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## Improving the Resolution of International Tax Disputes

Hugh J. Ault

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## IMPROVING THE RESOLUTION OF INTERNATIONAL TAX DISPUTES

by

*Hugh J. Ault*

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**IMPROVING THE RESOLUTION OF INTERNATIONAL TAX DISPUTES\****by**Hugh J. Ault\*\****I. INTRODUCTION AND BACKGROUND**

The dramatic increase in international trade and investments and related phenomena under the general heading of Globalization have multiplied the situations in which international tax disputes can arise, both between taxpayers and governments but also, and in some ways, more importantly, between governments themselves. These disputes may involve transfer pricing issues, differing income characterization rules, disagreement about the existence of a permanent establishment, or more generally, diverging views on the appropriate exercise of potential taxing rights by the source country jurisdiction and the corresponding obligation of the residence country to provide double tax relief.

In the current circumstances, it seems inevitable that the frequency and complexity of international tax disputes will increase and, likewise, the need for some mechanism to solve them is increasingly important. This paper will review briefly the existing mechanisms for dealing with such disputes, looking at their structure and application, and then consider some of the current proposals to modify and improve the procedures, focusing principally on the work at the OECD.

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\*This article is based on a lecture presented on September 23, 2005 at the International Tax Symposium sponsored by the University of Florida Levin College of Law in connection with the inauguration of its LL.M. in International Taxation.

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## II. EXISTING DISPUTE RESOLUTION MECHANISMS

### *A. The existing Mutual Agreement Procedure (“MAP”): Is it working?*

Under existing procedures, Article 25 of the OECD Model Convention,<sup>1</sup> taken over in various formulations in existing bilateral treaties and in the US Model,<sup>2</sup> provides that if the taxpayer believes that the actions of one or both of the treaty partners would result in taxation “not in accordance with the convention” he can present the case to the “competent authority” of the country of which he is a resident. If that country cannot or will not resolve the problem unilaterally, it has the obligation under the treaty to “endeavor” through the Mutual Agreement Procedure to seek to resolve the issue with the other country.

However, beyond “endeavoring,” there is no obligation to actually resolve the conflict. In addition, under Article 25, paragraph 3, the competent authorities can on their own initiative consult together on issues of application and interpretation not directly brought up by taxpayer in a particular case and can also deal with double taxation generally even if not covered by treaty, though most MAP cases are taxpayer-initiated.

A number of issues have come up in the application of the existing MAP procedure and there has been substantial criticism of the MAP process from the private sector. The procedure takes too long; it is costly and the taxpayer must incur expenses with no assurance of acceptable outcome. It is often necessary to pay tax in order to get into process and then the interest paid if the taxpayer wins is not adequate or cannot be offset against the interest that the taxpayer has to pay in the other jurisdiction. There is a perceived and real lack of transparency and insufficient taxpayer input in the process with an attendant fear of “package” deals in which the individual case is not considered on its merits but part of a larger tradeoff between the countries. All of these points have come up in a series of consultations with the private sector which the OECD has had on the current state of dispute resolution.

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1. Organization for Economic Co-operation and Development, Comm. On Fiscal Affairs, Model Tax Convention on Income and on Capital, art. 25 ¶1 (2005), at <http://www.oecd.org/dataoecd/50/49/35393840.pdf> (Jul. 15, 2005) [hereinafter 2005 OECD Model].

2. Treasury Department, United States Model Income Tax Convention, Sept. 20, 1996, art. 25, 96 TNT 1866 (Sept. 23, 1996) (LEXIS, FEDTAX Library, TNT file), at <http://www.treas.gov/offices/taxpolicy/library/model1996.pdf> (last visited Oct. 20, 2005) [hereinafter 1996 U.S. Model].

### *B. Structural aspects in the current MAP process*

Beyond these particularized points and observations, there are some important more general legal issues raised by the current structure of the MAP procedure.

#### *1. Discretion to accept case*

First of all, how much discretion does the competent authority have in taking a case? The Model Convention says the competent authority “shall” take the case but some countries will not accept a case if the case involves penalties, tax avoidance and the like. Is it appropriate that potential double taxation be an additional penalty in these situations? Or suppose that the taxpayer did not cooperate in the audit and is trying in effect to get the case redecided de novo at the MAP level? Are these grounds for the competent authority to refuse the case? In addition, some countries take the position that they will not accept MAP cases on particular issues.

#### *2. Secondary adjustments*

Where the MAP has been successful in getting an agreed adjustment, another question is how to deal with the secondary adjustment which is necessary to allow the assets to be rearranged in accordance with the initial adjustment. The issue is not fully dealt with in the current Commentary. Suppose, for example, both States agree that profits in State A should be 100 more and in State B 100 less but the excess cash is still in State B. In some cases, there is a mechanism under domestic law which allows the accounts and cash flow to be adjusted without further tax consequences<sup>3</sup> but if not, which is the case in many countries, a MAP can make that possible and the question should be addressed more directly.

#### *3. Authority to deviate from domestic law*

Another question is how much authority does the MAP have to deviate from domestic law outcomes? Suppose there is a court decision in point on the question but not involving this particular case; or suppose a decision of assessment in this case has been made, but the competent authority is willing to reduce it to accommodate a MAP agreement. Here country practices differ and timing of the assessment can be crucial as it can bind the hands of the competent authority in subsequent attempts to reach a mutual agreement. A related issue is the relation to domestic remedies. Does the taxpayer have to suspend court procedures to undertake the MAP? And if he does, is there any way to protect his rights if it turns out that

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3. See, e.g., Rev. Proc. 99-32, 1999-2 C.B. 296.

the MAP is not able to reach an agreement in the time period that is required for the prosecution of the legal proceedings? Again, country practices differ. In the United States, it is typical to suspend domestic judicial proceedings while the MAP is going forward<sup>4</sup> but at the end of the day if the taxpayer is dissatisfied with the MAP result, he is free to pursue domestic remedies as long as he has taken the necessary steps to preserve his rights.

#### *4. Other procedural issues*

There are a number of other procedural issues involved in MAP. The statute of limitations often raises important questions. Article 25 states that the taxpayer should be able to implement a MAP despite domestic statute of 2005] *Improving the Resolution of International Tax Disputes* limitations issues<sup>5</sup> and since this obligation arises out of treaty law, it should in principle override conflicting domestic legislation. However, not all countries have adopted this approach.

A related question is staying collection when the case is being considered. Here, the taxpayer, rather than having to pay the full tax at the outset of the procedure, is given the possibility of posting security to avoid current payment. Again country practices differ.

Another important procedural issue is the role of the taxpayer in the MAP process. He is nominally a party in interest but often just a stakeholder who does not care where he pays the tax; he just wants to be taxed consistently. Despite the importance of the MAP process to the taxpayer, it is basically a government-to-government procedure and the taxpayer's role in presenting the case has been limited.

#### *5. OECD Draft Progress Report 2004*

The OECD has been doing significant work on these issues. A Joint Working Group was established in 2003 to consider the existing procedures for resolving international tax disputes and a report, *Improving the Process for Resolving International Tax Disputes* was made public in July 2004.<sup>6</sup> In addition, the OECD has now posted on its website a summary

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4. Rev. Proc 2002-52, 2002-2 C.B. 242.

5. See 2005 OECD Model, supra note 1, art. 25; see also Organization for Economic Cooperation and Development, Comm. On Fiscal Affairs, Model Tax Convention on Income and on Capital Commentary, art. 25, ¶¶ 7, 27-28 (OECD) 2000 [hereinafter OECD Model Commentary].

6. OECD, Centre for Tax Policy and Administration, *Improving the Process for Resolving International Tax Disputes*, § I, at <http://www.oecd.org/dataoecd/44/6/33629447.pdf> (Jul. 27, 2004) [hereinafter OECD Report].

of country practices in an effort to make the process more transparent.<sup>7</sup> The OECD Report also foresees the preparation of a *Manual on Effective Mutual Agreement Procedure* which would deal with many of the issues that were just mentioned. The Manual would survey the operation of the MAP in Member Countries and try to establish a kind of “best practices” approach to the questions involved. Some of the matters considered may involve changes to the Commentary to the OECD Model. Others would be handled in the context of the Manual which would have less legal force but would represent a kind of benchmark of best practices. It would set international standards in a kind of “soft law” way and there could be a mechanism for monitoring the extent to which States follow the practices in the Manual.<sup>8</sup>

### III. SUPPLEMENTARY DISPUTE RESOLUTION (SDR) TECHNIQUES

While all of these points are important and are being examined in the context of the OECD study, the single most important problem with the existing procedures is that there is no assurance at the end of the day that the MAP process will reach a conclusion. As previously mentioned, under the existing obligation of Article 25, the competent authorities have to “endeavor to agree” but do not have to come to any solution. Thus there is clearly, in my view, a need for some type of supplementary dispute resolution mechanism in the context of MAP which moves in the direction of arbitration. The reference here is to “supplementary dispute resolution,” not as it is often formulated “alternative dispute resolution.” This process is not viewed as alternative to the MAP but as an extension of it, growing out of it and not a parallel system. In a sense the MAP itself is an alternative approach, as it represents an alternative to two independent domestic court procedures.

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7. OECD, Centre for Tax Policy and Administration, Cross Border Tax Treaty Dispute Resolution: Country Profiles and Draft Progress Report at [http://www.oecd.org/document/31/0,2340,en\\_2649\\_29601439\\_1\\_1\\_1\\_37427,00.html](http://www.oecd.org/document/31/0,2340,en_2649_29601439_1_1_1_37427,00.html) (last visited Oct. 20, 2005).

8. See David Weissbrodt & Muria Kruger, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 97 Am. J. Int'l. L. 901, 914-15 (2003) (defining soft law as “recommendations [that] over a period of time may be viewed as interpreting treaties . . . or may serve as the basis for the later drafting of treaties.”); see also David Tan, Towards a New Regime for the Protection of Outer Space as the “Province of All Mankind,” 25 Yale J. Int'l L. 145, 181 (2000) (listing “range, flexibility, and frequent adherence by the governments that made such declarations” as advantages of soft law).

*A. Forms of SDR**1. Mediation*

Within the context of MAP, there are a number of possible supplementary dispute resolutions techniques, some of which are already being used. A number of countries have a procedure where a “stuck” case will be reviewed by a higher level official who has no direct connection with the case in an effort to “mediate” and clarify the positions of the two parties. Less frequently there is recourse to the use of a third party mediator who tries to help each side understand the strengths and weakness of each side and find common ground which allows the parties to reach a settlement without actually having any authority to reach a decision himself.

*2. Advisory Opinions*

Interesting, the current Commentary to Article 25 in the Model Convention already contains reference to the possibility of the countries getting an “advisory opinion” or of the Committee on Fiscal Affairs being asked to give an opinion on a point of interpretation,<sup>9</sup> though there appear to be not reported cases of this process actually being used.

*3. Arbitration*

The most discussed and most important form of SDR which might be introduced in the international tax field is some kind of arbitration of international tax disputes. As a wag once said, arbitration seems to be an idea whose time is coming and coming and coming but now it really seems like it might be arriving and this is for several reasons. In the first place, as discussed earlier, the increase in the scope and complexity of international activity will quite likely produce more unresolved cases in the future, increasing the need for a mechanism which will deal with these cases. For example, the developing rules on attributing profits to a permanent establishment,<sup>10</sup> while bringing more order to what has been a somewhat unprincipled and chaotic area of tax law, will also raise a number of interpretive questions on which disagreements are possible.

Secondly, as non-tax barriers to trade and investment are eliminated, tax issues assume greater and greater importance. Competing trade and investment disciplines already provide

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9. OECD Model Commentary, *supra* note 5, art. 25, ¶ 47.

10. See generally, OECD, Centre for Tax Policy and Administration, Discussion Draft on the Attribution of Profits to a Permanent Establishment at <http://www.oecd.org/dataoecd/22/51/33637685.pdf> (Aug. 2, 2004).



institutional structures to resolve disputes in their fields of competence<sup>11</sup> and the lack of such a mechanism in the tax area invites the extension of those other disciplines into this field. Some years ago tax people were able to ensure in the GATS process that no tax issues involving national treatment and discrimination will be handled in the WTO dispute resolution procedures but the issue is still there.<sup>12</sup> The WTO cases involving the US FSC/ETI regimes are a reminder that tax and trade are closely connected.<sup>13</sup> And the failure to provide an adequate tax-based dispute resolution mechanism invites those issues being decided by someone else.

If arbitration of tax issues is going to be taken more seriously, there are a number of structural issues which must be considered and the following material will discuss some of the most important, all of which are analyzed at greater length in the OECD Report.<sup>14</sup>

### *B. Structural issues in fashioning an arbitration procedure*

#### *1. Mandatory or optional arbitration*

The first question is whether the arbitration procedure should be “mandatory” or “optional,” that is, should there be an agreement prior to any actual dispute that all disputes would be submitted to the arbitration procedures or would be the decision to go to arbitration be made on a case-by-case basis? With pre-dispute or mandatory arbitration, the two countries agree in advance that if a MAP case cannot be resolved it will be required to be submitted to the arbitration process when certain conditions have been met. The agreement to arbitrate is made prior to the existence of an actual dispute and requires arbitration in all cases that cannot be resolved. The EU Arbitration Convention<sup>15</sup> follows a “pre-dispute” model, as does the recent German-Austrian convention.<sup>16</sup> Most other existing conventions are “post-dispute” and

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11. See Understanding on Rules and Procedures Governing the Settlement of Disputes, at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm#17](http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#17) (last visited Oct. 20, 2005).

12. OECD Model Commentary, supra note 5, art. 25, ¶¶ 44.1-44.7.

13. See McDaniel, Trade Agreements and Income Taxation: Interactions, Conflicts and Resolutions, 57 Tax L. Rev. 275 (2004).

14. OECD Report, supra note 6, § III.

15. Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, art. 6-8, at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=41990A0436&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=41990A0436&model=guichett) (last visited Oct. 20, 2005) [hereinafter EU Convention].

16. Convention between the Federal Republic of German and the Republic of Austria for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital, Aug. 24, 2000, Aus.-F.R.G., art. 25, 2001 WTD 36-15; Doc. 2001.5225.

require an agreement by both the competent authorities and the taxpayer to submit the particular case in question to the independent panel.<sup>17</sup>

One of the important aims of SDR is to ensure that there will be a final resolution of the case which has entered the MAP process. Lack of assured finality is an important reason for taxpayers not to commit the time and resources necessary to a successful resolution of a MAP. This aim can be best realized by a “pre-dispute” or mandatory agreement to arbitrate. While this potentially involves a greater delegation of authority to the independent panel, it goes further in meeting the objectives of the MAP by helping to ensure that the MAP process will reach an appropriate result and on balance seems to be the preferential approach.

### *2. Duty to submit*

A weaker form of mandatory arbitration which would help to resolve an outstanding question would be to require that the issue to be submitted to SDR if the case could not be resolved by normal procedures. That is, the submission of the cases would be mandatory, which goes beyond optional arbitration since the country could not walk away from the table, but still would not ensure that a binding result would be reached. The duty to submit to some kind of SDR under existing treaties might be derived from the general international law requirement to interpret and apply the treaty in good faith, and might be found to be an obligation under existing treaties. While the OECD Report suggests that such an obligation might be derived from existing law,<sup>18</sup> it certainly has not been country practice, an important determinant of international law obligations and reasonable people can differ on this point.

### *3. Triggering event*

Any kind of pre-dispute agreement requires some “trigger” to determine when the case will be submitted to the independent panel. A time period is sometimes used. The EU Arbitration Convention requires that the case be submitted to the “advisory commission” within two years of “the date on which the case was first submitted to one of the competent authorities” when the competent authorities cannot resolve the case in that period to eliminate double taxation.<sup>19</sup> Another approach would be to have the case submitted when the competent authorities “agreed to disagree,” that is, came to a good faith conclusion that the case would

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17. Convention between the United States of America and the Federal Republic of German for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, Aug. 21, 1991, U.S.-F.R.G., art. 25, S. Treaty Doc. No. 101-10 (1990); 1708 U.N.T.S. 3.

18. OECD Report, supra note 6, § III.D., ¶ 134.

19. EU Convention, supra note 15, art. 7, ¶ 1.

not be resolved without recourse to SDR. Here it would seem preferable to use a fixed time period, though with the agreement of all of the parties, the period could be extended, e.g., where the case was very close to resolution at the end of the time period.

*C. Effect of the SDR decision on the MAP process*

Assuming a decision has been reached by an independent panel, what are the effects of that decision? Here there are a variety of options

- a) Advisory only, competent authorities may follow or not. This is the weakest form but at least exposes an independent opinion;
- b) Binding to the extent that the competent authorities do not agree to an alternative which relieves double taxation or otherwise resolves the issue. This is the approach taken by the EU Convention;<sup>20</sup>
- c) Binding on the competent authorities in all events as long as the TP follows;
- d) Binding on the competent authorities and on the taxpayer to the exclusion of domestic judicial remedies.

This latter possibility, while the most desirable in terms of a final consistent resolution of the issue, presents one of the most difficult issues in structuring SDR procedures. What is the relation between those procedures and domestic judicial proceedings? While the existing MAP process varies from country to country, the taxpayer at the end of the day generally has recourse to domestic judicial procedures if he does not wish to follow the MAP agreement.

Though the MAP process may require that the judicial procedures be suspended, recourse to those procedures is ultimately available. On the other hand, arbitration (“alternative” dispute resolution) in most other contexts intentionally removes the substantive matter at issue from the domestic judicial system (though there may be a judicial review of the procedural aspects of the case). In the context of SDR techniques being considered here, one of the important aims is to ensure a single binding and consistent resolution of the matter at issue.

As an overall goal, it would clearly seem desirable that the panel decision would be final and binding. While the governments can clearly agree to be bound by the decisions of the panel, the question is whether and to what extent the taxpayer can be bound, as a condition to the availability of SDR, to give up his rights to a judicial consideration of the issues of the case. Here practices seem to vary from country to country. For some countries, there is apparently a question as to whether a taxpayer can be asked to give up judicial remedies, and,

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20. See generally EU Convention, *supra* note 15.

even if he agrees to do so, whether that agreement can be enforced. In such a situation, the taxpayer can in effect “forum shop” between the panel decision and a possibly more favorable judicial determination.

Despite the theoretical problem, in practice there should be very few situations in which this question would come up. The taxpayer has been offered a solution in which double taxation is avoided, which was his initial goal. It would clearly be appropriate to provide that if the taxpayer did in fact attempt to challenge the panel finding in domestic litigation, the other country would be free to ignore the arbitral decision in determining its assessment (or to go back to its original assessment). In addition, it should be open to the government to present the arbitral decision to the court, so that the court is on notice that the decision was not simply one made by the tax administrators but had been reached by an expert and independent panel. It might also be possible to stipulate that the taxpayer would have to bear the costs of the arbitration procedure if he subsequently refused to be bound by the procedure which offered him a solution to double taxation.

#### *D. Review of the arbitral decision*

Assuming that the panel decision cannot be collaterally challenged judicially on its substance, a separate question is whether there needs to be some sort of mechanism to allow a challenge based on procedural grounds. One possibility would be to allow the courts of each country to review the arbitral decision on limited procedural grounds such as bias or corruption, exceeding the delegated authority in the decision, violation of the panel’s own procedural rules, etc. This sort of stipulation could be made by the parties in the Terms of Reference when the arbitral procedure is initially set up.

Another approach would be to provide for a supra-national reviewing body which would supplant national courts as far as procedural review was concerned. Such a procedure is provided for in the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID)<sup>21</sup> dispute settlement and in the North American Free Trade Agreement (NAFTA).<sup>22</sup> In the latter procedure, the bi-national panel decisions concerning trade disputes can be reviewed by an extraordinary Challenge Committee for limited procedural defects. In the context of tax arbitration based on an OECD model, it would be possible to have a review

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21. The World Bank Group, *International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules*, pt. A, ch. 4, §§ 1-6, at <http://www.worldbank.org/icsid/basicdoc/partA-chap04.htm> (last visited Oct. 20, 2005).

22. North American Free Trade Agreement (NAFTA), *Review and Dispute Settlement in Antidumping and Countervailing Duty Matters, Extraordinary Challenge Procedure*, pt. 7, ch. 19, annex 1904.13, at [http://www.nafta-secalena.org/DefaultSite/index\\_e.aspx?DetailID=173#An1904.13](http://www.nafta-secalena.org/DefaultSite/index_e.aspx?DetailID=173#An1904.13) (last visited Oct. 20, 2005).

body appointed by the Committee on Fiscal Affairs, or the matter could, under appropriate procedures, be referred to the Co-ordinating Body envisaged by Article 24 of the Mutual Administrative Assistance Convention.<sup>23</sup>

#### IV. OTHER STRUCTURAL ISSUES

Assuming then that it is possible to develop the legal basis for a mandatory, binding arbitration procedure which is the exclusive mechanism for the resolution of international tax disputes, there are a number of interesting and important structural issues which must be resolved in establishing such a procedure.

##### *A. Selection of the arbitration panel*

First, and in some ways most important, is the selection of the arbitrators. Presumably they would initially be selected by the competent authorities, since the process is still at the end of the day a government-to-government process, though consultation with the taxpayer would be desirable. One would expect that the competent authorities would only select qualified and appropriate candidates, but one way of insuring that result might be to establish a panel of persons who were deemed to be qualified in advance of any particular case. This is the procedure used in the EU Convention.<sup>24</sup> Another issue is whether a representative of the competent authority itself should be on the Panel or not. More broadly, there is a question if any governmental employees should be on the panel.

In order to make sure the process functions in a timely manner, there also must also be a mechanism to ensure that if one of the parties does not appoint an arbitrator within the time period, one will be appointed by an independent Appointing Authority. The same applies to the appointment of a chairman if the appointed arbitrators cannot agree on a Chairman.

##### *B. Arriving at the arbitration decision*

Assuming the panel has been established, there must be procedures for determining how it reaches its decision. The first question is what materials should it be able to refer to. Since by definition, we are dealing with tax treaty interpretation, presumably any material which would be appropriate under the Vienna Convention on the Interpretation of Treaties<sup>25</sup>

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23. Joint Council of Europe/PECD Convention on Mutual Administrative Assistance in Tax Matters, art. 24, ¶ 3, at <http://www.oecd.org/dataoecd/11/29/2499078.pdf> (Jan. 25, 1998).

24. EU Convention, *supra* note 15, art 9.

25. Vienna Convention on the Interpretation of Treaties, arts. 31-33, 23 May 1969, 1155 U.N.T.S. 331, 8 ILM 679.

would be appropriate. This, however, would presumably preclude reference to unilateral sources of interpretation like the US treaty Technical Explanations which may not be appropriate.

Another issue is the form of decision of the Panel. One option would be so-called “last best offer” or “baseball” arbitration. Under this procedure, each party submits to the panel the “last best offer” which it would have been willing to accept and the panel simply selects one or the other of the offers and notifies the parties. This procedure has the advantage of requiring the parties realistically to assess their case and provides for a relatively straightforward result. It really views that arbitral procedure as an extension of the administrative procedure and the most important thing is to get an answer to the question and not necessarily the “right” answer. This procedure would work well with some cases, transfer pricing for example, where there really is no “right” answer and the most important thing is “an answer” but it would not seem to make much sense in more complex questions of interpretation.

Another more “quasi-judicial” approach would require a written opinion which sets forth the reasoning of the panel. If the opinion was published, which is a separate question, this would allow the development of a kind of “common law” of treaty interpretation which might help to avoid future disputes. Even though the opinion would not be binding on future cases in a common law *stare decisis* sense, it could certainly have some impact on future cases, just as case law does in civil law systems which do not have a *stare decisis* principle.

### *C. Practical questions of implementation*

Beyond these structural questions, there are a number of important practical issues which must be resolved. Who pays the costs, what language, translation and who pays the translators, where does the panel meet, is there the need for some kind of Secretariat? All of these matters are important and should be taken into account in establishing an effective arbitration procedure.<sup>26</sup>

## **V. OTHER DEVELOPMENTS**

The prior discussion has focused primarily on the form which arbitration could take in the context of the work of the OECD but there are other models available for comparison. In the European Union, the EU Arbitration Convention foresees a very special kind of arbitration.<sup>27</sup> In the first place, the procedure is limited in scope to transfer pricing cases and

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26. Author Assertion.

27. See EU Convention, *supra* note 15, arts. 1-3 (defining and limiting the scope of the convention).

cases of attribution of profits to a permanent establishment and does not cover interpretative issues generally. In addition, the competent authorities are members of the panel and are joined by “independent persons of standing” who are selected from a list submitted by each government. Finally, after the arbitral decision has been reached, the two competent authorities have the right to take the case back and have six months to arrive at another result, as long as that result, while differing from the result of the arbitration, eliminates double taxation. Thus the process really can be viewed as an extension of the administrative process, rather than the arbitration in the strict sense of the term.

There are also two private sector proposals, one sponsored by International Fiscal Association<sup>28</sup> and one developed by the International Chamber of Commerce.<sup>29</sup> These are, as one would expect, more in line with “traditional” arbitration structures which give arbitration a more independent role. The ICC proposal goes so far as to say the taxpayer can have the right to arbitration even if the competent authority agreement avoids double taxation if the taxpayer nonetheless believes that there is taxation not in accordance with the treaty.<sup>30</sup>

## VI. WHERE DO WE GO FROM HERE?

The discussion here has been principally about the OECD and the EU, that is, developed countries, but these issues are equally important, if not more important, in relations with developing countries, especially those which have a broad concept of source taxation which is reflected in their treaty positions. It is against this background that the OECD is trying to develop a fair and effective SDR process which would be acceptable to both developed and developing countries in their treaty practice. The OECD work is going forward after the publication of the Report last year and it is anticipated that early in 2006 a discussion draft of its tentative proposals which address many of these issues will be made public.

In the more distant future there may be the possibility of a multilateral arbitration agreement which would deal as well with the problems of “triangular” cases with more than two countries and the case of relations between two branches where there is no applicable bilateral treaty.

The idea of some more comprehensive dispute resolution process in the international area has been around for a long time but as this review of the developments hopefully shows,

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28. See International Fiscal Association (IFA) Arbitration Proposal, Arbitration of Disputes Arising Under Income Tax Treaties: Model Treaty Article and Memorandum of Understanding, in OECD Report, *supra* note 6, annex 4.

29. See International Chamber of Commerce (ICC) Arbitration Proposal, Arbitration in International Tax Matters Bilateral Convention Article, in OECD Report, *supra* note 6, annex 5 [hereinafter ICC Study].

30. ICC Study, *supra* note 29, art. 25A, ¶ 1.

it may in fact be coming closer to being a reality.