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ARBITRATION AS A RESOLUTIVE MECHANISM IN MUTUAL AGREEMENT TAX PROCEDURES, BETWEEN BILATERALISM AND EU HARMONISATION

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SUMMARY

INTRODUCTION

Globalization and digitalization of the economy have undoubtedly brought many benefits to the world, but they have also simplified tax avoidance and double non-taxation especially for multinational entities (MNEs), thus letting them in a situation of an unduly low tax or non-taxation at all. To fight these loopholes, Nations within their own tax system have started to aggressively levy taxes implying, in an even growing number of situations, the imposition of similar level of taxes on the same income, thus resulting in an income taxed twice. As emphasized by Markham M.[1], their strategy has become more aggressive after the financial crisis period, during which the gross debt of OECD countries, in percentage of the GDP, passed from 74% in 2007 to 112% in 2013. In this context each Nation tried to collect as many taxes as possible, in a desperate attempt to recover the reserves lost during the crisis. As asserted by Park W.[2], the subtle difference between the *normal* portion of taxes and the *abusive* power is that the first has the scope of funding the government while the second inevitably leads businesses to the disruption of their economic value. The sovereign power to tax that pertains to each country cannot lead multinational companies in disadvantaged situation in respect to national companies, and so states have to inevitably deal with the international framework and interdependence created by the trans-national companies. For this reason, a cooperation between nations was necessary to look for a resolution to the double taxation problem, which is the ultimate goal of double tax agreements. Generally, measures as exemption or credit relief from taxes already payed in another jurisdiction eliminate the double payment of taxes, thus giving company the possibility to effectively operate at a cross-border level. Sometimes the above-mentioned tools do not avoid double taxation to arise and in these situations another mechanism is advocated, the mutual agreement procedure (MAP). The scope of introducing more powerful resolution instrument is that of distributing the tax burdens in a fair manner at an international level, since from one side there's the objective of eliminating tax avoidance strategies and, on the other, there's the problem that different national legal systems pretend to apply their jurisdiction to tax on the same item of income, causing double taxation to arise. The dissertation in particular refers to this second problem and focuses on the existing mechanism for the resolution of disputes derived from an income taxed twice. Although a dispute resolution mechanism already existed, that is the mutual agreement procedure, its functioning was far from reached and it presented some drawbacks.

[1] Markham M.A., 2015, *New Developments in Dispute Resolution in International Tax*, Revenue Law Journal, Vol. 25, Issue 1, p. 1-30.

[2] Park W.W., 2008, *Arbitrability and Tax*, L. Mistelis & S. Brekoulakis (eds), Arbitrability: International and comparative Perspectives, Boston University School of Law, p.179-205. Available at SSRN: https://ssrn.com/abstract=3019219.

In the first chapter of this dissertation, after the presentation of some basic knowledge useful to understand the concept of double taxation and its economic and juridical facets, MAP art. 25, as it is included in the OECD Model Convention, is illustrated and its different stages and functioning process are explained. The perception that the amicable settlement was a sort of *black box*[3] in which the taxpayer's dispute disappears or, otherwise, it is conducted in an unclear manner due to the absence of an obligation to resolve the issue, has made countries reluctant on its usage. In practice the procedure has unveiled its unsatisfactory path after years of unsuccessful dispute resolution and it revealed itself as a waste of time in taxpayer's perspective. The limited effectiveness of the MAP, together with its weaknesses, has brought the legislator, both in the international area and in the European sphere of influence, to strengthen the mechanism through the extension of the procedure, thus appealing to arbitration. In the international field, the lack of cooperation and transparency among countries have pushed the OECD, together with the G-20 leaders, to promote inside their Base Erosion and Profit Shifting package (BEPS) - a project aimed at restoring the trust in the tax system - a plan to strengthen the current MAP through the insertion of a peer-review and monitoring process. In this way countries provide their data and the organization gives back some suggestions to better enhance the mechanism's functioning. Even though the BEPS project was basically designed to fight the shift of profits to low-tax countries, limiting the reduction of the taxable base, two practices that MNEs were doing to inflate their profit, a critical point in the project was the development of an efficient mechanism for dispute resolution and its implementation through the adoption of the Multilateral Instrument (MLI). Given the previously named path, the increase of international trade and investment has inevitably brought to the increment in the number of tax disputes, as it is already recorded in the latest available statistics. For this reason, the OECD promoted the insertion of an arbitration clause, in its Model Tax Convention, as a last resort mechanism to resolve conflicts. The need of a functioning instrument that can ultimately eliminate double taxation is crucial for the free movements of goods, trade and investment, thus widening the barriers and letting multinational companies to compete at the same level of taxation of national enterprises.

The second chapter enters in the details of the arbitration mechanism, pursuant to the international guidelines. A general definition of arbitration, together with its historical perspective, is given and subsequently its functioning is explained. The different figures' role involved during the proceeding are described, such as the taxpayers and the arbitrators, and the

[3] See note 1.

decision-making process, which encompasses two different types of available arbitration, is tackled. In addition, the various steps of that procedure, pursuant to the MLI and the prior sample in the OECD commentary, are outlined. Finally, the implementation of the arbitration decision is described and the reluctant position of developing countries toward arbitration is discussed.

Up to now the perspective adopted was at an international level, while in the third chapter the steps that have been made at the European level, are analyzed. Starting from the Arbitration Convention, a non-completely binding instrument, and arriving to the European Directive, which given its nature is governed by the European Court of Justice and has definitely obliged states to include on their legislation an arbitration mechanism, thus effectively imposing a more binding power towards member states. Moreover, two recent sentences are analyzed in light of the compatibility issue of arbitration clause, contained within bilateral tax treaties, with the Union law.

The fourth chapter emphasizes that, given the relative novelty of the arbitration discipline, no-consensus has been reached on its application and for this reason the implementation mechanism provided by the OECD guarantees a level of flexibility, thus permitting countries to better suit the arbitration clause along with their purposes. Moreover, it analyzes the European moves and compares them to the international ones, as the conflictual problems between the EU binding law and the International soft-law and its possible overlap, for both OECD and EU member countries, is dealt with. Finally, it suggests some ways to improve the existing arbitration discipline, such as through the creation of an institution which manages in a coherent way tax arbitration issues and embodies a series of procedural rules to be applied, feasible improvement in regarding to precedential value attributed to the arbitration decision or again, advance some hypothesis to resolve the issue of triangular cases. The ultimate goal of arbitration is that of removing barriers to cross-borders activities, but, since it's a novelty both in the international and in the EU area, its application is limited and its effects might be clearer in a future nearby, once more countries have renovated their bilateral tax treaties including such clause.

Conclusions shape the positive attitude toward the widespread diffusion of arbitration also in developing countries, despite their initial reluctance, once they have realized that it is a well-functioning mechanism which simplifies the dispute resolution, given the experience gained in the developed countries that have successfully applied arbitration. It is finally emphasized that practitioners are overall optimistic regarding the future development of the binding arbitration;

they assert that only some corrections are necessary, but the overall mechanism will reveal its power on resolving disputes.

1. AN INTERNATIONAL OUTLOOK

1.1 Internationalization of the economy and the thorny problem of double taxation

International tax law provides the rules for the avoidance of double taxation through the usage of tax treaties, whether bilateral or multilateral[4] (Vogel, 1986). This term, as explain the author, generally refers both to international and domestic tax provisions, specifically relating to the so-called cross-borders situations involving the territory of more than one state. A tax treaty is an agreement between two countries inherent to the administration of taxation and it is used when domestic tax legislation of both states enforce at the same time with respect to a particular taxpayer; its objective is to eliminate this dual tax charge and prevent fiscal evasion. These conventions represent an instrument to solve on a uniform basis the problem arising from international double taxation, promoting capital movements and international trade.

In the past, states have always levied taxes on their domestic income easily: they could establish and collect taxes over their territories without any particular kind of constraints, due to the fact that economies were typically enclosed within their national borders. Things started to change in the last decades with the globalization and the corresponding widening of boundaries, from national to international, the liberalization of market and the delocalization of product plants. These switches have determined the arising of conflicts between states about their right to levy taxes due to the overlapping of sovereignty; both states claim their right to tax a specific income thus leading to double taxation. In order to deal with these issues, and more generally to promote human well-being after the WWI, a growing number of nations joined efforts and gave birth to supranational organism as the League of Nations later became the United Nations and the Organization for the Economic Cooperation and Development (OECD), that will be described later on. Latter has shaped a definition of "*international juridical double taxation as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods*"[5]. Although this definition hasn't an international legal nature, it is widely accepted and it is characterized by five elements: taxation by multiple countries, on the same taxpayer, on the same item of income, by similar taxes and periods. Furthermore, this juridical definition can be distinguished from the economic one, which covers a broader concept: it occurs whenever there is a multiple taxation of the same item of economic income, in the hands of different taxpayers**.** In a certain sense it is more difficult to provide remedies for this last definition, given the fact that two types of economic international double

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4 Vogel K., 1986, *Double Tax Treaties and their Interpretation*, International Tax & Business Lawyer Vol. 4, p.4-85.
5 OECD, 2017, Model Tax Convention on Income and on Capital, Introduction, paragraph 1.

taxation can be identified: one on dividend distribution, and the other on international transactions implemented by multinational entities. Given the definitions above, the difference between the two can be reassumed in the absence of identification of a single subject in the economic one.

Using a comprehensive perspective, as mentioned in *What is International Double Taxation?*, double taxation can be distinguished following three approaches: "*a conflict of norms, a parallel imposition on the same tax object and a specific discrimination resulting from the interaction of two or more states*" [6]. In this respect, a *quantitative element* needs to occur, that is represented by the taxes imposed by two states that conduct to a grater tax burden if compared to a single tax jurisdiction. The difference must not be due only to the different tax rate applied, but it is represented by the overall higher level of tax respect to a merely domestic case.

In the juridical interpretation, some typical cases can be identified as the employee who is resident in state A and he works stably on state B, or when a company, located in state C, conducting business in state D, sets up a permanent establishment on state D; in both cases the two states have the right to tax the income and double taxation emerges. The result is an income taxed twice. Instead, in the economic one the classical example is the *transfer price* in intra-group economic transactions[7]. The abovementioned trend toward decentralization has given rise to the thorny problem of setting prices for transactions within the parent company and its subsidiaries. In fact, multinationals companies have created a strong network between the principal company located in its home country and all the other subsidiaries around the world. Transfer price is referred as the price established in a transaction between related parties; multinationals companies use transfer price for sales and other transfers of goods and services within their corporate group.

Economic double taxation arises when adjustments in the transaction prices are not accepted in the residence state of the branch or the subsidiary: for example, suppose that a company, resident in state A, has sold assets to its subsidiary, resident in state B and after sometime it is recognized that the value of the transaction between the two related parties is lower if compared to the price that would have been in a transactions between unrelated parties. So, applying the *arm's length principle*[8], an adjustment is necessary in order to recognize for the parent a higher

[6] Ismer R. & Ruß J., 2020, *What Is International Double Taxation?*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 48, Issue 6 & 7, p. 555-563.
[7] Migliorini F., 2020, *Doppia imposizione internazionale: come riconoscerla e i rimedi.* See https://fiscomania.com/doppia-imposizione-fiscale-guida-rimedi/#:~:text=Questi%20due%20principi%20di%20tassazione,viene%20chiamata%20doppia%20imposizione%20internazionale.
[8] See note 5. OECD, 2017, Model Tax Convention on Income and on Capital, Art. 9.

taxable income and for the subsidiary a higher cost due to the purchase of assets. Until both tax administrations recognize the greater value of the transaction, there will be a double taxation on a taxable amount equal to the surplus between the price paid and the major price recognized as the *normal value* in a transaction between unrelated parties. The different amount attributable to the transfer price transaction at arm's length is also connected to the time of collection of information, which are: the arm's length price setting that uses data available when the transaction effectively takes place and the arm's length outcome testing which avails of the outcome of the transaction between associated parties. Double taxation may arise when countries involved in the tax treaty adopt different approaches to determine this arm's length price. The alteration of transaction prices between associated enterprises has represented a way through which multinationals shifted their profits in a country with tax benefits or increased their losses in a country where they could benefit from tax relief for the following years. Their strategies have been specifically designed to exploit loopholes and mismatches in the international tax field to increase their wealth.

To overcome this problem, in 1997 the OECD has published a report in which it advocates the adoption of the arm's length standard to determine the prices of transactions between associated enterprises, thus avoiding multinationals enrich themselves without paying taxes due to tax administrations. Despite some criticism, the widespread consent in the application of this principle, as remarked by Vervinden, "*has helped to preserve some measure of certainty in the international tax arena for a substantial period of time*"[9].

International double taxation is opposed to the tax avoidance phenomenon and it represents an obstacle which limits cross-borders transactions. In this respect it could be interpreted as an *anti-competitive strategy*[10] that favors domestic production disregarding foreign manufacture and thus limiting free market and its competitive rules. In detail, every nation claims its right to tax incomes based on the residence of individuals or legal entities and on the country where it is sourced.

Three kinds of juridical double taxation arise from conflicts of tax jurisdictions, instead. The first, called *source-source,* occurs when two countries assert their right to tax the same taxpayer's income because they both recognize that the income is sourced in their country, while the *residence-residence* one happens when they both claim that the taxpayer is a resident of their country (dual-resident taxpayer). Lastly, the *source-residence* claim comes out when

[9] Verlinden I., 2021 *The Value of a Principle … the Arm's Length Principle*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 49, Issue 3, p. 206-209.

[10] Bantekas I., Professor of International Law, Brunel University School of Law, 2008, *The mutual agreement procedure and arbitration of double taxation disputes*, ACDI - Anuario Colombiano de Derecho Internacional, Vol. 1, p.182-204.

one country asserts the right to tax a foreign income because it's sourced in its territory whilst the other one asserts the same right because of the residence of the taxpayer.

Different methods could be used in tax treaties to resolve these kinds of conflicts but, it's worth to say that, the power of the single contracting state plays a dominant role during the negotiations on the agreement. These deals reduce or eliminate juridical double taxation assigning taxing rights among residence and source states; generally the residence country has the priority over the source country, with the latter renouncing to his tax right, but it can occur that the state of residence grants relief through *credit*, *exemption* and *deduction* methods[11]. These are used although no international consensus has been reached on what is the most appropriate one to avoid international juridical double taxation. So, it relies upon the contracting states to decide which method they deemed more appropriate for their case.

Applying deduction method, the residence country allows its taxpayers to claim a deduction for taxes paid to a foreign government on an income sourced abroad. Country using this method tax their residents on their worldwide income and allow them to get a deduction related to foreign taxes already paid in the computation of their taxable income. That said, it only represents a theorical procedure, as both the OECD and the UN Model Treaties do not encompass it, since they mention only the other two methods as being effective for granting double taxation relief, that are exemption and credit technique. Going further, the exemption method can be splitted into *full exemption* and *exemption with progression*. Applying the first, the residence country taxes its residents on their domestic source income and exempt them from taxation on their foreign source one, whereas using the second one it determines an average tax-rate applicable to the entire taxpayer's income, as it was only sourced domestically. Lastly, using the credit method, the residence country provides its taxpayers a credit, equal to the taxes paid to a foreign country, usable as a reduction of the taxes due. Under the credit method, foreign taxes are deductible in computing the tax payable to the residence country; strictly speaking foreign source income is subjected to domestic taxation whenever the foreign tax rate is lower than the domestic one.

Usually, the majority of juridical double taxation concerns refers to the identification of the taxpayer's residence. That's why conventions typically provide remedies under which a country cannot tax business profits earned by a resident of other countries unless it has a permanent establishment in it. Worth to say that, whereas juridical double taxation, together with its remedies, are widely discussed, the economic double taxation issue is not tackled in a

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[11] Arnold B., 2016, *International Tax Primer*, published by Kluwer Law International BV, Alphen aan den Rijn, 3rd edition.

comprehensive way. In fact, only some articles of the Conventions that will be discussed in the following paragraph, as the articles 9 and 10 of the OECD Model, respectively concerning the taxation of *Associated Enterprises* and *Dividends*, seem to specifically address the economic issue.

1.1.1 Model treaty and its origin

The gathering of countries, begun by the League of Nations after the WWI, under a unique international body, even if only with advisory function, was an ambitious program, and it was mainly driven by a desire for peace, stability and collective securities. The League commissioned the first structured study to lay down foundations for the future development of international tax treaties to four economists in 1921. The group formed by Professor Bruins, Einaudi, Seligman and Sir Josiah Stamp[12] had to consider "*what were the economic consequences of double taxation, and whether any general principles could be formulated as the basis for a general international convention to eliminate this consequence*"[13]. The paper was included in the Report on Double Taxation and published in 1923. Lately, in 1928 the Council of the League of Nations appointed a standing committee on tax issues, to work on model treaties for the following years.

The United Nations has succeeded the League of Nations and has brought with it the task of creating an intergovernmental body with, among the others, the goal of developing a shared model treaty dealing exclusively with income tax matters, thus letting states to use it as a reference for the stipulation of their own treaties. It must be kept in mind that a Model Convention represent only a recommended arrangement, but it does not contain any legal binding force for the contracting states, neither at international nor national level. The standing committee was able to implement two draft model conventions, first the Model Treaty of Mexico (1943) and then the Model Treaty of London (1946), where also industrialized countries could concur, after the end of WWII. Unfortunately, at that time, these conventions were not unanimously accepted, and, despite its efforts, they failed in their ambitious plan. This failure, according to Eloranta, can be linked to two important dimensions: "*the failure to provide adequate security guarantees for its members states and the failure [...] to achieve*

[12] The group were made up by Professor Bruins G.W. Jan, a Dutch monetary expert, Luigi Einaudi which was, among other things, also a journalist and lately became the second President of the Italian Republic, Edwin R.A. Seligman an American economist famous for his work in taxation and public finance and finally the British Sir Josiah Stamp a banker and statesman who covered the position of Director of the Bank of England.
[13] Coates W. H., January 1924, *Report on Double Taxation submitted to the Financial Committee by Professor Bruins, Einaudi, Seligman and Sir Josiah Stamp*, Journal of the Royal Statistical Society, Vol. 87, p. 99-102.

disarmament goals set in the '20s and '30s"[14]. Under this view, its failure could be seen in the larger context of the missed collective security arrangements of the interwar period.

The Organization for European Economic Co-operation (OEEC), lately turned into the OECD for its accomplished international relevance, took over the role of producing a standard model treaty, picking up what the standing committee had left off: the development of a system for the avoidance of double taxation.

In this perspective the OECD's Fiscal Committee, in 1956, started to work on a draft model convention which would provide a basic structure to solve the double taxation issue among OECD countries. In 1963, OECD works lead up to a final report, entitled *Draft Double Taxation Convention on Income and Capital*, that was further revised at a later stage conducting, in 1977, to the publication of a new updated Model Convention with the addition of a *Commentary*. It is only after the Vienna Convention on the law of Treaties[15], concluded by May 23, 1969 and entered into force on January 27, 1980 that OECD has acquired its worldwide fame as supranational organization able to provide a base model for bilateral tax treaties among states. The necessity of harmonizing bilateral tax conventions under uniform principles, definitions and rules, was pushed by the globalization and the liberalization of economies in the 1980s, and the OECD Model soon became a reference one. Today, an updated version of the OECD is published almost every few years[16]; these revisions, as mentioned on the historical background of the Convention, "*are needed to take account of the experience gained by member countries on the negotiation and practical application of bilateral conventions, on changes in their tax systems, on the increase in international fiscal relations and on the development of new sectors of business activity and the emergence of new complex business organizations at the international level*"[17].

The impact of the OECD Model Convention (abbreviated MC) has extended far beyond its reference area, thus influencing also non-OECD member countries, and it is internationally recognized as a basic model for bilateral treaties between states. Nowadays more than 3.500 tax treaties exist and most of them resemble the structure of the OECD MC. The OECD

[14] Eloranta J., 2011, *Why did the League of Nations fail?*, Cliometrica, vol.5, p.27–52.
[15] Best known as the Vienna Convention, it is generally considered to be binding on all nations, because its provisions are a codification of the principles of customary international law dealing with treaties. All nations are considered to be subject to the principle of customary international law. In particular, according to art. 2 of the Vienna Convention: "*a treaty is an international agreement concluded between states and governed by international law*". Moreover, on art. 26 it contains the *pacta sunt servanda* principle, under which treaties are binding on the contracting states and must be performed by them in good faith.
[16] The latest version available of Model Tax Convention on Income and on Capital dates to 21 November 2017 and it was published on December 18, 2017.
[17] See note 5. OECD, 2017, Model Tax Convention on Income and on Capital, Historical background.

Convention represents a starting point for the stipulation of bilateral arrangements but as said it has no regulatory power because the binding settlement is represented by the single convention agreed among states. Once contracting parties have reached an agreement it does not automatically enter into force; before it can produce effects, it has to be ratified by the national designated authority and parties need to exchange their ratifications instruments. Moreover, such Model has also been used as the basis for the original drafting and the subsequent revisions of the *United Nations Model Double Taxation Convention between Developed and Developing Countries*; UN, after its initial difficulty of reaching consensus, has so developed a UN MC alternative to the OECD one. As explicitly stated in its introduction, "*the similarities among these two leading Models reflect the importance of achieving consistency where possible*"[18]. As highlighted in the title, the United Nations Model Convention is suitable for tax agreement between developed and developing countries and it is thus designed to protect the weaker contracting states giving more weight to the source principle than the OECD one does, given the fact that income is generally sourced in the poorest country. Beside each article of the Convention[19], there is a detailed commentary, intended to illustrate or interpret its provision. The commentaries have assumed increasing importance in the development of international fiscal law, especially "*in the application and interpretation of the conventions and, in particular, in the settlement of any disputes*"[20]. As explained by Vogel, the commentary "*provides a source from which the courts of different States can seek a common interpretation*"[21] and "*the committee expects this trend to continue as the worldwide network of tax treaties continues to grow and as the commentaries gain even more widespread acceptance as an important interpretative reference*"[22].

Since freedom of agreement is recognized, in addition to the useful commentary tool, member states could suit their bilateral tax treaties making their own *reservations* if they do not agree with an aspect of the Model, thus indicating their intention not to adopt that particular provision. Alternatively, they can make an *observation* if they interpret and intend to apply a specific provision in a different way respect to the majority of member countries.

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[18] Model Double Taxation Convention between Developed and Developing Countries, United Nations Publications, New York, 2017 edition.

[19] From now on the reference model is exclusively the OECD MC, if not otherwise specifically mentioned.

[20] See note 5. OECD, 2017, Model Tax Convention on Income and on Capital, Historical background**.**

[21] Vogel K., 1997, *On double taxation conventions*, Kluwer Law International, Amsterdam, p. 33; cited in: S. Guglielmi, *Il ruolo dei commentari OCSE nella interpretazione delle convenzioni contro le doppie imposizioni.*

[22] See note 5. OECD, 2017, Model Tax Convention on Income and on Capital, Presentation of the Model Convention**.**

1.2 The Mutual Agreement Procedure as on the Article 25 of the Convention

The vast majority of tax treaties aiming to eliminate international double taxation are based on the OECD Model Convention or on the UN one, with the exception of some countries which have even developed their owns, such as the US. That of OECD is divided in various chapters that outline the scope of the convention, its general definitions, the taxation of income, the methods for the elimination of double taxation and lastly special and final provisions.

Alongside the already mentioned ordinary legal remedies, the OECD MC, since its first draft publication in 1963, contains in the fifth chapter at the article 25, a mechanism for the competent authorities of the involved states to "*resolve differences or difficulties regarding the interpretation or application of the convention on a mutually agreed basis*"[23] is provided, the so called MAP procedure. It gives administrative instructions on how to implement the provision of the treaty and it is used when the competent authorities give a different interpretation and application of a convention, or in cases of double taxation, whether juridical or economic, in which legal remedies are inapplicable or classical methods have not been effective. Since most of the situations in which double taxation originates are resolved with the methods cited above (as exemption and credit method), recourse to the mutual agreement procedure actually falls into a residual category.

In the field of international tax matters no countries has absolute jurisdiction and so dual taxation may arise; a tax treaty manages these controversies using a designed competent authority*:* an individual appointed by each contracting state to represent it. It is typically defined in the convention and usually performed by the Minister of Finance or the Secretary of the Treasury, or one of their authorized representatives. "*MAP is a state-to-state alternative dispute resolution procedure*"[24] : competent authorities of each contracting state dialogue with each other in order to find a remedy against a case of double taxation, occurred or only plausible, when a taxpayer request so. Some states instead grant access to the MAP only once the payment of the total amount or a portion of tax due has been made, thus implying inefficiencies in the proceedings. It must be noticed that OECD community strongly support the possibility to solve disputes through the usage of amicable settlements and, as mentioned in the introduction of the OECD MC, by the establishment of a mutual agreement procedure it focuses on "*eliminating double taxation and resolving conflicts of interpretation of the Convention*"[25]. The MAP article

[23] *Action 14 Mutual Agreement Procedure*, see https://www.oecd.org/tax/beps/beps-actions/action14/.
[24] Ault H., Sasseville J., 2009, *OECD Model: The New Arbitration Provision*, Bulletin for International Taxation, vol.63, issue 5, p. 208-215.
[25] See note 5. OECD, 2017, Model Tax Convention on Income and on Capital, Historical background.

is made up of five paragraphs and, in the following, the first four are analyzed, leaving the fifth for a more in-depth discussion since it has represented an absolute novelty of recent introduction. Typically, three general contexts where two states shall endeavor to resolve their different perspectives via the application of the mutual agreement procedure, can be established. The first and main category, generally referred to as *specific case provision*[26], it applies to situations in which the taxpayer believes that "*the actions of one or both contracting state result or will result in taxation not in accordance with the text of the Convention*"[27], as reassumed in paragraph 1 and 2 of the article, which read as follows:

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

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

This category is the one that occurs most frequently in international tax disputes. Generally, there is little control over the work done by the competent authority and settlements reached are not published, given the specificity and uniqueness of the cases treated. The large majority of issues refer to transfer pricing cases where related companies of a multinationals group bear dual economic taxation. This procedure can be accessed also for non-transfer pricing cases, as for the existence of a permanent establishment or when the dual residency problem emerges, with both states consider a taxpayer resident in their country. As a last resort of the tie-breaker rule, made explicit in art. 4, the MAP procedure is invocated and applied in these circumstances.

[26] Avery Jones, John F. et al., 1979, *The legal nature of the mutual agreement procedure under OECD Model Convention*, British Tax Review, p.333-353.
[27] See note 5. OECD, 2017, Model Tax Convention on Income and on Capital, art. 25 (1) and (2).

It is clear that the chance of starting a MAP stands primarily in the hands of the taxpayer, and that happened in almost all cases; it requests the procedure activation to the competent authority of its residence country or of either the contracting states, depending on the flexibility of the convention. It represents the tool through which it informs the authority that an action not in accordance with the relevant tax settlement has occurred or is likely to. Rarely, the authority itself initiates the procedure, connected to the interpretation or the application of a treaty, to protect their domestic interests.

In respect to the whole procedure the taxpayer has only a limited role, thus entailing limited legal protection; after requesting its activation its only other duty is to supply all the relevant information required. Due to its limited role it may happens that during the proceedings there is a lack of transparency as, for example, delayed information about the developments of the procedure are given to the taxpayer. The MAP request would be subject to control prior the acceptance and if the taxpayer's concerns about incurring in a double taxation is not consistent, then the request will be denied, in fact the procedure is designed in a way as to avoid wasting time and money on a process that is deemed unsuitable, without a real probability for the relevant party to incur in a double taxation.

It must be noticed that the possibility of requesting the activation of the procedure has a time window of three years, in most cases from the date of the notice of adjustment but, contracting parties, during negotiations of the treaties, could even shorten the period to two years. In both cases, once the time has gone, it is no longer possible for the taxpayer to access the procedure. The time limits are thought to avoid tax administrations from providing an adjustment relative to a passed taxable period, since data may be no more available thus making the evaluation difficult. Following the pattern of art. 25, in the second paragraph, it is explicitly mentioned that authorities *shall endeavor* to arrive at a *satisfactory solution*, but they are in no way obliged to do so. In general, as explained in the commentary to the article, the existing "*mutual agreement procedure provides a generally effective and efficient method of resolving international tax disputes*"[28], but there will be cases in which authorities are unable to reach a satisfactory solution and they are left without an agreement. Even if it represents a remote possibility, it could be that the procedure results in an unresolved tax dispute. In particular, as written in the preface to the commentary, this effort, taken by authorities to try to solve the case

[28] See note 5. OECD, 2017, Model Tax Convention on Income and on Capital, Historical background, point 5 and 5.1 of Preliminary Remarks on the Commentary on art.25.

in a fair and objective manner, which should be compliant both to the convention and the principles of international law, isn't mandatory.

Continuing with the second and the third contexts, as mentioned in the third paragraph posted below, these involve "*doubts on interpretation or application of the Convention [...] and the elimination of double taxation in cases not provided for in the Convention*"[29], which, keeping the setting of the article of Avery Jones et al., respectively refers to *interpretative provision* and *legislative provision*[30].

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

These two provisions generally do not require the involvement of the taxpayer and they assume that once the doubt is resolved it can apply to other similar cases. In fact, frequently the MAP discussion involves arguments of general nature thus regarding an entire category of taxpayer and so potentially covering multiple cases. In this view, resolving interpretation issues for a general category may help in preventing dispute arising from more than one case, thus offering an overall clarification. As regarding the conduct of competent authorities, paragraph 4, explicitly mentioned above, refers to them and points out the importance of communication among them in an objective and fair manner.

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

Their efforts are directed towards the satisfactory resolution of the controversial matter in accordance with the applicable tax agreement, the OECD Convention and its Transfer Pricing Guidelines. Moreover, competent authorities, as cited in best practice n°3 *Principles approach to resolution of cases*, should be "*consistent and reciprocal in the position they take and not*

[29] See note 5. OECD, 2017, Model Tax Convention on Income and on Capital, art. 25 (3).
[30] See note 26. Jones A., John F. et al., 1979, *The legal nature of the mutual agreement procedure under OECD Model Convention*, British Tax Review, p.333-353.

change position on an issue from case to case depending on which side of the issue produces the most revenue"[31].

1.2.1 MAP: Implementation and Functioning

The procedure, as primarily suggested by the *Manual on Effective Mutual Agreement Procedure* (MEMAP), and subsequently remarked in Action 14 inside the innovative project launched in 2013 by the OECD/G20, is broken down in three stages for better monitoring the performance of the competent authorities and dividing the amount of work into more simple task. Time spent on each one is recorded, and every phase correspond to a specific action undertaken by the competent authority. Stages can be identified as follows (*Figure 1*):

- Admissibility of the MAP request, starting with the presentation of the case by the taxpayer and ending with the valuation of it by the authority.
- Position paper preparation, it encompasses the presentation of the position paper by the authority, the screening and the analysis by the other authority and the beginning of the negotiation.
- Negotiation and final outcome, it begins with the final negotiation that lead to an agreement and imply its application.

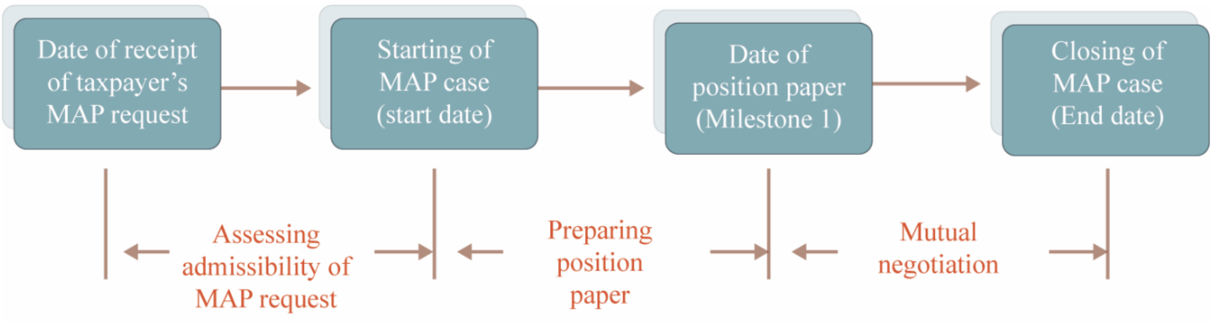

Figure 1: MAP stages as promoted in Action 14
Own elaboration from Qiang C. and Pengfei Z,, 2018, A Theoretical Reflection on the OECD's New Statistics Reporting Framework for the Mutual Agreement Procedure: Isolating, Measuring, and Monitoring, *Journal of International Economic Law, Vol. 21, p. 867–884.*

In the following, the three phases are analyzed more in detail, together with the time frame structure that is suggested for the execution of each single sub-phases.

During the first phase, the taxpayer, within three years from the notification of the measure not in line with the treaty, requests for the initiation of the procedure. Once the request is received, the procedure formally begins with the transmission of a copy to the other authority and a

[31] OECD, February 2007 Version, *Manual on Effective Mutual Agreement Procedures (MEMAP)*, Centre for Tax Policy and Administration.

preliminary valuation of the case is done. The authority may eventually ask for further information if necessary, doing everything with a time window of one month. Accurate and complete information have to be provided by the taxpayer, including its full name, the tax convention not correctly applied, the period involved and a summary of the facts. In any case the amount of information requested should be related to the complexity of the case and must kept confidential as mentioned in art. 26 *Exchange of information*. Information needs to be precise thus promoting a faster resolution of the conflict. In this perspective, subjects involved must be kept informed by the authority on the work in progress and they must entail a cooperative relation during the whole procedure. Whether a solution is agreed, taxpayer must be informed as soon as possible in a written form. On the opposite, if information is missing or not provided in a timely manner delays are likely to occur. After the collection of data, in 60 days, the eligibility for MAP is determined and the request is accepted. The approval mainly relies on four key elements, which are: the existence of a tax convention that encompass the issue, the reasonability of the issue presented, the notification made within the deadline and the taxpayer's argumentation. Whether the request is accepted or denied competent authorities inform taxpayer within a reasonable period, as it could be of 30 days, attaching the reasons in case of denial. By way of example, if the competent authority considers that the taxpayer involved has committed fraud or tax avoidance relating to the case for which MAP is requested, they may refuse to initiate the procedure. If the case is accepted, the authority that first gets the request release an opening letter to the other one, the latter confirms the receipt of the request and, within a month from the reception of the letter, it has to notify its decision of taking or refusing the demand. During the entire pending procedure, a suspension of tax collection is normally considered a good faith policy, in fact it is deemed unreasonable to force taxpayer to pay charges in order to access a procedure that should relief from those one. Furthermore, the administration which has already collected the amount may be reluctant to initiate a MAP procedure since it can bring to the refund of the amount it has already cashed. Governments, for protecting themselves, can assess the taxpayer's solvency at a future time, to make sure of the tax payment. The *Table 1* below represents the key passages touched during the first stage, and as for the subsequent tables, actions are presented on the left column, while on the right ones are listed suggested time period within which these actions must be undertaken. It is thus clearer in which relations are the various figures and their roles throughout each stage.

First Stage	
Action	**Suggested period**
1. Initiation of MAP by taxpayer through the submission of MAP **request**.	*Three years* from the notification of action giving rise to taxation not in accordance with the convention.
2. Confirmation of the receipt of MAP request by the competent authority and its transmission to the other authority. **Preliminary analysis** of the case. Eventual **request of additional information** to the taxpayer.	*Within a month* from action 1.
3. Determination of **eligibility for MAP** by authority that received the request. Notification of **acceptance or refusal** of the case to the taxpayer by appointee. In case of acceptance the competent authority that receive the case proposed to the other to **start MAP** through the release of an **opening letter**.	*Within a month* from last point of action 2.
4. The **other authority** confirms the receipt of MAP request and together with the preliminary analysis for verifying the completeness of the request with the notification decision to **accept or reject demand**.	*Within a month* from final point of action 3.

Table 1: Action implemented during the MAP First Stage own elaboration from the Annex 1 to MEMAP, An Ideal Timeline for a Typical Map Process.

The second stage of the MAP starts after the taxpayer's presentation and clarification of the issue. At this point, it is important that both competent authorities have understood and can agree on the facts, so that they can look for a shared solution This documental basis brings competent authorities to reach a position on the case and its relative adjustments, which should be presented in an understandable way, on which they should strive to keep updated their related parties on the evaluation progress on a quarterly basis. Customary, the competent authority of the country that has levied taxes, supposed to be contrary to the convention, supply a *position paper* to the other one, within a period of four to six months from the acceptance of the case. The paper is useful to give a better understanding of the issue and outlining its resolution; it encompasses general information about the case and, among the other things, contact of the official in charge of the case, full name of the taxpayer and applicable taxation years. The other competent authority, having received the position paper, can require additional information within six months. Anyhow, their exchange of information is important and represents a priority because there might be delays if those information are not exchanged promptly. In addition to the exchange of information, thanks to the sharing of the position paper, competent authorities communicate each other on a frequent basis. During their meeting, they should discuss the case in a practical and pragmatic way in order to find a deal, but given the fact that reaching a compromise is usually difficult although necessary, it may be useful the intermediation of a mediator, a neutral and impartial figure who assist the competent authority or simplify a complex case carrying an easier resolution.

Because of the exceptionality of the MAP procedure, cases are considered in their overall uniqueness and each one is treated differently considering each taxpayer, the relevant provisions of the domestic tax law and the effect of the transactions. Despite these inhomogeneities require different time for their resolution, authorities shall endeavor to solve the case within two years, however, if considered plausible to obtain its resolution, this period can be extended. The *Table 2* below continues with the synthetic representation of the various passages that follow one another in the second stage.

Second Stage	
Action	**Suggested period**
1. Authority of the country that initiates the adjustment started the **analysis and the evaluation.** **Consultation** between the two begin and the other authority **issues the position paper**, whether the first is not able to find a solution with a unilateral adjustment.	The time frame may vary between *4 to 6 months* after both authorities have agreed to enter a MAP consultation.
2. The work **other authority** initiates its **preliminary screening** and in case of missed information notifies them, requiring additional ones; whether it is feasible it can provide a unilateral reduction to taxpayer. The authority answers to the position paper issued by the other jurisdiction.	Ideally within *6 months* from the receipt of the position paper from the other jurisdiction.
3. Negotiation between officials including meeting whether necessary.	A *6 months.*

Table 2: Action implemented during the MAP Second Stage own elaboration from the Annex 1 to MEMAP, An Ideal Timeline for a Typical Map Process.

The third and final stage encompasses the decision with attached a clear explanation which underlines reasons that have led authorities to the result. As said, the binding time frame to come to an agreement is of two years from the acceptance of the MAP request, and for the sake of clarity it is communicated to the taxpayer in a written form. At this point, the taxpayer may accept the result and, consequently, the tax administrations exchange each other a written confirmation of the agreement. The result is later elaborated, and the subject finally obtains relief giving up to its right to appeal at domestic legal remedies or, on the contrary, whether it is not satisfied by the agreement it may reject it. In this latter circumstance, the competent authorities may rethink to a new alternative solution or they can consider the case closed; the first scenario is taken into account only if authorities haven't provided for a full relief in their initial proposal, otherwise if the case is considered concluded by the authority and the payer isn't satisfied it still has a way to go: the domestic legal remedies. The possibility of appealing to a domestic court or to an appeal process is considered valid if the taxpayer has presented and objection or an appeal. Otherwise, if all parties accept the resolution, in one month from the agreement follows a promptly exchange of closing letters between the competent authority, a means by which they confirm the conditions upon which they agreed. Once done, the MAP resolution could be implemented in three months from the interchange of letters; in this view it's considered appropriate to settle a draft program for the execution of the deal, which should help the competent authorities to make it effective in their jurisdictions. In some cases, authorities are unable to get a deal and they simply notify their inability to reach a common shared solution. The *Table 3* reassumes the last steps for the implementation of the resolution in a MAP.

Third Stage	
Action	**Suggested period**
1. Agreement is reached and keeping its written trackability through a **memorandum of understanding**.	Within two years, or *24 months* from the acceptance of the MAP request.
2. Interested parties, including taxpayer **approval**.	*Immediately* once the arrangement is reached. The term is fixed to *1 month*.
3. Exchange of closing letters represent the ultimately confirmation with terms and conditions.	*As soon as possible* as the taxpayer has accepted the deal.
4. Implementation of the agreement.	*Within 3 months* from action 3.

Table 3: Action implemented during the MAP Third Stage own elaboration from the Annex 1 to MEMAP, An Ideal Timeline for a Typical Map Process.

1.2.3 Defining the role of the Competent Authority

Competent authority is a leading figure during the process, typically nominated in the conventions, and as mentioned above it is embodied by the Minister of Finance or the Secretary of the Treasury. In practical, to carry out the entire process, functions and powers are delegated to the personnel who are involved in the day-to-day proceedings. In fact, it is important having the decision maker in close contact with the topic, thus avoiding that people distant from the case may take the final judgments. Moreover, to reduce time and having a close relationship with the taxpayer it must be at hand and in direct contact with it. Competent authorities hold discretionary power, and it is thus important that they keep their independence respect to the audit function, since a lack of autonomy could lead to biased decisions in line with the opinion of the audit function. It must be emphasized that in most of the cases the CAs are able to arrive to a fair solution thus leaving both satisfied. It happens sometimes that authorities refuse a case if double taxation hasn't occurred. The relationship between the two CAs is relevant since it can have effects on the outcome of cases and on the speediness of their resolution.

Availability of resources, mainly financials, is considered an essential element in the organization for the correct fulfillment of the operation and, in this respect, also human resources are considered extremely important. Having skilled personnel divided per area, such as legal, economic, statistical, and accounting is crucial for the correct partition of duties. Not all countries have this high-skilled level of personnel and sometimes they rely upon external experts; but disadvantages are clear: the reliance on others slow-down the process. In fact, as it will be better explained later on, many developing countries find difficult to implement a MAP procedure due to their limited resources available and complex cases might be assigned to low-skilled personnel. Another key aspect is the correct valuation of the case presented and its following assignments; more complex cases require a senior tax expert while customary cases may be undertaken by less experienced staff, adequately supervised. Competent authorities have also to be independent in economic terms from the audit function of the tax administration and maintain their integrity and their objectivity through all the stages, thus ensuring a correct application of the convention. Personnel is then valued using performance indicators such as time used for resolution of conflict, their decision-making consistency, and in case of need training program are implemented to improve their skill level.

Finally, it is worth saying that cooperation between the competent authorities is deemed vital for the correct fulfillment of the MAP procedure. In fact, reciprocal trust feeds a productive environment in which a collaborative attitude speeds up resolution time, while its lack slows-down the procedure, thus making it more cumbersome and difficult instead.

1.2.4 Relationship between domestic law and MAP

Albeit most cases are resolved through the achievement of an agreement, thus providing a relief from dual charges, taxpayer should bear in mind the possibility of recurring to domestic legal remedies. Normally, domestic and international procedure are mutually exclusive given the fact that they may provide two contrasting solutions to the same initial case; if one is implemented the other is suspended until the first has come to an end to avoid double costs and efforts. If the taxpayer has rejected the final decision declared by the authority, it can appeal to domestic legal remedies eliminating the possibility of enforcing MAP and pursuing a court proceeding. The range of choices can be further expanded: it can pursue a domestic procedure as regarding a specific issue and, at the same time, undertake an international one that addresses another. It's worth noting that the decision given in the domestic proceeding is not considered binding for the competent authority of the other country and, indeed, they frequently rely upon the merits of the case to take their choice.

In reality, the application of MAP is often limited by constitutional or other domestic legal remedies; for this reason, the OECD has pushed its efforts towards the promotion of initiative aiming at making the MAP an instrument of easier access**.** The relation between domestic law and the MAP process, as firstly proposed in 2006 in the P*ublic Discussion Draft*, must be addressed to allow the "*MAP to operate to the fullest extent possible, taking into account the possible constitutional and other legal limitations in the domestic legal systems*"[32] and, keeping this in mind, a *Manual on Effective Mutual Agreement Procedure* was drawn up one year later. The commentaries on the article of the Model Tax Convention were adapted to pursue that scope, introducing in 2007 a biggest innovative change: the arbitration procedure.

In particular, the MEMAP, even if not binding, is intended to be a practical guide for the correct usage of the MAP instrument. It aims at increasing the level of transparency about how procedures work, giving a higher degree of protection to the taxpayer's position and a clearer understanding for governments of how they should run the procedure. In a bigger picture, however, the manual is considered complementary to the OECD Model Convention, its Transfer Pricing Guidelines and domestic provisions. In the event of a conflict, the first is subordinated to the seconds. Moreover, explicit references to best practices are made in the

[32] OECD, February 2006, *Proposal for improving Mechanism for the resolution of tax treaty disputes,* Public Discussion Draft, Centre for Tax Policy and Administration.

paper as the suitable manner to deal a MAP issue, even though they are not always applicable due to the singularity of each question.

1.2.5 Alternative to the mutual procedure: non-statutory agreements and APAs

Given the recognized freedom left to taxpayers, in some circumstances they may take different choices that are represented as alternative to MAP method for resolving or preventing disputes. Sometimes taxpayers are persuaded by tax administration to give up their right to initiate a mutual agreement procedure through the offer of an unofficial agreements thus obtaining procedural advantages or other kinds of concessions. This settlement can also be stipulated with the prospect of future collaborations between parties and leaving the issue to be resolved only through the audit settlement. It resolves double taxation issue without appealing to art. 25 but can further lead the other tax administration to refuse relief for tax paid to this first government once the audit is over. So, the outcome of the settlement may be an obstacle to the correct usage of the procedure and a wrong implementation of the convention.

As explicitly mentioned in *Public Discussion Draft of BEPS Action 14*, these agreements "*preserve double taxation and the other contracting state is left exposed to the self-protection measures undertaken by the taxpayer*"[33]. In those circumstances the competent authority of the state where the settlement is stipulated may be unable to select adequate measures for the correct application of the treaty, since it is unaware of the incorrect application of the convention. In the discussion draft it is so emphasized that tax administration should commit not to undertake these actions and, on the contrary, favor the access to mutual agreement, through their comments on the best audit practices showing a global awareness of the audit role.

Looking now at the APA, literally Advanced Price Arrangements, as explain Mooij in *Tax Treaty Arbitration*, they represent an alternative chosen by the taxpayer to "*escape from troublesome and time-consuming MAP*" [34], promoting the resolution of disputes in a proactive way prior that controversies materially arise. They are used as instruments to prevent disputes, activated discretionally by the authorities, and they are defined by the OECD as agreements that determine in advance the transfer pricing for a set of transactions over a period of time, using a suitable set of criteria. Specifically, the OECD Transfer Pricing Guidelines suggest considering the advanced agreements within the scope of MAP art. 25 even though they are not mentioned in it. They can be unilateral if they involve a taxpayer and one tax administration or

[33] OECD, 18 December 2014 – 16 January 2015 Public Discussion Draft, *BEPS ACTION 14: Make Dispute Resolution Mechanisms More Effective.*
[34] Mooij H., 2019, *Tax treaty arbitration*, Arbitration International, Vol. 35, p. 195–219.

bilateral if beside the taxpayer both administrations are involved. The first has a limited utility and can be useful only in specific circumstances, while the second offers a higher certainty in the tax field and tackle the entire transaction. Differently from the prior settlement, cases in which the APA prevent the access to MAP are extremely rare, but anyway these exclusions should be avoided. Practically, APA serves to early regulate the transfer pricing applicable methodologies to the specific cross-border transaction with the goal of avoiding dual taxes. Interested taxpayer are likely to request a bilateral APA, whether it is available, and if the countries agree, and it involves similar facts, it can be implemented also for recurring issues over a multi-year period. Therefore, once an APA has been signed the probability of double charges decreases and both governments benefit from a more likely value of tax collection. For this reason, they are becoming a widely used tool that prevent the initiation of disputes with beneficial effects in term of costs and time savings for both parties, thus reducing the number of effective international tax litigation. The drawbacks of the APAs directly relate to developing countries, which given their budget constraints may face difficulties in entering such agreements, due to the huge amount of resources and costs required for their negotiation. For this reason, they are not yet universally available even if, contrary to audit settlements, APAs have been promoted during the OECD work on Action 14 as a tool to prevent the disputes and assure a timely resolution of treaty-related disputes. So, it is reasonably foreseeable to see its growing widespread in the next future, pushed both by the positive attitude of the global tax community toward its implementation and by the risk-averse taxpayer who wants to ensure the amount of payable tax liabilities with a degree of certainty.

1.3 Shortcomings of the MAP and the introduction of paragraph 5

The MAP structure, prior to the introduction of paragraph 5, does not oblige countries to come to a common understanding of the treaty, the result could be unrelieved double taxation or taxation not in accordance with the convention. As indeed expressed by Park[35], the dysfunctional problem of that procedure is not astonishing us, because it is a non-binding and non-restrictive process. Other limitations of the procedure relate to its duration, the lack of an active taxpayer involvement, and an opaque decisional process. They represent the main limitations of amicable settlement and the main reasons why taxpayers have always been skeptical on the usage of this mechanism, if not as a last resort tool. The inability of the MAP to provide a way to facilitate a final resolution of issues arising under treaties, as explained by Covington in his publication, was pointed out by both "*private sector representatives and tax*

[35] Park W.W., 2002, *Income Tax Treaty Arbitration*, George Mason Law Review, vol. 10, n° 4, p. 803-874.

officials as one of the principal obstacles to ensuring an effective dispute resolution"[36]. Furthermore, as stated by Burnett, for long time MAP has served "*as the exclusive method of international tax dispute resolution and it has increasingly been criticized for its protraction*"[37].

After years, the OECD realized that a change of course for the MAP was necessary and, despite the confidence they have always placed on it, they had to admit that things weren't working well and that some further suggestions were required. Thus, for enhancing the functioning of the tool, getting the inspiration from the European Arbitration Convention, in 2004 the OECD committee on Fiscal Affairs published a report dealing with the improvement of the dispute resolution of cross-borders tax disputes. Among these proposals, emerged the *Proposal for improving Mechanism for the resolution of tax treaty disputes* which included the introduction of an arbitration process to solve discord between contracting state during the mutual agreement procedure. Following the public discussion draft and the various proposal for modification, in 2007 the new version of art. 25 of the OECD contained a new paragraph dealing with arbitration. Whereas the oldest version only refers to a reciprocal effort by both contracting states, the new one addresses the problem to an arbitration panel which provides an answer to the unresolved dispute. The goal of arbitration is to enhance the resolution of tax treaty controversy in a faster way, thus ensuring, in case of pending MAP, a powerful mechanism that leads to a solution. This innovative tool is inserted as an extension of art. 25 and "*it could be activated by interesting parties, if the competent authorities are unable to reach an agreement within two years*"[38]. The recourse to this technique couldn't constitute an alternative path but it must be an essential part of MAP, otherwise there is the risk of reducing the effectiveness of the entire provision. Specifically, its utilization is emphasized when the authorities are stuck in the process and are unable to get to an agreement on some specific issue, locking the case resolution. In that case, the arbitration procedure may be submitted for that specific problem, thus permitting the final solution through MAP. It must be kept in mind that it is a supplementary technique and if authorities reach an agreement "*without leaving any unresolved issues as regards the application of the Convention*"[39] its activation is not needed, notwithstanding the satisfaction of the taxpayer who made the MAP request with respect to the

[36] Covington J. N., 1989, *Dispute Resolution Under Tax Treaties: Current and Proposed Methods*, Texas International Law Journal, Vol. 24, p. 367-388.
[37] Burnett C., 2007, *International Tax Arbitration*, Australian Tax Review, Vol.36, p.173–190.
[38] See note 32. OECD, February 2006, *Proposal for improving Mechanism for the resolution of tax treaty disputes,* Public Discussion Draft, Centre for Tax Policy and Administration, p.6, paragraph 45.
[39] OECD, 30 January 2007, *Improving the resolution of tax treaty disputes* (Report adopted by the Committee on Fiscal Affairs).

agreement reached by the governments. The box below reports paragraph 5 in its integral form; according to it, the right to recur to arbitration stands in the hands of the person who has started the procedure, after two years of pending unresolved MAP cases; in particular, it relates only to the unresolved issues and not the whole case submitted. Sometimes, it happens that taxpayer may prefer to wait an additional amount of time if it deemed reasonable that a longer period is needed to resolve the MAP or if it considers that a solution is closed but administrations requires few times for implementing it. The introduction of this section, was driven by the practical inefficiencies of the mutual agreement procedure; as emphasized before, its major weakness is that "*there is no hard obligation for authorities to resolve the case […] allowing them to drag on for years at length*"[40], and taxpayers, knowing the cumbersome procedure, tends to avoid as long as possible the MAP procedure. In other words, they are reluctant on that and they prefer other remedies.

5. Where,

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

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities,

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

[40] See note 34. Mooij H., 2019, *Tax treaty arbitration*, Arbitration International, Vol. 35, p. 195–219.

The overall efficiency brought by the arbitration is shown both when it is activated and when it is not; because, even in this case, it encourages taxpayer and governments to recur to art. 25 in force to this resolution instrument and its capacity to achieve a satisfactory result. This paragraph leads to a broad cost and time savings on subsequent procedures, such as domestic ones.

It must be noticed that tax arbitration under MAP differs from both commercial and investment arbitration. The first being a clause explicitly mentioned in contracts used as an "*alternative dispute resolution mechanism through which business disputes can independently be resolved"*[41] through a court system, it arises in several cases such as in corporate acquisition referring to question from previously accrued tax liabilities, while the latter being "*undertaken to resolve disputes between a foreign investor and the host State*"[42] who, in case of problems within its investments, may recur to arbitration. Investment arbitration disputes generally put into question the whole legitimacy of the tax and it differs from the OECD tax treaty arbitration since the arbitrators' power is extended to the resolution of the entire case and not only to the unresolved issues, as for the OECD arbitration. Investment arbitration came out by the agreements between countries within the scope of promoting capital investments in developing countries. Instead, MAP arbitration involves a taxpayer taxed twice and, despite "*the nature of the parties is a private entity and the other a public one, their dispute arise only through the unilateral imposition of tax burden*"[43].

1.3.1 Difficult launch of arbitration in tax treaty

Notwithstanding paragraph 5 was introduced in 2008 OECD Model Convention, the low trust placed in the mutual agreement and the lack of procedural rules for the implementation of the arbitration made states reluctant to its application. In fact, only 150 conventions included arbitration clauses in their MAP article out of the over 3.500 existing bilateral tax treaties; perhaps the new procedures limited history didn't provide states a sufficient background and made them unwilling to add it on their treaties because it represented a completely new tool. In this respect, as it will be later seen, even the European Arbitration Convention, signed in 1990

[41] Committee of Experts on International Cooperation in Tax Matters Twentieth session, 26 June 2020, *Chapter 5 on MAP Arbitration of the Handbook on Avoidance and Resolution of Tax Disputes*, Item 3(f) of the provisional agenda: Dispute avoidance and resolution.

[42] Faraz Alam S. and Pednekar S., May 15, 2019, *International Investment Arbitrations and International Commercial Arbitrations: A Guide to the Differences,* India Corporate Law, A Cyril Amarchand Mangaldas Blog. Available at: https://corporate.cyrilamarchandblogs.com/2019/05/international-investment-arbitrations-international-commercial-arbitrations-guide differences/#:~:text=Investment%20arbitration%20is%20undertaken%20to,claim%20and%20the%20parties%20involved.

[43] See note 10. Bantekas I., Professor of International Law, Brunel University School of Law, 2008, *The mutual agreement procedure and arbitration of double taxation disputes*, ACDI - Anuario Colombiano de Derecho Internacional, Vol. 1, p.182-204.

but entered into force in 1995, counts on his side only few cases terminated. In a certain sense, the introduction of arbitration clause was a deterrent for its application, pushing nations to conclude the litigation before opening a MAP or, otherwise, before the two-year deadline of the arbitration's request. As sustained by practitioners, the mere introduction of an arbitration provision in a tax treaty influences authority relationship in a positive way, as its input imposes discipline to solve the case. In this respect, it is exactly what happened with the treaty settled in 2010 between USA and Canada, which included arbitration to produce a *prophylactic effect*[44]. An analogous example is represented by the treaty between Germany and Austria which contains an arbitration clause that, as later analyzed on chapter three, should be executed by the European Court of Justice. That clause has promoted the successful conclusion of MAP procedure thus showing its positive effect, in respect to the amicable settlement.

Indeed, if theoretically the arbitration procedure has all the necessary requirements to streamline MAP pending cases, in practice for some years after its institution arbitration was neither added to the new agreements nor inserted in the oldest settlement. That's because on a hand nations were deprived of practical rules for its correct functioning, thus perceiving it as a complex process, and on the other, for agreements already settled, it was necessary to take them back one by one, with different counterparties needing to agree to the introduction of this new section. Moreover, the lack of experience in this field has ensured that the situation remained stalled for a couple of years, when the OECD realized that a more detailed set of rules were necessary to promote arbitration and give it the trust it deserved. Efforts were made towards addressing this problem but it cannot be said that it was ultimately resolved; that's why in 2012, inside the BEPS (Base Erosion and Profit Shifting) proposal, a 15 actions comprehensive package introduced by the OECD, it provided a mechanism for the resolution of disputes and their efficient implementation and also a practical guide for the arbitration procedure. Those arguments were specifically tackled in A*ctions 14 -Dispute Resolution Mechanism (DRM)* and *Actions 15 -Multilateral Instrument (MLI)*. In this regard, the next section shapes the context in which the application of arbitration paragraph is better explained, thus giving a brief introduction about the BEPS program.

1.4 BEPS package: Action 14 and 15

In July 2013, the OECD published the BEPS Action Plan: a package consisting of fifteen actions with the goal of providing tax administrations with rules to fight tax avoidance and

[44] See note 24. Ault H., Sasseville J., 2009, *OECD Model: The New Arbitration Provision*, Bulletin for International Taxation, vol.63, issue 5, p. 208-215.

ensuring definitively that profit are taxes where value is created. BEPS package is considered soft-law tool, and not a legally binding instrument; for this reason it is deemed suitable for shaping an international law ruling. The package, bringing fundamental changes to the international tax structure, has the scope of addressing the worries of governments to lose a meaningful tax revenue due to the tax planning of multinationals entities that shift their profits thus eroding their taxable base. These tools also give businesses greater certainty by reducing disputes over the application of international tax rules and standardizing compliance requirements. In 2015, its Final Report was then launched, representing "*the first substantial renovation of the international tax rules in almost a century*"[45]. It arises from the shared need of OECD member states to reduce the shift of profits implemented by multinational companies to low taxation countries and to erode tax bases through deductible payments, such as interest or royalties. Multinationals companies used tax planning strategies "*to exploit gaps and mismatches in tax rules to avoid paying tax*"[46], negatively affecting the financial sustainability of developing countries mainly because of their dependency on business income tax. The main challenge that BEPS package deals with is certainly that connected to the digitalization of the economy and, as explained in an interview by the director of the OECD center for tax policy and administration, Pascal Saint-Amans, the challenge is "*eliminating double taxation and stop facilitating double non-taxation*"[47]. In terms of annually lost revenues, as reported on the *Inclusive Framework on BEPS*, base erosion and profit shifting practices cost countries between 100 USD and 240 USD billions, which corresponds to 4% to 10% of global corporate income tax revenue[48]: a huge amount of resources uncollected from tax authorities that enrich shareholders and owners of multinationals. To ensure that these incomes are now proportionately taxed, as stated by OECD, over than "*135 countries and jurisdictions are collaborating on the implementation of 15 measures to tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment*"[49].

The BEPS Plan anchors on three fundamental Pillars:

- *Consistency*, meaning create coherence among different national tax rules that have an influence on cross-border activities.
- *Substantial Profile* to strengthen existing international standards.

[45] OECD, 2015, *Final report on Action 14 Making Dispute Resolution Mechanism More Effective*.
[46] OECD, *International Collaboration to End tax Avoidance.* See https://www.oecd.org/tax/beps/.
[47] Interview to Pascal Saint-Amans (Director, OECD Center for Tax Policy Administration) and Masatsugu Asakawa (Vice Minister of Finance for International Affairs, Japan), 7 June 2019, *History of the G20 & taxation*. See https://www.youtube.com/watch?v=vyrzdg8kFB8.
[48] OECD, *OECD/G20 Inclusive Framework on BEPS*. See https://www.oecd.org/tax/beps/flyer-inclusive-framework-on-beps.pdf.
[49] OECD, *What is BEPS?*. See https://www.oecd.org/tax/beps/about/.

- *Transparency* intended as information exchange for improving the legal certainty.

The broad consensus reached has allowed, beside OECD and G20 member countries, also interested countries and jurisdictions to work together on the Inclusive Framework (IF), "*to develop standards on BEPS related issues and to review and monitor the implementation of the whole BEPS package*"[50], reporting annually to the G20 on their progress.

The image below *(Figure 2)* summarizes the 15 actions implemented by the BEPS Action Plan.

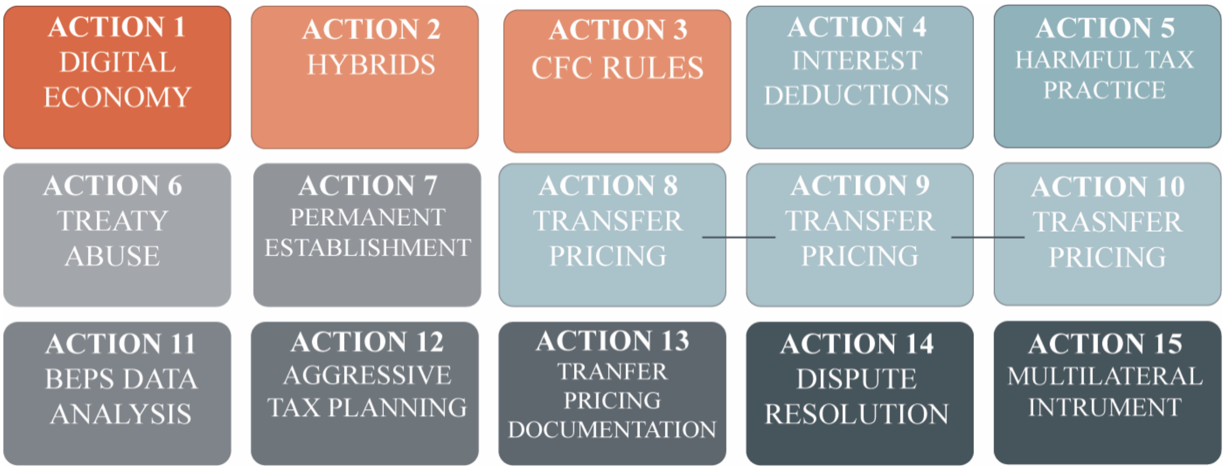

Figure 2: BEPS 15 Actions,
Own elaboration from OECD/G20 Inclusive Framework on BEPS Presentation

The analysis of all of them is beyond the scope of this text; what is interesting to address within BEPS package is represented by Action 14, which has added to MAP the mandatory binding arbitration as a mechanism to resolve pending disputes, and Action 15, an instrument for the implementation and application of the BEPS package. BEPS Action 14 -*Making Dispute Resolution Mechanisms More Effective*- "*develops solutions to address obstacles that prevent countries from solving treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases*"[51]. To achieve this purpose, it contains a commitment by jurisdictions to implement a minimum standard thus ensuring that they resolve tax treaty disputes in a timely, effective, and efficient manner. Moreover, a peer review and a monitoring process are included in the minimum standard to register the progression achieved if the measures have been successfully implemented and to provide a guidance for a future enhancement, among which the effort of nations that shall endeavor to solve the MAP issue with an average time of 24 months. With the aim of meeting the deadline, as explained by Brockman[52], the peer review

[50] OECD, 2017, Background brief Inclusive Framework on BEPS.
[51] See note 33. OECD, 18 December 2014 – 16 January 2015 Public Discussion Draft, *BEPS ACTION 14: Make Dispute Resolution Mechanisms More Effective.*
[52] Brockman K., 2018, *Dispute resolution: OECD collaboration*, International Tax Review, Vol. 29, Issue n° 7, p. 3.

process asks taxpayer to proactively contribute, completing a questionnaire; in this way the OECD gives them an opportunity for join and collaborate.

The process regarding action 14 is divided into two stages, the first encompasses an evaluation of the minimum standard for the members of the IF, while the second being a monitoring process on the accordance to the guidelines and recommendations are provided. The overall ongoing first stage also provides states with recommendations after having analyzed countries profiles. Those advices include the need of additional resource to deal with MAP cases, the renovation of internal rules and the enhancement of the timing resolution. In this respect, Italy together with other countries, following the OECD's recommendations has simplified its organizational structure thus to accelerate the cases processed. The overall recommendation provides beneficial effects; among the others, an increasing number of participating countries and closed cases, and states giving clarification about their guidelines with respect to the mutual procedure. For sure, bringing tax treaties of reviewed jurisdictions in accordance with the minimum standard of action 14 is an ongoing OECD process and there's still a lot of work to do.

The starting point of the *Dispute Resolution Mechanism* implemented was the lack of a clear obligation for authorities to solve MAP cases together with the absence of a shared consensus on the application of arbitration. In this respect, Action 14 is expected to make the MAP process quick and effective, adopting appropriate measure against those obstacles that prevent the resolution. The following four key elements are the basis of the minimum standard for this action. They aim at ensuring that treaty obligations are implemented in good faith, that the prevention and resolution of disputes is promoted by the administrative processes, that the taxpayer has guaranteed access to MAP and lastly that the cases are solved once MAP is activated, thus implying its punctual application. The OECD MAP secretariat reports in a document the review of each jurisdictions MAP process and checks their progress with respect to the full achievement of the minimum standard requirements.

The developing of Action 15 started from the analysis of the international tax law issues. The MLI is designed in a manner to quickly adapt to the continuously changing nature of the global economy and interested countries can decide to adopt it. This innovative tool has the main purpose to simplify the assumption of the tax treaty measures within the BEPS package, modifying the existing bilateral treaties among states through a multilateral instrument. Developing and implementing such instrument was a though challenge for the OECD/G20 leaders, but it was necessary to speed up the updating bilateral tax treaties that would otherwise have been renegotiated one by one, requiring a huge amount of time and resources. One of the problems of the inefficient bilateral negotiation is a clear difference between the treaty signed and the model provided by the OECD. They result not to be synchronized, because countries are unable to renovate their treaties on a bilateral basis in line with the modified Convention. According to the view of some, the existent aversion of countries to update their treaties, thus including the arbitration procedure, is connected with their worries about the higher involvement of the taxpayer in the procedure and, in practice, it has refrained the spread of arbitration.

That's why the MLI has been adopted for the swift to the BEPS package in a coordinated way. In fact, only an instrument that simultaneously renovate all the bilateral treaties of a country could face such implementation problems otherwise difficult to overcome. Indeed, the instrument allows governments not to waste time and money renegotiating each single bilateral treaty, modifying all in once the existing ones. It has a legal binding force among signatories, and it is governed by international law. In the international tax field, the multilateral tool has represented an absolute novelty, able to adapt to the quick change of rules. Since the correct and fast application of Action 15 was in essence the driving force for the entire success of the BEPS program, a degree of flexibility was necessary, thus expanding the number of countries joining it and speeding up negotiations. Its diffusion was facilitated by the possibility given to countries of shaping their commitment for a determined set of cases.

The *Multilateral Instrument* encompasses a set of articles (39), divided in four part, one for each topic covered, that give the rules for a practical and concrete implementation of the BEPS package. In particular, art. 1 and 2 set out the scope of the MLI and the terms interpretation, art. 3 to 17 deal with BEPS tax treaty measures, articles 18 to 26 address provisions related to the mandatory binding arbitration and finally art. 27 to 39 include procedural provision.

In 2017, the first high-level signing ceremony of the MLI took place; to date, more than 90 jurisdictions have signed the MLI on BEPS, thus agreeing to update all in one their tax treaty concerning the topics covered in the program. As part of the MLI, procedural rules were suggested inside the convention annex to the commentary on art. 25(5) as a *Sample Mutual Agreement on Arbitration* (SMAA), providing further guidelines for states on how effectively running the arbitration process.

Even though the simplifying power of the MLI instrument is undisputable, the high number of parties and their different views on the "*need for arbitration in the context of MAP reflecting their own economic, social, and legal environment and their experience with existing economic* *dispute resolution mechanisms in tax and non-tax agreements*"[53]*,* would hardly have led to a widespread consensus on mandatory binding arbitration discipline. That's why, to ensure a meeting point between all perspective, a level of flexibility has been introduced. States, given the compulsory feature of part VI, including article from 18 to 26, didn't agree on its forced implementation and, given the elasticity recognized, they can choice whether to allow its application or not. In this respect, this part was drafted following an opt-in approach; given the fact that it was clear that only a limited number of members would have accepted the mandatory binding arbitration procedure, the ad-hoc group let participate to the work only members that have serious intention to apply these provisions. Moreover, they can make customized reservation if they are willing to use mandatory binding arbitration only concerning some specific disputes. As reported by Nathalie Bravo, "*only twenty-nine out of the ninety parties and signatories to the MLI have agreed for the mandatory binding arbitration procedure, being for the majority developed economies*"[54], in substance only a minority of the participants that have agreed in the BEPS project have decided to advocate pending MAP issues to a mandatory binding arbitration. Undoubtedly, these efforts are needed for the widespread recognition of the importance of this instrument and there is still a long way to go before reaching a consensus; it is not a coincidence if countries that have signed the MLI are rich and developed, not in accordance with the idea of developing ones. The lack of solid and competent tax institutional structure has prevented them from accepting mandatory arbitration.

1.5 Growing confidence towards arbitration

From 2006, the OECD has started to spread statistics in the MAP application of both its member states and not, on a voluntary basis. The statistics are named as *old*, to differentiate from the new statistics promoted within the BEPS package, and merely served as informative basis for both the taxpayer and the competent authorities. The new Standard Reporting Framework instead, among other things, "*aimed at addressing the agency problem arising from the MAP practice*"[55]. The agency problem comes out in a MAP case when competent authorities, that shall endeavor to resolve the contention, embody the agent, while the taxpayer represents the principal and it has no way of monitoring the agent's effort in resolving the controversy. Authorities, in this view, could commit action only caring about their own revenues, thus

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[53] See note 41. Committee of Experts on International Cooperation in Tax Matters Twentieth session, 26 June 2020, *Chapter 5 on MAP Arbitration of the Handbook on Avoidance and Resolution of Tax Disputes*, Item 3(f) of the provisional agenda: Dispute avoidance and resolution.

[54] Bravo N., February 25, 2019, *Mandatory Binding Arbitration in the BEPS Multilateral Instrument*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p.693-714.

[55] Qiang C. and Pengfei Z., 2018, *A Theoretical Reflection on the OECD's New Statistics Reporting Framework for the Mutual Agreement Procedure: Isolating, Measuring, and Monitoring*, Journal of International Economic Law, Vol. 21, p.867–884.

causing damage to the principal: to overcome this moral hazard behavior, they have to be monitored. Since it has been recognized that, among the others, the agency problem represents one of the major causes of delay in a MAP, monitoring competent authority is therefore essential and the introduction of arbitration clause in the treaty, with the overall monitoring apparatus of the MAP process, promoted by action 14, serves to this scope. Even though, given the fact that the analysis is often done by different jurisdictions, it is more difficult to split their performance in order to overcome this obstacle. The new reporting framework has splitted MAP into clearly defined stages, thus simplifying the valuation of each party's contribution.

It is with the ratification of the MLI that it has been registered an increasing in the number of request for the MAP initiation and, in a certain sense, the introduction of the mandatory binding arbitration discipline has represented a propellent thrust in this mechanism that was for long time confined to a corner. The overall increment of cases presented to the authority caused, although, the slowdown in the procedure's execution. As reported in *Figure 3*, MAP caseload has increased both in terms of total numbers and in terms of average resolution period.

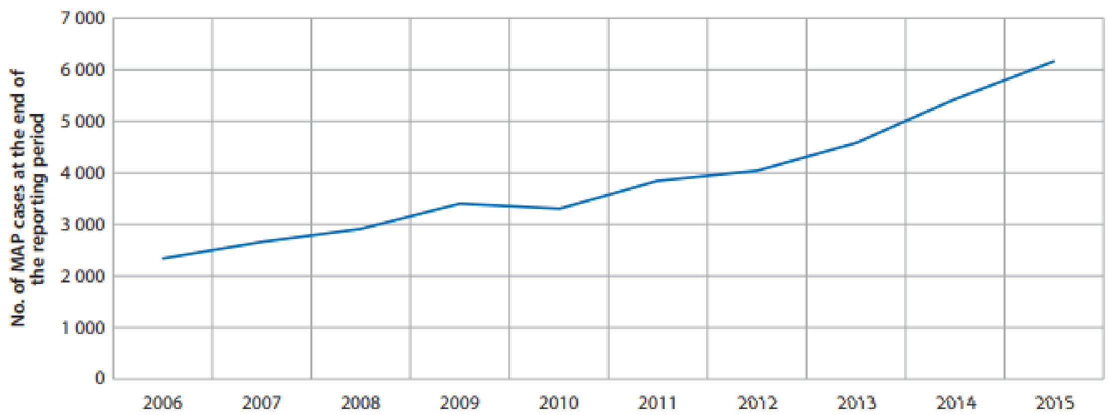

Figure 3: Evolution of the inventory of MAP cases in OECD member countries, 2006-15
Source: OECD (2017), Mutual Agreement Procedure Statistics for 2015
Available at: www.oecd.org/ctp/dispute/mapstatistics-2015.htm

As reported in the *Improving Mutual Agreement Procedures*[56], it has been recorded an increment from 2.352 in 2006 to 6.176 in 2015 total cases and approximately the 90% of total MAP caseload refers to merely 50 jurisdictions. The increase registered is of +162,5% of cases submitted to the amicable settlement mechanism. The OECD, with the aim of increasing transparency, closely monitors the situation of the MAP cases and, to reduce the time needed for completing the operation, has promoted a new MAP inclusive reporting framework (IF) in

[56] OECD, 2017, *Improving mutual agreement procedures*, Tax Administration 2017: Comparative Information on OECD and Other Advanced and Emerging Economies, OECD Publishing, Paris, Ch.13, p.175-180.

which interested countries have suggested way to increase MAP information transparency. This work has led member countries to agree on providing their basic information, such as the number of pending cases and the cases completed during a specific taxable year. The publication of these MAP cases has a double effect: taxpayers are aware of the current situation and they can make their decision more responsibly, while the tax administrations can assess their performance in regard to the MAP procedure, thus having a better understanding of the weak points delaying the resolution that they can try to improve to achieve results faster.

The MAP data, referring to 2017, shows an increment in the duration of MAP cases worldwide according to which the average completion time is thirty months and, in the 45% of cases, no agreement is settled. Things move in a similar direction as regarding the last available statistics including 97 jurisdictions published on October 2019, in the OECD website, which register an increasing number of pending MAP cases. As it is illustrated in *Figure 4*, beginning inventory counts 7.086 cases, of which 3.365 belong to cases received prior to the 1st January 2016, or in the year previously the joining of the BEPS IF (represented in dark blue in the graph), and 3.721 cases received after that date (represented in light blue in the graph). Of the total cases, only 2.690 were initiated in 2019 and 1.887 were closed in the same year, leaving an ending inventory with 6.955 unresolved cases with a net balance between starting and ending inventory of -131 cases: this might led us implicitly arguing that it's not a very efficient resolution mechanism.

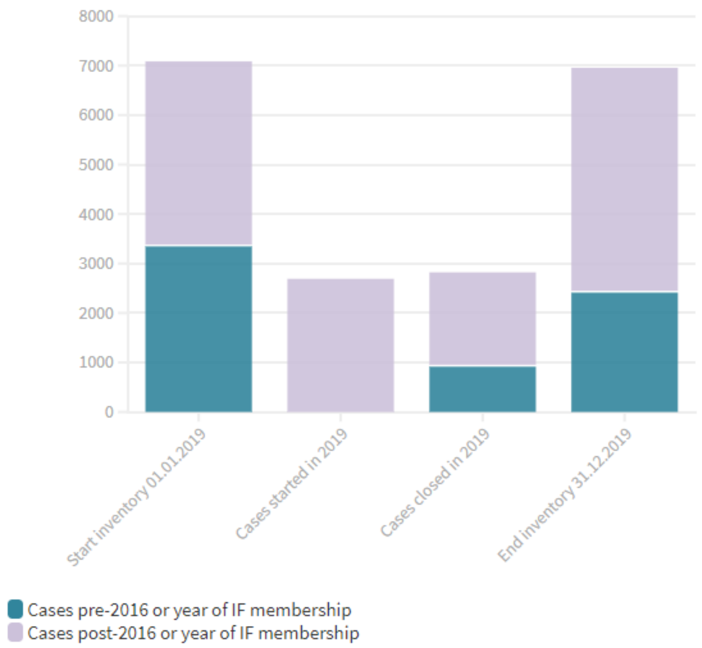

Figure 4: Total MAP case loaded in 2019, MAP Statistics at a glance
Available at https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm

Using the representation above, cases represented in dark blue are expected to decrease over time, since once closed no more cases will be opened without the implementation of the Action 14 minimum standard, while cases graphically depicted in light blue are expected to grow over time, eventually covering all cases in the jurisdiction's inventory, since, from BEPS IF on, action 14 represents the new implemented procedure. The reporting framework distinguishes between *transfer pricing* cases and *other cases*; transfer price cases refers to MAP where the taxpayer's MAP request relates either to the attribution of profits to a permanent establishment or to the determination of profits between associated enterprises. All MAP cases that are not included in the previous definition fall into the generic category denominated *other* MAP cases. This distinction is done following the rationale that the vast majority of MAP cases refers to transfer pricing; in fact, in regard to 2019, of the 6.955 total cases, 3.735 were transfer pricing cases while 3.220 were other cases, thus showing more than half of them referring to transfer pricing matters. The procedural problem connected with the augment of MAP cases is referred to the number of cases that each countries is able to deal with; in other words, the MAP capacity issue, as pointed out both by the statistics and by the peer review process, emphasizes how the national volume of cases resolved is a practical obstacle that can be overwhelmed only with the institution of arbitration and its wider acceptance.

Looking back to 2018 things aren't so different, the global aggregate MAP cases inventories were rising because cases closed increased more slowly than case started. Although some cases remain unresolved the rate of cases completed reached 80%, regarding transfer pricing case, and 75% for all the others. In 2018 countries closed 50% cases more than in 2016, thus revealing their improved capacity.

Even though, the whole BEPS group of actions themselves have augmented the risks of DT to arise, due to the uncertainty caused by the change of rules and the difficult implementation of those variations by countries worldwide. It was thus a foreseeable event that the number of disputes would arise in the forthcoming future, and, as emphasized by the International Chamber of Commerce (ICC), a more efficient dispute resolution mechanism is necessary to deal with the growing numbers of double taxation cases. After recommendations of the BEPS program to use amicable settlements, requests to start a MAP have increased. Given the high demands' load and poor organizational capacity the average resolution times have consequently increased; more precisely, transfer pricing cases normally take a period of 30,6 months, while for all the other cases the average time is 22 months: in both cases a very long and exhausting waiting period for the taxpayer. Thanks to Action 14 minimum standard, notwithstanding the increase in the MAP cases recorded in the last few years, it has promoted the recent tendency of states that have agreed on the monitoring program to close more cases, in particular those that were in the inventory for several time.

Given such premises, it was necessary to assure the functioning of the MAP mechanism strengthened by the arbitration clause. Arbitration reached a wider audience when it was proposed in a more comprehensive way inside the BEPS program, becoming a binding resolutive instrument. Within action 15, in the part VI of the Multilateral Instrument, OECD finally provided a set of rules useful for the application and the employment of the paragraph, defining a common path to follow and making explicitly the need for skilled personnel experienced in arbitration, pointing out that only nations with the ability to take charge of the arbitration process should include it in their treaty. In this way, they were suggesting to states not to insert it if they had no idea on how it worked or if they didn't have the organizational structure to make it function. In addition, states can narrower its application to some specific issue, such as transfer pricing cases, or they can decide for each case if its usage is suitable. Countries can also insert arbitration clause later on in their treaty if they haven't done it previously.

The international scenario has undergone a push towards the application of arbitration clause and, in this perspective, the increasing number of inventory MAP cases can be interpreted as a positive attitude towards the new tool both by governments, that are improving their operating machine in order to face these cases, and that for taxpayers, which are placing more trust on it given the previous cumbersome ineffective mechanism.

In the next chapter the general features of the arbitration provision as they are presented inside the MLI are discussed, which have provided the basic regulation for its correct application. Leaving states with their freedom of fitting arbitration rules according to their personal view, this flexible provision has reached a wider recognized importance, highlighted by the effort of including it in their conventions.

2. THE ARBITRATION PROCEDURE

2.1 Historical perspective on arbitration

As already mentioned in the previous chapter, the European Arbitration Convention has provided the impetus for an international trust in the arbitration mechanism to resolve disputes but, following an historical perspective, its usage is not exactly a new path. In this respect, it is interesting to see whether contracting states have agreed on the introduction of arbitration in their bilateral treaties before its promoting campaign as a MAP extension process. Indeed, even before being included in the OECD or UN model, in 1922 a rudimental form of arbitration appears in the multilateral Treaty of Rome against double taxation. Once established that there is a dual fiscal burden, the treaty clause acknowledges the "*role of the taxpayer in requesting a consultation process between governments*"[57], authorities should work to achieve an equitable settlement. Then, in 1926, followed the insertion of the first tax treaty provision which refers to a third-party tribunal to resolve disputes; such provisions were inserted inside the agreement between Ireland and United Kingdom, thus contributing to the spread of arbitration in the international tax field. In 1927, it makes its first appearance in the draft of the Model Treaty elaborated by the League of Nations. In this model, besides the amicable settlement instrument within art. 14, it is included an advisory opinion procedure that explicitly mentioned the recourse to arbitration as a voluntary instrument, if chosen by contracting states. Some years later, a more sophisticated design of the mutual agreement procedure came out. As explicated by Mooij, "*it was a European invention of the 1930s and first emerged in the tax treaty between Italy and France, as a means for taxpayers to protest with the authorities against any double taxation occurring in their case*"[58], and, in this respect, it is not surprising that arbitration hints appeared in the same period.

However, before the international tax reforming promoted by the BEPS program, running arbitration has led to the creation of two opposite sides. In this respect, in the European context, lately discussed, the first program towards a formal conceptualization of arbitration encountered obstacles and in the 1970s discussions for a proposal on that matter took place at the European Commission. Indeed, in 1976, was issued a proposal for a directive dealing with elimination of DT relating to transfer pricing between associated enterprises that contained a rudimental arbitration procedure. For sure, a premature move if compared to the OECD's one, which in the commentary on art. 25 of the 1977 OECD MC still refers to MAP as an overall

[57] Majdanska A. & Turcan L., 2018, *History of Arbitration in Tax Treaty Law*, in OECD Arbitration in Tax Treaty Law, Chaudhary, 5th edition, Linde.
[58] See note 34. Mooij H., 2019, *Tax treaty arbitration*, Arbitration International, Vol. 35, p. 195–219.

satisfactory dispute resolution mechanism. Moreover, as Markham M. mentioned in her paper[59], when the MAP implementing procedure was discussed in 1981 at the Congress of the International Fiscal Association in Berlin, many participants criticized it and they opposed to the arbitration introduction. They were afraid of losing their legitimate power to tax and the creation of an independent arbitration system could bring constitutional issues.

In those years (1984), the OECD issued the report on *Transfer Pricing and Multinational Enterprises*, in which it tackled the functioning of the MAP and it started to discuss for the insertion of an arbitration clause. In the paper, amicable settlement was recognized as an efficient and flexible instrument, although far from perfect, suitable for the elimination of both juridical and economic double taxation, but it presented several shortcomings and the arbitration appeared as a powerful support tool. On the contrary, the OECD didn't sustain its usage, stating that MAP, despite its deficiencies, represented a complete procedure, while the inclusion of an arbitration clause would have involved both legislative and procedural problems. Of the same thought was the UN group of experts, which during a discussion in 1987 stated that also developing countries were particularly suspicious toward arbitration.

Although the lack of sustain by the international organization, in those years some states were autonomously moving towards, including arbitration in their DTC. Germany and Sweden, on a voluntary basis, inserted it in their convention in 1985 and, in 1989, US and Germany did the same, including a very comprehensive arbitration process on their settlement. Especially the latter, has represented a breath of fresh air in the discipline, since two of the most industrialized countries have promoted arbitration of own's accord in their tax treaty. This was an atypical situation at the time, and, as academics sustain, that can be identified as the first arbitration clause in a modern double tax convention. Furthermore, the trust placed by US in the voluntary arbitration did that also subsequent treaties included it, such as the ones with Italy, Canada and Mexico. For long time, a promoting campaign for the creation of an arbitration procedure has been desired, but the opponents were still numerous and froze the initiative. Despite the opponents, its increasing application was slowly recognized and, between 1990 and 1999, 36 DTCs with an arbitration clause were signed. The numbers grow to 50 DTCs in the 2000-2008 period; in all these conventions, arbitration clause was introduced on a voluntary basis by parties, without following any supranational organization guidelines. It is only in 1996 that the OECD, with the adoption of the Transfer Pricing Guidelines, revisited its initial position against arbitration and started to conduct and analysis for the introduction of the clause. Even though,

[59] Markham M.A., 2019, *Mandatory binding tax arbitration—is this a pathway to a more efficient Mutual Agreement Procedure?,* Arbitration International, Vol. 35, Issue 2, p. 149–170.

the Fiscal Committee of the OECD has highlighted that arbitration was not universally accepted and for this reason further studied would have to be done. Also, reluctance to MAP usage was one recognized problem and, as pointed out in the Global Transfer Pricing Survey[60], a research conducted by Ernst & Young in 2001, the trust in the dispute resolution instrument was extremely low, due to the fact that in only 27% of cases the procedure has brought to a relief, leaving all the others unresolved.

In 2003, the International Tax Law Interest Group presented a panel dealing with arbitration disputes rising under the tax treaties stipulated during the last sixty years. The call for binding arbitration was a clear need, since its conceptualization had been postponed for nearly twenty-five years. In the panel overview, Tillighast D. explains that arbitration would operate as a *safety valve*[61] activated only when needed but having an inducement function to the tax authorities to reach an agreement on their own. In that period, the increasing statistics of pending MAP had put pressure toward a mandatory requirement to solve cases, resulting in the proposal of a new arbitration clause. Evidence showed that arbitration didn't lead to an agreement and in parallel the OECD Committee on Fiscal Affairs found out that multinational entities prefer to avoid its application. The inefficiencies of both amicable settlement and arbitration have brought to the idea of including arbitration on it, thus joining forces to the dual tax common enemy. In this fragile framework, the OECD, in 2006, after having collected positive opinions about the introduction of arbitration, directly asking to the business community their thought and suggestion about dispute resolution, published a document in which the proposal for including an arbitration paragraph on art. 25 emerged. In 2008, the OECD finally adopted these amendments in its Model as complementary to the MAP process. Similar to what happened to the OECD Convention, in 2011, also the United Nations has introduced an arbitration paragraph in its Model at art. 25B (5). Moreover, also the Latin American Institute of Tax Law Model contains a provision for arbitration which looks like the OECD's one but addresses procedural aspects not tackled in the OECD Model.

Mandatory binding arbitration has an important attractive element: it always reaches a conclusion, ensuring an impartial analysis determined by the law application. Despite its recognized power, it has done little in respect to the increasing number of MAP cases which have passed the two-year period and are eligible to arbitration; they are growing, and the

[60] Ernst & Young, November 2001, *Transfer Pricing 2001 Global Survey Practices*, *Perceptions and Trends in 22 Countries*. International Tax Services.

[61] Tillinghast D., April 2-5, 2003 *ARBITRATION OF DISPUTES UNDER INCOME TAX TREATIES: A Panel Overview*, Proceedings of the Annual Meeting, published by Cambridge University Press on behalf of the American Society of International Law, Vol. 97, p. 107-109.

provision apparently seems ineffective to reduce the augment of storage cases. Trying to exceed this limit, efforts are pushed towards action 14.

In the European context, important steps forward were pursued by the European Arbitration Convention on *The Elimination of Double Taxation in Connection with the Adjustment of Profit of Associated Enterprises*, primarily signed in 1990 by the twelve-member state at the date. It advocates arbitration exclusively for transfer pricing cases at the EU level and standardizes the discussion on the cross-border transactions. In 2004, following a research conducted by the European Transfer Pricing Forum, it emerges that 108 cases were pending, and with the objective of widening the application of the Convention, the forum putted more pressure on the improvement of a Code of Conduct. Again, at the European level another important achievement was represented by the agreement between Germany and Austria, in which a structured arbitration clause that requires the involvement of the European Court of Justice to carry out arbitrarily the procedure was inserted.

Nowadays, the heart of the matter stands on the reluctance of many countries to adopt arbitration, justifying their position appealing to their worries about a reduction of their legit tax jurisdiction, this still representing an evidence on his difficult capillary diffusion. As discussed by Pit H.M. in his paper[62], few treaties included arbitration provision and, in this regard, only 17% of the agreement settled by OECD member countries between 2005 and 2012 enclosed that clause. In his analysis, it came out that, from the introduction of paragraph 5 in the OECD Model in 2008 up to march 2014, 178 DTCs incorporated an arbitration clause of which 20 provisions didn't constitute an arbitration clause per se but a semi-arbitration clause, where the states agree to a future possible addition of arbitration. Of the 158 effective clauses, 63 pursued, with some deviations, to the OECD MC, were signed. The other 95 DTCs agreed are not based on the OECD model, thus requiring specific condition for arbitration to be activated. Pit finds out that states involved are a limited number, among which Netherlands, Canada, Switzerland, Italy, US, Germany and UK. In this view, the inclusion of the clause appears as a policy pursued by a limited group of states rather than a widely accepted tool. Most of these conventions are settled among few OECD members, even if the agreement between an OECD and a non-OECD member constitutes a relevant part, thus amplifying the spread of arbitration clauses around the world. It is so underlined that the introduction of arbitration clause should be encouraged also countries outside the OECD sphere of influence. A closer look reveals that this 158 DTCs, containing the arbitration clause, are few if compared to the

[62] Pit HM, 2014, *Arbitration under the OECD Model Convention: Follow-up under Double Tax Conventions: An Evaluation*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 42, Issue 6&7, p. 445-469.

approximate number of total worldwide agreements (3.500), representing only the 5%. It must be added that, the 158 treaties show only the efforts of states toward the arbitration, since no one of them includes a clear explanation on the functioning mechanism or rules that could guide authority on its application. Despite the recognition of the enormous work that still needs to be done, arbitration is slowly becoming a widely accepted settlement procedure due to the increase of cross-border transaction and the connected increase in the number of tax treaty disputes. The 158 DTCs concluded with the amended part, although their implementing limitations, could be interpreted as a shared acknowledge of its power. Even though the clause is not unanimously recognized and uniformly applied, and it is accepted by a relative low number of states, the worldwide awareness of its strength is a task that requires further time, given its relative new spread. Notwithstanding the difficulty to reach consensus on a uniform arbitration clause and its effective application, in the last decade scholars have generally take an opinion in favor to arbitration and the number of tax treaties that include the clause, even if small, has identified the way to go for the others bilateral agreements. In 2015 scholars have participated to a workshop on the mutual agreement procedure and arbitration as tools to resolve disputes with the objective of moving forward the debate on mandatory binding arbitration. During the discussion, Owens J. has emphasized that arbitration is going to represent a key instrument, given the foreseeable *tsunami of disputes*[63] powered by new players in the international field, such as the BRICS countries and the BEPS project itself. In the following, the general design of the procedure and its functioning are presented. The approach used is the one shaped in the Multilateral Instrument and, according to it, the various element and its critical points are analyzed.

2.2 Arbitration procedure

Using a comprehensive definition, arbitration is an international law institution aiming at addressing disputes between parties located on different countries, or as better explained by Kollmann J. and Turcan L., "*arbitration combines a mandatory settlement with a high procedural flexibility that allows it to be tailored to the needs of each particular disputes*" [64]. It is identified as a quasi-judicial and binding dispute resolution method which relies upon a contract between states. Indeed, under the MLI, it is considered a state-to-state mechanism because the parties involved are the CAs that disagree on the interpretation of the tax treaty, as

[63] Kollman J. et al., March 30, 2015, *Arbitration in International Tax Matters*, Tax Notes International, Vol.77, n°13, p.1189-1195.
[64] Kollmann J. and Turcan L., 2015, *Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges*, in International Arbitration in Tax Matters, Chapter 2, p.15-76.

the MAP process. As explained by Garbarino C. and Lombardo M.[65], on their paper, arbitration stands in the middle between judicial and non-judicial methods. It differs from the first since judicial case turns around permanent institutions, like courts, and not as in the arbitration case by an arbitration panel which is selected each time following an ad-hoc basis. On the opposite, it is not even a non-judicial procedure as mediation and conciliation, which both try to solve the controversial issue, as for arbitration the resolution of disputes is a mandatory task. Countries exchange the possibility to recourse to domestic courts for the resolution of contentions with an international binding agreement which depends on arbitration. Continuing with their explanation, authors affirm that arbitration can be voluntary or mandatory; the first requires that both the authorities agreed upon the application of arbitration clause or they later agree to opt-in, while in the mandatory form the request of a competent authority is enough for the opening of the procedure since the counterparty has no power to oppose, since an irreversible agreement was concluded before. In the OECD Model arbitration pursuant to art. 25(5) is mandatory. A further relevant distinction can be made according to an institutional arbitration and an ad-hoc arbitration. While the latter aims at the resolution of any kind of disputes without the support of an arbitration center, the institutional arbitration focuses on the resolution of a recurring set of disputes, under the supervision of an arbitration center. OECD arbitration refers to an ad-hoc basis procedure since the panel of arbitrators is appointed differently for each case. Finally, another distinction can be made with regard to the decision-making process that it is deeply analyzed in the following, between the *independent opinion approach* and the *final offer approach*.

In the Post-BEPS era, as mentioned by Doruado[66], there are mainly two instruments providing the legal framework in the international tax arbitration field, which are the Multilateral Convention Instrument (MLI) and the European Dispute Resolution Directive (DRD). The latter, enacted after the acknowledged failure of the European Arbitration Convention, is handled in the third chapter. Both the two instruments establish a mandatory binding arbitration, after an unsolved MAP case. In the MLI, the mandatory binding arbitration does not represent a minimum standard, and that's the reason why few countries have decided to apply it on their conventions. However, in the scientific community there is large consensus in the usage of arbitration, the terms to be agreed are about the models and the procedure to be applied. The

[65] Lombardo M. and Garbarino C., June 22, 2010, *Arbitration of Unresolved Issues in Mutual Agreement Cases: The New Paragraph 5, Art. 25 OECD Model Convention, a Multi-Tiered Dispute Resolution Clause*. Bocconi Legal Studies Research Paper n°. 1628765. Available at SSRN: https://ssrn.com/abstract=1628765.
[66] Dourado A.P., 2019, *Post-BEPS International Tax Arbitration*, INTERTAX, Kluwer Law International BV, The Netherlands, Volume 47, Issue 8 & 9, p.671-673.

call for arbitration was also highlighted by Tillinghast D.[67]; he stressed on its usage for dispute arising under tax treaties because, from the taxpayer's perspective the uncertainty of the handling of the procedure by the CAs and the huge amount of cases risk to underestimate the importance of every single one, and interested parties are worried about being the *sacrificial lamb* in the CAs priority case.
As known, arbitration is already applied in other fields, such as in the investment and in the commercial area, and its success has been confirmed by the benefits it has brought. First, among all the undiscussed cost savings benefit, the fewer resources required and the expertise of the appointed arbitrators in the specific area have conducted to a cost-cutting connected to court procedure and attorney fees. In addition, as sustained by Briner R., it is an effective method that provides a certain conclusion to the pending disputes, thanks to "*impartial determinations applying law rather than expediency*"[68]. The fast decision-making process and the possibility of a taxpayer involvement are elements that provide a beneficial effect on the usage of arbitration. Another relevant question refers to the confidentiality of information previously required during the MAP. It represents an essential element since many individuals and companies would like to maintain private news about disputes otherwise they might incur in the risk of losing credibility and reputation. At art. 23(5) of the MLI an optional provision stresses on this point stating that, the involved persons and their legal advisors shall agree in a written form not to disclose information they have received during the arbitration proceeding, penalty its interruption.

The anticipated revolutionary multilateral procedure of the mandatory binding arbitration in the BEPS action 15, particularly useful to resolve cases in which more than one taxpayer were involved, was not exactly transposed under the MLI, which imposes arbitration procedure only among states that have decided to its adoption on their Covered Tax Agreement[69]. The nature of arbitration procedure has remained a bilateral one, in line with the resolution process for MAP cases, even if the broad designing of the MLI was that to modify also multilateral tax treaty. A lack of interaction between the bilateral provision in the MLI and the multilateral tax

[67] Tillinghast, D. R., 2002, *Issues in the Implementation of the Arbitration of Disputes Arising under income Tax Treaties*, Bulletin for International Fiscal Documentation, Vol. 56, Issue 3, p. 90-99.
[68] Briner R., 28 October 2002, *An End to Tax Trouble*, At the Double Australian Financial Review, cited in (see note 59) Markham M.A., 2019, *Mandatory binding tax arbitration—is this a pathway to a more efficient Mutual Agreement Procedure?*, Arbitration International, Vol. 35, Issue 2, p. 149–170.
[69] Covered Tax Agreement is an agreement in which contracting parties made a notification that express their decision to apply MLI into their tax treaty. The term is indeed used in the MLI to explicitly refer to agreement that are subject to the modification according the MLI. Pursuant to Article 2(1) *Interpretation of Terms* of the MLI, a tax treaty can be a Covered Tax Agreement if the following two conditions are fulfilled: 1) the treaty has been concluded with the intention of avoiding double taxation with respect to taxes on income and it must be in force between two or more parties; and 2) all the parties must have sent a notification to the depositary.

convention has stuck its wider scope, effectively limiting its range to bilateral treaties. Ideally, the arbitration provision should be designed in such a way to encourage the settlement of MAP cases, precisely what claimed by Ruiter M. and Barret E., they affirm that "*arbitration provisions should be expected to increase the timeliness of the MAP procedure and reduce case inventories, but OECD member countries have continued to show a certain hesitance in adopting arbitration provisions*"[70]**.** Part VI of the MLI can thus be applied to a Covered Tax Agreement only if the parties decide it in line with art. 18 and they shall notify their intention and the depositary accordingly; moreover it will apply to any other parties that in the future may also opt for its application. Some modifications respect to the previous SMAA were introduced in the MLI and were analyzed by Bravo N.[71]. In this regard, she explained that no specific information were provided concerning the procedural request for arbitration in the SMAA, but it is common practice that the request should be made in a written form to clearly identify the case and the unresolved questions, as later mentioned in art. 19B(1). She continued clarifying that another relevant difference stands in the type of arbitration preferred; while under the SMAA the independent opinion was favored, on the contrary, according to the MLI it is promoted the baseball approach, pushed both by the positive results obtained through its application in the implementation of the US tax treaties and thus for incentivizing less developed countries to join the instrument in the near future. She points out that in the MLI articles from 19(2) to (9) constitute a detailed set of rules, that were not part of the OECD Sample, which determine whether the case is eligible for arbitration or not. In these paragraphs the treaty makers have considered cases in which the CAs have requested additional information to be provided by the taxpayer before the two- or three-years MAP period started to elapse or more how to identify the MAP starting date. Moving on, art. 19B(2) states that: "*any unresolved issues arising from the case shall, if the person so requests in writing, be submitted to arbitration*"; arbitration procedure, can therefore be activated by the taxpayer if "*[...] competent authorities are unable to reach an agreement to resolve that case [...]*" [72], pursuant to a provision of a Covered Tax Agreement, within a period of two years. As suggested in the Sample annex to the commentary on art. 25, or as later amended by the MLI, as Bravo mentioned, the period from which it is possible to request for arbitration can be extended to three years if the parties decide to make a reservation pursuant to art. 19(11). She argued that

[70] Ruiter M. and Barrett E., June 2012, *OECD Work on the Resolution of International Tax Disputes*, World Commerce Review, Vol. 6, Issue 2, p.50-52.
[71] See note 54. Bravo N., February 25, 2019, *Mandatory Binding Arbitration in the BEPS Multilateral Instrument*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p.693-714.
[72] OECD, 2016, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.*

his paragraph was introduced as an incentive for developing countries which lack resources to apply part VI give the one-year time extension. Under both the OECD and the UN Models, arbitration is available only when a person asks its initiation to the competent authority of the state in which it is resident, and it explicitly regards unresolved issues for a case pursuant to MAP art. 25(1). The deferral from the previous requirement can be allowed by contracting states by amending that part on their conventions. Some OECD members have limited the application of the MAP arbitration to specific treaty articles such as art. 4, 5, 7, 9 and 12, respectively dealing with resident, permanent establishment, business profits, associated enterprises, and royalties. Notwithstanding the desirability of the arbitration application to all kinds of issue, the OECD provides some restrictions that can be widened to a specific range of MAP cases according to the countries' will. Indeed, as explained by Arnold B. on its paper, "*MAP cases pursuant to art. 25(3) that concerns the interpretation or application of the treaty or more the elimination of DT not provided in the treaty, do not qualify for arbitration*"[73]. In this sense, its formal initiation is denied whether the MAP procedure fall within the scope of art. 25(3) since its initiation is not requested by the taxpayer.

Before the introduction of default rules contained in part VI of the MLI, procedural rules were provided in the OECD SMAA annex to art. 25(5). Indeed, in the OECD Model, arbitration according to paragraph 5 of art. 25 does not provide procedural rules, but the commentary on the article contains an Annex where a Sample on Mutual Agreement on Arbitration is designed. The annex might constitute a solid basis from which to depart while drafting their procedural rules, since most of the countries that have opted in for arbitration in their tax treaties still need to agree through a MAP on the procedural rules to apply. The lack of structural rules can explain why in tax treaties containing an arbitration clause it has been recorded a deficiency of procedural implementing rules in respect to the application of that clause. To promote the application of these rules, also the Explanatory Statement on the MLI has represented a useful tool for the clarification of these provisions. In the Sample, the procedure is presented as a multi-step process. Arbitration pursuant to the OECD Model encompasses five different passages that are: the request from the taxpayer, the agreement on the *Terms of Reference*, the appointment of arbitrators, the arbitration decision and finally its implementation through the mutual agreement. In most of the cases, taxation not in accordance with the treaty provisions arises from an incorrect application or interpretation from article 6 to 21, so called distributed article, of the OECD Convention. *Figure 5* below encompasses the first stages of the arbitration

[73]Arnold B., 2015, *The Scope of Arbitration under Tax Treaties*, in International Arbitration in Tax Matters, IBFD, Ch.5, p. 111-135.

procedure pursuant to the OECD annex, starting from the request and lasting with the agreed on final term of reference followed by the appointment of arbitrators. The writing request must contain a statement for each of the persons who are directly affected specifying that no decision has been already given upon that question by a court or administrative tribunal of the Contracting States. The competent authority that has received the request has ten days to send a copy of the arbitration request within the statements of parties to the other authority; under this perspective the arbitration procedure resemble the timing-structure base of the MAP. The agreement on the Terms of Reference is a step that must be accomplished, according to the Sample, within three months from the receipt of the request. The agreement on the terms constitutes the judicial basis for issues to be solved by the panel. It contains both relevant information such as the questions of arbitration and organizational details as the place of arbitration or the language used and shall be sent to the taxpayer. Whether the Terms of Reference have not been communicated to the taxpayer in the due time, the authorities together with the taxpayer, within one month, share each other the *Tentative Terms of Reference*; a paper listing the issues that have hindered the agreement on the Terms of Reference. The third passage is the appointment of the arbitrators by the CAs. Each one shall appoint one arbitrator within three months from the receipt of the Terms of Reference or otherwise within four months. The arbitration panel is completed with the designation of the Chair, the third arbitrators, in two months from the previous nomination. In the case of a

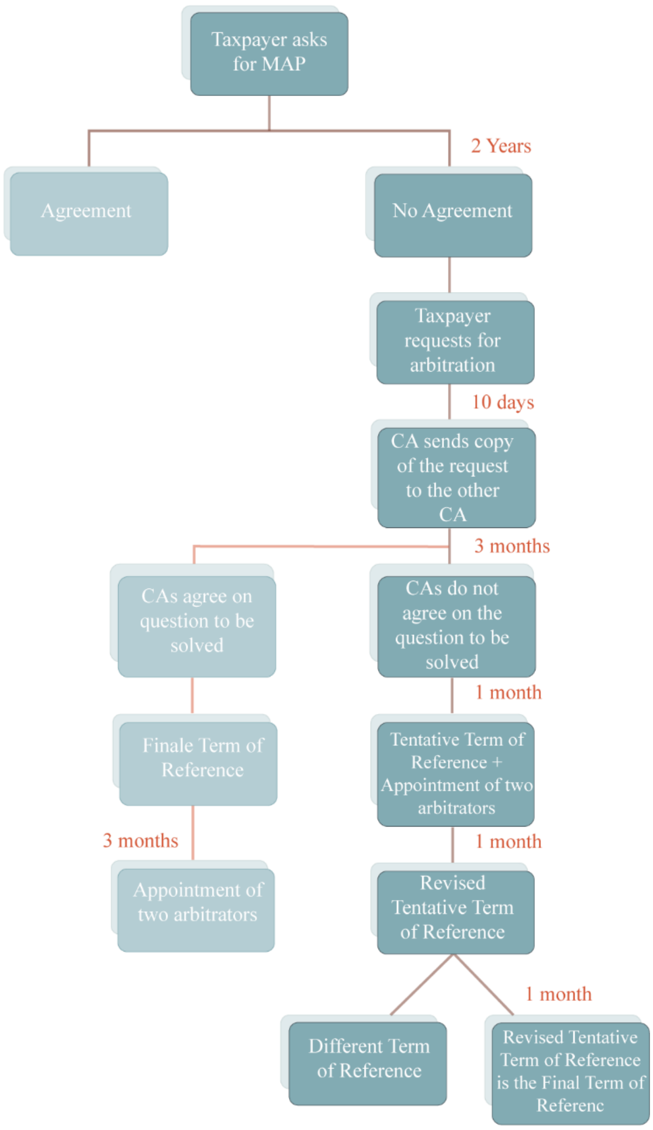

Figure 5: Dispute settlement procedure as proposed in the Sample annex to the OECD Convention, 2008 update, starting from the taxpayer's MAP request to the appointment of arbitrators. Own elaboration from Lombardo M. and Garbarino C., see note 65.

Tentative Terms of Reference, arbitrators have one month, once elected to revise it, and communicate their choice to parties. This amended version shall made up the Final Terms of Reference, unless the authorities agree other Terms of Reference and communicate them to the taxpayer and to the arbitrators, within one month after the receipt of the revised version. Once the question regarding the Terms of Reference is agreed the fourth step in the arbitration procedure is the decision. It should be given by the arbitrators in six months from the declaration of the Chair that they have obtained all the relevant information from the taxpayer for starting the analysis of the case. The period can be extended if the notification of the communication is not done within the timeframe, and in case of failure it is possible to appoint new arbitrators.

At this stage, after the appointment of arbitrators and the agreement on the Terms of reference, the final decision process, according to the OECD, can be led by two approaches: the baseball approach and the independent opinion approach, discusses in the following paragraph. Disregarding the method adopted to the fulfillment of the final decision, once it is reached, it shall be told to the authorities of both contracting states. The last stage of the procedure encompasses the implementation of the arbitration decision through a mutual agreement procedure. This passage must be done in six months from the communication of the decision to the competent authorities. The final resolution of the disputes is determined by the agreement between authorities that are legally bound to apply the decision, they only have the power to formally give application to the decision taken by the panel with no exceptions. On the contrary, the taxpayer, as for the classical MAP procedure, may decide not to accept the implementation of the arbitration decision. *Figure 6* summarizes the latest three steps of the procedure, starting from the appointment of arbitrators to the mutual agreement

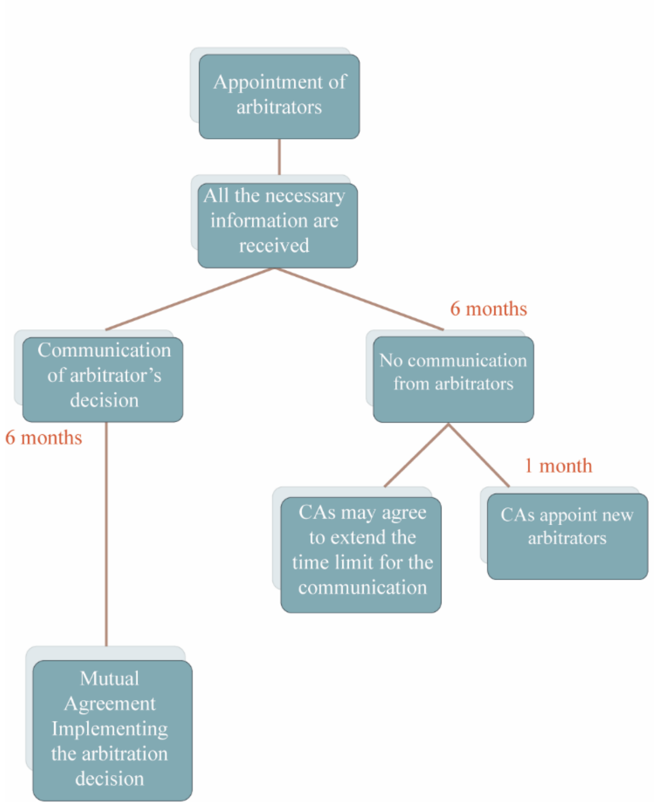

Figure 6: Dispute settlement procedure as proposed in the Sample annex to the OECD Convention, 2008 update; starting from the third stage the appointment of arbitrators to the final agreement. Own elaboration from Lombardo M. and Garbarino C., see note 65.

that implement such decision, passing through the final resolution communicated by arbitrators. In essence, under the OECD, arbitration is a mandatory ad-hoc basis procedure and once the panel has enacted the sentence the competent authorities are legally bound to implement it through a MAP procedure and only the taxpayer has the power to refuse the decision of the arbitration panel.

In general, continuing with the discussion dealt by Bravo N. in her article, she asserts that the flexibility provided by the whole MLI is granted "*thanks to the mixture of optional provisions, alternative provisions, and reservations*"[74]. The first refers to the possibility to apply or not a specific paragraph, such as para. 1 and 2 of art. 23; these optional provisions' ratification are listed in art. 29(1)(p) that concern the entire application of part VI, art. 29(1)(q) regarding the confidentiality obligations and art. 29(1)(r) that relates to the possibility given to the CAs to deviate from the panel decision. The second represents a different way of adopting such instrument and the latter excludes or modifies the application of the treaty provisions and relates to all the involved parties to a Covered Tax Agreement. The recognized reservation provisions have been introduced with the objective of allowing countries with different tax policies and economic interests to adhere the MLI. As regarding reservations, treaty makers have limited their scope, following the purpose of reaching a certain harmonization level. Moreover art. 28(1) provides a list of all the expressly permitted reservation that states can adopt in relation to the scope of cases that can be submitted to arbitration; its application regards all the parties to a Covered Tax Agreements, excluding or modifying such provision for all of them. As highlighted by Markham: "*over half of jurisdictions opting-in to Part VI have made one or more reservations on the scope of application of the mandatory binding arbitration procedure, thereby restricting its scope of application to their Covered Tax Agreements*" [75]. In this respect, these reservations can only be made prior to the time of signature or the time of depositing the instrument of ratification, acceptance, or approval, while all the others are forbidden. Even though, a limitation is recognized as the MLI does not provide a complete list of the allowed reservations in connection with the scope of the mandatory binding arbitration procedure. Reservation, as Nathalie continues, are accepted with a tacit consent of 12 months and whether parties do not accept it they have to make an objection. In this respect, four recurrent reservations that prevent the mandatory binding arbitration to apply have been identified: the exclusion of tax treaties that already provide that procedure, the scope of the case, the exclusion

[74] See note 54. Bravo N., February 25, 2019, *Mandatory Binding Arbitration in the BEPS Multilateral Instrument*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p.693-714.
[75] Markham M.A., 2019, *Arbitration and Tax Treaty Disputes*, Arbitration International, Vol.35, Issue 4, p. 473-504.

whether the other contracting parties have made the reservation not to apply the confidentiality obligations for the taxpayer and its advisors, and finally the exclusion if the contracting parties have opted for the independent opinion approach. It is worth mentioning that the second recurrent reservation is adopted in particular by France, Germany, Italy, Portugal, Slovenia, Spain and Finland, excluding from the scope of application of part VI of the MLI cases in which income has not been included in the taxable base, because subject to exemption or to zero rate. They probably consider resources for conducting a mandatory binding arbitration process to be unjustified if DT does not materially arise. Reservations, together with the limited number of countries that have decided to opt in to part VI, have determined a restricted utilization of arbitration under the MLI.

Lastly, art. 26 named *Compatibility* deals with the possible conflicts that may arise between the provision of a Covered Tax Agreement that establishes the arbitration procedure and part VI of the MLI; even though these sorts of conflicts do not emerge very often, the provision at art. 26(1) recognizes that the mandatory binding arbitration part shall apply "*in place of or in the absence of provisions of a Covered Tax Agreement*"[76] which set up arbitration of unresolved MAP issues. In particular, if an issue has been already submitted to an arbitral panel in accordance to a bilateral tax agreement the same should not be submitted to arbitration following the provision of part VI. Moreover, art. 26(4) states that a party has the right not to apply that part with respect to one or more Covered Tax Agreements if they already contain an arbitration clause for pending MAP issue. On this way the MLI and the existing agreements between states coexist and permit the implementation of the BEPS measures without the renegotiation of each single bilateral treaties. If the MLI is silent respect to a certain matter it should be interpreted following the bilateral tax agreements.

Some scholars have seen the MLI as an instrument that leave much freedom to parties without specifying all details. The lack of a comprehensive tool prevents its application because states need to agree on the procedural rules before starting arbitration. Researchers also sustained that the MLI would not have success if not properly adjusted and to enhance it, they proposed that a predefined framework that parties can modified, instead of leaving everything to be determined by agreement, might be a functional change, thus avoiding that parties start a dispute even prior to the formal initiation of arbitration, for deciding which rules to apply.

[76] See note 72. OECD, 2016, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.*

2.2.1 Types of arbitration procedure

It is recognized that the arbitration procedure is designed to be quick to deal with the huge and increasing numbers of pending mutual agreements cases. Basically, there exist two types of decision-making approach in the arbitration process explicitly mentioned in the MLI, provided by the OECD, and also in the UN MC, which are: the *last-best offer* or *final offer* or *high-low arbitration*, commonly known as *baseball* arbitration and the *independent opinion* or the *conventional approach* arbitration, a quasi-judicial process. However, contracting states are free to adopt several intermediate solutions between the two approaches. These procedures only provide an alternative method to implement the decisional step, since they are both inserted inside tax treaties, according to the OECD MC as an integral part of the MAP, thus applying the same mechanism. The choice on which approach to undertake is based on the needs and the existing condition of the country that is valuing whether to adopt arbitration clause on its tax treaties.

Under the independent opinion approach, as in the art. 23(2) of the Multilateral instrument, facts, circumstances and necessary documents are presented to the arbitration panel which finally provides a written independent decision with a reasoned analysis, pursuant to the applicable tax agreement and the domestic legal sources or others expressly identified by mutual agreement. All the relevant information are essentials to ensure that the arbitrators carry out their careful studies on the case. The conventional approach permits the analysis of issues regarding law or fact or a mix of the two. Applying the independent opinion according to the MLI requires the publication and explanation of reasons that have led the arbitrators to their decisions together with the indication of the legal sources which relies upon. Although their publication does not have a precedential value, the clear and exhausting explanation given to the taxpayer, should satisfy it, notwithstanding the outcome of the process. The required written form for the release of the opinion is stressed in the OECD Convention, since its publication might help the taxpayer on the acceptance of the decision taken. The way in which decision process is designed looks like a judicial proceeding and it is the preferred default method both under the EU Arbitration Convention, the EU Directive and the art. 25(5) of the OECD SMAA prior to the 2017's MLI reform. Arbitrators come to a decision by their own, listening if necessary to the taxpayer or other witnesses that could provide further relevant information or explanation useful to solve the case in a fairly and objective manner. Applying the independent opinion approach gives full authority and power to the panel, the lack of restriction implies a sort of responsibility on the decision presented by the arbitrators. One issue that comes up using this method deals with the loss of sovereignty; in fact, assigning full power to the arbitrators deprives contracting states of their authoritarian power and provides an element for those against its application. Another matter concerns with the time window required for the resolution of the case; since the written explanation provided requires a deep analysis of all the possible outcomes and variables, the time required to bring a solution increases, thus negatively impacting the proceedings schedule. However, other methods can be adopted if agreed by parties, and it is exactly what happened with the application of the baseball approach in a certain number of bilateral treaties signed between OECD member states.

On the other side, in the baseball approach, reported in art. 23(1) of the MLI, each competent authority presents its respective proposals, addressing all the unresolved issues, to the arbitration court and arbitrators have to choose among them. The proposal contains a monetary amount, the applicable tax rate and whether the conditions for the treaty application have been achieved. In a wider sense there are two procedural methodology that can be used during the baseball approach decision-making process: arbitration issue by issue and package deals. With the first variation each issue is deal separately, thus implying more resources, this method is applied in the US-Canada arbitration clause with some exceptions for interrelated issues. The second variation instead, grouping the issues, has increased the difficulty for arbitrators on reaching a decision, since the multiple questions are hard to weigh. Generally, the submitted proposals of the contracting states have attached a position paper that explain the rationale of the solution proposed, and a copy of it should be provided to the other authority. CA can, in addition, reply to the proposal submitted by the other CA. Once arbitrators have received the proposals they have to express their decision, but they don’t have any obligation to provide written reasons for their adopted solution. In fact, the choice of the panel should not be justified, and it does not have precedential value for future cases, as stated on art. 23(1) subparagraph (c). It surely represents a faster and cheaper resolutive method, that’s why it is recommended and preferred by UN and it is mentioned as the default method in the MLI even though the flexibility provided leaves to parties the freedom of choosing their preferred method. Indeed, the two alternatives represent an optional provision inside the MLI art. 23, and where it is not specified which one to adopt the preferred and default method used is the baseball approach. Otherwise, parties before entering arbitration have to settle by mutual agreement the type of arbitration procedure to adopt. In contrast, the independent approach is applied if specifically mentioned by parties.

The time window to lead baseball arbitration is normally very narrow, since to arbitrators is not required to decide on the merits of the case or to write an explanation for the reasons of their decision of one solution over the other; this short timeline generally implies a low procedural cost. Researchers agree on the fact that involving directly states makes their efforts and their commitment in drafting the proposal greater than in other circumstances. Indeed, as highlighted by a paper by Petruzzi et al., "*it is believed that baseball arbitration encourages reasonable and well considered resolution proposals of the competent authorities*"[77]. Contracting states are thus incentivized toward the adoption of a proactive behavior during the drafting of their proposal since they are aware it might be chosen by arbitrators. The baseball approach, as suggested in the MLI, better fits with the disputes that involved a *threshold questions* where parties' proposal regards a monetary amount, as in the case of transfer pricing disputes, or again as concerning the application of a particular provision as whether an individual is resident or as regarding the existence of a permanent establishment, in contrast with the independent opinion that applies to the other cases. In essence, given the closed answer to the question, the usage of the final offer approach is deemed more suitable for situations in which there is no middle way solution, but only clear and identified ones, as in the case where the decision is a number and it does not require comments by the panel. As expected, whether a monetary issue is not the relevant problem, as in the case of interpretation of a particular term in the treaty or a provision, final offer is not deemed the suitable approach to use. Opposing to the loss of sovereignty of countries attributed to the independent opinion approach, within the baseball approach the authority of arbitrators is reduced to a mere decision among the two proposals and the CAs hold power over them. Despite the publication of reasons that have led arbitrators to the final decision, under the baseball approach is not a compulsory step, legislators have sustained the opposite. The publication of the motivations is considered an important element for the further development in the arbitration discipline. In particular, according to the view of the retired judge of the UK upper Tribunal, Jones J. A.[78], reasons of baseball arbitration should be published; from one side because arbitrators would like to explain their reasons and from the other because tax authorities might have similar issues in the future and they would like to avoid them, knowing in advance reasons of arbitrators. Moreover, also third parties would benefit from the published reasons because they are made aware of the facts. On the same opinion is Turcan L., who states that "*the lack of a written decision explaining the reasons for choosing one proposed resolution over the other can make it impossible to understand the outcome of the arbitration process, which may, at the same time, create the impression of arbitrariness and thus the perception of bias, reducing the trust of competent authorities in the*

[77] Petruzzi R., Koch P. & Turcan L., 2015, *Baseball Arbitration in Comparison to Other Types of Arbitration*, in International Arbitration in Tax Matters, IBFD, Chapter 6, p. 137-156.
[78] Jones A. J., 2019, *Types of Arbitration Procedure*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p.674-677.

mandatory binding arbitration procedure"[79]. The risk that arbitration loses confidence under baseball approach should be seriously considered and reasons' publications could represent a weapon against these pressures. Reducing the trust placed in the arbitrators is an issue not to be undervalued, since it can cause further departure from arbitration.

The source of the name, as explained by Bravo N.[80] might have some connection with the aversion on providing reasons, indeed baseball approach origins from disputes among baseball players in the US Major League, regarding their salary. The major league baseball players founded an association (MLBPA) in 1954, to oppose against the owners of the baseball teams who had the control over their salaries through the reserve clause inserted in their contracts. With the scope of rescuing the reserve clause the owners of the teams and the players who had joined the association, come to an agreement through the adoption of the salary arbitration in 1973. The procedure can be requested unilaterally both by the player and the team; once opened, they both proposed a monetary amount and the arbitrators decided which one of the two resemble more appropriate. The outcome was positive indeed, the players have seen their compensation growing whilst the owners had maintained a part of their revenues, generated by the players, unaltered. During these salaries' disputes, players have showed a degree of reluctance in publishing reasons by arbitrators, that justifies their required salary. In this respect, the MLI seems to be negatively influenced by this American practice and further improvements to address this lack of giving reasons in the baseball approach must be undertaken. According to this view, parties are eager to receive reasons simply because in the future they might have to face similar questions and having a previously example can help them in handling the case. The baseball procedure has some drawbacks since it can only give as output one of the two proposal submitted by the authorities, if the solutions proposed are not in accordance with the treaty, thus providing an incorrect interpretation of the agreement, then even the arbitration decision may not be in line with the treaty and cannot be consequently applied, thus resulting in a potential loss of tax revenues for a contracting state without a justified reason. The limited and restricted power of the arbitration panel of choosing between the two options presented by the states contributes to reduce the complexity of the decisional process and it incentivizes parties not to submit aspirational numbers but to assume a reasonable position. Weaknesses of the baseball approach, on the opposite, are the strengths of the independent opinion approach; the latter has not to provide an answer which corresponds to the solution provided by the

[79] Turcan L., 2017, *Dispute Resolution*, in The UN Model Convention and Its Relevance for the Global Tax Treaty Network, IBFD, Institute for Austrian and International Tax Law, series editor Michael L., Chapter 10, p.261-317.
[80] See note 54. Bravo N., 2019, *Mandatory Binding Arbitration in the BEPS Multilateral Instrument*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p.693-714.

countries involved in the dispute, but it can give a middle way solution that better suits to the case and represents a compromise taken by an impartial entity. Practitioners suggest the implementation of the baseball approach between states with a solid and long-term relationship which are focused on dispute resolution in a pragmatic and efficient manner.

Among tax practitioners, the usage of baseball approach is recognized as a an absolutely simplifying method and, as sustained by Avery Jones, arbitration procedure should move towards this direction. After the MAP failure the scope is to come faster to a conclusion, providing an answer to the taxpayer. This minimalist approach has been promoted by the US that, besides being a pioneer in the introduction of arbitration procedure on a voluntary basis into its agreements with Canada, Germany, France and Belgium, it has decide to apply the baseball arbitration because it represents a quick resolutive method. Scholars agree on the attribution to the US to the diffusion of the baseball arbitration in tax treaties, together with the spread of arbitration in general. The decision assumed by states to insert an arbitration provision on their bilateral tax treaties normally follows the recommendations provided by the OECD or the UN Model, on the contrary the US arbitration provision didn’t follow that model. US provisions can be splitted in two categories, the first refers to the period prior to 2006, when they were called first-generation provision and included arbitration provision on a voluntary basis, according to which CAs can opt for arbitration, while the other, named second-generation provision approached the OECD model, including a mandatory arbitration clause, thus obliging CAs to appeal to arbitration panel in case of unresolved dispute, but limiting its scope to some specified treaty articles. Prior to 2006, when US amended the tax treaty settled with Germany including the referral to an arbitration commission, they were against the introduction of a mandatory arbitration clause, maybe in connection with its low international spread, as pointed out on its own Model Tax Convention. Their change of mind is perhaps due to the increasing widespread usage of arbitration and, in a certain sense, it has anticipated the adoption of arbitration in the OECD MC. During the subsequent years the US have concluded lots of DTTs with the arbitration clause thus becoming in 2014 the state with the highest number of arbitration clauses in its tax treaties. All the agreements signed by the US including a mandatory arbitration clause explicitly refer to final offer arbitration and the clauses, even if not based on the OECD Model, present detailed procedural rules on how to handle with arbitration. The US tax policy emphasizes the importance of implementing that approach, because of the clear benefits it brings. Indeed, based on the US experience as mentioned by Monsenego J. on his paper, one of the advantage of the baseball approach “*is the incentive it gives to the CAs to avoid extreme and non-justified interpretations of a tax treaty since the lack of convincing* *arguments supporting a particular interpretation of a tax treaty is likely to encourage the arbitrators to choose the position of the other country*"[81]. For this reason, given this bias of arbitrators, CAs are thus encouraged to provide a justified resolution proposal.

As highlighted by Professor Rosenbloom during the workshop in Vienna[82], the agreement between US and Canada has represented a unique case because of their history, their geography and their economic relationship, but it is a success story that had led to the resolution of several cases and it may provide the proof for other countries to embrace arbitration, leaving apart their initial hesitation. Indeed, during the embryonal stage of arbitration, US had the same concerns that reluctant states have today, such as the sovereignty issue, the confidentiality issue, and the requisite of independent arbitrators. Their prosperous example might be taken into account as a reference one for wavering countries. Moreover, the US uses another figure, an arbitration institute that coordinate and supervise arbitrators, represented by the American Arbitration Association. The arbitration institute, even if not specifically cited in the MLI or in the EU directive, represent an element for monitoring the work of the arbitrators and managing the organizational part.

Situations in which a contracting state has expressly denied the usage of the MLI default approach while the other has refused the application of the independent opinion approach, prior to access the mandatory binding arbitration, need to be settled deciding which method to exert**.** Independently from the type of the procedure applied during the decision-making process, the final decision is taken by a simple majority of the panel members, in the case of three arbitrators as is in the general rule, two out of three. The decision taken by the arbitration panel can be published if the parties involved do not decide otherwise, given their legitimate decision-making power to prevent its issuing. In this way, the decision stays private to parties and arbitrators that have contributed to its pronunciation. Also, the absence of the precedential value assigned to a case is a characteristic that both types of arbitration methods have in common. Focusing now on their differences, it is interesting to see them in respect to the evidence perspective; in fact, depending on the type of decision-making process applied, the evidence considered changes. During the independent opinion approach the process encompass a formal deposition by the testimony, evidence is showed to the arbitration members and eventually the taxpayer makes a presentation. On the opposite, applying the baseball approach typically requires only one hearing and limits the amount of required evidence. Arguments and facts are

[81] Monsenego J., 2014, *Designing Arbitration in Tax Treaty, Reflection Based on the US Experience*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 42, Issue 3, p. 163-168.
[82] See note 63. Kollman J. et al., March 30, 2015, *Arbitration in International Tax Matters*, Tax Notes International, Vol.77, n°13, p.1189-1195.

presented to the arbitration panel through the submissions presented by the competent authorities, without involving the taxpayer and requiring more sophisticated analysis of the case. Moreover, the confidentiality issue in a final offer approach is considered an essential element, whilst in the conventional approach pursuant to the OECD the publication of the decision assumed by the panel are allowed if the taxpayer and the competent authorities accept it. It shall be kept in mind that arbitration outcome, disregarding the method adopted for the decision-making process, is binding only respect to the specific issues submitted to arbitration and no other issues on which authorities have previously agreed during the amicable settlement. Furthermore, whether the independent opinion is applied, competent authorities have the option to solve other similar cases according to the previous decisions, but they are not obliged to do so, since the reasons provided by arbitrators do not have a precedential value. Between the two applicable methods, as remarked in the MLI, which stresses on the flexibility of the instrument, contracting states are free to settle an arbitration procedure that is more suitable to their specific need and in the perspective of the cases that they are dealing with. In fact, they can shape an intermediate solution, such as the baseball approach with reasons, a combined arbitration or they can decide to agree on a mutually agreed rules, mirroring the uniqueness represented by each case. The application of the arbitration procedure should be settled by mutual agreement simultaneously to the stipulation of the Convention.

2.2.2 Criteria for the appointing of arbitrators

According both to the MLI and to the European Directive, arbitrators are appointed by the CAs. In the OECD each one appoints one arbitrator, while the third is chosen by the other two previously elected and it constitutes the Chair arbitrator, whilst the highest composition of the EU arbitration panel is better dealt in chapter three. The appointment of arbitrators from CAs constitute an element of debate. Some protect the thesis that it should go this way, while others embrace a greater involvement of the taxpayer in the selection of arbitrators, thus assuring parties that the case will be tackled by skilled and trustworthy people. Ideally, balancing between the taxpayer and the CAs the selection of arbitrators there would be an annulment of potential bias that might negatively affect the case. In reality, arbitrators are appointed exclusively by the CAs and the taxpayer, up to now, has no recognized power of appointment.

Arbitration commission is made up by three arbitrators, it has the role of determining the exact application of the convention and they have no powers concerning to the linkage between the treaty and the domestic law. Pursuant to the MLI, if authorities fail to nominate an arbitrator it is an external body, the OECD, or the local court, that has the task to pick one. The derogation relating to the postponement of the appointment is permitted if related person lately provides information deemed useful for the resolution of the case under MAP procedure. Art. 20 of the MLI *Appointment of Arbitrators* sets out that the arbitration panel shall consist of "*three individuals with experience or expertise in international tax matters*"[83]. As emphasized by some authors, it is deemed necessary having at least one of the arbitrators with real experience in arbitration matters, showing that inside the panel a figure who knows what to do is crucial to break down fears of taxpayer and countries regarding its usage. Park W.W., among others, sustains this thought providing convincing reasons stating that "*arbitration raises difficult procedural questions that may determine the success or failure of the enterprise, and which in a legally heterogeneous world often have no universally accepted answer. Consequently, at least one member of the tribunal must possess experience in conducting arbitration*"[84].

Respect to the ones presented in the SMAA, deadlines are more stringent. Indeed, each CAs have 60 days from the date of request of arbitration to appoint an arbitrator and the Chair shall be designated within other 60 days from the latter nomination of the others two. This while in the Sample time limits were respectively set to three months after the receipt of the Terms of reference by the involved person for the first choice and two months for the second. Carrying on, subparagraph c) of art. 20(2) states that the member of the panel must be impartial and independent respect to the CAs, the tax administrations and the ministries of finance of the contracting jurisdictions and to all persons involved in the case and the arbitrators if required so, can provide a written statement in which he declares his impartiality and neutrality. These requisites must be kept through the overall proceeding, otherwise they could undermine its own integrity. The independent and impartiality requisites represent an improvement if compared to the Sample, that was highly criticized since it allows to appoint as arbitrators also government officials, whether not previously involved in prior stages of the case that have led to arbitration, thus contrasting with the recognized independence principle. The effective election of arbitrator, according to the annex, is pursued by a confirmation letter signed both by arbitrator and who has appointed him.

In the appointing procedure, notwithstanding who is acting, an issue persists: how to identify an arbitrator that is particularly suitable to handle the unique case in question? Even if as showed by the MAP statistics most cases refer to transfer pricing, there is a part that involves other issues. Taxpayer that request for arbitration gives for granted the expertise level of

[83] See note 72. OECD, 2016, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.*
[84] See note 35. Park W. W., 2002, *Income Tax Treaty Arbitration*, George Mason Law Review, Vol. 10, Issue 4, p.803-874.

arbitrators, but for the competent authorities selecting an adequate one is not so obvious. The specific experience of the arbitrators according to the case to deal with is a requisite that is considered together with its nationality and its impartiality. In this sense, it has to be independent from the taxpayer and from the authorities that have submitted the case; in the MLI it is explicitly mentioned that if, during the process, the requisites are missed for whatsoever reason the arbitrators shall notify to the CAs the situations and give up the case, since its impartial and independent position has been compromised. Impartiality and neutrality in the judgements of the case are considered essential for the successful completion of the procedure; OECD received comments during the public discussion draft on action 14 in which it was explicated that arbitrators must accomplish the independence and impartial criteria during the proceedings but also for a reasonable time after the decision is reached, thus permitting the control of the arbitrators behavior for a period of time.

Whether the nationality of the two members appointed by the competent authorities is not explicitly binding, the third arbitrators, the Chair, must have a nationality different from both states involved. Moreover, arbitrators, beside not being citizens of neither states involved in the dispute, should not have any kind of commercial affiliation with the case in question. Despite the acknowledge difficulties in the appointment of arbitrators, some recurrent criteria are used in the existing tax agreements and in the models, and they were also recognized during the OECD Discussion Draft. These set of criteria can be agreed and published among participating countries in order to avoid differences on the members they appoint and thus develop agreed criteria for the qualification of arbitrators. They encompasses some standards such as the recognized experience of the arbitrator in cross-border tax issues, his experience in the tax area as a lawyer, accountants or economists, his judicial temperament and, in particular, he should be able to evaluate facts in a neutral way and assume decisive solution maintaining the composed structure and being respectful of the law. The experiences as a judge or arbitrator are not required but they are considered as a plus. In addition, a standard position paper signed by the arbitrator may be requested, in which he declares he is impartial and independent, and he assures to disclose conflict of interest or cases whether the conditions required are missing.

Regarding the European Directive, it excludes from the list of possible arbitrators retired or active professional tax advisers, thus reducing the available experts, since many eligible are committed in the tax advisory community, thus requiring even more stringent criteria for the appointment. The arbitrator's selection process becomes then even tougher than in the MLI. Also, the directive requires that the president of the arbitration panel should be a judge. In other words, even if, finding an expert that fulfill of all the required qualification is difficult, the

European instruction make the task even more tricky. For this reason, it provides a list of arbitrators constantly updated by member states (each one provides at least 3 arbitrators) that must be consulted and used by the authorities for the selection process. Only the European Directive provides a public list of available arbitrators and states must appoint an arbitrator taken from that list.

The possibility of recurring to a pool of arbitrators is a practice enforced both under the US baseball approach and in the European Arbitration Convention. In particular, in the first case, as happened for the US treaty with Canada, the implementation of a list of arbitrators by both contracting states prior to the start of the procedure gives a significant time saving and provides to the other authority the register of the arbitrators, facilitating the task. On the same direction has moved the European Arbitration Convention, which has promoted an updated list of arbitrators who meet the requirements for eligibility, in which each member state has to appoint a number of arbitrators. In these circumstances, former governments employee, if not a year from its departure has passed, and legislator without an international background cannot be included on that list. On the contrary, the MLI does not provide any register of arbitrators thus making the search and selection more difficult. Moreover, the OECD on its *Discussion Draft* has expressed concerns about the nomination of arbitrators as an obstacle that make countries hesitant on the adoption of MAP arbitration, due to the lack of experience of their tax experts and the limited guidance provided. Practitioners suggest that, to overcome this refrain from the adoption of arbitration, also the OECD should create a list of potential arbitrators, with selected criteria, from which CAs could draw. In this regard, Professor Lang M., outlined that "*the creation of a list of arbitrators under auspices of the U.N. and OECD could be a starting point to promote and facilitate arbitration*"[85]. Of the same view is the ICC that sustained the crucial importance of creating a global pool of experts both in developed and developing countries; it already has a network of potential arbitrators taken from the center for Alternative Dispute Resolution (ADR) experts.

Independence of arbitrators is a crucial point since the sentence of the panel can be nullified whether it is missed or if at some point during the work arbitrators lack their independence. The constant monitoring is difficult and can be carried out by an arbitration institute. Some academics, as for example Professor Owens J.[86], assume a position in favor of institutionalization of arbitration, and he presented a proposal during the work on arbitration

[85] See note 63. Kollman J. et al., March 30, 2015, *Arbitration in International Tax Matters*, Tax Notes International, Vol.77, n°13, p.1189-1195.
[86] See note 63. (Kollman J et al.).

where he promoted the creation of a self-standing panel that build up a set of standard rules. An arbitration institute, with supranational status, would grants stability, provides answers to practical questions, and facilitate the acceptance of decisions in tax matters outside the domestic power to legislate. For sure, drawbacks exist on the introduction of an institute that manages arbitration cases, such as the possibility that it could give to the CAs an idea of which direction is more likely to undertake, given its former position. As mentioned by Lindencrona G. and Mattsson N.[87] on their paper, the creation of a more structured arbitration panel is a task to be dealt only after its initial diffusion, cause it is risky and more difficult to implement compared to an arbitration commission; that's why the latter was implemented leaving the development of an international tax court as a future possible event.

If arbitrators are appointed according to their background and accomplishing the needed requirements, it is unclear who is going to administrate and manage the duties as regarding the support work for arbitrators. As explained by Mooij in his paper[88], one of the key success factors for the arbitration procedure is the creation of a support apparatus able to coordinate the work of the arbitrators with the work of the authorities. In this regard, both the MLI and the European Directive lack of information on who is going to assist the arbitrators in their role. For sure, the arbitration institute has to keep confidential information, without disclosing the specific case details, thus maintaining the discretion and secrecy that also arbitrators were used to. Arbitration institute is seen with skepticism by some since its private nature could deviate to business forgetting the states interests. Other reply that it could have also a structured intergovernmental basis to eliminate states' concerns. The required qualification for arbitrators is necessary to the conduct of a fair trial and an unbiased and coherent decision.

The OECD Sample also foresee a streamlined arbitration process in which the number of arbitrators is reduced only to one, which must be appointed by common agreement of both competent authorities. As suggested by Park W.[89], a single arbitrator represents a cheaper procedure and minimize scheduling problems; he continued arguing that cost may be well suited when a small amount of money are involved but, if compared with the standard three-arbitrators procedure, the latter is preferred because justifying a conclusion in deliberation with others arbitrators leads to a more stringent proceedings. Moreover, as sustained by Desax M.

[87] Lindencrona G. and Mattsson N., 1982, *Arbitration in Taxation*, INTERTAX, Kluwer Law International BV, The Netherlands, Volume 10, Issue 3, p. 76-82.
[88] Mooij H., 2019, *Arbitration Institute: An Issue Overlooked*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p. 737-744.
[89] See note 35. Park W. W., 2002, *Income Tax Treaty Arbitration*, George Mason Law Review, Vol. 10, Issue 4, p.803-874.

and Veit M.[90] in their article, in some situations the simplified process may be suitable, as when the case concerns to primarily factual issue, such as the determination of the arm's length transfer price, while in other circumstances it may fit less.

During their work, arbitrators and the staff who works with them must treat information regarding the case as confidential. On this point, art. 21(2) of the MLI, in line with the general MAP procedure, and art. 26 of the OECD Convention requires them to sign a paper in which they agree on that. The confidential information provided by the taxpayer assume a greater relevance during arbitration in connection with the reliance in tax administration. This due to the fact that independent figures, like arbitrators, are involved and that their allowed access to the full extent of information, if not kept secret, may damage taxpayer and the whole trust in the mechanism. This confidential information must be shared to both competent authorities, otherwise they are considered not admissible.

2.2.3 Cost of the arbitration process

Arbitration costs, as both suggested by the MLI and the European Directive, should be equally distributed among competent authorities, excluding the cost of their respective arbitrator, which each one should bear. States in the recent years have experienced a decrease in the amount of available resources, and in this regard, the costs of MAP arbitration have represented an important point in designing the framework of the arbitration process. There are three categories associated with the costs of an arbitration that are: costs connected with the arbitration panel, consisting of fees due to arbitrators, costs related to each CA's participation in the procedure, such as the cost related to the drawn up of the position paper, and finally costs bound to administrative functions, such as translation or travel expenses. Generally, the most relevant cost category is the compensation due to the arbitration panel and it must be adequate thus guaranteeing qualified experts; exception is given by the possibility of recurring to the mentioned simplified procedure, in which the panel is constituted by only one arbitrators, and the baseball approach is adopted; it is a path particularly well-suited for small cases to reduce the resources necessary to conduct arbitration. As later explained on art. 25 of the MLI, fees and expenses of the arbitration members and all the other costs inherent the arbitration proceedings shall be incurred in a way settled by a mutual agreement. In the absence of any agreement, each contracting state shall sustain its own expenses and that of the arbitrator they appointed, while the costs of the Chair arbitrator and other expenses associated with arbitration

[90] Desax M. and Veit M., 2007, *Arbitration of Tax Treaty Disputes: The OECD Proposal*, Arbitration International, Vol. 23, Issue 3, p. 405-430.

proceedings should be equally divided. It is a view commonly shared that CAs have to pay to participate to the proceedings, and they provide their consent to bear cost, such as telecommunication and travel costs, of their nominated arbitrators in the letters of their appointment. The agreement on a different costs' allocation must be specified in the Terms of Reference, pursuant to the OECD Sample. Generally, the CA to which the case was primarily presented is in charge with the coordination and the logistical part, and it sustains the costs of the meetings and of the administrative employees.

Even if the general rule is to equally divide costs, a detailed subdivision of payments of each cost item is not provided and, in some circumstances, after the final decision is given by the panel, countries may reveal their position against bearing the cost of the procedure, for instance because they have lost the process or because they are simply unable to pay. To overcome that issue, as explained by Mooij[91], the creation of an arbitration institute that is responsible for the payment, and with the right to demand an advance payment in order to carry on the procedure and at the same time controlling the fee and expenses of arbitrators, might help to ensure the fulfillment of arbitration costs.

2.2.4 Arbitration Decision

The decision provided during the proceeding by the panel, is based on the treaty between the two contracting states involved. The final decision, that should be presented in written form, is assumed by a simple majority of the panel members, two out of three or, where no agreements between the panel's members is reached, the Chair alone should take the decision. Depending on which type of arbitration procedure is applied during the decision-making process, arbitrators will or will not mention reasons behind their choice. The solution following the SMAA, should be provided within six or three months from the notification, made by the Chair member, that they have received all the necessary information to solve the case alternatively if the independent opinion or the baseball approach is implemented, while in the 2017 OECD's update MTC the time-limit has been extended to 1 year. In particular circumstances the timeline can be extended by other six months, for example given the fact that scheduling meetings for three arbitrators coming from different countries may not be possible within the stringent timeframe required.

Decision rendered should be considered binding with respect to CAs and it should be implemented within six months more. In line with the possibility recognized under the MAP

[91] See note 88. Mooij H., 2019, *Arbitration Institute: An Issue Overlooked*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p. 737-744.

procedure, also during arbitration, if the taxpayer decides to reject the decision rendered by the panel, it can pursue domestic legal remedies; in reality, few cases have been refused by taxpayer, because to access MAP and arbitration it usually has to give up its right to appeal to domestic remedies. Apart from the faculty of the taxpayer of rejecting the arbitration decision and appealing to domestic legal court, there are situations in which the decision taken by the panel is not enforceable because of a violation of art. 25(5) or of any procedural rules agreed in the terms of reference. Ignoring extreme impediments, the implementation of the decision should pass through a MAP issued by the CAs, as explained in art. 19 of the MLI, then becoming effective in the domestic legal system of each contracting state. The simple delivery of the decision by the panel does not constitute itself a legal application of it; it is therefore necessary its incorporation within the domestic law that outlines its process and its outcome. Given that the decision has been rendered by an international panel, any domestic impediment on its usage should be overcome, since the all-embracing tax treaty obligations. Rarely, arbitrators are unable to provide an answer to the question because the case lies outside the area covered by the agreement between states. Arbitration decision, conforming to Art. 19(4), subparagraph B of the MLI, is binding to contracting states except in three circumstances. The first is referred to the possibility that lies in the hands of the taxpayer to reject a decision rendered by the panel through the refusal of the MAP that implements such decision. The second hypothesis consist in a domestic court sentence of one of the states involved which affirms that the decision rendered is invalid, following by a procedural mistake, such as when confidentiality is interrupted. Finally, the decision cannot be binding whether a person involved decides to go after litigation on a court or administrative tribunal against MAP decision that implement arbitration. Moreover, as remarked on art. 19(12), a party has the option to refuse submission to arbitration regarding issue for which a decision has already been rendered by a domestic court or an administrative tribunal of a contracting state. Similarly, an arbitral decision is suspended whether during the proceedings a court or an administrative tribunal of the contracting states provides a decision concerning the same issue.

Generally, the decision taken by the panel is private but there can be exceptions if both CAs and the taxpayer agree on its publication. For the sake of maintaining the confidentiality, some details must be kept away from publishing as the name of parties or others hints that may help on their identification, for this reason the eventual publication should be done in a revised form. Anyhow, there is a debate regarding the issuing of arbitration decision; in the perspective of a future widespread of arbitration the general view taken by scholars is that arbitration decision, whether under independent or baseball approach, should be published, improving its predictability, thus having an overall enhancement in the trust place on arbitration. On this opinion took side the retired judge Avery Jones which asserts that "*publication of decisions is necessary in order to present the reasoning behind them*"[92]. The transparency granted by the release of the decision clashes with the confidentiality requirements granted to the taxpayers during the process. Question goes on a sensitive level since the acknowledge benefits for future trial is undoubtedly recognized, but at the same time taxpayers are worried not to be protected enough, as for example, regarding business secrets that if revealed to the competitors might cause damage to the whole company activities.

Given the last resort nature of the arbitration mechanism, the possibility of agreeing on a different resolution is left open to the CAs, similarly to what happen in the MAP, and if they are able to reach agreement through other channels, arbitration process is cancelled. Indeed, the procedure can be stopped if, at any time before the conclusion, an agreement on the resolution between the two CAs is reached. According to the Multilateral Instrument art. 24(2), CAs have three months after that a decision was rendered by the panel to agree on a different resolution, thus nullifying the arbitration sentence and implementing their settled choice. This deferral was also allowed in Art. 12 of the European Arbitration Convention with an extension of the period from three to six months to reach the agreement, and it represents a new provision respect to the pre-2017's OECD Sample. As recognized on art. 22 of the MLI *Resolution of a Case Prior to the Conclusion of the Arbitration*, the arbitration procedure should terminate if the contracting states get an agreement or if the taxpayer withdraws its initial request.

2.3 Lack of participation of the taxpayer in the arbitration procedure

During the whole arbitration procedure, as in the MAP case, the taxpayer plays a marginal role. In this respect, interested person, generally identified as the taxpayer, has the possibility to present his case to arbitrators in a written form or alternatively through his representatives, and during the proceeding, if it is request so, it can give an oral explanation on the facts. The right to initiate an arbitration procedure stands in the hands of the taxpayer, who may decide at any moment to withdraw its request or can make no request at all according to its will, for example if it doesn't want to enter into arbitration or if it deems suitable giving more time to authorities to resolve the case through a MAP. In some circumstances, its access to the procedure might be denied due to some loopholes that refer to constitutional limitation or other issues relating to sovereignty, but in the majority of cases with the taxpayer's decision the recourse to the

[92] See note 63. Kollman J. et al., March 30, 2015, *Arbitration in International Tax Matters*, Tax Notes International, Vol.77, n°13, p.1189-1195.

proceeding is activated. Some improvements regarding its role are recognized during arbitration, in respect to MAP process. Indeed, it is more involved in the proceedings and it has the right to be constantly updated about the ongoing state of the case. Its participation to the hearing is confirmed by the right to present evidence and its view to the board. The active involvement of the taxpayer positively influences the quality of the decision-making process and provides the panel with all the relevant information. As emphasized by Perrou K. the "*taxpayer should be granted fair trial guarantees to protect their rights*"[93] and, to assure this protection, a constant update on the panel's work in progress and the taxpayer participation throughout all the steps, seem to address the reasonable fears that lies on its mind relating to the worries that its case might be neglected.

In the procedure, taxpayer has some key roles, as mentioned above. Another relevant power that is on the hands of the involved person refers to the effective implementation of the decision through MAP; while the authorities are bound to enact such resolution, the taxpayer can reject it at its discretion. Pursuant to the MLI, the rights of the taxpayer are similar to that already mentioned, thus limiting to its request for initiating arbitration, its right to accept or deny the final decision taken by the panel, the provision of additional information, together with the possibility of an oral audience in case the arbitrators request so. These set of rights are far from those that the taxpayer would have if it was entitled to initiate an arbitration under a Bilateral Investment Treaty (BIT) to resolve the same issue, and in this respect scholars sustain that the MLI should strengthened its taxpayer's position, since, except these few roles, the taxpayer has a marginal participation during the whole process. That's why some assert that the taxpayer should be major involved during the process, stating that its economic interest is as powerful as the ones of governments authority.

2.4 Why developing economies are reluctant to the usage of arbitration

It is not simply a coincidence if the signatories to the MLI that have also included it on their Covered Tax Agreement Part VI, relative to the mandatory binding arbitration procedure, are for the vast majority developed countries; less developed countries have gap of resources anchored to their late historical development, which is intrinsically linked with its future evolution. Reasons are multiple and, as some authors have sustained, the above mentioned one only represent the tip of the iceberg, because many others are linked to this. Nathalie B.

[93] See note 63. Kollman J. et al., March 30, 2015, *Arbitration in International Tax Matters*, Tax Notes International, Vol.77, n°13, p.1189-1195.

reassumes on her article[94] that the reasons pushing developing countries against arbitration are three: the high costs of the procedure, the fiscal sovereignty, and the uncertainty of the outcome. Starting from the first, developing countries, given their limited availability of resources tends to avoid entering arbitration since it requires even more funds than a MAP proceeding. They are worried that through the application of the arbitration procedure only taxpayer would effectively gain benefits, while the cumbersome costs would be on their shoulders. It is an acknowledge fact that developing countries often lack resources and expertise to conduct an arbitration process, indeed the majority of experts come from OECD countries: in this context it could be very difficult to implement arbitration within both approaches. The independent opinion would be a too costly procedure, while the baseball approach would be conducted in an unreasonable way, since the authorities of the developing countries instead of proposing a reasonable decision would be more likely to advance obstructive solution, making more difficult the acceptance of its proposal by the arbitration panel. Some proposed that costs of proceeding should be divided according to the ability-to-pay of states or, otherwise, promoting a simplified operation as the one-arbitral procedure to cut costs. The second issue is used merely as an excuse rather than representing a real obstacle; states appeal to their legitimacy to impose tax to withdraw international tax arbitration agreement. As argued by practitioners, arbitration intervenes only after that tax administration have been given the possibility to resolve the conflict within a time window of two years, sustaining that countries, *de facto*, have revealed their incapacity to reach such a resolution and thus the dispute is entrusted to an international body. Many scholars, instead, agree on the thesis that in the modern context the increasing usage of MAP and arbitration will be foreseeable pumped up by new international tax treaties involving developing countries, even it’s too early to see that phenomenon. On the contrary, various Latin-American countries, such as Brazil, have explicitly made reservation on their convention about application of both MAP and arbitration, prying up to the national legality principle. Finally, the uncertainty of the results is an issue connected with the figure of the arbitrators and their consideration of future likely relation with developed countries, which could potentially bias their choice making it lean towards the industrialized nations. To overcome this problem, it is important to assure the neutrality of arbitrators and their transparent conduct, understanding the background of the developing countries, together with their social and economic conditions.

[94] See note 54. Bravo N., February 25, 2019, *Mandatory Binding Arbitration in the BEPS Multilateral Instrument*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p.693-714.

To break these barriers to the widespread diffusion of arbitration, Lennard M.[95], actually chief of the International Tax Cooperation and Trade in the Financing for Development Office of the UN, has expressed the importance of balancing both benefits and costs that the BEPS MLI can bring to less developed countries, in regard to a fair process that should be left unaffected by the different resources and experienced arbitrators among states involved. He has advanced the hypothesis that the UN may provide a list of experts to help developing countries when choosing arbitrators. The concern, as postulated by the same on his paper *Transfer Pricing as an Option for Developing Countries*[96], is about the lack of transfer pricing experts in developing countries that have the ability to arbitrate such matters; the presence of arbitrators in those realities is seen with suspicious, given the fact that they might pursue the interests of developed countries because they consider the event of conducting arbitrations for industrialized countries more likely in the future to happen, and so they want to keep stable and lasting relationships with them.

To protect the interest and the weaknesses of developing countries, it is not a coincidence if the UN Model, the reference one for treaties between developed and developing countries, departs from art. 25(5) of the OECD Convention. The differences regard four aspects: the time window to activate arbitration is extended to three years instead of two, in line with the MLI provision, the request for its initiation must be done by the competent authorities instead of by the taxpayer, the decision given by the panel is not bound to the authorities, indeed if they come to an agreement within six months from the communication of decision by the panel their settlement dominate the arbitration solution, and finally the arbitration clause is included in one of the two alternative version of the MAP art. 25(5) at part B, while part A does not include such provision. Indeed, the UN Committee during the work for arbitration clause, presented difference of opinions and so two alternatives to art. 25(5) were developed. The taxpayers' interest in receiving a certain answer is subordinated to the interest of contracting states, since in the UN model the power to request the formal initiation stands upon the CAs and, for example, they may take into account future relationship with the other state when deciding if submitting a case for arbitration. In this respect, it is no surprising if the general attitude of developing countries toward arbitration is against it, frequently making a reservation on that clause. In particular, the inclusion of such paragraph is an alternative decided on a voluntary basis, as it stands on the hands of the competent authorities to decide upon its activation; states

[95] Lennard M., October 2013, *TP Arbitration for Developing Countries: Benefits and Burdens*, 24 International Tax Review, Vol. 24, n° 8, p.28-33.
[96] Lennard M., 2014, *Transfer Pricing Arbitration as an Option for Developing Countries*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 42, Issue 3, p.179-188.

have the tendency not to include it on their treaties since they lack of expertise in dealing with arbitration and the arbitrators, most of the time, miss the neutrality and impartiality requisite. Furthermore, through the acceptance of arbitration, countries are giving up some of their resources for an uncertain and time-consuming procedure, that may be otherwise be exploited for other more rewarding activities. Whether the arbitration is agreed by developing countries, they prefer to adopt the baseball approach since it is the cheaper method and normally minimum amount is established, below which the procedure is not even activated. Despite their adverse attitude towards the usage of arbitration, due to the above-mentioned concerns, some positive effects can be recognized; accepting arbitration countries appear as a slightly more attractive environment to invest in. The progressive acceptance of the arbitration clause is a gradual step process that requires the promotion by institutions as the UN or at a local level, which should increase the developing countries confidence towards that new dispute resolution mechanism.

2.5 International arbitration and national sovereignty

States have used the concept of national sovereignty as a scapegoat to refuse MAP arbitration in their treaties, as sustained by the director of the Centre for Tax Policy and Administration at the OECD, Pascal Saint-Amans, who asserts that "*some nations have hided their reluctance toward the adoption of arbitration appealing to sovereignty excuse, and that the BEPS action plan should made an effort to persuade these countries to join mandatory arbitration*" [97]. It is, indeed, a thesis sustained by many scholars that countries have appealed to constitutional issue as an excuse to keep the control on taxation and not to put it in the hands of international organizations. According to this idea, governments are afraid of seeing taxation getting out of their control, because in this way they might be forced by these organizations to grant exemptions or credit reliefs against their volition. As highlighted by Ellis J.M.[98], the intrinsic concept of fiscal sovereignty embodied a principle pursuant to which the jurisdiction to tax should be maintained in the hands of the domestic authority. The same concerns are mentioned in the note to art. 25(5) of the OECD Convention, given the recent adoption of arbitration provision they express their worries about the possible barriers caused by national sovereignty which, in a certain sense, could also explain why not all the OECD countries that have participated to the drafting of the provision adopted it. On the opposite, as also made explicit by UN Committee of experts "*a counterpart of sovereign independence is the capacity and the*

[97] Cited in: Smith J.S., March 2015, *OECD looking for a way forward on arbitration*, International Tax Review, vol.26, n°2, p.7.
[98] Ellis, M. J., 2002, *Issues in the Implementation of the Arbitration of Disputes arising under Income Tax Treaties-Response to David Tillinghast*. Bulletin for International Fiscal Documentation, Vol. 56, Issue 3, p.100-101.

right of a State to limit its own sovereignty by treaties"[99]. In a certain sense, an equilibrium between the unquestioned domestic power to tax and the referral to international bodies for more sensitive or pre-agreed issues is an explanation that states should provide, thus increasing their transparency, being aware of the fact that the globalization of market and the increasing number of international disputes are questions that go further beyond their nationals barriers and should be treated accordingly. It is a thesis sustained by many scholars, among which Allison C.[100], who emphasizes the importance of realizing a set of interconnected countries among the global community and that the national enclosed tax system should be overcome because it is an old isolated framework not in relation with the wider worldwide frame. In this regard, the EU Arbitration Convention advanced a hypothesis to favor arbitration diffusion among reluctant states, limiting the scope to a specific range of questions, such as the EU Arbitration Convention does, which applies only to transfer pricing cases and permanent establishment issues.

Theoretically the arbitration process should be considered independent from domestic legal remedies, but in practice, to avoid double waste of resources, to initiate an international arbitration procedure, some CAs require the supply of a written declaration in which it is affirmed that no domestic remedies have already been provided on that question. In some countries, domestic remedies, if already undertaken, are suspended, waiting for the arbitration outcome or vice versa arbitration is postponed after the pending domestic remedies outcome. In addition, in other cases, the unresolved issues may only be submitted to arbitration if domestic remedies are no longer available. It's easy to see that, in case of different domestic law, arbitration difficulties will appear as soon as the two CAs start to dialogue. For this reason, the adoption of a shared approach among countries on the relation between arbitration and domestic provision is a key tool that provide the guidelines for the application or not of the international dispute settlement instrument. Within the scope of providing a greater clarity, the *Discussion Draft on Action 14* mentioned that countries should provide guidelines on how the international provision deals with the domestic ones, in a manner that the two are coordinated and do not overlap. In particular, it points out a possible way to get the formal requisite for initiating an international arbitration that is a notification made by the taxpayer of its intention to waive domestic treatment prior to entering into arbitration, as it is suggested in the MAP

[99] UN Committee of Experts on International Cooperation in Tax Matters, Report by the Subcommittee on Dispute Resolution: *Arbitration as an Additional Mechanism to Improve the Mutual Agreement Procedure*, Geneva 6 October 2010, cited in (see note 52) Markham M.A., 2019, *Mandatory binding tax arbitration—is this a pathway to a more efficient Mutual Agreement Procedure?,* Arbitration International, Vol. 35, Issue 2, p. 149–170.

[100] Christians A., 2009, *Sovereignty, taxation and social contract*, Minnesota Journal of International Law, Vol. 18, n° 1, p. 99-154.

procedure, thus avoiding possible conflict between the decision assumed by a court or an administrative tribunal and that taken by the arbitration panel. According to MAP guidelines, also arbitration should not be available if a solution has already been provided by domestic process.

Up to now the focus was pointed to an international field, with the OECD shaping a reference Model Convention useful for states that intend to adopt arbitration. In the next chapter the perspective is closer and more binding. Indeed, if the sample and the guidelines for the introduction of arbitration on bilateral tax treaties were only a soft-law instrument in the supranational tax area, narrowing borders to a European framework the previously inefficiencies recorded by the less-binding Arbitration Convention instrument are later healed by a more stringent legal instrument the European Dispute Resolution Directive.

3. THE EUROPEAN INITIATIVE

3.1 The European background

In 1951, the desire of peace and stability pushed a handful of nations in the old continent[101], with a long-term vision, to join European Community of Steel and Coal (ECSC) through the signing of the Treaty of Paris, which entered into force the 23rd July 1952. The ECSC can be considered a milestone for the future form of organizational development in the European context, which consist of an "*autonomous regulatory system run by independent institutions, vested with the power and authority needed to make the system work*"[102]. States combine each other under a political and an economic perspective with the final aim of reaching a lasting period of peace. In 1957, followed the signing of the Treaty of Rome, which gave rise to the European Economic Community (EEC), a common market which brought and important innovation: the elimination of customs duties to reciprocal exchanges[103]. In these years of economic explosion, populations have known socio-economic well-being due to the overproduction of foodstuffs connected to the agricultural sector, and the nightmare of famine has become a distant memory. The propulsive thrust in the economy, driven by the capillary diffusion of cars, the propagation of household appliances and electricity in all neighborhoods simplified home life, shortened distance, and increased widespread trust in the period. Despite the difficulties, the common thread was to turn the page and move on, towards a new future in which the free movements of goods, trade, investment and people among the Community territories could be realized in its entirety, one step after the other. The Treaty of Rome embraced this vision and the value of freedom; in particular, in art. 220 it presented a basic formulation in relation to the efforts that member states were required to do when pursuing the conclusion of agreement and negotiation among them, aimed at granting an equal treatment of citizens. Member states should strive to eliminate the DT issue within the Community territories. In the same article, it is also mentioned that states shall do their best to introduce the arbitral proceedings as an instrument to grant overall benefits to their nationals. If the above-mentioned article may represent a first trajectory to follow delineated by the legislator, from a treaty evolutionary viewpoint, in the later amendment, the Treaty of Lisbon, such effort to establish arbitration disappears and two schools of thought are formed. The first considers such a modification with a negative connotation, since the previous doctrine contained a mere invitation to states to include arbitration, sustaining that the discipline should be more structured

[101] The six-founding members were: Belgium, France, Germany, Italy, Luxembourg, and Netherlands.
[102] General background to the ECSC. See https://europa.eu/ecsc/results/index_en.htm.
[103] La storia dell'Unione europea. See https://europa.eu/european-union/about-eu/history_it.

from a legal perspective. The second strand of thought, instead, positively value the amendment because the previous formulation implies the risk of undervaluing the fact that DT must be eliminated.

If compared to the international DT issue, in Europe the problem of dual taxation, represents a problem of major connotation, because, since its foundation, the Union has emphasized the need of granting the creation of an efficient market characterized by a real, and not a mere, freedom in respect to the movement of goods, trade and investments. This highlights the importance of overcoming the DT obstacles for the successful achievement of such ambitious goals and ensuring the exercise of such liberty. The purpose of the legislator was assuring that cross-border situations were not undermined in contrast to the domestics one, in reference to the level of tax due to the CA by the taxpayer who conducts business in another country and sells its product even into another one. The necessity of having a common ground on the elimination of DT is recognized as an important objective to achieve, in line with the Treaty of Functioning of the European Union (TFEU) and the priority of creating a union market without distortions. Such problems must be mitigated, or better definitely eliminated, in a perspective of favoring as much as possible the free circulation within the European zone, so assuring the success of the Union in regard to all the aspects touched in the European Charter of Fundamental Rights.

The pressure of effectively realizing a market Union that does not discriminate non-national businesses and the implementation of effective methods to protect taxpayer from this form of discrimination, has led Union members to sign the European Convention for the Peaceful Settlement of Disputes, in Strasbourg, which formally entered into force the 30th April 1958. The Convention premises focus on the achievement of "*a great unity between its members* and that *the pursuit of peace based upon justice is vital for the preservation of human society and civilization*" [104]. It aims to settle disputes in a peaceful way with three different approaches; the first encompasses the recourse to an International Court of Justice and it normally covers issues on the interpretation of the treaty, on international law problems or on the existence of facts that violate international obligation; in the second, disputes concerning the resolution of other controversies are analyzed by a Permanent Conciliation Court, while in the third other issues, not encompassed in the first method and which cannot be submitted to conciliation, are resolved through arbitration. This premise to say that since its foundation, the Union has strived to reach a close and binding bond among its Members in a wider sense, and it is exactly what it has

[104] Consiglio d'Europa, *Convenzione Europea per la risoluzione pacifica delle controversie*.
See https://www.coe.int/it/web/conventions/full-list/-/conventions/treaty/023.

continued to do in the subsequent years. This acknowledged fundamental values have primarily brought to the adoption of the European Arbitration Convention and later to a more strengthen and applicable Directive on Dispute Resolution. The next passages are the description of the first together within its shortcomings, that have led to the emanation of a more stringent directive.

3.2 The EU Arbitration Convention

The European Union has started to move earlier in the field of tax arbitration than the OECD did, and, in a certain sense, the international body first took inspiration by the actions undertaken by the Union. Later on, the situation has turned around and it is the EU that started to emulate the measures embraced during the BEPS project. Indeed, the EU Arbitration Convention was adopted in the 90's while the introduction of the arbitration clause in the OECD MC dates back only to 2008; in this first step the EU had a guide role. On the opposite, in a more recent period, precisely in 2013, the OECD and the G-20 leaders joined the BEPS program, introducing in 2015 the MLI, which encompasses the arbitration adoption through the acceptance of the part VI. In this second situation, the OECD has shaped the line that was then followed by the EU, through the strengthen of the Convention idea through a Directive with the purpose of speeding up the arbitration utilization and diffusion in the European area.

The preparing work for the Arbitration Convention started in 1976, when the Commission, under the suggestion of the Dutch governments, proposed a directive to eliminate DT in referral to the "*transfer of profits between associated enterprises in different Member States*"[105]. The initial proposal, due to a lack of consensus among the Council Members, was changed into an interjurisdictional Convention, signed the 23rd July 1990. The adoption of the *European Union Transfer Pricing Arbitration Convention on the elimination of double taxation, in connection with the adjustment profits of associated enterprises*, (90/436/CEE), by the 12 members states at the time[106], embedded the EU precursor's role in arbitration matters. The multilateral Convention came actually into effect five years later, the 1st January 1995, with its ratification. Briefly, the Convention's prerequisites for its application are the recognition by more than one

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[105] European Commission, *Transfer Pricing and the Arbitration Convention*, Taxation and Customs Union. See https://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context/transfer-pricing-arbitration-convention_en.

[106] The 12 EU states that have initially ratified the Convention are: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. While in a subsequent step procedure, in 1996, also Austria, Finland and Sweden joined the Convention, followed by the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, in 2005. In 2008 also Bulgaria, Romania accessed the Convention and, in 2014, also Croatia did the same. In essence since 2014, the Arbitration Convention applies in all EU Member States.

contracting states of the taxable income attributable to related parties (or associated enterprises), with the purpose of the determination of the arm's length price in the negotiation, thus resulting in an income taxed twice in the hands of different taxpayers; on this point, art. 1 clarify that it applies both where DT has materially verified or, alternatively, where it may potentially arise. In this second case, sufficient documentation must be provided by companies and the event has to be highly probable. In practice, the Convention sets up two phases, the MAP and the Arbitration proceedings, in order to solve controversies where DT arises, in relation to a transaction between companies located in different states within the Union. The problem emerges when an upward adjustment of profits is made in one state and the other does not provide a corresponding downward adjustment, thus generating dual charges to be paid by the taxpayer. Art. 2 explains that the Convention shall apply to the above defined situations, in which similar taxes are imposed on the same income.

The EU Arbitration Convention diverges from the MAP arbitration in the OECD MC since it applies only regarding transfer pricing cases and, of course, whilst the OECD provides a reference model, the nature of the European Convention binds Member State to its adoption and effective usage, instead. The narrower scope provides then a method for the elimination of DT only concerning profit adjustment between associated enterprises. It is worth noticing that the EU Convention is not a legal instrument of European Union law. For this reason, the Court of Justice has no jurisdiction on the interpretation or application of the Convention. Its limited application was seen as a draft form of a future global development of arbitration in tax treaty. Since the arbitration usage was an emerging element at that time, which was slowly gaining consensus, it was not considered appropriate to expand its coverage for fear of getting the opposite result, making away the possible users of such provision because of its widest scope. Moreover, given the relative homogeneity of the EU member states about their economic level, the Convention represents a model not easy to be replicated in a group of diversified states, like those of the OECD. Its design was particularly thought to be suited for the European context and it won't be adapted to be used outside the EU area. It has to be considered as the expression of a tax coordination system with binding nature within the EU. The geographical coverage of the Convention is limited to the European Community territories, as explicitly mentioned in art. 16(1) of the same. In this regard, third parties involved in a transfer pricing disputes, non-resident in the EU territories, are not considered for the purposes of applying the EU treaty. In terms of application, as stated on art. 15 of the Convention, it permits the use of other instruments with wider obligations in relations to the elimination of double taxation, such as tax treaty arbitration under the OECD or UN Model. Concretely, such overlap between legal sources does not arise because the involved party materially choose which instrument to adopt for the resolution of the controversial issue. With the purpose of eliminating DT, on art. 14 the EU Convention recognizes profits to be included on the taxable base of only one state or, alternatively, of both, with one state making a proportionate adjustment reducing its level of taxation. It was applicable, and produced its effects, for five years (up to 31st December 1999) and after that period a Prolongation Protocol was proposed and signed in 1999, to widen the extension of the Convention for other five years. Due to the slow bureaucratic procedure of the ratification process, in 2002 the Protocol was not already entered into force while the older Convention was no more applicable leaving a gap in the discipline; the subject involved, in particular multinational entities operating in the European area, were left with no further protection from DT. The Protocol for the prolongation of the Convention was ratified only in 2004, with a retroactive effect from 1st January 2000, thus encompassing the uncovered period. Due to the increasing number of disputes arising between members states, during 2002, a *Joint Transfer Pricing Forum* (JTPF) was created, with the purpose of designing the basis for a future EU development in the arbitration discipline. The EU Arbitration Convention foresees a two-step procedure, the MAP and the arbitration; the latter can be invoked, similar to the OECD MC, if the CAs of the members states do not find an agreed solution by means of MAP for the elimination of DT; in such cases if they fail to reach a solution, a Commission is instituted to provide an independent opinion on the issue. The mutual agreement procedure follows a path similar to the one described in the first chapter as regarding the OECD art. 25, with two major differences: the access to the procedure is subordinated to the occur of double taxation and not a mere *taxation not in accordance with the convention*, as reported in the OECD MC, and the access to the Convention is denied if, in accordance to art. 8, following and administrative or legal procedure the enterprise in question is liable of serious penalty[107]. Instead, such cases, under the OECD MC are not specifically excluded. Another difference, as reported by Kollmann and Turcan (2015)[108], is that the arbitration phase under the EU Convention is activated mandatorily if DT is not eliminated, while in the OECD MC the arbitration clause can be accessed only if the CAs fail to reach an agreement in respect to all issues. The Convention is divided into four phases: access to the procedure, the unilateral stage, the consultative stage and the final stage. In short, the access to the procedure is subordinated by the request of an interested party to CA of its state of residence; primarily the CA tries to unilaterally solve the issue and it verifies the validity of the complaint. If it is unable to solve the controversial issue

[107] See note 64. Kollmann J. and Turcan L., 2015, *Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges*, in International Arbitration in Tax Matters, IBFD, Chapter 2, p. 15-76.
[108] See note 64. (Kollman J. and Turcan L.,2015).

on a unilateral basis, the consultations with the other CA are formally opened. The procedure echoes the one previously described; in this context, the legislator highlights the lack of specific detailed procedural rules for governing these phases. If they fail to reach an agreement, the Convention mandatorily provides for the arbitration stage. The novelty is referred to the arbitral mechanism, since the existing bilateral tax treaties among EU member state, due to their slow renegotiation process, do not entails the 2008 updated version of art. 25 which included the arbitration paragraph, thus resulting in tax agreements without the arbitration clause. The EU Arbitration, indeed, encompasses this phase; it starts upon the request of the taxpayer with the establishment of an *Advisory Commission*, within six months from the request, to submit the issue to arbitral judgement, once it is acknowledged that the CAs have failed to solve the case by mutual agreement and the two-years times limit has elapsed. The Commission is made up by a chair elected by the other members, two representatives of both countries involved, and an even number of independent experts, selected by a pool and it provides a mandatory reasoned opinion concerning the resolution of the case in question. If a comparison is made with the three panel members under OECD arbitration clause, the EU Convention on one side provides a wider control to the CAs, that can appoint their representatives, but on the other it pursues to maintain the independence requisite of experts through a more rigorous set of control prior to their insertion in the specialist pool. The participation of the CAs is seen also as an incentive to their mutual cooperation to reach a conclusion. The independent experts and the chair are chosen from a public list in which each state has the right to nominate five persons that meet the requirements. The decision of the panel, as in the OECD Model, is assumed by the simple majority of the panel members. The Convention presents some peculiarities, such as the limited scope of application. Indeed, it applies only to transfer pricing disputes arising between EU contracting states, relating to associated enterprises situated therein; subsidiaries or branch of the companies located in a non-EU member states are not covered within the scope of the Convention. In those circumstances, DT arises when the transfer price is not accepted in the jurisdictions involved. Its limited field of application to the disputes concerning the arm's length price in transactions between associated enterprises is in line with art. 9 of the OECD MC. The structure of the instrument is considered the precursor of the OECD arbitration and it presents some similarities with it, such as the activation after the two years of pending MAP disputes (or the extended period agreed by parties in accordance with art. 7(4) of the EU treaty), the increased participation of the taxpayer, such as its right to initiate the procedure, and the final decision that is rendered by an arbitral board. A difference with the OECD arbitration is given by the panel's composition; under the EU model, two representatives are chosen for each country involved, together with other selected independent experts. So, differently from the three-panel members suggested in the MLI, the composition of the board is wider, while in this way the decision is rendered by the simple majority of the panel's members, obligatorily providing a written reasoning. The panel in the EU Convention, called the Advisory Commission, entails independent members that are experts in dealing with transfer pricing matters. Once a decision has been rendered by the commission, authorities have a six months period to implement it or, otherwise, it is possible for CAs to defer from that opinion within six months from its receipt. Although the Convention emphasizes how the decision rendered by the Commission is legally bounding, the possibility of deferring from such sentence is thus admitted on previously agreed basis. Moreover, the EU Convention, as explained by Owens J.[109], presents a more detailed set of procedural rules in relation to the appointing of arbitrators and the creation of a pool from which selecting the panel's members, but it also includes a set of rules for the communication with the panel. The choice of arbitrators is strictly connected with the pool of available tax experts: authorities must select the member of the Commission from the available arbitrators provided in such list.

Differently from the taxpayer involvement during the MAP procedure, its role is more active during the EU arbitration procedure, as it is for the arbitration under the MLI. The nature of taxpayer's right under arbitration in the European sphere of interest present some similarities to that recognized under a BIT, that is investor-to-state arbitration, that ensure taxpayer participation during the entire process with the right to finally enforce the decision given by the panel. Arbitration should be considered as an alternative approach to resolve transfer pricing disputes among the tax authority and the taxpayer. In particular, it can appear before the commission, it has the right to supply relevant information and it can initiate the process; these set of rights appears difficult to exercise and, on the overall lower if compared to these foresees in the Directive. As the international arbitration path has lately replicated, the publication of the decision achieved by the Commission is allowed upon the consent of CAs and related parties, thus conferring the possibility of a transparent conduct following the accord by the involved parties.

The reluctance to waive governments tax sovereignty is a problem emerged also in the European context, and it refrain the recourse to the EU arbitration Convention. As reported by Picciotto S.[110], in his working paper, in 20 years of application the number of cases submitted

[109] Owens J., 2018, *Mandatory Tax Arbitration: The next frontier issue*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 46, Issue 8&9, p. 610-619.
[110] Picciotto S., August 2016, *International Tax Disputes: Between Supranational Administration and Adjudication*, ICTD – International Centre for Tax and Development, Working Paper n°55.

to arbitration are half a dozen and the introduction of that mechanism, as some sustained for the OECD one's, serves more as an incentive for states to solve the conflict before giving up their jurisdiction to tax and enhance MAP resolution method. Indeed, as highlighted for the arbitration clause in the OECD MTC, the lack of a mandatory binding commitment and the lack of a possible recourse to the European Court of Justice or the European Commission has in practice generated a different applications and interpretation towards Member states, thus making even more difficult to reach a shared solution through arbitration. The initial discipline shaped the form of a convention instead of a directive, thus excluding the role of the European Court of Justice and that of the European Committee because it does not constitute a secondary EU law tool and, for this reason, it fall outside the EU sphere of influence. The limitation on the surveillance by the European body has implied a non-uniform and non-consistent application of the Convention. The heterogeneous use of the EU treaty, as remarked by Markham M.[111], has led the legislator in 2004 to draft a proposal for a transfer price Code of Conduct, lately adopted (December 2004), based on the recommendation made by EU Joint Transfer Pricing Forum (JTPF). The Code has the scope of clarifying the provisions of the EU arbitration mechanism that have raised disputes, providing a common interpretation of them including aspects such as the scope of the Convention, the admissibility of a case, the functioning of the MAP and of the dispute resolution mechanism. It is a soft law instrument, leaving to the member states the decision inherent on its adoption. It was then revised and consequently modified in 2009, trying to ensure a more effective and uniform application by all member states, establishing a set of common procedures. In 2015, the JTPF agreed on a report for a further enhancement of the functioning mechanism of the Arbitration Convention, reviewing again the Code of Conduct. In addition, the code suggests states to suspend the collection of taxes during dispute resolution waiting period. Similar to what is lately happened with the international tax arbitration mechanism, also in the Union area members states were far from eager to join the Convention. After seven years from its ratification, arbitration procedure has tackled only one case, in which the Italian and French authorities were involved; it regards the Electrolux conflict, which has showed for the first time that the procedure can effectively work. The proceedings for years have served as an incentive for states to resolve disputes through MAP, prior to demand the Arbitration Convention appeal, but once that its application turned out to be working, cases were expected to grow. Even if, during the twenty years of application of the Convention there have been few cases of its concrete usage, in

[111] Markham M.A., 2005, *The Resolution of Transfer Pricing Disputes through Arbitration*, INTERTAX, Kluwer International Law, Vol.33, Issue n°2, p. 68-74.

general due to the lack of information and uniform discipline regarding international tax issues, its appeal has been recently rediscovered. Indeed, if up to 2014, as reported in the analysis of Picciotto S.[112], the number of new cases submitted to EU arbitration was 231, and Germany together with Italy were the two states with the majority of pending disputes, respectively 88 and 61. In the more recent MAP statistics, it is recorded a huge increase in the number of cases, registering a total European MAP pending cases of 1.899 at the opening inventory, as of 01/01/2017, and 1.907 cases recorded in the ending inventory as of 31/12/2017 with 547 new cases initiated and 534 cases closed during the year; of the 1.907 recorded, 996 lasted pending for a period longer than the two-years limit, so more than 50% of the cases were still unresolved and out of time. According to these statistics, at the EU level, Germany, France and Italy were the States highly involved, respectively with 183, 162 and 286 cases[113]. Such augment has brought to the increment of the average duration time of pending cases, even higher than the thirty months OECD average for 2017. Under the EU context, the average time for resolution of transfer pricing disputes goes over fifty months. The number of cases registered a similar trend also for 2018 and 2019; in particular, in regard to 2018[114], 1.938 were the cases as of 1/01/2018, with 727 cases started and 674 cases solved, with 1.988 cases as of 31/12/2018, whilst, in 2019[115], there were 1.991 cases at the opening inventory, with 839 cases initiated and 752 cases concluded, thus resulting to an ending inventory of 2.084 cases. Even if the number of MAP cases has continued to grow in the last years, in 2017 the recorded cases submitted to arbitration were only two. The increase in cases has represented for CAs more work to do, but nevertheless the quality and effectiveness of the definition of procedures has enhanced, hiring a more equipped staff and strengthening the whole apparatus. More cases were closed, suggesting that difficult and long-standing cases had been closed, demonstrating that multinationals should encompass the mutual agreement because it is good option. The Arbitration Convention, prior to recur to the arbitral panel, encompasses a tentative to solve the dispute using a MAP. In the last years, the recorded increase in the European MAP pending cases could be interpreted under two different perspective: the first is that, despite the mandatory expiry date is settled to a maximum of two years, the threshold is frequently

[112] See note 110. (Picciotto S., 2016).
[113] European Commission, 24 October 2018, *Overview of numbers submitted for Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention (AC) at the End of 2017*, EU Joint Transfer Pricing Forum, Direct Tax Policy & Cooperation.
[114] European Commission, July 2019, *Overview of numbers submitted for Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention (AC) at the End of 2018*, EU Joint Transfer Pricing Forum, Direct Tax Policy & Cooperation.
[115] European Commission, March 2021, *Overview of numbers submitted for Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention (AC) at the End of 2019*, EU Joint Transfer Pricing Forum, Direct Tax Policy & Cooperation.

overcome thus showing inefficiency in the effective functioning of the mechanism, while, under another viewpoint, such increase may be interpreted as an increased trust of taxpayers in the instrument, despite the slowness in carrying out the procedure. Disregarding such slowdown due to the novel mechanism to answer DT troubles, the confidence put on the Convention works as a good omen for its subsequent enhancement through a Directive.

3.2.1 Deficiencies of the EU Convention

The evolutionary process has pointed out the shortages of the EU Arbitration Convention. First, among all its limited scope, it covered only economic double taxation issues, in particular those referring to profits between associated enterprises, and, thus, the change was driven by the amendment of this limited scope of application towards a wider one, that comprises not only the economic DT but also the juridical one. In addition, the Convention is not included within the source of the Union law, as it is for the lately formulated Directive, and so its binding nature is limited to a formal obligation, refrained also by its slow ratification process. The shift from a convention to a directive implies the passage of the sovereignty power from the states to the European Commission, that prior was not entitled to operate a supervision and correction role. Now, since the Directive encompasses the jurisdiction of the CJEU, the EU Commission is authorized to do it; this upheaval was an issue of major concern since it was the reason that refrained the adoption of a directive back in 1995, inducing countries to opt for a convention as a preferred format because it didn't lowered their powers.

Many uncertainties in respect to the effective functioning of the Arbitration Convention were pointed out during its adoption period, and still today the complexity of the European legal system does not simplify the departure legal framework on which DT represents a refrain from the development of an internal market. The lack of a general institution that supervises, controls, and ensures compliance of member states with the obligations contained in the Convention and that correct the multiple defects on its general structure, has meant that this instrument was unable to promote the correct use of arbitration. In addition, as emphasized by Pit H.M.[116], some loopholes in the overall meager procedural rules can be identified, such as the lack of a time scheduling for the CA to decide on the acceptance or on the denial of the procedure, of a clear method to identify the starting date of the two-years MAP period, of a defined set of rules for arbitration and finally the lack of transparency, as decision are not published.

[116] Pit H.M., 2019, *The Changed Landscape of Tax Dispute Resolution Within the EU: Consideration of the Directive on Tax Dispute Resolution Mechanisms*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p. 745-759.

The cumbersome resolution mechanism revealed its weaknesses one after the other and a change of course was no longer confined to a mere idea, but its practical implementation became then necessary, lately put into effect by the European DRD. The acknowledged failure of the EU mechanism was recognized at the beginning of the 21st century, and in an attempt to give more power to such provisions a proposal was made by the EU Commission to enhance the existing Arbitration Convention (which is still in force) through a directive with a full legal binding force, subject to the interpretation power of the ECJ. As above mentioned, a directive proposal was already embraced in the '80s, but in both circumstances times were not ripe for such an innovative change and, as happened in the past, in 2003 the EU Directive plan has been shelved. In the following years, the EU Commission, notwithstanding the failure to embrace a directive, has continued to mention that its achievement was its ambitious plan. Even if in the context of the EU law, the Convention does not represent a strong instrument, it clearly shows the direction towards which the EU law is moving. As a matter of fact, despite the application of the Convention the number of MAP cases has gone up and the excessive pending arbitration finally drove the EU to work at the Dispute Resolution Directive. To pursue a fairer tax environment and strengthening the transparency and the anti-tax avoidance measure it was no longer possible to deferral the introduction of a more efficient resolutive mechanism that recognize and ultimately solve DT issues. At this point, the proposal of an enhanced mechanism for the correct adoption and fulfillment of arbitration practice was no longer optionable and, the Union has followed the path drawn by the OECD/G-20 BEPS work, thus designing a more functioning resolution mechanism. The new tool, aimed at harmonizing at a European level the usage and the application of the arbitration procedure, tries to ensure its homogeneous and capillary diffusion. The Directive development begins with the acknowledgement of the non-uniform interpretation and application of tax treaties and of the Arbitration Convention among Member States, these representing serious obstacles to cross-border businesses. Across the Union, the existing mechanism not always ensures a timely and effective resolution. Opposed to the shortcoming of the Convention, as explained by Juanpere[117], there are multiple reasons behind the approval of the Directive; on the top of the list there is the need to integrate the BEPS action 14 in the European Union, the pressure received by MNEs to arrive quickly at a dispute resolution and the relevant cost and time advantages implied by such procedure. Another important improvement is the referral to a plurality of member states in the DRD, instead of only two countries as mentioned in the Convention. Despite the effort, this wide range attempt

[117] Juanpere B.A., January 2020, *The Resolution of Tax Disputes and International Tax Arbitration*, European Journal of Business and Management Research, Vol. 5, No. 1, p. 1-10.

was only of formal nature since also the Directive refers to dual questions between states and it does not cover triangular cases. The two instruments actually coexist but, as it was in the mind of the legislator when it shaped the Directive, the Convention usage will slowly pass away, leaving the ground to the more effective mechanism.

3.3 Directive proposal

Prior to the adoption of the DRD in 2017, there have been few attempts towards a stronger and powerful arbitration mechanism. The first, from a European perspective, has been the directive proposal in the '80s. The directive was thought and proposed in 1976, but it was not immediately approved and for years it remained only a mere ideal project. The qualms from its adoption were in majority connected to states sovereignty. The proposal was lately withdrawn in 1996, due to the approval of a more restrictive one. For many decades, the EU system did not entail an instrument for the resolution of disputes through MAP or arbitration in direct tax issues. Given the limited scope of the EU Convention, also at European level DT still persisted in many areas[118]. The need to finally provide a binding tool to ultimately solve dispute resolution within EU has a dual origin, in respect to the internal market but also in a wide global scenario of competitiveness. It recognized the need to finally eliminate DT at EU level for question inherent to the transfer of profits among associated enterprises. Initially, the sovereignty concerns and the skepticism of EU states to subject tax matters to an international commission refrain its adoption. Similar reasons have later guided to the promotion and design of a convention instead of a directive, with a limited coverage, relating only to the transfer pricing issue. It was with the failure of the Arbitration Convention that things started to move to the directive guidance; its inefficient mechanism pushed the legislator to shift to a more powerful one. The main reason why the Convention revealed itself as an inefficient mechanism was the failure by the authorities to reach a conclusion on their own initiative. This exacerbated the number of unresolved questions and so, appealing to a more binding and resolutive instrument became a priority. Indeed, up to 2017, only eight cases were set in for arbitration under the Convention, and it was in that year that Dispute Resolution Directive was enacted, after years of failure by authorities to conclude an arbitration procedure. Even if its acknowledged limits resulted in a not very functional arbitration mechanism, the Convention is still in force but, with the subsequent introduction of the Directive, it is foreseeable to slowly see its application diminishing, thus leaving more relevance to the latest wider scope

[118] Kofler G., 2019, *EU Tax Dispute Resolution Directive: The Deathblow to Double Taxation in the Europe Union*, EC Tax Reviews, Vol. 28, Issue 6, p. 266-269.

instrument. The limitations in the scope of the Convention and the necessity to grant harmonization at EU level, guided the legislator to the drafting of a Directive. The driving force to this change, as stated by Juanpere, "*is a crucial need to introduce an effective and efficient framework for the resolution of tax disputes which ensures legal certainty and a business-friendly environment for investments in order to achieve fair and efficient tax system in the Union*" [119].

The legal status variation from a convention to a directive, as explained by Govind S. and Turcan L.[120], carries important implication; the directive, even if not immediately legally binding, transfers competences to a supranational level, given the premises that, when direct taxation influences the internal market, it becomes a shared question and the European power supersede that of the member states. The supranational relevance recognizes the power to the ECJ to provide a more cohesive and homogeneous interpretation. On the other side, as highlighted on their work, a convention, under art. 288 of the TFEU, is not a legal instrument and it does not imply its automatic adoption by member state that lately access the Union[121]. The ultimate difference is the faculty, given by a convention to member states, not to accept it: a unilateral decision that is not contemplated in the case of a directive. These are some reasons that explain why the Directive can be considered in general an enhancement if compared to the Arbitration Convention. During the work on the draft Directive, it emerged that it should be based on the existing EU system, thus encompassing the Arbitration Convention, but with a wider scope of application, extending the limited transfer pricing issue among associated enterprises and the allocation of profits to the permanent establishment. It is exactly the path followed by the legislator and the Directive is so applied to all taxpayer which are subject to income and capital taxes provided in bilateral tax agreements or conventions such as the EU one. Due to the particular evolutionary framework, the resolution of cross-border disputes intra-EU is simultaneously governed by the Directive, that is a secondary law instrument, and by the Arbitration Convention, an international tax coordination instrument with binding effects. The free movement of goods and the dislocation of production facilities cannot be entirely fulfilled if for any reasons, such as the DT, the entrepreneur conducting this kind of cross-border business is in somehow put in disadvantage if compared to others entrepreneurs running

[119] See note 117. Juanpere B.A., January 2020, *The Resolution of Tax Disputes and International Tax Arbitration*, European Journal of Business and Management Research, Vol. 5, No. 1, p. 1-10.

[120] Govind S.P. and Turcan L., 2017, *The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive*, 71 Bulletin for International Taxation, n° 3/4, p.1-11.

[121] The European Directive, even if it does not represent an immediate legal instrument, generally provides a time limits within which it has to be transposed into domestic law, thus effectively becoming a binding tool.

business exclusively within the borders of its member state. The real need to treat fairly these situations, thus assuring the creation of an efficient European market with no favored situation over others, has brought to the design and the later application of a law of secondary rank, that becomes effectively binding once states have transposed it into their domestic one. As emphasized by Valente P. on his article, "*DT represents a matter of particular concerns at European level, since it is an obstacle for cross-border businesses*" [122]. In particular, it is source of legal uncertainty for the taxpayer who does not know which state has the right to impose taxes on its income and, moreover, such phenomena increases the level of total tax burden, thus implying a negative impact on investment, given the aversion to invest in an uncertain tax environment. He explains that EU companies may suffer from this investment disincentive with respect to the extra-EU businesses that, given the highest investment received, result more competitive. On his article he asserts that the DT represents an obstacle to the European economic activity, and he advances some possible solutions, or path, that could be followed by the EU in its future proposals to enhance a mechanism that eliminates the issue. The requirement for harmonization derives from the lack of agreement against dual imposition between member states that govern their bilateral relations. The need to develop a shared and common EU discipline, in order to overcome the inefficiency of the Convention, given its burdensome and time-consuming resolution of conflict, has guided to the creation of a directive. Moreover, he mentioned the EU document *Double taxation in the single market* published in 2011, which listed the disadvantages of the dual taxation issue in the internal EU market, highlighting that at that time, despite the effort, it was not possible to identify an EU provision that ultimately obliged member states to remove the dual burden, given the fact that it didn't fall within the scope of application of the fundamental freedom recognized. The publication emphasized that obstacles to the realization of a single market must be removed, and member states should strive to coordinate their tax policies to encourage the economic growth after the crisis period. In addition, it is explained that growth is intrinsically connected to the capacity of removing cross-border obstacles, because otherwise the market could not expand, and that those situations are undermined. All these problems risk to compromise the creation of a unique market initiated more than thirty years ago, because both companies and individuals operating in more than one member states face the risk of being taxed twice on the same item of income, due to the fact that the transaction involved goes beyond national borders. The effort must be pointed to assure an equal treatment of national and non-national market, so ensuring the non-

[122] Valente P., 2012, *Transfer pricing e doppia imposizione: soluzioni secondo la Commissione europea*, il fisco, approfondimento fiscalità internazionale, p.4633-4636.

discrimination or not a higher taxation on transnational transaction, granting a fairer business competition. To implement the EU market and make if function with a long-term horizon, it is so necessary to address these impediments through an effective dispute resolution mechanism. Only through the achievement of this goal it is possible to benefit the entire potential of the common market creation, allowing citizens to exercise their right. Undoubtedly, DT represents an obstacle also at EU level, as reported in the document of DT in the single market, "*more than 20% of the cases were above 1 million Euro for corporate taxpayers and more than 35% were above 100.000 Euro for individuals*" [123]. Up to 2010, the existent mechanisms to remove dual taxes were inadequate; they covered only some situations leaving unveiled many others. For this reason, it has been promoted the implementation of a Directive that widens the scope of application of the Convention, solving as much situations as possible ensuring the full realization of the union market.

Forty years were needed for it to be recognized as the suitable instrument for a complete integration and for an identical application and interpretation of the settlement of disputes through arbitration. The Directive is an EU secondary law and it binds states to renounce to their power to levy taxes on a taxpayer, appealing to an independent Commission for the judgement of the case. The sovereignty questions have been set aside for a greater interest: ensuring that the fundamental rights named in the EU founding treaties are preserved. The Directive, if compared to the Convention, has a broader scope of application, encompassing difficulties arising from the interpretation of the tax agreements and their consequently interpretation doubts that may arise. It provides a default arbitration procedure that triggers when the authorities are unable to establish arbitration by their own.

In 2017, when the Directive was finally approved by the Commission, the need to grant equal treatments of citizens and business among states, that mirrors the founding freedom value of Europe, was no more a question to be discussed but a solution to be provided. The application of the Directive to an extended area of DT issues embedded its all-encompassing tentative to fully eliminate the issue of dual charges, thus ensuring the success of the European free market.

3.3.1 Legal Framework of the DRD

The unsuccessful story of the Convention has pushed the European legislators to look for a more resolutive and powerful instrument. The work for the adoption of the Directive effectively started in 2015, when the Commission launched a proposal to enhance the existing mechanism

[123] European Commission, 11th November 2011, *Double Taxation in the Single Market*, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee.

for dispute resolution and continued in 2016 with the public consultation process and the issuing of a directive proposal. Indeed, the 26th October 2016, after years of discussion, a new Directive was proposed and in 2017 it was finally accepted; it dealt with the effective resolution of cross-border tax disputes. The European Council formally approved the *Dispute Resolution Directive* on taxes on income and capital (2017/1852) on the 10th October 2017, thus completing the process initiated with its proposal in 1976. The Directive, as suggested by Pistone P.[124], has a mixed nature because, from one side, it implies coordination obligations between tax authorities but, at the same time, it sets up right for the involved taxpayer. He added that the Directive provides a quasi-judicial remedy to solve disputes regarding the interpretation or the application of tax treaties or convention aimed at finally eliminate double taxation of income and of capital. The addressees of the Directive are the European member states, as explicit stated on art. 24 of the same, while on art. 1 its objective and its scope of application are clarified, explaining that it contains the norms or specifics mechanisms adapted to resolve controversies among states, aimed to the elimination of double taxation on income and if applicable on capital, arising from the interpretation and application of agreements and conventions, encompassing DTCs and EU Arbitration Convention. The precondition for the Directive application is the existence of a tax treaty between the involved states. Up to now, as explained by Kofler G.[125], there are only five relations among states not covered by a bilateral tax treaty. The dispute resolution mechanism entails a legal obligation for member states to reach a "*conclusive and enforceable decision*[126]". On the first chapter of this dissertation a definition of international double taxation was given, splitting it between juridical and economic one. What is interesting in this respect is represented by the first legal definition of international double taxation. In fact, up to now the definition given by the OECD in its model treaty was merely a reference one with no legal force. Instead, inside the European Directive 1852/2017, the first legally binding definition of double taxation appears and, moreover, as explained in the article by Ismer & Ruß[127], its art. 16(7) also allows states to refuse the start of arbitration if dual taxation hasn't materially occurred[128]. Previously, the EU Arbitration Convention contained an indirect definition of double taxation as the incorporation of profits of a company or of a permanent establishment in a contracting state

[124] Pistone P., 2020*, Il Diritto secondario dell'Unione Europea in materia tributaria*, Diritto tributario europeo, Giappichelli, p. 292-313.
[125] Kofler G., 2019, *Comparative Tax Policy seminar: EU Tax Law and Policy*, Johannes Kepler Universität Linz, slides 263-269.
[126] See note 125. (Kofler, 2019).
[127] Ismer & Ruß, 2020, *What Is International Double Taxation?*, INTERTAX, Vol. 48, Issue 6 & 7 Kluwer Law International BV, The Netherland.
[128] A prerequisite for the material application of the Directive is the verification of double taxation; this aspect represents a difference in regard to the Arbitration Convention that consent its application even if DT is merely plausible, but it has not yet verified.

and, simultaneously, the allocation of the same to another business or PE located in another states. In respect to the legal definition of DT[129], on art. 2 of the Directive it is defined as: "*the imposition by two or more member states of taxes covered by an agreement or convention […] when it gives rise to either: an additional tax charge, an increase in tax liabilities or the cancellation or reduction of losses that could be used to offset taxable profits*"[130]. A punctual definition of dual charges consents to simplify the identification of such situations and immediately provides an efficient tool for their ultimate resolution. In addition, the DRD has innovate the scenario shaping a three-step procedure that includes a complaint procedure, an intergovernmental MAP and finally the mandatory binding dispute resolution. The substantial difference between an EU Convention and an EU Directive is clearly that the legal nature of the directive implies that the European Court of Justice has interpretative competence over it. The possibility to have a uniform application of rules aimed to the elimination of DT, due to the different interpretation of the text of the treaties served as a cohesion instrument in the EU legal framework.

3.3.2 The European Dispute Resolution Directive

The adoption of the Directive represents another step forward, in line with those done by the OECD in the achievement of an equal and fair distribution of the tax burden. The solution implemented by the European Union after the BEPS era has followed its direction toward a more efficient resolution mechanism for double tax treaty issues, implementing a more likely state-to-state procedure with only a marginal involvement of the taxpayer, if compared to its participation during BIT. It has the right to receive a fair trial and the right to conduct business. The Directive is split up into three different stages: the compliant stage, the MAP stage and finally the Arbitration stage.

The first three article of the Directive encompasses the compliant stage; they explain how the involved partied should fill the request to the authority for the application of the same, with the necessary documentation to be attached. The Directive presents similar characteristics of the MAP arbitration, recognizing on art. 1 the right for interested parties to file a complaint inherent to a dispute to each of the CAs of both member states involved within a period of three years, as stated on art. 3, from the first notification of the action that has led or will lead to the dispute notwithstanding the other domestic legal remedies. The complaint must be submitted to both

[129] The definition of double taxation embedded in the Directive presents similar characteristics with respect to that provided on art. 1(1) of the EU Convention but widening its scope of application. It encounters limits of application only in two provisions, in particular when dual taxation does not occur and in case of tax evasion or tax fraud.
[130] Gazzetta ufficiale dell'Unione europea, 10th October 2017, Direttiva del Consiglio (UE *2017/1852* sui meccanismi di risoluzione delle controversie in materia fiscale nell' Unione europea.

CAs involved, and not to only the one of the residence states. The CAs have two months to notify the receipt of the request. The acceptance of the claim is subordinated to the receipt of all the information deemed necessary to pursue the proceedings and, if needed, CAs may request additional information to the involved subject during the evaluation of the case within 3 months. The decision of acceptance or denial of the case is given after six months from the receipt of the request or the receival of the additional information demanded. Given the fact that the taxpayer has presented the case to both CAs, there can be three possible outcomes: that they both accept the case, that one accepts and the other refuses it, and that they both reject the case. If the first condition verifies the next step is entered without additional requirements, but if on the contrary, the second state occurs, two options are available in the hands of the taxpayer. The first is the establishment of an Advisory Commission which decides, within six months, if the rejection reasons are justified or not, while the second is the appeal to a domestic court that reverse the rejection. In case that the Advisory Commission expresses that all the information were supplied and the request results in compliance with the discipline, a step back is taken and the amicable procedure started. Lastly, if both CAs have refused the case, the taxpayer has an ultimate right to exercise: to lodge an appeal to both domestic courts of the involved member states, that will decide whether or not the rejections are sound. If the reasons are deemed unjustified, the CAs must undertake the MAP. In general, the CA may reject a complaint only giving one of the three following reasons: the request lacks some relevant information, the request was made after the three-years deadline or there's no controversial issue, since DT has not occurred. Once the case has been accepted, as in the EU Convention, it follows the unilateral stage, during which a CA, within a six months' time-window, tries to unilaterally solve the case, without involving the other one. If it succeeds, the directive's application is terminated and the case is closed. The same result is gotten if the subject that has initially made the request, for any reason, lately decides to withdraw such demand. If the CAs are unable to unilaterally resolve the case, and all the CAs of the member states accept the compliant, the MAP stage is initiated. Apart from the extreme case above mentioned, if the involved persons present a case which is based upon a verified question, with all the necessary element for the conduction of the procedure, the second stage is initiated. It is the MAP stage explained on art. 4 that again mirrors the OECD one. Once the request is accepted, member states shall strive to resolve the case by mutual agreement within a two-years period (that can be extended up to three upon a written request made by the CAs), starting from the latest confirmation of the CAs that approves the case. If the agreement is reached it should be binding to the CAs and the taxpayer has the possibility to accept such settlement renouncing to pursue other legal remedies available, or, on the contrary, if no agreed decision was rendered a notification is sent to the subject involved in which are explained the general reasons for the missed agreement. In either case, whether the agreement is reached or not, the MAP stage comes to an end, and the CAs are obliged to notify that to the taxpayer, and if such notification is missed a violation of EU law is committed, punishable by the Court of Justice of the European Union (CJEU). If one of the CAs rejects the case or if they are unable to find and agreed solution within the deadline, the taxpayer has the right, within 50 days from the notification of one of the two conditions, to ask the CAs the establishment of an Advisory Commission. In those circumstances, the third phase starts, the so-called arbitration stage. The Commission should be established within 120 days from the receipt of the request and, if the CAs fails to nominate the Commission within such period, art. 7 provides that the duty passes to the competent court, or any other body or persons designated by the national law. In this way, the Directive, differently from the Convention, adds a stronger application tool. If the designated CAs do not appoint the members of the Commission, the taxpayer can appeal to the domestic court enforcing the establishment of a Commission. The appointed panel has to provide an opinion on how to resolve such dispute. Art. 8 establishes that the Advisory Commission should be made up by a chair who shall be a judge, a representative of each involved CAs, that can be extended to a maximum of two for each unit, and one independent person appointed by each CAs that can also be increased to two for each unit[131]. The latter are designated from a list of independent experts that must not belong to the tax administrations concerned and must not to have had any kind of relationship with the parties involved in the prior five years. In addition, such panel's members must be impartial and neutral, and they must be experts in taxation matters. Whereas such requisites have to be maintained for a period of twelve months after the decision is rendered if at any time during the proceedings these requirements fail a notification shall be made and the member that lacks such requisites shall be substituted. The list of experts, in accordance to art. 9, is made up by the independent persons designated by each member states. Each one shall nominate at least three experts that meet the requisites; the pool of neutral and objective consultant is updated when needed. As explained on art. 10, the CAs may otherwise agree to set up an Alternative Dispute Resolution Commission (ADRC) instead of an Advisory Commission upon the explicit request of the taxpayer, within the scope of expressing an opinion on how to solve the issue. Moreover, CAs can decide to establish a Standing Committee, a commission with a permanent nature,

[131] The Advisory Commission under the Directive is made up by at least five and up to nine members. The increasing number of component and the more stringent EU independence requisites to their admissibility, makes the selection procedure more cumbersome if compared to the classical arbitral panel suggested in the OECD sample which is made up of three members. Some experts suggest reducing the number of representatives of CAs to one to ease the selection.

instead of the ADRC or the Advisory Commission, for the same purpose. The actual debate, relating to the involvement of the Court of Justice as a permanent tax arbitration body that is dealt in the following, departs from such provision. The ADRC, apart from the independence requisites, can differ in respect to the Advisory Commission on its form and on its composition, representing a more discretionary and a more flexible panel. If it is deemed suitable to the case, the ADRC can apply binding resolution technique. Whilst the Advisory Commission applies the independent opinion approach, the ADRC can decide whether to apply such method, the baseball approach, whatever decision-making process that stands in the middle among the two, or, moreover, to depart from arbitration and adopt alternative resolutive techniques, such as mediation and conciliation. The ADRC grants more flexibility in respect to the adopted decision-making method and, as later discussed, the possibility of structuring the panel with a permanent nature represents an opportunity in the view of the creation of a stable arbitration structure in the European tax system. On art. 11 operating rules are described; they include the specific controversial issue, the type of commission, whether it is an advisory commission or an alternative dispute resolution commission, and other more practical aspects, such as the composition of the panel and a calendar for the procedure scheduling. All this information must be given to the taxpayer within 120 days from its request of appealing to arbitration is received. Moving on the procedural costs (art. 12), it is specified that fees of experts, together with the expenses they have sustained during the procedure, should be equally divided among the competent authorities if not otherwise agreed, while the expenses incurred by the taxpayers are not covered by member states. The right of the taxpayer of participating to the hearings is confirmed on art. 13, which affirms that involved parties can provide information or evidences and documents deemed relevant for the case also through an oral hearings, whilst the panel members' cannot disclose that information due to their confidentiality agreements, complying with the standards of protection contained on the Union legislation.

The final opinion (art. 14) on the relevant issue, which should be based on the relevant tax agreement, must be provided in a written form by a simple majority of the commission or, if not possible, the chair gives it, within six months from the panel's creation. The time period can be extended of other three months if the controversial question requires more time for its resolution. The decision is then provided to the CAs, thus bringing the case back to them. Differently from the final opinion, the final decision (art. 15) must be implemented by the CAs within six months from the notification of the decision to the authorities by the panel. The competent authorities can agree for a different solution but, if they fail to reach such alternative purpose, they are bound to the opinion expressed by the commission. Each member state should notify to the taxpayer about the final decision reached and, even if member states are legally obliged to implement such decision, the taxpayer can exercise its right to appeal if it does not intend to adopt such solution. It is in the hands of the affected persons the right to accept the final decision within 60 days, waiving the other available legal remedies. On art. 16 a clarification is given with respect to the interaction of the MAP on the arbitration proceedings with the national derogations; in particular, it is explained that the recourse to the directive does not prevent a Member State from initiating or continuing judicial proceedings or proceedings for administrative and criminal sanctions in relation to the same matters. Interested parties may avail themselves of the available means of appeal provided for by the national law of the States interested members.

The causes of exclusion from the dispute resolution procedure include cases in which the decision has already been rendered by a domestic tribunal and it has been notified to the authorities that domestic remedies of such state do not allow it to derogate. The commission works should be stopped as soon as they received such notification. Moreover, as explicated on art. 16 (6) and (7), since the rationale of the legislation is thought to costs savings, whether the double taxation has not arisen or sanctions have been imposed to the involved partied by a member state in relation to income or capital adjusted for tax fraud, willful misconduct and gross negligence, the state may deny the access to the procedure. Some simplification measures are provided for small enterprises or physical person, on art. 17, it is specified that the involved party may refer uniquely to the CA of the states in which it is resident for all the question connected to the proceeding. The Directive presents an interesting novelty respect to the international arbitration standards, as regarding the disclosure of information (art. 18) indeed, if all parties agreed there is the full disclosure of information regarding the proceeding but, if parties are contrary to do so, disrespectful from their will, final decision are published in a redacted form, encompassing a brief description of the problem, the industry sector, the tax periods in question and the final decision assumed, specifying which arbitration method has been used. The publication of opinions given by the panel, even if in a redacted form, without prior requesting of the permission of the parties involved, represents an interesting novelty if compared with the OECD clause and the prior EU Convention. So, if parties agree, decision published may contain a more detailed list of information, always keeping in mind the confidentiality of such information whilst, if the CAs and the taxpayer do not agree on such publication, an abstract of decisions are nevertheless published. Another difference is the referral in the DRD to a plurality of member states instead of only two countries as it is explicitly mentioned in the Convention. Despite the effort, this wide-range attempt to cover also triangular cases is only of formal nature since, also with the Directive, the question involved refers to a dual question between states and not to multiple cases. Information in order to keep up with the confidentiality are published in a redacted form but interesting parties cannot restrain that. Since the DRD open the possibility to the adoption of the baseball approach for the decision-making process, if the ADRC is instituted and such type of arbitration is selected there is no need to explain the reasons behind the decision undertaken by the commission, as it is encompassed in the MLI. In either case the precedential value of cases is excluded while the purpose is that to guide the future behavior of the taxpayer.

The commission has to maintain an updated list of the independent experts on arbitration on tax matters (art. 19), if the independence condition or the confidentiality clause are infringed, sanctions are provided or experts from the pool of available specialists are eliminated. During its activities the commission is supported by the dispute resolution committee (art. 20). The Directive functioning implies that each member state has to transpose it into its national legislation, effectively becoming a legally binding instrument. The deadline for transferring the Directive was fixed the 30th June 2019 (art. 22) while it started to be applicable from the 1st July 2019, the twentieth day following its publication in the official gazette (art. 23). A report on its application will be prepared as of 30th June 2024; up to now it's too early to analyze whether or not its application has been successful. The mandatory paper to be prepared evaluates the Directive's implementation with a report to be presented to the Committee attached (art. 21). Even though the Directive contains a more punctual legislation if compared to the other legal instruments available for the resolution of tax disputes, for example it tries to limit the discretionary power left to the CAs as in the acceptance or denial of the request, it does not completely eliminate the opacity that characterizes the entire procedure. Moreover, the Directive does not specify its relationship with the other available legal instruments, leaving to the interested parties the freedom to choose which instrument better suits the resolution of their disputes. The Directive takes inspiration from the international tax law and it aims at increasing the relevance on procedural rules rather than substantive ones. The basis of such European binding law are found on the need to increase the transparency on the decision-making problems and on the appointment of the arbitral tribunal, obliging states to publish the decision rendered even if in a redacted form, ensuring a clear explanation and description of what happens behind the scenes. The overall process focuses also on protecting the weaker taxpayer position, who has always been considered a marginal participant, thus recognizing the possibility of an oral audience to provide evidences and useful elements to the arbitration panel.

3.3.3 Objectives of the Directive

The Directive proposes the achievement of four objectives that are deeply analyzed in the paper by Pit H.M[132]. The first is namely mentioned on art. 1 and it represents the extension of the scope of application in respect to the Arbitration Convention, the second is ensuring legal certainty for taxpayers, the third is granting efficiency and effectiveness while the fourth is to ensure transparency. Such objectives, result to be perfectly in line with the Directive preface which states that: "*[...] in the spirit of a fair taxation system, it is necessary to ensure that mechanisms for dispute resolution are comprehensive, effective and sustainable*"[133]. The broadening of the scope of application of the Directive wants to keep the experience gained in the period of application of the Convention, thus providing an extension to all disputes connected to the interpretation of tax treaties settled among member states.

The objective of assuring a more legal certainty to taxpayers, whether it is company or an individual, that is conducting its business among the member states is of crucial importance for their EU future investment decision, and for this purpose the directive points at assuring them the access to the dispute resolution mechanism. Being able to provide a granted level of taxation, that is not subject to a higher burden because of the cross-border origin of the transaction, is a key element for the development and the future flow of capital within the EU businesses. In order to reach that scope, Pit explains that the Directive was designed on the basis of three points: stringent criteria are recognized to deny the access to the procedure, rigorous deadline are scheduled and a review mechanism, to control if the work done by CAs is in line with the provisions contained in the Directive, is established. The author, describing the scope of each objective, aims to analyze whether it was reached or not, and figures out some possible improvements that can be made to the directive in order to fully achieve them. Indeed, despite the enhancement from the Convention is clear and undisputable, some criticism must be addressed in respect to the question of the assurance of legal certainty to the taxpayer. In particular, he asserts that a margin of discretion is still left on the table to the CAs when they have to decide whether to accept the case or not. That because the access to the procedure is denied in case of fraud or gross diligence but the definition of such terms is missed in the Directive, thus giving space to discretionary behavior; the possible referral to the domestic definition may conduct to a non-uniform interpretation an so a clarification in such case would be appropriate. Moreover, he adds that another circumstance which let the CAs not to

[132] See note 116. Pit H.M., 2019, *The Changed Landscape of Tax Dispute Resolution Within the EU: Consideration of the Directive on Tax Dispute Resolution Mechanisms*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p. 745-759.

[133] See note 130, cited in Pit H.M., 2019, (see note 116).

implement the final opinion rendered, is represented by the lack of independence within the Commission's members. Since the appointment of the experts is a duty of the CAs, the taxpayer shouldn't be penalized by the failure of the decision implementation if a lack of independence of the panel members is verified. Lastly, he asserts that there is the risk of different transposition; in fact, due to its nature, the Directive must be transferred to the domestic law of member states and in those cases the risk of a non-uniform interpretation and application, that once again mines the certainty ensured to the taxpayer, may occur; to tackle this issue more coordinate actions must be pursued and additional clarifications are required.

In respect to the third objective, the unsatisfactory results provided by the Convention has exacerbated the requirement of an efficient and effective mechanism to resolve the issues without leaving a pending cases for years, thus implying cost and time savings. Such objective, as explained by the author, was in in general reached, also thanks to the time-setting encompassed by the deadlines for each stage of the procedure; moreover, the effectiveness is granted by the review mechanism introduced. The Directive thus grants to the taxpayer a time-window within which a solution is addressed. However, the author emphasizes some drawbacks of the mechanism; in fact in order to ensure the review and the certainty to the taxpayer, more time and resources are needed and this effect evidences that the improvements, even if theoretically achieved, are usually not all materially granted. In addition, he notices that, if the various deadline scheduled are summed up, they bring to a minimum resolution period of four years without taking into account the possible extension due to the appeal or the prolongation of the MAP to three years. He also emphasizes that a possible solution is the recourse to the baseball arbitration, if the ADRC is opted, but such decision-making process results not in line with the whole Directive structure which better suits the independent opinion approach.

Finally, the objective of ensuring transparency is addressed with respect to the publication of the decision rendered by the arbitral commission, that provides an example for taxpayers and CAs that might face similar problems in the future, but without a precedential value. The improvement from the Convention is at this point clear, the latter preferred to give up transparency for the sake of confidentiality of information, while the Directive has set itself the more ambitious goal of publishing the outcome of the procedure. The transparency of the Directive is intended independently from the will of the parties; in fact he argues that if parties agree, the entire case is published - but this situation rarely occurs - and otherwise, if someone does not agree, the decision is still published but in a reduced form. In this way only the final decision is published and not the entire settlement achieved through the MAP. In essence, even if not in their entirety, the objectives fixed are also reached by the Directive implementation and application. Some further work can be surely done in respect to the legal certainty and the timely disclosure of information to the taxpayer, but much has been done if compared to the past.

3.3.4 Participation of the taxpayer in the DRD

The Directive specifies legally enforceable deadlines within which an opinion by the panel has to be provided. In this perspective, some actions must be taken by the taxpayer in the due time, otherwise its rights cease and it can no longer exercise them. For this reason, it is of extreme importance the assurance that CAs provide timely information to the taxpayer, thus giving it all the necessary tools to take action and to ensure the solution of the dispute. Although in the description of the functioning of the Directive some rights were already tackled, for clarification purposes they are listed below. Being aware of the fact that at European level also for tax matters it is required a minimum level of guarantee for the taxpayer, in the Directive its right is limited to the initiation of the procedure. The taxpayer is not directly involved as a participant in the proceedings, but as Perrou K. emphasizes[134], in some circumstances its rights are improved if compared to those in the MAP or in the Arbitration Convention, thus letting it exercise a higher level of control throughout the proceedings. For example, the resolution mechanism, granted by the Directive, is defined as a process driven by the taxpayer, thanks to its right to receive the updates regarding the progress of the procedure, one step after the other. The taxpayer can exercise its rights during the various Directive's stages. In the compliant stage, it has the primarily right to request the initiation of the process upon the presentation of a justified reason, attached with all the necessary documentation as remarked on art. 3(1). In particular, as specified on the same article, the taxpayer must indicate which agreements or conventions should be used, if there is more than one agreement, that overlap themselves to regulate the same discipline. In this case, the Directive foresees that the involved party must specify which one to adopt to the purpose of eliminating the tax dispute. In addition to the right to submit a complaint, the taxpayer has the right to appeal against the decision of rejection of the case provided by the competent authority, pursuant to art. 5(3), asking the establishment of an Advisory Commission that provides an opinion in relation to the acceptance or the denial of the rejection. The institution of the Commission, regulated in art. 6(1), aims to avoid as much as possible discretionary behavior of the authority, thus ensuring legal certainty to the taxpayer. In general, the taxpayer has the right, during the whole procedure, to activate judicial remedies if the CAs violates the norms of the Directive or their inactivity delays the standard proceedings

[134] Perrou K., 2019, *Taxpayer rights and Taxpayer participation in procedures under the Dispute Resolution Directive*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p. 715-724.

course. Another important prerogative throughout all the process is the right to control the adoption of the Rules of Functioning. If they are not adopted promptly, the taxpayer can appeal to a court of an involved member state in order to obtain the implementation by the CAs of the operating rules. This latter event rarely occurs, what can instead happen more frequently is encompassed on art. 13(1) and it is the right to appear, or to be represented, upon its request, as clarifier on art. 13(2) before an Advisory Commission or an ADRC; to the taxpayer is granted the right to have an oral audience which must first be authorized by both the CAs involved, and providing, in this way, additional relevant information. Furthermore, as described on the operating rules on art. 11, it is recognized the possibility of giving to the taxpayer a higher level of participation during the procedure, thus assuring to it a wider protection. Normally, each member state must assure that the notification of the final decision is made by the CAs within 30 days from when the decision has been adopted. In some cases, such notification is not made within the due time and for this reason art. 15(3) recognizes to the taxpayer the right to lodge an appeal to the competent court of its residence state, in order to get the final decision and preserve its adoption. Finally, once the decision has been rendered by the panel, the CAs are bound to its implementation upon the acceptance of the taxpayer, that has the right to formally accept and implement the final decision. In regard to the right of a fair trial, instead, it must be noticed that the Advisory Commission result as an independent entity both from the taxpayer and the CAs, and this ensures an equal valuation of each single case.

3.4 Compatibility of the Directive with the EU law

The EU legal system provides an instrument capable of granting legal protection to the taxpayer's, in relation to cross-border issues which otherwise are only refereed to disputes between states regarding their sovereignty to tax. Although the directive recognizes more rights to the taxpayer, as discussed above, it is not involved in the procedure in a *stricto sensu*. Indeed, due to its secondary EU law nature, it must grant effective protection to the taxpayer in relation to the actions and the behaviors of the CAs. The power of this tool goes beyond the procedural rules, designed in the DRD under the tax treaties and the Convention among EU countries, since it delineates for the first time the obligations and the rights of the involved persons. In particular, Perrou K.[135] highlights the importance of the taxpayer involvement during the proceeding and its right to a fair trial, due to its relevance throughout the conclusion of the dispute. She asserts that a gap exists between the acknowledged right to start the procedure and the wider recognition to the right of having a fair trial guaranteed by the European Charter of the

[135] See note 134. Perrou K., 2019, *Taxpayer rights and Taxpayer participation in procedures under the Dispute Resolution Directive*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p. 715-724.

Fundamental Rights (EUCFR). In this context, of particular relevance is the attention that the European Commission has addressed to the taxpayer involvement during the elaboration of the DRD to ultimately solve double tax treaty disputes. She explains that the legal binding effect towards the EU institution and the national governments is sanctioned by the entry into force, the 1st December 2009, of the Treaty of Lisbon. Undoubtedly, the tax proceedings, such as the Directive for the resolution of controversies in tax matters, are covered by the Charter. In particular, on her article the referral is to art. 47 of the Charter, which states that: "*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented*"[136]. This provision thus encompasses also question relative to tax issues and constitute the major difference between the EUCFR and the articles 6(1) and 13 of the European Convention on Human Rights (ECHR).

Two historical judgments feed the discussion on whether the Directive results compatible with the EU Charter of Fundamental Rights or not; in particular, as emphasized by Perrou, in regard to the right acknowledged to the taxpayer to have a fair trial. These two sentences, one pronounced before the adoption of the Directive (September 2017) and the other enunciated shortly after its adoption (March 2018), seem to influence the structure provided in the DRD. In light of these judgements, the author affirms that the Directive has extended the right of the taxpayer even though it remains unclear if it has to participate to the proceeding due to a member states obligation to include them as a party in the DRD procedure. The eventual obligation should be implemented in the national law that transpose the EU Directive into domestic legislation, and for this purpose it is interesting to view two recent decision of the CJEU, namely the Austria v. Germany and the Slovak Republic v. Achmea cases.

3.4.1 The Germany v. Austria and the Slovak Republic v. Achmea cases

In the previous, paragraphs the deep analysis of the Directive has brought to light the current debate about art. 10(1), according to which an Alternative Dispute Resolution Commission can be established if required by CAs, alternatively with a permanent status or on ad-hoc basis. The paragraph thus recognizes the possibility to set up a commission with a permanent nature, referring to it as a Standing Committee, instead of the classical ad-hoc panel. The arguments in favor of such provision are for sure connected to cost and time savings, since it avoids the onerous institution of a panel for the resolution of each single dispute. Moreover, the permanent

136 European Union, 18th December 2000, *CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION*, Official Journal of the European Communities.
Available at: https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

panel can, through the accumulated experience, gain expertise on the dispute resolution ensuring efficiency of the procedure and overall benefits. At this point, the question is if the Court of Justice can be established as an arbitration panel with a permanent status. The possible involvement of the CJEU to act the role of arbitrator, pursuant to what expressed on art. 273 on the TFEU, which states that issues connected to the interpretation and application of Union law must be dealt by a court or tribunal so defined in the EU treaties, such as the CJEU. As explained by Pit H.M.[137], the Directive draft proposal presented by the Commission did not entail the creation of a permanent arbitration body and also the ADRC had an ad-hoc status. The pressure advanced by some states, among which France and Germany, to attribute the power to solve disputes through arbitration to the CJEU has led to a compromise, thus encompassing the faculty of appointing as an ADRC the European Court of Justice. The first case analyzed below represents one example in this sense, because the arbitration clause included in the treaties stipulated between Germany and Austria gives competence to the CJEU with the role of arbitrator. The German-Austrian case has recently involved the CJEU in connection to the different interpretation of the *interest* term included in their DTAs. Notwithstanding the involvement of the CJEU has been welcomed, it is worth noticing that it took five years to reach a decision about it and that probably charging the CJEU with the role of a permanent arbitrators might not lead to a time enhancement for the dispute resolution. Indeed, after the pronunciation of the CJEU on the Austrian-German case the debate, on whether art. 10(1) of the DRD would constitute a sufficient legal basis to accept the participation of the CJEU in the process with the role of arbitrator, was powered.

The first case, namely the C-648/15 Austria v. Germany case, refers to an operation that dates back to the acquisition, between 1996 and 1999, by an Austrian Bank (UniCredit Bank Austria), of registered certificates (known as *Genussscheine*) from a German institution (WestLB). Such certificates produce an income defined as an *interest*, within the meaning of the art. 11 of the Convention between Austria and Germany. They disagree on whether such interest falls within the first or the second paragraph of art. 11. In detail, as explained in an article by Han Verhagen[138], Austria claimed its right to tax the income received from the certificates, because it was the state of residence of the beneficial owner of the interest paid, whilst the German

[137] See note 116. Pit H.M., 2019, *The Changed Landscape of Tax Dispute Resolution Within the EU: Consideration of the Directive on Tax Dispute Resolution Mechanisms*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p. 745-759.

[138] Verhagen T.H.J., 13th September 2017, *The European Court of Justice as Court of Arbitration for Disputes under DTA's (Case C-648/15, Austria v Federal Republic of Germany),* Kluwer International Tax Blog. See http://kluwertaxblog.com/2017/09/13/european-court-justice-court-arbitration-disputes-dtas-case-c-64815-austria-v-federal-republic-germany/

Republic claimed its right to tax that same income on the basis of the source state, since that income was generated in Germany, thus stating to have the exclusive right to tax the income from those certificates. Conflict on the interpretation of the tax treaty gave rise to double taxation of the company in question for the 2003-2009 period. The Austria v. Germany case concerns the interpretation and application of art. 11 of their DT Convention. On one side Germany asserted that the income had to be classified in accordance with art. 11(2) as *income from the rights or debt-claims with participation in profit* and for this reason it had exclusively taxing right, while a credit had to be recognized in Austria; on the other side the Austrian government argued that the payments received were not participation in the profits, but Austria, as residence state, was exclusively entitled to tax that income, pursuant to art. 11(1). The taxpayer involved, namely the Austrian Bank, submitted a request of initiating a mutual agreement procedure, as stated on art. 25 of the German-Austrian DTA, directly to the Austrian competent authorities. Such procedure failed to provide a solution to the DT issue and, in order to find a remedy to the unresolved question, the taxpayer decided to submit the dispute to arbitration that, in line with art. 25(5) of the abovementioned agreement, required the judgement of the European Court of Justice (CJEU). In fact, this article recognizes that if no agreement is found on the interpretation or application of the treaty during the MAP, the states are obliged, upon the request of the taxpayer, to refer the issue to the CJEU under arbitral process, in line with art. 273 of the Treaty on the Functioning of the European Union (TFEU), better known as the Treaty of Rome. At this point, another issue raised since it was the first time in the European history that the CJEU was called to solve a dispute concerning the interpretation of a bilateral convention among member states on the elimination of double taxation. The case, in particular, gave the Court the possibility to determine its jurisdiction boundary, because, before giving an answer to the submitted question, it had to be verified if the three conditions listed on art. 273 were satisfied. Only after these requirements were fulfilled, the Court's jurisdiction is recognized and so it can express a statement on the relevant question. To the scope of analyzing the achievement of the three conditions, what stated on article 273 is recalled: "*the Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties*"[139]. Namely it requires first that the dispute must exclusively involve Member States, then it must be brought to the Court in compliance with a special agreement concluded between the parties and finally it must comprehend the subject matter of the Treaties. For the

[139] Gazzetta ufficiale dell'Unione europea, 26th October 2012, *Trattato sul Funzionamento dell'Unione Europea* (versione consolidata), C 326/47.

case in question, these three requirements were fulfilled, even though the last condition, as stated by General Advocate Mengozzi P.[140], was more difficult to accomplish. Despite the case does not fall within the subject matter of the Treaties, the dispute is connected to the development of the internal market, as stated on art. 3(3) of the Treaty of the European Union (TEU), and the elimination of DT contributes to the creation of such market, permitting free movements and circulation among the territories of the Union. In particular, the Court asserted that existed an *objectively identifiable link*[141] between the case, the subject matter of the Treaties and the positive impact that the avoidance of DT to arise has brought to the European market. Once confirmed that the Court had jurisdiction over a conflict between Member States, it subsequently expressed its arbitral opinion asserting that the interest income in question had not to be considered pursuant to art. 11(2) rejecting the German[142]. The case undoubtedly acknowledges the rights in the hands of the taxpayer of initiating the MAP and, if it leads to an unsatisfactory result, to request an arbitration procedure. The relevance of the decision is connected to the attribution to the CJEU of the power to act as an arbitrator, providing a solution to the disputes that involve member states, starting from the fact that in their bilateral treaties Austria and Germany had allocated such competence to the EU Court. The referral to the CJEU as a Court in charge of providing such opinion, from one side suggests the implementation of a more structured institution that manages tax arbitration issues, thus creating a European permanent tax treaty arbitration court, but from the other seems in contrast with the DRD, that clarifies that the Advisory Commission or the ADRC needs to be composed of independent experts. The debate on whether the jurisdiction of the European Court has been extend too far or not, emerged in this situation but it must be kept in mind that both states freely decided to include the Court as an arbitral tribunal in their bilateral Convention and, on this point, the CJEU has affirmed its jurisdiction on tax issue connected to the fulfillment of the common EU market. As it is later analyzed, this debate has moved further in the last few years, pushing more and more experts in favor of the creation of a European institution in charge of tax treaty arbitration. This thesis is sustained also in light of the post-Achmea era; a case that may potentially influence the whole arbitration arena and that for its relevance is now described.

The second case is the C-284/16 Slovak Republic v. Achmea case; it is not a tax case but it concerns the compatibility of the arbitration clause of the BIT between Netherlands and

[140] Mengozzi P., 27th April 2017, *Opinion of Advocate General Mengozzi, Republic of Austria v Federal Republic of Germany, Case C-648/15*. See https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CC0648&from=EN.
[141] See note 134. Perrou K., 2019, *Taxpayer rights and Taxpayer participation in procedures under the Dispute Resolution Directive*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p. 715-724.
[142] Schwarz J., 20th September 2017, *The European Court of Justice and Interpretation of Tax Treaties*, Kluwer International Tax Blog. See http://kluwertaxblog.com/2017/09/20/european-court-justice-interpretation-tax-treaties/.

Slovakia with the EU law, and in particular with articles 18, 267 and 344 of the TFEU. Its judgement has consequences of wider range, influencing the entire arbitration community. Before the analysis of the compatibility question, it is useful to give a background of the case. The BIT entered into force in 1992 and established an equal and fair treatment of the investment made by the other contracting party, without applying discriminatory measures. The treaty suggests that disputes concerning investment shall be resolved amicably and, if it is not resolved within six months, it is submitted to the arbitral tribunal. Lately, in 2004, the Slovak Republic entered into the EU; at that time the BIT was already in force but a clarification was then necessary and, in case of conflict between the EU law and the text of the treaty, the first took precedence over the other. The question that gave birth to the dispute involved a Slovak law through which, in 2004, the internal health system market was liberalized; such liberalization induced the Achmea, a Netherlands insurance company, to set up a branch in Slovakia to offer private health insurance services. Slovakia, in 2006, has partially modified the liberalization of the private health insurance market, limiting the distribution of profits generated. Such amendment was lately judged contrary to the Slovak constitution and, in 2011, the distribution of profits was once re-allowed. In the meanwhile (2008), Achmea was conducting its businesses and it deemed that such provision had violated the treaty standards, causing damage to its activities. It decided to bring them to arbitration proceedings, in accordance with art. 8 of their BIT. The arbitral investment tribunal instituted sentenced that Slovakia had violated the BIT and ordered them to refund Achmea for the damages suffered. In response, the Slovakia Republic requested the cancellation of the proceedings, challenging the arbitral award on jurisdiction. In particular, it appeals to the incompatibility of art. 8 contained in the bilateral investment with the articles 18, 267 and 344 of the TFEU[143]. The German Federal Court of Justice[144], although its interpretation provided that the arbitration clause was not incompatible with the EU law, stopped the proceeding and appealed to the CJEU for a preliminary ruling. The German Court considered appropriate to refer the questions to the Court, given the fact that it had not yet provide answers to such issues and that they are of particular significance due to their impact to the other existing intra-EU BIT. As expressed by Blanck J.I[145], the preliminary ruling required to the CJEU by the German Court, which is authorized but not obliged, is considered of a greater relevance in respect to the uniform interpretation of the EU law and it

[143] Fouchard C. and Krestin M., 7th March 2018, *The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!*, Kluwer Arbitration Blog.
See http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/.
[144] German law is applicable to the arbitration proceedings in question since Frankfurt was chosen as seat for the arbitration.
[145] Blanck J.I., June 19, 2018, *Slovak Republic v. Achmea BV: The Death Knell for Intra-EU BITs?*, American Society of International Law, Vol. 22, Issue 8.
See https://asil.org/insights/volume/22/issue/8/slovak-republic-v-achmea-bv-death-knell-intra-eu-bits.

is described as a pillar in the EU judicial system. The opinion provided by the Advocate General Wathelet M.[146] suggested that the BIT was not in contrast with the Union law. The decision, latterly assumed by the Court of Justice, was radically different from that sustained by the Advocate and, even if the case does not refer to a tax matter, the recourse to the European Court and the sentence provided, affected the whole environment. The Court provided its answer considering the cited articles in question. The first phase related to determine whether or not the arbitral tribunal under the BIT was entitled to solve disputes that may relate to the interpretation or application of the Union law. In details, the question referred to verify if art. 344, which states that *member states undertake not to submit a dispute concerning the interpretation or application of the Treaties*[147] *to any method of settlement other than those provided for therein*, was breached through the application of the Slovakia-Netherlands BIT provision, which had brought such issue to the BIT arbitral tribunal. The Court, in order to answer the first question, observed that the international agreement on investment "*cannot affect the allocation of power fixed by the EU Treaties or consequently the autonomy of the EU legal system*"[148]; in particular, it highlights the EU law supremacy over the law of member states and that of settlements, such as the BIT. In fact, even if the arbitral tribunal has competence in regard to violation of the BIT, it has to take into account the applicable law of the parties, namely the EU law. The affirmative answer to the first question led the Court to analyze whether the BIT arbitral tribunal was deemed a court or a tribunal pursuant to art. 267. The article authorizes the CJEU to provide a preliminary ruling on the *interpretation of the Treaties* and on *the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union*, when such issue is requested by a tribunal or a court of a member state. Such verification has important implication because a decision by a tribunal under the EU judicial system is subject to a control that guarantees the efficacy of the rules of the Union law. It emerged that the BIT tribunal had an exceptional nature, not being part of the Dutch or of the Slovak judicial system. So, it falls outside the definition of tribunal or court within art. 267. In essence, whilst the CJEU and the court of a member state fall within that category, the arbitral tribunal for investment treaty does not. Articles 344 and 267 must be read in the perspective that they preclude the application of a provision such as art. 8 contained in the BIT between Netherlands and Slovakia. Lastly, in relation to art. 18, the Court has specified that there is no need to further clarification, since the previous two answers are affirmative and, in its view, the application of

[146] Wathelet M., 19th September 2017, Opinion of Advocate General Wathelet, Slowakische Republik v Achmea BV, Case C-284/16. See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CC0284&from=EN.
[147] The term *Treaties* refers both to the Treaty on European Union (TEU) and the TFEU.
[148] Monsenego J., 2019, *Does the Achmea Case Prevent the Resolution of Tax Treaty Disputes through Arbitration?*, INTERTAX, Kluwer Law International BV, The Netherlands, Volume 47, Issue 8 & 9, p. 725-736.

the provision of an international agreement is precluded by articles 267 and 344. The Court sustained that the arbitration clause in the BIT was incompatible with the Union law, to the extent that disputes related to the application and interpretation of the EU law cannot be dealt by organizations outside the EU jurisdiction. In addition to that explanation, the Court also consider the principle of *mutual trust* and *sincere cooperation* stated respectively on art. 2 and on art. 4(3) of the TEU, which requires the effective application on the member states territories of the EU law. The founding reasoning assumes that member states cannot withdraw their obligation under the EU Charter of Fundamental rights and, more in general under the Union law, stipulating tax treaties. The Achmea case suggests that members states are required to mandatorily appeal to institution that qualifies themselves as a court or as a tribunal, pursuant to art. 267 of the TFEU, for issues connected to the interpretation or application of the treaty.

As explained by many experts, the conclusion reached on the case has important implications with regard to the 196 intra-EU BITs that may potentially be influenced by this decision. The way in which the Court has elaborated the conclusions could be interpreted as a mean to give a broader involvement; in fact, even if the case does not refer to a mechanism that solves tax treaty disputes, the question is if the Achmea case may have an impact on tax treaties arbitration between EU member states. On this point, Monsenego[149] argues that despite the obvious differences between investment treaties and tax treaties, among which the subject of the legal question, some common features can be shaped as their bilateral nature, their final scope to enhance the condition of the involved persons and their similar way to resolve disputes giving prior access to the mutual agreement and only later to the arbitration procedure. In his opinion, such common features, with respect to the mechanism for resolving disputes, should be interpreted as a way to extend the application of the Achmea conclusions also to tax treaties. His analysis is conducted prior under an international perspective, with the tax treaty arbitration under the art. 25(5) of the OECD MTC, and then focusing to the European DRD. To the first extent the issue is if the arbitration clause, pursuant to the OECD Model, is going to apply to question of EU law; in case of positive answer one need to examine whether such mechanism grants the uniformity and consistency of EU law. He continued explaining that the purpose of tax treaties is to reduce the effect of the application of different domestic provisions, which is made up by domestic laws and, as a Union member state, by EU law. Similarly to what seen in the Achmea case, also here the arbitral tribunal under a bilateral tax treaty may be called to apply or to provide an interpretation of the EU law. Following the same path, the arbitral

[149] See note 148. (Monsenego J., 2019).

tribunal, according to arbitration clause of the Convention, does not belong to the judicial system of the Union and so it cannot be considered as a court or a tribunal under art. 267 of the TFEU. Tax treaty arbitration procedure does not foresee the preliminary ruling by the Court but such appeal is possible through the recourse to the domestic court when the decision rendered by the panel is subject to a judicial review, because it is challenged by the taxpayer. The limits of such procedure are that the denial of the decision given by the panel and the undertaken of the litigation, are both actions that rely upon the will of the taxpayer, while the author sustains that the EU law should itself represent a reason for deeming the arbitration decision invalid due to its primary value in the hierarchy. Moreover, tax treaty arbitration under the OECD consents the judicial reviews of the decision when it violates the European law appealing to the CJEU. The author remarks that two issue still persist: dual charges and the problem connected to the application or interpretation of EU are not dealt with. According to his view, once the issue connected to the EU law has been solved, the existing system should be enhanced thus permitting to the taxpayer the opening of a new arbitration procedure. In relation to the second extent and in particular the impact of the Achmea case in respect to the resolution of controversies under the DRD adopted by the member states, he asserts that the tool cannot grant the compatibility of its dispute resolution mechanism with the Union law. As in the Achmea case, it is to ascertain if the arbitral panel under the DRD belongs to the category of a court or a tribunal under art. 267. Following the author reasoning, a series of factors has been taken into account such as its legal origin, the level of details presents in the directive, its degree of independence - lower if compared to that of the domestic court - and its lack of a permanent structure. Conclusions, either in this case, were analogous. In the sense that the dispute resolution tools provided by the Directive cannot interact with the Court of Justice, as they cannot be considered as tribunal or a court of a member state. A similar opinion is postulated by Pistone[150], who asserted that, given the fact that the scope of the Directive is to correctly interpret and apply tax treaties and convention against double taxation, the utilization of arbitral mechanism should not be subject to limitations by the CJEU, on the basis of the argumentation given in the Achmea case. In regard to the DRD, neither the Advisory Commission nor the ADRC have the skills to pronounce on issues relative to the interpretation or application of the EU law. If they would do so, the finality of the resolution of the dispute could mine the Union law. Since the panel does not fall within the definition of court or tribunal, it cannot ask the

[150] See note 124. Pistone P., 2020*, Il Diritto secondario dell'Unione Europea in materia tributaria*, Diritto tributario europeo, Giappichelli, p. 292-313.

CJEU for a preliminary ruling on the interpretation or application of the EU legislation. This can however be required by the interested parties in court.

For sure, the DRD represents a great shot in order to fight the unresolved issues of DT in the EU zone, with the future possibility, analyzed in the next chapter, to build up a permanent arbitration panel. As described for arbitration within the OECD model, also in the European context, its mere existence might have a positive impact on the enhancement resolution of disputes using the amicable settlement procedure, because states might put more efforts before leaving the dispute to be solved by an arbitration body. Nevertheless the enthusiasm showed after its publication, some criticisms were addressed by tax experts in referral to the Directive. In particular, they were afraid that its limited scope of application, even if enhanced in respect to the Convention one's, could represent a weakness during its practical application, that may be connected only to transfer pricing issues. The risk is that to undermine the whole ambitious program of double taxation elimination in its wider sense, allowing the non-discrimination of cross-borders businesses. Notwithstanding the great trust and the confidence placed in the mechanism, its properly usage and its effective functioning are not actually demonstrated due to its relative novel introduction. For this reason, a faction prefers to carefully evaluate the radical changes and innovation brought only after a period of application of the Directive, which consents to draw up more complete conclusions on its effective functioning. The suggestions in the perspective of enhancing the loopholes that the Directive presents, is to create a permanent institution at EU level, strengthening the permanent nature of the Standing Committee which is not statutory but it's merely due to its selection by the CAs of the member states involved. Even though it seems that the Achmea case does not automatically make the resolution tools inserted in the Directive, conflicting with the law of the Union, particular attention has to be pushed and efforts have to be made in a tentative to finally promote an efficient dispute resolution tool that does not oppose to the EU rule. Some authors instead, among which Monsenego[151], assert that the Achmea conclusions can thus be extended to the tax treaty arbitration sphere and, in particular, they point out the need of a permanent arbitration mechanism to ultimately solve disputes.

The DRD discipline seems to be affected by these two cases under two perspectives; one connected to the acknowledged right of the taxpayer to have a fair trial, ensuring its participation throughout the process, and the other that is the maintenance of the independence of the EU legal framework realized through a control body.

[151] See note 148. (Monsenego J., 2019).

To the scope of realizing this second supervision role, some experts proposed the creation of a Commission for the arbitration of dispute with a permanent status, following art. 10(1) of the Directive. Such hypothesis is dealt in the next chapter.

4. PROPOSAL AT EU AND AT INTERNATIONAL LEVEL

4.1 The plan for a Standing Committee at EU level

The second dispute analyzed on chapter three which refers to the Achmea case, notwithstanding it was a BIT case, given the relevant judgement provided by the CJEU, has even echoed the whole arbitration community getting in touch also with the international tax arbitration. More in particular, at European level, the preliminary ruling pointed out the lack of a control mechanism, on whether the decision rendered by the arbitral panel established under the Directive results compatible or not with the primary Union law. Indeed, if the decision assumed for the Achmea case can be amplified to tax arbitration, an analogous reasoning can be made and the arbitral court, that is set up pursuant to the Directive, in essence, does not embodied a tribunal or a court under the EU law. The immediate consequence, as for the Achmea case, is that they cannot make judgement in regarding to the interpretation or the application of the EU law, but at this point the lack of a body that supervise the correct fulfillment of the hierarchy of the Community law must be healed to grant its correct application. On this point Perrou has stated that "*the judicial system of the European Union, as it is based on mutual trust and sincere cooperation between member states, is inherently incompatible with the possibility of member states establishing, in their bilateral relations, a parallel dispute settlement mechanism which may concern the interpretation and application of the EU law*"[152]. It seems to be more inclined against the possibility to set up an arbitration panel that govern tax treaty issue, which is not part of the EU body because the commission may be called to provide a judgement on compatibility with the Union law, and it wouldn't be entitled to do so.

The successful creation of a common EU market passes by the correct and uniform application of the community law. Such role can be carried out by an institution able to manage and to process that information and to provide a consistent interpretation of the applicability of the tax treaties with respect to the EU highest ranking law. To this scope a bunch of experts in tax matters have advanced a proposal to favor the implementation of a Standing Committee at EU level in accordance with art. 10 of the Directive[153], that, in their program, has a permanent status. The draft scheme is described in the following and in their view it is a hint to the direction that should be pursued both in the international and at the European level for the purpose of

[152] See note 134. Perrou K., 2019, *Taxpayer rights and Taxpayer participation in procedures under the Dispute Resolution Directive*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p. 715-724.
[153] Piotrowski S., Ismer R. et al., 2019, *Towards a Standing Committee Pursuant to Article 10 of the EU Tax Dispute Resolution Directive: A Proposal for Implementation*, INTERTAX, Kluwer Law International BV, The Netherlands, Volume 47, Issue 8 & 9, p. 678-692.

developing a shared mechanism on tax treaty arbitration. The proposal advanced was guided also by an interesting level of member states wishing to introduce such Committee, since, in general, members states agree on the creation of a permanent commission that can operate efficiently and effectively. The Standing Committee according to the authors' view represented the most innovative option as alternative to the ad-hoc advisory commission. Even if the DRD mentions the possibility to opt for a Standing Committee it is largely silent on its effective implementation and functioning procedure. As it was described in the previous chapter the resolution of tax treaty disputes under the Directive can be carried out alternatively by an Advisory Commission, an ADRC or even a Standing Committee, the CAs expressly select which Commission to adopt, based on which is the most suitable to the case in question. The ADRC and the Standing Committee can select alternative method for dispute resolution such as the baseball approach with reasons or moreover mediation and litigation. In addition to the Standing Committee is attributed a permanent nature but the Directive lacks implementation rule with respect to such Committee so leaving member states free to settle an agreed functioning mechanism. Given the lack of reference to procedural rules for the set-up of the Standing Committee, the proposal advanced by the experts, as they emphasize must take into account two risks that might possibly emerge after the adoption of a Standing Committee: the *substantive risk* and the *risk of confusion*. The first might arise due to the lack of independence among arbitrators, since the referral to a list of independent persons as it is provided on art. 9 for the composition of the Advisory Commission is missing in the case of a Standing Committee, while, the risk of confusion is pointed out by the fact that this Committee represents a sub-categories of the ADRC with different methods for solving disputes and, since it is not specifically drawn a distinction line, doubt may arise. The two combined risk, as they explained, if art. 10 is opted and the Alternative Commission is established, in the worst situation, can bring to resolutive procedure which lacks independent arbitrators and misses taxpayer protection. The proposal so advanced must take into account such limitation and thus ensure that the taxpayer rights are preserved thanks to a verified independent Committee. The vision promoted by the team of researchers favors the adoption and the development of a more structured form of art. 10 relative to the Standing Committee because they sustain that it represents a unique opportunity to achieve an enhancement on the resolution of disputes in the EU area. They assert that such mechanism might also provide the basic structure for a more defined permanent structure of arbitration in tax treaty. The reasons in favor of their presentation are connected to the possible expertise and experience that a Standing Committee can achieve, thus encompassing "*the institutional accumulation of pertinent know-how and* *resources, […] transparency, legal certainty and an increased and uniformity of decisions as well as higher standard of taxpayer protection*"[154]. The consistency of decision assumed serves also as a starting point for the resolution of similar cases arising in the future, since the mandatory publication of the decision provided for by the Directive gives the tools to verify whether this uniformity on the decision-making procedure is preserved or not.

The Standing Committee can be adopted as an alternative to the standard Advisory Commission, after the acknowledgement that the MAP stage has unsuccessfully terminated. Its role, differently from the Advisory Commission, that can also be established during the complaint stage in case of rejection of a member state to accept the complaint, has limited jurisdiction exclusively to the arbitration stage. Even if its competences are limited, a wide range of possibility is offered by the Directive with respect to the composition of the panel and the procedures applicable, since as mentioned before art. 10 completely miss to shape how the Standing Committee should look like. The only referral is found on art. 10(2) that recall the fulfillment of art. 8(4) and (5) of the DRD with respect to the independence and impartiality requisites of the Standing Committee, whilst no other guidelines are provided in relation to its composition or its form.

The researchers analysis moves from the prerequisites that their proposal must satisfy, that are the compatibility with the Union law, namely the EU law, the constitution of each member states and the European Convention on Human Rights. The Directive indeed encounters the limitation of the EU law, so it cannot extend its scope of application out of its borders because otherwise, a primary EU law, which prevails over the Directive, is undermined, to this scope such limitation has been taken into account.

The compatibility with respect to all the other sources of EU law in general has recently being analyzed in light of two thorny issues: the consequences of the CJEU judgement in the Achmea case and the effective applicability of art. 47 of the European Charter of Fundamental Rights. On the first point, the CJEU sentenced that the arbitration clause contained in the BIT between the Slovakia and Netherlands finally results incompatible with EU law, given that it violates both articles 267 and 344 of the TFEU, cause the BIT tribunal does not represent a court or a tribunal under the Community law. The issue is now in referral to the possible extension of the Judgement of the Achmea case also to the Standing Committee and authors affirm that in their view it should not have a wider implications for the Directive, since the Committee, given that the DRD is part of EU law, has in some circumstances to guarantee the correct application of

[154] See note 153. (Piotrowski S., Ismer R. et al., 2019).

the Union law. In relation to art. 47 of the EU Charter of Fundamental Rights, as emphasized by Perrou, the right for the taxpayer to have a fair trial is an essential right that must be guaranteed to all the EU citizens.

To accomplish both the issues the experts assert that the Standing Committee must be a court or a tribunal of a member states but in this respect the Committee has some limitations as for example the fact that its decision is not binding, indeed the CAs have the possibility to agree on a different solutions and moreover the taxpayer has the ultimate right to effectively make the decision binding through its acceptance, otherwise it is not enforceable. Notwithstanding these elements the Committee should comply with art. 47 of the EU Charter of Fundamental Rights and thus granting a higher degree of taxpayer protection assuring to it an equal and fair treatment. In this sense, given the competence attributed to the Committee to interpret and apply EU law, authors foresee the possibility to comprehend the request of a preliminary review to the CJEU.

The proposal sets the achievement of five objectives, which are:

1) *the promotion of a speedy, inexpensive and comprehensive resolution of the dispute* through policy that promote the cut-off of costs, thanks to the specialization of the arbitrators and the complete elimination of DT through the correct and right application of tax treaty.
2) *The legal certainty and guarantee the rule of law* can be achieved thanks to independent arbitrators which understand and consequently precisely apply the law, thus feeding the reliance on procedural rules in spite of substantive rules in the international tax field.
3) *Guarantee taxpayer protection* that implies the right to have a fair trial, notwithstanding its dimension and the maintaining of a good conduct pass through the confidentiality of the information and the recognition to the taxpayer of the right to be heard and to participate during the proceedings.
4) *Ensuring transparency and acceptability*: the concept of transparency may enter in contrast with the confidentiality constraint that may push taxpayer to a low publicity profile during the hearings, on the other side the transparent conduct of the process must be ensured through the publication of the information even in a redacted form. The concept of transparency moreover refers to the whole decision-making process and it is on the interest of the taxpayer that such procedure is conducted in a clear way. On the concept of acceptability the referral is to the member states since they are part of the arbitration process and their interest to protect their tax sovereignty is of crucial

importance. The proposal for a Standing Committee must take into account the sovereignty issue and balancing it with the right of taxpayer protection.

5) *Contribution to future development of international tax law*: the possibility that the establishment of a Standing Committee might serves as a model for the future development in international tax law since the cases resolved under the DRD can potentially represent a basis inspiration when similar issues are to be dealt with.

Once defined the objectives of the proposal and the legal basis that it has to comply with, they shaped the proposal of a Standing Committee that is based on eleven points reassumed in the following. They tackle the major elements necessary for the fulfillment of the arbitration stage, under a more practical perspective; the scope of the experts indeed is to provide a materially useful draft implementation of a permanent body at EU level that can be, maybe with some little adjustment, effectively used.

1. *Competence*: the Committee should have universal competence for all kind of tax treaty disputes between the participating member states. In this way all the cases emerged pursuant to the DRD will be submitted to the Committee.
2. *Location*: it is essential to locate the Committee to a place that present an existing network of infrastructure such as the Hague, Brussels or Paris, and, once decided, it is should be permanent.
3. *Qualification of members of Standing Committee*: the experience of the panel members shall be cover transfer pricing and the EU law, thus granting its correct interpretation, the authors moreover suggest that the panel shall resemble the one proposed under the MLI which is made up of three independent experts.
4. *Composition of Standing Committee for a specific case*: *independence requirement;* in this regard the same minimum requisites required for the Advisory Commission must be satisfied also in relation to the Standing Committee. The members of the Committee, given its permanent nature provide a continuity in respect with the consistency of decision and the knowledge accumulated.
5. *Procedural rules and organization of the Standing Committee*: member states that intend to adopt the Committee must agree to a statue and to specific rules of functioning given that the DRD are poor in providing procedural rules for the Committee establishment; the same rules must be agreed also by the CAs and must be communicated to the involved taxpayers. In relation to the cost, remuneration of arbitrators should follow what described on art. 12 of the DRD that encompasses a threshold of 1.000 euro per person per day. The Directive, as already mentioned above,

lacks a complete explanation of procedural rules; it means that inspiration can be taken from permanent arbitration body operating into other fields. Another issue that must be taken into account in the proceedings are the maintenance of the arbitrator independence requisite throughout all the procedure, if it is missed such arbitrator must be substituted promptly.

6. *Taxpayer rights*: it must be guaranteed a common level of rights to taxpayer: that's exactly the scope of the instauration of a Committee, to strengthen the taxpayer position and not to weaken it. For sure the taxpayer enforcement of its rights encounters some refrain from member states that would like to preserve their position and power.
7. *Language of the procedure*: it is usually adopted the language of the treaty or alternatively English when chooses by both states.
8. *Decision based on law not equity*: the finale decision must be based on the applicable agreements and the equity consideration is no more available since the arbitration stage is no longer opened to mutual cooperation.
9. *Independent opinion approach*: the alternative commission has the option to select the independent or the baseball approach in the authors perspective also within the introduction of a Standing Committee the independent opinion approach would be preferrable because it gives to arbitrators a chance for a complete analysis of the case in question, whilst the baseball approach simply select one of the two alternative presented. If the second approach is selected, to accomplish with the Directive the panel must provide the reasons that have led to the selection of the solution.
10. *Legal reasoning and publication of opinion*: the importance of providing legal reasons is reconfirmed by the mandatory publication of the decision.
11. *Review of decisions*: in case of obvious errors the decision rendered should be corrected; such implication requires an amendment of the Directive to consent the adjustment of mistaken decisions. The importance of this point is in particular in relation to the compatibility of the decision assumed with the EU primary law; the incompatibility shall determine the inapplicability of the decision.

The proposal advanced by the experts moves from the emerging necessity to provide a common ground for the interpretation and application of EU law; the build-up of an arbitration panel that governs tax treaty issues among member states and, when necessary, has to deal with the compatibility of the application of the treaty in question with the hierarchically overlying Union law, is a task that must be accomplished, pursuant to art. 267 of the TFEU by a court or a tribunal of the member states because it is entitled to express a judgement on the compatibility.

In this respect, the Standing Committee is deemed similar to a court or a tribunal of a member states, and so, according to their view, it is in charge to demand for a preliminary ruling to the CJEU. The suggestion offered by the team of experts represents an interesting point of departure for the future development of an arbitration institution at European level that is in charge to govern the tax treaty arbitration. Its permanent nature so consent the homogeneity of decisions rendered, given that the same panel of arbitrators are called to decide on analogous questions, thus granting the maintenance of independent experts that keep the control over the supremacy of the Union law in spite of the bilateral tax treaties stipulated between member states. The tentative of the experts to advance a practical proposal for arbitration institutionalization represents an innovative approach to the discipline that might be extended to the international arena. In this regard the question related to the echo of the Achmea case may represents a push towards the implementation of a fixed organization at EU level that ultimately govern the question with the task of assuring the uniform application of Union law and granting that it is not violated.

Moreover, the mandatory publication of the decisions assumed by the panel as it is explicitly mentioned in the Directive and also remarked in the Standing Committee proposal, represents a revolutionary stronger element. The Standing Committee, with different chambers specialized to solve specific matters such as transfer pricing case or other types of issues, has to provide decisions that do not give a different interpretation in respect to questions already tackled in the past and so it has to maintain integrity over time. Even if the precedential value of the decisions is excluded for the resolution of similar issues, the possibility to access prior decision rendered prevents that taxpayers more frequently involved on similar disputes to have an advantage over that who are facing the problem for the first time. The birth of a sort of register in which decision and case are collected provide an instrument usable by all taxpayers, thus granting them an equal level of knowledge without promoting an unfair distribution of information.

On the other side the creation of a permanent body may represents a refrain from the deep analysis of each single case that has unique characteristics; the advantages provided by the uniform interpretation and consistent decision risks to undermine the broad spectrum of possible solutions. Indeed the same court that judge similar questions, even if it is made up of independent experts - due to its fix composition - may generate analogous decisions because divergent solutions that are lately published may create a prejudice in the taxpayer for future dispute resolution thus pushing it away from the utilization of the DRD tool. Arbitration is a powerful instrument that must be used wisely and the homogeneity on the solutions provided by the panel is of essential value in order to ensure the involved parties that they have all been treated in an equal manner and that they do not make favoritism to bigger taxpayers in respect to the smaller ones. The Directive, in a certain sense, can be seen as self-contradictory: it invokes the cost reduction but it sets up two alternatives for the establishment of the commission namely the Advisory Commission and the ADRC, which for sure represents a waste of resources, not counting the overall amount of time needed for the case resolution, that is not diminished but it is just better articulated. The alternative two commissions were created to differentiate from one side a more rigid procedure conducted under the Advisory Commission and on the other a more flexible proceedings adopting the ADRC. The latter seems to contrast with the general scope of the Directive, since it foresee the baseball approach as a decision-making dispute resolution, it fight against the transparency and the fair trial discipline, because the classical baseball method does not comprehend the publication of the decisions and moreover, picking up one of the two possible solutions proposed by the CAs risks that non-uniform solutions are provided for similar cases. The risks is that the invoked flexibility that the Directive wants to offer through the adoption of the ADRC may destruct the consistency on the decision assumed; such possibility is real and it may represent one of the main limitations of the DRD. But, at the same time, the two alternative commissions drafted by the legislator in the Directive pursue the scope of keeping interpretative questions separated from that involving a more practical issues; generally the first are solved by the Advisory Commission that provide a deep analysis of the context and of the situations for the purpose of creating an interpretative heritage available for the future users, whilst, the second, that are connected to a threshold question can be determined more rapidly through the establishment of an ADRC that adopt the baseball approach. The will of creating a clear distinction between the two kind of decisions and their impact on the future choices pass through the institution of two different Commissions; in this way, even if procedural costs increase, the relevance of the decisions published provided by the Advisory Commission are considered pertinent and, it does not affect the taxpayers view regarding the role of the arbitration mechanism.

The DRD is a breath of fresh air in an environment that has for long time been restricted to the application, on a discretionary basis, of a non-suitable EU Arbitration Convention. It is so, understandable the enthusiasm that its introduction has generated in the tax community but, since its efficiency are only theoretically valid and it is not yet supported by well-founded practical evidences, it is better to be cautious and waiting the analysis of its usage during the first period 2019-2024. For sure it is early to say whether the measure is completely effective or not, but this first evidence of data refereed to the use of the dispute resolution tool and consequently to arbitration, may suggests possible adjustments or loopholes that are emerged in the period and that can be consequently corrected. In this sense, the optimism generated by the final adoption of the Directive after forty years from its first proposal, despite being justified, must be considered in light of the possible non-completely satisfactory results that the DRD may imply. It is true that the EU law field is a slow-changing environment but thanks to the desire of the majority of member states such enhancement on the dispute resolution was made possible; the uniformity of EU countries from an economic and a cultural perspective has facilitated the dialogue among them, it has for sure shortened the time necessary for the development of such instrument and it has allowed the application of a boundary dispute resolution mechanism, with a secondary law nature, that create a constraint for EU members.

4.2 The need of a permanent arbitration body in the international field

The OECD/G-20 package of 15 actions, due to its aggressive policy against tax evasion and avoidance, feed the risk that double taxation or taxation not in accordance with the convention may arise. The digitalization of the economy and the consequent aggressive tax planning strategies have been accepted by the international body as challenges to fight. Such loopholes have been counteracted by the negotiation of more tax treaties that undoubtedly will contribute to the expected increase of tax disputes. The innovative BEPS measures fielded, with all its relative changes that encompass a broad range of actions, in order to be effectively applicable imply the amendment of the domestic law and tax treaties.

The foresees number of tax treaties are expected to grow due to the internationalization of the market and, as a consequence, also the number of tax treaty disputes are expected to increase too. For this reason it is necessary the adoption of an efficient instrument that solve tax treaty related disputes in a timely manner, which reduce the actual prolonged resolution time required for the conduct of the procedure. The future augment of conflicts connected to the application and interpretation of tax treaties and the determination of who has the right to tax that income are question that can no longer be deferred and, the arbitration clause inserted in the OECD Convention provides an effective ultimate resolutive method to the long standing issues after an unresolved MAP. The inclusion of paragraph 5, on the MAP article 25, on the agreement stipulated after 2008 has been up to now a slow process refrained by its existing drawbacks during the effective implementation of arbitration and also connected to its limited diffusion. Excluding developed countries, and thus encompassing the EU initiative, there is a large slice of countries, especially developing ones that are still reluctant on moving toward arbitration. This is confirmed also by the poor number of participating countries during the work on part VI of the MLI and to the even low countries that have lately adopted the arbitration part thus amending their existing bilateral treaties all in once. Notwithstanding the Multilateral Instrument proposal, arbitration suffered a scarce diffusion among both developed and developing countries. The trend against its adoption was emphasized also by countries that had opted in for part VI, since their hesitation have implied the notification of reservation on its application.

Among the tax community, as analyzed by Garoupa N.[155], there are two different deployments in relation to the usage of arbitration; the first, in favor of arbitration, is made up by legislators and tax practitioners while the second, even if not deliberately contrary to it, is of economist which have studied costs and benefits of arbitration and up to now such data demonstrate that the real efficiency of tax arbitration is unclear because of a lack of empirical analysis. The article explains that also in tax arbitration, agency costs represents a problem for its future development and that prior to establish whether the arbitration is a beneficial tool or not, an individual and an aggregate comparison of costs and benefits is necessary. Only if the latter are higher in respect to the costs sustained, both when considering the individual taxpayer's costs and benefits or the government and their aggregate wealth, arbitration is deemed effective, otherwise there are no empirical evidence of its beneficial effects.

The skepticism toward the amendment of tax treaties with an arbitration clause can be overcome thanks to the introduction, either in the international field as proposed by tax experts for the EU Community, of a permanent arbitration structure. Such system exercise control over the work done by the arbitrators, ensuring the correct fulfillment of all the rules and their homogeneous enforcement notwithstanding what country or which taxpayer are involved. Its supervisory role would ensure the uniform application of procedural rules for all cases in question and it may gain experiences over the years on tax arbitration matters that can be of relevant advantage when dealing similar issues in the future. That same stable institution, in case of need, can supply developing countries with the expertise of the members, given that their poor resources available may deprive them from acceding to the procedure; such support role can be an important push factor to the major widespread of arbitration. In essence it may represent a good compromise which both ensure a standardization of the procedure and a capillary diffusion of arbitration thus reaching consensus even from more reluctant countries, showing them all the benefits that this process can generate.

[155] Garoupa N., 2019, *Domestic Tax Arbitration: Some Economic Considerations*, INTERTAX, Kluwer Law International BV, The Netherlands, Volume 47, Issue 8 & 9, p.760-765.

The international market and the elimination of barriers has created an incentive for multinational companies to look for a tax heaven location, whilst the aggressive campaign of sovereign state to tax the income where the value is created has emphasized the opposite problem, which is the double taxation of profits. As it said the truth lies somewhere in between the complete avoidance of taxation and DT. The correct balance between these two extreme situations can be identified only with a complete legislative framework that prevents tax planning strategies with the scope of collecting a higher portion of income by companies and aggressive tax planning campaign by states. The right level of taxes levied indiscriminately to all businesses can promote the correct development of a free international market that assure a fair level of competition. An equal treatment of businesses located in different countries from a tax perspective is nowadays an even more strategic key point to achieve; indeed, due to the globalized society in which we live and, more particularly for the whole enhancement of the human well-being such inequal situation can no longer exist. The context to deal with, in order to reach this ambitious assignment, is the fact that the adoption of arbitration as a mandatory task still encounters arid ground, making its proliferation difficult; many countries, in particular developing ones, for a series of structural and cultural reasons are against its introduction because they fear of being controlled, once again, by developed countries even in relation to tax issues or more, in case where arbitrators came from an industrialized countries they are afraid that their judgments may not be free of bias. The scope of spreading arbitration all over the world is that to enhance the tax playing field and allow a health business competition. Such objective can be faster achieved through the adoption of an arbitration clause by countries that prior were reluctant. For sure it would be a gradual process that takes time, and patience is essential, because states must convince themselves of the progress they are doing and set aside their doubt and their prejudice against such innovative tool.

The overall limited amendment of the tax treaties thus inserting the arbitration clause in the international arena, as suggested by Salehifar A.[156], in a recent study is connected with two drawbacks of the procedure: its binding nature and its ad-hoc basis structure. In particular he explains that the current debate relating to the OECD and UN MTC on the adoption of arbitration clause is on whether the current ad-hoc structural form, in which each procedure is specifically designed by the CAs and the arbitration panel is newly set up each time, constitute a suitable way of enhancing the exiting MAP process or not. Indeed, arbitration is no more available if the authorities reach a conclusion through a MAP, regardless of the fact that the

[156] Salehifar A., 2020, *Rethinking the role of arbitration in international tax treaties*, Journal of International Arbitration, Kluwer Law International BV, The Netherlands, Vol.37, n°1, p.87-130.

agreement reached is deemed satisfactory or not. The taxpayer, once a decision is rendered through MAP, has no more possibility of appealing to arbitration and it may only reject its implementation appealing to the domestic legal remedies. The constraint is given by the fact that the procedure in both MTCs is presented as an extension of the MAP procedure. Not being an independent and autonomous process lock in its activation upon the request of the taxpayer after the two or three years unresolved pending MAP case. The purpose is that the taxpayer should prior search a relief to DT through the amicable settlement procedure and, if that procedure does not come to a resolution or if it fails to do so, it can appeal to the arbitration instrument. Instead in some circumstances, the taxpayer, given the relative low costs and the timeliness of the mechanism, may be eager to activate such procedure without keep on wasting resources in an inefficient procedure such as the MAP or because it deemed the result obtained incorrect.

The author explains that the risk of convenience behaviors by the CAs is not diminished with the application of the arbitration clause as it is embedded in the two major international reference models since there is no administrative control by an arbitration institution. The ad-hoc process cannot start if no procedural rules have previously been decided. Leaving parties to decide all the procedural rules necessary to conduct arbitration provide other cumbersome and time-consuming elements, because, prior to the formal initiation, the conflicting parties need to agree upon the rules to be applied. The grumpy relationship, which continues after the unresolved MAP procedure, does not simplify agreement on the regulation and the introduction of an external institution that provides a standardize set of rules to use might serves to avoid the waive of recourse to arbitration due to the fact that there is no pre-settled ruling. To this purpose rules are drafted inside the OECD SMAA, but their non-binding nature threat to leave much autonomy to states during their bilateral treaties negotiation, slowing down the mechanism and thus providing the possibility of not finding an agreed rule for the application of the arbitration clause. So, arbitration clause cannot be applied if such ruling has not been priorly defined.

Another limitation of the current methodologies applied is connected with the fact that double tax treaties stipulated have a bilateral nature, whilst, due to the today's rapid economic growing and the globalization, multi-jurisdictional cases are no more the exceptions but are becoming more and more frequent. So, it urges the need to go beyond the dual nature of tax treaties and appeal to multilateral once. Arbitration cannot refer to this sort of *triangular cases* where a third countries is involved and it represents an emerging issue to deal with in the forthcoming years; probably adapting arbitration for a suitable usage on that specific cases, modelling functional multilateral agreements such as the Nordic Multilateral Treaty.

Starting from the analysis of the current procedure applied, the *lex lata*, he has found some loopholes in the functioning mechanism that can be corrected; in particular his reasoning started from a simple question: what are the implication of an agreement reached by the CAs obtained through political arrangements or other sort of compromises deemed unjust? The problem, he argues, are the agreements between competent authorities to share the slice of tax income, which led their behavior to be biased during the negotiation and there is no authority who exercises control over them. Even if, he sustained, that the probability of having biased attitude is less likely if compared to the national systems, there's still room for distortion. In addition, the subjectivity of arbitration implies that similar cases are not treated on the same way, since the recourse to the procedure is left as an option at the taxpayer's discretion. The fact is that in principle arbitration represents a solid and good legal instrument which ultimately provide a resolution to the taxpayer but in reality its application by the treaties countries gave rise to some criticism, showing that there is still a long way to go before reaching both widespread diffusion of arbitration and its homogeneous application without attitudes of convenience respect to the country within which tax agreements are made. In contrast to the existing provision in the arbitration field named *lex lata*, the advanced proposals, is called *lex ferenda*[157]. The recent studies in the arbitration area have revealed that the debate is nascent and they have suggested some improvement to guarantee adequate solution to the taxpayer without letting political interests or convenience among states to overwhelm the real issue of granting a method to avoid double taxation to the involved parties. That's why some new proposals, that are slowly becoming more widely accepted, relate to the introduction of a stable commission, that serves to control the activities of the CAs and manages the organizational part of the arbitration, providing a basic set of rules that is applied for each single case in an analogous way, without the occurrence of problem on different interpretation. Salehifar explains that through the adoption of an institutional arbitration panel the parties involved in a dispute decide to entrust the arbitration's management to a competent body such as the International Chamber of Commerce or the American Arbitration Association. The benefits of the institutional arbitration with respect to the ad-hoc form are many, first of all the incoherent application of arbitration among countries due to their bilateral tax agreements, thanks to the recourse to an institute, would be eliminated, thus granting an adequate and homogeneous application of the instrument. Another relevant issue, mentioned on the second chapter, regards the availability of experts in

[157] *Lex lata* and *lex ferenda* respectively refers to the existent law and to what the law ought to be; generally the latter is used to design future possible enhancement in the legislation starting from the existing defects. The author in this sense shape a desirable improvement, that can be adopted in the future for strengthening the mechanism, in the field of tax arbitration, starting from the acknowledge limits and weaknesses that the current discipline presents.

arbitration and transfer pricing matters, which can be easily overcome thanks to the set-up of a list of independent experts at disposal of competent authorities. The CAs may propose arbitrators that are lately confirmed or not by the commission depending on whether they have the qualifications and the level of experience required or not; their competences and knowledge would be tested by a reliable body. Moreover, the institute can assist the tax authorities to identify arbitrators that better suit for the case in question, given its past experiences and its law knowledge on the relevant matter. His study asserts that the rare application of arbitration to solve international tax disputes may be connected with its difficult implementation and with the problem that such procedure embedded: it leaves too much autonomy to countries to shape arbitration rules that better fit with their specific case and it does not provide binding guidelines. Instead of promoting the process, procedural rule to be lately decided, has refrained it, because another step on which to agree was added to the cumbersome path through arbitration, thus slowing down access to such procedure and limiting once again its spread. Among other benefits recognized, it is worth mentioning that thanks to an institution, which carries out the administrative functions, uniformity is provided in the interpretation of tax treaty given the coherent application of the detailed set of rules and lastly it can remove arbitrators due to their misconduct or their lack of independence. The institute would thus grant a more consistent interpretation of obligations and would assure a regularity in the treatment of issues.

The introduction of a permanent institution which provide a common set of procedural rules to be applied and at the same time operates control over the correct application of such ruling is an interesting proposal that should be seriously taken in consideration due to all the benefits that it could effectively bring in the international tax arbitration arena. The shift from an ad-hoc basis to an institutionalized procedure for sure cannot be immediate, but it is a gradual movement, which starts with the selection of an appropriate organization in which to incorporate the institution, in particular whether the OECD or the UN are suitable for the development of their own arbitration institution as the other organization in the commercial and investment area did. In the author's view the OECD, given the homogeneity of its member states, its relative low number (36) if compared to the UN (193) and the shared among them towards arbitration implementation might be the better candidate for the proposal of an arbitration institution in the form of soft law, since it may be a more acceptable way for introducing the arbitration as a resolutive method to international tax disputes. The high number of members states in the UN and their different economic development would imply an even more conflictual path since there are more different interests to satisfy. Instead, the OECD members are comparable developed countries with a relative economic power able to influence other nations on their arbitration future implementation decision and moreover, it can be a fertile ground for the foundation of institutionalized arbitration in the tax field. Furthermore, the OECD arbitration framework is technically more robust, and it contains a set of detailed guidelines. The flexibility of the instrument is left to parties, giving them the possibility to modify the pre-existent set of rules, without invoking an international tax court but leaving states to decide whether to adhere or not. The binding arbitration mechanism, as highlighted by the author, might appear in contrast with the initial freedom but these two elements are independent since the decision of recurring to the arbitration institute is optional, while once that state has opted in for arbitration, the disputes that arise must be carried through that mechanism and the outcome produced has a legal binding nature.

Another crucial point for the creation of a stronger international organism is connected with the precedential value attributed to previously solved cases; to keep the uniformity of treatment and the coherence through time a systems of precedents is considered essential and, in this sense, inspiration may be taken from the EU Directive which mandatorily foresee the publication of the decision assumed by the panel. A sort of register of the cases solved would guarantee the uniform application of the standard rules and the correct interpretation of law thus leading to consistent dispute resolution over time. As sustained by Altman, "*the development of a system of stable precedents is contingent on the tribunal developing and applying such precedents over a large number of cases*"[158]. Having as starting point a solid background made up by an historical archive of cases solved is of crucial importance but, prior that a well-founded structure, which applies such precedent, can be implemented, an arbitration institution must be created only in this way all the other relevant points can be touched. Finally, the decision rendered by a supranational organization widely recognized can easily be accepted and enforced by countries if compared to a national court judgement.

The issue that would undoubtedly arise is if the non-binding nature to join the arbitration instrument would bring to achieve a consistent widespread diffusion of the institute without recurring to other measures such as the compulsory enforcement or if, instead, due to its voluntary nature the capillary propagation of the tool encounter such limitation and a sort of more restrictive measures are desirable in order to reach the objectives settled.

[158] Altman Z. D., 2005, *Dispute Resolution Under Tax Treaties*, IBFD, Vol.11, cited in: Salehifar A., 2020, *Rethinking the role of arbitration in international tax treaties*, Journal of International Arbitration, Kluwer Law International BV, The Netherlands, Vol.37, n°1, p.87-130.

4.2.1 Taking inspiration from the success of arbitration in other fields

Arbitration, as previously mentioned, has already been adopted in other fields, such as in the multilateral trade agreements and in the Bilateral investment Agreements (BIT), with successful and satisfactory results. Some experts, among which Kollman and Turcan (2015)[159], suggest that its usage and application, out of tax treaty issue, can provide a valuable and useful feedback for the improvement of arbitration in resolving tax treaty disputes. They explain that, in the case of BIT, contrary to the OECD Convention for tax treaty, there is not a reference model, but, each single state has developed its own model in which the arbitration clause might differs. In respect to the BIT, the authors assert that it can refer to tax issue, since for attracting foreign investors, typically in a developing country a tax incentive serves as a motivation to pilot investment. In such agreements the taxpayer has more influence as it directly participates to the debate, since the dispute is an investor-to-state ones and it is part of the proceedings. The example provided in the BIT area, in the authors' view, can provide an advantage for the taxpayer especially in cases where developing countries are involved because their lack of experienced personnel can be overcome by the institution of an arbitration tribunal. More in general, the taxpayer wider spectrum of rights recognized in the BIT, due to its nature, can be an example to follow in the enhancement of taxpayer protection when applying the tax treaty arbitration. In this sense, another element in favor of the institutionalization of arbitration is connected with the higher trust that it could bring in tax disputes especially in the perspective of developing countries. They may embrace a more proactive attitude toward arbitration and leaving their usual reluctance, given that an institution provides a list of available arbitrators from which they can draw thus supply them the necessary tools for conducting arbitration. The institutionalization of arbitration may have beneficial effects to the acceptance of arbitration by developing countries.

Indeed, as advanced by Altman[160], the major taxpayer involvement, passing from a state-to-state mechanism to a private-to-states once, thus allowing to it a direct access to the dispute resolution mechanism represent a way for enhancing the whole arbitration procedure. The taxpayer's involvement is deemed a necessary step to eliminate the existing political arrangements problem that compromise the trust in the CAs behavior, and their legitimate interest would be assured by a supranational organization. A similar institute has been used in

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[159] See note 64. Kollmann J. and Turcan L., 2015, *Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges*, in International Arbitration in Tax Matters, IBFD, Chapter 2, p. 15-76.

[160] See note 158. Altman Z. D., 2005, *Dispute Resolution Under Tax Treaties*, IBFD, Vol.11. cited in See note 156, Salehifar A., 2020, *Rethinking the role of arbitration in international tax treaties*, Journal of International Arbitration, Kluwer Law International BV, The Netherlands, Vol.37, n°1, p.87-130.

other areas, such as in the commercial and investment treaty arbitration and it has revealed its successful of standardize the procedure and to provide a structured organization on which to rely on. The positive results achieved through the application of arbitration in other fields provide parties with basic knowledge that the system implemented works and produced coherent structure applicable for all the similar cases to deal with.

The undoubtedly benefit carried by the investment arbitration are speed, efficiency and flexibility on dispute resolution; its path may be followed in tax treaty arbitration for achieving similar results. Arbitration in investment treaties has been used for a long time if compared to the 2008 introduction of the arbitration clause in the OECD Model and, for this reason it may represent a reference model from which take inspiration since it has been applied for a longer period and it has a more defined structure and functioning rules.

Moreover, the introduction of the arbitration clause in the OECD Convention does not mean that DTTs are automatically updated, indeed, up to some years ago, a large number of countries were against the introduction of mandatory arbitration on their tax treaties and so they didn't amend their treaties with the new clause. Over the time, fortunately, many countries have reviewed their position changing their mind, also thanks to the success achieve on arbitration in other areas, and for example, the US, which was prior contrary to the introduction of mandatory arbitration, have later embrace that provision. Nowadays more and more countries are slowly taken actions toward this direction opening their mind to this powerful resolutive tool. In this sense can be interpreted the European initiative, after the acknowledged failure of the Arbitration Convention, which put pressure on the mandatory arbitration for issues relating on tax treaties dispute. The Directive was pushed by the desired of obtaining a real and concrete internal market in its wider sense and to this scope it was necessary to put an end to inequality treatment of cross-border situation if compared to the merely domestic one, such air of change in the EU context was powered by the global BEPS initiative that give the unique international opening possibility to dialogue and to tackle the issue arising from the digitalization of the market and its connected issues.

4.3 Comparison between the international MLI and the EU Directive

The international tax community and the European one has moved, despite with a different timing, toward the same direction, with the goal of providing a more uniform solutions to address the DT issue. The two initiatives, the MLI from one side and the European Directive on the other, share the basic structure of MAP and arbitration but they also present some differences. Their commonalities and their divergencies are now reassumed.

Both the EU DRD and the OECD/G-20 MLI part VI represent a turning point on tax treaty arbitration, one at the European and the other at the international level. They both aim to provide a more functional binding instrument that overcomes the loopholes emerged with the poor diffusion of the OECD arbitration clause and the scarce utilization of the EU Arbitration Convention. Secondly, given the long unspecified time required for the dispute resolution by applying the previously available tools, they now provide a more structured timeline that encompasses each single passage, so the deadlines punctuate in a non-deferrable manner - with some exceptions - thus assuring that the proceedings is articulated in a fluent manner and the rigid limit must be observed by the CAs, the arbitration panel and the taxpayer. Another interesting enhancement, that is probably easier to catch in the EU context, is the wider scope of application; indeed, the Directive aims to extend the limited scope of the Convention in regard only to transfer pricing disputes, covering a more ample region of controversies, namely all the disputes that regard DT, originated both from conventions or bilateral tax agreements between states. On a similar perspective also the MLI pursues in general the elimination of DT or, of a taxation that is not in accordance with the Convention, thus enclosing an extended scope. Moreover, either the initiatives mandatory activates the arbitration procedure upon taxpayer requests when the MAP stage has resulted unsuccessful, and a similar structure of the various MAP stage can be identified.

The common factors are opposed to some important differences. Starting from the application perspective, arbitration contained in part VI of the MLI has a limited application since it is optional, and for this reason it implies the amendment of the arbitration procedure only on an agreed basis by the contracting states. So, they may decide not to adopt such part on their Convention, whilst the Directive instrument, even if not directly binding, once transposed into domestic legislation it produces its effect *de facto* constraining member states to its adoption. Another relevant difference is the composition of the arbitration panel, which in the OECD Multilateral Instrument is made up by three independent arbitrators whilst following the DRD it may vary from the Advisory Commission to an Alternative Dispute Resolution Commission, with a variable number of members from five to a maximum of nine members, and it encompasses representatives of each CA. The European procedure presents a more detailed set of procedural rules and, even if also within the MLI an enhancement was made if compared to the prior arbitration rules provided in the SMMA. Moreover, the European law puts more attention to the participation of the taxpayer throughout all the stages, recognizing it the right to participate in the proceedings, whilst in the OECD framework the taxpayer's rights during the MAP are more limited. In addition, the flexibility provided by the EU tool gives access to the taxpayer also to other alternative dispute resolution instruments such as mediation and conciliation.

In regard with the decision provided, the MLI expressly diverges from the previously stated preference in the OECD SMAA for the independent opinion approach, arguing that the baseball approach can be the realistic way to pursue for speeding up the resolution process and reducing the growing number of pending MAP case On the opposite, the European scheme explicitly mention the independent opinion as the favorite resolution method. The Directive, due to its EU legal nature and to the fact that it must accomplish Union law, has expressed its preference for the independent opinion approach, arguing that in order to preserve the compliance with Union law and assuring a fair trial and an adequate level of protection to taxpayer, decision should preferably be taken by independent experts after a deep analysis of the case, which more likely would judge the case impartially, keeping uniformity on the decision rendered. As already mentioned, the DRD gives the possibility to recur to the baseball approach, opting for the ADRC which can take the form of a Standing Committee; the baseball approach meant in the Directive differs from that of the Multilateral Instrument in the sense that the mandatory publication of the decision cannot be excluded pursuant to art. 18, so the Directive ensures the publication of the decision even without the consent of the involved parties, and, despite its publication does not have precedential value, it is thus granted the transparency and the uniform conduct of the arbitration procedure, notwithstanding the type of procedure applied in the decision-making process. Therefore the baseball approach with reasons is allowed according to the Directive, whilst the MLI foresee the adoption of the independent opinion approach if opted by the contracting states during the negotiation of part VI.

In the international context the fast resolution of cases, reached through the adoption of the baseball approach, has precedence over the comparable and public dispute resolution, thus possibly resulting in opposed decisions on similar cases; this loophole is defined by the tax community as a missed opportunity by the MLI to achieve a greater homogeneity with respect to tax statues in a global framework. The tax community is in general confident on the fact that the Directive represents an enhancement respect to the MLI discipline and that it may be determinant for the future attraction of developing countries, since the above mentioned flexibility grants access also to other methods to resolve disputes and not only to arbitration.

Both strategies are driven by the pressure of definitely and ultimately fight the dual taxation issue, accomplished by the usage of effective dispute resolution instrument, thus permitting an attractive landscape for investment and, at the same time protecting the revenue base.

4.3.1 How the EU Directive and the MLI relates at EU legislative level

The majority of EU member states are also part of the OECD group and the immediate thought is that the two different tools described may contrast each other and that for this reason some difficulty may be encountered. Union members result from one side bound by the transposition of the EU Directive on their domestic law which, due to its secondary law nature, implies the consequent mandatorily application of the dispute resolution mechanism for unresolved MAP issue relating to dual taxation exclusively among member states. On the other side, instead, the OECD Convention is only a reference model from which to start for the draft of tax treaties with a non-binding nature that can be used between EU and also non-EU members. On this point, it seems more likely that, due to its higher hierarchical position, the Directive is applied in the territories of the Union whilst the OECD soft law instrument is more suitable for the bilateral tax treaties stipulated with non-EU countries. The issue may arise when community members have a provision contained in their bilateral tax treaties that is not in line with the Community law. Independently from whether the agreements is concluded between EU or non-EU nations, the question of compatibility with the Union law has priority over the application of the provision and, in case that the Court declare the incompatibility, the relevant article of the tax treaty cannot be applied. When the Multilateral Instrument was drafted it was relevant to identify its secondary nature, underlying the superiority of the Union rules; it can be considered like international tax treaties and then it must respect the same compatibility constraint with EU law. In this sense, as remarked by Govind S.P. and Turcan L., "*EU law has supremacy over domestic law, including international agreements such as tax treaties and, by extension, the MLI*"[161]. There is no doubt: EU law and thus the Directive has supremacy over the Multilateral Instrument and, as also highlighted on art. 351 of the TFEU, if some incompatibilities with EU law arise due to the international tax agreements concluded by member states, they shall immediately adjust or modify such settlements in order to eliminate the contradiction, because such procedure cannot exist and neither be applied. In this context, the Directive has remarked its superiority over the settlements stipulated between EU and also non-EU members and its application is confirmed for question that concerns the possible divergence from the Union rules; the Directive, in its territories of application, has the priority over the tax treaties in general but also with respect to the MLI, which is included as an international agreement that has to accomplish the EU law. When the risk of compatibility is safeguarded and the possible divergencies present in the international agreements are promptly

[161] See note 120. Govind S.P. and Turcan L., 2017, *The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive*, 71 Bulletin for International Taxation, n° 3/4, p.1-11.)

corrected the two instruments, namely the Directive and the relevant tax treaty, can both be applied, and in this case it is up to the taxpayer to decide which one to adopt. The choice of the instrument to deem relevant for the resolution of the pending case must be explicitly made by the taxpayer during the submission of the MAP request; once it has express its preference it is no longer possible to modify the relevant agreements that it intends to apply for the resolution of the dispute.

4.4 Future implementation of tax treaty arbitration

The OECD arbitration clause and the EU Directive presented, although designed within the same scope of avoiding double taxation, represent two different perspectives. In the first case the international tax law has the characteristics of soft law and it embodies all the enforcement problems connected to its non-binding nature, due to the fact that it is simply a guideline provided by an international organization and its legal application is subject to the discretionary power of parties. Indeed, the OECD MTC is only an example from which states can take inspiration during the draft of their own DTT and it must be highlighted on that point that the novelty on arbitration introduced into the OECD Model are not automatically added to each singular bilateral treaty stipulated, but each one must be renegotiated with the amended part included therein. For this purpose the MLI was proposed as a tool that provides the automatic modification of the parts that were subject to rearrangements, thus granting the simultaneous progress of the OECD Model and the effective application of such tools in the bilateral tax treaties already concluded, that do not need to be renegotiated one by one but they merely require states to sign the Multilateral treaty.

To reach a wider audience it was recognized to the MLI a higher degree of flexibility which has in substance pushed back the efforts done in regard to promotion of arbitration; in fact, the low consensus achieved in the OECD community to include an arbitration clause on their tax treaties has open the opportunity to make reservation on part VI of the MLI that deals with the arbitration issue. The limited participation to the preparatory work for part VI and the consequent low number of member states that have decided to entirely accept the application of such part may in a certain sense represent a failed tentative to the share of arbitration. Another element that can represent an obstacle is connected with the nature of bilateral tax treaties that can unilaterally be terminated by the contracting states at any moment for whatsoever reason, so they do not embed a strictly enforceable provision as the Directive which has the nature of secondary EU binding law and thus must be accomplished, without the possibility to terminate its application. The reality is that bilateral tax treaties concluded between contracting states attempt to provide states with the direction towards which the discipline is moving. Countries, sooner or later, due to the unavoidable globalization path, will come up with DT issue and their sovereignty will fall in overshadowed due to the higher international pressure. Despite the OECD MC is defined as non-legally binding, given the worldwide recognized importance of the organism, its influential power makes sure that states sooner or later would follow such advices.

The Directive instead embodied in all respects an enforceable EU law that is binding among members states. The hard-law European Directive is thus applicable and it produces its legal effects. The totalizing European discipline implies a constraint among member states to the appeal on arbitration; although the arbitration procedure is encompassed within the MAP administrative procedure, it represents a last resort tool that is used in extreme situations; for sure it does not represent an ordinary remedy against DT, but it provides a close solution in cases that were pending for a long period. In addition, the member states represent a uniform set of countries in relation to their economic level and, for this reason, the application of the Directive for dispute resolution containing arbitration as a last tool available, due to the nature of the EU, was a more simple task if compared to the OECD work, since the international organization entails developed and developing countries with different needs and particularly a different set of available resources. The position against arbitration sustained by developing countries has to be analyzed in light of their lack of a structured organization to manage DT controversies in general, their poor apparatus and their scarce economic resources represents their major limits. They cannot apply arbitration without experts with a deep knowledge of their history and their culture, and even if experienced arbitrators coming from other countries are found, developing countries fear that they may be corrupted or tempted to pursue the interest of developed countries.

In this sense, the possible success of the Directive in the Union territories may represent a model for the others, in particular for developing countries that at the moment are the most reluctant toward the introduction of an arbitration clause on their DTTs. The same fear was recorded in the past by UE member states and either by developed economy, because they didn't want to waive their sovereignty power to tax. Slowly, they realized that their rights was no longer enforceable in a globalized economy and thus they decided to put aside the sovereignty issue for a more relevant question: the international market and the free market economy.

The objectives for the future are that to effectively apply the arbitration clause of the MLI and that of the DRD and enhancing them, thus reducing the growing number of actual unresolved

MAP cases thanks to the implementation of a permanent apparatus that is able to manage such disputes. Moreover, the scope of the MLI is also to broaden the consensus base reached to the skeptical countries, namely the developing countries but in general all the countries, with the exception of those which have decided to apply also part VI of the instrument. The wider consensus can be achieved thanks to the monitoring and implementation program that provides statistical data regarding the usage of the MAP and of the arbitration procedure. Persuade more and more countries to embrace tax arbitration is a task that requires time and, probably, it can be easily achieved thanks to the creation of a stable apparatus that grants the correct application of the procedural rules and which operates a supervision control over the work done by the arbitrators.

CONCLUSIONS

The mandatory binding arbitration is slowly becoming an unavoidable tool for the resolution of disputes to which states must recognize its power and its effectiveness, even if for a residual category of cases in which the mutual agreement procedure did not lead to an agreement between the competent authorities. Arbitration is deemed a last resort method for the authorities to solve the dispute within the framework of the MAP administrative procedure.
The fiscal sovereignty is no longer enforceable by states and if they stuck on this reason the situation may reverse as "*by not committing to the treaty arbitration provision […] states may face decreased investments and consequently less states revenue […] soon, sovereignty will not be an excuse for a state not to commit to arbitration as a form of dispute resolution*"[162]. The flow of capital within the national borders has to be encouraged in all the possible ways, because it is intrinsically connected to the economic growth; such investments are deployed for the researches and the technological innovations and they are of crucial relevance for assuring the states collection of taxes. Arbitration clause is for this reason destined to slowly be introduced in all tax treaties, independently from the more or less justified hesitations advanced up to now by the reluctant states.

To this extent, as remarked in the OECD Model, the amendment of the arbitration paragraph proposed within the MLI, in order to be adopted by as much states as possible, has been provided with a high degree of flexibility and, in this view, each state that has to decide to introduce the arbitration clause into a tax treaty has lately to agree with the other contracting states on the procedural rules to apply through an amicable settlement. Moreover, since the mere addition of the arbitration clause does not automatically imply its application, but procedural rules need to be agreed, it is considered more appropriate to introduce it only into conventions in which states are actually intentioned to agree on its complete implementation.

Another relevant issue is the different level of power and of the available resources; such disparities between developing and developed countries make the achievement of a common arbitration mechanism more difficult in the international context and for sure, if compared to the EU area, such divergencies are greater. Poor countries are not very inclined to arbitration adoption, and on their perspective the poor resources available may be wisely used for more structural reforms, suitable to favor the country development.

[162] See note 75. Markham M.A., 2019, *Arbitration and Tax Treaty Disputes*, Arbitration International, Vol.35, Issue 4, p. 473-504.

Professor and arbitrator Margaret Moses, in relation to commercial arbitration, stated that "*certainly, the goal in international arbitration is to permit people from different countries and cultures to resolve their differences in ways that leave all parties feeling that the private system of dispute resolution serves a shared sense of justice*"[163], the purpose of reaching a common equal treatment of cases notwithstanding the parties background can for sure be extended also in the field of tax treaty arbitration. The achievement of a satisfactory resolution to dispute can thus be pursued thanks to fairness and justice application of the tax treaty arbitration methodology that is shared and accepted by states.

The successful experience gained during the several years of application of arbitration in both investment and commercial treaties has a positive effect towards the widespread diffusion of arbitration in relation to international tax matters. The solid arbitration structure build up in the other fields has suggested the future direction of the arbitration: its institutionalization. Through the creation of an arbitral institution with the task of governing international pending disputes homogeneity in the application and interpretation is no more hampered, and the arbitral panel could be easily made-up thanks to the available list of tax experts and arbitrators. The arbitration institution has a wider organizational role and its creation, as suggested by some, should be carried out by the OECD since its limited number of members states presents similar economics and development characteristics in contrast to the heterogeneous UN members countries and it may be easier its first implementation. Also, thanks to its recent initiative to provide an efficient mechanism for the resolution of disputes, the OECD efforts to the inclusion of an arbitration procedure on the Model Tax Convention represents an element that better suits for the creation of an internal apparatus to manage arbitration disputes. Eventually, the lucky result obtained by the OECD panel structure could function as a basis for the development of an institution also in the UN framework. Of the same opinion are some authors, as regarding the EU sphere, the Advisory Commission responsible for rendering a decision as suggested by the proposal advanced by a group of experts presented on the third chapter, should be updated aiming at the creation of a Standing Committee with a permanent nature at European level.

Other relevant points to stress on relates to the efforts of enhancing the transparency and ending the secrecy decision assumed by the panel thus facilitating the future development of arbitration and, even if not yet recognized, the creation of a sort of precedent case or simply having an example on how similar cases are dealt. Surely, it provides benefit in terms of certainty of

[163] M. L. Moses, 2017, *The Principles and Practice of International Commercial Arbitration,* Cambridge University Press, cited in - see note 96 - Lennard M., 2014, *Transfer Pricing Arbitration as an Option for Developing Countries*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 42, Issue 3, p.179-188.

results and in terms of time saved for the resolution of the case, since similar cases can be handled in analogous way.

The uncertain political and economic times brought after the implementation of the BEPS instrument represents the challenge of the renewed tax systems, since an opening like the one occurred during the OECD/G20 Inclusive Framework is unlikely to happen in the near future. The strong power of such massive reform should be exploited and used wisely for the creation of an efficient apparatus, slowly including also developing countries on its ambitious reforms tax planning. If in the international tax area, the current situation is unknown due to the deep BEPS reform, which has highlighted that uncertainty will last also in the subsequent years, things follow another path in the EU area. The increasing numbers of pending disputes, as showed by the recent available data, revealed also in the Community the inefficiencies of the amicable settlement dispute resolution mechanism and it has highlighted how much such a functioning tool is needed. Thus, the efficient and effective resolution of disputes through the recourse to arbitration represents a pathway that states need to seriously take into account in the following, since it is the instrument that provides certainty and an adequate level of confidence desired both by states and by taxpayers. The key aspect for the triumphant outcome lies upon the creation and improvement of the existing procedural rules. In this perspective, the OECD should make an effort and update its existing guideline with a more detailed set of practical regulation that could help states, eager to submit arbitration, to adopt it quickly without wasting time. The strengthening of the tax law apparatus is a challenge that almost all states need to tackle with, since the creation of an arbitration panel relies upon the presence of experts in transfer pricing and more in general in arbitration matters.

The efficient implementation of an arbitration procedure, supported by a permanent structure, can be the dispute resolutive mechanism that push up both investments and trades; given the fact that investors are more willing to locate their business in states where the tax certainty is granted by a functioning resolution system that provides them the certain level of tax they are going to pay. The functioning of arbitration is so deemed essential for the future development of a country. The optimism toward the usage of arbitration is confirmed indeed "*in the last decade arbitration is reaching more and more consensus in the international tax arena since it will increasingly be seen as a valid cross-border tax resolution system*"[164] and its overall acceptance is closer.

[164] See note 117. Juanpere B.A., January 2020, *The Resolution of Tax Disputes and International Tax Arbitration*, European Journal of Business and Management Research, Vol. 5, No. 1, p. 1-10.

REFERENCES

Altman Z. D., 2005, *Dispute Resolution Under Tax Treaties*, IBFD, Vol.11.

Arnold B., 2016, *International Tax Primer*, published by Kluwer Law International BV, Alphen aan den Rijn, 3rd edition.

Arnold B., 2015, *The Scope of Arbitration under Tax Treaties*, in International Arbitration in Tax Matters, IBFD, Chapter 5, p. 111-135.

Ault H., Sasseville J., 2009, *OECD Model: The New Arbitration Provision*, Bulletin for International Taxation, Vol.63, Issue 5, p. 208-215.

Bantekas I., 2008, *The mutual agreement procedure and arbitration of double taxation disputes*, ACDI - Anuario Colombiano de Derecho Internacional, Vol. 1, p.182-204.

Bravo N., 2019, *Mandatory Binding Arbitration in the BEPS Multilateral Instrument*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p.693-714.

Brockman K., 2018, *Dispute resolution: OECD collaboration*, International Tax Review, Vol. 29, Issue n° 7, p. 3.

Burnett C., 2007, International Tax Arbitration, Australian Tax Review, Vol.36, p.173–190.

Christians A., 2009, *Sovereignty, taxation and social contract*, Minnesota Journal of International Law, Vol. 18, n° 1, p. 99-154.

Coates W. H., January 1924, *Report on Double Taxation submitted to the Financial Committee by Professor Bruins, Einaudi, Seligman and Sir Josiah Stamp*, Vol. 87, p. 99-102.

Covington J. N., 1989, *Dispute Resolution Under Tax Treaties: Current and Proposed Methods*, Texas International Law Journal, Vol. 24, p. 367-388.

Desax M. and Veit M., 2007, *Arbitration of Tax Treaty Disputes: The OECD Proposal*, Arbitration International, Vol. 23, Issue 3, p. 405-430.

Dourado A.P., 2019, *Post-BEPS International Tax Arbitration*, INTERTAX, Kluwer Law International BV, The Netherlands, Volume 47, Issue 8 & 9, p.671-673.

Ellis, M. J., 2002, *Issues in the Implementation of the Arbitration of Disputes arising under Income Tax Treaties-Response to David Tillinghast*, Bulletin for International Fiscal Documentation, Vol. 56, Issue 3, p.100-101.

Eloranta J., 2011, *Why did the League of Nations fail?* Cliometrica Vol.5, p.27–52.

Garoupa N., 2019, *Domestic Tax Arbitration: Some Economic Considerations*, INTERTAX, Kluwer Law International BV, The Netherlands, Volume 47, Issue 8 & 9, p.760-765.

Govind S.P. and Turcan L., 2017, *The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive*, 71 Bulletin for International Taxation, n° 3/4, p.1-11.

Ismer R. & Ruß J., 2020, *What Is International Double Taxation?*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 48, Issue 6 & 7, p.555-563.

Jones A., **John F. et al**., 1979, *The legal nature of the mutual agreement procedure under OECD Model Convention*, British Tax Review, p.333-353.

Jones A. J., 2019, *Types of Arbitration Procedure,* INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p.674-677.

Kofler G., 2019, *EU Tax Dispute Resolution Directive: The Deathblow to Double Taxation in the Europe Union*, EC Tax Reviews, Vol. 28, Issue 6, p.266-269.

Kollmann J. and Turcan L., 2015, *Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges*, in International Arbitration in Tax Matters, IBFD, Chapter 2, p.15-76.

Kollman J. et al., March 30, 2015, *Arbitration in International Tax Matters*, Tax Notes International, Vol.77, n°13, p.1189-1195.

Lennard M., October 2013, *TP Arbitration for Developing Countries: Benefits and Burdens*, 24 International Tax Review, Vol. 24, n° 8, p.28-33.

Lennard M., 2014, *Transfer Pricing Arbitration as an Option for Developing Countries*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 42, Issue 3, p.179-188.

Lindencrona G. and Mattsson N., 1982, *Arbitration in Taxation*, INTERTAX, Kluwer Law International BV, The Netherlands, Volume 10, Issue 3, p.76-82.

Lombardo M. and Garbarino C., June 22, 2010, *Arbitration of Unresolved Issues in Mutual Agreement Cases: The New Paragraph 5, Art. 25 OECD Model Convention, a Multi-Tiered Dispute Resolution Clause*. Bocconi Legal Studies Research Paper n°. 1628765.
Available at SSRN: https://ssrn.com/abstract=1628765.

Majdanska A. & Turcan L., 2018, *History of Arbitration in Tax Treaty Law*, in OECD Arbitration in Tax Treaty Law, Chaudhary, 5th edition, Linde.

Markham M.A., 2005, *The Resolution of Transfer Pricing Disputes through Arbitration*, INTERTAX, Kluwer Law International, Vol.33, Issue 2, p.68-74.

Markham M.A., 2015, *New Developments in Dispute Resolution in International Tax*, Revenue Law Journal, Vol. 25, Issue 1, p.1-30.

Markham M.A., 2019, *Mandatory binding tax arbitration—is this a pathway to a more efficient Mutual Agreement Procedure?*, Arbitration International, Vol. 35, Issue 2 p.149–170.

Markham M.A., 2019, *Arbitration and Tax Treaty Disputes*, Arbitration International, Vol.35, Issue 4, p.473-504.

Monsenego J., 2014, *Designing Arbitration in Tax Treaty, Reflection Based on the US Experience*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 42, Issue 3, p.163-168.

Monsenego J., 2019, *Does the Achmea Case Prevent the Resolution of Tax Treaty Disputes through Arbitration?*, INTERTAX, Kluwer Law International BV, The Netherlands, Volume 47, Issue 8 & 9, p.725-736.

Mooij H., 2019, *Tax treaty arbitration*, Arbitration International, Vol. 35, p.195–219.

Owens J., 2018, *Mandatory Tax Arbitration: The next frontier issue*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 46, Issue 8&9, p.610-619.

Park W. W., 2002, *Income Tax Treaty Arbitration*, George Mason Law Review, Vol. 10, Issue 4, p.803-874.

Park W.W., 2008, *Arbitrability and Tax*, L. Mistelis & S. Brekoulakis, eds., Arbitrability: International and comparative Perspectives, Boston Univ. School of Law, p.179-205. Available at SSRN: https://ssrn.com/abstract=3019219.

Perrou K., 2019, *Taxpayer rights and Taxpayer participation in procedures under the Dispute Resolution Directive*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8&9, p.715-724.

Petruzzi R., Koch P. & Turcan L., 2015, *Baseball Arbitration in Comparison to Other Types of Arbitration*, in International Arbitration in Tax Matters, IBFD, Chapter 6, p.137-156.

Picciotto S., August 2016, *International Tax Disputes: Between Supranational Administration and Adjudication*, ICTD – International Centre for Tax and Development, Working Paper n°55.

Piotrowski S., Ismer R. et al., 2019, *Towards a Standing Committee Pursuant to Article 10 of the EU Tax Dispute Resolution Directive: A Proposal for Implementation*, INTERTAX, Kluwer Law International BV, The Netherlands, Volume 47, Issue 8 & 9, p.678-692.

Pit H.M., 2014, *Arbitration under the OECD Model Convention: Follow-up under Double Tax Conventions: An Evaluation*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 42, Issue 6&7, p.445-469.

Pit H.M., 2019, *The Changed Landscape of Tax Dispute Resolution Within the EU: Consideration of the Directive on Tax Dispute Resolution Mechanisms*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 47, Issue 8 & 9, p.745-759.

Qiang C. and Pengfei Z., 2018, *A Theoretical Reflection on the OECD's New Statistics Reporting Framework for the Mutual Agreement Procedure: Isolating, Measuring, and Monitoring*, Journal of International Economic Law, Vol. 21, p.867–884.

Radu M. E., 2012, *International Double Taxation*, Procedia – Social and Behavioral Sciences, Vol. 62, p.403-407.

Ruiter M. and Barrett E., June 2012, *OECD Work on the Resolution of International Tax Disputes*, World Commerce Review, Vol. 6, Issue 2, p.50-52.

Salehifar A., 2020, *Rethinking the role of arbitration in international tax treaties*, Journal of International Arbitration, Kluwer Law International BV, The Netherlands, Vol.37, n°1, p.87-130.

Smith J.S., March 2015, *OECD looking for a way forward on arbitration*, International Tax Review, vol.26, n°2, p.7.

Tillinghast, D. R., 2002, *Issues in the Implementation of the Arbitration of Disputes Arising under income Tax Treaties*, Bulletin for International Fiscal Documentation, Vol. 56, Issue 3, p.90-99.

Tillinghast D. R., April 2-5, 2003, *ARBITRATION OF DISPUTES UNDER INCOME TAX TREATIES: A Panel Overview, Proceedings of the Annual Meeting*, published by Cambridge University Press on behalf of the American Society of International Law, Vol. 97, p.107-109.

Turcan L., 2017, *Dispute Resolution, in The UN Model Convention and Its Relevance for the Global Tax Treaty Network*, IBFD, Institute for Austrian and International Tax Law, series editor Michael L., Chapter 10, p.261-317.

Verlinden I., 2021, *The Value of a Principle … the Arm's Length Principle*, INTERTAX, Kluwer Law International BV, The Netherlands, Vol. 49, Issue 3, p.206-209.

Vogel K., 1986, *Double Tax Treaties and their Interpretation*, International Tax & Business Lawyer Vol. 4, p.4-85.

Vogel K., 1997, *On double taxation conventions*, Kluwer Law International, Amsterdam, p.33; cited in S. Guglielmi, *Il ruolo dei commentari OCSE nella interpretazione delle convenzioni contro le doppie imposizioni.*

OTHER SOURCES

Committee of Experts on International Cooperation in Tax Matters, 26th June 2020, *Chapter 5 on MAP Arbitration of the Handbook on Avoidance and Resolution of Tax Disputes*, *Item 3 of the provisional agenda: Dispute avoidance and resolution*.

Consiglio d'Europa, *Convenzione Europea per la risoluzione pacifica delle controversie.* Available at: https://www.coe.int/it/web/conventions/full-list/-/conventions/treaty/023. Consulted on 28th April 2021.

Corte di giustizia, 12th September 2017, *Sentenza Della Corte (Grande Sezione)*, Causa C648/15 Austria-Germania, Raccolta della giurisprudenza.

Ernst & Young, November 2001, *Transfer Pricing 2001 Global Survey Practices, Perceptions and Trends in 22 Countries*. International Tax Services.

European Commission, 25th March 1957, Trattato che istituisce la Comunità Economica Europea, Trattato Di Roma.

European Commission, 11th November 2011, *Double Taxation in the Single Market*, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee.

European Commission, 24th October 2018, *Overview of numbers submitted for Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention (AC) at the End of 2017*, EU Joint Transfer Pricing Forum, Direct Tax Policy & Cooperation.

European Commission, July 2019, *Overview of numbers submitted for Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention (AC) at the End of 2018*, EU Joint Transfer Pricing Forum, Direct Tax Policy & Cooperation.

European Commission, March 2021, *Overview of numbers submitted for Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention (AC) at the End of 2019,* EU Joint Transfer Pricing Forum, Direct Tax Policy & Cooperation.

European Commission, *Transfer Pricing and the Arbitration Convention*, Taxation and Customs Union.
Available at: https://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context/transfer-pricing-arbitration-

convention_en#:~:text=After%20long%20negotiations%20in%20the,of%20profits%20of%20associated%20enterprises. Consulted on 28th April 2021.

European Union, 18th December 2000*, CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION*, Official Journal of the European Communities.
Available at: https://www.europarl.europa.eu/charter/pdf/text_en.pdf. Consulted on 27th April 2021.

Faraz Alam S. and Pednekar S., May 2019, International Investment Arbitrations and International Commercial Arbitrations: A Guide to the Differences, India Corporate Law, A Cyril Amarchand Mangaldas Blog.
Available at: https://corporate.cyrilamarchandblogs.com/2019/05/international-investment-arbitrations-international-commercial-arbitrations-guide differences/#:~:text=Investment%20arbitration%20is%20undertaken%20to,claim%20and%20the%20parties%20involved Consulted on 11th March 2021.

Fiscalità internazionale, 2020, *Doppia imposizione internazionale: come riconoscerla e i rimedi.*
Available at: https://fiscomania.com/doppia-imposizione-fiscale-guida-rimedi/#:~:text=Questi%20due%20principi%20di%20tassazione,viene%20chiamata%20doppia%20imposizione%20internazionale, consulted on 17th February 2021.

Fisco oggi, 3rd September 2019, Ue, 2018, sprint per gli accordi Apa e le procedure amichevoli Map, Rivista online dell'Agenzia delle Entrate.
Available at: https://www.fiscooggi.it/rubrica/dati-e-statistiche/articolo/ue-2018-sprint-accordi-apa-e-procedure-amichevoli-map, consulted on 11th March 2021.

Fouchard C. and Krestin M., 7th March 2018, *The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!*, Kluwer Arbitration Blog.
Available at: http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/, consulted on 6th May 2021.

Gazzetta ufficiale dell'Unione europea, 20th August 1990, *Convenzione relativa all'eliminazione delle doppie imposizioni in caso di rettifica degli utili di imprese associate*, (90/436/CEE).

Gazzetta ufficiale dell'Unione europea, 13th December 2007, *Trattato di Lisbona che modifica il trattato sull'Unione europea e il trattato che istituisce la Comunità europea*, 2007/C 306/01.

Gazzetta ufficiale dell'Unione europea, 26th October 2012, *Trattato sul Funzionamento dell'Unione Europea* (versione consolidata), C 326/47.

Gazzetta ufficiale dell'Unione europea, 10th October 2017, *Direttiva del Consiglio (UE), sui meccanismi di risoluzione delle controversie in materia fiscale nell' Unione europea*, 2017/1852.

Kofler G., 2019, *Comparative Tax Policy seminar: EU Tax Law and Policy*, Johannes Kepler Universität Linz, slides 263-269.

Mengozzi P., 27th April 2017, *Opinion of Advocate General Mengozzi, Republic of Austria v Federal Republic of Germany, Case C-648/15*.
Available at:
https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:62015CC0648&from=EN, consulted on 29th April 2021.

Migliorini F., November 2020, *Doppia imposizione internazionale: come riconoscerla e i rimedi.*
Available at https://fiscomania.com/doppia-imposizione-fiscale-guida-rimedi/#:~:text=Questi%20due%20principi%20di%20tassazione,viene%20chiamata%20doppia%20imposizione%20internazionale, consulted on 18th February 2021.

Nazioni Unite, *Storia.*
Available at: https://unric.org/it/storia-2/, consulted on 16th February 2021.

OECD, February 2006, *Proposals for Improving Mechanisms for The Resolution of Tax Treaty Disputes*, Public discussion draft, Centre for Tax Policy and Administration.

OECD, January 2007, *Improving the resolution of tax treaty disputes*.

OECD, February 2007 Version, *Manual on Effective Mutual Agreement Procedures (MEMAP),* Centre for Tax Policy and Administration.
Available at: http://www.oecd.org/ctp/dispute/manualoneffectivemutualagreementprocedures-index.htm

OECD, 2014, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties*, Action 15, OECD/G20 Base Erosion and Profit Shifting Project.

OECD, 18 December 2014 – 16 January 2015, *BEPS ACTION 14: Make Dispute Resolution Mechanisms More Effective,* Public Discussion Draft.

OECD, 2015, *Final report on Action 14 Making Dispute Resolution Mechanism More Effective*.

OECD, 2016, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*.

OECD, 2017, *Background brief Inclusive Framework on BEPS*.

OECD, 2017, *OECD Model Tax Convention on Income and on Capital: Full Version 2017*, OECD Publishing, Paris.

OECD, 2017, *Mutual Agreement Procedure Statistics for 2015*.
Available at: www.oecd.org/ctp/dispute/mapstatistics-2015.htm

OECD, 2017, *Improving mutual agreement procedures*, Tax Administration 2017: Comparative Information on OECD and Other Advanced and Emerging Economies, OECD Publishing, Paris, Ch.13, p.175-180.

OECD, June 2018, *OECD/G20 Inclusive Framework on BEPS Presentation*.
Available at: www.oecd.org/tax/beps/flyer-inclusive-framework-on-beps.pdf.

OECD, 2019, *Mutual Agreement Procedure Statistics for 2019*.
Available at: https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm.

OECD, June 2019, Interview to Pascal Saint-Amans and Masatsugu Asakawa, *History of the G20 & taxation*.
Available at: https://www.youtube.com/watch?v=vyrzdg8kFB8.

OECD, 2020, *OECD/G20 Inclusive Framework on BEPS Progress*, report July 2019 – July 2020, part IV evaluation, transparency and tax certainty, p.29-33.

OECD, *What is BEPS?*.
Available at: https://www.oecd.org/tax/beps/about/.

OECD, *Action 14 Mutual Agreement Procedure Minimum Standard.*
Available at: https://www.oecd.org/tax/beps/beps-actions/action14/.

OECD, *Building fairer societies through global tax cooperation*.

Available at: http://www.oecd.org/tax/beps/.

Pistone P., 2020*, Il Diritto secondario dell'Unione Europea in materia tributaria*, Diritto tributario europeo, Giappichelli, p. 292-313.

Schwarz J., 20th September 2017, *The European Court of Justice and Interpretation of Tax Treaties*, Kluwer International Tax Blog.
Available at: http://kluwertaxblog.com/2017/09/20/european-court-justice-interpretation-tax-treaties/, consulted on 29th April 2021.

United Nations*,* 2017, *Model Double Taxation Convention between Developed and Developing Countries*, New York.

Valente P., 2012, *Transfer pricing e doppia imposizione: soluzioni secondo la Commissione europea*, il fisco, approfondimento fiscalità internazionale, p.4.633-4.636.

Verhagen T.H.J., 13th September 2017, The European Court of Justice as Court of Arbitration for Disputes under DTA's (Case C-648/15, Austria v Federal Republic of Germany), Kluwer International Tax Blog.
Available at: http://kluwertaxblog.com/2017/09/13/european-court-justice-court-arbitration-disputes-dtas-case-c-64815-austria-v-federal-republic-germany/, consulted 29th April 2021.

Wathelet M., 19th September 2017, *Opinion of Advocate General Wathelet, Slowakische Republik v Achmea BV, Case C-284/16*. Available at:
https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:62016CC0284&from=EN, consulted on 5th May 2021.