

The mutual agreement procedure and arbitration of double taxation disputes

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Abstract: It is in the interest of most states to eliminate double taxation (i.e. the payment of the same tax in two jurisdictions) of transnational commercial enterprises. Because such disputes involve, on the one hand, the state imposition of taxes, a right universally asserted by all states, and private entities on the other, taxation disputes between such parties are not, on their face, easily susceptible to arbitration. This article analyzes two dispute settlement procedures—the OECD First Model Tax Convention and a similar EU Convention—with the exclusive focus on disputes relating to the imposition of double taxation. It will look at the ways in which state roles may vary under these procedures from assisting in the negotiation process to taking a part similar to, but with important differences from, diplomatic protection on behalf of an affected enterprise. The article will examine the situations under which the settlement procedure is required and/or available, how the procedures are triggered, the obligations and parts played by the parties, the means by which the disputes are resolved (from negotiations to tribunals) and the limitations of the procedures. Are they “taxpayer friendly”? As a result the reader may draw comparisons between the two procedures. Finally, the article will look at the proposed OECD Arbitration Clause which is intended to be incorporated into Article 25 of the OECD Model Tax Convention as well as how these mechanisms relate and/or conflict with bilateral tax treaties and the GATS.

Key words: Double taxation, arbitration, OECD Model Tax Convention, dispute settlement, Mutual Agreement Procedure, creeping expropriation, bilateral tax treaties, GATS.

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Resumen: Hay un claro deseo de los Estados de eliminar la doble tributación, el pago de un mismo impuesto en dos jurisdicciones diferentes, de las empresas multinacionales. Lo anterior en la medida que, por un lado, la imposición tributaria es un derecho universalmente aceptado del Estado, por el otro, los diferendos en materia tributaria no son fácilmente susceptibles de arbitraje. Este artículo analiza dos procedimientos de solución de controversias, el de la OECD, primer modelo de tratado sobre impuestos, y un convenio similar de la UE específico en solución de controversias relativas a la doble imposición. Analiza los diferentes mecanismos que el Estado puede asumir durante el procedimiento, marcando las diferencias con la protección diplomática en favor de la empresa afectada. El artículo examina las situaciones bajo las cuales se necesita y/o existe un proceso de solución de controversias; como se inician los procedimientos, cuales las obligaciones y las partes, los medios como se resuelven los conflictos, desde la negociación hasta acudir a un tribunal y las limitaciones de los procedimientos. En conclusión, el lector podrá analizar y comparar los dos procesos. Finalmente, el artículo nos muestra la cláusula de arbitraje que se pretende incluir en el artículo 25 del modelo de la Convención sobre impuestos así como si estos mecanismos son incompatibles con los tratados bilaterales en materia de impuestos y con los GATS.

Palabras clave: Doble tributación, arbitraje, Convenio Modelo sobre impuestos de la OECD, solución de controversias, procedimientos de mutuo acuerdo, expropiación incrementada, tratados bilaterales de impuestos, GATS.

Introduction

The imposition of double taxation upon persons or enterprises involved in transnational commerce—including multinational corporate entities and their affiliates—may be viewed in some sense as producing the same results as anti-competitive practices. Notwithstanding the fact that States possess exclusive sovereign prerogative to impose direct taxation for activities undertaken on their territory, it is also true that the imposition of tax for the same activity with respect to affiliates located in two different jurisdictions has the effect of limiting trade and distorting the freedom of movement, establishment and ultimately of unhindered competition.¹ It is in the interest of most States to eliminate double taxation in favour of an increased globalised trade, which has the potential of reaping more benefits in the long run.² But given the sovereign nature of taxation, how is one to adjudicate a taxpayer's claim that he has been subject to double taxation? Equally, if a claims procedure were available, would it be the concerned States alone, or also

1 McDaniel, P., "The Pursuit of National Tax Policies in a Globalised Environment: Principal Paper: Trade and Taxation", in *Brooklyn Journal of International Law*, 26, 2001, p. 1621; Warren, A., "Income Tax Discrimination against International Commerce", in *Tax Law Review*, 54, 2001, p. 131.

2 McLure, C., "Globalisation, Tax Rules and National Sovereignty", in *Bulletin for International Fiscal Documentation*, 55, 2001, p. 328.

the aggrieved taxpayer, that would possess the requisite *locus standi* to bring such claims? Certainly, the existence of bilateral double taxation treaties provides some answers to these questions, as do the existence of judicial and/or administrative measures implemented in some States with a view to eliminating double taxation. Problems arise, however, where said domestic measures fail to settle all outstanding issues, as far as the taxpayer and the other State is concerned. For this reason, since the early 1970s, with the promulgation of the first Model Tax Convention adopted by the Organisation for Economic Cooperation and Development (OECD), an attempt has been made to incorporate an appropriate mechanism in bilateral tax treaties that would assist the aggrieved parties to endeavour to settle their disputes amicably without the need for the taxpayer to resort to the domestic courts of either State. A similar mechanism was also adopted in the context of the European Union³ and elsewhere around the world.⁴

These mechanisms envisaged a so-called mutual agreement procedure (MAP) the aim of which was to enable the States concerned to discuss double taxation disputes with a view to an agreed settlement. Although the taxpayer is not a party to such disputes because they concern States' sovereign authority to impose tax, the taxpayer may, nonetheless, play a significant role and can in fact initiate the process by lodging an individual petition. The MAP is subject to significant limitations, not least that it does not guarantee the settlement of all pertinent issues. As a result, the EU Arbitration Convention introduced an additional mechanism in respect of those cases where mutual agreement failed to resolve the dispute as a whole. This is described in the text of the Convention as an arbitral mechanism and one of the aims of this article is to analyse its legal nature with a view to discerning if it is indeed tantamount to regular arbitration, or whether it departs from the customary notion of arbitration. The same idea was picked up by the OECD, which is now too proposing the incorporation of an arbitration mechanism in its MAP clause of its Model Tax Convention. The existence of arbitration in these multilateral instruments is particularly important on account of the fact that said provisions are thereafter transposed in their member States' bilateral tax treaties and subsequently implemented and translated into domestic legislation.

This article deals exclusively with the dispute settlement procedures related to the two major multilateral double taxation instruments; the OECD and EU conventions. The question of whether international tax disputes generally between an investor and a State are amenable to commercial or foreign investor arbitration are not dealt in this article. In any event, the resolution of such disputes, if found to be arbitrable, should be sought in bilateral investment treaties (BITs) and the contracts entered into between the parties.⁵ The imposition of tax in such cases usually hides an element of creeping expropriation by the host State. Neither is this

3 See, *infra* note 33, 1990 EU Arbitration Convention and Protocols.

4 1971 Andean Double Taxation Treaty (Bolivia, Colombia, Ecuador, Chile, Peru); 1994 Caribbean Community Double Taxation Agreement; 1988 OECD-Council of Europe Convention on Mutual Assistance in Tax Matters; 1983 Nordic Double Taxation Convention.

5 See *Ecuador v Occidental Exploration & Production Co. (OEPIC)*, [2006] EWHC 345 (Comm).

article concerned with the settlement of tax disputes as a matter of tax policy,⁶ or the remedies available to taxpayers as these arise out of international tax treaties but settled by reference to domestic courts.⁷ Following the analysis of the two major multilateral instruments the author examines their relationship with the dispute settlement provisions of the General Agreement on Trade in Services (GATS), alongside a representative sample of bilateral tax treaties. The objective in this regard is to demonstrate whether or not conflicts exist and to what degree the two major instruments have found a place in the plethora of bilateral tax agreements.

The OECD Mutual Agreement Procedure

Unlike commercial arbitration where the parties are either private entities or a mixture of private and public entities, which seek to settle their disputes on the basis of a contractual undertaking, where the dispute involves a disagreement over double taxation, the status of the parties is fundamentally different. In such cases, although by nature one of the parties is a private entity and the other a public one, their dispute can never arise as a result of contract, but only through the unilateral imposition of a tax burden. Such disputes are not generally amenable to arbitration, either because the constitutional order of the taxing State views such disputes as lacking arbitrability,⁸ or because even if they were deemed arbitrable, the enforcement of the ensuing award would offend public policy. In this article we are concerned only with disputes pertinent to the imposition of double taxation and not tax disputes generally. Given that double taxation is treated in bilateral treaties with the aim of avoiding its imposition on nationals and business enterprises of the signatory States, an additional dimension arises. Whereas the disputing private entity may not typically be able to entertain its dispute other than before the national courts of the taxing State,⁹ the existence of bilateral double taxation treaties provides an opportunity for the State of the enterprise to intervene in the process and therefore play a significant role. This may vary from the assumption of a diplomatic protection role to assisting in a process of negotiation with a view to eventually settling the dispute. The more recent initiatives, as will become evident in later sections of this article, have gone a step further than the traditional mutual agreement procedure (MAP)¹⁰ that is typically associated with double taxation

6 See *Karrer v USA*, 152 F. Supp 66 (1957); *Bank of American v USA*, 680 F 2d 142 (1982); *Boulez v Commissioner*, 83 TC 584 (1984).

7 *Diggs v Shultz*, 470 F 2d 461 (DC Cir. 1972), cert. denied, 411 U.S. 931 (1973).

8 Art II.1 and V (2)(a) of the 1958 New York Convention, infra note 67. See *Scherk v Alberto-Culver*, 417 U.S. 506 (1974) and *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, where the contemporary position in developing countries is that non-arbitrability is the exception and the parties may even submit to arbitration disputes relating to anti-trust violations, but can only do so with respect to the contractual elements of such violations.

9 Or by means of written objections directed to the relevant tax authorities. See *OECD Commentary on Article 25*, para. 6, p. 300.

10 Avery-Jones, J. et al, "The Legal Nature of the Mutual Agreement Procedure under the OECD Model Convention-I", in *British Tax Review*, 22, 1979, p. 333; Avery-Jones, J. et al, "The Legal Nature

disputes, and have introduced an additional arbitration procedure as part of the MAP. Article 25 of the OECD's Model Tax Convention is instructive of this procedure.

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

The legal nature of the MAP procedure under Article 25 does not seem to reflect the traditional notion of diplomatic protection, particularly because the latter seldom arose as a result of contract or treaty, whereas the MAP can only arise out of a treaty obligation.¹¹ Equally, diplomatic protection generally arises because the private entity concerned is not recognised as possessing a sufficient degree of international legal personality as to enable him to compete against a State before an international judicial or arbitral forum. In the present instance, the MAP surfaces on account of the bilateral tax treaties and, moreover, the private entities involved in the dispute may initiate other judicial proceedings—although where a mutual agreement has been adopted and the taxpayer has accepted it, he may not subsequently pursue the settled points before a judicial

of the Mutual Agreement Procedure under the OECD Model Convention-II", in *British Tax Review*, 23, , 1980, p. 13.

¹¹ See Brownlie, I., *Principles of Public International Law*, Oxford, Oxford University Press, 2003, pp. 391-392.

forum. However, the MAP itself excludes the active participation— or at least one that would produce legal effects —of the private parties and upon submission of the dispute to this procedure, the matter will only be examined and potentially resolved between the State authorities themselves. In this sense, therefore, the MAP significantly resembles the process of diplomatic protection but through a contemporary lense, in the sense that the dispute is not between the private entity and a State, but primarily an inter-State one because it refers to the delimitation of sovereignties. Nonetheless, the Commentary is adamant that where the procedure is brought before the joint commissions, taxpayers must be afforded certain essential guarantees: a) the right to make representations in writing or orally, either in person or through a representative, and; b) the right to be assisted by counsel.¹² It is fair to argue, hence, that the MAP is a *sui generis* procedure involving an aspect of diplomatic representation.¹³ It is also evident that the application of the MAP encompasses situations in which the private entity is not necessarily a national of the two States involved in the double taxation dispute. This is possible where enterprise X is incorporated in country A, but is currently resident in country B and its income generated from activities in country B are also taxed in country C, which is where it conducts associated business. In this case, the dispute may arise on account of income taxation imposed in both B and C, but not country A.

Unlike well-known international human rights procedures (remedies), or diplomatic protection generally, where the rule of exhaustion of national remedies is of paramount importance,¹⁴ no such restriction exists with regard to the MAP.¹⁵ Although in practice the MAP is initiated on the basis of alleged double taxation violations, there is no impediment in the OECD Tax Convention for the triggering of the procedure in other circumstances relating to a violation of any terms of the Convention.¹⁶ Unlike diplomatic protection which is initiated at the inter-State level —although it is true that this is done with the very strong urging of the private party, which is always apprised of every detail of the negotiating or other process— the MAP is triggered by the aggrieved private party. The trigger mechanism of the MAP does not require that the taxpayer wait until the alleged

12 OECD Commentary, supra note 9, paras. 42-43, p. 309. There is no requirement, however, of disclosure to the taxpayer, which confirms the lack of effective *locus standi* of the taxpayer in the procedure.

13 The OECD Commentary notes that on account of para. 4 of Art. 25, the competent authorities may communicate with each other directly without the need to establish in each case diplomatic channels. This will be achieved through “joint commissions” through an oral exchange of opinions. Id, para. 4, p. 300.

14 Brownlie, supra note 11, pp. 472-481; Amerasinghe, C., *Local Remedies in International Law*, Cambridge, Grotius Publications, 1990.

15 In actual fact, the taxpayer need not exhaust the domestic remedies of either State. See OECD Commentary, supra note 9, para. 20, p. 304.

16 Id, paras. 8-9, 11, pp. 301-302. Art 25 enables the competent authorities to resolve transfer-pricing disputes not only with respect to juridical double taxation, but also economic double taxation, particularly those resulting from the inclusion of profits of associated enterprises under Art 9(1) of the Model Tax Convention.

double taxation or violation has been charged against, or notified to him before he is able to commence the MAP. All that he is required to demonstrate is that the actions of one or both of the contracting parties resulted in the imposition of inappropriate double taxation. Moreover, the taxpayer may trigger the MAP if he demonstrates under the same circumstances that said actions run the risk of future double taxation, which although not present at the relevant triggering instance, appear, nonetheless, “as a risk which is not merely possible but probable”.¹⁷ This is not wholly progressive in comparison to other international procedures in which non-State entities are involved. For example, petitions addressed to international human rights bodies must concern an “actual” violation and the same is true with regard to foreign investment infringements, even where this is viewed as “creeping expropriation”.¹⁸ On the contrary, it is not unusual in commercial arbitration for one party to allege that as a result of the actions of the defendant its contractual rights are susceptible to harm in the future. In the sphere of double taxation, there exists an additional reason as to why the probability of future harm is subject to the MAP; given that taxes are imposed annually, the actions of a tax authority in the beginning of a tax year will produce effects only at the end of the tax year. Hence, the parties should possess ample time to prepare for the eventuality of double taxation where this is evident from the actions of the executive at any particular time. The only other requirements for the submission of the dispute to the MAP are that the application be addressed to the competent authority of the taxpayer’s State of residence –unless Article 24(1) is applicable– and all objections must be presented within three years of the first notification¹⁹ of the action which gives rise to taxation in violation of the Convention.²⁰

Equally, unlike other commercial disputes or human rights infringements, where the aggrieved party can clearly identify a violator or infringing entity, in double taxation disputes the aggrieved private entity simply wants to challenge payment of the same tax in two different jurisdictions. As a result, it is not seeking to pay tax in one particular jurisdiction to the detriment of the other; this is of no concern to it. Had there not existed a MAP or equivalent procedure, the taxpayer may well have had to argue his case before all of the States that taxed him. This would tend to turn into a vicious cycle, where the courts of one State cannot pass judgment on the same taxation imposed by the authorities of another State. Such disputes can only

17 OECD Commentary, id, para. 12, p. 302. The Commentary also explains that such actions encompass all acts or decisions, whether of a legislative or regulatory nature, and whether of a general or individual application, having as their direct and necessary consequence the charging of tax against the complainant contrary to the provisions of the Convention.

18 Weston, B., “Constructive Takings under International Law: A Modest Foray into the Problem of Creeping Expropriation”, *Virginia Journal of International Law*, 16, 1975, p. 103; see also, *Middle East Cement Shipping and Handling Co SA v Egypt*, 7 *ICSID Reports*, p. 173.

19 The general principle is that the three-year time limit as the date of the first notification should be interpreted in “the way most favourable to the taxpayer”. OECD Commentary, supra note 9, para. 18, p. 304.

20 Id, para. 13, pp. 302-303. No special form is specified in the Convention, but contracting State parties are free to prescribe one in their domestic legislation.

be resolved by reference to double taxation treaties, while the most efficient manner for resolving disputes therein is by mutual agreement of the relevant States. From a practical perspective, however, what this means is that there is no reason why the taxpayer cannot lodge his MAP submission with *any* of the tax authorities concerned in his grievance. This requires an enabling provision in bilateral tax treaties,²¹ however, in the absence of which the taxpayer may only turn to his country of residence.

As has already been explained, it is the taxpayer that triggers the MAP. Where the complaint concerns actions taken by the taxpayer's State of residence, and such complaints are *prima facie* justified, the competent authority must satisfy the taxpayer and grant him relief. If, however, it appears to the competent authority that the complaint relates to measures taken in whole or in part in the other State, it is obliged in accordance with Article 25(2) to set in motion the MAP. While the MAP is viewed in the OECD Convention as an over-arching procedure, it is not perceived as exclusive. This means that it may run alongside litigation or other appropriate dispute settlement mechanisms. If litigation is indeed pending, the competent authority of the State of residence should not wait for the final adjudication, but must clearly pronounce whether it considers the complaint eligible for the MAP. If the competent authority decides that the MAP is inappropriate in relation to a particular dispute, it must decide if it is itself able to reach a satisfactory solution, or whether the complaint must be submitted to the competent authority of the other contracting State. The Commentary is unambiguous that MAP applications lodged by taxpayers should not be rejected without good reason.²² Where a court in the State of residence of the taxpayer has had the opportunity to pass a final judgment on a claim, the taxpayer may still wish to pursue a particular claim—or the claim as a whole—under the MAP. The text of Article 25 makes no mention to such a possibility, but it does not exclude it either. The OECD Commentary suggests that the appropriate solution is to be found in the domestic law of the State of residence. Hence, in some States the separation of powers doctrine stipulates that final court judgments cannot be overridden by the executive authority, while in others this is not the case.²³ While there would be no grounds for rejecting a request by a taxpayer that he be allowed to defer acceptance of the solution agreed upon as a result of the MAP until the court had delivered its judgment in the pending suit, it is also normal for the State concerned to desire avoidance of conflicting results.²⁴ Hence, where multiple proceedings have been initiated but a MAP agreement has been reached between the concerned States, in order for such an agreement to produce any legal effects for the taxpayer, the latter must formally accept it and withdraw those points in his suits that were settled in the context of the mutual agreement.²⁵

Finally, there is the issue of scope and obligation on the part of the contracting entities when initiating the MAP as a result of a taxpayer complaint.

21 *Id.*, para. 16, p. 303, wherein the Commentary provides a model clause.

22 *Id.*, para. 23, p. 305.

23 *Id.*, para. 24, p. 305.

24 *Id.*, para. 31, p. 307.

25 *Id.*

Paragraph 2 of Article 25 certainly entails a duty to negotiate, but as far as reaching an agreement is concerned, no such duty exists and at best the relevant States are obliged to “merely use their best endeavours to achieve a result”.²⁶ This is not to say that the two States cannot agree on a more far-reaching commitment, either as a contractual provision in their bilateral tax treaty, or through an *ad hoc* arrangement, but there is no obligation to do so. In any event, the parties will have recourse to their national tax laws and regulations, the terms of their bilateral tax treaties and as a subsidiary means they may have regard to considerations of equity with a view to satisfying the taxpayer.²⁷

The Mutual Agreement Procedure under the EU Arbitration Convention

Despite the fact that EU law leaves the authority to impose direct taxation to its member States, the powers retained by said States “must nevertheless be exercised consistently with Community law”.²⁸ Where, therefore, the tax laws and policies of member States culminate in cases of discrimination with regard to the right of movement or establishment, the matter comes within the purview of the EC Commission and the European Court of Justice (ECJ). The ECJ has as a result required that particular provisions contained in double taxation treaties and their corresponding implementing laws be amended to conform to EU law.²⁹ In every other respect, matters relating to the regulation and elimination of double taxation fall within the exclusive jurisdiction of the States who are free to enter into bilateral and multilateral tax agreements.³⁰ The aforementioned analysis applies with respect to tax treaties concluded among members of the European Union. In respect of bilateral treaties adopted with third States, Article 307 of the EC Treaty, which covers conflicts between EC law and bilateral tax treaties between EC member States and third States concluded before the entry into force for the member State of the EC Treaty, provides that the rights and obligations arising out of such agreements shall not be affected by the EC Treaty. However, where there is a conflict between EC law and a treaty with a third State, Article 307(2) provides that member States are to take all appropriate steps to eliminate such conflicts. As a result, the member State concerned must renegotiate the conflicting provisions and take all possible steps to resolve the issue, “including,

²⁶ Id, paras. 25–26, pp. 305–06.

²⁷ Id, para. 27, p. 306.

²⁸ *Finanzamt Köln-Altstadt v Schmacker*, Case C-279/93, [1995] ECR I-225, point 21; *G H E J Wielockx v Inspecteur der Directen Belastinge*, Case C-80/94, [1995] ECR I-2493, point 16.

²⁹ See *F W L de Groot v Staatssecretaris van Financien*, Case C-385/00, [2002] ECR I-11819, points 84,94,99 et seq; *Oee Van den Grinten NV v Inland Revenue Commissioner*, Case C-58/01, [2003] ECR I-9809, point 54; *Metallgesellschaft Ltd and Others, Hoechst AG and Hoechst (UK) Ltd v Commissioners of Inland Revenue and HM Attorney-General*, [2001] ECR I-1727, point 71 et seq.

³⁰ *Mr and Mrs Robert Gilly v Directeur des Services Fiscaux du Bas-Rhin*, Case C-336, [1998] ECR I-2793, point 24; *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt*, Case C-307/97, [1999] ECR I-6161, point 56.

where necessary, denouncing the bilateral treaty”.³¹ There are practical and legal problems associated with such a solution, not least that the third State is under no obligation to renegotiate the terms of the treaty, nor obviously absolve the EC member State from its responsibilities thereof.³² It goes without saying that bilateral tax treaties involving either solely member States, or a third State, violate Community law where they are incompatible with it.

The EC Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises was adopted in 1990 (EU Arbitration Convention),³³ prior to the Treaty on European Union (TEU).³⁴ Three subsequent Protocols were added; two of these aimed at accommodating new accession States,³⁵ while the other amended the expiration date of the Convention.³⁶ Double taxation of income between enterprises established in the EU runs foul of the Union’s objective to establish an internal market where freedom of movement and capital is the key component. Moreover, there was a need to set up a process by which the taxpayer –essentially multinational enterprises³⁷– would be able to challenge the imposition of double taxation. As a result, a draft Directive was attempted in 1976³⁸ in order to establish an arbitration mechanism that would deal with the elimination of double taxation arising from transfer profit adjustments of enterprises.³⁹ The outcome of that process only materialised with the 1990 Convention. The mutual agreement procedure established under the EU Arbitration Convention resembles to a large degree the one encountered in Article 25 of the OECD Model Tax Convention. For one thing, the aggrieved taxpayer does not waive his remedial rights under domestic law by triggering the MAP mechanism and the case must be presented within three years from the first notification of action which results or is likely

31 EC Commission, EC Law and Tax Treaties, TAXUD E1/FR, Doc (05) 2306 (9 June 2005), p. 8.

32 See Art 30(4) of the 1969 Vienna Convention on the Law of Treaties.

33 90/436/EEC, OJ L 225 (20 Aug. 1990).

34 The Arbitration Convention is based on Art. 293 of the EC Treaty. Its inter-governmental form under this provision means that the ECJ does not possess jurisdiction to interpret or enforce it. Neither can the EC Commission initiate any action under Art. 226 EC against a member State for failure to comply. See Ben Terra, Peter Wattel, *European Tax Law*, Kluwer, The Hague, 2001, p. 407.

35 Convention of 21 December 1995 on the Accession of Austria, Finland and Sweden to the EU Arbitration Convention, OJ C 26 (31 January 1996); Convention on the Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the EU Arbitration Convention, OJ C 160/1 (30 June 2005).

36 Protocol amending the Convention of 23 July 1990 on the Elimination of Double Taxation in connection with the Adjustment of Profits of Associated Enterprises, OJ C 202/1 (16 July 1999).

37 Legal form is not important and the Convention is applicable to individuals, as long as the particular entity is an enterprise: Hinnekens, L., “The European Tax Arbitration Convention and its Legal Framework II”, in *British Tax Review* 272, 39, 1996, p. 277.

38 Proposal for a Council Directive on the Elimination of Double Taxation in Connection with the Adjustment of Transfer of Profits Between Associated Enterprises (Arbitration Procedure), COM/76/61FINAL, OJ C 301/4 (21 December 1976).

39 Luc de Hert, A New Impetus for the Arbitration Convention? (2005) 2 *Intl Transfer Pricing Journal* 50, pp 50-51.

to result in double taxation.⁴⁰ Equally, the requirement that the complaint be “well-founded” in order for the competent authority to entertain it⁴¹ does not seem to be any different from Article 25(2) of the OECD Convention, where the complaint must be “justified”.⁴² In such cases, where the competent authority is itself unable to arrive at a satisfactory solution, it “shall endeavour to resolve the case by mutual agreement” with the competent authority with a view to eliminating double taxation.⁴³ Up to this point, even the wording in the two instruments seems to be identical. Article 7(1) of the EU Convention goes on to say that if the competent authorities fail to reach an appropriate agreement within two years of the date on which the case was first submitted to one of them, they shall set up an advisory commission charged with delivering its opinion on the elimination of the double taxation in question. While enterprises may have recourse to the remedies available under domestic law, where they have submitted their claim to a court or tribunal, the term of two years shall be computed from the date on which the judgment of the final court of appeal was given.⁴⁴ Where the domestic law of a member State does not permit the executive to override final judicial decisions, mutual agreement is prohibited under the relevant circumstances, unless the associated enterprise of that State has allowed the time provided for appeal to expire, or has withdrawn any such appeal before a decision has been delivered.⁴⁵ Equally, the associated enterprise may consent to a waiver of the relevant time limits, so that it can proceed to the MAP phase.⁴⁶

Overall, the MAP procedure of the EU Convention aims at speedy resolution under certain terms by the introduction of time limits, which, however, the parties can mutually waive. This has not generally been achieved and taxpayers have suffered significant delays in the resolution of their cases.⁴⁷ The significant difference,

40 EU Arbitration Convention, *supra* note 9, Art. 6(1).

41 *Id.*, Art. 6(2).

42 Besides the possibility of rejecting a MAP application on the basis that it is not well-founded, an application may also be dismissed where legal or administrative proceedings have resulted in a final ruling that by actions giving rise to an adjustment of transfers of profits one of the enterprises concerned is liable to a serious penalty. See Art. 8, *id.*

43 *Id.*, Art. 6(2).

44 *Id.*, Art. 7(1).

45 *Id.*, Art. 7(3). Although France and the UK were the only contracting States that made a formal declaration that this provision applies therein, a survey demonstrated that the majority of States would apply the same rules in practice. The EU Joint Transfer Pricing Forum (JTPF) noted in this respect that Art. 7(3) is self-executing and does not require a formal declaration in order to be applicable. EU JTPF, Report on the Activities of the EU Joint Transfer Pricing Forum in the Field of Business Taxation (October 2002- December 2003), p. 10. As a result, a Code of Conduct for the Effective Implementation of the EU Arbitration Convention was adopted in 2006, with a view to clearly ascertaining the starting point of the two-year period in Art. 7(1) and the starting point of the three-year period in Art. 6(1) of the Convention. OJ C 176/8 (28 July 2006).

46 *Id.*, EU Arbitration Convention, Art. 7(4).

47 A questionnaire conducted in late 2004 by the JTPF revealed that at total number of 107 cases were pending as of 31 December 2004. In 65 of these cases the time already spent on mutual agreement procedures exceeded two years and in 24 cases the taxpayer had to wait for more than five years.

nonetheless, between the EU and OECD Conventions does not lie in the procedures followed. Rather, whereas the OECD Convention views the MAP as the last resort of treaty-based resolution, its EU counterpart introduces a hybrid arbitration procedure, which itself is supplementary to the MAP and other envisaged procedures. Following in the steps of the EU Convention, the OECD has made proposals suggesting that an arbitration procedure should be incorporated in Article 25 of its Convention, with the aim of helping the parties to reach a final resolution, particularly since in both instruments the MAP is not designed to produce a final and binding decision. Let us, therefore, examine in detail the arbitral proceedings envisaged in the two instruments.

The Arbitration of Double Taxation in the EU Arbitration Convention

We have already stated that in accordance with Article 7(1) of the EU Convention, where the competent authorities fail to reach agreement, the case may be submitted to an advisory commission, provided that two years have elapsed from the time of first submission to the competent authority, or from the date of a final appeal judgment. The question is, however, whether the legal nature of the advisory commission is in fact for all legal purposes tantamount to an arbitral tribunal and whether its decision is binding upon the parties concerned. The fundamental premise of arbitration is a written agreement entered into by the parties with the aim of submitting an existing or future dispute to arbitration.⁴⁸ As we have explained, in the double taxation context the taxpayer does not have a claim against anyone of the countries that has taxed him until such time as the competent authorities of the relevant States have agreed among themselves as to which one imposed inappropriate taxation. Although a particular tax rule may be clear, this is not an issue which the taxpayer can dispute, particularly since the two authorities may decide to impose the right amount of tax without strict adherence to the relevant rules, as long as by doing so they eliminate the possibility of double taxation, which is after all the aim of the relevant mechanisms. The taxpayer is not contractually bound with any of the States that tax him, this being a unilateral act on the basis of public law. While, however, the taxpayer is excluded from the EU Convention's "arbitral" process, the competent authorities of the States concerned contractually agree to submit double taxation claims to arbitration on the basis of Article 7(1) of the EU Convention itself, which in this sense serves the same purpose as an arbitration clause in a private-law contract. The parties to this arbitration clause are the concerned States and no further submission agreement is required (*compromis*) before the advisory commission assumes responsibility. The fact that the parties to the arbitration clause are States in no way invalidates

See EU JTPF, Report on the Re-Entry into Force of the Arbitration Convention, Doc. JTPF/019. REV5/2004/EN (30 May 2005).

48 Art. 7(2), UNCITRAL Model Arbitration Law; Art II.2, 1958 New York Convention. See Redfern, A.M et al, *Law and Practice of International Commercial Arbitration*, London, Sweet and Maxwell, 2004, pp. 159-163.

the application of an arbitral process, given that States are quite capable of settling their disputes before arbitral *fora*.⁴⁹ It is also perfectly normal for the parties in the present instance to submit to arbitration disputes that arose out of a claim invoked by private entities. This is so because the imposition of tax is always a matter falling within the exclusive sovereign authority of the executive and in any event the competent authorities are representing the legal interests of the taxpayer. Moreover, the advisory commission constitutes a species of institutional, rather than *ad hoc*, arbitration.

An issue worthy of consideration is whether the arbitral tribunal (advisory commission) possesses the requisite jurisdiction and competence to hear the dispute. The tribunal's jurisdiction would have been seriously compromised where the Convention to contain a provision to the effect that contracting States were under no obligation to recognise or enforce the tribunal's award, or where a State's domestic laws forbid it to arbitrate tax disputes before an international body. With a minor exception this is not the case and hence the tribunal's competence is not compromised. A further criterion is that of the independence of the arbitrators⁵⁰ and the ability of the parties to choose said persons.⁵¹ There is no doubt that under Article 9 of the EU Convention some members of the advisory commission must be independent, but not all. In addition to the Chairman, Article 9(1) states that the commission shall consist of two or one (following agreement to reduce the number) representatives of each competent authority concerned, as well as "an even number of independent persons of standing to be appointed by mutual agreement from the list of persons referred to in paragraph 4⁵² or, in the absence of agreement, by the drawing of lots by the competent authorities concerned". Equally, although it is not expressly stipulated whether the Chairman himself should be independent, Article 9(5) states that he "must possess the qualifications required for appointment to the highest judicial offices in his country or be a jurisconsult of recognised competence. The provision is somewhat ambiguous because although a judge is by nature independent, a recognised jurisconsult need not necessarily be so. However, the provision must be interpreted as implying that the Chairman is required to act in an independent capacity. Besides the Chairman and the independent persons referred to in Article 9, the appointment of representatives of each competent authority dilutes the

49 For example, Iran-US Claims Tribunal. See Aldrich, G., *The Jurisprudence of the Iran-United States Claims Tribunal: An Analysis of the Decisions of the Tribunal*, Oxford, Oxford University Press, 1996; see also the Eritrea-Yemen Arbitration. Permanent Court of Arbitration (eds.), *The Eritrea-Yemen Awards: 1998 and 1999*, The Hague, T M Asser Publications, 2005.

50 Art. 10, UNCITRAL Rules provide for a challenge where justifiable doubts as to the arbitrator's impartiality and independence arise. Equally, Art. 11(1) of the International Chamber of Commerce's (ICC) Rules provide for a challenge in cases of lack of impartiality or otherwise.

51 See Redfern and Hunter, *supra* note 48, pp. 238-240.

52 Paragraph 4 of Art. 9 states that the list of independent persons of standing shall consist of all the independent persons nominated by the contracting States. For this purpose, each contracting State shall nominate five persons, which must be nationals of a contracting State and resident within the territory where the Convention applies. Such persons must be competent and independent.

legal nature of the “arbitration” process. By their very nature such persons are not independent. Had they not been destined to play an active role in the proceedings, their presence therein would not have had an impact on the legal nature of the process as an arbitral one. However, Article 11(2) of the EU Convention makes it clear that the advisory commission shall adopt its opinion by a simple majority of its members, including its non-independent members. As a result, the procedure automatically loses its arbitral characteristics. One could argue that the choice of arbitrators in commercial arbitration entails a certain degree of dependence, given that the parties choose their arbitrators because they perceive that the particular person will either favour their case or perceive his appointment as a form of dependency. However, in all of these cases of party appointments, it is required that the arbitrators remain impartial and independent in the performance of their functions. If they are found to have violated this rule they are susceptible to disqualification.⁵³ Necessarily, therefore, the fact remains that independent persons are under no relationship of dependency or intimacy with the choosing party and are not answerable or liable to them in respect of their decision.⁵⁴ This does not seem to be the case at all with government representatives sitting in judgment in the advisory commission.

Once an arbitration clause is triggered and the tribunal is established, the parties would do well to adhere to the tribunal’s procedure, otherwise they face the risk of an award that is final and binding and which may turn out to be detrimental to their personal interests on account of their lack of interest and active participation in the arbitral proceedings. Besides, therefore, the private risks involved, the arbitral tribunal cannot impose measures or enforce interlocutory decisions and injunctions against a party, except through the courts of the *lex arbitri*.⁵⁵ In the case of the EU Arbitration Convention the situation is different. The enterprises and the competent authorities of the contracting States concerned *shall* give effect “to any request made by the advisory commission to provide information, evidence or documents”.⁵⁶ This obligation is not incumbent on the competent authorities where: a) this would be at variance with their domestic law or normal administrative practices; b) the requested information is not obtainable under its domestic law or administrative practices, or; c) to supply such information which would disclose any trade, business, industrial or professional secret or trade process or information would be contrary to public policy.⁵⁷ Equally, the associated enterprises are obliged to appear before the commission if it so requests them.⁵⁸ We have already alluded to the fact that the associated enterprises (taxpayers) are

53 Art. 10(1), UNCITRAL Rules.

54 Redfern, A. et al., *supra* note 48, pp. 238-239.

55 See ss. 42-44 of the 1996 English Arbitration Act, which provide that the courts can assist the tribunal by issuing freezing orders, search orders and orders securing the attendance of witnesses, among others.

56 Art. 10(1), EU Arbitration Convention.

57 *Id.*

58 Art. 10(2), *id.*

not third parties for the purposes of arbitration. Instead, given that their claim is taken over –or indeed represented– by a competent authority, they constitute an integral part of the arbitration process but with no independent right of *locus standi*. Their direct participation in the arbitral proceedings encompasses also the right to “provide any information, evidence or documents which seem to them likely to be of use to the advisory commission in reaching a decision. Equally, each of the associated enterprises may, at their request, appear or be represented before the commission.”⁵⁹

One of the fundamental attributes of arbitral proceedings is the element of confidentiality and secrecy.⁶⁰ Indeed, some parties choose arbitration over litigation because they do not wish to expose trade secrets or practices to their competitors.⁶¹ Confidentiality and secrecy are instrumental in the workings of the advisory commission. Moreover, the contracting States are under an obligation to adopt legislation penalising any breach of secrecy obligations.⁶² Similarly, the relative speed of arbitral proceedings and the rendering of awards within a set time frame makes arbitration all that more attractive. The same attributes are found in the EU Arbitration Convention, which requires that opinions are to be adopted by simple majority of its members and within no more than six months from the date on which the matter was referred to the commission.⁶³

Finally, there is the question of the relative value of the award rendered. Final arbitral awards that comply with the *lex arbitri* are binding on the parties.⁶⁴ An award may be binding and yet not susceptible to enforcement in certain countries on account of those countries’ public policy legislation. This is not *initially* the case with the opinions delivered by the advisory commission. Given that the “arbitration” procedure in the EU Arbitration Convention constitutes an integral part of the MAP, the onus is on the concerned States to reach a mutual solution. Hence, although the opinion of the commission is not initially binding on the parties, they must, “acting by common consent”, take a decision that will eliminate double taxation within six months from the date on which the advisory commission delivered its opinion.⁶⁵ In doing so, the competent authorities are free to adopt a common decision which deviates from the commission’s advisory opinion. However, if they fail to reach agreement, “they shall be obliged to act in accordance with that opinion”.⁶⁶

59 Art. 10(1) and (2).

60 Art. 21, ICC Rules; Art 25(4), UNCITRAL Arbitration Rules. For the classical position that confidentiality is inherent to arbitral proceedings, see *Dolling-Baker v Merrett*, [1991] 2 All ER 890 and *Hasnab Insurance Co of Israel v Mew*, [1993] 2 Lloyd’s Reports 243. The contemporary stance suggests a dichotomy between the inherent privacy of arbitral hearings and the need to limit confidentiality over the entirety of the arbitral process, particularly where a genuine public interest is at stake. See *Eso Australia Resources Ltd v The Honourable Sidney James Plowman*, (1995) 183 CLR 10

61 Redfern, A. et al, supra note 48, p. 164.

62 Art. 9(6), EU Arbitration Convention.

63 Art. 11(1) and (2), id.

64 Art. 32(2), UNCITRAL Rules; Art. 28(6), ICC Rules.

65 Art. 12(1), EU Arbitration Convention.

66 Id.

Hence, the commission's opinion shares the same legal characteristics with those found in an arbitral award. As regards enforcement of the commission's opinion, given that its binding character is premised on a treaty undertaking, there is no question that it is enforceable between the contracting States. The Convention does not specify whether an enforcement procedure similar to that envisaged in the 1958 New York Convention is required.⁶⁷ The answer to this question must be negative, because on the basis of the EU Arbitration Convention the State parties assume obligations which they cannot extinguish by reference to contrary provisions in their domestic laws.⁶⁸ Hence, the State parties to the Article 7 procedure cannot argue that the commission's opinion is contrary to their public policy, etc, not only on account of the legal impediments already identified, but also because their representatives took part in the commission's deliberations that delivered the opinion.

Given that publication of proceedings and opinions is dependent on the consent of the competent authorities and the taxpayer, information is hard to come by. As far as the author is aware, only one case has been published, proceeding from the MAP to arbitration; the *Electrolux* case.⁶⁹ The dispute involved taxation of the company's affiliates in both France and Italy. The MAP was initiated in 1997 but the inability to settle all the issues within the required two-year period led to the setting up of the arbitration procedure. This did not take place until 2000, at which time the French competent authority approached its Italian counterpart and even then it was only in March 2001 that a preparatory meeting was held.⁷⁰ The process was further set back by an additional year and a half because the parties could not agree on the composition of the advisory commission, nor come up with a Chairman. Although Article 11(1) of the Arbitration Convention stipulates that the commission must deliver its opinion within 6 months from the date on which the matter was referred to it, there is nothing in the Convention confirming whether this timeframe includes also the time spent to appoint the members of the commission. The commission argued that this period commenced from the moment it was fully composed.⁷¹ It is evident that if this issue is not comprehensively addressed, whether by an additional Protocol or otherwise, the foreseeable delays will render the arbitration procedure unworkable in practice.⁷² The bulk of material also meant that the commission had to improvise and set up a secretariat, for which the Convention is

67 1958 New York Convention on the Enforcement of International Arbitral Awards, 330 UNTS 538.

68 Art 27 of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, clearly points out that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

69 Only fragments of the case and the proceedings are known, as these have been excerpted in EU JTPF, Draft Summary Record of the Third Meeting of the EU JTPF, Doc JTPF/007/2003/EN (4 June 2003).

70 *Id.*, para. 12, p. 2.

71 *Id.*, para. 20, p. 3.

72 *Id.*, para. 15, pp. 2-3.

silent.⁷³ The commission asked the competent authorities if they had initiated the MAP with other States and, if so, to have access to the relevant communications. Again, this is a matter not anticipated in the Convention.⁷⁴ The corporation did not attend the commission's deliberations,⁷⁵ which is worrying given that the rationale for the arbitration procedure was to engage the taxpayer by giving him a chance to present his case. Although the commission was not unanimous in its opinion, the competent authorities did not reach agreement on an alternative solution, rendering thus the commission's ruling binding.

As a conclusion to this section, it is fair to argue that the procedure established under Article 7 of the EU Arbitration Convention is very close to a normal arbitral process, but for the fact that some of the members of the commission lack the credential of independence. It is not, however, wholly removed from the general legal parameters of commercial or foreign investment arbitration and it is evident that the authorities of the EU did make an effort to accommodate genuine arbitral proceedings, while paying due heed to the desire of States to safeguard their sovereign interests in the tax sphere. The arbitration procedure, however, in no way matches the speed and efficiency of regular arbitral proceedings and the member States must think hard on ways to remedy such inefficiencies if they wish taxpayers to have faith in it.

The Proposed OECD Arbitration Clause

The OECD mutual agreement procedure has not yielded the results expected by its creators. This does not mean that it has proven to be wholly unsuccessful. Just like its EU counterpart, there are situations constantly where the MAP does not settle all the relevant issues, with the result that some remain outstanding. The OECD's Committee of Fiscal Affairs has been cognisant of this problem and its proposal reflects influences derived from the EU Arbitration Convention.⁷⁶ The Committee took into consideration the concerns of business participants who feared that the person or corporation making the arbitration request would have to waive its rights to domestic remedies. The Committee, thus, amended its previous report in order to remove this possibility.⁷⁷ The draft clause, which will be incorporated in Article 25, as paragraph 5 ff, reads as follows:

- a) Where, under paragraph 1, a person has presented a case to the competent authority of a contracting State on the basis that the actions of one or both of the contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and;

⁷³ Id, para. 16, p. 3.

⁷⁴ Id, paras. 18-19, p 3.

⁷⁵ Id, para. 21, p 3.

⁷⁶ See OECD Committee on Fiscal Affairs, *Improving the Resolution of Tax Treaty Disputes* (February 2007).

⁷⁷ Id, p. 3.

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other contracting State.

Any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the contracting States shall by mutual agreement settle the mode of application of this paragraph.⁷⁸

Just like the EU Arbitration Convention, the proposed clause intends to incorporate the arbitral process within the MAP and make it an extension of the MAP. Thus, under the paragraph, the resolution of the case continues to be reached through the mutual agreement procedure, whilst the resolution of the particular outstanding issue which is preventing agreement in the case, is to be handled through the arbitration process. This distinguishes the process from commercial or foreign investment arbitration where the jurisdiction of the arbitral tribunal extends to resolving the entire case.⁷⁹ Equally, the decisions of the proposed OECD arbitral panel do not have an independent life outside the MAP and must be endorsed by those parties that possess *locus standi*; i.e. the concerned competent authorities. The legal nature of OECD arbitration remains unclear. Were the parties to adopt the EU arbitration model as prescribed in the 1990 Convention, there would not exist any legal impediments for enforcing the award (or opinion in the case of the EU advisory commission), as already explained. If, however, the OECD Model Tax Convention incorporates a mechanism that resembles commercial arbitration, without encompassing therein State-appointed representatives alongside independent members, there is no doubt that recognition and enforcement problems will arise.⁸⁰ The Commentary is wise to warn that constitutional concerns may prevent certain States from permitting tax disputes to be settled through arbitration, among others. It suggests, therefore, that the proposed paragraph only be included in the Convention where each State concludes that the process is capable of effective implementation.⁸¹ If this not a clear endorsement of the EU model, then taxpayers and competent authorities alike face the real risk of lengthy proceedings without any certainty that the eventual award will be enforced in the relevant States.

⁷⁸ Id, p. 5.

⁷⁹ Id, p. 46.

⁸⁰ Arts. 5, 7 and 8 of the Sample Mutual Agreement on Arbitration (Annex I to the OECD's 2007 Report, id), suggests that it is the competent authorities that may appoint arbitrators. Id, p. 13. States parties, however, are free to opt for a different model whereby some or all of the arbitral panel members are independent.

⁸¹ Id.

A request for arbitration must be submitted by the taxpayer, who should not, however, assume that this is an automatic process. Although the taxpayer may consider that not all issues have been resolved, the competent authorities may deem otherwise. A request is, therefore, a practical necessity. Equally, the person who presented the case may wish to wait beyond the end of the two-year period following the mutual agreement process in order to allow the competent authorities more time to resolve the case. Moreover, it is also possible that the claimant may not wish to pursue the case any further.⁸² For all these reasons, the request for arbitration must be lodged in writing. There is no procedure under which the taxpayer can challenge the decision of the competent authorities that all issues have been resolved and that taxation has been imposed in accordance with the Convention.⁸³ In such cases (i.e. where the competent authorities of the concerned States are in agreement that all the dispute double taxation issues have been resolved), the taxpayer cannot submit the alleged outstanding issues to arbitration. Such decisions, however, the aim of which is to bar the taxpayer from the arbitral process, must be decided mutually between the concerned States and cannot be taken unilaterally.⁸⁴

Generally, there would be no need for the taxpayer to exhaust domestic legal remedies. Thus, legal remedies would simply be suspended pending the outcome of the MAP, which would involve the arbitration of outstanding issues. The agreement would then have to be presented to the taxpayer who would have to choose to accept it, or reject it in order to pursue domestic legal remedies. In the former case he would have to agree to waive all domestic legal remedies.⁸⁵ In those States that require tax disputes to be submitted to arbitration following exhaustion of domestic remedies, these States may consider the approach of waiving one's right to pursue such remedies before arbitration can take place.⁸⁶ This would certainly involve a series of legislative amendments, some of which may even be constitutional in nature. In any event, it is clear that the taxpayer cannot pursue domestic legal remedies simultaneously with the MAP, as this has the potential of producing conflicting judgments.⁸⁷ The arbitration award would be binding with respect to the specific issues submitted to the tribunal, but would create no future precedent in respect of similar cases.⁸⁸ The Commentary suggests that some States may favour the EU model, whereby the competent authorities may well desire to depart from the arbitral award, provided they reach an alternative mutual agreement. Where this is the case they may accordingly do so in their bilateral tax treaties.⁸⁹

⁸² *Id.*, p. 8.

⁸³ Art 3 of the Sample Mutual Agreement on Arbitration excludes the taxpayer from the drafting of the Terms of Reference to the arbitrators.

⁸⁴ *Id.*

⁸⁵ *Id.*, p. 10.

⁸⁶ *Id.*, pp. 10-11.

⁸⁷ *Id.*, p. 9.

⁸⁸ *Id.*, p. 11.

⁸⁹ *Id.*, pp. 11-12.

The proposed OECD double taxation arbitration process is far more State-centric than its EU counterpart. This is not surprising, given the disparity of OECD member States as compared to the membership of the EU. Again, serious questions have to be asked as to whether this procedure can be efficient in terms of the panel members and the time constraints of the private entities involved. Proposals for a “streamlined arbitration process”⁹⁰ would certainly eliminate some of the aforementioned obstacles.

Relation and Conflicts with Bilateral Tax Treaties and the General Agreement on Trade in Services

The mutual agreement procedure, and its associated arbitration process (where applicable), may give rise to jurisdictional bodies or treaties whose aim is to resolve double taxation disputes. Article XXII(3) of the General Agreement on Trade in Services (GATS) stipulates that a dispute as to the application of Article XVII of GATS, and relating to the national treatment rule, is not susceptible to resolution under the dispute settlement mechanism provided by Articles XXII and XXIII of GATS, where the disputed measure “falls within the scope of an international agreement between them relating to the avoidance of double taxation”. This provision obviously refers to bilateral double taxation conventions. Where there is disagreement over whether a measure falls within the scope of such a bilateral agreement, paragraph 3 provides that either State involved in the dispute may bring the matter to the Council on Trade in Services, which in turn shall refer it further to binding arbitration. A footnote to paragraph 3, however, contains an important exception according to which if a dispute relates to an international agreement “which exist[s] at the time of the entry into force” of the GATS, the matter may not be brought to the GATS Council unless both States agree.⁹¹

There exists a significant degree of ambiguity regarding the “double taxation scope” of a dispute and the possibility of conflict under a MAP obligation is very likely, particularly since there is no requirement that both concerned States must agree for the GATS Council to decide whether a dispute falls within its jurisdiction. It is no accident, therefore, that a good number of bilateral tax treaties have incorporated an explicit provision that prevents all double taxation disputes from falling within the scope of GATS and its Council. Article 1(3)

(a), for example, of the Japan-USA Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, states clearly that:

⁹⁰ Art. 6, Sample Mutual Agreement, id, p. 14.

⁹¹ See OECD Commentary on Art. 25, supra note 9, paras. 44.2-44.7, pp. 310-311.

a.a) Any question arising as to the interpretation or application of this Convention and, in particular, whether a measure is within the scope of this Convention, shall be determined exclusively in accordance with the provisions of Article 25 of this Convention [i.e. the MAP provision]; and

a.b) The provisions of Article XVII of the General Agreement on Trade in Services shall not apply to a measure unless the competent authorities agree that the measure is not within the scope of Article 24 of this Convention [i.e. non-discrimination provision].⁹²

Other bilateral tax treaties adopted by member States of the EU, even with non-EU member States do not feature of a provision of this type.⁹³ In every other respect, double tax treaties of both types reflect almost completely the mutual agreement procedure contained in the OECD Model Tax Convention, although in some cases the provision is far more elaborate.

⁹² The same is true with all other bilateral tax treaties adopted by the USA. See Art. 1(3)(a) of the USA-Belgium Bilateral Tax Treaty.

⁹³ E.g. UK-France Double Tax Convention (consolidated version); 1994 UK-Estonia Double Tax Convention; 1977 UK-Egypt Double Tax Convention; 2003 UK-Australia Double Tax Convention.

Conclusion

One may reasonably ask whether the mechanisms analysed in this article are taxpayer friendly, efficient, deliver justice and if they are put to use by the relevant actors. No doubt, the EU Arbitration Convention is a cornerstone document in the context of the EU and equally the OECD Model Tax Convention has had a significant impact on the drafting of dispute settlement clauses in bilateral tax treaties. The mutual agreement procedure has been prescribed therein and whatever its merits it provides an alternative to aggrieved taxpayers other than recourse to national courts. As far as the arbitration procedure in the EU Arbitration Convention is concerned, the scarcity of information due to the secrecy clause in the Convention makes any assessment of the procedure very hard indeed. The only case that became publicly available, and then only in the form of minor excerpts, highlighted the fact that it is not taxpayer friendly, given that the taxpayer declined to partake in the process. It is clear that this type of “arbitration” does not fit the classic arbitration model, particularly since at least some of the members are not independent on account of their appointment by the parties with a view to acting in their interests. As a result, it is taken for granted that such persons lack the impartiality and independence required for appointment as arbitrators. One is well aware that double taxation disputes are cumbersome and require the cooperation of the competent authorities of the concerned States. Equally, the aggrieved taxpayer cannot become an active party to the dispute because such matters essentially concern a sovereign element of States and only indirectly involve the individual taxpayer. Nonetheless, given that the aim of such procedures is to enhance the role of the taxpayer where a dispute arises and to engage him in the process, it is inconceivable that the time frames for reaching a settlement can take as much as five years. This creates a significant degree of legal uncertainty and perhaps induces taxpayers to settle with the competent authority in order to avoid wasting time and money. Were bilateral tax treaties and the EU Arbitration Convention to prescribe shorter deadlines for establishing arbitral tribunals (or the advisory commission in the case of the EU), taxpayers would be given a good incentive to partake in the overall process. Equally, if the advisory commission is given only six months to come up with a reasoned opinion, it makes sense to argue that the mutual agreement procedure should itself not exceed the same amount of time to either settle the dispute or decide to submit outstanding issues to arbitration. A mechanism that takes a year to a year and a half to conclude a case would certainly make itself appealing and would in any event produce sufficient jurisprudence with respect to future cases, such that would render the resolution of future disputes much easier. At present, the arbitration procedure is at an embryonic stage and lacks experience. It will be interesting to see if the proposed arbitration mechanism of the OECD Convention will become operational and if

so, how many States are going to be willing to incorporate it in their bilateral tax treaties. One can only suspect that if this materialises, particularly if approved by the USA, it will provide an impetus to settle outside the courts. In any event, it will be a welcome step towards the speedier resolution of tax disputes. Hopefully, also, whether by a clause in bilateral tax treaties or by amendment to the existing multilateral conventions, member States will agree to render the relevant awards public so that a sound body of jurisprudence can aid other cases in the future.