

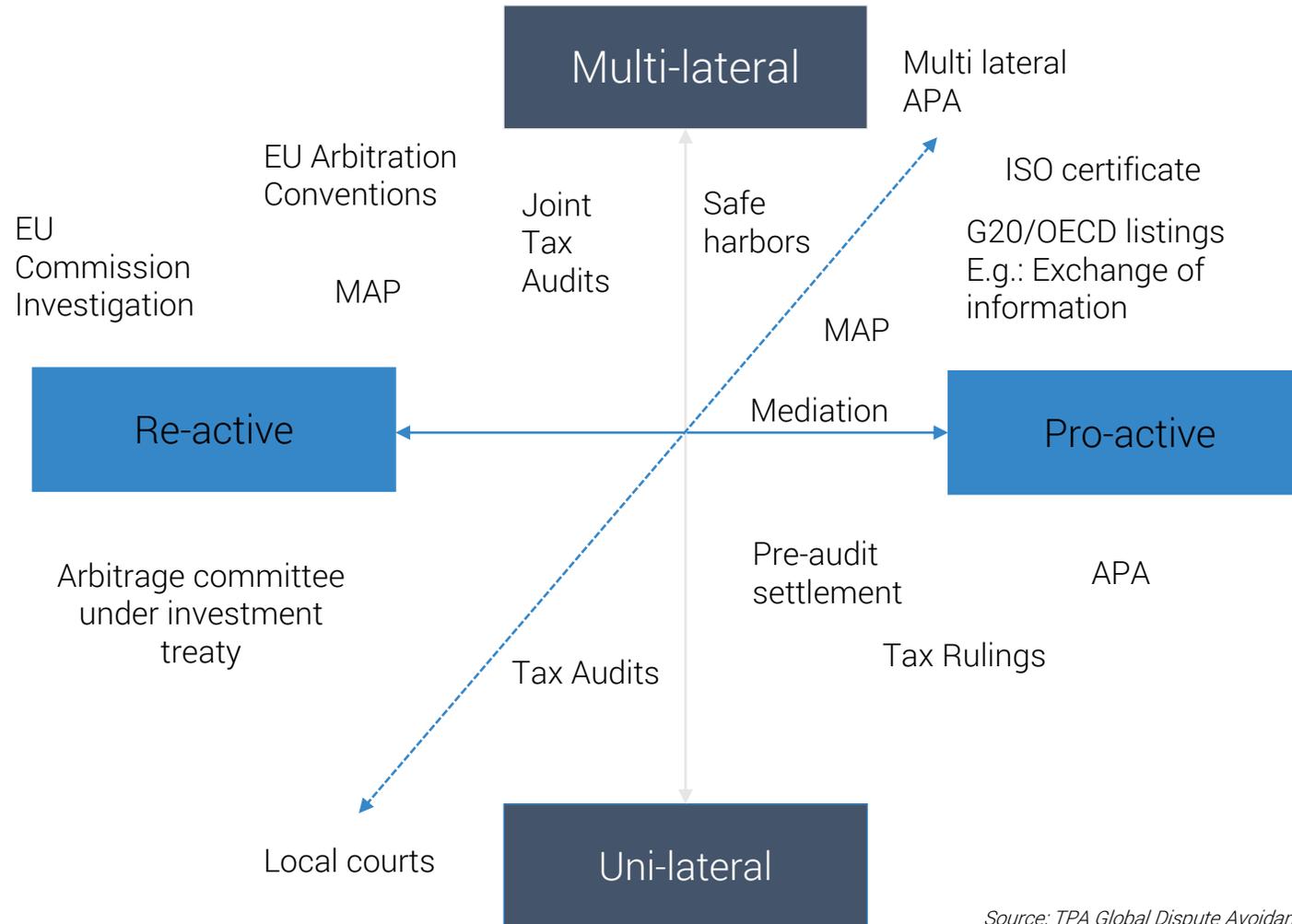
Mapping the trends in MAP resolution of tax treaty disputes after BEPS

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January 18, 2018
Amsterdam, The Netherlands

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Controversy management instruments



Source: TPA Global Dispute Avoidance and Resolution Matrix

Controversy management instruments – A value chain perspective (1)

A. A value chain analysis after BEPS

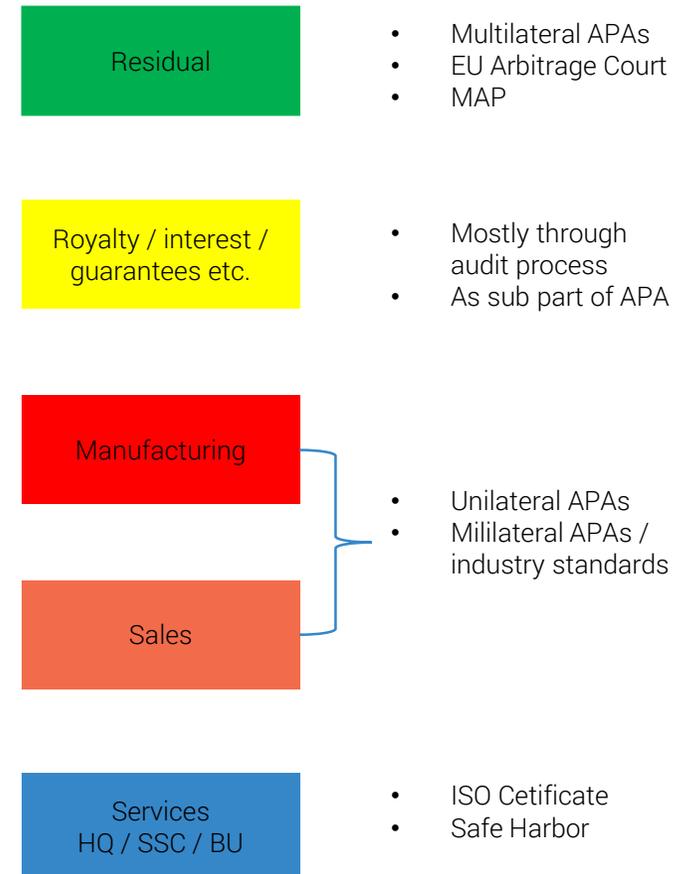


C. Main questions:

- which disputes to handle?
- which toolbox to use?
- what timing of risk management?
- what professional process to use?

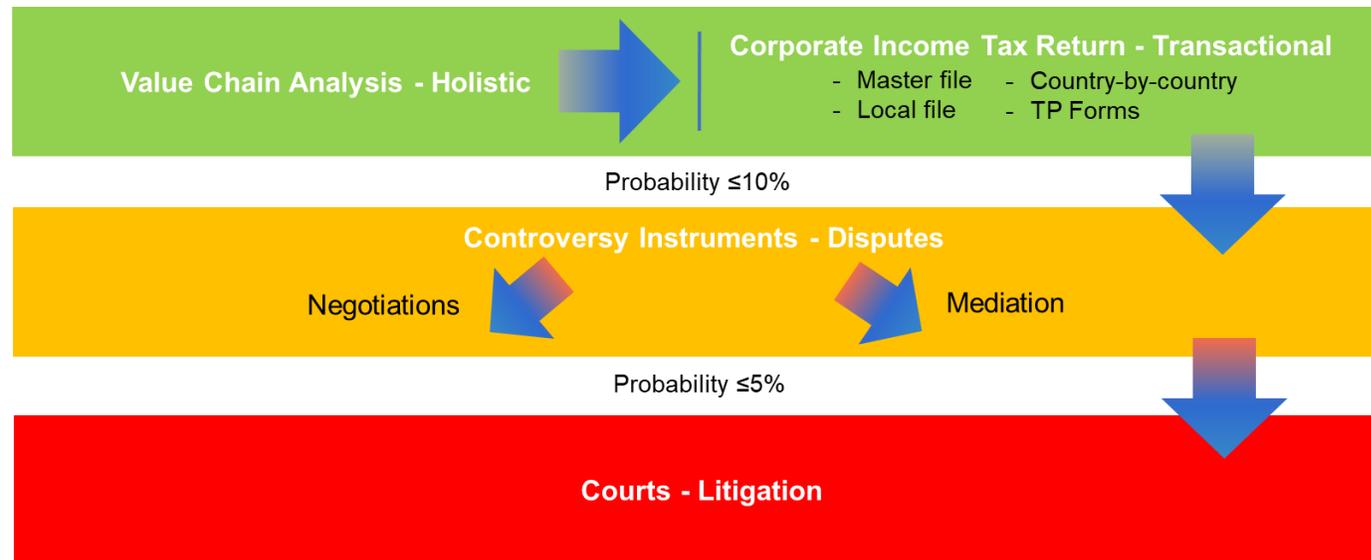
→ What will be your Global TP risk mitigation strategy?

B. Dispute avoidance / resolution toolbox



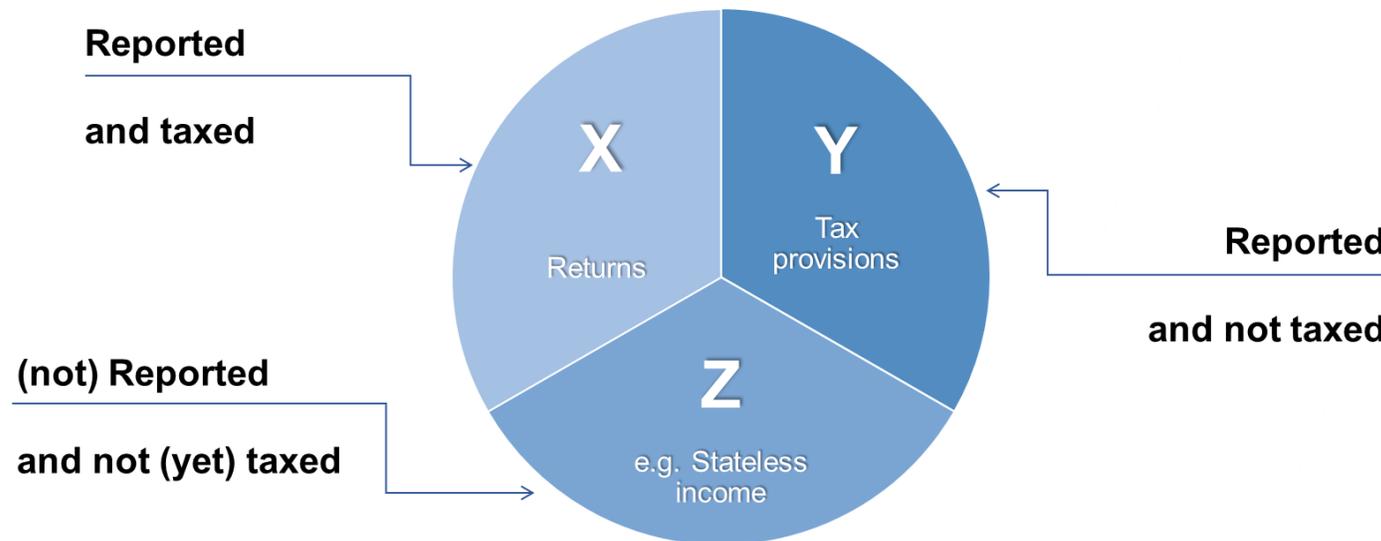
Controversy management instruments – A value chain perspective (2)

In the post-BEPS world, is it wise to choose a transactional approach to dispute avoidance versus a bundled entity approach?

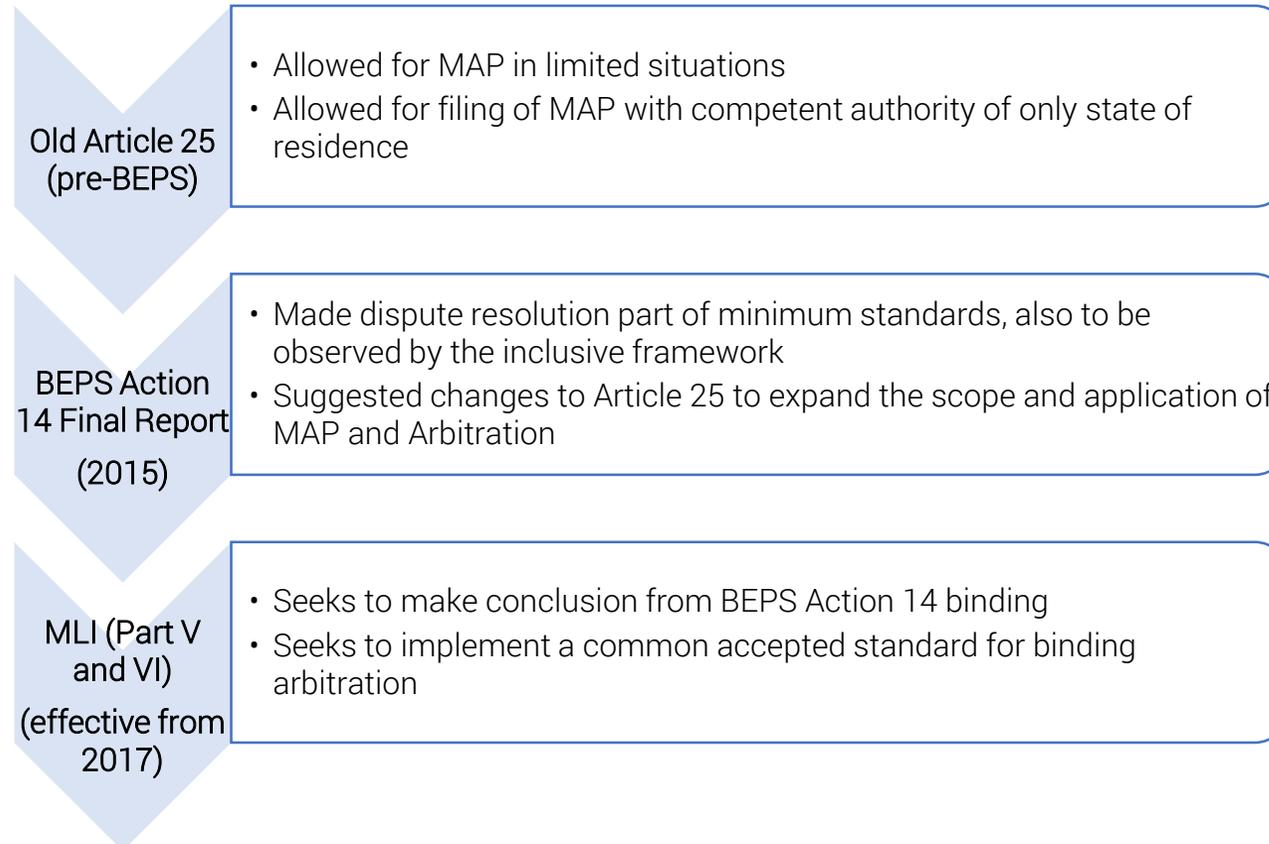


Benefits of a proactive attitude towards dispute management

Procter and Gamble has obtained APAs in over 17 countries, most of which are bilateral by providing extensive detailed information backed by financials which has helped them reduce their tax provisioning from USD 4 billion to USD 500 million, which allows them to improve the quality of their earnings

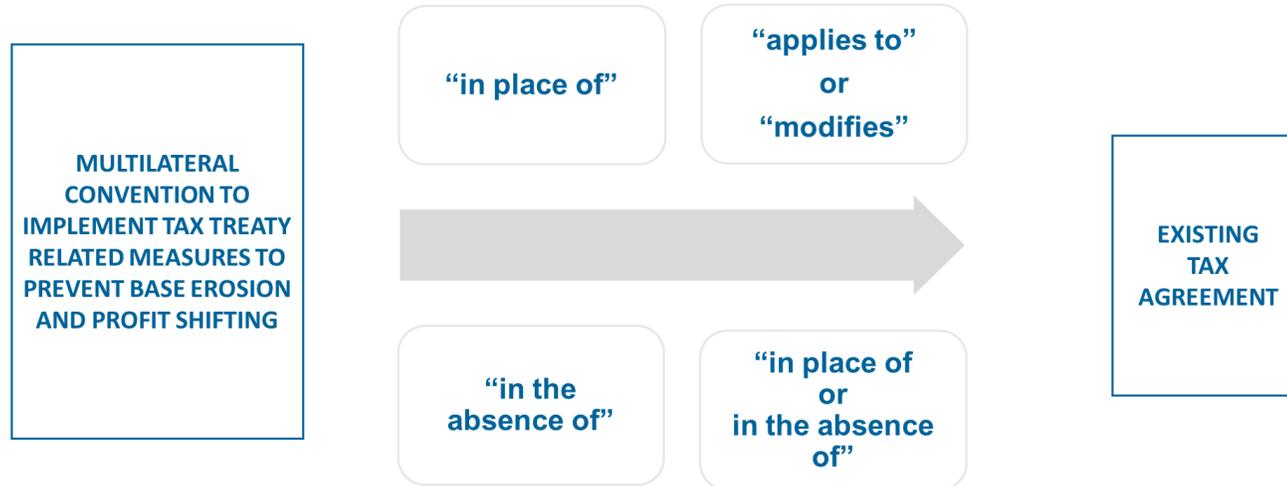


Timeline of Evolution of International Instruments for dispute management



Post-BEPS outlook towards MAP – Key Highlights

Application through the MLI



MLI seeks to implement MAP as a part of BEPS minimum standards. Thus, all clauses in Article 16 and 17 under Part V (Improving Dispute Resolution) apply “in place of” or “in absence of” existing treaty provisions.

This makes these provisions applicable to all Covered Tax Agreements.

Post-BEPS outlook towards MAP – Key Highlights

Minimum standards for authorities proper MAP conduct

Three general objectives of the minimum standard:

- Countries should ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner
 - E.g.: Include Article 9(2) in tax treaties
- Countries should ensure that administrative processes promote the prevention and timely resolution of treaty-related disputes
 - E.g.: Implement bilateral programs
- Countries should ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 can access the mutual agreement procedure
 - E.g.: Set procedure for multilateral MAP

Post-BEPS outlook towards MAP – Key Highlights

Minimum standards for authorities proper MAP conduct (2)

In addition to this, countries, part of the inclusive framework are preparing and publishing their MAP profiles with the OECD providing details on the four main categories envisaged by BEPS Action 14:

- Preventing Disputes
- Availability and access to MAP
- Resolution of MAP Cases
- Implementation of MAP Agreements

Additionally, members of the inclusive framework have also agreed to have their compliance with the minimum standard reviewed and monitored by their peers.

The peer review process is conducted in two stages. Stage 1 assesses countries against the terms of reference of the minimum standard according to an agreed schedule of review. Stage 2 focuses on monitoring the follow-up of any recommendations resulting from jurisdictions' stage 1 peer review report.

As of now, stage 1 peer review has been completed for 13 countries and will be completed by the end of 2018 for more than 50% of the countries part of the inclusive framework.

Post-BEPS outlook towards MAP – Key Highlights

Other Features



- Provides access to competent authorities of either contracting State
- The minimum time period for filing an application is three years from the date of notification of taxation, which is to be interpreted in the “most beneficial” manner to the taxpayer
- Countries to reach bilateral agreement within 24 months of filing
- Simultaneous domestic court and MAP proceeding
- Provides an option for mandatory binding arbitration, to which 25 of the members of the inclusive framework have committed to



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- Through an earlier mutual agreement procedure, in order to end litigation for previous years, it was agreed that the division of income between USA and India will be done as if there were to exist a PE. The Revenue department wanted to use this as a justification to conclude that the activities in India constitute a PE.
- The MAP procedure and agreement is no doubt relevant but cannot be determinative or the primary basis to decide whether the assessee had PE in India. Whether or not PE exists is a matter of law and fact and there has to be determination of the said issue on merits. It is always open to the competent authorities of the two countries to enter into an agreement for avoidance of double taxation and bring a litigation/dispute to an end. A concession on point of law, is not binding for other assessment years or a different assessee.



- The taxpayer decided, in 2005, to close down a factory in Denmark. All of its employees were dismissed and the factory's machinery was sold to a third party. This resulted in the Danish tax authorities (SKAT), in 2011, increasing the taxpayer's taxable income for 2005 by approximately DKK 500 million.
- This decision was appealed by the taxpayer in 2012 and the appeal was still pending in 2014 when the taxpayer decided to apply for a MAP resolution.
- SKAT contested taxpayers' access to MAP on grounds that the application was not submitted within the required three year time period. For this purpose, SKAT stated that since the taxpayer had not provided the information requested by SKAT within the three year period from the time of taxation, it shall be interpreted as non-filing of dispute within the provided timeframe.
- Danish High Court decided against the SKAT to state provision of insufficient information cannot be used as a reason to refuse MAP access.

Same intention appears to be reflected through OECD documents where not only the three year time period has to be read in the manner most favourable to the taxpayer, but also that it is discouraged to use lack of provision of information as a ground for refusing MAP access.

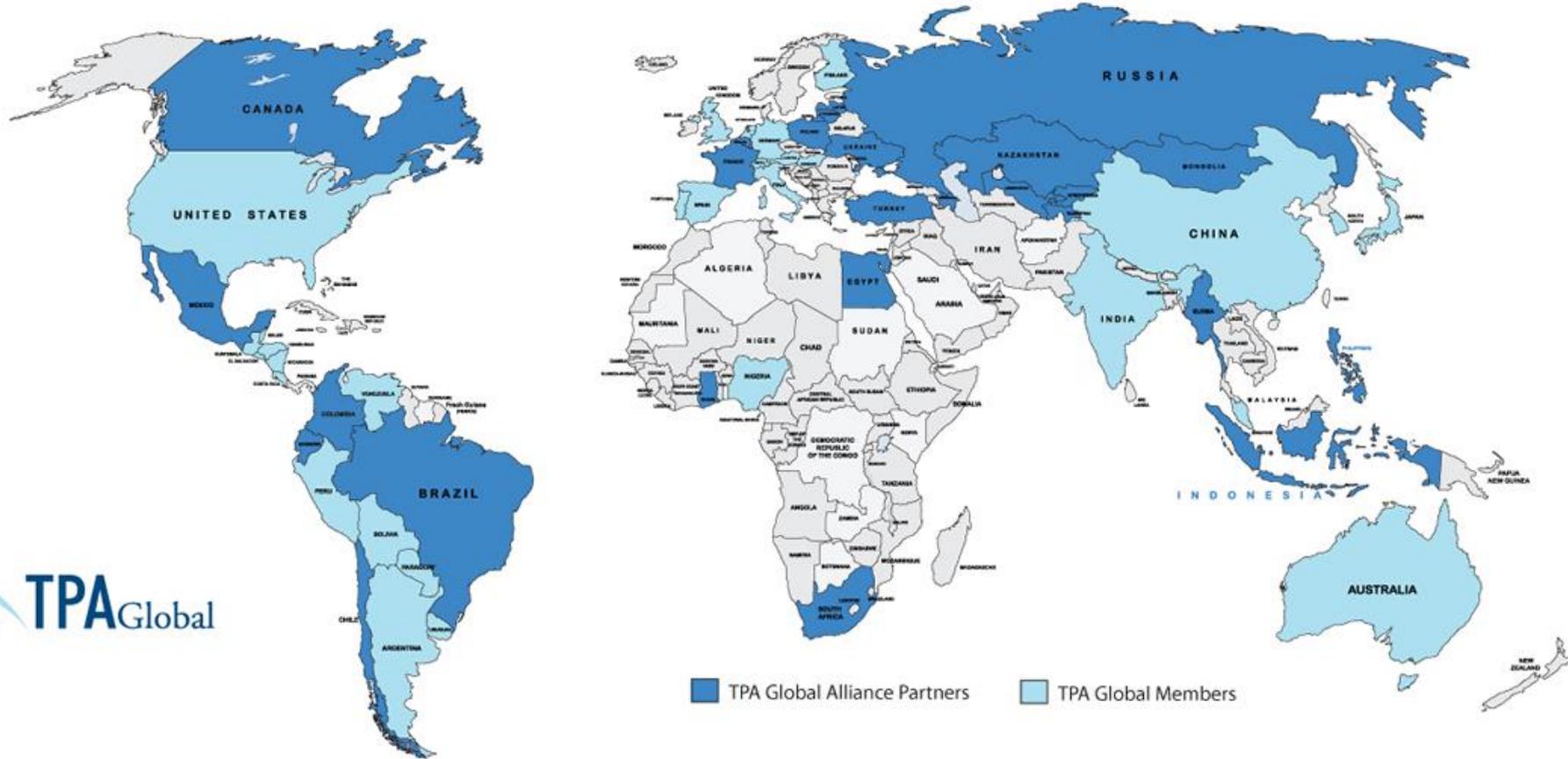
For more information on this topic and to create a dispute resolution plan for your company, please contact:



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