Tax risks of multinational enterprises are expected to continue to increase post-BEPS as tax authorities globally increase their scrutiny on cross-border tax transactions. This trend is anticipated in the OECD/G20 BEPS Action Plan: Action 14 attempts to complement efforts to address BEPS with measures that ensure certainty and predictability for businesses in the face of increased tax controversy risks.

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**THE MUTUAL AGREEMENT PROCEDURE:**
**A TAXPAYERS’ TOOL REINVENTED**

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**WHAT IS A MAP?**

A MAP is a mechanism for competent authorities (tax authorities or representatives of the Ministry of Finance or similar) to discuss cross-border taxation of specific transactions or situations with a view to coordinate their approach for the benefits of the taxpayers involved. This process is available under a tax treaty entered into by two or more countries so that the treaty partners are able to resolve cases involving their taxpayers where they have been disputes concerning cross border transactions in their countries.

**WHO CAN ACCESS MAP?**

Taxpayers, both individuals and multinational corporations, can access MAP in the country in which they are resident. There is generally no minimum requirement on the amount of taxes in dispute for accessing MAP. No tax dispute is too small, or too big, for a MAP.

**HOW TO INITIATE MAP?**

The process for initiating a MAP is relatively simple. Most countries have designated competent authorities that deal with MAP requests initiated by their residents. Tax authorities are likely to require that certain information be provided before they accept a MAP request. This means that taxpayers are expected to show they are entitled to treaty protection. Taxpayers also have to be prepared to put forward their case, showing taxation not in accordance with the applicable tax treaty resulting from the actions of the tax authorities in another country.
WHY SHOULD YOU CONSIDER USING MAP?

- MAP is an additional mechanism that taxpayers can use in conjunction with the usual dispute resolution mechanisms available under the domestic law of every country. In most cases, this additional avenue can be explored in tandem with the domestic channels for dispute resolution.
- A MAP process can bring pressures from another tax administration to the attention of the tax authorities with whom taxpayers are in dispute. Having another tax authority on your side in any dispute can help you attain a proper resolution to a dispute.
- Another advantage of MAP is that it can often take the dispute out of the hands of local auditors and providing for a fresh set of eyes to look at the issue, perhaps from a different perspective.

IS MAP A Viable Alternative for Dispute Resolution?

While cross-border disputes are on the rise, the MAP, in our opinion is still underused, even though the number of MAP cases has increased internationally. This is mainly due to the lack of understanding of the MAP process and perceived legal and practical obstacles.

Recent changes to the MAP processes following countries’ commitment to the minimum standards under Action 14 of the BEPS Action Plan and the signing of the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) should improve both the access to and effectiveness of MAP. According to the new rules, countries need to be committed to resolve MAP cases within an average time frame of 24 months.

A small group of countries has signed up to mandatory arbitration under their MAP process. These countries are likely to face even more pressure to resolve MAP cases, because unresolved cases will be subject to binding arbitration by third parties.

It is anticipated that the MAP process will become more effective in the future as competent authorities interact more closely as a result of BEPS. MAP-related meetings and conferences taking place at the international level have broadened and strengthened bilateral competent authority relationships.

Furthermore, as part of Action 14, the OECD is encouraging competent authorities to accept cases and move them more quickly through to resolution, given the peer review and monitoring process that competent authorities are undergoing. Resources that countries have committed to MAP are also expected to increase as a result of the peer review process, which is likely to put sustained pressures on countries to improve the timely resolution of MAP cases.

In addition to these developments, the European Union has proposed a new Directive on Double Taxation Dispute Resolution Mechanisms in the European Union, which aims at resolving double taxation cases within the EU by agreement between the member states. This may become another tool that taxpayers can access in the EU in due course.

Multinational enterprises faced with disputes concerning cross-border transactions are well advised to proactively consider the use of MAP (as well as other alternative dispute resolution mechanisms such as bilateral advance pricing agreements – APAs), where available, while at the same time pursuing their options under the usual domestic avenues.
## FOUR BENEFITS OF MAPS

MAP can be used to resolve a wide range of disputes and to obtain a variety of benefits for taxpayers.

### 1. ELIMINATING DOUBLE TAXATION

A MAP can be invoked by taxpayers so that a country can eliminate, by agreement with the other country, instances of double taxation resulting from the actions of the tax authority in the other country. In the context of transfer pricing disputes, a MAP can be invoked by taxpayers to resolve potential double taxation arising from a transfer pricing adjustment initiated by a country. Taxpayers facing a transfer pricing adjustment may approach their country of residence to resolve any potential double taxation concern that can arise from this transfer pricing adjustment. In the first instance, the country of residence would have to consider providing a corresponding adjustment if it considers the adjustment to be consistent with the arm’s length principle. If the resident country does not agree to provide a corresponding adjustment, it may invoke the MAP in an attempt to resolve this double taxation concern by agreement with the other country. MAP is also used in many countries as a basis for initiating bilateral advance pricing agreements (APAs). In this approach, taxpayers take proactive steps to secure the agreement from two countries on the transfer pricing arrangement that they apply to their cross-border transactions. A MAP is used in this context as a tool for prevention of transfer pricing disputes.

### 2. ENFORCING TREATY LIMITATION

Tax treaties offer protection to taxpayers by prohibiting or limiting a country’s ability to tax income from certain cross-border transactions. Where a country’s action under its domestic law is contrary to such treaty commitments, taxpayers are able to invoke MAP to enforce the treaty limitation. This may take place either because a country has attempted to put withholding taxes on certain income when no such right to tax can be exercised or when the rates of taxation exceed those permitted by the applicable tax treaty. It may also occur when a country attempts to tax non-residents based on the presence of a permanent establishment when the other country disagrees that one exists.

The ability of taxpayers to enforce this right is not dependent on any double taxation concern. For example, a source country can be asked to exempt capital gains from taxation, if taxing such income would be contrary to the proper application of the relevant tax treaty, even when the gains qualify for participation exemption in the resident country (and thus no double taxation has occurred).

The ability to access MAP is also not dependent on meeting domestic or treaty anti-abuse rules. In other words, taxpayers do not have to prove that their transactions meet the domestic or treaty anti-abuse rules in order to access MAP.

### 3. DETERMINING THE RESIDENT COUNTRY OF DUAL RESIDENT PERSONS

MAP can be invoked by a dual resident taxpayer to ascertain which country has the right to impose tax as the country of residence. In such cases, tax authorities may come to an agreement under the MAP on the country where the taxpayer is resident for treaty purposes. This determination is important in order to ascertain which country has worldwide taxing rights and which is able to tax only when cross-border income has a source there, as well as to commit the resident country to provide double taxation reliefs.

### 4. SECURING NON-DISCRIMINATORY TAX TREATMENT

A country’s domestic taxation rules that impose taxes that are more burdensome on non-residents and their permanent establishments compared with the country’s own residents may be inconsistent with certain non-discrimination principles in bilateral tax treaties. Taxpayers who find themselves in these situations may invoke MAP to secure equal taxation treatment based on the non-discrimination principles in the applicable tax treaty.
While cross-border disputes are on the rise, the MAP, in our opinion is still underused, even though the number of MAP cases has increased internationally. This is mainly due to the lack of understanding of the MAP process and perceived legal and practical obstacles. It is important, when considering MAP as an alternative dispute resolution mechanism, to:

- assess the possibility for use of MAP to secure or enhance your position in tax disputes concerning cross border transactions;
- consider the use of MAP early in the dispute resolution process so as to develop and implement your strategy accordingly;
- inform yourself about the role that MAP can play in having a fresh set of eyes look at an issue and/or having another government support your position;
- consider, when assessing whether to accept a domestic settlement offer, its impact on your ability to effectively access MAP; and
- consider the possibility of combining a MAP concerning transfer pricing with a bilateral APA, which may help you get the most out of the process.

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