Ramos Muñoz, D. (2014). A game of snakes and ladders - Tax Arbitration in an International and EU setting. In: Sarmiento, D. ; Jiménez-Valladolid de L'Hotellerie-Fallois, D. *Litigating EU Tax Law in International, National and Non-EU National Courts.* Amsterdam: International Bureau of Fiscal Documentation, pp. 109-207.

Part Three: EU Tax Law in WTO and International Arbitration Litigation

Chapter 7: A Game of Snakes and Ladders – Tax Arbitration in an International and EU Setting

7.1. Introduction

There is an apocryphal anecdote of Mahatma Ghandi, where he was asked what he thought about Western civilization, and he answered: “Yes, I think that would be a very good idea”. One is tempted to give the same answer when asked about tax arbitration. For it would seem to be conventional wisdom that arbitration has not yet reached the tax field, and that any response to the question would have the contours of a hypothetical and speculative exercise.

To be entirely fair with states and tax authorities, they have engaged in an honest effort to expand the availability of dispute resolution mechanisms beyond ordinary administrative or judicial processes. Isolated examples of such mechanisms were already present in the 1990s and 2000s in the Germany-Sweden and Germany-Austria treaties;[2]as well as in the European “Arbitration” Convention (which should be more accurately called the “Transfer Pricing Convention”).[3]The idea seems, however, to have received a new impetus with the inclusion of an “arbitral” mechanism in the Model Tax Conventions of the Organisation for Economic Co-operation and Development (OECD)[4]and the United Nations (UN),[5]as well as in the modified bilateral tax treaties between the United States, on one side, and Belgium,[6]Germany,[7]Canada[8]and France,[9]on the other. With the “arbitral” solution being supported by the international community, and actively promoted as part of their tax treaty policy by the United States and Germany (at least), “tax arbitration” seems a reality; so, are the inverted commas, and the skepticism they convey, justified at all?

The answer is that even if “tax arbitration”, as an issue, deserves more than a condescending smile and a frown of disbelief, even if the effort made by states and international organizations is undeniable, whether such efforts have been enough to establish full-blown arbitral proceedings is still a legitimate question, and still an inconvenient one.

It is still legitimate because states, even when accepting the introduction of arbitration as a positive move, have fought hard to give themselves extra room for manoeuvre. In that regard, the abovementioned instruments include important variations that clearly depart from “conventional” commercial or investment arbitration.

It is inconvenient because such variations have an influence on the aspects that are considered essential to classify a dispute resolution process as an “arbitration” mechanism. Rather than being a matter of semantics, concluding that

2. *See* Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital, 24 August 2000, Austria-Federal Republic of Germany, 2001 WTD 36-15; Convention for the Avoidance of Double Taxation on Income and Capital, Sweden-Federal Republic of Germany, 1995. Other treaties provided for the possibility of resorting to arbitration if the tax authorities consented to it. Article 25(5) of the former 1991 treaty between the United States and Germany stipulated that “If a disagreement cannot be resolved by the competent authorities it may, if both competent authorities agree, be submitted for arbitration” (thereby requiring ad hoc consent in each case, rather than establishing an automatic right to begin arbitral proceedings). *See* William W. Park, *Income Tax Treaty Arbitration* , George Mason Law Review, vol. 10 (2002), at 803-804 and 811-812.
3. Article 7 of the European Convention 90/463/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises. The Prolongation Protocol entered into force on 1 November 2004, 3 months after all Member States had ratified it. Article 3.2 states that it took effect from 1 January 2000 and thus provided for a retroactive application of the Arbitration Convention.
4. Art. 25(5) OECD Model Tax Convention on Income and on Capital, 2010.
5. Art. 25 (alternative B), para. 5 United Nations Model Double Taxation Convention between Developed and Developing Countries, New York, 2011.
6. Convention between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, 27 Nov. 2006 (hereinafter “US-Belgium Convention”).
7. Protocol Amending the Convention between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, 1 June 2006 (hereinafter “US-Germany Protocol”).
8. Protocol Amending the Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital, 21 Sept. 2007 (hereinafter “US-Canada Protocol”).
9. Protocol Amending the Convention between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, 13 Jan. 2009 (hereinafter “US-France Protocol”).

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something is “arbitration” or not makes an enormous difference in the protection dispensed by the domestic, and international, legal order.

Section 7.2. of the present study will address such concerns, whereas sections 7.3. and 7.4. will deal more directly with all the aspects of a dispute’s resolution, from the moment of the consent to the moment of the decision and its enforcement. The focus will be on examining whether the differences between such mechanisms and those contemplated for commercial and investment arbitration justify a conceptual distinction between “arbitration” and “tax dispute resolution”, and whether the distinction, in turn, implies a need for such differences.

Therefore, the present study has a two-pronged approach. On the one hand, it goes into the detail of how the different mechanisms would work in practice, with special emphasis on those that most closely resemble arbitration, and anticipates possible issues, drawing from the experience of commercial and investment arbitration. On the other hand, it does not lose sight of the fact that all the answers are qualified by the acceptance of the procedures as “arbitral” mechanisms. Since this is a big if, the study is practical and existential in equal measure, and it reflects the difficulties of the scholar and practitioner in reconciling the states’ conflicting needs.

7.2. Tax arbitration’s lack of pedigree: Sheer snobbery or legitimate concern?

One can hardly think about a more incongruous combination with “arbitration” than “tax law”. In itself, the reference to “tax arbitration” can look more like a provocation than the definition of a subject matter of analysis, hence the question mark added in the title to this section.

The question is whether a question mark is justified. Granted, there are important legal hurdles to overcome in order to resolve tax matters in arbitration, but regardless of technicalities and academic discussion, the truth is that tax disputes (especially international ones) where the decision is taken by a body of experts that does not form part of the regular system of administration of justice is a reality.[10]Thus, as a first contention, this chapter describes the existing examples where, despite preconceptions, tax issues are decided through “arbitration” (*see* section 7.2.1.). It is only then, with a more reflective perspective, that we go beyond such preconceptions, and explore the legitimate objections to lend credibility to those examples as manifestations of “tax arbitration” (*see* section 7.2.2.).

7.2.1. “Tax issues are not arbitrated”

This could be the obvious response from an arbitral practitioner who is used to combining in his practice, disputes on commercial contracts, construction, corporate, investment or even intellectual property and securities. Tax does not normally come under the radar. But this focus on more developed disciplines is deceptive, because tax *is* the subject matter of discussion in commercial and investment disputes (*see* section 7.2.1.1.), and even in “pure” tax disputes (*see* section 7.2.1.2.).

7.2.1.1. Tax issues in commercial and investment arbitration disputes

If the question guiding the present preliminary stage is whether “tax” is “arbitrated”, or “subject to arbitration”, the answer is that it depends on what we consider as “subjecting tax to arbitration” and this, in turn, depends on the distinction between an arbitration “case”, and an arbitration “issue”, or an issue subject to arbitration. If we settle for the latter, any arbitration practitioner will tell us that tax issues are, indeed, subject to arbitration (and hotly contested).[11]In commercial arbitration cases, tax and, more particularly, tax liabilities are a normal source of analysis in cooperation agreements, joint ventures and, especially, M&A cases, where the size of the liability can clearly influence the price-per-share paid in the transaction;[12]hence, the care placed by experts when accomplishing their due diligence, and the potential source of conflict if expert reports disagree (as they are bound to do when commissioned by both buyer and seller).

Commercial arbitration disputes, of course, cannot alter the nature and amount of the tax liability of the taxpayer vis-à-vis the tax authorities; not only as a matter of the authorities’ mandates under public law, but as a matter of the scope of

10. Professor Park likens the situation to that of the parishioner who, when asked by a priest whether he believes in infant baptism, answers “Believe, Father? I have seen it done”. William W. Park, *Arbitrability and Tax* in Loukas Mistelis & Stavros Breoulakis (eds.), *Arbitrability: International and Comparative Perspectives* , Kluwer Law International, 2008, at 179.
11. *See* the special number of the *Revue de l’Arbitrage* 2 (2001), and the contributions by Pascal Ancel, *Arbitrage et ordre public fiscal* , at 269-289; Maurice Cozian, *Arbitrage et incidences fiscales des clauses de garantie de passif* , at 289-299; Ibrahim Fadlallah, *Arbitrage international et litiges fiscaux* , at 299-311; Sébastien Manciaux, *Changement de législation fiscal et arbitrage international* , at 311. The latter is more focused on investment arbitration, but the other three focusing on commercial arbitration.
12. Maurice Cozian, *supra* n. 11 , at 289-299.

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the consent to arbitrate. Even if two parties have explicitly agreed on the amount of tax liability to be satisfied by each of them (for example, by means of an indemnity for tax amounts),[13]such agreements are not binding on the tax authorities, nor is the arbitration clause that may accompany them.

But if we move outside commercial arbitration disputes, it is not difficult to see that the subject matter of the dispute may not be the private party's tax liability, but the legitimacy of the tax itself. In investment arbitration disputes it has not been infrequent for defendant states to have passed tax measures in breach of some of the state's duties under the terms of an investment treaty, where it has committed itself to protect the investment transactions in its territory undertaken by nationals of the other contracting state. In such cases, where the subject matter of the treaty violation under the investor's claim is the state's taxation measures, one could argue that tax has ceased to be "an issue", and has become a "case". Examples of arbitration disputes where state taxation measures were subject to scrutiny under investment treaties, are abundant,[14]and will increase in importance as governments, rebuffed in expropriation cases, resort to more indirect measures, consisting of regulatory and tax changes.

7.2.1.2. Tax issues in tax disputes

Outside the commercial and investment arbitration circuit, tax issues are also discussed (and resolved) in out-of-court settings, in "proper" tax disputes. In such disputes it is not the incidence of the tax rule and the tax liability arising from it, that are discussed. It is rather the determination of the tax liability that constitutes the subject matter of the dispute.

In fact, it was arbitration that seemed to have support as the mechanism of resolving international tax disputes in the 1920s and 1930s, when arbitration provisions were included in treaties between Ireland and the United Kingdom (1926) or Czechoslovakia and Romania.[15]It was only in the 1960s when, after efforts to establish such mechanisms seemed to have stalled, the OECD gave them another push. On the understanding that member countries were not prepared to relinquish sovereignty as an arbitral mechanism requires, it did so by introducing into its Model Treaty the mutual agreement procedure (MAP) which, as its name indicates, consists of a negotiation procedure between the competent authorities (CAs). It was only later (in the 1980s) that mechanisms involving the opinion of a third party (rather than relying on negotiation only) were re-introduced in individual (i.e. not "Model") bilateral tax treaties (BTTs) as a result of the support given to them by countries such as Germany or the United States.[16]

Then, alternative dispute resolution mechanisms started to develop as an actual possibility, hailed not only by single states, but also by the community of nations with sophisticated tax systems, albeit through a restriction of the scope of the disputes from the generality of "cross-border taxation", or even "double taxation" cases, to the more specific field of transfer pricing disputes. The reason for this is that, in such disputes, given the complexity of industry (and services) processes, the methods for determining transfer prices between entities of a single group became an incredibly cumbersome issue and one which increasingly required the constructive engagement of both taxpayer and tax authorities. Moreover, even if the success and widespread use of the so-called advanced price agreements (APAs) is well-known, the contested nature of the problem, with minor adjustments resulting in a changes of millions in the monetary value of tax liabilities, and the involvement of several tax authorities with diverging interests, began to require the use of independent and impartial third parties in such "agreements", thereby turning the final outcome into something that, at first glance, resembled an arbitral mechanism.[17]The EU Arbitration Convention (which should be called the Transfer Pricing Convention) is a result of the acknowledgement by states of this necessity.[18]

It is only after such a long process that arbitration has been re-introduced as a more "general" mechanism of dispute resolution for all kinds of international tax disputes: first, in the Model Tax Convention of the OECD, in paragraph 5

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13. This type of clause has so far been the main focus of analysis by contribution on the subject of "tax and arbitration". *See* Maurice Cozian, *supra* n. 11 , at 289-299; Pascal Ancel, *supra* n. 11 , at 269-289.
14. They include *Tokios Tokeles v. Ukraine* ; *Plama Consortium v. Bulgaria* ; *Chevron Texaco v. Ecuador* ; *Pan American Energy v. Argentina* ; *Occidental v. Ecuador* ; *Nykomb Synergetics v. Latvia* ; *Goetz v. Burundi* ; *Feldman v. Burundi* ; *Duke Energy v. Peru* ; *Corn v. Mexico* ; *Continental Casualty v. Argentina* ; *Cargill v. Mexico* ; *Archer Daniels v. Mexico* ; *Amto LLc v. Ukraine* , and many others.
15. Czechoslovakia-Romania double taxation convention of 20 June 1934. A board was formed by the Fiscal Committee of the League of Nations.
16. *See* Sharon A. Reece, *Arbitration in Income Tax Treaties: 'To Be or Not To Be'* , Florida Journal of International Law, vol. 7 (1992) at 288 and 289, referring to the treaties between the United States and Germany, the United States and Mexico, and the United States and the Netherlands.
17. In the United States, for example, some famous transfer pricing disputes have been resolved by means of arbitral courts/boards/panels. *See* , for example, Stipulation for Resolution through Voluntary Binding Arbitration under Tax Rule 124, *Apple Computer Inc. v. Commissioner* , no. 21781-90 (T.C. 1993). In the case the arbitral board indicated that, applying the proper transfer prices between entities of the same group, an important amount of the taxable income/base had to be re-assigned to the United States, rather than Singapore. *See* William W. Park, *supra* n. 2 , at 824-825.
18. Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 90/463/EEC, OJ L225/10, 20.8.90.

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of article 25, which otherwise regulates the MAP,[19]and thereafter, by means of Protocols to the BTTs between the United States and Belgium,[20]the United States and Germany,[21]the United States and Canada,[22]the United States and France,[23]or the United States and Spain,[24]a number that is bound to increase as arbitration makes its way to the top of the US and German (as well as Austrian or Dutch) policy agenda vis-à-vis BTTs.[25]All these facts militate against the idea that arbitration and tax are mutually exclusive, and find no common ground, or do they?

7.2.2. "Tax arbitration is not arbitration"

One would be tempted to answer the above question with an unqualified "yes" answer, were it not for the fact that the re-discovered pro-arbitration zeal in some states masks a more complex reality, where states (and their tax authorities) wish to have the benefits of arbitration without giving up the privileges of their sovereign status. This leads us to answer with a cautious "it depends", and to elaborate on this idea by stating that it depends on what we understand for arbitration.

With it being such a developed field, one might be tempted to conclude that the idea of "arbitration", as that of "beauty", is in the eye of the beholder. Fortunately for us, academic treatises attempting to define the term tend to be fairly coincident on most of its features. First, arbitration constitutes an "*alternative*" dispute resolution mechanism, as opposed to the jurisdiction of normal courts. As opposed to courts, which are constituted, and remain in place to decide on a range of cases determined by abstract rules, arbitral tribunals are constituted for one specific dispute, and dissolved once the dispute has been resolved.[26]Second, arbitration is a "*private*" mechanism, which is selected and controlled by the parties to the dispute.[27]The arbitrators may be empowered to decide on the outcome of the dispute, and the procedure to be followed until a conclusion is reached, but such power stems from a voluntary act by the parties; an element that manifests itself in the ability of the parties to control the proceedings, provided they act together by agreement.[28]Such action by the parties has a clear goal: to resolve the dispute, which gives us the final characteristic of arbitration because, for the purpose of resolving the dispute, arbitrators are empowered to make a determination of the parties' rights and obligations that is "*final and binding*".

Greater insight will be gained, in order to classify alternative mechanisms for resolving tax disputes, if, besides defining what arbitration "is", we contrast this with what arbitration "is not". First of all, arbitration is *not* a mechanism relying on the decision of regular courts. Submitting a dispute to one of such courts may have some of the elements of arbitration such as "consent", but the "alternative" element is missing. Also, it is questionable whether and to what extent such a court can act as the parties' "private" court, and thereby be asked to consider not only the issues, but also the legal sources, indicated by the parties, and pursuant to the procedural rules agreed upon by them. Courts are typically not that malleable. Therefore examples of "voluntary jurisdiction", such as the submission of disputes to the International Court of Justice (ICJ) in the Germany-Sweden tax treaty,[29]or to the European Court of Justice, in the one between Germany and Austria,[30]cannot be considered examples of "arbitration".

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19. The reasons to include arbitration in tax treaties relate to the shortcomings of the MAP (lack of a requirement to achieve a solution, excessive duration, lack of transparency, and limited intervention by the taxpayer) and the evolution of the context of disputes and policy views (increase, in number and importance, of transfer pricing disputes, ratification of the European Convention in 1995, the evolution of the United States' position, and the inclusion of the issue in the Fiscal Affairs Committee of the OECD). *See* Adolfo J. Martín Jiménez, *Chapter V.2. Procedimiento Amistoso* , in Carmen Fernández (coord.) *Convenios Fiscales Internacionales y Fiscalidad de la UE* , CISS, 2012, at 6.2.
20. Convention between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, 27 Nov. 2006 (hereinafter "US-Belgium Convention").
21. Protocol Amending the Convention between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, 1 June 2006 (hereinafter "US-Germany Protocol").
22. Protocol Amending the Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital, 21 Sept. 2007 (hereinafter "US-Canada Protocol").
23. Protocol Amending the Convention between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, 13 Jan. 2009 (hereinafter "US-France Protocol").
24. Protocol Amending the Convention between the Government of the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, 14 Jan. 2013.
25. Arbitration has found its way into more improbable places, such as article 25(5) of the Spain-Switzerland treaty, added by the Protocol of 27 July 2011.
26. Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* , Kluwer Law International, 2003, at 4.
27. Id.
28. Id.
29. Article 41(5) of the German-Swedish tax treaty, which applied parts of the European Convention for the Peaceful Settlement of Disputes, such as chapters I (jurisdiction of the ICJ), or II (conciliation), but not III (arbitration). However, it provided that, instead of such proceedings, the parties could agree on a court of arbitration whose decision would be binding on them.
30. Art. 25(5) Germany-Austria double taxation convention.

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Nor can the examples of what is generically called “third-party determination” be considered to be arbitration. In the private arena, this encompasses situations where, for example, an expert is called to decide on a contentious issue of *fact* between the parties, such as the quality of goods in a commodities contract, or of the works performed (a matter typically decided by an engineer), under a construction contract.[31]Some complex contracts may stretch the idea, and provide for middle-of-the-road solutions, such as the so-called “adjudication” in construction contracts, where a person (or, more generally, a “board”) decides on the parties’ dispute, as a matter of expediency, a “dispute” that, given the lack of specificity of construction contracts in that regard, can be legal as well as factual.[32]

The description of the task entrusted to experts and adjudicators can well fit the description of some mechanisms of alternative resolution typical in tax cases, such as those designed for some types of factual issues (typical in disputes over prices), both under the domestic law of some states[33]or international, as the one contemplated under the EC Convention, which deals primarily with matters of *determination* of transfer prices, i.e. disputes of *fact*. [34]

Finally, arbitration is not one of the mechanisms that requires the parties’ agreement for a solution to be reached, nor does it sit in parallel with them. “Negotiation”, laudable as it is, only coins the process by which the parties involved reach an agreement. “Mediation”, also known as conciliation, refers to a system where a third party is involved in that process.[35]As much as a lot of expertise is needed, and the field has become increasingly sophisticated and specialized both according to the matter, and to the role played by the mediator/conciliator, the common ground remains the same: it is the parties’ agreement (or the acknowledgement of the failure to reach such agreement by the mediator/conciliator) that puts an end to the process, and has the legal value of a contract, rather than an arbitral decision.

With that in mind, it is difficult not to draw a parallel with the dispute resolution mechanism envisaged in the OECD Model Convention, and followed by the US-Germany, US-Belgium or US-Canada Protocols. The so-called arbitration is contemplated not as an autonomous mechanism, but rather as an appendix to the MAP between competent tax authorities, to the extent that it is regulated in an additional paragraph to the provision on MAP, and for *issues* where such MAP fails to result in an agreement (under the OECD Model the authorities can still resolve the case by mutual agreement, and it will be the specific issue that will be resolved in arbitration).[36]In addition to this, the emphasis on the parties’ control before, during and after the “arbitral” proceedings[37]is such that it can suggest an “enhanced” conciliation as much as a “diminished” arbitration. Finally, the effect of the decision rendered by the arbitral board will be that of an agreement (as if under the MAP) between the two CAs.[38]

Since the previous discussion could be dismissed as a matter of semantics, it is worth returning for a second to the initial statement that “arbitration” may be in the eye of the beholder. This association of ideas is not as casual as it may seem. Being a predominantly practical (as opposed to academic) discipline, “arbitration” can evoke in many practitioners not so much abstract concepts as an aesthetic canon, as to how a type of proceedings tends to run, and what issues tend to arise. As with the US judge who was asked to define “pornography”, an arbitral practitioner may shy away from defining

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31. Andrew Tweddale & Keren Tweddale, *Arbitration of Commercial Disputes* , Oxford University Press, 2005, at 10 et seq. *See also* Julian Lew, Loukas Mistelis & Stefan Kröll, *supra* n. 26 , at 10-12.
32. Andrew Tweddale & Keren Tweddale, *supra* n. 31 , at 15-17.
33. *See* IRS Rev. Proc. 2006-44 *Appeals Arbitration Program* , Internal Revenue Bulletin: 2006-44, 30 Oct. 2006; with regard to IRM 8.26.6 and 35.5.5.1-35.5.5.3; and also Announcement 2008-111 *Test of Procedures for Mediation and Arbitration for Offer in Compromise and Trust Fund Recovery Penalty Cases in Appeals* , Internal Revenue Bulletin: 2008-48, 1 Dec. 2008, available at http://www.irs.gov/Businesses/Arbitration-Procedures-for-Appeals.
34. *See* , for example, articles 4 and 7 of the 90/463/EEC Convention.
35. Andrew Tweddale & Keren Tweddale, *supra* n. 31 , at 6-10; Julian Lew, Loukas Mistelis & Stefan Kröll, *supra* n. 26 , at 13-15.
36. Paragraph 62 of the OECD Commentary to Article 25 (paragraph 5) states that:

> The arbitration process provided for by the paragraph is not an alternative or additional recourse: where the competent authorities have reached an agreement that does not leave any unresolved issues as regards the application of the Convention, there are no unresolved issues that can be brought to arbitration even if the person who made the mutual agreement request does not consider that the agreement reached by the competent authorities provides a correct solution to the case. The paragraph is, therefore, an extension of the mutual agreement procedure that serves to enhance the effectiveness of that procedure by ensuring that where the competent authorities cannot reach an agreement on one or more issues that prevent the resolution of a case, a resolution of the case will still be possible by submitting those issues to arbitration. Thus, under the paragraph, the resolution of the case continues to be reached through the mutual agreement procedure, whilst the resolution of a particular issue which is preventing agreement in the case is handled through an arbitration process. This distinguishes the process established in paragraph 5 from other forms of commercial or government-private party arbitration where the jurisdiction of the arbitral panel extends to resolving the whole case.

See also Adolfo J. Martín Jiménez, *supra* n. 19 , at 6.4.

37. *See* sections 7.3. and 7.4.
38. *See* , for example, US-Belgium Protocol No. 6, (k), US-Germany Protocol No. XVI, 22, (k), US-Canada Protocol, article 21, which introduces new article XXVI, paragraph 7(e); or US-France Protocol, article X, which introduces new article 26, paragraph 5(e).

"arbitration" but would be sure to recognize it when seeing it. The problem with this is that so far, "tax arbitration" is in an embryonic stage, with no well-documented international tax arbitration disputes. In the absence of a sample for him to examine, our arbitration practitioner cannot conclude whether international tax arbitration has confounded its critics, and revealed itself as the quick, flexible and no-nonsense practical mechanism that he identifies with arbitration, or rather, it has materialized as the clumsy and bogged-down procedure prone to the type of stalling and strategic behaviour that could be anticipated from provisions in tax treaties.

Again, these objections could be dismissed, not as a matter of semantics, but of snobbery. Surely, arbitration is not always that quick, flexible and practical, and even if it were, different degrees of speed and flexibility could be tolerated without stretching the definition too much. As such, "tax arbitration" could be regarded as a specific type of arbitration, with its own peculiarities, not unlike other varieties, such as investment arbitration or securities arbitration.

The initial reluctance to accept a new field among the (already crowded) arbitration "club" always involves some snobbery, and also insecurity. For an arbitration practitioner who presents as a multi-faceted expert with all-encompassing knowledge, the inclusion of tax as a discipline suitable for arbitration is particularly forbidding; as a result of the peculiarity and complexity of the disputes, but also of the need to reflect on whether some procedural specificities are needed as well.

However, the reluctance is also a manifestation of legitimate concerns about the suitability of current mechanisms for tax dispute resolution to achieve the same "results" that arbitration has been providing for decades, and that have made it worthy of the special protection dispensed by the legal order, in the form of court assistance and enforcement by regular courts.[39]

This protection is based, as a matter of law, on the parties' agreement, entered by their own volition prior to the dispute but, as a matter of history, is legitimated by the arbitral tribunals' record to serve the interests of the parties which appointed it. In other words, protecting and supporting a system of justice that presents itself as an "alternative" to the justice dispensed by ordinary courts, is only sound if that system proves to be a better mechanism for those types of dispute and the parties involved in them.[40]"Better", of course, does not mean that the substance of the decision must leave all parties equally happy. It means that all parties have an equally "fair" chance to present their case, and that, after having given due consideration to all views, arbitrators can give closure to the problem in a way that is both quick and definitive, but also sufficiently flexible to adjust to the parties' interests. From that perspective, the answer to the question of whether "tax arbitration" is, or is not "arbitration" is not in itself important, but is important as a means of ascertaining whether the mechanisms for resolving tax disputes serve the parties' interests, and grant them a level of effectiveness akin to those of "arbitral" mechanisms; one that justifies an equivalent legal protection to the "final", "binding" and "enforceable" solution.

The answer to the question is "no", or, at least, "not without qualifications", which shows that sometimes disputes about concepts go beyond mere linguistic purity. This can be seen in the fact that the attempts to create arbitral solutions for tax disputes vary in the way the mechanism is referred to in the norm itself. Some, like the EC Convention, refer to an "advisory commission".[41]Others, like the OECD Model Tax Convention, the UN Model Tax Convention or the US Convention, talk about "arbitration",[42]but the names of the bodies entrusted with making the decision, albeit varying between "arbitration board"[43]or "arbitral panel",[44]fall shy of "tribunals". This ambivalence goes far beyond semantics, and encapsulates very well states' and tax authorities' mixed feelings towards arbitration: they want its advantages (professionalism, full-dedication, flexibility or expediency) but none of the disadvantages (discretion by the tribunal, and loss of control on the parties' side).

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39. *See* the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, or articles 5 and 6 of the UNCITRAL Model Law on International Commercial Arbitration (1985 with 2006 amendments).
40. The understanding of arbitration as a "service" to the parties involved in it, and the claim that the current state of arbitration law can only be understood from that "service" perspective are ideas that first entered the academic discourse in the 1960s by means of Ms Ruvelin Devichi. Today they are coined as the "autonomous" theory of arbitration, as an alternative to the classic debate between the "contractual" theory of arbitration, which bases arbitration's legal standing on the parties' consent and agreement; and the "jurisdictional" theory of arbitration, which argues that such standing is based on the consideration of arbitration as an "alternative" jurisdiction, but jurisdiction after all; and the synthesis of the two: the "mixed" or "hybrid" theories. *See* Julian Lew, Loukas Mistelis & Stephan Kröll, *supra* n. 26 , at 79-82.
41. Art. 7(1) EC Convention 90/463/EEC.
42. Art. 25(5) OECD Model Tax Convention; art. 25(5), para. 2 (alternative B) UN Model Tax Convention; US-Belgium Protocol, no. 6; US-Germany Protocol, XVI, 22; US-Canada Protocol, introducing new article XXVI(6); US-France Protocol, new article 25(5).
43. US-Belgium Protocol, no. 6, (b); US-Germany Protocol, XVI, 22, (b); US-Canada Protocol, introducing new article XXVI(6)(d).
44. OECD Model Tax Convention, Sample Agreement, nos. 12, 13(d), 15, commentary paragraphs 3, 9, 18, 30, 64, of which paragraph 64 is referenced under paragraph 18 of the commentary to the UN Convention; and the provisions of the Sample Model Agreement are referred to in the annex to the Commentary on Article 25; US-France Protocol, new article 25(5)(e).

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The process set forth in tax treaties could evolve into a full-blown arbitral process, but it contains too many inadequacies and uncertainties to consider it tantamount to arbitration. In the following sections it will be shown that states and CAs have done a thorough job in clipping the system's wings, and undermining its potential for effectiveness and usefulness. The system, as such, can be praised as "consistent", albeit it is, alas, consistent in its mediocrity. And while that may work in the authorities' short-term interests, it is self-defeating in the long run, since it also leaves *the authorities'* (not just the taxpayers') issues unresolved, to say nothing of the fact that such a "hybrid" system creates problems of its own, to which conventional arbitration principles have no easy answer. To these we now turn.

7.3. Consent and jurisdiction

No matter the perspective one has on arbitration, the concept that consent provides the basis for arbitral jurisdiction is settled. This single-minded focus poses serious questions for tax arbitration, as to *who* has consented to have their disputes arbitrated, and *what* kind of disputes are encompassed by such consent. The answer to both questions determines, in turn, the jurisdiction *rationae personae* and *rationae materiae* of the arbitral tribunal in tax disputes. These issues will be examined under section 7.3.1. , preceded by an inquiry into the configuration of competence to decide on the arbitrators' jurisdiction, which, worryingly – albeit unsurprisingly – presents (again) specialties in the tax context. Section 7.3.2. will be dedicated to the specific issue of "two-tier" proceedings, where arbitration is preceded by a period where one or both parties are expected to resort to a different mechanism to try and resolve the dispute. The visible (some would say oppressive) presence of the "previous" stage in tax disputes makes the subject worthy of separate attention.

7.3.1. Jurisdiction/Arbitrability

7.3.1.1. Jurisdiction *rationae personae*

Consent is the basis of arbitration. The commitment of free will to resolving all future disputes arising in a certain context by arbitration is what justifies the parties' waiver of their rights to access other fora. Yet, consent is a tricky issue in tax arbitration. First, there is the issue concerning the state, with its sovereign powers on taxation, and its sub-state tax authorities (*see* section 7.3.1.1.1.). Second, there is the investor or taxpayer, whose actual status as a party is a subject of controversy (*see* section 7.3.1.1.2.).

7.3.1.1.1. The state and its authorities. Issues with sovereign immunity and sub-state entities

When focusing on the state and its public authorities vis-à-vis arbitration proceedings, the first question we are confronted with is whether a public authority *can* actually be a party to such proceedings. The same issue could well be addressed under the heading on jurisdiction *rationae materiae* . If it is included here it is because the primary obstacle one has to deal with is the state's status as a party (and, more specifically, as a respondent) in judicial or arbitral proceedings.

The state's immunity of jurisdiction and execution has long been a matter of controversy, as to its sources and its limits. Until recently, there were still doubts as to whether it was an issue of comity, and thereby based on reciprocity, or else a matter of law. The ICJ has greatly contributed to the clarification of this and many other aspects, in its ruling *Germany v. Italy* ,[45]where immunity was considered to be a matter of law,[46]and thereby not one of comity.

In so doing, the ICJ confirmed much of the conventional wisdom on sovereign immunity, including the "functional", rather than "absolute" approach to sovereign immunity,[47]and this permits the possibility of waiver by an act of consent by the state. Whether a sovereign state can be the subject of (arbitral) proceedings involving organs other than its own courts is a settled matter. The extent of such jurisdiction could, potentially, be a more controversial issue, but one that bears a more direct relationship with matters of jurisdiction *rationae materiae* .[48]

A second aspect of the "state" side of the dispute concerns the doubt as to *who* is really a party to the proceedings. In both the OECD and UN Model Tax Conventions, as well as in specific treaties, the MAP, to which arbitration is attached,

45. Jurisdictional Immunities of the State (*Germany v. Italy: Greece Intervening*), 3 Feb. 2012, General List 143.
46. Id., paragraphs 54 to 58 (specifically, customary law, in the case of both countries). Furthermore, the ICJ also clarified the uncomfortable relationship between sovereign immunity and human rights, by definitively holding that state courts cannot adjudicate on a dispute with another state, even in cases of gross violations of human rights since human rights law is a matter of substance, whereas sovereign immunity has an incidence on procedure. *See* id., paragraph 93.
47. The "functional" approach, i.e. that immunity (of jurisdiction, primarily) depends on the nature of the acts performed by a state. *See* Karl M. Meessen, *State Immunity in the Arbitral Process* , in Norbert Horn & Stefan Kröll (eds.), *Arbitrating Foreign Investment Disputes* , The Hague, Kluwer Law International, 2004, at 387, and references to the approach in Germany, the United Kingdom and the United States.
48. *See* section 7.3.1.2.

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takes place between *CAs* (i.e. tax administrations or agencies).[49]This would imply that, if arbitration ensues, the same authorities are parties to the proceedings.[50]This solution is far from satisfactory, as it creates a duality between the parties to the treaty, i.e. the *states* , and the parties to the proceedings, i.e. the *authorities* .

This duality of sorts is not unknown in international arbitration, and investment arbitration is a case in point. In this context, it is not uncommon for investment contracts to be subscribed with a governmental department or agency, rather than the government itself, on behalf of the state. If a controversy arises, one of the first issues to be determined is whether the investor can resort to the dispute resolution mechanisms enshrined in investment treaties, which presume that the *state* is a party to the proceedings. This, in turn, requires determination of whether the department or agency, or the state itself is bound by the agreement. The Treaty that establishes the International Centre for the Settlement of Investment Disputes (ICSID) contemplates the matter explicitly, by indicating that the state is expected to approve the consent of the subdivision or agency of the state.[51]

In tax treaties, the matter is slightly more complicated. On the one hand, recourse to the dispute resolution mechanism is made by direct reference to the treaty itself. On the other hand, there is a clear indication that participation in the proceedings is restricted to the CAs.[52]The question, thus, is whether they participate in those proceedings on their own behalf, or on behalf of the state. On the one hand, state consent to the treaty by means of ratification justifies that the state itself should be bound by the award.[53]On the other hand, if one accepts that, in cases already decided by the courts, the solution can be altered by negotiation and horse-trading between parts of the administrative branch, allowing the state as a party to the proceedings could seriously impinge upon separation of powers and judicial review.[54]This is one of the reasons why arbitration should be dissociated from the “agreement” procedure. Meanwhile, however, the conclusion of the issue is not easy; it would require an in-depth analysis of the theory of the state and its organs and the discussion would, in any event, be mostly fruitless. Even if one concludes that the authorities participate in the proceedings on behalf of the state, the restrictions on the effects of the decision, and the (private) parties who can be subject to it as procedural parties, already cripple the mechanism.

7.3.1.1.2. The private (non-)party as the catch in the game

As much as one can be surprised by the idiosyncratic treatment of the “official” parties to the tax arbitration proceedings, that is nothing compared to the baffling status of the taxpayer. The private citizen having the status of a party is not unknown in arbitral disputes involving states, where the investor can sue the state directly. This possibility, stated in a clear-cut manner,[55]constitutes one of the keys to the success of investment arbitration and investment law.

The solution is much more complicated in tax arbitration. According to Model, and actual, tax treaties, arbitration proceedings are initiated as a result of a request by the taxpayer (the matter is more complicated, as the taxpayer only requests the initiation of a MAP, and after the expiry of a time period varying between 2 and 3 years, arbitral proceedings “shall” or “may” follow).[56]

Notwithstanding that the initiative may be his, the taxpayer does not enjoy “party” status in the proceedings.[57]He does not have any say in the appointment of the arbitrators.[58]The possibility to present his views is only given express provision in

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49. Article 25(5) OECD Model Tax Convention; art. 25(5) (alternative B) UN Model Tax Convention; US-Belgium Protocol, no. 6; US-Germany Protocol, XVI, 22; US-Canada Protocol, introducing new article XXVI(6); US-France Protocol, new article 25(5).
50. OECD Model Tax Convention Sample Agreement nos. 8, 9, 10, 12, 13(e), 14, 15, 16, 17; UN Model Tax Convention, commentary to article 25(5) (alternative B) paragraphs 12, 13, 14, 16 (to name some); US-Belgium Protocol, no. 6, para. 1; US-Germany Protocol, XVI, 22, para. 1; US-Canada Protocol, introducing new article XXVI(6), para. 1; US-France Protocol, new article 25(5), para. 1.
51. Article 25(3) of the ICSID Convention states: “Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required”.
52. This is reinforced by the fact that, in bilateral tax treaties, the decision from the arbitral board will be equivalent to an agreement of the two CAs pursuant to the MAP.
53. The OECD Model leans towards this solution, since its Sample Agreement includes a reference to the fact that “The arbitration decision shall be final”, and limits the grounds of non-enforceability (Sample Agreement, para. 18). Bilateral tax treaties ratified by the United States also indicate that “the determination [of the arbitration board] shall constitute a resolution by mutual agreement under this Article and shall be binding on both Contracting States with respect to that case” (*see* , for example, article 13(6)(e) of the US-Germany treaty, which has been replicated in treaties with Belgium, Canada or France, the italics are ours).
54. Some conventions try to introduce rules to avoid this problem. As such, the arbitral tribunal cannot decide on the issue if the matter has already been subject to the decision of domestic courts. *See* section 7.5.2. , the subsection on parallel proceedings.
55. Art. 36(1) ICSID Convention.
56. The “shall” formula is the one under the OECD Model Tax Convention, whereas the “may” is a direct implication of the UN Model, where another act of initiation is required from the tax authorities. *See* UN Model Tax Convention commentary to article 25(5) (alternative B), paragraphs 12 to 15.
57. Adolfo J. Martín Jiménez, *supra* n. 19 , at 6.4.

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the OECD Model[59]and the EC Convention.[60]In fact, the taxpayer has no *right* to have the issue resolved by arbitration. Rather, the taxpayer has the right to petition for a MAP (and can insist that arbitral proceedings are initiated), but that does not pre-determine the decision of the CAs, who can simply refuse.[61]Although the grounds of refusal are more restricted *once* the authorities have initiated the MAP, and after the deadline stipulated in the instrument has passed, if they have failed to reach an agreement, the authorities *must* initiate arbitration (at least under the OECD and US Models), it is still the CAs, and not the taxpayer, who have the key to access the MAP.

If the status of the taxpayer has to be associated with a known institution in arbitration, it would be that of the "third party" intervening in the arbitral proceedings.[62]Yet, in this sort of game of mirrors and shadows that states play with tax arbitration, the instruments indicate that, even if the taxpayer has no right to *initiate* the proceedings, he can end them.[63]

This middle-of-the-road solution, in addition to its being ironic (no matter the legal status, from an economic perspective the taxpayer is the one with more at stake) has a crippling effect on the guarantees of the proceedings and the finality of the decision,[64]which have been key to arbitration's expansion as an actual *alternative* to ordinary justice. No matter what the legal argument may be, this approach can only be justified by the public authorities' desire not to relinquish control over proceedings and decisions. While one can be sympathetic with that position, the consequences are sufficiently serious as to beg the question of whether the price has been too high.

7.3.1.2. Jurisdiction *rationae materiae*, and arbitrability

In the previous section we have briefly analysed the issues concerning the jurisdiction of the tribunal in tax arbitration *rationae personae*, and reached the preliminary conclusion that the arbitral proceedings envisaged in tax treaties err by far on the side of caution. In this part we will see that states' tendency to be overcautious manifests itself even more clearly in the issues of jurisdiction *rationae materiae*. For example, in investment treaties, tax is one of those subjects that, despite receiving a more extensive treatment (or because of it), gives rise to the greatest uncertainty. When one moves from investment to tax treaties, the potential scope for jurisdiction broadens but overzealous behaviour is still the default rule.

Tax has been a controversial issue in international disputes involving state responsibility from their origins. Early in the twentieth century, in the so-called *Silesian claims*,[65]the controversy revolved around whether the arbitral tribunal could adjudicate on a matter of taxes. As a result of the post-World War I arrangements, parts of Upper Silesia had been given to Poland, and a system of protection against expropriation by the host state was set up. The Polish government imposed a sort of tax (it was called a licence fee, but worked similarly to an excise tax) that was claimed to be tantamount to expropriation, as a result of which a German brewer had to close his business. In the further proceedings, the arbitral tribunal held an extremely formalistic interpretation of the notion of "expropriation", in the sense that, since a tax presupposed the existence of a business, there could have been no expropriation of that business.[66]

Today, fortunately for investors, there is an increased awareness of the endless varieties of plundering by states, and, as a consequence, a more substantive, rather than formal, concept of expropriation is employed, one that takes into consideration what the measure does, rather than what the measure is called.[67]

Still, even if protection against expropriation constitutes a cornerstone of investment protection, it is not the only standard of treatment contemplated in investment treaties: national treatment (NT), most-favoured nation (MFN) or fair and equitable (F&E) treatment are standards customarily used, depending on the level of protection that the host wishes to dispense

58. OECD Model Tax Convention Sample Agreement, para. 5; US-Belgium Protocol, no. 6(e); US-Germany Protocol, XVI, 22, (e); US-Canada Memorandum of Understanding by the Competent Authorities, no. 6; US-France Memorandum of Understanding, no. 6.
59. OECD Model Tax Convention Sample Agreement, para. 11.
60. Art. 10 90/463/EEC Convention.
61. Ehad Farabh, *Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem*, Florida Tax Review, vol. 9 (2009), at 713-742.
62. Bernard Hanotiau, *Complex Arbitrations*, Kluwer Arbitration, 2006, at 384; Stavros Brekoulakis, *Third Parties in International Commercial Arbitration*, Oxford University Press, 2011, at 272.
63. US-Belgium Memorandum of Understanding, no. 17; US-Germany Memorandum of Understanding, no. 18; US-Canada Memorandum of Understanding, no. 17; US-France Memorandum of Understanding, no. 18.
64. *See* sections 7.5.2.1. and 7.5.2.2.
65. *Kügele v. Polish State* (1932), 6 ILR 69 (Upper Silesian Claims Tribunal).
66. Id. *See* analysis in William W. Park, *supra* n. 10, at 188.
67. "Indirect" expropriation is currently accepted on an equal footing with direct expropriation, and the debate focuses on its boundaries, rather than on the category itself. *See* OECD "Indirect Expropriation" and the "Right to Regulate", in *International Investment Law Working Papers on International Investment*, no. 2004/4, Sept. 2004; sec. IV World Bank Guidelines on Expropriation and Unilateral Alterations or Termination of Contracts; art. 13 Energy Charter Treaty; art. 1110 North American Free Trade Agreement.

to investors from a signatory state. That variety, together with the growing number of treaties, and the unpredictable relationships that can be created between them (something on which the MFN standard has a strong influence) make states uneasy about the prospect that "policy" measures can come under close "legal" scrutiny. As a consequence, states tend to insert carve-outs in the treaties so as to exclude from the applicability of certain standards, the policies deemed crucial for the well-functioning of the state, or otherwise politically sensitive. Unsurprisingly, tax is among them.

Yet, the provisions employed in investment treaties to exclude tax policy from the scope of protective standards tend to be extremely protracted, and work in a way that professor Park likens to that of the *matryoshkas*, or Russian dolls, as a provision includes an exception, which, in turn, includes an exception to it, etc.[68]

A clear example of this tendency is, for example, article 2103 of the North American Free Trade Agreement (NAFTA). The provision begins: (i) by stating that nothing in the treaty shall apply to taxes (paragraph 1), and nothing in the article shall affect the rights and obligations under tax conventions.[69]Then, (ii) *notwithstanding* this exclusion, market access provisions requiring an NT, and those specific to export taxes, will apply;[70]and then, (iii) *subject to* the tax conventions NT provisions for cross-border services and financial services *shall apply to taxation measures on income, capital gains or on the taxable capital of corporations*, and to taxes related *to the purchase or consumption of particular services*; and that NT and MFN provisions for investment, cross-border services and financial services *shall apply to all taxation measures, other than those on income, capital gains or on the taxable capital of corporations, taxes on estates, inheritances, gifts and generation-skipping transfers and* on the purchase or consumption of particular services.[71]Yet, (iv) those provisions will *not* apply to any collection measure, (v) to the extent that it does not arbitrarily discriminate between persons, goods or services or nullify or impair the benefits accorded under them. However, (vi) the expropriation provisions act as a sort of general guarantee, since they apply to (all) taxation measures,[72]bearing in mind that customs duties are not considered as "taxes" under NAFTA.

The Energy Charter Treaty (ECT) provides another example, which also: (i) begins by stating that the Treaty will not apply to taxation measures;[73]then, (ii) that provisions on "transit" of energy materials, and NT provisions shall apply to taxes (iii) except to taxes on income and capital;[74]and also (iv) with an exception made for collection measures, (v) except where the measure *arbitrarily discriminates* or *arbitrarily restricts benefits*.[75]Then, (vi) expropriation provisions apply to taxation (to the extent that a tax is expropriatory),[76]bearing in mind that (vii) *the terms "tax provisions" and "taxes" do not include customs duties*.[77]

The difficulty of applying such a "cascade" of provisions is shown in the *Occidental* and *Encana* awards. These awards have been compared by scholars such as Park to show how two separate tribunals could reach opposite conclusions on the same single issue (Ecuador's refusal to refund value added tax for purchases made by foreign oil companies) subject to two treaties (Ecuador-United States, Ecuador-Canada) in which the language differed only slightly.[78]

The complexity of the legislative technique leading to this provision reflects a seemingly unstable compromise between the governments' willingness to signal their commitment towards investment protection to the international community – and to

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68. In a witty comment, Park expands the remark by saying that tax carve-outs, however, differ from *matryoshkas* in a significant way, because "[w]hile the doll releases smaller figures, treaty exceptions often reveal other exceptions that prove as capacious as the provision from which they derogate" *See* William W. Park, *supra* n. 10, at 188-189.
69. Paragraph 2 of the provision states that: "Nothing in this Agreement shall affect the rights and obligations of any Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency."
70. Art. 2103(3) NAFTA.
71. Art. 2103(4) NAFTA.
72. Art. 2103(6) NAFTA.
73. Art. 21(1) ECT.
74. Art. 21(2) and (3) ECT.
75. Art. 21(2) ECT.
76. Art. 21(5) ECT.
77. Art. 21(7)(d) ECT.
78. The provision in the Ecuador-US treaty began by stating that the treaty applied to taxation measures, albeit it later limited the applicability, whereas the Ecuador-Canada treaty began by denying such applicability, and then established exceptions. Also, the provision on taxation in the Ecuador-US treaty included a reference to the need for the states to "strive to accord fairness and equity" to foreign investors in their tax policies, a provision that could have been interpreted as a policy aim, but that was held to be a legal standard similar to that of "fair and equitable" treatment (i.e. ignoring the difference between "accord" and "strive to accord"). As such, in *Occidental* the tribunal held that such standard had been violated, whereas in *Encana* the tribunal held that this and other standards were inapplicable to taxation, and that the tax measure did not amount to an "expropriation". *See Occidental Exploration and Production Company v. Ecuador*, 1 July 2004, American Journal International Law, vol. 99 (2005), at 675 et seq.; *Encana v. Republic of Ecuador*, 6 Feb. 2006, ILM, vol. 45 (2006), at 895. *See* especially William W. Park, *supra* n. 10, at 194-200.

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preserve their sovereignty and the national interests of their citizens.[79]Nowhere is the delicate compromise more obvious than in the so-called "joint tax veto",[80]where, in expropriation and non-discrimination cases, the investor is required to present the issue to the CAs, which have 6 months to decide *jointly* if there has been an expropriation. Only if no such agreement has been reached, can an investor go to arbitration.[81]

7.3.2. Nature of consent and two-tier proceedings

7.3.2.1. Pre-dispute or post-dispute consent

In arbitration, a well-known (and logical) distinction is the one made between consent given *after* the dispute arises, and consent given *before* any dispute arises. An expression of consent of the first kind is called "submission agreement" or, in French *compromis arbitral* , whereas one of the second kind is an arbitration "convention" or "agreement" (or *clause compromissoire*).[82]Commercial and investment arbitration typically relies on the second kind, which explains an important part of arbitration's success. This is not to say that arbitration has always enjoyed such public support. For a large part of the twentieth century, and earlier, commercial arbitration was received with hostility and contempt in the United States,[83]which resulted in the ability of the parties to revoke consent to arbitration until the very moment when the award was rendered.[84]Only the Federal Arbitration Act and its interpretation by the US Supreme Court[85]as an indication of a policy change in favour of arbitration reversed the course, and gave rise to arbitration expansion.

The trouble with post-dispute consent is that, once a controversy has arisen, one can presume that the parties' relationship has soured, which makes it very difficult to agree on something, even if it is the best option for everyone, not to mention the incentive to stall, or use dilatory tactics, especially for the party who has the least to lose from a delay in the solution. Therefore, solutions like those of the former US-Germany[86]and the current Germany-Austria tax treaties or the UN Model Tax Treaty, which require the authorities' consent to initiate arbitral proceedings,[87]err on the side of caution, by yielding too much to the states' concerns about loss of sovereignty.

In this regard, the framing of the issue in the tax context has been particularly unhappily worded. First of all, for someone coming from the arbitration field, it is very confusing to see references to *"mandatory"* arbitration as opposed to *"voluntary"* arbitration.[88]Arbitration *has* to be voluntary, and not mandatory; that is what distinguishes it from other forms of jurisdiction.[89]

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79. Even if some early tax treaties included an arbitration provision its scope was very restrictive. For example, the US-German tax treaty of the nineties excluded: "matters concerning either the tax policy or the domestic tax law of either country" (which seemed to lie at the discretion of the International Revenue Service – IRS). *See* Paul D. Tutun, *Arbitration Proceedings in the United States-German Income Tax Treaty: The Need for Procedural Safeguards in International Tax Disputes* , Boston University International Law Journal, vol. 12 (1994), at 191; David R. Tillinghast, *Choice of Issues To Be Submitted to Arbitration under Income Tax Conventions* , in *Essays on International Taxation* (Herbert H. Alpert & Kees van Raad eds., 1993), at 353.
80. William W. Park, *supra* n. 10 , at 193; William W. Park, *Arbitration and the Fisc: NAFTA's 'Tax Veto'* , Chicago Journal of International Law, vol. 2 (2001), at 231-241; Abba Kolo, *Tax 'Veto' as a Special Jurisdictional and Substantive Issue in Investor-State Arbitration: Need for Reassessment?* , Suffolk Transnational Law Review, vol. 32 (2009), at 475-492.
81. Art. 2103(6) NAFTA; art. 21(5) ECT.
82. Andrew Tweddale & Keren Tweddale, *supra* n. 31 , at 98-99; Julian Lew, Loukas Mistelis & Stefan Kröll, *supra* n. 26 , at 100-101.
83. Allegedly a sentiment inherited from England. *See* Gary B. Born, *International Commercial Arbitration* , 2nd edn, Kluwer Law (2001), at 35.
84. *Restatement (First) of Contracts* , paragraph 550, Comment a (1932), not to mention the fact that, according to some courts, arbitration agreements were contrary to public policy, as they ousted the courts from their jurisdiction. *See Home Ins. Co. v. Morse* , 87 U.S. 445, 457 F. (1847); *Dickinson Mfg. Co. v. American Locomotive Co.* , 119 F. Supp. 488 (M.D.Pa. 1902).
85. Even though the FAA was enacted in 1925, the main cases by the US Supreme Court, which helped change the attitude towards arbitration for good, were much later in time. *See Scherk v. Alberto-Culver Company* , 417 U.S. 506, 94 S.Ct. 2449 (1974); *Southland Corp. v. Keating* , 465 U.S. 1 (1984); *Mastrobuono v. Shearson Lehman Hutton, Inc.* , 514 U.S. 52 (1995), to cite only some.
86. The US-German tax treaty in the 1990s did establish pre-dispute consent, in the sense that it contemplated arbitration proceedings for cases where the CAs could not reach an agreement, but it required CAs to begin the proceedings (it seems by mutual agreement, with the consent of the taxpayer, but not prompted by him). Thus, in practice the consent was post-dispute. Furthermore, it stated that parties "may" submit a dispute to arbitration. Nothing in the provision required that any case be submitted to arbitration. *See* US Treasury *Treasury Technical Explanations of 1989 US-German Income Tax Treaty and Protocol* 2 Tax Treaties (CCH) 39,066, at 39,060 (A-Z). *See* Paul D. Tutun, *Arbitration Proceedings in the United States-German Income Tax Treaty: The Need for Procedural Safeguards in International Tax Disputes* , Boston University International Law Journal, vol. 12 (1994), at 190. The mechanism was never tested (no dispute was ever submitted to arbitration). Nor under the similar US-Mexico tax treaty. *See* Ehab Farah, *Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem* , Florida Tax Review, vol. 9 (2009), at 742.
87. Art. 25(5) (alternative B) UN Model Tax Convention.
88. Ehab Farah, *supra* n. 86 , at 705 et seq.; Michael Mcintyre, *Comments on the OECD Proposal for Secret and Mandatory Arbitration of International Tax Disputes* , 7 Florida Tax Review 9 (2006), at 624 to 630; William W. Park, *supra* n. 2 , at 811.
89. William W. Park, *supra* n. 2 , at 811.

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A more measured examination of the issue reveals that tax arbitration is, as could be expected, *always* voluntary. The distinction refers to the moment when consent is given. That is, a distinction akin to that of *compromis* and convention: in "mandatory" arbitration consent is pre-dispute and a right to arbitration is triggered automatically; in "voluntary" arbitration further consent is necessary. The choice of words is important. "Mandatory" is a term associated with obliging someone to adhere. Hardly appealing if the aim is to persuade a party to give up his ultimate choice over the dispute resolution mechanism (which, in the case of states, involves *sovereign* rights).

Even if one accepts consent as the premise in the language employed, using words such as "irrevocable" hardly ameliorates the issue. Of course in arbitration one knows that consent in an arbitration clause is irrevocable (unless otherwise stated), but this can be employed as a descriptive term in arbitration circles, not as a selling point. A party who is constantly reminded that he cannot backtrack on what he said is likely to have second thoughts about the wisdom of his commitment. Therefore, the conclusions are quite clear. First, arbitration, in its pure form, is always a voluntary mechanism, as it is based on consent. Second, the word "mandatory" in "mandatory arbitration" is incorrectly used, and, what is worse, has a sort of ominous connotation for sovereign states. Third, to ensure that arbitration remains a useful mechanism to resolve disputes, consent should be given prior to the dispute, and simply called "pre-dispute" consent.

7.3.2.2. Two-tier proceedings

Despite the discussion about the jurisdiction *rationae personae, rationae materiae* , and the nature and irrevocability of states' consent the key that messes-up everything is the two-tier nature of the proceedings. In all known tax treaties (Model or real) the possibility of arbitration proceedings materializes only after a lengthy, and unsuccessful, negotiation process: the MAP.

7.3.2.2.1. Two-tier proceedings in commercial and investment arbitration

Two-tier proceedings are not unknown in arbitration. In commercial contracts it is common to insert a clause that refers disputes to an arbitral tribunal, but only *after* the parties have engaged either in negotiation, or mediation/conciliation during a period of time, and this has turned out to be unsuccessful.[90]The controversy arises in the enforceability of such clauses.[91]Does non-compliance of the negotiation/mediation period deprive the arbitral tribunal of jurisdiction?

The traditional view held in some jurisdictions like England was that, in general, agreements to negotiate (not necessarily restricted to dispute resolution) were not enforceable.[92]This was taken perhaps a bit too literally by some courts which held that the first tier of the dispute resolution procedure was unenforceable, even when it did not make reference simply to negotiation, but, rather, to a more "structured" conciliation process, with reference to the International Chamber of Commerce (ICC) Conciliation Rules.[93]Another alternative was to take a closer look at the rationale of the decisions on the enforceability of agreements to negotiate, which was the courts' concern: that this could give rise to the enforceability of agreements to negotiate "in good faith" for an unspecified period of time.[94]This indicates that the sources of tension are twofold: (i) the specificity of the conditions under which negotiation or mediation is to be conducted; and (ii) the standards applicable to the parties' conduct during the negotiation process.

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90. Julian Lew, Loukas Mistelis & Stefan Kröll, *supra* n. 26 , at 182-185.
91. For a very clear and systematic analysis of the issue in comparative law, *see* Peter Tochtermann, *Agreements To Negotiate in the Transnational Context – Issues of Contract Law and Effective Dispute Resolution* , Uniform Law Review (2008) at 685-712. For another clear and interesting analysis, this one focused in the United States, *see* James Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation* , Harvard Negotiation Law Review, vol. 12 (2006) at 43 et seq.
92. *Walford v. Miles* [1992] 2 WLR 174 [1992] 2 AC 128, [1992] 1 All ER 453. In the case at hand, the agreement provided that the seller of a business would negotiate in good faith with the prospective buyer, and would cease negotiations with third parties provided the prospective buyer gave certain conditions. *See also Courtney & Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd.* [1975] 1 W.L.R. 297.
93. *Paul Smith Ltd. v. H & S International Holding Inc.* [1991] 2 *Lloyd's Rep.* 127.
94. The decision of the House of Lords is a good indication of English courts' reluctance to enforce open-ended standards such as good faith:

> I believe it is helpful to make these observations about a so-called "lock-out" agreement. There is clearly no reason in English contract law why A, for good consideration, should not achieve an enforceable agreement whereby B agrees for a specified period of time not to negotiate with anyone except A in relation to the sale of his property [...] The agreement alleged in para 5 of the unamended statement of claim contains the essential characteristics of a basic valid lock-out agreement, save one. It does not specify for how long it is to last. Bingham LJ sought to cure this deficiency by holding that the obligations upon the respondents not to deal with other parties should continue to bind them "for such time as is reasonable in all the circumstances" [...] However, as Bingham LJ recognised, such a duty, if it existed, would indirectly impose upon the respondents a duty to negotiate in good faith. Such a duty, for the reasons which I have given above, cannot be imposed.

See Walford v. Miles [1992] 2 WLR 174 [1992] 2 AC 128, [1992] 1 All ER 453 per Lord Ackner.

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On the first count, English courts themselves have shown a move towards enforcing provisions where the "first tier" of the resolution process was sufficiently specified, as the court did in the *Channel Tunnel* case,[95]albeit the default mood was one of reluctance to give effect to agreements to negotiate.[96]In other countries, such as France or Australia, the courts have signalled a willingness to enforce mediation agreements provided the agreement sets out the conditions under which mediation will be conducted in a sufficiently clear manner.[97]

Perhaps the jurisdiction most likely to enforce the first tier of dispute resolution clauses is the United States. The pro-arbitration policy of the Federal Arbitration Act (FAA), vehemently reinforced by the US Supreme Court jurisprudence,[98]has led some courts towards an extremely liberal interpretation of "arbitration" as including almost any dispute resolution mechanism decided by the parties, and thereby to enforce under the FAA clauses providing for non-binding expertise[99]or mediation.[100]Albeit without the semantic confusion, there are aspects in common with the evolution in the United Kingdom. The Woolf report[101]led to reforms designed to encourage the parties to solve their disputes outside the courts,[102]and this led to decisions where "first-tier" clauses were enforced in a less hesitant manner, by making reference to the will of the parties.[103]Provided the parties' will is established, what was relevant was what the parties wanted, rather than the court's pre-conceived ideas about a "proper" dispute resolution process. In the international arena, Switzerland seems to be one of the few examples where the courts remain prejudiced against the enforcement of clauses providing for a "first tier" in dispute resolution proceedings.[104]

Even after having established the courts' increasingly favourable policy towards clauses providing for "non-jurisdictional" mechanisms, doubts remain in relation to mere "negotiation" clauses, which lack the structure that the presence of a third party gives to dispute resolution processes. True, some of the reluctance of English courts to enforce such clauses lies in the fact that such clauses have typically included a duty to negotiate "in good faith", a concept abhorrent to the English lawyer, especially in a context where parties adopt an adversarial attitude, as in negotiation.[105]But there are legitimate concerns in this reluctance, since an agreement setting up a process of negotiation (in good faith or not) is tantamount to an "agreement to agree", which is unenforceable for lack of certainty.[106]In addition, the absence of a third party deprives

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95. In *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd* [1993] AC 334 the dispute-resolution clause provided a resort to arbitration, but, in its first part, it read as follows:

> Settlement of disputes (1) If any dispute or difference shall arise during the progress of the Works [...] then [...] such dispute or difference shall at the instance of either the Employer or the Contractor in the first place be referred in writing to and be settled by a Panel of three persons (acting as independent experts but not as arbitrators) who shall unless otherwise agreed by both the Employer and the Contractor within a period of 90 days after being requested in writing by either party to do so, and after such investigation as the Panel thinks fit, state their decision in writing and give notice of the same to the Employer and the Contractor. (2) The Contractor shall in every case continue to proceed with the Works with all due diligence and the Contractor and the Employer shall both give effect forthwith to every such decision of the Panel [...] unless and until the same shall be revised by arbitration as hereinafter provided [...]

In the opinion of Lord Mustill, it was not the courts' role to second-guess the choice made by sophisticated parties in arm's length negotiations, but to give effect to what they had chosen.

96. In *Halifax Financial Services Ltd. v. Intuitive Systems Ltd* [1999] 1 All E.R. (Comm) 303 McKinnon J held that the clause was "nearly an immediately effective agreement to arbitrate, albeit not quite" (as Lord Mustill did in *Channel Tunnel*), but concluded that the negotiation part, despite the fact that it provided for the assistance of a mediator, did little more than to "make provision for the parties to negotiate, hopefully towards an agreement" and held that it was unenforceable. The decision has been subject to criticism. *See* Julian Lew, Loukas Mistelis & Stefan Kröll, *supra* n. 26 , at 184.

97. In France, *see Cour de Cassation* , 14 Feb. 2003, *Revue de l'arbitrage* (2003) at 403 et seq., where the Court held the arbitral claims to be inadmissible for not having fulfilled the mediation period. In Australia, *see Hooper Bailie Associated Ltd v. Natcom Group Pty Ltd* (1992) 28 NSWLR 194 (where the agreement was enforced); and *Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd* (1995) 36 NSWLR 709, and *Aiton Australia Pty Ltd v. Transfield Pty Ltd* (1999) 153 FLR 236 (where the agreement was not enforced for lack of certainty). One could say that, despite the approach being similar, the reluctance towards enforcement is greater among Australian courts. In *Aiton Australia* , for example, the Court held that it could not enforce the agreement directly, through specific performance, but only indirectly, by decreeing a stay of proceedings, and that, given the circumstances, it would refuse to do the latter as well. The lack of certainty was circumscribed to the determination of the mediator's remuneration. *See* Peter Tochtermann, *supra* n. 91 , at 708.

98. *Scherk v. Alberto-Culver Company* , 417 U.S. 506, 94 S.Ct. 2449 (1974); *Mastrobuono v. Shearson Lehman Hutton, Inc.* , 514 U.S. 52, 115 S.Ct. 1212 (1995).

99. *AMF, Inc. v. Brunswick* , *Corp.* , 621 F.Supp. 456, 461 (S.D.N.Y. 1985).

100. *Cecala v. Moore* , 982 F.Supp. 609 (N.D. Ill. 1997). *See* Peter Tochtermann, *supra* n. 91 , at 699-702.

101. Lord Woolf, Master of the Rolls, *Access to Justice. Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* , July 1996. Available at http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/index.htm.

102. Peter Tochtermann, *supra* n. 91 , at 690-692.

103. *Cable & Wireless Plc v. IBM United Kingdom Ltd.* [2002] EWHC 2059 (Comm Ct). In fact, this was the key element of the *Channel Tunnel* decision. *See Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1993] AC 334.

104. Peter Tochtermann, *supra* n. 91 , at 709 and 710 with reference to a decision by the Swiss *Kassationsgericht* Zürich.

105. *See* the excellent analysis of Peter Tochtermann, *supra* n. 91 , at 686.

106. *Courtney & Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd* [1975] 1 W.L.R. 297; *Walford v. Miles* [1992] 2 A.C. 128; *Paul Smith Ltd. v. H & S International Holding Inc* [1991] 2 *Lloyd's Rep.* 127; but *see also CertainTeed Corp. v. Celotex Corp. and Celotex Asbestos Settlement Trust* , no. Civ.A. 471, 2005 WL 217032 (Del. Ch. Jan. 24, 2005), in the United States.

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the process of much of its structure, and eliminates the main arguments employed by some courts to uphold such "first-tier" resolution processes.[107]Even the most liberal of judges would hesitate before enforcing a clause that may give rise to open-ended and pointless negotiations, not only for its lack of certainty, but because it is difficult to conclude that this was the parties' choice.

A similarly pragmatic stance (perhaps excessively pragmatic) has led arbitral tribunals in investment disputes to disregard, as a matter of course, two-tier clauses as they view these clauses as an impediment to their exercise of jurisdiction. International investment law and arbitration have significantly evolved from the times of the *Calvo* doctrine, where protection under international law of the nationals of one state against another state was only possible when the former state itself acted as claimant, by espousing the claims of its nationals through diplomatic protection, which required that an individual had already exhausted the domestic remedies of the defendant state.[108]Even though some treaties follow this historical practice and include a requirement that the investor exhausts the domestic remedies of the host state before starting arbitral proceedings, most bilateral investment treaties (BITs) currently provide for a two-tier structure that resembles the one just examined for commercial disputes, i.e. one that, before resorting to arbitration, only requires an attempt to settle the differences amicably, through negotiation. Some treaties employ a more vague style (US Model BIT),[109]but others make a clear reference to specific periods for negotiation (typically 6 months).[110]

Arbitral tribunals confronted with cases where a private investor had not waited until the end of the period stipulated in the treaty to bring a claim, have tended to dismiss this omission, by holding that the 6-month negotiation period was a procedural, rather than jurisdictional, requirement, and that non-compliance with it could not affect the tribunal's jurisdiction.[111]

However, the view is not unanimous, and there have also been arbitral awards, like that under the *Enron v. Argentina* case, where the arbitral tribunal – albeit finding that it had jurisdiction – did so because the waiting period had been complied with, and added in an *obiter dictum* that, had it not been complied with, the objection would not have been merely procedural,

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107. In *Hooper Bailie Associated Ltd v. Natcom Group Pty Ltd* (1992) 28 NSWLR 194 the Court dwelt extensively on the issue of why a court should enforce a process that required cooperation to be successful despite the reluctance of one party being taken to presume its lack of cooperation. The Court stated that:

> Conciliation or mediation is essentially consensual, and the opponents of enforceability contend that it is futile to seek to enforce something which requires the cooperation and consent of a party when cooperation and consent cannot be enforced; equally, they say that there can be no loss to the other party if for want of cooperation and consent the consensual process would have led to no result. The proponents of enforceability contend that this misconceives the objectives of alternative dispute resolution, saying that the most fundamental resistance to compromise can wane and turn to cooperation and consent if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, in particular where a skilled conciliator or mediator is interposed between the parties. *What is enforced is not co-operation and consent, but participation in a process from which co-operation and consent might come* . [Emphasis added]

This argument, which constitutes the centerpiece of Australian courts' current, and relatively liberal, stance towards "first-tier" clauses, disappears with the third party (mediator or conciliator), who is the one creating the "process" from where cooperation might come.

108. The doctrine was originally formulated in Carlos Calvo, *Derecho internacional teórico y práctico de Europa y América* , Paris: 1868. *See* Alwyn V. Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law* , 40 The American Journal of International Law 1 (1946), at 121 et seq.; Paul C. Szasz, *The Investment Disputes Convention and Latin America* , Vanderbilt Journal of International Law, vol. 11 (1971), at 256 et seq. For a more modern take on how the doctrine has been excluded in the ICSID Convention, and how it has made a (more discreet) comeback, *see* Christopher Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration* in *The Law and Practice of International Courts and Tribunals* , Leiden: Koninklijke Brill NV, 2005, at 1-17.

109. Article 23 (Consultation and Negotiation) of the US Model BIT states that: "In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures". Article 24 (Submission of a Claim to Arbitration), for its part, states that: "In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation". Thus, leaving the decision on whether the dispute can or cannot be settled by negotiation to each party, it is difficult that the clause is determinant of an arbitral tribunal's jurisdiction.

110. *See* , for example, article 1120 of NAFTA (Submission of a Claim to Arbitration) which states that: "Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration"; or article 10 of the German Model BIT, which, after stipulating for the need to settle divergencies amicably "as far as possible", states in its clause (2) that: "If the dispute cannot be settled within six months of the date on which it was raised by one of the parties to the dispute, it shall, at the request of the investor of the other Contracting State, be submitted to arbitration".

111. *Ethyl Corp. v. Canada* , Decision on Jurisdiction, 7 ICSID Reports 12, paras. 76-88; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Pakistan* , Decision on Jurisdiction, 14 Nov. 2005, paras. 88-103; *Ronald Lauder v. The Czech Republic,* Final Award, 3 Sept. 2001, 9 ICSID Reports 66, paras. 183-187; *SGS v. Pakistan* , Decision on Jurisdiction, 6 Aug. 2003, 8 ICSID Reports 406, para. 184. *See* , for an excellent summary of the situation, Christoph Schreuer, *Travelling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road* , Journal of World Investment and Trade, vol. 5 (2004), at 232 et seq.; and, from the same author, *Consent to Arbitration* in Peter Muchlinski, Federico Ortino & Peter Schreuer (eds.), *The Oxford Handbook of International Investment Law* , Oxford University Press, 2008, at 844-846.

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but jurisdictional, and the tribunal would not have found itself competent.[112]Furthermore, in a recent case, the Court of Appeals of the District of Columbia[113]reversed the prior decision of the District Court[114]and vacated the arbitral award in the case *BG v. Argentina* ,[115]on the grounds that the tribunal, by disregarding the 18-month waiting period, had exceeded its authority.[116]The case has not yet been finally settled, as it is pending before the Supreme Court, and numerous petitions for *amicus* briefs have been presented,[117]but it is an indication that both the relevance of "first-tier" procedures, and the competence to examine them, are still a matter of contention.

7.3.2.2.2. Two-tier proceedings in tax arbitration, and the parties' initiative to start proceedings

This all leaves us with quite a bit of uncertainty when it comes to analysing the issue from the perspective of tax treaties. In principle, the way the dispute resolution mechanism is conceived in the OECD Model, UN Model or all of the ratified treaties containing an arbitral clause, means that it is difficult even to talk about "two-tier" proceedings, since "one-tier with epilogue" would be more accurate. Arbitral proceedings are contemplated not in separate provisions, but in a paragraph of the MAP.[118]What is worse is that there is a tendency among tax experts to see the arbitral proceedings as a sort of "sword of Damocles", waiting to fall on the states' heads should they fail to resolve the dispute by means of negotiation within the allocated time.[119]For someone coming from the arbitration field, it is a bit odd – not to say shocking – to see arbitral proceedings turned into a threat, rather than an opportunity, and perhaps this – more than anything else – contributes to their bizarre configuration in tax treaties.

The provisions make reference to the fact that, once the 2-year period for the MAP has elapsed, the issue *shall* be resolved in arbitration,[120]or that *binding arbitration shall be used* to determine the application of the treaty provisions.[121]This does not, however, say much about how arbitral proceedings are supposed to be initiated, or the respective roles of the CAs and taxpayers therein.

The access to MAPs has been clarified in the commentaries to the treaties, and in (judicial and administrative) practice. Taxpayers can "request" the initiation of a MAP, but they have no "right" to such proceedings.[122]The CAs must decide whether it is "pertinent" to start them. In some countries, like Spain, the courts have held that, while having wide powers, the CA's decision is not entirely discretionary;[123]in other countries this is unclear, but it seems obvious that CAs have ample scope to grant, or deny, access to a MAP. If taxpayers do not have a right to "access" the proceedings, they do not have a right to obtain a "solution", that is, unless 2 years have passed without an agreement that resolves the matter in which case a reference to arbitration shall be made. The question is how do such arbitral proceedings begin.

On the one hand, it seems odd that the taxpayer, who has no party rights to initiate the MAP, should be vested with them to set arbitral proceedings in motion. On the other hand, if the taxpayer had no such right, this would render the reference to arbitration meaningless. In examples like the UN Model Tax Convention, or the Germany-Austria treaty, there is a reference to the need for the authorities to "agree" again to arbitral proceedings (a sort of arbitral *compromis*)[124]but this sits in contrast to those other examples where recourse to arbitration seems to follow automatically from the exhaustion of the 2-year period. Since arbitration does not commence automatically (a party has to submit a dispute, appoint an arbitrator, etc.) it follows that one of the CAs can begin the proceedings without the other CA's agreement.[125]The troublesome scenario

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112. *Enron Corp. and Ponderosa Assets, LP v. Argentina* , Decision on Jurisdiction, 14 Jan. 2004, 11 ICSID Reports 273, para. 88. *See also Goetz v. Burundi* , Award, 10 Feb. 1999, 6 ICSID Reports 5, paragraphs 90 to 93. *See also* Peter Schreuer, *supra* n. 111 , at 846.
113. Republic of Argentina v. BG Group PLC, 764 F. Supp. 2d 21 (D.D.C. 2011).
114. Republic of Argentina v. BG Group PLC, 715 F.Supp.2d 108 (D.D.C. 2010).
115. *BG Group plc v. Republic of Argentina* , Final Award, 24 Dec. 2007.
116. A ground of annulment under section 10(a) of the FAA.
117. Sebastian Perry, *BG v Argentina appeal draws amicus briefs* in Global Arbitration Review, vol. 7, issue 5, 4 Sep. 2012.
118. Art. 25(5) OECD Model Tax Convention; art. 25(5) (Alternative B) UN Model Tax Convention; art. 25(5) and (6) US-Germany tax treaty; art. 24(7) and (8) US-Belgium tax treaty; art. XXVI(6) US-Canada tax treaty.
119. *See* Adolfo J. Martín Jiménez, *supra* n. 19 , at 6.2. Also, according to Desax and Veit, "Possibly, the mere existence of the supplemental arbitration procedure will cause the competent authorities to reach agreement, and to reach agreement before the two-year waiting period to institute arbitration proceedings expires". *See* Marcus Desax & Marc Veit, *Arbitration of Tax Treaty Disputes: The OECD Proposal* , 23 Arbitration International 3 (2007), at 429.
120. Art. 25(5) OECD Model Tax Convention; art. 25(5) (alternative B) UN Model Tax Convention; new paragraph (6) of article 26 introduced by article 21(1) of the US-Canada Protocol.
121. US-Belgium Protocol, no. 6, first paragraph; US-Germany Protocol, article XVI, no. 22, first paragraph.
122. Ehab Farah, *Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem* , 9 Florida Tax Review 8 (2009), at 713-748.
123. *See* Jose M. Calderón, *The Taxpayer's Right To Set the 'Mutual Agreement Procedure' in Motion: The Spanish Tax Court's Approach* , Intertax, vol. 29 (2001) at 362 to 364, with references to Spanish case law.
124. *See* section 7.3.2.1.
125. If an agreement were necessary, the system would be the same as that of other treaties expressly requiring agreement, and then the different language would have to be considered meaningless, which does not seem a reasonable interpretation of the drafters' intention.

is not that situation – rather the one where the 2 years have passed – yet, none of the CAs wishes to start the proceedings for fear of souring their relationship with the other CAs. If there was no remedy to that impasse, the "shall be resolved in arbitration" provision would be meaningless.

One way of dealing with such an impasse, would be to give the taxpayer the possibility of going to the national courts, to seek an order requiring the CA to start arbitration. In response to the taxpayer's request, it does not seem that the courts could hold that the CAs have "discretion", or even any room for manoeuvre; hence, they should make an order but the problem would, again, depend on the configuration of the right of access to justice, and the right to a proper remedy, in the jurisdiction involved. Therefore, even though the language of the treaty is clear, the taxpayer would still have to show that he has standing in order to claim its breach.

7.3.2.3. Competence-competence in tax arbitration: The elephant in the room

The most basic questions arise when we move from theorizing about tax treaties to actually considering how proceedings are started. The first question, as seen above, is whether the taxpayer has any right to prompt the commencement of the proceedings if CAs seem too complacent or in a gridlock. The second is whether the arbitral tribunal has the power to decide that such proceedings can begin (which includes the power to decide whether the 2-year period has been exhausted, or was pointless, or whether any of the impediments set forth in the treaty are present in the case).

This turns to the fundamental issue of *competence-competence* : the arbitral tribunal's power to rule on its own jurisdiction. In commercial or investment arbitration this principle is taken for granted, meaning that arbitral tribunals, almost by definition, have the competence to rule on their own jurisdiction, according to the most important statutory rules applicable to international adjudication and jurisdiction.[126]

In international tax arbitration, on the other hand, the standing of this principle is problematic. Regulating the arbitral procedure as an appendix to the conciliation procedure (whether it is denominated as MAP or otherwise) or, at best, without drawing any clear distinctions between one and the other, puts into question the very "jurisdictional" essence of the mechanism, which is one of the keys to its success. This is seen, for example, in the emphasis on the control by the CAs of the access to arbitral proceedings, in a similar vein as happens in the conciliatory procedure: CAs may preclude arbitral proceedings if they agree on the issue.[127]In addition, under US treaties such as those with Germany and Belgium, the two authorities can exclude arbitral proceedings if they "agree that the particular case is not suitable for determination by arbitration",[128]an agreement that, in the case of the US-France treaty, must be prior to the beginning of arbitration.[129]In the US-Canada treaty, the focus on consent by the authorities looks almost obsessive and provides for some strange reading, since the provision states that a case can only be decided in arbitration if it

> "[…] *(i) Is a case that: (A) Involves the application of one or more Articles that the competent authorities have agreed in an exchange of notes shall be the subject of arbitration; and (B) Is not a particular case that the competent authorities agree, before the date on which arbitration proceedings would otherwise have begun, is not suitable for determination by arbitration; or (ii) Is a particular case that the competent authorities agree is suitable for determination by arbitration* […]".[130]

This broad discretion of the CAs to preclude, or put an end to, the proceedings is not alien to arbitral practice, where parties can customarily stop the proceedings, or even settle the matter, with that settlement being recorded in the form of an award and having the same status as an award decided by the arbitral tribunal itself.[131]Therefore, an emphasis on the parties' control is not, per se, an obstacle to the principle of *competence-competence* , and may be over-interpreted in the case of tax arbitration because one tends instinctively to see the taxpayer as a party, which, as shown above, he is not. One can argue that this solution is skewed towards the interests of tax administrations, and against those of the taxpayer (and the author would agree), but that objection is not the same as suggesting that *competence-competence* is absent.

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126. This is contemplated in article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration, article V(3) of the European Convention, article 41(1) of the ICSID Convention, or article 36(6) of the Statute of the International Court of Justice.
127. *See* OECD Commentary of the Model Tax Convention, article 25, paragraphs 70 and 71; article 7(1) of the EC Convention.
128. US-Belgium Protocol, no. 6, first paragraph; US-Germany Protocol, article XVI, no. 22, first paragraph.
129. New article 26(5)(b) of the Treaty, as introduced by the Protocol, indicates that the case shall be resolved through arbitration if "the case is not a particular case that both competent authorities agree, before the date on which arbitration proceedings would otherwise have begun, is not suitable for determination by arbitration".
130. US-Canada Protocol, article 21, new article XVI, no. 6.
131. *See* , for example, article 31 of the ICC Arbitration Rules; article 30(1) and (2) of the UNCITRAL Model Law.

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A more important test for the absence of *competence-competence* would be the possibility that parties (i.e. CAs) have, of unilaterally leaving the proceedings, and here the issue is more confusing. If one relies on the OECD Model for example, its Commentary indicates that, "where serious violations of domestic laws resulting in significant penalties are involved, some States may wish to deny access to the mutual agreement procedure",[132]and later adds that, "Where the mutual agreement procedure is not available, for example because of the existence of serious violations involving significant penalties [...], it is clear that paragraph 5 (arbitration) is not applicable".[133]This has led at least one author to suggest that the *competence-competence* principle does not apply, with the argument that "the road to arbitration is blocked".[134]

But precluding arbitration in some cases is not tantamount to precluding *competence-competence* (if so, every limit to the possibility of arbitration would be seen as a limit to the principle). What matters is the unilateral decision to pull out once the conditions for arbitration are fulfilled. What the OECD Model suggests is that CAs can refuse to start a MAP if the issue is one involving penalties, in which case there would be no arbitration. The relevant question is, once the MAP has been resorted to, and the 2-year period has expired, and the taxpayer has requested arbitration, and one of the CAs has begun proceedings and, say, appointed a member to the arbitral tribunal: can the other authority unilaterally pull out by starting proceedings for the imposition of penalties, so that the arbitral tribunal can say, or decide, nothing? If the answer to this question is "yes", the *competence-competence* principle would be curtailed, but the question is more contentious than the previous, simpler, one, and the OECD Model, or its Commentary, does not provide an answer to it.

The texts that develop the US treaties regulate the matter more specifically. In particular, the vague references in the Protocols to the requirement that CAs "agree" that the matter is "suitable" for arbitration, or that they "do not agree" that the matter "is not suitable", are further elaborated in the Memoranda of Understanding (MoUs) signed by the *CAs* . Such Memoranda include a provision on "Cases Eligible for Arbitration", and another on "Cases Ineligible for Arbitration".[135]The first provision indicates that arbitration will be available in "any case where the competent authorities have endeavored but are unable to reach an agreement",[136]which will include cases of APAs.[137]More importantly, it indicates that "Once a case is accepted into the mutual agreement procedure, neither competent authority will cease unilaterally to consider a case […]", except for the circumstances described in the provision on Cases Ineligible for Arbitration.[138]

The provision on Cases Ineligible for Arbitration contemplates the possibility, already stated in the treaties, that the authorities *agree* on the case's "unsuitability" for arbitration, which, the MoUs seem to suggest, will occur in cases where the taxpayer has started parallel proceedings.[139]In addition to this (and what constitutes the more problematic provision), the MoUs indicate that "Arbitration is not available for a case that neither competent authority has accepted, or in which either competent authority ceases to provide assistance, in accordance with published guidance".[140]Such guidance is

132. It also adds that "The circumstances in which a State would deny access to the mutual agreement procedure should be made clear in the Convention". *See* Commentary to the OECD Convention, article 25, paragraph 26.
133. Id., para. 68.
134. *See* Marcus Desax & Marc Veit, *Arbitration of Tax Treaty Disputes: The OECD Proposal* , 23 Arbitration International 3 (2007), at 315. Similar to the EU Arbitration Convention, the Commentary to the new Article 25(5) of the Model Convention provides for the possibility for the Contracting States to exclude recourse to arbitration in the event of a "serious violation involving significant penalties". This is consistent with the provisions governing the mutual agreement procedure and which state that this remedy may not be available under these circumstances. Since, in such instances, the road to arbitration is blocked, it is not possible for the arbitrators to decide whether the conditions of a "serious violation involving significant penalty" are met (hence no "Kompetenz-Kompetenz" with the arbitrators).
135. Secs. 1 and 2 US-Belgium MoU; secs. 2 and 3 US-Germany, US-Canada, US-France MoUs.
136. Sec. 1, first paragraph US-Belgium MoU; sec. 2(a) US-Germany, US-Canada, US-France MoUs.
137. Sec. 1, second paragraph US-Belgium MoU; sec. 2(b) US-Germany MoU; sec. 2(c) US-Canada MoU. The US-France MoU does not include such provision.
138. Sec. 1, third paragraph US-Belgium MoU; sec. 2(c) US-Germany MoU; sec. 2(d) US-Canada MoU; sec. 2(b) US-France MoU.
139. "Seem to suggest" because the drafting is hardly enlightening. The US-Belgium MoU states that the case will be ineligible if there are parallel proceedings; and then, in a separate paragraph, if the CAs agree that it is "unsuitable" (US-Belgium MoU, no. 2, paragraphs 4 and 5). Under the US-German MoU, the case will be ineligible if the CAs so agree (*see* US-Germany MoU, no. 3(b)); *which the authorities will consider* , among other situations, when the taxpayer dockets the case or there is an administrative appeal (*see* US-Germany MoU, no. 3(b)(ii-iii)) (but also when there is an inordinate/repeated delay in the response of a taxpayer to a request of information; *see* id. no. 3(b)(i)). The same happens with the US-France MoU (*see* no. 3(b)(1-iii)). In the US-Canada MoU, the CAs' agreement on the "unsuitability" of the case, and the taxpayer's recourse to parallel proceedings are stated as separate causes of ineligibility, as in the US-Belgium MoU, but, unlike it, the latter is stated *after* the former (US-Canada MoU no. 3(b) (agreement); (c) and (d) (parallel proceedings)) rather than *before* , which could suggest that the scenario of parallel proceedings is a specification of cases where the CAs will agree on the unsuitability (as in the US-Germany MoU). The possibility of CAs' agreement on the unsuitability of the case for arbitration in circumstances other than in parallel proceedings exists (even under US-Germany and US-France MoUs the examples of cases where there would be agreement are not put in an exhaustive manner) but the way the provisions are drafted does not suggest an unfettered discretion to decide on political grounds.
140. US-Belgium MoU, no. 2, first paragraph; no. 3(a) in the US-Germany, US-Canada, US-France MoUs.

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referred to in the different MoUs, and, for example for the United States, it is stipulated under section 12.02 of Revenue Procedure 2006-54,[141]which permits the CA to cease to provide assistance, in other situations, where:

> (1) competent authority determines that the taxpayer is not entitled to the treaty benefit or safeguard in question or to the assistance requested;
>
> (2) the taxpayer is willing only to accept a competent authority agreement under conditions that are unreasonable or prejudicial to the interests of the U.S. Government;
>
> [...]

which are discretionary. MAP procedures are (as shown above) subject to some degree of administrative discretion, and it is conventional wisdom that a party can pull out of a negotiation. The question is whether it can also pull out when a third party has been appointed. In this regard, there is a certain degree of contradiction between the Protocols, which indicate that arbitration can only be excluded by the CAs' *agreement* , and the MoUs, which suggest that CAs can pull out unilaterally, on sheer discretionary grounds. In case of doubt the Protocol prevails, the question being whether the regulation of the arbitral proceedings as an addition to the MAP implies the application of the MAP rules, even when they overtly contradict the specific provisions of the arbitral proceedings.

The answer to this question would determine the nature and extent of the *competence-competence* principle in the context of tax arbitration, and the question itself would turn on an interpretation of the intention of the drafters in making reference to "arbitration". Arbitration is not just a term of art, or a business term, but a *legal* term, one which has an inherently "jurisdictional" connotation, unless one concludes that the states simply made a mistake. However, that could only happen if the substance of the proceedings envisaged in the treaties *clearly* contradicted the express language, which talks of "arbitration".

A similar approach impinges upon the *competence-competence* principle. If one concludes that it stems from the arbitration rules chosen by the parties (now most arbitration rules include it),[142]that would give rise to a circular argument: the arbitral tribunal would have competence to rule on its own jurisdiction because the rules chosen by the parties say so, but then, where would the competence to examine whether the parties have consented come from? That is why the source of the *competence-competence* must come from a source external to the parties' agreement. In commercial arbitration the problem is avoided by the inclusion of *competence-competence* , as a matter of public policy, in most arbitration laws,[143]but this raises the question of what happens in disputes against states, where "consent" and "law" are difficult to separate, as the former may be manifested through the latter (as in a treaty).

In investment disputes subject to ICSID there is dissociation between the consent to arbitrate, in the investment treaty, and the consent to the dispute being decided in the framework of ICSID, which is in the ICSID Treaty. This does not however resolve the issue in cases where nothing is said, for example because the dispute is decided outside the ICSID framework, by means of an ad hoc arbitration. Some ad hoc tribunals have indicated that the *competence-competence* principle does not stem from statutory provisions, but is a "customary rule, which has the character of necessity, derived from the jurisdictional nature of the arbitration, confirmed by case law more than 100 years old and recognized unanimously by the writings of legal scholars".[144]

The underlying rationale is that if one appoints a person to decide on something, it is only a matter of logic that that person must decide whether to decide. Otherwise, there would be no difference between the party who decides and the parties who dispute.[145]A similar rationale, based on logic and necessity, has historically led to the establishment of the principle of judicial review in constitutional,[146]as well as international law.[147]Yet, what if the parties insist on being illogical and

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141. Available at http://www.irs.gov/irb/2006-49_IRB/ar13.html#d0e2210.
142. *See* , for example, article 23(1) of the UNCITRAL Arbitration Rules; art. 6(3) and (5) ICC Arbitration Rules; art. 23(1) LCIA Arbitration Rules; art. 15(1) AAA International Dispute Resolution Procedures; art. 34(1) Madrid Court of Arbitration Rules.
143. That is certainly the case of those inspired in the UNCITRAL Model Law, and its article 16(1).
144. *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. The Government of the Lybian Arab Republic* , Preliminary award on jurisdiction, 27 Nov. 1975.
145. Hence the importance of conceptually distinguishing between "arbitration" and "mediation", and, in this regard, the reference to "arbitration" in the treaty provisions establishes a strong presumption in favour of its being qualified as such.
146. *Marbury v. Madison* 5 U.S. 137 (1803).
147. *Question of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Lybian Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of Apr. 14 1992* , ICJ Reports 1992, 3, paragraph 39 (where the ICJ indicated that the parties were bound by the overriding duties imposed by the UN Charter, which included the possibility of UN Security Council sanctions, but it did not declare its lack of jurisdiction to adjudicate on UN Security Council Resolutions).

irrational, and exclude *competence-competence* in their tax treaty? The first answer to that question would turn into an inquiry on whether the *competence-competence* principle, even if part of customary international law, forms part of that selected group of norms called *ius cogens* or "international public order" (*ordre public international*), to which there is no easy answer (which, in any event, would exceed the scope of the present study). The second, more pragmatic, answer, would turn to the interpretation of the tax treaty, pursuant to the rules of the Vienna Convention on the Law of Treaties, article 31(1) of which refers to the need to interpret treaties "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[148]

Thus, the question is not only one of vocabulary (one could argue that, even bearing in mind the use of the word "arbitration", it is significant that the US treaties carefully avoid use of the word "tribunal", and refer instead to a "board") but of systematic interpretation: if one party can unilaterally pull out of the proceedings in a discretionary manner, then the statement that the issue "shall be resolved" in arbitration, or the one indicating that the decision "shall be binding on the Contracting States" would be false. It would be false *unless* the process for pulling out of the arbitral proceedings *once they had started* was a regulated process where the arbitrators have decision-making power. If the arbitrators cannot control whether the criteria in the "published guidance" for situations where one CA can withdraw from the process, have been complied with, then there is no *competence-competence* , but then, there is no "jurisdictional" mechanism, there is no "arbitration" and there is no "final and binding" decision. Only practice and experience will determine on which side the interpretation falls,[149]but a lot more than arbitral pride is at stake in this little matter of semantics.

7.4. The arbitral tribunal and its constraints

7.4.1. The arbitral tribunal: Appointment, challenge and removal

The first issue when one approaches the matter of the arbitrator or arbitral tribunal which must decide on the dispute, concerns the mechanism for appointing the arbitrators. In commercial arbitration, it is customary that, in arbitration proceedings with an odd number of arbitrators (typically three) between two parties, each party appoints an arbitrator and the third one, the President of the arbitral tribunal, is appointed by agreement of the parties, agreement of the other two arbitrators, or a combination thereof (e.g. by agreement of the other two arbitrators in consultation with the parties).[150]

The most important thing is that the parties, by expressly providing so in the agreement, or by making reference to arbitration rules that so provide, include a back-up mechanism for cases where a party fails to appoint, or the parties/ arbitrators fail to agree on an arbitrator. Selecting an appointing authority thus provides certainty, and discourages delaying tactics in the appointment process. In selecting the authority it is important to bear in mind that the task is a delicate one: the authority will only appoint an arbitrator as a *default* mechanism, that is, where there has been a problem in making an appointment. Typically, the problem involves a party's reluctance to refer the dispute to arbitration, or a deadlock that goes beyond a disagreement on the substance of the dispute. In such context, it is important that the appointing authority gives an impression of competence, professionalism and neutrality so that potentially dissatisfied parties have little to cling to in any attempt to derail the subsequent proceedings. The arbitral institution not only has to select persons with a proper background, it also has to vet them, to check for potential conflicts of interest. The mechanism for this typically involves the submission of a list to the parties, who can veto the names that they consider unsuitable, and rank the others in order of preference.[151]The institution puts together the preferences of the parties, and makes a decision.

Bearing in mind the type of process involved, it is arguable whether the choice of the OECD Centre for Tax Policy and Administration as the appointing authority[152]was an entirely wise move. Checking an arbitrator's connections with the parties, his prior views on an issue, etc. as a matter of course is not something the Centre is used to but institutions like the Permanent Court of Arbitration (PCA) are very familiar with this.[153]Also, as any member of the staff in an arbitration institution will acknowledge, after the most rigorous process has been respected and the shortlist is short enough, the appointment task involves a bit of an art so as to compose a tribunal that is not only neutral, but also functional. If the concern is that the specific backgrounds of the arbitrators could be of particular importance in tax disputes (and it surely

148. Art. 31(1) 1965 Vienna Convention on the Law of Treaties.
149. A decision claiming the existence of competence-competence by the arbitrators could leave CAs baffled when experiencing first-hand that arbitration as all "jurisdictional" mechanisms, like a jack-in-the-box, tend much more easily to spring out than to get back inside it.
150. Andrew Tweddale & Keren Tweddale, *supra* n. 31 , at 141.
151. *See* , for example, article 9(3) by reference to article 8(2) of the UNCITRAL Arbitration Rules 2010.
152. This is the choice of the OECD Model Tax Convention (to some extent, understandable), but also of the US-Germany, US-Canada and US-Belgium tax treaties.
153. In the same sense, *see* William W. Park, *supra* n. 2 , at 815 and 816.

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is), a mixed formula could be included by which the appointing authority would have to rely on the expert lists provided by the OECD Centre or other tax-specific institutions.

This reflection leads us directly to the issue of the arbitrators' backgrounds, as well as their independence and impartiality. Regarding the first, an obvious dilemma arises between the need for tax expertise and the need for expertise in (arbitral) dispute resolution. This can be a very delicate matter in practice. A party interested in actually settling the dispute would make sure that the arbitrator appointed knows how to conduct proceedings, and resolve matters of jurisdiction and procedure as they arise, but that party will be even more interested in the issue being solved *in its favour*, and it may fear that an expert in arbitration might be at a disadvantage in the deliberations.[154]Three experts in tax, with no background in arbitration, however, could easily make the procedure flounder, or expose the proceedings to challenge. It would thus be desirable to have at least one of the members of the arbitral tribunal with knowledge or experience in arbitration.[155]

Leaving these matters (which can constitute the key to the success of the arbitration but do not pose many legal challenges) aside, it is important to move to the issues of independence and impartiality. And, here, one must emphasize that, in arbitration, the relevant consideration is not the *existence*, but the *appearance* of bias.[156]Since it is impossible to know what an arbitrator is thinking when he makes his decision, it is important to guard against those conditions under which a reasonable person can conclude that the arbitrator's judgment is compromised, and can thereby compromise the fairness and equality of treatment principles that underpin arbitration.

Independence and impartiality are controversial and slippery issues. The general conclusion is that it is impossible to guarantee independence or impartiality, hence the importance of appearance and in the tax field, this raises some issues that need to be discussed. Tax arbitration, for starters, will always involve a tax authority (the way it is designed in existing treaties, two authorities). This creates a difficulty where there are arbitrators who are, or have been, government officials. In this regard, the OECD yielded to the pressure of its member states, and included quite lenient rules on who can, or cannot, be an arbitrator.[157]The US treaties are stricter, in prohibiting the appointment of current or former government or tax administration employees (depending on the treaty).[158]

However, until now the issue has solely focused on the arbitrators' relationships with tax authorities but tax is a more complex field for other reasons; as opposed to commercial or investment arbitration, where the interests tend to be represented in one of the parties, in tax arbitration, despite the outward appearance of the proceedings as being between two tax authorities, it is the interests of the taxpayer which are at stake and which have given rise to the proceedings in the first place. Therefore, the rules (or practices) on selection and appointment would need to bear in mind the need to avoid not only a relationship with the tax authorities, but also a relationship with the taxpayer.

More importantly, in addition to "independence', which measures the relationship between an arbitrator and the parties, attention must be paid to "impartiality', which measures an arbitrator's predisposition to rule in one direction or another. Of course, there is always a delicate balancing act between appointing persons who are not prejudiced, and persons who are smart and knowledgeable. Not ever writing an opinion on a controversial legal issue is a way to ensure a smooth vetting process vis-à-vis impartiality issues, but surely not the best avenue to ensure the quality of the process and the decision. However, in the tax field, on the opposite side of the corps of tax commissioners are the cohorts of tax advisors, who are arguably as biased as the former and, even though the lack of public employee status makes it harder to define them as a legal category for the purposes of disqualification for lack of independence, their constant involvement with the interests of the taxpayer should disqualify many of them for lack of impartiality.

Which leaves the field of tax law professors as the ideal crop from which to reap the tax expertise for the composition of arbitral tribunals. But again, even if one ought to be extremely careful before disqualifying an otherwise ideal candidate because of views expressed in published form, regular consulting for and representation of, taxpayers' or the administration's interests – though not disqualifying activities per se – should be the source of closer scrutiny.

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154. Sadly, it would be unrealistic to assume a different set of expectations among the parties when it comes to selection and appointment of arbitrators, hence the importance of notions of independence and impartiality as absolute limits on who can decide, and of proper procedures for challenge and replacement.
155. *See* William W. Park, *supra* n. 2 , at 817 and 818.
156. Or "justifiable doubts", as put by article 12 of the UNCITRAL Model Law. *See also* section 24(1-a) of the English Arbitration Act 1996.
157. Paragraph 7 of the OECD Model Sample Agreement states that: "Any person, including a government official of a Contracting State, may be appointed as an arbitrator, unless that person has been involved in prior stages of the case that results in the arbitration process".
158. It is not possible to appoint *current tax administration* employees (Protocol US-France); or *current government employees* (Protocols US-Belgium, US-Germany, US-Canada); or *former career government* employees (Protocol US-Belgium), or *former government* employees, (US-Germany, US-Canada); or *former tax administration* employees (Protocol US-France) within 1 year following the departure from government employment (Protocol US-Canada), or 2 years of their last employment in the government/tax administration (Protocols US-Belgium, US-Germany, US-France).

Carelessness or half-hearted moves in this regard could prompt strategic behaviour from the authorities, which could match the pool of pro-taxpayer experts for hire with a pool of pro-administration experts to circumvent rules on independence (CAs might agree on common appointment policies where the Spanish CA appoints German and French officials, German officials appoint Spanish and French officials, and so on).

7.4.2. Constraints on decision-making (I). General and procedural constraints

Once the arbitrators are appointed, and the arbitral commission/board/tribunal is formed, it is important to establish the constraints that operate in its decision-making role. In commercial disputes there is what scholars have denominated a "regulatory web"[159](although the arbitrators' flexibility and discretion are far wider than the term would suggest) comprised of: the arbitration agreement, accompanied in some cases by the Terms of Reference (an agreed set of terms where the parties determine the scope of the dispute, rather than letting the arbitrators do that); the arbitration rules chosen by the parties, either for ad hoc (e.g. the Arbitration Rules by the United Nations Commission on International Trade Law – UNCITRAL), or institutional (ICC, the London Court of International Arbitration (LCIA), Court of Arbitration of Madrid (CAM) , etc.) arbitration; the arbitration law (which will be that of the seat of arbitration), plus procedural principles drawn from arbitral experience and precedent;[160]and instruments such as the New York Convention when it comes to enforcement. Substantive sources constitute of another set of constraints which are addressed below.[161]

Tax arbitration, in its embryonic stage, has not yet developed such a massive body of rules and principles, which is understandable. The problem is that its specificities, which render the system a bit dysfunctional, also make it difficult to decide whether resort can be had to "conventional" arbitration rules in order to supplement the regulatory gaps.

The difficulty is that arbitration rules, and arbitration laws, are designed to give shape to arbitration's general principles, which combine party autonomy (together the parties can arrange the proceedings as they see fit) with the discretion of the arbitrators,[162]and a need for informality, flexibility and expediency. This means that, for issues that arise during the proceedings and where the parties are not in agreement or do not express an opinion, arbitrators usually have ample room for manoeuvre in order to make the proceedings move forward. In tax arbitration, however, it is hard to conclude whether this default solution would be the same, which is a question that cannot be answered with authority until one has established the coincidence between the goals and principles of tax arbitration and "conventional" arbitration.

Some help is provided by the fact that, in the OECD Model as well as in the US treaties, there is some development of procedural rules, in the form of a Sample Agreement in the OECD case,[163]and the combination of an MoU[164]and some Operating Guidelines,[165]in the case of US treaties.

The content of such instruments is useful in shedding some light on how the proceedings are supposed to run. In fact, despite the differences already highlighted in matters of consent and jurisdiction, notably, the subordination of tax arbitration

159. Julian Lew, Loukas Mistelis & Stefan Kröll, *supra* n. 26 , at 28 to 30.
160. Fernando Mantilla Serrano, *Towards a Transnational Procedural Public Policy* in E. Gaillard (ed.), *Towards a Uniform International Arbitration Law* , Juris Publishing & Staempfli, 2005, at 163.
161. *See* section 7.4.3.
162. William W. Park, *Arbitration's Protean Nature: The Value Of Rules and the Risks of Discretion* , Annual Freshfields Lecture, London, Dec. 2002, reprinted in *International Arbitration Report* , vol. 19, May 2004, at 2; Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration* (1989); Julian Critchlow, *The Authority of Arbitrators To Make Rules* , 68 Arbitration 4 (2002).
163. Its structure is: "1. Request for submission of case to arbitration; 2. Time for submission of the case to arbitration; 3. Terms of Reference; 4. Failure to communicate the Terms of Reference; 5. Selection of arbitrators; 6. Streamlined arbitration process; 7. Eligibility and appointment of arbitrators; 8. Communication of information and confidentiality; 9. Failure to provide information in a timely manner; 10. Procedural and evidentiary rules; 11. Participation of the person who requested the arbitration; 12. Logistical arrangements; 13. Costs; 14. Applicable Legal Principles; 15. Arbitration decision; 16. Time allowed for communicating the arbitration decision; 17. Failure to communicate the decision within the required period; 18. Final decision; 19. Implementing the arbitration decision; 20. Where no arbitration decision will be provided". OECD Model Tax Convention. Article 25. Sample Model Agreement.
164. Usually they follow the structure: "Introduction; 1. Competent Authority Assistance in General; 2. Cases eligible for arbitration; 3. Cases ineligible for arbitration; 4. Commencement Date; 5. Date Arbitration Proceedings begin; 6. Board member appointment; 7. Nondisclosure Issues; 8. List of Chairs; 9. Proposed Resolution, Position Papers and Reply Submissions; 10. Requests for Additional Information; 11. Multiple Issues; 12. Permanent Establishment Cases; 13. Competent Authority Initiating the Mutual Agreement Procedure; 14. Nondisclosure; 15. Communication between the Board and the Competent Authorities; 16. Fees and Expenses; 17. Board Determination; 18. Terminating Proceedings; 19. Arbitration and requests for Advance Pricing Agreements (APAs)" (*see* , for example, Memorandum of Understanding between the Competent Authorities of the Federal Republic of Germany and the United States of America).
165. Usually they follow the structure: "1. Chair appointment; 2. Non-disclosure; 3. Installation of Board; 4. Operating Procedures; 5. Communication with the Competent Authorities; 6. Position papers and supporting papers; 7. Reply Submissions; 8. Requesting additional information; 9. Board meetings; 10. A board member's use of staff; 11. Payment of board members; 12. Inability of a board member to fulfill duties; 13. Process for board's determination; 14. Multiple issue cases; 15. Permanent establishment cases; 16. Board's Determination; 17. Terminating a Proceeding" (*see* , for example, US-Germany Competent Authorities Arbitration Board Operating Guidelines.

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to the MAP (which admittedly hinders the effectiveness of the decision), once proceedings begin the principles of party autonomy are present (though the "party" status is restricted to CAs), but so also is the principle of arbitral procedural discretion. Perhaps the clearest formulation of the combination is contained in the OECD Model Sample Agreement, which states:

> Subject to this agreement and the Terms of Reference, the arbitrators shall adopt those procedural and evidentiary rules that they deem necessary to answer the questions set out in the Terms of Reference. They will have access to all information necessary to decide the issues submitted to arbitration, including confidential information. Unless the competent authorities agree otherwise, any information that was not available to both competent authorities before the request for arbitration was received by both of them shall not be taken into account for purposes of the decision.[166]

The US treaties also include ample powers for the arbitration "board" regarding the arbitral proceedings, since "The arbitration board may adopt any procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of [the Treaty provisions]".[167]

This creates the necessary scope for some kind of arbitral practice to evolve.[168]Naturally, the arbitrators' discretion will be subject to the other procedural rules set forth in the instruments. Such rules provide for, essentially, a process in writing, where the CAs are supposed to deliver written submissions (of limited length, in the US case),[169]and can reply to the other party's submissions.

Oral presentations are not expressly contemplated, nor is there a proper "evidentiary" stage. This creates plenty of doubt as to what approach will be followed by the arbitrators, but in light of the divergent attitudes towards evidentiary matters[170]this is not necessarily a bad thing, to the extent that it allows arbitrators to decide on the spot on crucial issues. Whether there will be oral appearances, whether the tribunal will be proactive and ask its own questions, or limit itself to the presentations by the parties, whether there will be witnesses or expert testimony, in writing, orally, or with cross-examination,[171]are delicate matters better left to the specific needs of the dispute and the ability of the arbitrators to distinguish them[172](if, say, an oral appearance is not necessary, there is no need to rouse discrepancies in the attitudes of parties and counsel, coaching of witnesses, cross-examination, etc.). In US instruments there are some restrictions on the power of arbitrators to request additional information, which can *consist only of existing documents and may not request new or additional analyses* .[173]

The need for expediency is reflected in the time limitations applying to submissions and to the decision by the arbitrators. In the EC Convention, that time is 6 months from the date on which the matter was referred to it,[174]and 6 months "from the date on which the Chair notifies in writing the competent authorities and the person who made the request for arbitration that he has received all the information necessary to begin consideration of the case" in the OECD Sample Model Agreement.[175]The US instruments limit only the time of the submissions (within 90 days after the appointment of the Chair, and 180 days after the appointment of the Chair for reply submissions).[176]The OECD Sample Model Agreement includes a streamlined arbitration process, where times are limited to 2 months for the presentation of submissions, and 1 month for the decision (total of 3 months) after the appointment of the arbitrator (which, in turn, takes place within 1 month after the reception of the terms of reference by the person who made the request for arbitration).[177]The US treaties follow a similar structure in the procedure, except for the times allocated for each step.

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166. OECD Model Sample Agreement, no. 11.
167. Protocol to the US-Germany treaty, no. 22, f); Protocol to the US-Belgium treaty, no. 6, f); US-Canada Arbitration Board Operating Guidelines, no. 3, a.
168. Professor Park expressed his misgivings about arbitral "discretion", arguing that it is overrated, and argued in favour of more specific procedural rules in his Freshfields Lecture in 2002. William W. Park, *supra* n. 162 , at 3 to 13. However, he also admitted that, in tax disputes, "it would seem best to give arbitrators considerable procedural flexibility, particularly during the initial development of tax arbitration. More informed guidance will come as specific cases contribute to the accumulation of 'procedural capital' in tax arbitration". *See* William W. Park, *supra* n. 2 , at 823.
169. US-Germany MoU, no. 9; US-Belgium MoU, no. 8; US-Canada MoU, no. 9.
170. William W. Park, *supra* n. 2 , at 820 to 823; Siegfried Elsing & John M. Townsend, *Bridging the Common Law Civil Law Divide in Arbitration* , 18 Arbitration International 1 (2002), at 1 to 6.
171. Siegfried Elsing & John M. Townsend, *supra* n. 170 , at 4 and 5; William W. Park, *supra* n. 2 , at 821-822.
172. William W. Park, *supra* n. 2, at 823.
173. US-Germany MoU, no. 10; US-Belgium MoU, no. 9; US-Canada MoU, no. 10.
174. Art. 11 EC Convention.
175. OECD Sample Mutual Agreement, para. 16.
176. US-Germany MoU, no. 9; US-Belgium MoU, no. 8; US-Canada MoU, no. 9.
177. OECD Model Sample Agreement, para. 6.

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The only other aspect expressly contemplated in the norms is confidentiality. The issue of confidentiality in arbitration is interesting, because even though it is highlighted as one of the fundamental distinctions between arbitration and ordinary justice[178](parties opting for arbitration are said to have waived the right to a "public" hearing) it is still a matter of debate whether "privacy" as a normal *feature* of arbitral practice gives rise to a default, or even mandatory *requirement* , or even a *right* to the confidentiality of the proceedings and the award.[179]Some question the existence of such "inherent" rule or right, in the absence of specific mention.[180]Since the parties hardly regulate this issue in the arbitration agreement, some arbitration rules include such a mention.[181]In order to make sure that the issue is not subject to the uncertainty of an abstract discussion on the "inherent" arbitral rights/duties, on top of another abstract discussion on the applicability of such rights/duties in tax arbitration proceedings, international instruments include an express reference to it.[182]

In addition to the general debate on confidentiality in arbitration, the issue has particular implications in tax arbitration, since it is unclear whether the purpose is to protect taxpayer information from mishandling by the tax authorities, information of the tax authorities from mishandling by the taxpayer, or both. In principle, the taxpayer enjoys a status that is closer to a "third party" in the sense that arbitration law understands the concept. Therefore, the proper legal term to address this issue would be that of arbitration "privacy", i.e. the right of the actual parties to prevent any other party from attending the hearings, rather than "confidentiality", which concerns the disclosure of material information.[183]In such context, the risk is that the third party will reveal information from the proceedings, and there seems to be a wider consensus that "strangers" may be excluded from arbitration hearings unless all parties agree.[184]

A tendency to import the conclusions from the arbitral experience into the tax field without any filter, however, would risk reading the problem backwards. In tax arbitration the taxpayer, even if treated as a sort of "third party", is the party with more at stake, and more to lose if sensitive information is revealed. That is why the common point for the confidentiality rules of all instruments is the protection of taxpayer information. The EC Convention indicates so in a direct but broad way, by stating that the members of the advisory commission shall keep secret all matters they learn as a result of the proceedings.[185]The OECD is more specific, albeit more indirect, since, in order to protect confidentiality, it assimilates arbitrators to CA representatives for *the sole purposes* of the application of articles 25 and 26, and domestic laws of the contracting states concerning communication and confidentiality.[186]It remains to be seen whether this entails an absolute duty of confidentiality, or if the duty varies vis-à-vis the authority of which the arbitrator is considered a representative, the other authority and the taxpayer, as this would clearly influence the remedy to which the aggrieved party would be entitled to.

Finally, the US approach is the most stringent vis-à-vis confidentiality. The US treaties not only include a duty of non-disclosure by the arbitrators, their staff or the CAs,[187]in order to start the proceedings, each "concerned person" must

178. Andrew Tweddale & Keren Tweddale, *supra* n. 31 , at 349.
179. Id., at 353, opposing the views of England and France (where an obligation of confidentiality is held to exist) to those of Australia, Sweden or the United States, where such an obligation is put into question. *See also* ICC Report on Confidentiality as a Purported Obligation of the Parties in Arbitration (April 2002).
180. Y. Fortier, *The Occassional Unwarranted Assumption of Confidentiality* , Arbitration International, vol. 15 (1999), at 131; Expert Report of Dr Julian Lew in *Esso Plowman* (1995), 11 Arbitration International 3 (1995), at 283. Against, *see* Fouchard, Gaillard & Goldman, *International Commercial Arbitration* (1999), paragraph 1412.
181. *See* , for example, article 30 of the LCIA Arbitration Rules.
182. Art. 9(6) EC Convention, OECD Model Convention, Sample Agreement, no. 8; US-Germany Arbitration Board Operating Guidelines, no. 16, f; US-Canada Arbitration Board Operating Guidelines, no. 13, g).
183. *See* Andrew Tweddale & Keren Tweddale, *supra* n. 31 , at 350. Both have been held to be "two sides of a same coin". *See Esso Australia Ltd v. Plowman* (1995), 183 Commonwealth Law Reports 10; Arbitration International, vol. 11 (1995), no. 3.
184. *Oxford Shipping Co. Ltd v. Nippon Yusen Kaisha* [1984] 2 Lloyd's Rep 373 at 379. *See also* Andrew Tweddale & Keren Tweddale, *supra* n. 31 , at 351 and 352, with references to arbitration rules of the UNCITRAL, ICC or LCIA.
185. Art. 9(6) EC Convention.
186. Sample Agreement, no. 8.
187. US-Germany Arbitration Board Operating Guidelines, no. 16, f; US-Canada Arbitration Board Operating Guidelines, no. 13, g) states that:

> No information relating to the Proceeding (including the board's determination) may be disclosed by the members of the arbitration board or their staffs or by either competent authority, except as permitted by the Convention and the domestic laws of the Contracting States. In addition, all material prepared in the course of, or relating to, the Proceeding shall be considered to be information exchanged between the Contracting States. All members of the arbitration board and their staffs must agree in statements sent to each of the Contracting States in confirmation of their appointment to the arbitration board to abide by and be subject to the confidentiality and nondisclosure provisions applicable to proceedings of Exchange of Information and Administrative Assistance.

In the US-Belgium Memorandum of Understanding the mechanism is different, and equivalent to that used for "concerned persons" in the other instruments, i.e. by means of an agreement by the members of the arbitration board. The relevant provision states that:

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deliver a statement to the CAs agreeing not to disclose any information received during the course of the proceedings from either contracting state or from the arbitration board.[188]The structure chosen to impose these two types of duty is revealing of the standing of the different parties in the process. Whereas the CAs and the members of the arbitration board form the core of the process, and thus the law can directly impose duties upon them, the "concerned persons" do not (even though they have the most at stake) and so the imposition of a duty directly by law looks a bit contrived in relation to constitutional guarantees to say, or disclose, whatever one wants, hence the need to rely on an indirect mechanism, by which the law relies on a requirement to *the CAs* to have received the parties' statement, and on the parties' statement to limit their disclosure.

All in all, the impression of the rules of procedure for tax arbitration contained in international instruments is more positive than that of the general tax arbitration approach. It encompasses an interesting combination of autonomy, discretion and expediency. Whether arbitrators will succeed in using this tenuous guidance as a basis for evolving a sort of international tax arbitration "practice" and principles is a matter yet to be seen.

7.4.3. Constraints on decision-making (II). Substantive constraints

7.4.3.1. The sources of the decision (I). International (tax) arbitration and substantive law

The relationship which arbitrators have with the law, especially substantive law, is somewhat ambivalent. On the one hand, they want to be granted a large discretion when applying it. Arbitration laws tend to establish that, failing agreement between the parties on an applicable set of rules, the arbitrators will determine which law to apply by reference to the conflict of laws rules which *they consider appropriate* .[189]Arbitration *rules* by the UNCITRAL (for ad hoc proceedings) or by the main arbitral institutions give arbitrators even more leeway, by providing, again in the absence of agreement between the parties, that an arbitral tribunal can decide on the basis of the laws that it considers appropriate (thereby extending the discretion from the selection of the conflict rules, to the direct selection of the applicable law).[190]Furthermore, the definition of "laws" is sufficiently generic as to include "rules of law",[191]thereby opening the door for a decision on the basis of usages, or uniform "a-national" principles. Then, there is the discretion of the arbiters as to *how* to apply the law, since their decision can only be challenged to the extent that it is contrary to *public policy* , thereby excluding cases of "error" in law.[192]Modern "de-nationalized" arbitration approaches only further this trend, by arguing an ever looser requirement for arbitrators to adhere to the rules of a particular legal system.

Yet, on the other hand, the decision by an arbitral tribunal on the basis of the law is what gives arbitration a certain status, and differentiates it from other dispute resolution mechanisms, such as "adjudication" or "expert determination". Also, arbitration rules, even while providing for ample discretion on the selection of the applicable rules, fall shy of doing the same when it comes to the ability of the arbitrators to decide *ex aequo* (i.e. on equity) or acting as *amiable compositeurs* , something that requires a *specific* authorization by the parties.[193]

Thus, the option which is chosen when establishing the relationship of an arbitration tribunal (or board, panel or commission) to the law, reveals much about the underlying idea as to the role that arbitrators will play in the dispute. In this

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Upon confirmation of appointment of the arbitration board, each board member must agree in a statement to abide by and be subject to the confidentiality and nondisclosure provisions of Article 25 of the Convention and the applicable domestic laws of the Contracting States, as well as to this Agreement and the Arbitration Board Operation Guidelines.

US-Belgium MoU, no. 13.

188. US-Germany MoU, no. 7; US-Canada MoU, no. 7.
189. Art. 28(2) UNCITRAL Model Law on International Commercial Arbitration; sec. 46(3) English Arbitration Act 1996.
190. *See* article 35(1) of the UNCITRAL Arbitration Rules; article 21(1) of the Arbitration Rules of the ICC International Arbitration Court; article 28(1) of the International Arbitration Rules of the American Arbitration Association; article 22.3 of the Arbitration Rules of the London Court of International Arbitration, or article 21(1) of the Arbitration Rules of the Court of Arbitration of Madrid.
191. Art. 35(1) UNCITRAL Arbitration Rules; art. 21(1) Arbitration Rules of the ICC International Arbitration Court; art. 28(1) International Arbitration Rules of the American Arbitration Association; art. 22.3 Arbitration Rules of the London Court of International Arbitration; art. 21(1) Arbitration Rules of the Court of Arbitration of Madrid.
192. Art. V(2)(b) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; art. 36(1)(b)(ii) UNCITRAL Model Law on International Commercial Arbitration. Section 69 of the English Arbitration Act allows, unless the parties agree to the contrary, an "appeal" of the award with a leave from the court; and its paragraph (3)(b) provides that such leave will be granted, in addition to cases of "general public importance" where "the decision of the tribunal is at least open to serious doubt", in cases where "the decision of the tribunal on the question is obviously wrong", yet English courts are generally prudent when deciding on such appeals.
193. Art. 35(2) UNCITRAL Arbitration Rules; art. 21(3) Arbitration Rules of the ICC International Arbitration Court; art. 28(3) International Arbitration Rules of the American Arbitration Association; art. 22.3 Arbitration Rules of the London Court of International Arbitration; art. 21(2) Arbitration Rules of the Court of Arbitration of Madrid.

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regard, for example, the EC Convention provides that the "commission" must base its opinion on article 4 of the Convention (i.e. the applicability of the arm's length principle),[194]without further specification. This shows that the European countries envisaged a procedure closer to fact-finding than actual arbitration. This can cause problems when the issue of "prices" cannot be resolved without resort to legal principles (i.e. when characterizing a payment as dividend, royalties, interest or management fees) which may act as an implicit carve-out for the commission's competence (though given the authorities' control over the proceedings, and the arbitrators' limited discretion it is hard to speak of "competence" or "jurisdiction" in the traditional sense).

The OECD Sample Agreement provides a solution closer to "normal" arbitration, albeit not quite, by stipulating that arbitrators shall decide in accordance with the treaty, and, subject to it, the domestic law provisions, and that they may resort, for interpretive purposes, to the principles of interpretation of articles 31 to 34 of the Vienna Convention on the Law of Treaties, *and* (of course) to the OECD Commentaries on the Model Tax Convention and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (as well as any sources identified by the competent authorities in the Terms of Reference).[195]

The US approach in the treaties with Germany and Belgium follows the same principle as in the OECD Model (i.e. a decision in "law", not fact, or equity, albeit with limited sources) but it goes one step further in constraining the sources the arbitrators may use, by establishing a descending order of priority, as follows: (i) provisions of the convention; (ii) agreed commentaries or explanations of the contracting states concerning the convention; (iii) laws of contracting states to the extent they are not inconsistent with each other; and (iv) OECD Commentary, Guidelines or Reports regarding relevant analogous portions of the OECD Model Tax Convention.[196]

This creates a problem for applying the principles of interpretation of the Vienna Convention of the Law of Treaties. A reasonable view would be to hold that they cannot be ruled out unless expressly excluded, due to their having the character of customary rules, and to the fact that *some* interpretative principles will always be needed (even to interpret the meaning of the applicable law clause), and that despite the peculiar nature of tax arbitration, one cannot presume that the intention of states is to create a separate set of norms for these disputes which are unaffected by the international legal order.

A second problem is whether resort to the principles of the Vienna Convention could open the door to the applicability of precedent (judicial or arbitral). The current view in international law and in arbitration is that there is no such thing as a doctrine of precedent;[197]this does not however prevent international courts and arbitral tribunals from referring to previous decisions of other courts or other arbitral tribunals as an instructive and persuasive source.[198]Thus, the question is whether precedent could be referred to in the same manner in tax arbitration. The answer, in the case of the United States, would be "no", at least in light of what the treaties say, something that may have unintended (and harmful) consequences.[199]

A third problem concerns the authoritative nature of the OECD Commentaries. Of course, no one can deny their usefulness as an updated and thorough analysis of the OECD Model Tax Convention in light of principles and practices of international taxation. The problem is when this source is given pre-eminence over any "international" source other than the treaty itself, which is what the abovementioned US treaties do.[200]This, when it comes to OECD members, might be acceptable, but the problem would arise if the same policy were maintained in the US treaties with non-members.

Maybe because of these or the other numerous problems which arise when one tries to restrict the sources on which an arbitral body can draw for its decision, or even inspiration, posterior treaties with Canada and France do not include a similar clause. This does not solve the problem, because then the question is whether the arbitrators' decision will be grounded on the law, as in the OECD Model and other US treaties, or mainly on fact, as in the EC Convention, or maybe equity.

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194. Art. 11(1) EC Convention.
195. OECD Sample Agreement, no. 14.
196. US-Germany Protocol, no. 22, (i); US-Belgium Protocol, no. 7, (i).
197. Articles 38(d) and 59 of the ICJ Statute (judicial decisions are only a secondary source, the ICJ decision is binding on the parties, and no one else); article 1136(81) (in the same sense) of the NAFTA; article 53(1) of the ICSID Convention (decision binding on the parties, no mention whatsoever of binding nature upon anyone else); M.L. Shahabuddeen, *Precedent in the World Court* , Cambridge: Cambridge University Press, 1996; Christopher Schreuer & Matthew Weiniger in Peter Muchlinski, Federico Ortino & Christopher Schreuer (eds.), *supra* n. 111 , at 1188 to 1207; *Amco v. Indonesia* , decision on Annulment, 16 May 1986, 1 ICSID Reports 509.
198. The phenomenon is very clear in investment arbitration, where decisions tend to be based on grounds previously held by other decisions. *See LETCO v. Liberia* , Award, 31 Mar. 1986, 2 ICSID Reports 346; *Feldman v. Mexico* , Award, 16 Dec. 2002, 7 ICSID Reports 341, paragraph 107; *Encana v. Ecuador* , Award, 3 Feb. 2006, paragraph 189.
199. *See* section 7.5.3.
200. First comes the treaty, then the commentaries and explanations agreed by the contracting states, then domestic laws not inconsistent with each other; *then* the OECD materials but given that, if a case proceeds to arbitration, there will be a lack of agreement, the OECD materials could be second in importance only to the treaty.

The requirement that each CA must present a submission of 5 pages maximum, which must determine "each specific amount of income, expense or tax at issue", shows that the focus is on the figures.[201]Yet, figures cannot exist in a vacuum, and thus the law also provides that the 5-page submission can be accompanied with a supporting position paper of 30 pages max, and that the Proposed Resolution may also address any related issues that are required to determine those amounts (e.g. the existence of a permanent establishment).[202]Also, each CA can submit a Reply Submission to the board to address any points raised by the Proposed Resolution or Position Paper submitted by the other CA (MoUs).[203]This suggests that, even though the purpose of the procedure is to come up with a specific figure, the decision will most likely be taken on grounds of law (though which law remains to be seen).

7.4.3.2. The sources of the decision (II). International (tax) arbitration and EU law

An issue that merits special consideration in this study is the role that EU law plays in international arbitration disputes. An accurate summary of the *status quo* would be that, when it comes to EU law, arbitral tribunals are caught between a rock and a hard place. On the one hand, arbitral tribunals are expected to apply EU law.[204]Disregarding EU law can be a cause for setting aside an arbitral award or denying its enforceability.[205]It is interesting to note, in this regard, that the policy in favour of arbitration can clash with the *effet utile* of some European provisions. According to the former, the justifications for refusing recognition and enforcement of an arbitral award are very limited and, leaving aside the constitution of the arbitral tribunal, excesses of jurisdiction or equal treatment, a substantive rule can only result in non-enforcement when the rule is a public order rule.[206]This status is reserved only to the most fundamental policies of a state, and thus not all mandatory rules form part of the public order.

Pursuant to this, for some states, competition rules may not form part of that state's public order. Yet, in *Ecoswiss v. Benetton* , the ECJ expressed the view that the *effet utile* of the rule would be affected if arbitral tribunals were entitled to disregard it, without the risk of non-enforceability,[207]and therefore the wrong application of EU competition rules should be a cause for not enforcing the award.[208]

The ECJ, however, does not seem to require the state to establish in practice a two-lane system, with a narrow lane for "typical" objections to enforceability, and a wider, and more intrusive one, for matters of EU law, at least not from a procedural perspective. Conformity with EU law will be appraised at the stage of recognition and enforcement of the award, and subject to existing deadlines.[209]If that objection has not been raised on time, the courts are not compelled to facilitate a longer period, provided the one existing is not artificially short, or prevents in practice an actual scrutiny.[210]The author is also of the view that conformity with EU law should be examined within the (restricted) parameters for review of the award.

That is, the lack of compliance with EU law must be a source for setting aside or refusing the enforcement of the award only if it results in: (i) the violation of limitations to the capacity of the parties, or invalidity of the arbitration agreement; (ii) inequality of treatment of the parties or another important procedural irregularity; (iii) excess of power (decision beyond the scope of the submission to arbitration); (iv) irregular composition of the arbitral tribunal; or (v) non-arbitrability of the subject matter, or the violation of public policy if the award is enforced.[211]Normally the infringement of EU law will fall within the "public policy" exception, provided some flexibility is employed in its definition.

If, on the other hand, "conformity with EU law" were framed as an autonomous ground for setting aside the award or refusing its enforcement, that would be contrary to the states' policy in favour of arbitration, and against legal certainty. Even in tax disputes, public policy and expediency recommend that, once the need to apply EU law is acknowledged,

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201. US-Germany Protocol, no. 22, (g); US-Belgium no. 6, (g); US-Canada MoU, no. 9; US-France MoU, no. 9.
202. Id.
203. Id.
204. ECJ,Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co KG et al.* [1982] ECR 1095, para. 14. *See also* ECJ, Case C-126/97 , *Eco Swiss China Time Ltd and Benetton International NV* [1999] ECR I-3079; ECJ, 6 Oct. 2009,Case C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* .
205. ECJ, Case C-126/97 , *Eco Swiss China Time Ltd and Benetton International NV* [1999] ECR I-3079; ECJ, 6 Oct. 2009,Case C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* .
206. *See* , for example, articles V.1(c) and II(b) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.
207. ECJ, Case C-126/97 , *Eco Swiss China Time Ltd and Benetton International NV* [1999] ECR I-3079, para. 40.
208. Id., paras. 35-40.
209. Id., paras. 44-48.
210. Id., para. 45.
211. The scheme follows article V of the New York Convention 1958 for the Recognition and Enforcement of Foreign Arbitral Awards, but the same structure of limited grounds for setting aside or refusing enforcement of the award is replicated in most modern arbitration laws for both domestic and international disputes.

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arbitrators should be given flexibility as to *how* to apply and accommodate it within the existing parameters of arbitration law. Otherwise the system would suffer from unpredictability.

A quick analysis of recent case law, such as *Asturcom Telecomunicaciones* ,[212]however, could lead to the conclusion that the ECJ has thrown caution to the wind. In that case, which concerned a consumer dispute, the ECJ stuck to the more protective reading of its previous decision in *Mostaza Claro* ,[213]and held that the national court had to check ex officio the conformity of the decision with EU law, even if no party had raised this during the proceedings.[214]It is submitted, however, that the ECJ's decision was in part motivated by the importance, from a public policy perspective, of consumer rights. However, the ECJ could have been clearer in stressing this point, since any misapplication of a provision of EU law, no matter how unimportant, obscure or arcane, could result in the refusal of enforcement of an arbitral award, even if none of the parties have alleged that during the proceedings, or even the enforcement.

The position of arbitral tribunals is aggravated by the fact that they are excluded from making preliminary references to the ECJ, in the same way domestic courts can. The ECJ has found in its case law that, while statutory arbitral tribunals that function in a manner similar to courts can make preliminary references,[215]arbitral tribunals appointed for one dispute cannot do so.[216]

One view would be to find this arrangement unfair, since arbitral tribunals must apply EU law (as we have seen above) but cannot inquire as to its content. A more careful view, however, shows that the reasons for this arrangement are rooted in arbitration's special status as a mechanism of dispute resolution. The arbitral tribunals' ability to pose preliminary references would only be justified if they were "court or tribunals *of a Member State* " [emphasis added], pursuant to article 267, paragraph 2 of the TFEU .[217]

This would mean siding with the so-called "jurisdictional theory" of arbitration, under which the nature of arbitration is that of a jurisdictional mechanism, akin to normal courts, which is in clear contrast with the so-called "contractual theory" of arbitration, which defends the view that the source of arbitration is a contract (the arbitration agreement), and the more recent "autonomous theory", which justifies arbitration's current status in terms of its ability to provide the "service" needed by the parties, and thereby fulfill their needs.[218]

Current positions vary, but pure "jurisdictional" views are unheard of. Neither courts nor arbitrators want arbitration to become a sort of parallel system of courts. Also, even if we consider arbitral tribunals as courts or tribunals "of a Member State" in the sense of article 267 of the TFEU , that would not put an end to the problem, because the next question would be whether they would fall under the general rule applicable to "any" court or tribunal, under which the latter "may" pose preliminary references, or the specific rule for courts or tribunals "against whose decisions there is no judicial remedy under national law", under which the latter "shall bring the matter before the Court".[219]What would "remedy" mean in this case? Arbitral awards are not subject to appeal, but to a specific process, with limited grounds for review. Would that count as a "remedy"? Would it depend on the level of review granted to domestic courts? Too many questions, and too much uncertainty, only to distinguish whether arbitrators "may" or "shall" make preliminary references. Few arbitrators would want to relinquish their flexibility in exchange for more clarity regarding EU law.

Nonetheless, domestic laws may give arbitrators the possibility of asking the ECJ in an indirect way. Section 45 of the English Arbitration Act provides arbitral tribunals with the possibility of consulting domestic courts concerning matters of English law.[220]To the extent that English law includes EU law, it would be possible for an arbitral tribunal to pose a question

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212. ECJ, 6 Oct. 2009,Case C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* .
213. ECJ,Case C-168/05, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10437.
214. ECJ, 6 Oct. 2009,Case C-40/08 *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* , at 30-32, 53-55.
215. ECJ,Case 61/65, *Vaassen-Göbbels v. Management of the Beambtenfonds voor het Mijnbedrijf* [1966] ECR 583; ECJ,Case C-393/92, *Municipality of Almelo v. NV Energiebedrijf IJsselmij* [1994] ECR I-1477.
216. *See* ECJ,Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co KG et al.* [1982] ECR 1095. To this extent, it is irrelevant that the arbitration is institutional or ad hoc. In institutional arbitration the institution does not decide the dispute, but only assists the parties in appointing the members of the arbitral tribunal, and the tribunal itself for matters like administration or remuneration.
217. "Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon" .
218. Julian Lew, Loukas Mistelis & Stefan Kröll, *supra* n. 26 , at 81-82.
219. Paragraphs 2 and 3 of article 267 of the TFEU .
220. Section 45 of the English Arbitration Act provides that:

> Determination of preliminary point of law.

to an English court, with the aim that such question be “forwarded” to the ECJ in the form of a preliminary reference issued by the domestic court.[221]

Other laws, such as those inspired by the UNCITRAL Model Law on International Commercial Arbitration, do not provide for a specific right of consultation, but they allow plenty of discretion to arbitral tribunals to order the process as they see fit.[222]Under the provisions of, say, the Spanish Arbitration Act,[223]which mimics the UNCITRAL Model Law in this sense, it would arguably be possible, upon that general power to order the proceedings, to make a request to domestic courts to make a preliminary reference, albeit the matter has not yet arisen.

In the case of tax arbitration there would be more uncertainty. The power of arbitrators formed under the “arbitration” provisions in a BTT to make a request resulting in a preliminary reference would depend not only on the procedural flexibility granted to the arbitrators (we saw earlier that this was probably one of the laudable aspects of the provisions) but on the admissibility of such request by domestic courts. The power of the arbitrators to conduct the proceedings in such manner as it considers appropriate can be read to imply the power to refer a question to the courts only if supplemented with the provisions on domestic court assistance,[224]which are absent from tax arbitration rules. Thus, the extent to which domestic arbitration laws can be used to supplement such tax arbitration provisions in this regard heavily depends on whether one considers tax arbitration as an “actual” arbitration, i.e. one that can take advantage of arbitration law provisions.

It would be neither in the interest of transparency, nor that of certainty and expediency, if one of the consequences of tax arbitration’s bizarre nature were to be the risk of non-compliance with EU law, especially if such risk was impossible to avoid for lack of a proper reference mechanism.

> (1) Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties)
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> determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties. An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.
>
> (2) An application under this section shall not be considered unless–
>
> (a) it is made with the agreement of all the other parties to the proceedings, or
>
> (b) it is made with the permission of the tribunal and the court is satisfied–
>
> (i) that the determination of the question is likely to produce substantial savings in costs, and
>
> (ii) that the application was made without delay.
>
> (3) The application shall identify the question of law to be determined and, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the question should be decided by the court.
>
> (4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.
>
> (5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.
>
> (6) The decision of the court on the question of law shall be treated as a judgment of the court for the purposes of an appeal. But no appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal.

221. Julian Lew, Loukas Mistelis & Stefan Kröll, *supra* n. 26 , at 481. *See also* Johan Eraw, *Reference by Arbitrators to the European Court of Justice for Preliminary Rulings* in CEPANI, *Arbitration and European Law* (1997) at 132.
222. Article 19 of the UNCITRAL Model Law on International Commercial Arbitration provides that:

> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

223. Art. 25 Spanish Arbitration Act 60/2003.
224. *See* , for example, article 6 of the Spanish Arbitration Act.

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7.5. Decision, finality and enforcement

7.5.1. The decision. Of facts, law and baseball

The typical way for arbitral proceedings to finish is by means of a decision by the arbitral tribunal in the form of an arbitral "award". The many peculiarities of tax arbitration run so deep that they even affect the definition of the equivalent decision by the arbitrators, so that it is difficult in tax arbitration to talk about an "award" in the sense it is understood in arbitration.

First, there is the issue of the reasoned nature of the arbitrators' decision. Detractors of this solution could argue that including such reasons makes the award vulnerable to challenges.[225]It is easier to set aside an award for being wrong when the arbitrators include their arguments. Parties do not necessarily resort to arbitration, rather than adjudication, because of the knowledge or skills of the arbitrators, as opposed to those of judges (although sometimes that may be a factor in specific matters). They do so in the expectation that the dispute will be more quickly and satisfactorily solved, which relies upon the dispute resolution skills of the arbitrators (which can include, but are not necessarily limited to, their legal backgrounds) but also the flexibility of the procedure, and the single-minded attention which the arbitrators apply to the case.[226]The parties expect to be listened to carefully and their submissions properly taken into consideration, but do not necessarily expect the award to resemble a treatise that distills eloquence and legal acumen.

Advocates of the need to justify awards, on the other hand, argue that if decisions are not taken in a vacuum, but follow a process where facts and law are weighed by the arbitrators, the decisions should somehow reflect that process. Also, the supposed "vulnerability" highlighted above as a negative point has the advantage that it ensures that the decision, and the process, enjoy minimum guarantees.[227]An award without justification is an open door for a lack of accountability.

With that in mind, the different instruments all give importance to the need for expediency (it is normal to require arbitrators to decide in a short period, normally of 6 months)[228]but, regarding the need for justification, they opt for different systems. Under the OECD Model the arbitrators are expected to state the reasons for the decision, including sources of law.[229]The EC Convention, on the other hand, is silent on this point, which is not unreasonable given the heavily factual task of arbitrators, and the paucity of detail as to the legal sources, if any, that the members of the commission can use.

Then, US treaties, like those with Germany, Belgium or France, provide that the arbitrators *will* not state a rationale,[230]and the same solution is adopted with Canada, albeit in the Operating Guidelines subscribed by both tax authorities.[231]In this regard, US treaties have adopted a format closer to the OECD's streamlined version of the proceedings and, more importantly, they involve a form of so-called "baseball arbitration".[232]In baseball arbitration, the arbitrators are not expected to make their own assessment of the sums due, but to lean towards the solution proposed by the parties that seems more reasonable.[233]This creates an incentive for parties to behave reasonably when making their assessment, and helps in the resolution of disputes that involve monetary sums. It has been very popular in sports arbitration (one of the reasons why it is called "baseball" arbitration).[234]

Besides the positive incentive for tax authorities to settle or moderate their positions, the "baseball" approach, focused on figures and not on rationales, is a manifestation of the concerns of national authorities, that tax arbitrators may develop an autonomous body of law outside the control of domestic legislatures and authorities.

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225. Robert Coulson, *Business Arbitration* , 4th edn (1991) at 30, referring to the practice of the AAA for domestic awards. *See* the reference in William W. Park, *supra* n. 2 , at 823, who does not side with this opinion.
226. This does not imply that arbitrators do not have anything to do other than to decide on the case, as much as it means that a long list of pending issues does no longer constitute a valid excuse for a lack of expediency on the arbitrators' side.
227. William W. Park, *supra* n. 2 , at 823.
228. US-Belgium Protocol, no. 6, (h); US-Germany Protocol, article XVI, no. 22, (h); US-Canada Arbitration Board Operating Guidelines, no. 12, (j); US-France Arbitration Board Operating Guidelines, no. 18, (a).
229. According to the OECD Sample Agreement, arbitrators "shall indicate in writing the sources of law relied upon and the reasoning which led to its result, unless otherwise provided in the Terms of Reference".
230. US-Germany Protocol, no. 22, (j); US-Belgium Protocol, no. 6, (j); US-France Protocol to the Income Tax Treaty, MoU, letter (j).
231. US-Canada Arbitration Board Operating Guidelines, no. 13, (e).
232. Lawrence M. Hill & Tamara Ashford, *Baseball and Taxes: United States Makes Similar Agreements with France and Germany Detailing Mandatory Binding Arbitration Procedures for Unresolved Competent Authority Disputes* , unpublished manuscript, at 1.
233. Julian Lew, Loukas Mistelis & Stefan Kröll, *supra* n. 26 , at 13.
234. Id.

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In this regard, it is telling that the two sentences, “The determination of the board will not state a rationale” and “It will have no precedential value” are tied together in US treaties;[235]yet, it is submitted that this is a mistake as the implications of the lack of precedential value are not nearly as serious as the implications of a lack of stated rationale. It is true, in a similar way to sports arbitration, or other fields where baseball arbitration has been popular, that in international taxation the final sum matters very much, but, as opposed to other fields, it is not the only thing that matters. Very complex issues of fiscal sovereignty are at stake, and the reasons for reaching a conclusion may be as important as the conclusion itself. In this regard, the positive effect of creating an incentive for the parties to settle or moderate their positions can be offset by the lack of transparency of the process, which in a field as sensitive as taxation, endangers certainty and the rule of law.

Perhaps tax authorities were concerned that the lack of an express doctrine of precedent has not prevented commercial and investment arbitration from developing a whole body of (case) law, without accountability to national parliaments and authorities, on the sole basis that the rationale of certain decisions may be “persuasive” and should be followed. Perhaps they wanted to ensure that this did not happen in taxation, hence the lack of rationale. If anything, however, such “creeping codification” of a *lex mercatoria* in the absence of a doctrine of *stare decisis* should serve as a basis for enhancing the need for a rationale in tax arbitration decisions, not the opposite. If, despite a lack of legal or constitutional foundation, it is a fact that arbitrators tend to look back to past decisions, and to trust the judgment of certain persons, this process is not going to be stopped because of a legal mandate not to state a rationale. (Tax) lawyers and arbitrators will keep meeting in proceedings, symposia, conferences, moot courts, etc, and will keep exchanging views. Matters will still be discussed without giving confidential details, but with sufficient accuracy as to predict the next decision by the same arbitrator for those with access. The absence of publicity and rationale will have the effect only of creating a division between “insiders” and “outsiders”, or lawyers and arbitrators who are “in the know” and those who are not. Given that the commercial and investment arbitration field is already accused of being excessively hermetic and endogenic, this policy approach can only aggravate the problem in the tax field. So much for “no taxation without representation”.

7.5.2. The finality of the decision and parallel proceedings

7.5.2.1. Parallel proceedings, tax arbitration and the backlash for middle-of-the-road solutions

In tax arbitration the award’s finality poses problems of its own. In the former treaties of the United States with other countries, before the introduction of “mandatory” arbitration,[236]one requirement for the commencement of arbitration was the taxpayer’s consent in advance to the arbitration and its agreement in advance to be bound by the arbitration decision.[237]In the versions subsequently modified, proceedings cannot begin until both competent authorities have received from each concerned person (typically, taxpayers) an agreement not to disclose any information received during the course of the proceedings from either country or the board, other than the determination of the board (the “nondisclosure agreement”),[238]but the treaties do not require that the taxpayer presents an agreement not to resort to other mechanisms, such as administrative or regular courts.

Since the risk of parallel proceedings is a clear and present one, it constitutes an issue that should be addressed by the arbitral provisions. The way in which the issue is dealt with varies among the different instruments. Both the OECD and the UN Model Tax Conventions state that issues shall not “be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State”.[239]In order for the proceedings to begin, the request should be accompanied by statements indicating that no such decision has been rendered.[240]In the US tax treaties, the CAs can consider a case as “not suitable” for arbitration if the courts do not allow for suspension of litigation proceedings until there is a CA resolution, and arbitral proceedings may also be temporarily deferred if there is an administrative appeal and the appeal proceedings have not been suspended.[241]

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235. US-Germany Protocol, no. 22, (j); US-Belgium Protocol, no. 6, (j); US-France Protocol to the income tax treaty, MoU, letter (j); US-Canada Arbitration Board Operating Guidelines, no. 13, (e)-(f).
236. The meaning of this reference has been clarified earlier, as pre-dispute consent. *See* section 7.3.2.
237. *See* Joint Committee on Taxation, *Explanation of Proposed Income Tax Treaty Between the United States and Belgium* (JCX-45-07), 13 July 2007, at 86; Joint Committee on Taxation, Explanation of Proposed Protocol to the Income Tax Treaty Between the United States and Germany (JCX-47-07), 13 July 2007, at 73.
238. Protocol Amending the Convention between the United States of America and The Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and Certain Other Taxes, no. 22, art. 25.5.(d).
239. Art. 25(5) OECD Model Tax Convention; art. 25(5) UN Model Tax Convention.
240. OECD Commentary on Sample Agreement, para. 6.
241. MoU US-Belgium, no. 2; MoU US-Germany, no. 3, (b)(ii)-(iii); MoU US-Canada, no. 3, (c); MoU US-France, no. 3, (b)(ii)-(iii).

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Even if a decision has not been rendered, or proceedings have not been commenced, the issue is left dangling as long as such administrative or litigation proceedings can be opened afterwards. The possibilities are twofold: that proceedings are opened *during* arbitral proceedings or *after* their conclusion. The parties that can open them are also two: CAs and taxpayers.

The risk of CAs starting parallel proceedings is lesser. For the situation *during* arbitral proceedings one must bear in mind that judicial or administrative proceedings do not begin as a result of the administration suing the taxpayer, but as a result of the latter appealing a decision of tax authorities. For the situation *after* arbitral proceedings, the risk of the CAs re-opening the proceedings is ultimately tamed by the "binding", "final" or even "enforceable" decision of the arbitrators, and will thus be examined below.[242]

In this subsection it suffices to say that, under the EC Convention, the submission of a case to the advisory commission shall not prevent a contracting state from initiating or continuing judicial proceedings for administrative penalties in relation to the same matters.[243]In such a case, the state can suspend the arbitral proceedings and continue with the proceedings for the imposition of serious penalties.[244]The view that access to arbitration (or conciliation) should be denied in situations giving rise to serious penalties (or even abuse) is acknowledged by the OECD Commentary, albeit not endorsed in its text.[245]

The risk of the taxpayer resorting to domestic proceedings is a more serious one. In order to mitigate that risk *during* the arbitral proceedings, US treaties reserve to CAs the possibility not only of considering the case ineligible when arbitration is requested, but also of deferring arbitral proceedings in case of parallel administrative or judicial proceedings.[246]In both the OECD and the UN Model this possibility can be considered implicit, given the CAs' status as the only parties to the proceedings (enhanced in the UN Model by the requirement that they agree to arbitration once the dispute has arisen and the 3 years for the MAP have lapsed), *provided they do so by agreement* . The possibility of a CA unilaterally withdrawing from arbitral proceedings because the taxpayer has initiated parallel proceedings is not contemplated.[247]It seems, thus, that a decision from the arbitral tribunal would be needed.

The EC Convention provides for a more radical solution. Where domestic law does not permit CAs to derogate from judicial decisions, arbitral proceedings cannot start unless the associated enterprises have allowed the time provided for appeal to expire, or withdrawn the appeal before a decision has been delivered.[248]That way the risk of parallel proceedings is minimized. While the OECD does not endorse this, or another approach in the text of the Convention, it indicates in the Commentaries that a similar solution could be adopted by states who want to deal with this risk, by tinkering with the 3-year period in which the taxpayer must request the MAP.[249]One possibility is to suspend the 3-year period; another would be to let the 3-year period run without suspension (i.e. the taxpayer must present the MAP request before the 3 years expire) but with "[…]the competent authorities not entering into talks in earnest until the domestic law action is finally determined […]"; another, "[…]having the competent authorities enter into talks, but without finally settling an agreement unless and until the taxpayer agrees to withdraw domestic law actions[…]".[250]

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242. *See* section 7.5.3.
243. Art. 7(2) EC Convention.
244. Art. 8(1) EC Convention.
245. Some States may deny the taxpayer the ability to initiate the mutual agreement procedure under paragraph 1 of Article 25 in cases where the transactions to which the request relates are regarded as abusive. This issue is closely related to the issue of "improper use of the Convention" discussed in paragraph 9.1 and following of the Commentary on Article 1. In the absence of a special provision, there is no general rule denying perceived abusive situations going to the mutual agreement procedure, however. The simple fact that a charge of tax is made under an avoidance provision of domestic law should not be a reason to deny access to mutual agreement. However, where serious violations of domestic laws resulting in significant penalties are involved, some States may wish to deny access to the mutual agreement procedure. The circumstances in which a State would deny access to the mutual agreement procedure should be made clear in the Convention. *See* Commentary OECD Model Tax Convention, art. 25, para. 26.
246. MoU US-Belgium, no. 2; MoU US-Germany, no. 3, (b)(ii)-(iii); MoU US-Canada, no. 3, (c); MoU US-France, no. 3, (b)(ii)-(iii).
247. Also, given that access to the MAP is provided regardless of the availability of domestic remedies (*see* Commentary OECD Model Tax Convention, article 25, paragraph 31), it does not seem reason enough to withdraw unilaterally.
248. That does not affect the appeal in regard to matters other than those resolved under these proceedings. *See* article 7(3) of the EU Convention.
249. Three years since the taxpayer was notified of the action not in conformity with the Treaty.
250. Commentary OECD Model Tax Convention, art. 25, para. 25.

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7.5.2.2. Parallel proceedings, procedural guarantees and tax arbitration

7.5.2.2.1. Limits on the reach of procedural guarantees in tax cases

The peculiar nature of the solutions is a consequence of the peculiar nature of tax arbitral proceedings, which affect taxpayers without properly involving them and, despite aiming to be binding, do not involve the courts. Still, despite such consistency the solution looks contrived and awkward for someone used to "regular" arbitration. Arbitral (or judicial) mechanisms to avoid parallel proceedings are mainly: (i) the requirement to exhaust local remedies;[251](ii) the subjection of the country (including its courts) to the decision of an international tribunal;[252]or (iii) so-called "fork-in-the-road" provisions, by which the private party is given the option to either resort to domestic courts *or* exercise its rights before an international tribunal.[253]

The systems envisaged in tax treaties clearly exclude the second option and, since tax authorities cannot normally contradict the findings of the courts, they do not opt for the first (exhaustion of local remedies). Rather, they "nudge" the taxpayer towards choosing between the MAP plus arbitration, or domestic courts but they do so indirectly, by means of a *right* of tax authorities to suspend the proceedings, rather than a *requirement* that the taxpayer waives his right. So the question is: why not include an actual "fork-in-the-road"?

The answer is that this would give rise to inconvenient questions about the nature of the proceedings, and the rights that are discussed therein, and how they affect the taxpayer's access to justice. In theory, all modern human rights charters (whether or not embedded in a constitution) grant citizens access to justice. In this particular field, however, the issue becomes more convoluted, as we see if we take the case law on the European Convention of Human Rights (ECvHR) by the European Court of Human Rights (ECHR) as a blueprint.

First, the right of access to justice is not infringed if resort to "regular" courts is simply replaced by an alternative system such as arbitration.[254]This conclusion, however, is not unqualified because not every dispute resolution system will do: only one which provides the same procedural guarantees as are required of the judicial process.[255]

Second, the fundamental right of access to justice, and the procedural guarantees of a fair and public hearing, independent and impartial tribunal, and public judgment, are granted to every person only for "the determination of his civil rights and obligations or of any criminal charge against him".[256]If we leave out proceedings for the imposition of fines and imprisonment for tax fraud, and focus only on those where the issue is the measure of the tax liability, it is difficult to conclude whether tax proceedings are included among those for the determination of the person's "civil rights and obligations". The

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251. This requirement was typical when the litigation was undertaken between states by virtue of the right of diplomatic protection. A prerequisite to exercise that right was for the citizen of the country exercising diplomatic protection to have exhausted the judicial remedies before the other country, i.e. to have given that state the opportunity to correct the situation by itself. In investment treaties it is now atypical to include such a clause, because the delays involved in exhausting local remedies would hinder the effectiveness of the protection dispensed by the treaty. Yet there are still some examples where such requirement is included. *See* Christopher Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration* in *The Law and Practice of International Courts and Tribunals* , 2005, ch. 4. *See also Emilio Agustín Maffezini v. The Kingdom of Spain* , Decision on Jurisdiction, 25 Jan. 2000, 16 ICSID rev – FILJ 203 (2001).

252. The issue of *lis alibi pendens* and res judicata has been the subject of analysis and debate in the field of international commercial arbitration or investment arbitration; and there is no consensus as to the ideal solution in some cases (the issue heavily depends on attitudes as to the power and discretion of courts and arbitral tribunals, the criteria to determine the identity of the disputes, and the relationship between proceedings undertaken under courts, arbitral tribunals or international courts). *See* Resolution 1/2006 72th Conference of the International Law Association held in Toronto, Canada, 4-8 June 2006; Katia Yannaca-Small, *Parallel Proceedings* in Peter Muchlinski, Federico Ortino & Christopher Schreuer, *supra* n. 111 , at 1008 to 1048. Still, the matter is in a better state than in tax arbitration, where those principles do not apply (or, rather, they apply, but one cannot consider that the MAP and judicial proceedings belong to the same legal order, hence the lack of identity, and of res judicata or *lis alibi pendens*).

253. Christopher Schreuer, *Travelling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road* , JWIT, vol. 5 (2004), at 239 et seq.

254. *Regent Company v. Ukraine* , ECHR 3 Apr. 2008, no. 773/03; *Deweer v. Belgium,* ECHR 27 Feb. 1980, no. 6903/75; *Pastore v. Italy* , ECHR 25 May 1999, no. 46483/99; *Jakob Boss Söhne v. Germany* , ECHR 2 Dec. 1991, no. 18479/91; *Suovaniemi and others v. Finland* , ECHR 23 Feb. 1999, no. 31737/96. *See also* Charles Jarrosson, *L'arbitrage et la Convention européenne des droits de l'homme,* Revue de l'arbitrage 1989; Thomas Schultz, *Human Rights: A Speed Bump for Arbitral Procedures? An Exploration of Safeguards in the Acceleration of Justice* , 9 International Arbitration Law Review 1 (2006), at 10-12.

255. Article 6(1) of the ECHR states that:

> [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

256. Art. 6(1) ECHR.

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issue was raised in 2001 in the case of *Ferrazzini v. Italy* .[257]Despite holding that the notion of "civil rights and obligations" was an "autonomous" one, not dependent on national categorizations,[258]that legal concepts must be interpreted in the light of present-day conditions in democratic societies,[259]and that "[r]elations between the individual and the State have clearly evolved in many spheres during the fifty years which have elapsed since the Convention was adopted, with State regulation increasingly intervening in private-law relations",[260]it also found that "pecuniary" is not akin to "civil"[261]and, most importantly, that the developments occurring in democratic societies have not affected "[…]the fundamental nature of the obligation on individuals or companies to pay tax […]", nor have they "[…] entailed a further intervention by the State into the "civil" sphere of the individual's life *[…]".* Tax matters, according to the Court, "still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant",[262]and thereby the Court refused to review its previous position. Tax matters, thus, were not covered by article 6(1).

The issue, however, is not entirely settled. First, there were six dissenting judges in *Ferrazzini* ,[263]and the reference to "civil" rights and obligations is absent from other texts such as article 14 of the International Covenant on Civil and Political Rights, or article 8 of the American Convention on Human Rights (which makes express reference to "fiscal" obligations).

Second, tax proceedings, the purpose of which is the imposition of a fine on the taxpayer, can be considered "criminal" in nature, and therefore covered by the procedural guarantees of article 6, as the Court held in *Jussila v. Finland* .[264]One can argue that, since "criminal" proceedings are also excluded from tax arbitration, there is no room for overlap (i.e. there are no cases that are considered "criminal" pursuant to article 6, and yet are covered by the MAP and arbitration procedures); yet, that depends on the coincidence of the criteria employed to characterize such "criminal" proceedings.

The troublesome (and, admittedly, unlikely) scenario would be one where tax authorities determine the taxable base, the taxpayer resorts to the MAP before the authorities of one country, which accept the request, while the authorities of the other country are starting administrative proceedings to impose, let us say, a "surcharge" (whose nature as a fine can be a matter of contention).

The most likely scenario would be for both authorities to drop the MAP and arbitral proceedings, but if they are not dropped, the matter of whether article 6 applies could arise. The existing treaty materials do not expressly exclude proceedings for the imposition of sums that could qualify as "fines" from the MAP or arbitration. Only the EC Convention makes such a reference, but it does so by introducing a new source of uncertainty, when referring, alternatively, to proceedings to impose "administrative penalties",[265]and proceedings for the imposition of "serious" penalties.[266]Since the seriousness of the penalty is only one criterion to classify proceedings as "criminal",[267]could there arguably be proceedings where the issue is decided on arbitration, and yet is subject to article 6? The answer is: "most likely, no". The purpose of the

257. Application 44759/98, *Ferrazzini v. Italy* , 12 July 2001. In that case an Italian citizen alleged that the excessive length of the proceedings had breached article 6(1), whereas the Italian government argued that the case was inadmissible, since proceedings had been instituted for the determination of the taxable income and rates, and thus were not "criminal" – something on which Ferrazini agreed – and, as a matter of "public" law, the determination of tax liability did not involve "civil rights" – which Ferrazzini disputed. The Court held that the case could not be directly dismissed, since there were complex matters that could not be determined without looking at the merits (it consequently declared the case admissible).
258. Application 44759/98, *Ferrazzini v. Italy* , 12 July 2001, para. 24.
259. Id.,para. 26.
260. This "has led the Court to find that procedures classified under national law as being part of 'public law' could come within the purview of article 6 under its 'civil' head if the outcome was decisive for private rights and obligations, in regard to such matters as, to give some examples, the sale of land, the running of a private clinic, property interests, the granting of administrative authorisations relating to the conditions of professional practice or of a licence to serve alcoholic beverages" . Application 44759/98, *Ferrazzini v. Italy* , 12 July 2001, para. 27.
261. Id., para. 25.
262. Id., para. 29.
263. The dissenting opinion illustrates, by reference to the *travaux préparatoires,* that the reference to "civil" may not have been meant to exclude "fiscal" or "tax" obligations, but, rather, to leave out matters that might be subject to administrative discretion (something that does not characterize tax obligations, which are a result of the application of legal provisions). It also pointed out that the current division created important inconsistencies when purely economic rights were at stake (for example, between taxes and social security contributions). *See* Application 44759/98, *Ferrazzini v. Italy* , 12 July 2001, dissenting opinion of Judge Lorenzen, joined by Judges Rozakis, Bonello, Strázniká, Bîrzan and Fischbach.
264. Application 73053/01, *Jussila v. Finland* , 23 Nov. 2006.
265. Art. 7(2) EC Convention.
266. Art. 8(1) EC Convention.
267. In *Jussila v. Finland* , the Court extensively discussed its case law, such as *Öztürk v. Germany* , 21 Feb. 1984, paragraph 54, series A, no. 73; *see also Lutz v. Germany* , 25 Aug. 1987, paragraph 55, series A, no. 123; *Bendenoun v. France* (24 Feb. 1994, series A, no. 284; *Ezeh and Connors v. the United Kingdom* ([GC] nos. 39665/98 and 40086/98, paragraph 82, ECHR 2003-X; *Janosevic v. Sweden* (no. 34619/97, ECHR 2002-VII); *Morel v. France* (Dec., no. 54559/00, ECHR 2003-IX). It concluded that, even though in some cases, such as *Morel v. France* , significant importance was attached to the seriousness of the penalty to classify proceedings as "criminal" in nature, the approach of the Court is more global, such as the one employed in *Janosevic* or *Ezeh* , and thus a proceeding for the imposition of a surcharge would be deemed "criminal", and thereby subject to article 6 guarantees. *See Jussila v. Finland* , paragraphs 34 to 38.

MAP or arbitral proceedings is to determine the proper interpretation of the treaty (or, in the case of the EC Convention, the application of the arm's length principle), which establishes the taxpayer's liability as a consequence. The treaties do not go as far as to determine the consequences beyond such liability (e.g. fines or surcharges), and the arbitral tribunal could not go further than the scope of the treaty it is supposed to interpret.[268]In cases, however, where the interpretation of the treaty is so closely linked with the determination of crucial aspects leading to the imposition of surcharges or fines (i.e. the "reasonableness" of the taxpayer's interpretation, and therefore his culpability), one cannot entirely rule out the operation of procedural safeguards.

7.5.2.2.2. Circumventing limits on (procedural) guarantees in tax cases through the (substantive) rules on the protection of property

Finally, and most importantly for our purposes, in addition to the right of access to justice there is the protection of the peaceful enjoyment of property, pursuant to article 1 of Protocol 1 to the Convention on Human Rights.[269]Even though the protection of property does not fetter a state's right to enforce the laws necessary to secure the payment of taxes,[270]any deprivation must be subject to certain guarantees.

A strict interpretation could allow a neat distinction between a first stage, for the determination of the tax liability, where the only provision potentially relevant would be article 6(1) of the Convention, and it would not apply, pursuant to *Ferrazzini* , and a second stage, for the actual enforcement of the claim against the taxpayer's property, where article 1 of Protocol 1 would apply. Provided that the MAP plus arbitration envisaged in the treaties affects primarily the first stage, states might introduce a "fork-in-the-road" provision without being inconvenienced by article 6(1) issues.

Case law of the ECHR shows, however, that things are a little more complicated than that. In cases such as *Regent Company v. Ukraine* the Court has established that a "claim" can constitute a "possession" within the meaning of article 1 of Protocol 1 if it is sufficiently established as to be enforceable.[271]In that case, the claim had been upheld by a court. However, the Court has been even more flexible, at least in tax cases. Pursuant to *Pressos Compañia Naviera* , the "property" protected by article 1 of Protocol 1 encompasses "claims", including claims against the state,[272]provided the holder of the claim has a "legitimate expectation" regarding it[273]and, therefore, state action (including legislative) interfering with the exercise of the claim can constitute a deprivation of property.[274]

In *Dangeville* , the Court further held that such assets could include a claim for the reimbursement of taxes unduly paid.[275]In that case, the taxpayer's claim was based on the non-conformity of French VAT law with the VAT Directive (something that was acknowledged by a circular), and it was only denied by the *Conseil d'Etat* on the basis of the French procedural doctrine of "classification of proceedings" (*principe de la distinction des contentieux*),[276]and the interference with the

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268. *See* the issue of "applicable law" in section 7.4.3.
269. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952. Article 1 states that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law [...]

270. Second paragraph of article 1 of Protocol 1 reads:

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

271. *Regent Company v. Ukraine* , no. 773/03, ECHR, 3 Apr. 2008, paragraph 61, citing *Burdov v. Russia* , no. 59498/00, ECHR 2002-III, paragraph 40, and *Poltorachenko v. Ukraine* , no. 77317/01, 18 Jan. 2005, paragraph 45.
272. Application 17849/91, *Pressos Compania Naviera and Others v. Belgium* , 20 Nov. 1995, para. 31. The judgment is a bit unclear, however, on whether and to what extent the classification of such claim as an asset was dependent on the "autonomous" interpretation of article 1 of Protocol 1, or the domestic law applicable to the claim. The Court held that:

> In order to determine whether in this instance there was a "possession", the Court may have regard to the domestic law in force at the time of the alleged interference, as there is nothing to suggest that that law ran counter to the object and purpose of Article 1 of Protocol No. 1 (P1-1). The rules in question are rules of tort, under which claims for compensation come into existence as soon as the damage occurs. A claim of this nature "constituted an asset" and therefore amounted to a possession within the meaning of the first sentence of Article 1 (P1-1). This provision (P1-1) was accordingly applicable in the present case. *Ibidem*

In a *similar* sense, *see Van Marle and Others v. the Netherlands* judgment of 26 June 1986, series A, no. 101, at 13, paragraph 41.
273. Application 17849/91, *Pressos Compania Naviera and Others v. Belgium* , 20 Nov. 1995, para. 31.
274. Id., paras. 33-34.
275. Application 36677/97, *Dangeville v. France* , 16 Apr. 2002, para. 48.
276. The taxpayer's right had been recognized by the Paris Administrative Court of Appeal, and was only overturned by the *Conseil d'Etat* on the procedural grounds of the "classification of remedies" doctrine. *See* Application 36677/97, *Dangeville v. France* , 16 Apr. 2002, paragraph 22. The "classification of remedies" doctrine was some sort of extension of the res judicata principle, and prevented a party from bringing an action under

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claim based on procedural grounds was considered a "deprivation of possessions" pursuant to the *Pressos Compania Naviera* doctrine.[277]Furthermore, the Court held that the interference with property was not required in the general interest,[278]nor was it proportionate, partly as a result of the absence of proper procedures to exercise the claim.[279]

The *Dangeville* case begs the question whether the ECHR would have been equally proactive, and unforgiving with the domestic authorities if the right involved had arisen from the determination by tax authorities of a tax liability in breach of a bilateral tax treaty, rather than EU law provisions; the reference in the text of article 1 of Protocol 1 to "general principles of international law" suggests that it should. If so, the author must conclude that a procedural obstacle to the recovery of sums resulting from tax liabilities unduly determined, may not constitute a breach of article 6(1) of the ECvHR but it impinges upon the right to enjoyment of property, pursuant to article 1 of Protocol 1.

The second question which this gives rise to, is whether, to claim that there has been a breach of the right to enjoy one's possessions, an absolute procedural rule that definitely excludes the substantive right is necessary (as in *Dangeville*) or the mere absence of guarantees that can potentially result in that loss is sufficient. Given the wide reference to "interference" we would be inclined towards the second alternative. In such context, in cases where a decision by state authorities impinges upon a taxpayer's patrimony, even if the taxpayer is deprived of the article 6 right to due process as such, the "procedural" side of the right to peaceful enjoyment of possessions acts in practice as a way to circumvent that limitation.

7.5.2.2.3. Back to square one. Procedural guarantees and arbitration

The problem is that case law is not sufficiently developed to enable a determination as to whether, and to what extent, the right to enjoy one's possessions affords, as an autonomous source of rights, the same or equivalent procedural guarantees as when exercised in conjunction with article 6, or if it only offers something less. If it does provide equivalent guarantees (admittedly, a big if), this only takes us to square one, that is, such guarantees apply, *in the absence of a waiver* , such as the one implicit in arbitration. Thus, we need to examine whether and to what extent the guarantees can be waived pursuant to the Court's case law on arbitration agreements and arbitral proceedings.

On a strict theoretical view of arbitration, instruments such as the ECvHR are based on the idea of state responsibility for wrongful acts, and since arbitral tribunals are not organs of the state they are not directly subject to the ECvHR provisions, including article 6.[280]In practice, however, arbitral awards need to be enforced, and since states will be liable for the actions of their national courts, where a court has enforced an arbitral award in contravention of the ECvHR, national courts will decline to enforce such awards. Since arbitrators are supposed to render enforceable awards, they will therefore definitely consider the ECHR and other instruments. This means that, even according to the view grounded on the theory of arbitration, procedural guarantees come into play, albeit in an indirect way.[281]

Of course, there is no guarantee that the ECHR views the issue in the same light, for it has no duty to be consistent with the theoretical foundations of arbitration; its duty is to be consistent with the ECvHR. In fact, in *Regent Company v. Ukraine* , the Court upheld the private party's right to the enforcement of an award as being protected by article 6(1) of the ECvHR[282]but it did so by affirming that the reference to "tribunal" in article 6(1) "is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country", and further that "the Arbitration Tribunal was a tribunal established by law" because it was in conformity with the arbitration law of

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the general law of tort (in this case, liability would arise from non-compliance with the EU VAT Directive) when it had been refused under a special procedure. Id., para. 54.

277. Id., para. 51.

278. The Court dismissed France's arguments regarding case law where statutes of limitations had operated as a bar to the claim as being different, since the case at hand did deal with such type of limitations, but with "a refusal to take the right to reimbursement itself into account". Application 36677/97, *Dangeville v. France* , 16 Apr. 2002, para. 56. The Court also held that the fact that the taxpayer had not alleged the breach of EU law in its first appeal was not an impediment, as the *Conseil d'Etat* should have realized that by itself. Id., para. 57. To sum up, the Court held that the taxpayer should not "be required to suffer the consequences of the difficulties that were encountered in assimilating Community law or of the divergences between the various national authorities". Id., para. 57.

279. Id., para. 61 states that:

> Both the negation of the applicant company's claim against the State and the absence of domestic procedures affording a sufficient remedy to ensure the protection of the applicant company's right to the peaceful enjoyment of its possessions upset the fair balance that must be maintained between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

280. Thomas Schultz, *supra* n. 254 , at 7.

281. Id., at 8.

282. *Regent Company v. Ukraine* , no. 773/03, ECHR, 3 Apr. 2008.

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the seat of the arbitration.[283]Although the Court formulated this construction to protect the arbitral award (and the party's expectations in relation to it), it could be read backwards to justify the application of guarantees to arbitration in the same way as they apply to regular courts, which could be seen as an "interference" by the arbitral community[284]or even a "judicialization" of arbitration, which would be in accordance with a strict "jurisdictional" theory of the institution,[285]a view clearly discredited.[286]In other decisions, such as *Transado* ,[287]the Court did not point out the peculiarities of arbitration vis-à-vis procedural guarantees, but went on to examine whether they had been respected in the case (specifically the right to an independent and impartial tribunal) and concluded they were.

One could argue that such concerns are, to some extent, a storm in a teacup. Detractors of the ECHR's "jurisdictional" stance towards arbitration do not argue that arbitration should be detached from procedural guarantees, but only that such guarantees should come not from the ECHR but from a truly international public order.[288]This is all very well, but states whose courts do not check the compliance of a decision with the ECvHR will incur international liability and it is somewhat unrealistic for arbitration to expect an absolute protection from the courts. Few would trust a system where awards do not pass any scrutiny concerning at least the most fundamental policies, domestic or international, and ECvHR guarantees should fall into both categories.

On the other hand, it is not true that the ECHR examines arbitral awards in the same light as it scrutinizes court decisions. The ECHR is well aware that, in an arbitration, a party has waived his right to take the dispute to a court established by law, or to a public hearing, and it sees no problem in that, as it expressed in *Deweer v. Belgium*. [289]The question is whether this constitutes a *carte blanche* for arbitration or if it is only justified to the extent that arbitral proceedings respect certain basic procedural safeguards. The view in cases such as *Pastore v. Italy* ,[290] *Jakob Boss v. Germany* [291]or *Suovaniemi v. Finland* [292]is that rights other than access to a court of law or public hearing can be waived, but it is unclear which rights these are and what the limit is.[293]

The issue is particularly problematic because, if the approach in tax treaties evolves from 'nudging' the taxpayer towards choosing between domestic courts or MAP plus arbitration, to effectively 'asking' or 'forcing' the taxpayer to do so, there are obvious oddities in the arbitral proceedings vis-à-vis basic procedural rights, such as the taxpayer's lack of party status, which entails the absence of a "right" to rebut the views of the tax authority with which he disagrees.[294]Also, the approach towards the independence and impartiality of some treaties would raise the eyebrows of many an arbitral *connoisseur* even when one considers the proceedings only as between tax authorities;[295]yet, even under the stricter US approach,[296]the fact that an arbitrator has a sufficient degree of independence and impartiality vis-à-vis the tax authorities does not mean that his independence and impartiality vis-à-vis the taxpayer can be taken for granted without a reassessment. The issue becomes particularly problematic under, for example, the OECD Model, where the taxpayer's liability could ultimately be decided by a person working at the tax administration.

However, courts such as the ECHR have given significant leeway to international arbitration. For example, in *Suovaniemi v. Finland* , where Mr Suovaniemi did not challenge an arbitrator who had been counsel for one of the parties in the past,

283. Id., para. 54.
284. The comments on the decision express that view. *See Regent Company v. Ukraine* , comments by Jean Baptiste Racine, *Revue de l'arbitrage* 4 (2009), at 805 and 806.
285. To justify the expansion of the definition of a "tribunal established by law" to the arbitral tribunal the Court made reference to *Lithgow and Others v. the United Kingdom* , judgment of 8 July 1986 (series A, no. 102, at 72 and 73, paragraph 201), where the arbitral tribunal in question was established by norm, and not by the parties' choice.
286. Most experts adhere to a combination of the "jurisdictional" theory with the "contractual" theory, in what has come to be called the "mixed" or "hybrid" theory, by which the arbitral tribunal is established by contract, but then has to respect the specific laws that constitute the "regulatory web" of reference, and the framework of reference for the arbitrators' decision. *See* Julian Lew, Loukas Mistelis & Stefan Kröll, *supra* n. 26 , at 76-82.
287. *Transado – Transportes fluviais do Sado, S.A. v. Portugal* , no. 35943/02, ECHR, referred to in the comments to *Regent Company v. Ukraine* , Jean Baptiste Racine, *supra* n. 284 , at 806.
288. Charles Jarrosson, *L'arbitrage et la Convention européenne des droits de l'homme* , Revue de l'arbitrage (1989) at 607.
289. *Deweer v. Belgium* , ECHR 27 Feb. 1980, no. 6903/75.
290. *Pastore v. Italy* , ECHR 25 May 1999, no. 46483/99.
291. *Jakob Boss Söhne v. Germany* , ECHR 2 Dec. 1991, no. 18479/91.
292. *Suovaniemi and others v. Finland* , ECHR 23 Feb. 1999, no. 31737/96.
293. *See* Thomas Schultz, *supra* n. 254 , at 10-12.
294. According to the OECD Model the taxpayer can present her positions, and, *with the permission of the arbitral board* , present them orally. Nothing is said about the possibility of rebutting the CAs' positions. In the US Model a reference is made to the possibility of the "Presenter of the case" to submit positions in writing. In the EC Convention a reference is made to the possibility of the "enterprises" to *appear or be represented before the advisory commission* (article 10(2)); and the possibility that such enterprises *may provide any information, evidence or documents which seem to them likely to be of any use to the advisory commission in reaching a decision* (article 10(1)).
295. *See* section 7.4.1. Especially the OECD Model allows for persons currently working for the tax administration to act as arbitrators.
296. Arbitrators cannot have worked for any of the tax administrations in the past 2 years. *See* section 7.4.1.

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the Court rejected Mr Suovaniemi's subsequent claim of a breach of article 6, and held that the right to an independent and impartial tribunal had been waived.[297]According to the scholars, a waiver of this kind is admissible if: (i) it is unequivocal; and (ii) it is made with informed consent, which, in turn, means: (a) the party is aware of the rights and risks involved and (b) the waiver is accompanied with "guarantees commensurate to the importance of the right being waived".[298]In *Suovaniemi* , for example, the party was assisted by counsel; yet, in that case there was no question as to Mr Suovaniemi's right to challenge the arbitrator, or his right to be heard and to present his case for that matter, things that are not remotely clear in case of tax arbitration proceedings.

In summary therefore, the question is whether a party, even with unequivocal and informed consent, can waive *in advance* [299]a right to proper proceedings in exchange for proceedings to which *it is not even a party* , and thereby enjoys none of the guarantees which apply. Even after having shown, in the context of the ECvHR, (i) that proceedings for determining tax liabilities are not subject to article 6's procedural guarantees; (ii) that some sort of undefined guarantees come into play only indirectly as a result of the application of article 1 of Protocol 1 (right to enjoyment of possessions); (iii) that even if such guarantees are equivalent to those of article 6 they can be waived if the right to a court is replaced by a right to arbitral proceedings; and (iv) that the ECHR is quite generous in its interpretation of which procedural guarantees can be waived by choosing arbitration, we are nowhere near to answering that question. Furthermore, since one can imagine that countries ratifying tax conventions containing arbitration clauses will have conducted their own similar analyses, this may explain their careful attitude towards "fork-in-the-road" provisions, or any options that may formally deprive the taxpayer of his right to access to the ordinary courts.

7.5.3. Recognition and enforcement

Provided the taxpayer does not resort to other mechanisms beyond the arbitral proceedings (i.e. he agrees with the solution rendered by the arbitration board), the question is what happens next. It is at this crucial point that the paucity of details of the different instruments becomes unnerving. Even if arbitrators manage to nudge the proceedings forward despite the limitations, and make a decision, there is still plenty that competent tax authorities could do to avoid the decision: they could refuse enforcement arguing that the arbitral board got the facts wrong or resorted to the wrong interpretation of the tax treaty, that the decision is contrary to domestic public policy or that the award is unenforceable for budgetary reasons. What is worse, any of these reasons (except maybe for the budgetary ones) could be used by a court to refuse enforcement. Therefore, the fact that little is said about the avenues for enforcement of the arbitral decision that are available to the taxpayer, can change a system that, as we have seen, is merely mediocre into simply irrelevant. States cannot simply say that the issue slipped their mind.

Yet, the language employed seems solid. Supposedly, the decision is "final and binding" on the tax authorities. This is the solution adopted under the EC Convention, which, despite allowing the authorities to depart from the opinion of the Commission, also states that, failing an agreement in favour of a different decision, the authorities *shall* implement that opinion.[300]Yet, no mention whatsoever is made of the implications of that "shall" if the authorities fail to implement the solution. A similar solution is adopted by the UN Convention, which indicates that the decision *shall* be binding *unless* the authorities, within 6 months, adopt a different solution (or the person affected fails to accept the arbitration decision).[301]The solution in US treaties focuses more on the acceptance/rejection by the taxpayer, but it does not say much about the consequences vis-à-vis the CAs and their governing states other than that "[…]the determination of the arbitration board

297. *Suovaniemi and others v. Finland* , ECHR, 23 Feb. 1999, no. 31737/96.
298. Id.
299. It could be argued that Mr Suovaniemi's right was not only waived in advance when he opted for arbitration, but at the time of attending to the constitution of the arbitral tribunal, i.e. when the breach of article 6 occurred.
300. Article 12 of the EC Convention states that:

> (1) The competent authorities party to the procedure referred to in Article 7 shall, acting by common consent on the basis of Article 4, take a decision which will eliminate the double taxation within six months of the date on which the advisory commission delivered its opinion; (2) The competent authorities may take a decision which deviates from the advisory commission's opinion. If they fail to reach an agreement, they shall be obliged to act in accordance with that opinion.

301. Article 25(5) of the UN Model Convention stipulates that:

> The arbitration decision shall be binding on both States and shall be implemented notwithstanding any time limits in the domestic laws of these States: (1) unless both competent authorities agree on a different solution within six months after the decision has been communicated to them or (2) unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision.

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in a particular case shall be binding on the Contracting States […]",[302]that it will have the nature of a resolution by mutual agreement and that the taxpayer will have to accept it.[303]

So far, the only text that provides a reference to enforcement issues is the OECD Model Tax Convention. It states that the decision *shall be final and binding*, as the other texts do, and it also states that it shall be implemented no matter what the limitation provisions say.[304]But the OECD Sample Agreement between tax authorities makes reference to the enforcement process in the following terms:

> The arbitration decision shall be final, unless that decision is found to be unenforceable by the courts of one of the Contracting States because of a violation of paragraph 5 of Article 25 or of any procedural rule included in the Terms of Reference or in this agreement that may reasonably have affected the decision. If a decision is found to be unenforceable for one of these reasons, the request for arbitration shall be considered not to have been made and the arbitration process shall be considered not to have taken place.[305]

Nevertheless, it *requires* the CAs to *implement the arbitration decision within 6 months from the communication of the decision to them by reaching a mutual agreement on the case that led to the arbitration.* [306]

The OECD Model includes the first attempt to confront the cumbersome issue of enforcement, which makes it a better mechanism than those of any other instruments (it is especially regrettable that the US instruments, detailed in other respects, are so conspicuously silent when it comes to enforcement). Yet, the model provisions leave open more questions than they answer. First, enforcement is referred to in the Sample Agreement, which is supposedly signed between CAs. This raises doubts as to the aim of the provision. If its aim is to *deal with the consequences of non-enforcement by the courts as a matter of fact*, it can certainly do so. However, it is doubtful whether it can *regulate* individual stages in the enforcement process, which it arguably does by stating the reasons for non-enforcement by the courts: (i) a violation of paragraph 5 of article 25; (ii) the violation of any procedural rule included in the Terms of Reference; or (iii) in this agreement (the Sample Agreement), provided that it *may reasonably have affected the decision*) (*see* above).

The question is: what happens if the courts refuse enforcement for reasons that have nothing to do with those contemplated under an agreement (e.g. as a result of finding that the decision violates international public policy) or simply analyse enforcement from the perspective of a framework that has nothing to do with the one stipulated under the OECD Sample Agreement? In that event, there would be little the CAs could do.

That is why the proper solution would have been to include the enforcement process in the Tax Treaty (or Model Convention) itself, and then, to have cross-referenced it with an internationally accepted mechanism of enforcement, such as the one envisaged under the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[307]This would create problems of interpretation, since the NY Convention is deemed to refer to "commercial" disputes, which could give rise to complex arguments on the nature of a tax dispute[308]and stalling tactics, which could endanger the expediency of the process; yet, such problems would be much less likely if there were an express reference in the tax treaty to the fact that, for the purposes of the NY Convention, the disputes would be considered as "commercial".[309]

But one should be realistic with this: the absence of any reference to the enforcement process is not a casual oversight, but a deliberate omission sought after by the states, as a consequence of both: (i) the close association of the arbitration process with the administrative (i.e. non-judicial) MAP; and (ii) the states' unwillingness to relinquish their sovereignty, no

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302. US-Belgium Protocol no. 6, (j); US-Germany Protocol, article XVI no. 22, (j); US-Canada Protocol, article 21(7)(e); US-France Protocol, article X, no. 6, (e).
303. US-Belgium Protocol no. 6, (k); US-Germany Protocol, article XVI, no. 22, (k); US-Canada Protocol, article 21(7)(e); US-France Protocol, article X, no. 6(e).
304. Article 25(5) of the OECD Model Tax Convention states that: "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".
305. OECD Model Sample Agreement no. 18.
306. Id., para. 19.
307. We do agree with Professor Park in so far as the enforcement model for tax arbitration under bilateral tax treaties should not be a self-contained one, as the one under ICSID. William W. Park, *supra* n. 2 , at 838 to 848. The circumstances that gave rise to the prominence of ICSID and the Washington Convention are arguably not present today, and tax (we have seen it) remains an area more sensitive as a matter of policy (and politics) than investment protection.
308. For a similar problem about the "commercial" nature of the dispute, see *United Mexican States v. Metalclad* , [2001] B.C.D. Civ. J. 1708. *See also* William W. Park, *supra* n. 2 , at 841.
309. *See* William W. Park, *supra* n. 2 , at 841.

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matter that this comes at the cost of casting a(nother) shadow of uncertainty over what is already a process notable for its lacklustre solutions.

7.6. Conclusions

It is expected that, by now, an alert reader will have found the rationale for the title of this article. “Snakes and ladders” is a classic board game where players must move their pieces across the board (usually by throwing a dice). The catch with the game is that specific board squares are connected by “ladders” and “snakes” (or “chutes”), which make the player advance or go back multiple positions, thereby helping or hindering his game. The fun is in not knowing whether a player will be unexpectedly helped, or pushed back to start all over again.

Even if this uncertainty is exciting in the context of a board game, it is frustrating when associated to a legal process; yet, states have managed to create a king-sized game of snakes and ladders when it comes to tax arbitration. In some cases the taxpayer and tax administration alike can be unexpectedly helped by an alignment of circumstances that render them willing to resolve the issue as soon as possible, as well as by the discretion of the arbitrators, which, well-exercised, can make the process run smoothly. If the solution is quick and fair, perhaps the “losing” tax authority may even be interested in implementing it with equal swiftness, if only to ensure that next time, when the decision is favourable to it, it gets the money on time.

This rosy picture, with so many ladders, should not mask the reality that this is indeed a game filled with snakes. These come in various forms, but perhaps the most insidious are: (i) the emphasis in attaching the arbitral process as an appendix to the “conciliatory” procedure (called MAP or something else); (ii) the tax authorities’ absolute (and unnecessary) control of all stages of the process; and (iii) the taxpayer’s secondary role. All these elements create incentives for opportunistic behaviour by one, or both, tax authorities, who can stall or “play the referee”, knowing that the arbitrators have a more insecure position than those, say, in investment arbitration.

This may have been accepted as a necessary evil (or even created on purpose) by states and tax authorities. In fact, the current system is consistent with the view of arbitration as a sort of “Damoclean sword”, hovering over the tax authorities’ heads, and ready to strike if they procrastinate too much. In addition to being shocking for someone accustomed to the clear benefits of arbitration, this view, and the type of mechanisms that it has engendered, has further consequences that seriously question the judgment of the states and authorities who designed the process.

First, the mechanism can take an excessive amount of time, which may not be in the interests of states who are under budgetary pressures, although it can be argued that the incentive is reduced to the extent that the taxpayer can be forced to bear the cost of double taxation in the meantime. Second, the control which tax authorities exercise over the process hides another truth: parties to an arbitration, especially if they are public authorities, have many virtues: skilled and smart professionals but they are awful managers of arbitral proceedings. They lack flexible procedures (and mentality) and too often let formality triumph over expediency. Flexibility is what justifies arbitration in the first place. Making restrictive rules on the proceedings (such as those on the extension and written nature of the submissions) can work depending on the nature of the issue they apply to. This self-evident fact was probably what led states to accept (probably grudgingly) wider discretion for arbitrators in establishing procedural rules, albeit that this has not been extended to the legal sources, or the nature of the decision, which, at least in the case of US instruments, must only state the result and not provide a rationale; something dangerous, since it can give rise to a division between “insiders” and “outsiders” more patent than the one existing in commercial and investment arbitration.

Third, the lack of taxpayer involvement allows tax authorities a certain degree of control, and the possibility of saying “no”, which lets them align the existence of tax “arbitration” with their goals on pursuing tax avoidance and tax fraud. At the same time, the taxpayer’s secondary role creates very serious problems where he is forced by the tax authorities to choose between domestic courts and a clumsy procedure to which he is not a party. Also, all investment in the process might be to no avail if the taxpayer decides to withdraw from the proceedings, or even if he refuses to adhere to the final decision, where he is not happy with the process and its outcome. There are also very serious questions left unanswered when it comes to the taxpayer’s basic right to a due process.

Which leads us to the last problem: the most serious doubt concerns whether one can consider tax arbitration as an actual, and serious, arbitral “process”, or a game not to be taken seriously. A process entails certain duties, but enjoys legal protection. Actual arbitrators can request judicial assistance for matters of fact or evidence, something that a tax authority may be interested in, especially if the courts are those of another country. Arbitration is a system properly coordinated with the administration of justice. Courts have to accept the decisions emanating from arbitral tribunals as binding decisions

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"in law" and cannot brush them aside as the result of administrative horse-trading, a threat that always exists with current proceedings.

All in all, such guarantees are not present in the legal provisions of the system, which is worrying for a mechanism that is still in its infancy. Fortunately, the experience with arbitration tells us that not even the "conventional" arbitration procedure used in commercial cases has always enjoyed its current level of legal protection. The main doctrines that today constitute its pillars were not created through legislation, but from the acceptance of the arbitrators' *auctoritas* by parties that knew that the system itself (not the result) was in their best interests and the crystallization of such "practice" in a body of principles used time and again. Since this basic body of principles is already in place, its adjustment to the tax field requires only that arbitrators are given some room by the parties in tax arbitration. This will only happen when tax authorities start treating arbitration not as a threat, but as an opportunity. The potential positive consequences: quick settlement of disputes, the certainty of solutions, and the taxpayers' rights and interests, or even the development of an international *lex tributaria* (in the distant future), depend on this change of mentality.

Issue	OECD Model	UN Model	US Model	EC Convention
Relationship to conciliatory proceedings	Paragraph 5 of provision on MAP (art. 25) Unable to reach an agreement within 2 years from the presentation of the case to the CA of the other contracting state	Paragraph 5 of provision on MAP (art. 25) (alternative B) Unable to reach an agreement within 3 years from presentation of the case to the CA of the other contracting state	Paragraph in provision on MAP (art. 26(5) and (6)) CAs have endeavoured but are unable to reach an agreement (treaties) The later of: (i) 2 years after "Commencement Date" of MAP (date when CAs confirm to each other that they have received sufficient information to proceed with the MAP) "[…]unless both competent authorities have agreed prior to the date arbitration proceedings begin to a different date", (ii) Date of reception of non-disclosure agreements signed by taxpayers by CAs (MoUs)	Separate provisions (arts. 6, and 7 et seq.) Article 7(1). "If the competent authorities fail to reach an agreement that eliminates the double taxation referred to in Article 6 within two years on the date on which the case was first submitted to one of the competent authorities enterprises may have recourse to the remedies available to them under the domestic law of the Contracting States concerned; however, where the case has so been submitted to a court or tribunal, the term of two years referred to in the first subparagraph shall be computed from the date on which the judgment of the final court of appeal was given"

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Formal act to begin an arbitration	Request by taxpayer	Request by CAs	Automatic (provided there was a request for assistance that originated the MAP). CAs can agree to postpone the date, but, in the absence of agreement, one can directly appoint a board member	The CAs shall set up a commission. There is no specification as to how proceedings begin
"Mandatory" arbitration (limitations)	Article 25(5) "any unresolved issues arising from the case *shall* be submitted to arbitration" [emphasis added]	Article 25(5) (*alternative B*) "any unresolved issues arising from the case *shall* be submitted to arbitration" [emphasis added] A case shall not be submitted to arbitration if the CAs of both contracting states consider that such a case is not suitable for arbitration and neither of them makes a request (Commentaries)	Binding arbitration "*shall be used* [...] unless the competent authorities agree that the particular case is not suitable for determination by arbitration" (treaties) [emphasis added] The CAs will consider such agreement if: (i) "There is an inordinate and/or repeated delay in the response of a taxpayer to a request for information" *;* (ii) Parallel proceedings (*see* below) (MoUs)	Article 7(1). If the competent authorities fail to reach an agreement "[...] they shall set up an advisory commission […]" charged with delivering its opinion on the elimination of the double taxation in question

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Issues included	"[…]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" (art. 25(5)(a))	Same as in the OECD Model	Application of articles 4 (Residence) (but only insofar as it relates to the residence of a natural person), 5 (Permanent Establishment), 7 (Business Profits), 9 (Associated Enterprises), 12 (Royalties), including those originating with APAs The CAs may, on an ad hoc basis, agree that binding arbitration shall be used in respect of any other matter to which article 25 applies (US-Germany) Disagreement on the application of the Convention, including MAPs originated in APAs (US-Belgium and US-France) Application of one or more Articles that the competent authorities have agreed in an exchange of notes shall be the subject of arbitration, including APAs-originated disputes (US-Canada)	Issues arising out of the cross-border taxation of business profits of associated enterprises, where conditions are made or imposed which differ from those which would be made between independent enterprises (arts. 1 and 4) (Transfer Pricing Issues)

Issue	OECD Model	UN Model	US Model	EC Convention
Arbitrators 1. Appointment	Each CA will appoint an arbitrator, and the two of them will appoint the Chair. In case of non-appointment, the OECD Centre for Tax Policy and Administration shall do it within 10 days of receiving a request from the person who made the request for arbitration. The same procedure shall apply in case of replacement (Sample Agreement)	Unspecified	Each CA will appoint a member to the arbitration board by sending a written communication indicating their appointment to the other CA within 60 days (90 in US-France treaty) of the commencement of arbitration Within 60 days of the date on which the second such communication is sent, the two members appointed by the contracting states will appoint a third member, who will serve as Chair of the board In case of failure to appoint, the appointment will be made by the highest-ranking member of the Secretariat at the Centre for Tax Policy and Administration of the OECD who is not a national of either state In case an arbitrator is unable to fulfill its duties CAs have 14 days to replace (one can presume that, in the absence of replacement, the OECD Centre performs the same role)	The committee will be composed of a Chairman and: – two representatives of each CA (CAs can reduce the number to one by agreement) – an even number of independent persons of standing The persons of standing shall be appointed by agreement In the absence of agreement they shall be appointed by the drawing of lots by the CAs involved The representatives and persons of standing shall appoint a Chairman from among the list of persons of standing (art. 9(1)-(5))

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Arbitrators 2. Eligibility	"Any person, including a government official of a Contracting State, may be appointed as an arbitrator, unless that person has been involved in prior stages of the case that results in the arbitration *process*" (Sample Agreement, para. 7)	Unspecified	The CAs will develop a non-exclusive list of individuals with familiarity in international tax matters who may potentially serve as the Chair of the board. The Chair shall not be a citizen of either contracting state (Treaties) Also, there is a restriction not to appoint: (1) current tax administration employees (US-France) current government employees (US-Belgium, US-Germany, US-Canada) (2) former *career* government employees (US-Belgium) former government employees, (US-Germany, US-Canada) former tax administration employees (US-France) within – 1 year following the departure from government employment (US-Canada) – 2 years of their last employment in the government/tax administration (US-Belgium, US-Germany, US-France)	The list of persons of standing will be made with the five independent persons nominated by each state (each state shall inform the Secretary-General of the Council of the EC). They must be nationals of a contracting state, resident within the territory where the Convention applies, competent and independent The Chairman must have fulfilled the conditions for appointment to the highest judicial office in his country, or be a jurisconsult of recognized competence

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			"The competent authorities will appoint members who have significant international tax experience. They need not, however, have experience as either a judge or arbitrator. Every member of an arbitration board shall be impartial and independent of the contracting states and the Concerned Persons at the time of accepting an appointment to serve, and shall remain so during the entire arbitration proceeding (all Memoranda) and for a reasonable time thereafter" (US-Germany, US-Canada, US-France) CAs will jointly agree to a list of persons (5-10 US-Germany, US-Belgium; at least 10 US-Canada) who are qualified and willing to serve as a Chair for an arbitration board; and will review or revise this list every third year. Persons on the list will have significant international tax experience, but need not have experience as a judge or arbitrator. Same language applies on independence and impartiality	If lots are drawn for the appointment of the persons of standing, a state can object to the appointment of an independent person of standing: – in any circumstance agreed in advance by the CAs involved – where the person belongs to or is working on behalf of one of the tax administrations concerned

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			There are no provisions on challenge and removal, other than the statement that "If a board member is unable to fulfill his or her duties the chair will notify the competent authorities.", and that "the competent authorities will consult with the remaining board members to determine whether a new timetable is necessary". However, the US-Canada Memorandum provides for every prospective board member to "disclose to both competent authorities any fact or circumstance likely to give rise to justifiable doubts as to the Board Member's impartiality or independence" The duty is an ongoing one during the proceedings. (MoUs)	– where the person has, or has had, a large holding in or is or has been an employee of or adviser to one or each of the associated enterprises – where the person does not offer a sufficient guarantee of objectivity for the settlement of the case/s The CAs can also object to the appointment of the Chairman under these circumstances (art. 9(1)-(5))

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Parallel proceedings	Issues shall "not be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State" (art. 25(5))	Issues shall "not be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State" (art. 25(5))	If the taxpayer dockets the case for which it requested CA assistance, the case will be considered as not suitable for arbitration if the court does not allow for suspension of the litigation proceedings until there is a CA resolution Arbitration proceedings may also be temporarily deferred if there is an administrative appeal if the appeals proceedings have not been suspended	The submission of the case to the advisory commission shall not prevent a contracting state "from initiating or continuing judicial proceedings *for administrative penalties* in relation to the same matters" (art. 7(2)) [emphasis added] Where domestic law does not permit CAs to derogate from judicial decisions, the proceedings cannot start unless the associated enterprises have allowed the time provided for appeal to expire, or withdrawn the appeal before a decision has been delivered (that does not affect the appeal in regard of matters other than those resolved under these proceedings) (art. 7(3)) The CA is not obliged to follow proceedings when the adjustment of profits gives rise to liability to a serious penalty for at least one of the enterprises (art. 8(1)). If both proceedings are simultaneous the CA can stay the arbitration

Issue	OECD Model	UN Model	US Model	EC Convention
Procedure	Within 3 months after the reception by both CAs of the request for arbitration they shall agree on the questions to be resolved by the arbitration panel, which will be the Terms of Reference (Sample Mutual Agreement on Arbitration) In the Streamlined Arbitration Process each CA shall submit its own response to the questions raised in the Terms of Reference within 2 months from the appointment of the arbitrator The arbitrators shall adopt those procedural and evidentiary rules that they deem necessary to answer the questions set out in the Terms of	Unspecified	Submission by each CA of a proposed resolution paper (5 pages max) with a supporting position paper (30 pages max) The Proposed Resolution should provide a resolution for each specific amount of income, expense or tax at issue in the case. It may also address any related issues that are required to determine those amounts (e.g. the existence of a permanent establishment) If it so desires, each CA can submit a Reply Submission to the board to address any points raised by the Proposed Resolution or Position Paper submitted by the other CA (MoUs)	Enterprises and CAs shall give effect to any request by the advisory commission to provide information, evidence or documents. However, the CAs will not be obliged to: – carry out administrative measures at variance with domestic law or normal administrative practice – supply information not obtainable under its domestic law or in its normal administrative practice

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	Reference They will have access to all information necessary to decide the issues submitted to arbitration, including confidential information Any information that was not available to both CAs before the request for arbitration was received by both of them shall not be taken into account for purposes of the decision, unless otherwise agreed by the CAs (Sample Agreement, para. 11) The CAs may derogate or vary procedural rules of agreement in the Terms of Reference (Sample Agreement, para. 3)		Additional information may be submitted to the board only at its request, (Treaties, Memoranda and Guidelines) The board may request additional information that consists only of existing documents and may not request new or additional analyses The arbitration board may adopt any procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of the Protocol (Protocol and Arbitration Board Guidelines)	– supply information that would disclose any trade, business, industrial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*) (art. 10(1)) CAs can agree on additional rules of procedure (art. 11(2))

Issue	OECD Model	UN Model	US Model	EC Convention
Taxpayer participation	Terms of Reference will be communicated to the person who made the request for arbitration (Sample Agreement, para. 3) The person who made the request for arbitration may present his position to the arbitrators in writing to the same extent that he can do so during the MAP With the permission of the arbitrators, the person may present his position orally during the arbitration proceedings (Sample Agreement, para. 11)	Unspecified	The presenter of the case may submit five copies of a position paper (the Presenter Position Paper) not to exceed 30 pages, plus annexes. The positions, arguments or analyses raised in the supporting position paper must be positions, arguments or analyses previously provided to the CAs for their consideration prior to the beginning of arbitration. Any annex to the Presenter Position Paper also must be a document made available to the CAs for their consideration prior to the beginning of arbitration (Arbitration Board Guidelines)	Each of the enterprises may, at its request, appear or be represented before the advisory commision. The enterprise may also appear if the commision so requests (art. 10(2)) The enterprises may provide any information, evidence or documents which seem to them likely to be of any use to the advisory commission in reaching a decision (art. 10(1))

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Confidentiality	For the sole purposes of the application of the provisions of articles 25 and 26, and of the domestic laws of the contracting states, concerning the communication and the confidentiality of the information related to the case that results in the arbitration process, each arbitrator shall be designated as authorized representative of the CA that has appointed that arbitrator or, if that arbitrator has not been appointed exclusively by one CA, of the CA of the contracting state to which the case giving rise to the arbitration was initially presented (Sample Agreement, para. 8)	Unspecified	In order for proceedings to begin the CAs need to have received from each concerned person a statement agreeing that the concerned person and each person acting on its behalf will not disclose to any other person any information received during the course of the Proceeding from either contracting state or the arbitration board, other than the determination of the Proceeding "No information relating to the Proceeding (including the board's determination) may be disclosed by the members of the arbitration board or their staffs or by either competent authority, except as permitted by the Convention and the domestic laws of the Contracting States. In addition, all material prepared in the course of, or relating to, the Proceeding shall be considered to be information exchanged between the Contracting States. All members of the arbitration board and their staffs must agree in statements sent to each of the Contracting States in confirmation of their appointment to the arbitration board to abide by and be subject to the confidentiality and nondisclosure provisions […]" applicable to proceedings of Exchange of Information and Administrative Assistance	The members of the advisory commission shall keep secret all matters they learn as a result of the proceedings (art. 9(6))

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Sources of the decision	"The arbitrators shall decide the issues submitted to arbitration in accordance with the applicable provisions of the treaty and, subject to these provisions, of those of the domestic laws of the Contracting States. Issues of treaty interpretation will be decided by the arbitrators in the light of the principles of interpretation incorporated in Articles 31 to 34 of the Vienna Convention on the Law of Treaties, having regard to the Commentaries of the OECD Model Tax Convention as periodically amended, as explained in paragraphs 28 to 36.1 of the Introduction to the OECD Model Tax Convention. Issues related to the application of the arm's length principle should similarly be decided having regard to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. The arbitrators will also consider any other sources which the competent authorities may expressly identify in the Terms of Reference". (Sample Agreement, para. 14)	Unspecified	The board will apply, as necessary and in descending order of priority: (a) provisions of the Convention (b) agreed commentaries or explanations of the contracting states concerning the Convention (c) laws of contracting states to the extent they are not inconsistent with each other (d) OECD Commentary, Guidelines or Reports regarding relevant analogous portions of the OECD Model Tax Convention	The commission must base its opinion on article 4 of the Convention (no further specifications) (art. 11(1))

Issue	OECD Model	UN Model	US Model	EC Convention
Decision	Simple majority, 6 months, and shall indicate in writing the sources of law relied upon and the reasoning which led to its result, unless otherwise provided in the Terms of Reference. It has no precedential value (Sample Agreement, para. 15)	Unspecified	Limited to a determination regarding the amount of income, expense or tax reportable to the contracting states The determination of the board will not state a rationale. It will have no precedential value The determination of an arbitration board shall constitute a resolution by mutual agreement (US-Belgium Protocol 6, (h); US-Germany Protocol, article XVI, no. 22, (h); US-Canada Arbitration Board Operating Guidelines, no. 12, (j); US-France Arbitration Board Operating Guidelines, no. 18, (a))	6 months, simple majority, does not specify contents (art. 11(1))

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Binding and final decision	"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" (art. 25(5)) "The arbitration decision shall be final, unless that decision is found to be unenforceable by the courts of one of the Contracting States because of a violation of paragraph 5 of Article 25 or of any procedural rule included in the Terms of Reference or in this agreement that may reasonably have affected the decision. If a decision is found to be unenforceable for one of these reasons, the request for arbitration shall be considered not to have been made and the arbitration process shall be considered not to have taken place" (Sample Agreement para. 18)	The arbitration decision shall be binding on both states and shall be implemented notwithstanding any time limits in the domestic laws of these states: "(1) unless both competent authorities agree on a different solution within six months after the decision has been communicated to them or (2) unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision" (art. 25(5)) No reference is made to enforcement	Each concerned person must, within 30 days of receiving the determination of the board from the CA to which the case was first presented, advise that CA whether that concerned person accepts the determination of the board If any concerned person fails to so advise the relevant CA within this time frame, the determination of the board will be considered not to have been accepted in that case No reference is made to enforcement	"1. The competent authorities party to the procedure referred to in Article 7 shall, acting by common consent on the basis of Article 4, take a decision which will eliminate the double taxation within six months of the date on which the advisory commission delivered its opinion. 2. The competent authorities may take a decision which deviates from the advisory commission's opinion. If they fail to reach an agreement, they shall be obliged to act in accordance with that opinion." (art. 12)

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