated so much interest in the BEPS multilateral instrument, discussed below.

5. Focus on low-value-adding services. Developing a close-to-consensus view among scores of countries ranging from emerging markets to mature economies in BEPS's compressed time frame is an extraordinary challenge. Shaping the low-value-added services approach likely preoccupied the same governments who supported the 2013 safe harbor guidance.

So let's see how the low-value-added services approach fits into the picture.

The Simplified Low-Value-Adding Services Approach—Thing Two

The OECD's 2015 proposal on low-value-adding services[22] grew out of BEPS Action 10, which sought, among other things, the development of rules to ''provide protection against common types of base eroding payments, such as management fees and head office expenses.'' The balance struck is intended to be mutually beneficial: for governments, capping the amount of such payments; for taxpayers, eliminating audit risk regarding such payments, within the prescribed limits. There is some rough justice involved in that the mechanism is elective, the margin level could be debated, and new intercompany payments might be encouraged. But overall, the OECD's recommendation is a very important step. Several key aspects are addressed below.

[16] Dolores W. Gregory, ''OECD Discussion Draft Reflects Greater Acceptance of Safe Harbors,'' 21 Transfer Pricing Report 146, 6/14/12; Julie Martin, ''IRS Seeks Several Transfer Pricing Safe Harbor Agreements,'' 69 Tax Notes Int'l 740 (Feb. 25, 2013); Alex M. Parker, ''IRS Official Reports Movement on Transfer Pricing Safe Harbors,'' 21 Transfer Pricing Report 1062, 3/7/13; Dolores W. Gregory, ''Maruca: Bilateral Safe Harbor Accords Slow in Development but IRS is on Track,'' 22 Transfer Pricing Report 151, 6/13/13; Jaime Arora, ''Transfer Pricing Safe Harbors Will Take More Time, Maruca Says,'' 139 Tax Notes 1227 (June 10, 2013); Kevin A. Bell, ''IRS Designing Safe Harbor Regime for Routine Distribution, Official Says,'' 22 Transfer Pricing Report 356, 7/25/13; Matthew R. Madara, ''IRS Leaning toward Elective Transfer Pricing Safe Harbors,'' 140 Tax Notes 217 (July 15, 2013); Dolores W. Gregory, ''Maruca: IRS Dialing Back on Safe Harbors Due to Resources; 'Mushrooming' MAP Cases,'' 23 Transfer Pricing Report 256, 6/12/14 ('' 'We just don't have the resources,' Maruca said. 'But it's really important. Especially if, as we expect, as a result of BEPS, countries start making adjustments willy-nilly.' '').

[17] Douglas O'Donnell, now LB&I Commissioner.

[18] Dolores W. Gregory, ''IRS Still Interested in Safe Harbors But Strapped for Resources, O'Donnell Says,'' 23 Transfer Pricing Report 1341, 3/5/15.

[19] Peter Menyasz, ''Canada Not Yet Sold on Safe Harbors to Address Routine Transfer Pricing Deals,'' 21 Transfer Pricing Report 1029, 2/21/13. Note that these comments preceded issuance of the OECD's final safe harbor guidance.

[20] See IRS News Release IR-2016-133 (Oct. 14, 2016), note 10, above; IRS News Release IR-2000-56 (Aug. 11, 2000).

[21] Preferability of multilateral MOUs was voiced at the OECD's November 2012 public consultation on its safe harbor proposals. See Rick Mitchell, ''OECD's Andrus Defends Logic of MOUs for Bilateral Safe Harbors,'' 21 Transfer Pricing Report 746, 11/29/12.

[22] Revised Part D of Chapter 7 of the OECD transfer pricing guidelines, paras. 7.43-7.65, found in the 2015 report on Actions 8, 9 and 10, note 3, above, pp. 153-60.

Genesis

Centralized and headquarters services have long been a cross-border sore spot. At the same time that business efficiency concerns, combined with technological and communications advances, drive centralization, tax authorities in service recipient locations often question the extent of local benefit. For example, use of an administrable cost allocation key based on a metric like sales or head count may result in charges that cannot be tied to provable specific benefits to a particular affiliate or readily supported under a willingness-to-pay-for-or-perform-itself standard. Given the nature of these services and the costs and challenges of detailed substantiation, audit exposure in some service recipient countries is significant, and many taxpayers effectively end up with double taxation if the tax rules or tax authorities in the service provider location insist on a charge-out. The situation is aggravated because there are typically (many) more low-value-added service recipients than service providers in a multinational group.

Nevertheless, because the services tend to be of relative low value (for example, fairly routine back-office services requiring generic skill sets, inexpensive and readily available work force and increasingly automated), the ultimate enforcement payoff for the countries involved may be limited.

Until recently, the occasional rationalization in this area has effectively amounted to unilateral concessions by some primarily service-provider countries. Logically, the fiscal motivation of such countries is to see as healthy a profit on the services as the arm's-length standard permits. Yet lower returns may make sense for administrative reasons, even taking into account markups on inbound services per foreign requirements. The U.S., for example, allows cost-only charges for low value, non-core, services. The 1968 regulations applied this approach to services that were not an ''integral part'' of a party's business.[23] This mutated into the ''services cost method'' in the 2009 regulations.[24] The 2010 OECD transfer pricing guidelines support a similar approach, albeit in more limited situations.[25] A variant has been to set a fixed markup rate (as Singapore has done) or range (in Australia) for such services.

The perspective of primarily service-recipient jurisdictions is different. First, the proof-of-benefit hurdle must be surmounted for any service fee at all to be swallowed. Then, cost-only charges (that is, deductions) are fine; the fiscal concern is whether the charges are too high, not too low.

Satisfactorily proving benefit for indirect charges has been daunting in numerous countries (Mexico and Brazil, to name a few). Thus, unilateral measures provide incomplete succor to multinational enterprises with service recipients in multiple jurisdictions. Particularly with respect to ancillary, low-value services, multinationals crave uniformity for efficiency and simplification reasons as well as to minimize audit distractions. Companies may effectively be forced to adopt the only mutually acceptable approach—comparables-based charges—which leaves them both unable to take advantage of existing safe harbors in service-provider countries and at the mercy of the service-recipient countries' pushback on both benefit and return issues. The 2011 guidelines from the European Union discussed below dipped a toe in the benefit-proof water with some helpful precatory language, but the recommended documentation under those guidelines still envisions details of the benefit or expected benefit to each of the recipients.

OECD Recommendations

Enter the 2015 simplified low-value-added services approach. Its key features admirably touch all of the above concerns.

Test for eligible services. First, the approach is designed for support services. The basic test for eligible services[26] is that they be:

- of a supportive nature;
- not part of the core business of the multinational group;
- not requiring the use of, or creating, unique and valuable intangibles; and
- not involving the assumption, control or creation of substantial or significant risk by the service provider.

Exclusions. A wide swath of exclusions applies,[27] including activities at the heart of the 2013 OECD safe harbor guidance. Excluded are:

- services rendered to unrelated customers;
- R&D services, including software development;
- manufacturing and production services;
- purchasing activities;
- sales, marketing and distribution activities;
- financial transactions;
- extraction, exploration or processing of natural resources;
- insurance and reinsurance; and
- services of corporate senior management.

Examples of qualifying services. The following are examples of qualifying services:[28]

- accounting and auditing;
- accounts receivable and accounts payable processing and management;
- human resources activities;
- monitoring and compilation of data relating to health, safety, environmental and other standards;
- information technology services that aren't part of the principal activity of the multinational group;
- internal and external communications and public relations support;
- legal services;
- activities related to tax obligations; and
- ''general services of an administrative or clerical nature.''

[23] Regulations Section 1.482-2(b)(3) (1968).

[24] Regulations Section 1.482-9.

[25] Where the market value of incidental services is not greater than the costs incurred (para. 7.34), or in exceptional situations reflecting a tax administration's cost-benefit analysis (para. 7.37). Similar language is retained in the revised transfer pricing guidelines resulting from the 2015 BEPS report (see paras. 7.35-7.37).

[26] 2015 report on Actions 8, 9 and 10, note 3, above, para. 7.45.

[27] *Id.* paras. 7.46-7.47.

[28] *Id.* para. 7.49.

Uniform 5 percent markup. The recommendation is to apply a 5 percent markup to group-wide full costs to determine arm's-length charges for eligible low-value-adding services.[29] Although views could differ, this seems in the actual arm's-length ballpark, which is important to allay concerns of either a give-away (if too low) or a level that rational taxpayers will avoid (if too high).

The cost pool must exclude services benefitting solely the service provider entity and those performed by a single provider for a single recipient. Costs can be grouped by category of services for purposes of applying an appropriate allocation key, but the same 5 percent markup applies to all services regardless of category.[30] The report helpfully notes that in the interest of striking a balance ''between theoretical sophistication and practical administration, bearing in mind that the costs involved are not generating high value for the group,'' there may be no need to use multiple allocation keys.

Note: No markup is to be applied to ''pass-through costs'' where the service provider is effectively acting only as agent or intermediary.[31]

Benefits test. Recognizing that the nature of low-value-added services may make benefit evaluations difficult or require greater effort than the amount of the charge warrants, the report directs tax administrations to ''generally refrain from reviewing or challenging the benefits test'' if the conditions and documentation requirements of the simplified approach are satisfied. Tax administrations should consider services by category (not on a specific charge basis), and single annual invoices by category will suffice.[32] These admonitions are a critical element of the simplified method, if retained in this consensus document after the additional forthcoming work discussed below.

Application. Although elective by taxpayers, the simplified method must be applied on a consistent, group-wide basis in all countries in which the multinational company operates, ''as far as practicable.''[33] The latter qualifier presumably acknowledges that some jurisdictions may not have adopted the approach; to that extent, the MNE group can comply with local requirements in such jurisdictions without being disqualified from using the simplified approach elsewhere.

Reporting. Taxpayers must prepare and provide upon request descriptions of categories of services, beneficiaries, justification for low-value-adding categorization, rationale for the provision of such services, benefits or expected benefits of each category, allocation keys and their rationale and confirmation of the markup applied. Additional documentation includes written agreements, along with documentation and calculations regarding the cost pool and application of allocation keys. Obviously, no benchmark studies supporting the 5 percent markup are required.[34]

Withholding. Importantly, the report recommends that any country applying withholding taxes to service payments limit application to the markup on low-value-added services, not the cost pool element of the charges. The reason is that a typical withholding tax on the full amount would exceed the 5 percent markup and prevent the service provider from even recovering its costs.

Multilateral approach. Critical to the effectiveness of the simplified low-value-added services approach is that ''it must be adopted and applied on a geographic scale that is as broad as possible and it must be respected in both intra-group service provider and intra-group service recipient countries.''[35] But the report's recommendations are not a ''minimum standard'' to which OECD members are expected to adhere. Rather, they are more aspirational in nature, with implementation up to individual countries.

Auspiciously, the report states that ''the significant majority'' of the 80-plus BEPS countries have indicated that they will endorse applicability of the simplified approach before 2018. Nevertheless, some countries (for example, developing countries) have particular concerns regarding base erosion from these types of payments. The report envisions that a country could set a threshold above which the simplified method would not automatically be accepted, based, for example, on financial ratios of the recipients or overall group or other appropriate measures.[36] But further work is being undertaken on potential thresholds and other implementation issues in hopes of enabling more widespread (and presumably relatively uniform) adoption. This work was to be finalized by the end of 2016,[37] although it has not yet surfaced.

Other current international organization initiatives, including the development of BEPS-protective ''toolkits'' in combination with the G20 Development Working Group mandate,[38] are expected to provide additional assistance to hesitant members.

Comparison with U.S. services regulations. There is considerable conceptual similarity between the OECD's simplified low-value-added services approach and the U.S. services cost method approach in the regulations at Section 1.482-9(b), for example, as to the types of services covered or excluded. However, qualification

[29] *Id.* para. 7.61. The OECD discussion draft on low-value-adding services had called for a range of between 2 percent and 5 percent; final use of a single markup may have been intended to minimize the complication of differences between countries. See the discussion draft under BEPS Action 10, ''Proposed Modifications to Chapter VII of the Transfer Pricing Guidelines Relating to Low Value-Adding Intra-Group Services,'' Nov. 3, 2014, available at http://src.bna.com/mc8.

[30] *Id.* para. 7.56.

[31] *Id.* paras. 2.93, 7.34, 7.61.

[32] *Id.* paras. 7.54-7.55.

[33] *Id.* para. 7.52.

[34] The interaction with more general transfer pricing documentation requirements is not addressed, but one would hope that local implementing legislation or regulations would consider this low-value-added services documentation to be penalty-proof.

[35] 2015 report on Actions 8, 9 and 10, note 3, above, at 142.

[36] *Id.* para. 7.63.

[37] *Id.* at 142.

[38] See, for example, OECD, ''Part 2 of a Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries,'' http://src.bna.com/mdy ; OECD, ''G20 Development Working Group 2015 Annual Progress Report,'' http://src.bna.com/mdz; OECD, ''Inclusive Framework for BEPS Implementation,'' January 2017, Annex 3, http://src.bna.com/mdD.

for the U.S. services cost method results in a zero markup rather than 5 percent. Moreover, the services cost method supplements ''specified'' covered services with a somewhat broader group of low-margin covered services, consisting of services for which the median comparable markup does not exceed 7 percent. Superimposed on both categories, analogous to the non-core requirement of the simplified low-value-added services approach, is a ''business judgment'' test requiring the taxpayer to reasonably conclude that the services do not contribute significantly to key competitive advantages, core capabilities or fundamental risks of success or failure in its business.

At a minimum, it appears that the zero markup would render the services cost method noncompliant with the simplified low-value-added services approach. Nevertheless, perhaps the services cost method (or the ''shared services arrangement'' also included in the U.S. rules) could be characterized as a cost contribution arrangement (CCA) under the OECD transfer pricing guidelines, which are separate from the low-value-added services rules.[39] CCAs, addressed under Chapter 8 of the transfer pricing guidelines (also rewritten in the 2015 report as part of BEPS Actions 8-10), can cover services—of any kind—that are expected to create current benefits for the businesses of each of the participants through the pooling of resources and skills; costs are then allocated per such expected benefits. A somewhat controversial aspect of these rewritten rules is that contributions, consisting in this context of the performance of services, are generally to be made at an arm's-length level,[40] though a cost-based approach may be appropriate if low-value services are involved.[41] U.S. shared services arrangements largely involve similar concepts, but are narrower in that they can only cover services eligible for the services cost method.

Comparison with 2011 EU guidelines. The Council of the European Union in May 2011 endorsed guidelines on routine, low risk, low-value-adding, indirectly charged, intragroup services that had been developed by the EU Joint Transfer Pricing Forum.[42] There is no delineation of specific services, so this regime could presumably encompass not only low-value-added services but also some low-risk functions.

These EU guidelines amplified the more general then-existing OECD guidance,[43] resulting in an approach quite similar to (and perhaps taken into account in developing) the 2015 simplified low-value-added services approach. Areas elaborated upon by the EU JTPF included illustrative coverable services, documentation (including an extensive narrative), demonstration of benefit, cost pools, excluded shareholder costs and allocation keys. As to markup considerations, the EU guidelines noted that, per the OECD guidance, a markup may not be required, but that where one is appropriate, it will typically ''fall within a range of 3-10%, often around 5%.''[44]

In an effort to arrive at an expedient result in most cases, the EU guidelines urge a ''reasonable interpretation'' of available evidence, supported by multinational companies' representations, to the end that verification of provision of these services ''should not be a contentious issue.''[45]

The EU guidelines are directed at facilitating the evaluation of intragroup services by taxpayers and tax administrations, but there does not appear to be any strict implementation mandate. Their relevance or potential modification in view of the OECD's 2015 simplified low-value-adding services approach is not clear.

Comparison with United Nations' guidance. Very recently, the United Nations' Committee of Experts on International Cooperation in Tax Matters, in updating the services chapter of its Practical Manual on Transfer Pricing for Developing Countries, identified a unilateral safe harbor for certain low-margin services as ''a practical alternative'' that may be used by tax authorities.[46] Like the OECD simplified low-value-adding services approach, such a safe harbor would cover low-value, low-margin support-type services that are unconnected to an entity's main business activity. The UN guidance gives as examples human resources, accounting, tax compliance and data processing services, but excludes, among other things, marketing, distribution, manufacturing, R&D and strategic management services.

Requirements that may be contained in such a safe harbor are the scope of services, a fixed profit margin, documentation requirements and ''an assumption that the same gross profit margin is accepted in the other country.''[47] It is unclear how the bilateral concept in the last feature might operate. A subsequent comment in the guidance notes that there could be inconsistency between a safe-harbor deduction and the income required by the counterpart country if tax authorities there ''are not aware of the safe harbour''; ''to avoid this result, it is material that safe harbour requirements consider this possibility and a matching of income and costs is required.'' It seems unlikely that this ''assumption'' is intended to enable an increased deduction, but left unsaid is how to orchestrate reduced income in the counterpart country. To the extent this concept emanates from the symmetry condition in the Australian and New Zealand provisions for non-core services,[48] it may be difficult to replicate the unusually close trading relationship of those two countries.

[39] See 2015 report on Actions 8, 9 and 10, note 3, above, para. 7.1.

[40] *Id.* para. 8.25.

[41] *Id.* para. 8.28 and Example 2 in Annex to Chapter 8 (*id.* at 178-79).

[42] Guidelines, http://src.bna.com/mdH, adopted at the 3088th Economic and Financial Affairs Council Meeting, Brussels, May 17, 2011.

[43] Chapter 7 of the OECD transfer pricing guidelines.

[44] *Id.* para. 65.

[45] *Id.* paras. 27-29.

[46] E/C.18/2016/CRP.2, Attachment 5, October 2016, paras. B.4.63-B.4.75, available at http://src.bna.com/mdV. A second safe harbor for ''minor expenses''—that is, a de minimis rule—was also authorized. Both safe harbors are stated to be based on safe harbors in the Australian Taxation Office's Taxation Ruling 1999/1, ''Income Tax: International transfer pricing for intra-group services,'' paras. 77-87 (TR 1999/1).

[47] An example further suggests that the total expenses claimed may be limited to a maximum percent of the taxpayer's total deductions, and another example (albeit relating to a minor-expense safe harbor) suggests requiring that the same fixed profit margin be used for inbound and outbound services.

[48] Discussed below; also see TR 1999/1, note 46, above.

West African states. Another recent safe harbor undertaking is an extensive study emanating from a mandate of the European Commission Directorate-General for International Cooperation and Development, regarding potential unilateral or bilateral transfer pricing safe harbors for countries in the Economic Community of West African States (ECOWAS).[49] This study focused on low-risk activities of the type addressed in the OECD 2013 safe harbor guidance, but found interest in higher-value services as well. The study noted various trade-offs with respect to tax revenues, attractiveness to business and audit and compliance costs. It also commented that a safe harbor must be optional, and might contain variations depending on the industry, type of transaction or level of risk or value added. Some considerations noted as pertinent to the ECOWAS context included not discouraging investors from developing more value-added activities, and possibly implementing safe harbors on a temporary basis to evolve as the economic development and administrative capacity of a country strengthen. Bilateral or multilateral safe harbors were recommended, observing that guidance could be standardized or modeled, and negotiations even initiated, at a regional or community level. Indeed, the possibility of assigning negotiation powers to an existing or new state or regional body was mentioned.

Individual countries. Several countries already have low-value-added services approaches in place. The 2012 OECD survey identified seven such regimes: Australia, Austria, Japan, Netherlands, New Zealand, Singapore and the U.S.

Australia[50] and New Zealand[51] have simplified administrative approaches for non-core services (not exceeding 15 percent of the local group's revenue) and de minimis cases. Generally a 7.5 percent markup is required, but the markup may be as low as 5 percent for outgoing services or as high as 10 percent for incoming services if the counterpart country has symmetrical provisions or practices.

In Singapore,[52] a 5 percent markup applies to routine support services, if not also provided to unrelated parties. Cost pooling without a markup is also permitted if not the service provider's principal activity (no more than 15 percent of total expenses).

Japan allows a cost-only approach for incidental services.[53]

A post-2012 regime can be seen within the Netherlands' most recent transfer pricing guidance, providing for a zero markup on "supporting services."[54] The Dutch provision also authorizes advance rulings for such services as well as for other services not adding more than marginal value to primary business processes and not provided more than occasionally to third parties.[55]

OECD tax certainty initiative. One further indicator of an increasing level of interest is a recently launched OECD survey as part of a new project "to support certainty in the tax system with the aim to promote investment, trade and balanced growth." This project, endorsed by the Group of 20 and EU finance ministers in September 2016,[56] is to explore the relevance of business factors and tax factors in investment and location decisions and the effect of tax uncertainty on business operations. The survey includes detailed questions regarding the sources and nature of tax uncertainty, and seeks views on some measures that could enhance tax certainty. The survey results are to be presented to the G-20 in 2017.

In sum. The OECD's simplified low-value-adding services approach for standardized unilateral safe harbors is a very thoughtful and important accomplishment, as the prevalence of the covered business patterns cries out for an equitable solution. The breadth of adoption remains to be seen, as well as the variations or limitations that some countries may insist upon as comments or reservations issue in the next months. Minimizing or eliminating differences among adopters will be key. If there is a considerable degree of uniformity and extensive adoption, the low-value-added services enactments will effectively operate as multilateral safe harbors, which would be incredibly beneficial. Otherwise, they will operate more like the U.S. services cost method, which is primarily useful for service providers, since the service recipients—if they can get past the proof-of-benefit hurdle—are unlikely to encounter resistance to the outflow of low markups. Ideally, implementation of the simplified low-value-adding services approach will not be unduly limited to small transactions. But even if so, perhaps the limits will be relaxed over time as such rules proliferate and are well-received.

Possible Melding of Low-Risk And Low-Value-Added Safe Harbors

Low-risk functions and low-value-added services are complementary categories that complete the spectrum of high-frequency, relatively "easy," transfer pricing situations. Both are best served by maximum conformity among countries. Both are now part of a consensus-driven global simplification dialogue. Could they be combined?

[49] "Study on the feasibility of introducing transfer pricing unilateral or bilateral safe harbours provision in ECOWAS countries," October 2016.

[50] TR 1999/1, note 46, above.

[51] Transfer pricing guidelines issued in January 2000. Available at 9 Transfer Pricing Report 460, 11/29/00.

[52] IRAS e-Tax Guide on Transfer Pricing Guidelines (Fourth edition), Section 12 ("Related party services"), Jan. 12, 2017, available at http://src.bna.com/l2U.

[53] Administrative Guidelines 2-9, 2001, 2007.

[54] Dutch Decree on Transfer Pricing, No. IFZ 2013/184M, effective 11/27/13. An unofficial English translation is available at 22 Transfer Pricing Report 1116, 1/9/14.

[55] In a Feb. 2, 2016, letter to the Dutch Parliament, the Dutch state secretary of finance indicated adjustments may be necessary to reflect the OECD guidelines on low-value-added services, suggesting that the Netherlands will be part of the initial set of countries endorsing the simplified low-value-adding services approach; see Clive Jie-A-Joen, "Final OECD Guidance on Low-Value Intragroup Services: An Updated Comparison with EU, U.S., Dutch Guidance," 24 Transfer Pricing Report 1348, 3/3/16.

[56] See Rick Mitchell, "OECD Taking Comments on Tax Uncertainty Survey," 25 Transfer Pricing Report 766, 10/27/16; also see "September 2016 Informal Meeting of EU Finance Ministers: Remarks on Taxation," OECD (Sept. 10, 2016), http://src.bna.com/mea.

The table below compares the key features of the two types of safe harbors[57]:

	Low-Risk Functions 2013 OECD safe harbor guidance	**Support Services** 2015 OECD Simplified low-value-adding approach
Type of activity	Limited risk distribution, manufacturing and research services	Low-value-added support services, not core, no substantial risks. Many exclusions, including distribution, manufacturing and research services
Intangibles?	No significant intangibles	
Eligibility criteria	Limitations possible, *e.g.*, $ amount of sales or assets, expense/sales/inventory ratios, principal activity, specified industries, written agreement	Limitations possible, *e.g.*, financial ratios of service recipient or group, such as percent of total costs or revenue
Number of parties	Two	Many
Typical TPM	TNMM using OM or ROA. May need range to minimize need for annual true-up	Cost-plus
Availability of comparables	Ample	
Typical level of profitability	May vary	Generally low
Cyclicality	Theoretically no, but maybe	No
Challenge to prove direct benefit	No	Yes
Data segregation/identification issues	Less so	Yes
Auditability	Not difficult	
Potential for abuse	Varying views (may depend on eligibility limitations) but generally low	

The above view suggests considerable potential for a consolidated safe harbor format. Both categories use profit-based transfer pricing methods with available comparables, and tax administrations have considerable experience with both. Neither involves prickly intangibles issues. Most importantly, the OECD setting has fostered head-on engagement regarding the key issues that have bedeviled safe harbors for these types of services and has facilitated resolutions that can minimize double taxation. Specifically:

- the consensus-driven pressure in the multi-participant, multi-faceted BEPS environment enhances the possibility of widespread participation;
- broader participation both encourages more reasonable approaches to benefit determinations and motivates the use of arm's-length returns; and
- arm's-length returns minimize the potential for adverse selection.

How could a combined approach be achieved? The BEPS project was not intended to address simplification per se, and the 2013 safe harbor guidance is separate from BEPS. But as part of a dialogue on the simplified low-value-adding services approach, amid increasing taxpayer and governmental burdens from BEPS, countries should be reminded of the 2013 safe harbor guidance and encouraged to consider a dual approach to low-value-added services and low-risk functions in their local legislative or regulatory undertakings.

Potential Role of Multilateral Forums

Moreover, there are several multilateral forums that may be suitable for such an initiative.

MAP Forum of OECD Forum on Tax Administration

The MAP forum of the OECD Forum on Tax Administration,[58] comprising the competent authorities of many countries and led by the U.S., is particularly appealing in this regard. The MAP forum adopted a strategic plan in October 2014[59] with the goal of ensuring that treaty principles ''are properly applied to minimize to the fullest possible extent incidents of double taxation.'' Process improvements are one of its four areas of strategic focus. Specifically identified process improvement topics include techniques to avoid traditional MAP cases, including early involvement; ways to use multilateral case resolution procedures to the fullest possible extent; and consideration of the adoption of generally applicable approaches to the resolution of certain issues and, where possible, capturing such approaches in written agreements.[60] Safe harbor arrangements, while not mentioned by name, should fit squarely within these objectives. Moreover, since safe harbors are directed more at administrative and essential resource considerations than at transfer pricing theories and policy per se, they are more likely to be embraced—and implemented—by tax administrators within the FTA and MAP forums than by BEPS strategists.

[57] Although not expressly labeled a safe harbor, the simplified low-value-adding services approach effectively functions as such.

[58] The OECD's Forum on Tax Administration consists of the senior tax commissioners of 47 OECD and non-OECD countries (see www.oecd.org/tax/forum-on-tax-administration/about/). It established the MAP forum in 2013 to enable competent authorities of FTA member countries to deliberate on general matters affecting mutual agreement procedures.

[59] See http://oecd.org/site/ctpfta/map-strategic-plan.pdf.

[60] *Id.* para. 22-24.

Inclusive Framework for BEPS Implementation

The inclusive framework,[61] which is designed to bring additional countries into the BEPS fold, will be providing input into BEPS-related standard setting. The participation of more developing countries through this initiative may surface their pragmatic needs for safe harbors, though the agenda is broad.

And yet another platform for consideration of a safe harbor initiative is the new OECD tax certainty project described above.

Informally, it seems evident that the IRS both needs and seeks safe harbor mechanisms.[62] The confluence of fast-moving global tax developments, changing postures for U.S. international tax reform under the incoming administration, businesses' certainty desires, and growing dispute resolution needs,[63] increases the imperative for many jurisdictions. As a leading hand of the MAP forum, the IRS has a particularly apt opportunity to develop broad solutions of this genre and hopefully will do so, despite the concurrent distractions.

Solution Through the Multilateral Instrument—THE Thing?

How about embedding both types of safe harbors in a multilateral agreement? Bilateral agreements like the 2013 low-risk function MOUs involve a long and tedious path even if favored. Synthetic multilateral arrangements like the evolving 2015 simplified low-value-adding services approach are more comprehensive, but may lack sufficient consistency and a real-time guiding hand.

Fortuitously in this regard, BEPS Action 15 called for development of a multilateral instrument to implement BEPS measures by efficiently and expeditiously amending bilateral tax treaties.[64] An ad hoc group comprising 99 countries, four non-state jurisdictions and seven organizations has just produced such an instrument[65] (the 2016 MLI), open for signature as of December 31, 2016 with a mass signing ceremony scheduled for June 2017.

Developing a mechanism for simultaneously amending thousands of bilateral treaties affecting countries with both differing existing treaty provisions and differing approaches to implementing new BEPS provisions posed extensive mechanical and legal challenges. The OECD sought input on implementation issues ranging from consistency concerns and language aspects to related guidance and practical tools.[66]

The scope of the 2016 MLI is four BEPS topics: treaty abuse provisions (Action 6), hybrid mismatch arrangements (Action 2), permanent establishment matters (Action 7) and dispute resolution mechanisms, including a controversial mandatory arbitration provision (Action 14). All of the underlying BEPS reports involve proposals that implicate or would revise provisions of the OECD Model Tax Convention.

The February 2015 ''mandate'' for an MLI further suggested that the MLI ''would also include any changes to Article 9 of the OECD Model Tax Convention that may result from the work on Actions 8-10.''[67] Action 10 includes the low-value-added services recommendations, which are pertinent to the related enterprises provisions of Article 9. However, the 2015 report on Actions 8-10 focuses on revisions to the OECD transfer pricing guidelines, and does not recommend any specific treaty changes. Perhaps for this reason, the 2016 MLI does not contain any transfer pricing-related provisions.

Regardless, an MLI could be an ideal vehicle for global implementation of the simplified low-value-adding services approach, in a way that would maximize conformity. Indeed, although the MLI concept is not designed to reach beyond the four corners of BEPS, one can envision that if the 2016 MLI is successfully implemented, it could eventually become an apt vehicle for enabling operational low-risk function safe harbors as well (MLI 2.0). Although Action 15 described the MLI's purpose as ''to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties,'' it went on to say that such an instrument should be ''designed to provide an innovative approach to international tax matters, reflecting the rapidly evolving nature of the global economy and the need to adapt quickly to this evolution.'' That is a broader vision.

To be sure, an MLI is ''an innovative approach with no exact precedent in the tax world.''[68] The cat-herding evident in the 2016 MLI establishes a flexible, albeit complex, framework for coordinating disparate treaty relationships and provisions, through various mecha-

[61] See note 38, above. The inclusive framework opens the OECD's tax work to all countries and jurisdictions in order to more inclusively implement BEPS. Participating countries must commit to the comprehensive 15-action BEPS package and its consistent implementation.

[62] See Joyce E. Cutler, ''Cross-Border Tax Successes Can Be Replicated,'' 25 Transfer Pricing Report 784, 11/10/16 (''The United States can build on its successes with competent authorities to resolve cross-border tax issues and improve compliance and transparency, an Internal Revenue Service official told a Silicon Valley audience,'' referring to recent competent authority progress with India and Mexico. Also see Dolores W. Gregory, ''IRS International Division Poised for Brain Drain,'' 25 Transfer Pricing Report 788, 11/10/16.

[63] A very recent development in this regard is an Oct. 24, 2016, proposed directive from the European Commission to comprehensively revise the processing of double tax disputes within the EU. See http://src.bna.com/meT. If the directive is approved by the EU Council of Ministers, EU countries would be required to adopt the provisions into their national law by the end of 2017. See Joe Kirwin, ''EU Proposes Plans to Resolve 900 Double Taxation Disputes,'' 25 Transfer Pricing Report 746, 10/27/16.

[64] A potentially relevant, if simpler, BEPS-related model is the January 2016 ''Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports,'' http://src.bna.com/me7.

[65] OECD, ''Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting,'' Nov. 24, 2016, http://src.bna.com/me9.

[66] OECD, Public Discussion Draft BEPS Action 15: Development of a Multilateral Instrument to Implement the Tax Treaty-related BEPS Measures, May 31, 2016, http://src.bna.com/fsf.

[67] OECD, *Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS*, February 2015, para. 11, at 4, http://src.bna.com/mfc.

[68] OECD (2014), ''Developing a Multilateral Instrument to Modify Bilateral Tax Treaties,'' 23 Transfer Pricing Report S-244, 9/18/14.

nisms such as choices, options, reservations, compatibility provisions, and notifications. In addition, the 2016 MLI creates a centralized management function through the role of the OECD Secretary-General as the ''depositary.'' The feasibility of this approach will surely be tested in coming months, as countries evaluate whether, how and to what extent to participate, but the very ability to birth such a Herculean document is promising.

Given the newness of this exercise, it may be premature to envision low-value-added services and low-risk function features of an MLI. It is also quite uncertain whether the U.S. will even be a signatory to the 2016 MLI in any respect.[69] Some high-level thoughts nevertheless:

- Treaties generally establish broad principles, with little detail (U.S.-style limitation on benefits provisions aside). Thus at first blush it would appear that the level of detail in the 2013 sample MOUs or in the 2015 simplified low-value-adding services approach would not be appropriate for a treaty.
- Rather, the objective would be to encourage and/or facilitate safe harbors—to make them a kind of expected norm or even better, a minimum standard.
- For example, the MLI could state that countries opting in will provide elective safe harbors for low-value-adding services or low-risk functions so as to minimize burdens and maximize compliance for such commonly occurring situations. Such a provision could refer to Articles 9 (Associated Enterprises), 5 (Permanent Establishment) and 25 (Mutual Agreement Procedure), and, if to be extended to branches, Article 7 (Business Profits).
- Creation and adoption of a related document could be prescribed, to contain operational rules whereby participating countries could implement (one or more) safe harbors—effectively, a multilateral MOU.
- Baseline content of the multilateral MOU could include: covered services, including prohibitions (for example, no significant intangibles); eligibility limitations, if any; assumption of entrepreneurial business risks by associated enterprise; specified profit-level indicator or range, with an updating mechanism; election timing and notice; ability for advance determinations; dispute resolution via MAP; and a procedure for subsequent modifications. The draft MOUs appended to the 2013 safe harbor guidance as well as the specifications of the simplified low-value-adding services approach have facilitated the identification of key eligibility criteria and show that the issues are fairly limited. These precedents should help in establishing global criteria.
- Optional elements should be minimized, if not eliminated, in order to maximize global conformity. That said, it would not be essential to spell out every detail, since participating countries would be motivated, in order to balance significant resource constraints and modest revenue impacts, to be flexible and compatible.
- To the extent an MLI safe harbor mechanism (1) is optional for countries, or (2) has an implementation mechanism that provides choices, substantive subsets and non-overlapping parts will be created. But this should still be a substantial improvement on multiple (or, worse, few) unilateral or bilateral arrangements.

Notwithstanding the MOU supplement approach suggested above, the arbitration provisions of the 2016 MLI in fact provide precedent—if successful—for fairly detailed and flexible provisions within the MLI itself. Extending for eight small-type pages, the arbitration provisions in Articles 18-26 (Part VI) cover many aspects such as triggering of arbitration, timing of various steps, relationship to litigation and settlements, notifications, guidelines and process for the appointment of arbitrators, confidentiality, types of processes (that is, ''final offer'' or ''independent opinion''), the need for position papers and content and precedential nature of decisions. At the same time, the MLI expressly authorizes the competent authorities to agree to additional details or variations—for example, the mode of application of the provisions, variations in the process for appointing arbitrators or the type of arbitration process, and bearing of fees. These details or variations may be arranged on a treaty-partner-by-treaty-partner basis or on a case-by-case basis. This framework (again, if successful in the arbitration context) could readily be adapted to safe harbors. The role of the OECD as depositary would be very helpful in monitoring and coordinating multiple safe harbor provisions.

It is also noteworthy that the 2016 MLI includes an amendment mechanism that is not on its face constrained to the four currently covered BEPS topics. Under Article 33, any party can propose an amendment (by submission to the depositary), which will then be considered in a ''Conference of the Parties'' (under Article 31) if one-third of the parties support the request within a six-month period. Although the mechanism for agreeing on and implementing an amendment is not specified, presumably a process similar to that used in arriving at the 2016 MLI would be involved—that is, reaching a drafting consensus and then hoping many of the collaborators will sign up. In short, there is now an open door and a means for proceeding to ''MLI 2.0'' for safe harbors, if and after the 2016 MLI is up and running.

Some may say that melding low-risk function and low-value-added services safe harbors or enlisting the MLI for global safe harbors are unrealistic, pie-in-the-sky visions. But the need for safe harbors is accelerating rapidly. Persisting in and attempting to take advantage of the urgent innovative spirit of the OECD elements seems highly desirable. At a minimum, encouragement of a bilateral approach to low-risk functions and a generic, if unilateral, approach to low-value-adding services would be a move in the right direction. Thus, as the anti-tax-avoidance momentum of BEPS and other movements such as EU state aid cases crests (talk about wishful thinking), safe harbor mechanisms should move from the back-burner to at least the side-burner, so that they are ready for the front burner when everyone comes up for air and sees clearly the impact of BEPS on compliance, enforcement, administration and dispute resolution burdens. The value of safe harbors, to emerging and developed countries alike, should not be underestimated or overlooked.

Keep the dialogue going!

[69] Kevin A. Bell, ''U.S. Unlikely to Sign Multilateral Tax Treaty,'' 25 Transfer Pricing Report 864, 12/8/16.