

## Chapter 13

### Improving mutual agreement procedures

John Hughes and Deb Palacheck  
United States Internal Revenue Service

*Nearly all tax treaties between countries provide for a mechanism, known as the mutual agreement procedure (MAP), for resolving disputes as to the application and interpretation of the treaty provisions. Over time, however, the number of unresolved disputes within the MAP procedure has increased, creating uncertainty for both taxpayers and tax administrations.*

*This chapter provides an overview of initiatives that have been taken to improve the MAP process, including the recent minimum standard agreed under Action 14 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) project. This will provide context for a discussion of opportunities and approaches that countries might wish to consider in order to prevent disputes reaching MAP and, where they do, to improve the effectiveness of the MAP process.*

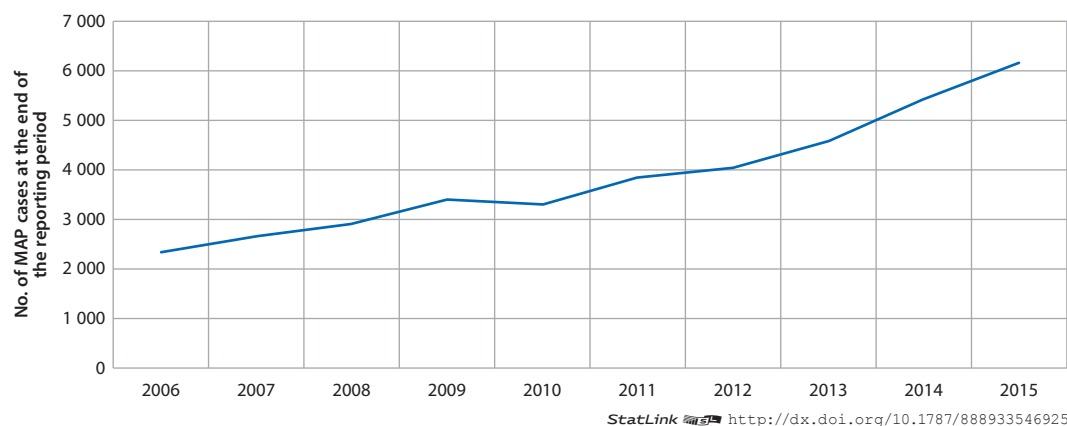
The primary purpose of most tax treaties, also known as double taxation agreements, is to eliminate double taxation of the same transaction or income and to prevent fiscal evasion. Where these occur, they can have significant economic costs, including for trade and investment. Tax treaties therefore set out agreed rules as to the allocation of tax on cross-border transactions and income of taxpayers resident in the signatory countries.

As with any agreement, however, the parties may sometimes take different views on the application or interpretation of those rules in a particular context. Where such a dispute arises, then the vast majority of tax treaties provide for a formal process for dispute resolution through a mutual agreement procedure (MAP). Such a procedure is set out in Article 25 of the OECD Model Tax Convention (Convention). The Convention is used by most countries as the framework for negotiations on tax treaties. MAP is of fundamental importance in minimising incidents of double taxation and taxation otherwise not in accordance with applicable tax conventions.

In the last decade, MAP has increasingly shown signs of strain, raising concerns among taxpayers and governments given its central role in the international tax system. According to recent statistics, MAP caseloads have increased in pure numbers as well as in the average time it takes for jurisdictions to reach agreement. It is important to note in this context that MAP is not an independent or binding arbitration process but a discussion between countries.

At the end of 2015, the total number of open MAP cases reported by OECD member countries was 6 176, compared to 5 429 in the 2014 reporting period and 2 352 in the 2006 reporting period (see Figure 13.1).

Figure 13.1. Evolution of the inventory of MAP cases in OECD member countries, 2006-15



Source: OECD (2017), Mutual Agreement Procedure Statistics for 2015, [www.oecd.org/ctp/dispute/map-statistics-2015.htm](http://www.oecd.org/ctp/dispute/map-statistics-2015.htm).

Improving the effectiveness of the MAP process is an important element of the BEPS project, designed to provide certainty and predictability and thereby complement the actions that counter BEPS.<sup>1</sup> Action 14 of the BEPS project, Make Dispute Resolution Mechanisms More Effective, is intended to “develop solutions to address obstacles that prevent countries from solving treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases” (OECD, 2013).

The outcome of Action 14 – discussed in more detail below – is an agreed minimum standard to ensure disputes related to tax treaties are resolved as quickly and efficiently as possible, supported by a peer review and monitoring mechanism (OECD, 2015).

### **Precursors of the BEPS Action 14 minimum standard**

Action 14 is the most recent mechanism to improve the MAP process, building on earlier multilateral and bilateral initiatives. An example of a bilateral initiative is the administrative agreement entered into by the United States and the United Kingdom in 2000 “to assist taxpayers in the conduct of cases under the MAP, to ensure taxpayers know what they can expect from the competent authorities, and to make the MAP as expeditious and effective as possible” (IRS, 2000).

On the multilateral side, in 2007, the OECD Committee on Fiscal Affairs (CFA) released its Manual on Effective Mutual Agreement Procedures (MEMAP), which provided basic information on the operation of MAP. It also set out best practices that competent authorities and taxpayers could follow to support and improve the MAP process and other cases eligible for MAP consideration (OECD, 2007).

The multilateral approach was taken further by the Forum on Tax Administration (FTA) through the creation of the FTA MAP Forum in 2014. This forum provides a means for FTA-member countries to surface concerns and collaborate on improving the effectiveness of MAP programmes. This is done on the basis of a Strategic Plan, which commits participants to “ensure that the principles embodied in [the participant’s] global network of tax conventions are properly applied to minimise to the fullest possible extent incidents of double taxation, unintended double non-taxation and taxation otherwise not in accordance with the provisions of applicable tax conventions” (OECD, 2016a).

Specific topics addressed in the Strategic Plan include the need for competent authorities to:

- Maintain an adequate number of experienced MAP case handlers,
- Retain an appropriate degree of independence from internal practices and policies relating to revenue collection,
- Approach the MAP process from a posture of mutual trust and co-operation,
- Commit to a programme of continuous review and implementation of internal improvements in handling the MAP process, and
- Ensure taxpayers have effective legal and practical access to MAP at the conclusion of an audit, if not before.

### **BEPS Action 14 minimum standard**

These bilateral and multilateral initiatives laid the groundwork for Action 14 of the BEPS project. Action 14 goes beyond earlier initiatives through its inclusive scope and mandate to participate in a peer review and monitoring programme. It also sets a clearly defined target for resolving MAP cases within an average timeframe of 24 months.

In September 2016, the FTA MAP Forum together with a Focus Group on Dispute Resolution formed by the CFA completed work on the structure and governance of the peer review programme. The programme’s details are set forth in Terms of Reference and an

Assessment Methodology (see OECD, 2016b). Together with supporting documents, these set out the process for conducting a fair and informative review process, including separate questionnaires for the reviewed jurisdiction, peers and taxpayers. Jurisdictions must also submit annual statistical reports, including on the amount of time it takes to close MAP cases.

Together with the OECD FTA MAP Forum Secretariat, the FTA MAP Forum will review each jurisdiction on its progress towards meeting the elements of the Article 14 minimum standard and then document its findings in a report. These elements of the minimum standard are divided into four main areas:

- Prevention of disputes.
- Assurance of appropriate and effective access to MAP.
- Efficient resolution of MAP cases, including seeking to resolve cases within an average of 24 months and ensuring that adequate resources are provided to jurisdictions' MAP functions.
- Timely implementation of MAP case resolutions.

The reports, which are already underway, are prepared on the basis of an agreed assessment methodology.

The Action 14 peer review programme incentivises jurisdictions to find concrete ways to improve their own handling of the MAP process. For example, in order to progress towards the standard of seeking to resolve cases within 24 months, jurisdictions may need to streamline their internal processes for evaluating cases and producing and responding to position papers. The peer review programme also incentivises jurisdictions to work jointly to meet the 24-month timeframe, including through adequate preparation prior to meeting and agreement to conduct their discussions in good faith and in a constructive manner.

The peer review programme also promotes efforts to improve the MAP process beyond reducing case closures to 24 months. Element 1.4 of the Action 14 minimum standard requires that countries become members of the FTA MAP Forum and participate fully and collectively in its work. In addition to timeliness, other elements essential to improving the MAP process are consistency and predictability, effective management of MAP case inventories and efforts to reduce incoming MAP cases altogether by preventing disputes.

## **Innovative approaches to prevent disputes and for quicker resolution**

In order to achieve significant reductions in current MAP case inventories and the average time for completion, competent authorities should continue to explore the range of approaches that might help in preventing and resolving MAP cases.

Although each case presents its own facts and circumstances, the majority of MAP cases are similar in the facts and issues they present. This observation allows for the exploration of innovative case resolution techniques.

- *Safe harbours*: An approach that could lead to quicker resolution is the adoption of bilaterally agreed-upon safe harbours. These provide certainty that cases presenting the same essential facts will be treated in an agreed, consistent way. Although safe harbours are most often used as provisions in domestic law, they could also be explored and adopted between competent authorities, particularly in relation to the

more common disputes, such as intercompany transactions between affiliates or assertions of the existence of, and profits attributable to, a permanent establishment.

- *Agreement of frameworks for handling cases:* Though not a safe harbour *per se*, it is possible to agree a framework for handling more common cases. For example in 2015 the US and Indian competent authorities agreed a framework for handling intercompany cases that represented approximately half of their shared MAP case inventory. This incorporated a systematic approach for deriving individualised arm's length benchmarks on the basis of data points specific to the tested parties.
- *Strict time limits for common cases:* One straightforward approach requiring modest efforts would be for competent authorities to agree upon strict time limits – well below 24 months – for the handling of cases that present common, familiar fact patterns or cases of modest size. Those concerning common services transactions and allocations of intercompany services might often fall into this category. If analysts cannot reach agreement within the expedited time frame, such cases could be rapidly elevated to the executive level.
- *Advanced Pricing Agreements (APA):* APA programmes are an effective tool for managing MAP case inventories. By providing tax certainty for both tax administrations and taxpayers on a prospective basis, MAP cases that might otherwise result from audits can be entirely avoided. The administrative advantages of bilateral and even multilateral APAs are amplified when they include roll-back provisions. As well as providing certainty for future years, roll-back can help resolve earlier years either under audit or already in MAP where there is similarity in the relevant facts and circumstances.
- *Advanced Competent Authority Procedures (ACAP):* ACAP can provide a similar return to APAs on upfront administrative investment. If a MAP case is already in negotiation, then there are obvious efficiencies if the two competent authorities are able to address not only years currently before them, but also address the same issues that arise in subsequent years. This is on the assumption of similarity in relevant facts and circumstances. Resolving “ACAP” years in the MAP discussions is tantamount to negotiating a bilateral APA with a roll-back provision, alleviating the burden of a separate audit and MAP process.

Due to domestic legal regimes, a bilateral APA programme and ACAP agreements may not be available to a particular competent authority to manage its MAP case inventory. However, even those competent authorities that lack such tools can avail themselves of other approaches for improving the efficiency and conduct of MAP. For example a competent authority can improve the MAP process by filtering out weak cases on a unilateral basis. This is in accordance with the obligation contained in the mutual agreement article to withdraw adjustments raised by its own examination function that are not justified and to otherwise resolve the taxpayer's request without presenting the case to its treaty partner.

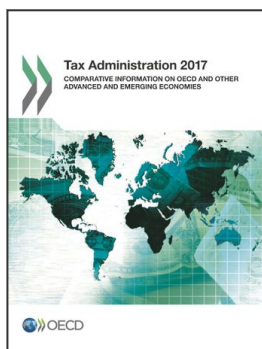
Such unilateral actions need not be taken only when a taxpayer formally presents its case to the competent authority. Some competent authorities have reported participating in internal panels within their tax administrations that review the propriety of international examination adjustments before they are actually made. Such early intervention is consistent with Action 14's recommendation that countries develop “global awareness” within their tax administration. Such wider awareness can help in reducing the number of MAP cases and allow resources to be directed to reducing the processing times of remaining cases.

## Note

1. For further information on the BEPS project please see [www.oecd.org/tax/beps/](http://www.oecd.org/tax/beps/).

## References

- IRS (2000), “U.S.-U.K. Develop New Administrative Arrangements for Mutual Agreement Procedure”, IR-2000-79, US Internal Revenue Service, [www.irs.gov/pub/irs-news/ir-00-79.pdf](http://www.irs.gov/pub/irs-news/ir-00-79.pdf).
- OECD (2017), “Mutual Agreement Procedure Statistics for 2015”, [www.oecd.org/ctp/dispute/map-statistics-2015.htm](http://www.oecd.org/ctp/dispute/map-statistics-2015.htm) (accessed 30 May 2017).
- OECD (2016a), “Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous Map Improvement”, OECD, Paris, [www.oecd.org/tax/forum-on-tax-administration/map-strategic-plan.pdf](http://www.oecd.org/tax/forum-on-tax-administration/map-strategic-plan.pdf).
- OECD (2016b), “BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents”, OECD/G20 Base Erosion and Profit Shifting Project, OECD, [www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf](http://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf).
- OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264241633-en>.
- OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264202719-en>.
- OECD (2007), “Manual on Effective Mutual Agreement Procedures (MEMAP) – February 2007 Version”, OECD, Paris, [www.oecd.org/ctp/38061910.pdf](http://www.oecd.org/ctp/38061910.pdf).



**From:**

## **Tax Administration 2017**

Comparative Information on OECD and Other Advanced and Emerging Economies

**Access the complete publication at:**

[https://doi.org/10.1787/tax\\_admin-2017-en](https://doi.org/10.1787/tax_admin-2017-en)

### **Please cite this chapter as:**

OECD (2017), "Improving mutual agreement procedures", in *Tax Administration 2017: Comparative Information on OECD and Other Advanced and Emerging Economies*, OECD Publishing, Paris.

DOI: [https://doi.org/10.1787/tax\\_admin-2017-18-en](https://doi.org/10.1787/tax_admin-2017-18-en)

This work is published under the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of OECD member countries.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

You can copy, download or print OECD content for your own use, and you can include excerpts from OECD publications, databases and multimedia products in your own documents, presentations, blogs, websites and teaching materials, provided that suitable acknowledgment of OECD as source and copyright owner is given. All requests for public or commercial use and translation rights should be submitted to [rights@oecd.org](mailto:rights@oecd.org). Requests for permission to photocopy portions of this material for public or commercial use shall be addressed directly to the Copyright Clearance Center (CCC) at [info@copyright.com](mailto:info@copyright.com) or the Centre français d'exploitation du droit de copie (CFC) at [contact@cfcopies.com](mailto:contact@cfcopies.com).