

Chapter I

About the Jurisdiction of International Courts to Settle Tax Treaty Disputes[♦]

1. Introduction

The rise and rise of tax treaties, together with the intensifying of global business, trade, investment and employment has undoubtedly increased the potential for conflicts between states and between states and taxpayers regarding the interpretation and application of double taxation agreements. Double taxation agreements (hereafter: DTAs) are currently the primary source of international income tax rules. Actually, it is not so hard to see that internationalization of income from business, trade, investment and employment is followed by internationalization of income taxation if states want to maintain their fiscal revenue, and that this may entail conflicts for the different (competing, overlapping) treasuries of countries.

With respect to those conflicts, there are signs that the settlement methods which have traditionally been used in tax treaty disputes, are currently in transition. Developments such as the emergence of arbitration clauses in tax treaty practice, the EC Arbitration Convention and a surge of interest by scholars and international organizations, all illustrate that trend, but if that trend will actually result in new real-life solutions is another matter¹. In any event, it is clear that at least a significant part of the legal doctrine acknowledges the need for or the advantages of supra-national solutions, and one of the solutions discussed is the use of international courts². The

[♦] This chapter is a revised and updated version of the key-note address the author made at the Scientific Conference on the Settlement of Tax Disputes at the University of Vienna. It was first published in *Settlement of Disputes in Tax Treaty Law*, Michael Lang and Mario Zuger (ed), Linde Verlag Wien, 2002, p. 501-531.

¹ Ellis, M., "Issues in the implementation of the arbitration of disputes arising under income tax treaties – response to David Tillinghast", *Bulletin for International Fiscal Documentation*, 2002, p. 100-101.

² Azzi, J., *Tackling tax treaty tensions: Time to think about an international tax court*, *Bulletin for International Fiscal Documentation*, 1998, p. 347.; Van Raad, C., "Interpretation of Tax Treaties by Tax Courts", *E.T.*, 1996, p. 6 (who does not consider the idea of an international tax court viable but suggests the creation of a non-binding, advisory body.; Berndt R. Runge, "The German view of the prevention and settlement of international disputes on tax law", *Intertax*, 1997, p. 3 (6) (who

prospects of this alternative³ way of settling tax treaty disputes stopped being almost entirely academic when a reference to the International Court of Justice (ICJ) was included in the 1992 German-Swedish tax treaty and a reference to the European Court of Justice (ECJ) featured in the new Austrian-German tax treaty.

Not all observers have reacted positively on the referral to the international courts in those (for the time being) few treaties. On the one hand, some writers have doubts whether the ICJ and/or the ECJ have the necessary technical experience to decide on tax treaty matters⁴. Others seem pleased with the idea that some international body will have final say over questions on the interpretation and application of tax treaties. Except for the few treaties where the ICJ or the ECJ is explicitly mentioned, there are those who dismiss the feasibility of the use of international courts as a dispute settlement method in tax treaty matters⁵. In this article, the prospects of using international courts to decide on tax treaty disputes is briefly examined and put in the broader context of the judicial settlement of disputes in international public law

2. The Peaceful Settlement of Disputes in International Public Law

2.1. The peaceful settlement of disputes as a general principle in international law

states: “It would be much better if an international tax court would be established”).Edwardes Ker, *Tax Treaty Interpretation*, In Depth Publishing, 1994, Chapter 2, 2.03.; IFA, Vicchi, *Interpretation of Double Taxation Conventions*, 1993, Cahiers de Droit Fiscal International, vol. 78a, p. 175.; Bricker, M.P., “Arbitration Procedures in Tax Treaties”, *Intertax*, 1998, p. 97.

³ In the light of the predominance of the mutual agreement procedure as the only international means of settlement of tax treaty conflicts, it can be said that those newly emerging methods as well as the suggestions from legal doctrine, may be called “alternative” although adjudication by international courts and tribunals is of course hardly “alternative” from the perspective of general international law.

⁴ The tax expertise of the ECJ was for example somewhat doubted by Vermeend, “The Court of Justice of the EC and direct taxes”, *ECTR*, 1996, p. 54.; See also Lindencrona, G. and Mattson, N., “How to resolve international tax disputes?”, *Intertax*, 1990, p. 273 (“After all, the judges [of the ICJ] are no specialists in international taxation”).

⁵ Bricker, M.P., *ibid*, ft. 2.; Lindencrona, G and Mattson, N., “How to resolve international tax disputes?”, *Intertax*, 1990, p. 273.

Public international law sets forth as a general principle that states are to settle their disputes by peaceful means⁶. It is not, however, a positive obligation under international law to *settle* disputes⁷. As a matter of fact, often states do not want a dispute settled at all⁸. The means of dispute settlement are also open to the discretion of the states involved in the dispute, provided that peaceful means are employed⁹. What is more, the consent of the parties is considered the dominant precondition for any means of settlement under international law. In other words, under international law states are free to agree to a means of settlement of a dispute, and as a general principle should, but they cannot be forced into a settlement procedure without their consent. Note however that consent can be granted before the actual dispute arises, and may then only be withdrawn in certain circumstances. In any event, the consent by both parties to the dispute, whether ad hoc or ante hoc, is the cornerstone of the jurisdiction of international courts and tribunals.

2.2. The settlement of disputes in treaty law

Under the international law of treaties, states must cooperate in the application and interpretation of a treaty between them, and should resolve treaty conflicts as a matter of good faith¹⁰. As Sir Robert Jenkins notes: “A refusal to consider means of settlement must be a breach of that obligation”¹¹.

The 1969 Vienna Convention on the Law of Treaties (VCLT), however, does not provide in a comprehensive dispute settlement obligation. There were proposals to add a general *compromissory* clause to the VCLT¹², the

⁶ Art. 2(3) and 33 of the Charter of the United Nations (which, it is true, actually only address disputes that endanger the maintenance of international peace and security); 1982 Manila Declaration on the Peaceful Settlement of International Disputes, G.A. Resn. 37/10, G.A.O.R., 37th Session, Supp. 51, p. 261; *Military and Paramilitary Activities case* (Merits), *I.C.J.Reports*, 1986, p. 14.; The reference to “general principle” is, among others, made by Brownlie, I., *The Rule of Law in International Affairs*, *Martinus Nijhoff Publ.*, 1998, p. 107.

⁷ Fitzmaurice, G., *Modern Law Review*, Vol. 19, 1956, p. 4-6.

⁸ Miall, H., *The Peacemakers*, p. 187.

⁹ Brownlie, I., *The Rule of Law in International Affairs*, 1998, p. 109.; Rosenne, S., *Developments in the Law of Treaties 1945-86*, 1989, Cambridge UP, p. 263.

¹⁰ *Case A 15 Iran vs. US*, 20 august 1986, US Claims Tribunal Reports, vol. 12 p. 61 (on the duty to cooperate and resolve difficulties while implementing the treaty); *Air Service Agreement* arbitration Award of 9 December 1978, XVIII RIAA 415, 445 (the duty to resolve treaty disputes).

¹¹ *Collected Writings of Sir Robert Jennings*, Vol. 1, Kluwer, 1998, p. 252.

¹² Proposal by Switzerland (L.250) and (A/CONF.39/L.33). Spain had a similar proposal (L. 392). Both were rejected.

effect of which would have been that all disputes arising out of the law of treaties codified in the VCLT could be brought within the compulsory jurisdiction of the ICJ. In practice that would have subjected any treaty to which the VCLT applied to the adjudication of the ICJ¹³. At present, the VCLT only foresees a compulsory adjudication by the ICJ with respect to the invalidity or termination of a treaty as a consequence of the emergence of or the conflict with a peremptory norm of general international law (jus cogens), provided there is no arbitration¹⁴. Also, a system of conciliation has been created for disputes between states on the interpretation or application of part V of the VCLT (invalidity, termination and suspension)¹⁵.

In addition to the removal of a disagreement between two states, there is an additional objective to dispute settlement in case of multilateral treaties, and by extension, in case of bilateral treaties that are closely related to each other. This is the achievement of uniformity of their application, a universality of adherence through some centralization of the interpretative function¹⁶. This objective can be associated with the observations of tax scholars on the international divergence of tax treaty interpretation¹⁷.

2.3. Methods for avoiding international disputes

Especially in recent years, the discussion surrounding settlement of disputes has also been approached from the perspective of avoiding those disputes in the first place. Several different methods for the prevention of disputes can be mentioned here, and although terminology is not always clear, it involves information or inquiry, communication, consultation and fact-finding missions.

The use of fact-finding missions, for example, has increasingly been seen as a possibility in the settlement of disputes, especially those carried out under auspices of the UN¹⁸. To institutionalize the information and communication between parties as a way of avoiding possible disputes

¹³ Rosenne, *ibid*, ft. 9, p. 267-268.

¹⁴ Art. 66 a) VCLT.

¹⁵ Art. 66 b) VCLT; See also the Annex to the VCLT.

¹⁶ *Reservations to the Convention on Genocide Case, ICJ Reports*, 1951, 15.; Sohn, L. B., *Settlement of disputes relating to the interpretation and application of treaties*, *Recueil des cours/ Academie de Droit* 150, 1976, p. 205.

¹⁷ *Ibid* ft. 2.

¹⁸ Manila Declaration on the Peaceful Settlement of International Disputes, 1982.

has been used in free trade agreements¹⁹, the World Trade Organization²⁰ and international financial institutions²¹. It is assumed that a close monitoring of the parties' performance of treaty obligations, whether by each other or by an international organization, will enhance the likelihood of those treaties being observed to the fullest and thus reduce potential for conflicts.

An interesting example of information replacing the function of a court or tribunal to achieve uniform interpretation of treaties is found in the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Criminal Matters²². This is a parallel convention to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Criminal Matters of 27 September 1968²³. The Brussels Convention provides in a system of preliminary rulings by the ECJ, but this was not an acceptable solution for the signatories of the Lugano convention, which is drafted with the EFTA members in mind. Instead, an information center was established that collects relevant judgments and increases awareness in the states party to the convention to reduce the likelihood of divergent interpretations²⁴.

2.4. Diplomatic means of settlement: negotiation, good offices, mediation and conciliation

The most commonly used methods of settlement of disputes in international affairs are of a diplomatic nature. With 'diplomatic' procedures are meant that are almost entirely free of rules, where the legal merits of the case are less relevant, and where the solution proposed is not binding upon the parties. In addition to negotiation, which does not involve third parties, mediation and conciliation by a third party are also considered to be of a diplomatic nature. They all focus on what *should be done* instead of *what happened*, and are therefore inherently more suitable for policy conflicts²⁵.

¹⁹ Voitovich, S.A., International Economic Organizations in the International Legal Process, Martinus Nijhoff, 1995, p. 115-125.

²⁰ GATT L/3464, 18S/97 (providing an obligation upon members to notify changes in tax legislation)

²¹ Poulantzas, N.M., "International financing and supervision: the example of the World Bank", Revue de Droit International, 1982, no. 4, p. 283-287.

²² OJ 1988 L 391/9.

²³ OJ 1972 L299/32.

²⁴ Protocol 2, art. 2 Lugano Convention.

²⁵ Merrills, J. G., International Dispute Settlement, Cambridge University Press, 1998, p. 290.

Negotiation is at present the most common method used for the international settlement of tax treaty conflicts, mainly by means of the conventional mutual agreement procedure. The character and critiques of the mutual agreement procedure are well-known, and need not detain us much²⁶. From the perspective of the state, negotiation is seen as a flexible process that is quite suitable for discussing policy conflicts, but the irrelevance of legal merits tend to work to the (economically) weaker state's disadvantage. It is also to be expected that some states are consistently less cooperative in mutual agreement procedures than other states, which may have more to do with its cultural inclinations and administrative organization than with its tax and legal system.

From the perspective of the taxpayer, the lack of internationally protected position and the almost complete lack of procedural safeguards for efficiency such as avoiding very long delays, are serious flaws in this method of settlement²⁷. In addition, there is the apprehension that his case may be the victim of "horse-trading" between states, which is worsened by the absence of a binding obligation to achieve any result at all²⁸.

Mediation is a method of settlement by which a friendly third state, an international organization or even an individual will bring about an amicable solution by making inquiries into the various aspects of the dispute, participating in the negotiations and by directing the parties. 'Good offices' is a method closely related to mediation but seems to indicate a lesser degree of involvement of the third party²⁹. Both 'good offices' and 'mediation' are characterized by a lack of any procedure or thorough investigation of the facts or the legal merits of the case.

Conciliation, in its narrow sense, is a "process of formulating proposals of settlement after an investigation of the facts and an effort to reconcile opposing contentions, the parties of the dispute being free to accept or reject the proposals formulated"³⁰. The process can be conducted by so-called "conciliation commissions" as provided in the 1899 and 1907

²⁶ Avery Jones, J.F. et al, *The Legal Nature of the Mutual Agreement Procedure under the OECD-Model Convention*, *B.T.R.*, 1979, 333 and 1980, p. 13.

²⁷ Bricker, M.P., *ibid*, ft. 2, p. 98-101.

²⁸ OECD Commentary on art. 25, par. 25-26.

²⁹ Starke, J.G., *Introduction to international law*, Aditya Books, reprint of 1994, 485-525 p. 513.

³⁰ Hudson, *International Tribunals*, Washinton, DC: Carneqie endowment for international peace and Brookings institution, 1944, p. 223.

Hague Conventions for the Pacific Settlement of International Disputes³¹, which can be setup by special agreement between the parties. Informal, tactful use of conciliation has booked impressive results in international affairs, and states are known to attach great value to this method of settling disputes³².

Expert panels are often used in international disputes, and the use of this method may be required by treaty³³. An expert panel can have a diplomatic or a legal character, depending on its mission and the effect of its decision. This evolution illustrates the emergence of mixed types of settlement methods, which can truly be considered alternative³⁴.

To a large extent, the lack of legal formalism, has contributed significantly to the effectiveness of diplomatic means of settlement, but such is actually a mixed blessing. That very same lack of legal procedure also means that larger and more powerful states are better at applying extra-legal, economical and political pressure, as was mentioned above with respect to negotiation. Legal methods of settlement, where the equality of states and the rule of law prevails are therefore described as advantageous for economically weak states³⁵, but it is also true that developing countries tend to be ardently opposed to any form of compulsory jurisdiction.

2.5. Judicial settlement of disputes: arbitration and adjudication

a) *Defining elements of arbitration and adjudication*

The actual use of arbitration and adjudication for the peaceful settlement of disputes in international affairs is marginal, but their contribution to the development of international law through their decisions is very significant. As a consequence, the international courts and tribunals are still of practical importance as well as of legal importance.

Both arbitration and adjudication can be called binding because the parties will, in one form or another, willingly consider the result of the proceeding binding upon them. A procedure that leads to a solution is not

³¹ Title III of the 1899 Hague Convention for the Pacific Settlement of International Disputes and Part III of the 1907 Hague Convention for the Pacific Settlement of International Disputes.

³² Starke, *ibid*, ft. 29, p. 514.

³³ Sohn, *ibid*, ft. 16, p. 260.

³⁴ *Ibid*, ft. 3.

³⁵ Sohn, *ibid*, ft. 16, p. 205.

binding to one of the parties, or perhaps even both, cannot be called an “arbitration” or “adjudication” *sensu stricto*. Whether or not a court or tribunal is “international” depends on its source of authority, composition, immunity from local jurisdiction and powers of jurisdiction.

b) Difference between adjudication and arbitration

The difference between arbitration and adjudication has in the past been much more significant than at present. Grotius quotes Aristotle as saying that

“an equitable and moderate man will have recourse to arbitration rather than to strict law [...] because an arbitrator may consider the equity of the case, whereas a judge is bound by the letter of the law”³⁶.

The days of Aristotle have long gone, and elements of equity (including ‘good faith’) have since been introduced to temper the excesses of formalism notably in Roman law³⁷. Still there remains some discussion about allowing the diplomatic origins of arbitration to persist³⁸. On the one hand, it is argued that arbitration is more suitable for disputes of a mainly factual nature and requires flexibility without much formalism in order to maintain a somewhat *mediatory* quality³⁹. The legendary Secretary-General of the Permanent Court of Arbitration **Charles De Visscher** wrote for example in 1960 that settlement *ex aequo et bono* definitely fits the arbitral function better than the properly judicial one⁴⁰. However, arbitral tribunals have also often been called upon to perform classic judicial functions, such as the interpretation of treaties. The main difference nowadays, as noted by Brownlie⁴¹, is the degree of control the parties can exercise over the dispute settlement proceeding. In arbitration,

³⁶ Grotius, *De Iure Belli ac Pacis*, book III, Cap. XX p. 47.

³⁷ In the third or early second century BC; Buckland, W.W., *The Main Institutions of Roman Law*, Cambridge University Press, 1931, p. 258.; Kazer, M., *Roman Private Law*, Butterworth, 1965, p. 40.

³⁸ See for example the discussion between Pinto and Schwebel, S.M., *Judicial Settlement of International Disputes*, Springer Verlag, 1974, p. 65 and 101.

³⁹ Remarks by The Netherlands in the Draft of the ILC, *Yearbook ILC*, 1953, Vol. II, p. 235.

⁴⁰ Note of the Secretary-General concerning the functioning of the PCA, 3 March 1960, p. 2-3, reproduced in *A.J.I.L.*, 1960, p. 933.

⁴¹ Brownlie, I., *ibid*, ft. 9, p. 117.

the parties can not only choose their own arbiters⁴², but also define (limit) the jurisdiction of the tribunal with respect to a particular aspect of the case and the law to be applied. Such control is unusual in international adjudication although the ICJ has recently also created the possibility of adjudicating cases by special chambers of the Court, the members of which can in part be determined by the parties to that particular dispute. As a consequence, but we are now entering the area of semantics, the term “arbitration” is not preferred when reference is made to dispute settlement by a permanent bench (such as the ECJ or the ICJ), except where that bench is not bound to apply strict law⁴³.

c) Development of different courts and tribunals

Sands observed four phases in the judicial settlement of international disputes. First, prior to the establishment of the Permanent Court of Arbitration (“PCA” which has this name despite the fact that this body was neither a court nor permanent) in 1899, international disputes were handled between states alone, and *ad hoc* bodies were only from time to time created to deal with particular issues. Since 1899, the need was recognized for a standing body, first the PCA and then the Permanent Court of International Justice, which constitutes the second phase. In the 1950ies, a new phase was entered by the establishment of the International Court of Justice, the European Court of Justice, the European Court of Human Rights, and the International Centre for the Settlement of Investment Disputes. This phase, according to Sands, lasted until the end of the 1980ies, after which the International Tribunal for the Law of the Sea and the WTO’s Dispute Settlement Understanding underlined the trend towards compulsory jurisdiction⁴⁴. At present, a myriad of international courts and tribunals exists or may be called into action on an *ad hoc* basis, and although it might often seem there is still a long way to go before one could speak of a comprehensive world dispute settlement system, by reference to what pre-existed recent achievements are quite remarkable.

⁴² Although this difference is, at least in comparison with the ICJ, no longer that important since the parties to a dispute may choose for a chamber composed to their choice; Merrills *ibid*, ft. 25, p. 306.

⁴³ Lachs, M., Arbitration and international adjudication, in *International arbitration past and prospects*, Soons, A.H.A. (ed.), Martinus Nijhoff Publishers, 1990, p. 52.; It may in this respect be noted that it would be better not to call the reference in the Austrian-German DTA to the ECJ an “arbitration”. On the other hand, that term is also used in art. 238 EC Treaty with reference to the ECJ.

⁴⁴ Sands, Philippe, (Introduction), *Manual on International Courts and Tribunals*, Butterworths, 1999, p. xxvi-xxvii.

Several of those courts, tribunals and bodies have a role to play in the development of international tax law. The European Court of Justice of the EU has become an important source of European tax law, as is by now well known⁴⁵. Also the European Court of Human Rights has decided on tax cases⁴⁶. The Dispute Settlement Body of the WTO deserves some particular attention in the light of the US-EU dispute about the “Foreign Sales Corporation” (“FSC”)⁴⁷. Its dispute settlement mechanism has been reformed by the “Dispute Settlement Understanding” of the Uruguay-Round (1986-94) and became a “quasi-judicial procedure” legally binding on all WTO members⁴⁸. Tax disputes that have been submitted to the WTO’s dispute settlement body have often concerned import duties but income tax issues may also be a source of differences of opinion, as is illustrated by the FSC dispute⁴⁹.

d) Reluctance by states to submit to international adjudication and arbitration

Interstate arbitration and adjudication have both been rather rare in practice, and many reasons –all true- have been quoted to explain the reluctance of states to submit themselves to arbitration or adjudication⁵⁰:

⁴⁵ Malherbe, J., “Fundamental rights and income tax. (in French)”, in *Recht zonder Omwegen, Fiscale Opstellen Aangeboden aan Prof. J.J. Couturier*, Larcier, Gent, 1999, p. 462.; Lehner, M., “Limitation of the National Power of Taxation by the Fundamental Freedoms and Non-discrimination clauses of the EC Treaty”, *ECTR*, 2000, p. 5-15.

⁴⁶ For an overview: Baker, PH., “Taxation and the European Convention on Human Rights”, *E.T.*, 2000, p. 298.

⁴⁷ The WTO Appellate Body decided that the US so called “foreign sales corporations”-regime (providing tax savings related to exports up to 15%) constituted an export subsidy contrary to WTO rules. See Larkins, E.R., “WTO Appellate Decision”, *JOIT*, May 2000, p. 16.; and *JOIT*, January 2000, p. 32.

⁴⁸ Jansen, B., in *Remedies of International Law*, “GATT/WTO Dispute Settlement Mechanisms: An Introduction”, p. 153-154.; Merills, J.G., *International Dispute Settlement*, 3rd ed., Cambridge, 1998, p. 287.; The Singapore Ministerial Declaration adopted on 13 December 1996, WT/MIN(96)/DEC, 18 December 1996, par 9. declared that “we believe that the DSU has worked effectively during its first two years”.

⁴⁹ For an overview, see Pescatore, P, Davey, W.J. and Lowefeld, A., *Handbook of WTO/GATT Dispute Settlement*; Petersman, E.U., *The GATT/WTO Dispute Settlement System*, With respect to income tax, the US started proceedings known as “Income tax Practices Maintained by France, Belgium and the Netherlands”, 1976.

⁵⁰ Vicuna, Francisco Orrego and Pinto, Christopher, *The peaceful settlement of disputes: Prospects for the twenty-first century*, The Hague, 1999, p. 82-83.

- ✓ The persistent belief of mainly laymen that it is an unfriendly act to start an international legal proceeding against another state⁵¹
- ✓ The unwillingness of governments, convinced that they alone know best how the interest of the nation is to be served, to lose control over the outcome of a certain dispute
- ✓ The apprehension that weaker (“unequal”) states will not have the same chances before a tribunal or court as powerful ones
- ✓ The apprehension not to embarrass the other state for breaches of international law it committed
- ✓ For those with a weak case, the risk that one might lose and look foolish on the national and international scene
- ✓ For those with a strong case, the chance that adequate compensation may in any event be elusive because the decision cannot be enforced
- ✓ For all of them, the unpredictability of the result, given the vagueness of international law
- ✓ Internal political consequences of the publicity related to an international proceeding
- ✓ The unwillingness to commit substantial costs and efforts for anything but very important cases
- ✓ Lack of policy-makers’ experience in and knowledge of international law, including the procedures of adjudication and arbitration
- ✓ Unavailability of specialized, experienced and affordable attorneys for the least developed countries⁵²

⁵¹ Brownlie, I., *Principles of Public International Law*, Oxford UP, 5th edition, 1998., p. 728.; See also Couvreur, PH., “The effectiveness of the ICJ in the peaceful settlement of international disputes”, in Muller, A.S. et al. (ed.), *The ICJ; Its Future Role after 50 Years*, Martinus Nijhoff, 1997, p. 209 (“The central truth about almost one hundred years of practice is that neither states nor international organizations want to use the ICJ very much. This is due in large measure to a perfectly rational desire on the part of governmental officials ...neither to lose political and administrative control of disputes nor to embarrass other states and organizations”). See also Manila Declaration.

⁵² Note that the UN announced in 1989 the constitution of a Trust Fund to assist states in settling their disputes through the ICJ, in order to compensate for the lack of expertise and money certain states may have: See (1989) 28 *ILM* p. 1584.; Bien-Aime T., “A Pathway to The Hague and Beyond: The UN Trust Fund Proposal”, 22 *NYUJ Int’l L. & Politics*, 1991, p. 671.

3. The Settlement of Tax Treaty Disputes by the European Court of Justice

3.1. Notes on the jurisdiction of the ECJ

The authority of the ECJ is attributed in and restricted by the EC Treaty and, although the ECJ's authority varies in scope considerably depending on the nature of the case (appeal court, constitutional court, international court, etc.)⁵³, any adjudicatory authority under a special agreement can only be exercised within the context of that EC Treaty⁵⁴. Furthermore, it is the ECJ which has the jurisdiction to determine whether or not it has jurisdiction, as became apparent in the *Foglia Case*⁵⁵. In addition, the ECJ can make "any assessment inherent in the performance of its own duties in particular in order to check, as all courts must, whether it has jurisdiction"⁵⁶.

The ECJ is competent for the interpretation of EC Law, and the member states of the EC may for that purpose not resort to other means of adjudication, such as an ad hoc arbitration tribunal⁵⁷. In addition to its jurisdiction of interpreting EC Law, art. 239 EC Treaty offers the possibility to the member states of having the ECJ decide on disputes related to the subject matter of the EC Treaty⁵⁸. In view of art. 293 EC Treaty, which obliges the member states as far as necessary to conclude agreements for the avoidance of double taxation, this condition of art. 239 EC Treaty is fulfilled. It has incidentally been suggested that it is best left to the Member States' judgment whether this requirement is fulfilled, and not to the ECJ itself. "In any event, if it were to create such a [objective] standard [for the competence of the court], it should be given a most

⁵³ Vanistendael, F., The role of the ECJ as the supreme judge in tax cases, *EC Tax Review*, 1996, 114-115.; Kapteyn, P.J.G. and Verloren Van Themaat, P., Introduction to the Law of the EC, (2nd ed.), p. 153.

⁵⁴ Campbell, D. (ed.), The Law of the European Community, Matthew Bender, (looseleaf), Art. 182, 5-315.

⁵⁵ Case 104/79, Pasquale Foglia v. Mariella Novello [1980] ECR 745.

⁵⁶ *Foglia* No. 2, [1982] 7 ELRev. 186, 187-8, p. 190.

⁵⁷ Art.292 EC Treaty.

⁵⁸ "The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of this Treaty if the dispute is submitted to it under a special agreement between the parties"; See Campbell, D. (ed.), *ibid*, ft. 54.; Ehle, D., *Klage- und Prozessrecht des EWG-Vertrages*, Art. 182 (looseleaf), Craig, P. and De Burca, G., *EC Law*, Clarendon Press, 1995, p. 70-80.; Weatherhill, S. and Beaumont, P., *EU Law*, p. 380-387.

liberal interpretation...”⁵⁹. It is also noteworthy that, as is clearly illustrated by the reference to the ECJ under the Protocol to the Rome Convention –which is not based on art. 293 EC Treaty⁶⁰- a matter can be considered a subject matter of the EC Treaty in the sense of 239 EC Treaty even without being explicitly mentioned in art. 293 or in any other article of the EC Treaty.

The exact nature of the instrument establishing the jurisdiction of the ECJ under art. 239 EC Treaty for a dispute is not relevant, as long as the consent of both Member States is assured, and the instrument is legally valid⁶¹. The Rules of Procedure of the Court do require the “special agreement” to be submitted in writing, a fact from which some have deduced that the agreement must be in written form⁶². EC members may, without any doubt, submit a dispute on a subject that relates to the EC Treaty, even without a conventional clause such as art. 25 (5) of the Austrian-German DTA (see below). The important thing is that the ECJ must be deemed the most suitable tribunal⁶³, so it seems.

The agreement to submit the case to the ECJ must at the latest exist at the time of submission⁶⁴. The nature of the agreement does not have to be on an *ad hoc* basis, notwithstanding the use of the word “special” with reference to “agreement” in art. 239. It is, in other words, not contrary to art. 239 to provide in the jurisdiction of the ECJ for all future disputes between two or more member states related to a certain subject matter, say tax treaty interpretation (see below on the Multi-Protocol”). As a matter of fact, such jurisdiction has already been established in the Brussels Convention and other conventions under art. 293 (see below). Furthermore, the word “special” may not be understood to mean that only agreements and treaties that have the establishing of the jurisdiction of the ECJ as their only purpose. A clause establishing the jurisdiction of the ECJ on a treaty or agreement with otherwise substantive rules is clearly possible⁶⁵, as is illustrated by art. 25 (5) of the Austrian-German tax treaty.

⁵⁹ Campbell, 182.07, c.); Ehle, D., *ibid.*, ft. 58, 182, II, 3.; Kruck, H., in Van Der Groeben, 4/670; Grabitz, *Kommentar*, a.a.O., art. 18, Rn. 6.

⁶⁰ Guiliano-Lagarde Report on the [Rome] Convention on the Law Applicable to Contractual Obligations, p. 5.

⁶¹ Kruck, H., in Van Der Groeben, 4/670.

⁶² *Ibid.*

⁶³ Art. 292 ECJ Treaty, Campbell, *ibid.*, ft. 54, 182.08.

⁶⁴ Calliess, C. and Ruffert, M., *Kommentar des EUV/EGV*, 1831.

⁶⁵ *Ibid.*

It follows from the above that two EC member states are perfectly allowed to submit a tax treaty dispute to the ECJ in common agreement, even in the absence of an explicit and/or compulsory clause to that effect in the tax treaty between them.

3.2. Jurisdiction of the ECJ under the Austrian-German tax treaty

As mentioned above, it is particularly relevant that, pursuant to Austrian policy with treaty partners which are EC members, a referral to the ECJ was already included in art. 25(5) of the new Austrian-German tax treaty⁶⁶ with the following wording:

“If any difficulty or doubt arising as to the interpretation or application of this Convention cannot be resolved by the competent authorities in a mutual agreement procedure within a period of three years after the question was raised pursuant to the previous paragraphs of this article, at the request of the person identified in Paragraph 1, the States shall be under obligation to submit the case to arbitration as defined by Article [239] of the EC Convention with the Court of the European Communities”⁶⁷.

The jurisdiction the ECJ has been attributed under this “special agreement” is not established for all difficulties or doubts arising to the interpretation or application⁶⁸ of the treaty. A referral to the ECJ is subordinated to a chain of conditions that have to be fulfilled cumulatively.

First of all, the ECJ will not have jurisdiction pursuant to art. 25 (5) of the Austrian-German tax treaty, *unless the mutual agreement procedure of the treaty was followed first*. This is clear from the text of the paragraph (“raised pursuant to the previous paragraphs of this Article”). If the difficulty or doubt is never raised in the context of a mutual agreement procedure, for example because the three years described in par. 1 of art. 25 had already lapsed when the taxpayer raised the issue, the jurisdiction of the ECJ cannot be established in this manner. If the procedure was never followed, one could argue that the difficulty or doubt can obviously

⁶⁶ Art. 25 (5); Further discussed below.

⁶⁷ This translation is adopted from the article of Zuger, M., “The ECJ as arbitration court for the new Austrian-German tax treaty”, *E.T.*, 2000, p. 101.

⁶⁸ A “difficulty or doubt arising as to the interpretation or application of this Convention” means both questions of law (interpretation) and matters that primarily arise in connection with determining the decisive facts of a case (application); Vogel, K., *Double Taxation Conventions*, 3rd ed., Kluwer, p. 1379.

never be solved by a mutual agreement procedure, and therefore the conditions of art. 25 (5) would be fulfilled. The context of the provision, however, seems to indicate that the contracting states did not have the intention to submit to arbitration any disputes they themselves did not wish to submit to arbitration, except in the case where a mutual agreement procedure did not produce a solution within three years. That can be concluded from the reference to the requirement of the mutual agreement procedure being followed during three years. In my view, therefore, it must be assumed that if the mutual agreement procedure is never set in motion, for whatever reason, the jurisdiction of the ECJ can never be established under art. 25 (5) of the Austrian-German tax treaty.

In order for the ECJ to have jurisdiction under the treaty, it is furthermore required that the mutual agreement procedure was *carried on for three years* since the question was first raised without reaching a solution. Zuger has noted criticism on the length of this three-year period⁶⁹. Indeed, when compared to other arbitration clauses (such as in bilateral investment protection treaties), three year does seem quite long⁷⁰.

It is furthermore required that the dispute will be submitted to the ECJ only upon *request of the taxpayer*. The mention in art. 25 (5) of the Austrian-German tax treaty of the request of the taxpayer creates some uncertainty as to the exact scope of the clause. Does this condition mean that such interpretative mutual agreement procedures cannot lead to a compulsory referral to the ECJ, because there is no taxpayer to formulate the request? Or does it mean that *if* a particular taxpayer is involved, he must agree to submit the matter to the ECJ, but if not, no such approval is required? It is fair to say that it remains unclear if the ECJ may be asked to adjudicate disputes that do not involve at least one taxpayer. Perhaps, difficulties or doubts arising as to the interpretation or application of the treaty that are not raised in the context of a specific case, cannot find their way to the ECJ under art. 25 (5) of the tax treaty. On the other hand, it is also relevant to note in this respect that art. 25 par. 5 mentions “a mutual agreement procedure pursuant to the previous *paragraphs*” – plural. That would normally include also procedures under par. 3 of art. 25, those that are carried out between competent authorities without reference to a specific taxpayer’s case. However, if such an interpretative difficulty would arise, who would be the taxpayer whose “request” is necessary to establish the jurisdiction of the ECJ?

⁶⁹ Zacherl, SWI 1999 at. 57 (quoted by Zuger, M., *ibid*, ft. 67).

⁷⁰ 6 months is the usual length according to Dolzer and Stevens, *Bilateral Investment Treaties*, Martinus Nijhoff, 1995, p. 119.

To a certain extent, this difficulty in interpretation loses its practical importance when we consider that most conflicts in interpretation between two contracting states will arise at the occasion of a particular case, and the condition “at the request of the person identified in Par. 1”, if it indeed is a condition, can be fulfilled. However, there is of course no guarantee that the taxpayer will indeed cooperate in a procedure which is important in the eyes of one contracting states. In any event, therefore, the wording of the clause is not entirely satisfactory.

3.3. Critical notes on the jurisdiction of the ECJ under the Austrian-German tax treaty

The reference to the ECJ under art. 25 (5) of the Austrian-German tax treaty is subject to significant practical and legal restrictions. Since the jurisdiction of the ECJ can only be established after three years of fruitless mutual agreement procedure and is only beyond all doubt possible in specific cases (which are not necessarily questions of law), it seems that the effectiveness of the procedure depends to a large extent on the courage of the taxpayer to face proceedings that may drag on for years. After all, the docket of the ECJ is quite full as it is, and a decision from that court may also take several years, in addition to the three years already “lost”. By allowing the ECJ only after three years of mutual agreement procedure, and by creating uncertainties about the access to the ECJ in cases where there is no particular taxpayer that requests for it, the potential role the ECJ can play, is significantly curtailed. The commendable intention of the drafters of the arbitration clause is that the actual reference to the ECJ or, rather, the fact that such reference is binding after three years, which –supposedly- would increase the pressure that some solution would be found.

The settlement method provides in a form of diplomatic protection which is guaranteed under tax treaty law, and where a state promises to act before an international court on behalf of one of its subjects. The mere possibility of the ECJ gaining jurisdiction over the matter might induce the competent authorities to reach an agreement, and reduce the likelihood of a state simply refusing to cooperate in a mutual agreement procedure, which can be dubbed “the preventive effect”. Jaenicke, for example, noted the preventive effect of the compulsory arbitration in investment treaties following the World Bank Convention for the Settlement of Investment Disputes between States and Nationals of Other

States⁷¹ in these terms: “The prospect of compulsory arbitration will most certainly induce states as well as private parties to avoid actions which might involve them into arbitration procedures with a possible negative outcome. (...) The preventive effect of a compulsory and effective arbitration procedure should not be underestimated.”⁷²

What would the result be if every bilateral tax treaty between Member States of the EC contained such a clause? Would this create more uniformity in international tax law throughout the EC? In my opinion, it would not. True uniformity can only mean that those who have the authority to interpret the tax treaty in last instance will do so in a homogeneous manner, irrespective of the forum where the question is raised. In other words, when tax treaty questions will receive similar answers, wherever they arise. The function accorded to arbitration in the Austrian-German tax treaty is not ideal for bringing that uniformity about, among other things because it is conceived as a complement to the mutual agreement procedure, and is thus not in a real position to influence the settlement of disputes between tax authorities and taxpayers before the national courts in Europe. This is of course not to say that the mutual agreement procedure, with or without arbitration attached to it, is not fulfilling an absolutely crucial role in solving certain disputes in the application of tax treaties, and often such solutions involve the interpretation of the double taxation convention. The generally satisfactory experience noted by the OECD is probably justified in view of this,⁷³ but its contributions to uniform tax treaty interpretation (questions of law) and the development of international tax law as a whole, can however be doubted, and has been doubted for quite some time⁷⁴. It is unlikely that adding an arbitration clause after the mutual agreement procedure will change the limited contribution the mutual agreement is currently making to international uniform tax treaty interpretation, although it may very well promote the swift and fair settlement of individual cases of dispute.

⁷¹ Convention for the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UN Treaty Series, p. 159.

⁷² Jaenicke, G., “The prospects for international arbitration: disputes between states and private enterprises” in Soons, A.H.A. (ed.), *International Arbitration Past and Prospects*, Martinus Nijhoff, 1990, p.155-157.

⁷³ OECD Commentary, art. 25/45.

⁷⁴ Avery Jones J., et al., “The legal nature of the mutual agreement procedure –II”, B.T.R., 1980, p. 20.; Vogel, K., *On Double Taxation Conventions*, 3rd ed., p. 1379 (par. 105); See also the interesting comments Frowein makes on the mutual agreement procedure in (German) double taxation conventions from the perspective of uniform interpretation of treaties by domestic courts in Jacobs, F. and Roberts, S., (eds) *The Effect of Treaties in Domestic Law*, 1987, p. 84-86.

3.4. The suggestion of a “Multi-Protocol”

At a future point in time, the Member States may agree that a more uniform interpretation of international tax rules throughout the EC, particularly of bilateral income tax treaty rules, is appropriate in view of furthering the common market and of tax harmonization.

One of the possible means of achievement worth considering is to attach a “Multi-Protocol” to existing bilateral tax treaties. Rather than rescinding all existing bilateral tax treaties, which would be an effort of biblical proportions⁷⁵, the EC member states could opt for drafting and concluding a protocol which installs more guarantees for uniform tax treaty interpretation throughout the EC by giving the ECJ the jurisdiction to interpret double taxation agreements under certain circumstances. This Multi-Protocol could take the form of a multilateral treaty concluded by all Member States, ancillary to all bilateral income between the contracting states of the Multi-Protocol. Following the example of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Criminal Matters, another instrument issued under art. 293 of the EC Treaty⁷⁶, the Multi-Protocol would stipulate that the courts of the contracting states, under conditions discussed below, can ask the ECJ for a ruling on the interpretation of the bilateral tax treaties referred to in the Multi-Protocol.

Art. 293 of the EC treaty, combined with art. 239 EC Treaty, would form the legal basis for the Multi-Protocol, because double taxation can just as well be the consequence of the *interpretation* of international tax rules as by their application. Furthermore, it may be noted that EC law does not exclude establishing the jurisdiction of the ECJ in matters that go much further than what is, even in qualified terms, required under Community law. The Rome Convention on the Law Applicable to Contractual Obligations of 19 June 1980 serves as a good example to that effect⁷⁷. In

⁷⁵ Wassermeyer, F., “Does the EC Treaty force the Member States to conclude a multilateral tax treaty?”, in Lang, Loukota, et al, *Multilateral Tax Treaties*, Kluwer, 1998, p. 15.

⁷⁶ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Criminal Matters of 27 September 1968, OJ 1972 L299/32. This Convention has entered into force since 1 February 1973, and is supplemented with a Protocol dated 3 June 1971, which has entered into force on 1 September 1975 (further discussed below). The (official) Jenard Report on the Convention was published in 1979 (OJ 1979 C59/3). Jenard’s phrase was also adopted by the European Court of Justice (Case 145/86 *Hoffman v. Krieg* [1988] ECR 645, 666).

⁷⁷ OJ 1980 L266; This convention also includes a reference to the ECJ, but commentators agree that its subject matter is hardly related to the EC Treaty, not even

any event, the legal basis for establishing the jurisdiction of the ECJ with such a Multi-Protocol seems in my view secure.

Basically, the Multi-Protocol uses a system to refer to the ECJ in a way that is similar to art. 234 of the EC Treaty, just as was adopted in the Brussels Convention. It allows the courts of the contracting states (Member States) to ask the ECJ for a preliminary ruling. The decisions of the ECJ on requests for preliminary rulings should be legally binding upon the courts of the Member States. The contrary would not be reconcilable with art. 239 EC Treaty.

The diversity of jurisdictional clauses in the other conventions pursuant to art. 293 EC Treaty⁷⁸ shows that the Member States can choose exactly how they wish to organize the access to the ECJ in this respect. Even in the event that not all Member States would agree simultaneously on the jurisdiction of the ECJ to interpret the tax treaties between them, those willing could still proceed, as illustrated by the double protocols of the Rome Convention. Because it seems appropriate to exclude the (quasi-) administrative phase most Member States have in tax cases, only courts deciding in an appellate capacity may ask the ECJ for a ruling. Courts of the Member States deciding in last resort, however, have a duty to ask the ECJ for a preliminary ruling if the court considers that a decision on the question is necessary to enable it to give judgment. In addition, it can be considered to give the competent authority a right to ask rulings as well, but the experience of the Brussels Convention with this kind of jurisdiction for the ECJ was not satisfactory.

An interesting question is whether in its capacity awarded under the Multi-Protocol, the ECJ would be entitled to apply general international law, EC law, and/or domestic law of the Member States. In this respect it is worth reminding that the whole purpose and consequence of getting the ECJ involved, is creating a uniform tax treaty interpretation throughout the Community, as it were to create a “Community meaning” of the tax

being mentioned in art. 293 (See Guiliano-Lagarde Report on the [Rome] Convention on the Law Applicable to Contractual Obligations, p. 5.; Stone, P., *Civil Jurisdiction and Judgments in Europe*, Longman, London, 1998, p. 2). In fact, the member states simply point out that the Convention is based on the desire “to continue in the field of international private law the work of unification of law which has already been done within the Community”.

⁷⁸ Bankruptcy Convention (that did not yet enter into force) Tizzano Report, OJ 1990 C219/I, at p. 4.; Convention of 29 February 1968 on the Mutual Recognition of Companies (not yet in force) See Dieu, “La reconnaissance mutuelle des sociétés et personnes morales dans les Communautés Européennes, 4 C.D.E., 1968, p. 532.; Community Patent Convention of 15 December 1989 OJ 1989 L401.

treaty terms⁷⁹. It is both obvious and necessary that the ECJ would not disregard EC law in interpreting bilateral tax treaties between Member States, even if most of the substantive law to be applied will be international law. It seems that Community law would be applied before general international public rules⁸⁰. The finding of the ECJ in the *Tessili v. Dunlop* case, which was already quoted above, indicates furthermore that the Court will bear the objective of the Multi-Protocol in mind, and will develop independent, autonomous tax treaty interpretations common to the Member States for as much as possible, even when tax treaties refer to domestic laws. The ECJ did not go so far as to disregard the significance of the internal laws of the Member States in favor of interpreting the Brussels Convention under EC law alone, nor would that have been feasible⁸¹. But it is important to note that the Court is likely to give the objectives stated in art. 293 EC Treaty great weight in its evaluations⁸², which is a matter to be kept in mind when considering the effect of referrals to the ECJ to achieve more uniformity in tax treaty judgments throughout Europe.

The text of the crucial articles in the Multi-Protocol could be as follows⁸³:

Article 1

The Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of all treaties and instruments designated in art. 2 of present Protocol, and also on the interpretation of the present Protocol. The Court of Justice of the European Communities shall also have jurisdiction to give rulings on the interpretation of the instruments of accession to present Protocol by any new contracting states.

Article 2

This Protocol shall apply to the bilateral and multilateral treaties for the avoidance of double taxation on income and capital, including all instruments ancillary to those treaties, whatever their designation, currently in force between the contracting states of the

⁷⁹ *LTU v. Eurocontrol* (1976) ECR 1541 (relating to the interpretation of the Brussels Convention).

⁸⁰ Kruck, H., in Van Der Groeben, 4/671 par. 13.; Campbell, *ibid*, ft. 54, 182.09.; Ehle, D., *ibid* note 58, 182, II, 3.

⁸¹ Kohler, C., "The case law of the European Court on the judgments convention, part I", *Eur. L. R.*, 1982, p. 7-8.

⁸² Schwarze, J., *The Role of the ECJ in the Interpretation of Uniform Law among the Member States of the EC*, Nomos, Baden-Baden, 1988, p. 36.

⁸³ The text is inspired on the Brussels Convention.

present Protocol. This Protocol shall also apply to said treaties and instruments between the contracting states of the present Protocol which are concluded while the present Protocol is in force.

Article 3

The following courts may request the Court of Justice to give preliminary rulings on questions of interpretation:

(1)

[list of countries, mentioning per country the name of the court in last instance/ supreme court];

(2)

The courts of the contracting states when they are sitting in an appellate capacity;

Article 4

(1)

Where a question of interpretation of all treaties and instruments designated in art. 2 of the present Protocol is raised in a case pending before one of the courts listed in art. 3 (1), that court shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

(2)

Where such a question is raised before any court referred to in art. 3 (2), that court may, under the conditions laid down of paragraph (1), request the Court of Justice to give a ruling thereon.

4. The Settlement of Tax Treaty Disputes by the International Court of Justice

4.1. Jurisdiction of the ICJ under the German-Swedish DTA

To my knowledge, only the DTA between Germany and Sweden of 1992 establishes explicitly the jurisdiction of the ICJ at present, but the ICJ can at present obtain jurisdiction over a tax treaty dispute by several other means, which are discussed below. That treaty refers to the European

Convention on the Settlement of Disputes⁸⁴, (“ECSD”; both states have ratified that convention), which establishes the compulsory jurisdiction of the ICJ.

The wording of the article in the DTA concerned is as follows:

“For the settlement of international disputes resulting from this Convention, the provisions of Chapter I, II and IV of the European Convention, dated April 29, 1957, for the Peaceful Settlement of Disputes shall apply. The Contracting States may, however, agree to order in place of the proceedings set forth therein a court of arbitration whose decision shall be binding for them. This court of arbitration should consist of professional judges from the Contracting States or other States or international organizations. Its proceeding shall be regulated according to the internationally recognized principles for arbitration proceedings. The affected parties shall be granted due process of law and the right to file their own motions. The decision shall be based on the conventions in force between the Contracting States and of general international law; a decision *ex aequo et bono* is not to be allowed. As long as an agreement concerning the calling and composition of the court of arbitration as well as concerning its rules of procedure has not been reached, then each Contracting State is at liberty to proceed according to Clause 1”.

The ECSD is a post WW-II treaty that provides in a general system for the settlement of disputes in Europe, but it never really became the success the drafters hoped for. In Chapter I, art. 1 of the ECSD, the High Contracting Parties agree to submit to the judgment of the ICJ “all international disputes which may arise between them including, in particular, those concerning: a) the interpretation of a treaty; b) any question of international law, c) the existence of any fact will, if established, would constitute a breach of an international obligation; d) the nature or extent of the reparation to be made for the breach of an international obligation”⁸⁵. Obviously, the same terminology has been chosen as in the Statute of the ICJ. As has been noted above, interpretation of tax treaties, disputes between states on tax issues, breach of international obligations in tax matters is all within the scope of the article. Reservations that a state may have formulated in its declaration

⁸⁴ This Convention was opened for signature in Strasbourg on April 29, 1957, and is in force since April 30th, 1958.

⁸⁵ Art. 19 of the ECSD provides in compulsory arbitration as well, but for disputes other than those mentioned in art. 1 of the ECSD (ICJ).

accepting the compulsory jurisdiction of the ICJ pursuant to art. 36 (2) of the Statute, will by simple declaration also apply to the ECSD⁸⁶.

The ECSD has been ratified by 13 countries and entered into force for all of them⁸⁷. It has been said that the prominence of the referral to the ICJ by the ECSD is one of the reasons for the reluctance of states to adopt it⁸⁸. None of the countries has made a reservation against the compulsory jurisdiction of the ICJ, as such was not allowed by the Convention⁸⁹.

4.2. Jurisdiction of the ICJ to settle other tax treaty disputes

The fact that no explicit mention is made in the text of a DTA with respect to possible adjudication by the ICJ does not mean that the ICJ may not have another head of jurisdiction. What follows is an overview of the current possibilities for the ICJ obtaining jurisdiction over a tax treaty dispute between states.

a) *Non-compulsory jurisdiction*

First of all, it may be noted that the ICJ may obtain jurisdiction over a dispute in a non-compulsory manner by agreement of the parties to submit the case to the Court on an *ad hoc* basis. This involves the conclusion of some kind of a special agreement. It is noteworthy that this agreement is not subject to any requirement of form, and may be established by a mere communication to the Court⁹⁰. What is more, the consent of the party may be established by way of *forum prorogatum*⁹¹, which was illustrated by the *Mavromattis (merits) case*⁹².

⁸⁶ Art. 35 (4) of the ECSD.

⁸⁷ Austria, Belgium, Denmark, Germany, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Sweden, Switzerland, UK. (Treaty Office on <http://conventions.coe.int>).

⁸⁸ Bardonnet, p. 182-183.

⁸⁹ Encyclopedia of Public International Law, Vol. 1. Settlement of Disputes, NH Publishing, 1981, p. 56-58.

⁹⁰ *Corfu Channel Case*, (Prelim. Obj.) *ICJ Reports*, 1948, 27. (“While the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form”).

⁹¹ Harris, D.J., *Cases and Materials on International Law*, Sweet and Maxwell, 5th edition, 1998, p. 999.

⁹² *Mavromattis (Merits) case*, PCIJ, 1927, Rep. Ser. A, No. 5 p. 27.; Note that currently, the Rules of the Court state that an application to the ICJ will only be entered in the General List after the state against which the application is made consents to the ICJ’s jurisdiction (art. 38 (5) Rules of the Court).

b) Compulsory jurisdiction established by treaty

Turning our attention to heads of compulsory jurisdiction, it is to be noted that states may have accepted the jurisdiction of the Court in all kinds of treaties and conventions⁹³. The parties agreed that the ICJ should be the body that would decide all disputes concerning their treaty. There are currently 263 treaties and conventions that contain such a clause, or a similar clause referring to the PCIJ⁹⁴. Compulsory jurisdiction (with reference to the peaceful settlement of general differences, matters of taxation thus not excluded) may, besides in the ECSD (in force for 13 countries) which was discussed above, also be found in “treaties of friendship and cooperation”, “treaties for the peaceful solution of disputes”, or any other international agreement between the two (or more) states.

Another example of a treaty that establishes the jurisdiction of the ICJ, much in the same manner as the ECSD, is the “Pact of Bogota” of the Organization of American States⁹⁵. Treaties of “Friendship, Commerce and Navigation” also often contain an acceptance of the jurisdiction of the ICJ/PCIJ⁹⁶.

c) Compulsory jurisdiction established by the optional clause

Art. 36 (2) of the Statute of the ICJ provides that the states which are parties to the Statute may at any time declare that they recognize the jurisdiction of the Court *ipso facto*. This is generally referred to as “the optional clause”. The text of the declarations differs from state to state, but the following main body is reproduced in a majority of the declarations:

“I hereby declare that (name of the state) recognizes as compulsory *ipso facto* and without special agreement, in relation to any other state which accepts or has accepted the same obligation, the

⁹³ Art. 36 (2) Statute of the International Court of Justice; Rosenne, *Law and Practice of the International Court*, 2nd ed. 1985, p. 291.; Szafarz, *The Compulsory Jurisdiction of the International Court of Justice*, 1993, chapter 3. As a matter of fact, a reference by states may also be accomplished by an exchange of letters (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain Case*, (Jurisdiction and Admissibility) *ICJ Reports*, 1994, p. 112.

⁹⁴ Art. 36 (5) and 37 of the Statute provide that when a treaty of convention refers to the Permanent Court, this suffices to establish the jurisdiction of the ICJ.

⁹⁵ American Treaty on the Pacific Settlement of Disputes, 13 April 1948, 30 UNTS 55, article XXXI.

⁹⁶ *Encyclopedia of International Law*, 1 Settlement of Disputes, “Arbitration”, p. 19.

jurisdiction of the ICJ in all legal disputes referred to in par. 2 of art. 36 of the Statute of the ICJ”

Some 62 acceptances of that nature have been deposited with the Secretary-General of the UN by the following countries⁹⁷:

Australia, Austria, Barbados, Belgium, Botswana, Bulgaria, Cambodia, Cameroon, Canada, Colombia, Costa Rica, Cyprus, Congo, Denmark, Dominican Republic, Egypt, Estonia, Finland, Gambia, Georgia, Greece, Guinea, Guinea-Bissau, Haiti, Honduras, Hungary, India, Japan, Kenya, Lesotho, Liberia, Liechtenstein, Luxembourg, Madagascar, Malawi, Malta, Mauritius, Mexico, Nauru, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Paraguay, Philippines, Poland, Portugal, Senegal, Somalia, Spain, Sudan, Suriname, Swaziland, Sweden, Switzerland, Togo, Uganda, UK, Uruguay and Yugoslavia.

It must be stressed that both states must recognize the *ipso facto* jurisdiction of the ICJ before the proceeding can be deemed entirely compulsory⁹⁸.

Most of the declarations contain some kind of a reservation or restriction, by application of art. 36 (3) of the Statute. The ICJ has, in practice, accepted those reservations, but the nature and legitimacy of some kinds of restrictions has been questioned by learned writers⁹⁹. None of the 62 states has literally excluded taxation, which is telling in itself¹⁰⁰. Of particular importance is a restriction often referred to as the condition of

⁹⁷ The US has withdrawn its declaration as a result of the *Nicaragua Case*, and since that time there have been repeated calls to have it re-instated. France also retracted its declaration as a result of the *Nuclear Tests Cases*.

⁹⁸ The so-called condition of reciprocity: Brownlie, I., *Principles of Public International Law*, Oxford University Press, 5th edition, 1998, p. 722.

⁹⁹ Particularly the “domestic jurisdiction”-reservation, which is discussed in detail below.

¹⁰⁰ Some subject matters have been excluded all together by states; fishing vessels (Canada), national defense (Greece, Hungary), armed conflict (Honduras, Nigeria), territorial boundaries (Honduras, India, Malta, Nigeria, Philippines), airspace (India), military occupation (Malawi, Malta), maritime exploration (New Zealand), natural resources (Philippines), environment (Poland), debts (Poland).

(exclusive) national jurisdiction, which is by the way criticized by a great deal of scholars¹⁰¹. Often it is formulated as follows:

“This declaration does not extend to ... disputes relating to matters which by international law fall exclusively within the domestic jurisdiction of (the state)”

The question is raised whether “taxation” can be considered to fall “exclusively within the domestic jurisdiction of the state”. While it is true that fiscal sovereignty is the only general principle that may be deduced from international decisions¹⁰², international law does acknowledge that the minimum standard of the treatment of aliens puts certain limits on the fiscal sovereignty of the state¹⁰³, even in absence of a tax treaty. In any event, the application, interpretation, modification and termination of treaties is clearly a matter of both states party to the treaty¹⁰⁴, and this is no less true with respect to tax treaties¹⁰⁵. Even if the treaty concerns a subject matter that falls essentially within domestic sovereignty, this conclusion must remain the same¹⁰⁶. In summary, it may thus be said that the reservation for matters of domestic sovereignty may exclude international income tax disputes from the jurisdiction of the ICJ, but only if no DTA is relevant to the case.

Another reservation found in the declarations issued under art. 36 (2) of the Statute of the ICJ is that if other means of settlement exists (like an arbitration clause in the treaty), the ICJ has no jurisdiction pursuant to the declaration. This raises questions on the nature of the mutual agreement procedure. Does the fact that DTAs generally include a mutual agreement

¹⁰¹ See, among others, Briggs, H., Reservations to the acceptance of the compulsory jurisdiction of the ICJ, in *Receuil des Cours*, vol. I, t. 93, 360-363; Higgins, R., *Problems & Process* (Oxford University Press, Oxford, 1994), p. 194.

¹⁰² Van Der Bruggen, E., “State responsibility under customary international law in matters of taxation and tax competition”, *Intertax*, 2001, p. 115-138.

¹⁰³ Quereshi, A.H., “The Freedom of a State to Legislate in Fiscal Matters under General International Law” *Bulletin for International Fiscal Documentation*, 1987, p. 16.; Marthaa, R.S.J., “Extraterritorial taxation in international law”, in Meessen, K., *Extraterritorial Jurisdiction in Theory and Practice*, Kluwer, 1996, p. 27.

¹⁰⁴ See preamble, art. 1, 2, 26, 27, 31, 39, 40, 41 54 etc. Vienna Convention on the Law of Treaties.

¹⁰⁵ Vogel, K., *Double Taxation Conventions*, 3rd ed., Kluwer, Deventer, p. 58-88.

¹⁰⁶ Such is to be deduced from the *Peace Treaties Case*, where the argument was put forward that a matter may be ‘essentially’ within the domestic jurisdiction of a state, although it is governed by a treaty. The ICJ (*Peace Treaties Case*, ICJ Reports, 1950, 70) stated that “the interpretation of the terms of a treaty for this purpose could not be considered as a question essentially within the jurisdiction of a state. It is a question of international law which, by its very nature, lies within the competence of the Court”.

procedure exclude the establishing of the jurisdiction of the ICJ under art. 36(2) because they can be regarded as “another means of settlement”? Elsewhere¹⁰⁷, I have argued that this is not the case, and if I can be permitted to elaborate the reasons a bit more, I would like to point out that first of all, the main use of the mutual agreement procedure is the solution of individual cases of taxpayers between the two contracting states (art. 25(1) OECD Model). It is true that par. 3 also provides in the possibility for the contracting states to resolve a conflict about the interpretation or application of the treaty, without any specific taxpayer’s case being involved, but this merely reflects the possibility of negotiation (possibly including the establishment of joint commissions without any authority to bind the states) *which is always available to states*. Against the backdrop of the notion and function of “negotiation” as a means of dispute settlement in international law, it can hardly be submitted that with art. 25 (3) the states wished to exclude all other international means of dispute settlement such as mediation, conciliation, arbitration or adjudication. Such argument would by the way also be contrary to the OECD Commentary, which notes that “par. 3 *invites* and *authorizes* the competent authorities to resolve, if possible, difficulties of interpretation or application by means of mutual agreement” (emphasis added)¹⁰⁸. The Commentary indicates in unmistakable terms that this is not to be considered an obligation to reach a result¹⁰⁹, and at no time is it suggested that art. 25 would exclude all other means of dispute settlement.

With respect to the effect of arbitration clauses on the optional clause for establishing the jurisdiction of the ICJ, it may be noted that these could indeed be regarded as “other means of settlement” provided arbitration was foreseen for disputes between the contracting states without a specific case of a taxpayer being required to start up the proceeding. Arbitration clauses of such nature are in a minority, but an example is found in the German-US DTA.

5. Some Concluding Remarks on the Prospects for the Use of International Courts in the Settlement of Tax Treaty Disputes

5.1. Preliminary observations

¹⁰⁷ Van Der Bruggen, E, “Compulsory Jurisdiction of the International Court of Justice in Tax Cases: Do We Already Have an “International Tax Court?”, *Intertax*, 2001, p. 250-267.

¹⁰⁸ OECD Commentary 25/32.

¹⁰⁹ OECD Commentary 25/26.

As the world tax treaty system comes under increased pressure by the forces of globalization, we witness at present the development of the international tax dispute settlement complex from “*power-oriented*” to “*rule-oriented*”. This development can somewhat be seen as a reflection of a similar, more general evolution in international economic and legal affairs, and its successful completion is undoubtedly one of the most important challenges that faces international tax law at this time. For this process to satisfy by definition conflicting interests of taxpayers and tax authorities, will require the increased development of several methods for settlement of international tax (treaty) disputes, while recognizing that the different levels are objectively and subjectively linked to each other. Solely depending on international courts to settle tax treaty disputes, and to bring about international uniformity of tax treaty interpretation, would clearly be a mistake. Mechanisms that prevent disputes from arising in the first place, such as the institutionalization of information and communication by means of multilateral technical panels may be developed in this respect, which could have a more direct practical influence on the tax treaty case law around the world. It may not be forgotten that, ultimately, most tax treaty disputes will of course end up before national courts, and not international ones.

Nevertheless, international courts could greatly contribute to the development of international tax treaty law. The nature of that contribution can take at least three shapes, which will be further discussed below: the international court as an alternative to ad hoc tribunals of arbitration (1), the international court as a means of promoting the uniformity of national case law by means of preliminary questions (2), and the involvement of international courts in genuinely interstate tax disputes (3).

It is obvious that the EC and the ECJ have a particular role to play in these developments. The discussions related to achieving a certain degree of harmonization of income tax rules have not faded since the early days of the Communities, and it is clear that the future prospects of tax dispute settlement –including those on the inter-state level- throughout the EC are different from those among non-member states. It may be recalled in this respect that “the uniform application of Community law is a fundamental requirement of the Community legal order”¹¹⁰. The role of the ECJ in the

¹¹⁰ ECJ Cases C-143/88 and C-92/89 *Zuckerfabrik Suderdithmarschen v. Hauptzollamt Itzehoe* 1991 ECR I-415 at par. 26; Jarvis, M., *The Application of EC Law by National Courts*, Clarendon Press, Oxford, 1998, p. 443.

future landscape of the settlement of international tax disputes throughout the EC will have to be addressed.

5.2. Using an international court instead of an ad hoc arbitration tribunal

One of the possible roles the ICJ and the ECJ may play in the settlement of tax treaty disputes, is that of the last resort in case the competent authority procedure does not lead to an agreement. Having an arbitration procedure that will eventually provide a final solution may have a positive influence on the behavior of states in the course of the mutual agreement procedure, which may be dubbed the “preventive effect” of the arbitration. This preventive effect, however, may not be counted on in the long term if insufficient safeguards exist to make the arbitration procedure effective in practice. As was mentioned above, the lack of pre-agreed procedural rules for ad hoc arbitration is among other things thus problematic for the effectiveness of this dispute settlement method and the clause may quite easily become virtually useless in practice. This problem would almost completely be solved by referring to the ICJ or the ECJ, with their existing and sophisticated “rules of the court”.

Furthermore, there is no need to appoint arbitrators, which is usually the bottleneck in interstate arbitration. In addition, the uniformity of tax treaty interpretation can at least in theory be better safeguarded and further developed when only one or two international courts are involved, than in the case of a myriad of bilateral arbitration tribunals.

And finally, from a practical point of view which is of importance for both inter-state and state-taxpayer relations, it may be noted that perhaps the contracting states of a tax treaty underestimate the efforts and problems associated with setting up an *ad hoc* arbitration. The experience of Brownlie, I believe, says it all:

“Anyone who has worked on cases in front of Courts of Arbitration and also in front of the ICJ will know very well the problems faced by the agent of the state and his team when you are setting up an ad hoc court of arbitration where the two agents are, so to speak, building the court, finding a registrar, and setting the whole thing up. And litigation of that kind is difficult enough without as it were having to design the building you are going to go into, in procedural terms. And since the experience of many states will be to have only one major arbitration or one case before the ICJ every 50 years, there is considerable

advantage in being able to go to an institution that has an existing registry and an accumulation of experience already accumulated. That is a very important practical difference”¹¹¹.

But there are some advantages with respect to ad hoc arbitration compared to international courts as well, most of which concern the fact that the tribunal can be constituted in function of the dispute at hand. First of all, because with ad hoc arbitration the arbitrators have to be appointed by the parties to the dispute at the time the dispute occurs, persons could be appointed that are considered specialists in the issue at hand. At least, this would mean that the concerns of some writers that the judges of the ECJ and the ICJ are not specialists in international taxation, can be laid to rest in case of ad hoc arbitration, where the parties can of course appoint such experts. Secondly, decisions of the international courts are always made public, but such is not necessarily the case with an interstate arbitration. It may be important for some states in certain procedures, to keep the whole matter confidential. Another disadvantage of an international court may be that the legal element of the disputes will usually be determinative of the outcome. In certain cases, for example genuinely interstate disputes on tax policy, the matter may be very difficult to settle on its legal merits alone, and a mediation followed by an arbitration by, say a technical body of the OECD, is probably a more appropriate dispute settlement method than an international court. Needless to say that this eventuality falls far beyond the scope of the current tax treaty practice in arbitration clauses. The most important practical advantage of ad hoc tribunals may be, however, that the resistance of some states to submit to this method of dispute settlement may be lower. This can be associated with the control they continue to have over the proceeding, and with the fact that most states have a little more experience with arbitration than with the international courts.

5.3. Preliminary rulings by international courts to create uniformity

Experience has shown that uniformity in the interpretation of multilateral conventions, or treaties that aim to harmonize domestic laws, can best be achieved by creating a centralized adjudicative and interpretative function¹¹². One of the best examples is of course the interpretation of EC

¹¹¹ Brownlie, I., *The Rule of Law in International Affairs*, *ibid*, ft. 9, p. 58.

¹¹² Rabel, E., *Festgabe für Erich Kaufmann*, Stuttgart, 1950, p. 310 as quoted by Bartsch, H.J., “The implementation of treaties concluded with the council of Europe, in Jacobs, F. and Roberts, S. (eds.) *The Effect of Treaties in Domestic Law*, Sweet & Maxwell, London, 1987, p. 211.; Schwarze, J., *ibid*, ft. 82, p. 37.

law throughout the community, where a system of preliminary questions ensures a uniform application and interpretation. With respect to international private law, another major achievement in the EU is the jurisdiction of the ECJ to interpret the Brussels Convention that was already discussed above. This approach has resulted in a substantial body of decisions by the ECJ (more than 150 decisions so far) that is generally viewed as uniform, consistent and of considerable importance for the development of international private law within the EC¹¹³.

The Council of Europe has also created a special tribunal to ensure uniformity in the application and interpretation of treaties. Besides the well-known example of the European Court of Human Rights, there is also the example of the European Tribunal in Matters of State Immunity¹¹⁴.

There are some fundamental advantages attached to this approach, as pointed out by Schwebel. The sovereignty of the states remains undiminished (because there is no right of appeal but merely a possibility to ask a non-binding advisory opinion), but in the same time, there is a real possibility for uniform standards in interpretation of international legal rules. It also provides some more flexibility to the rule that only states may be parties before international courts¹¹⁵.

Above I have suggested that the ECJ could perhaps be given the authority to interpret double taxation agreements throughout the EC by means of preliminary rulings along the lines of the Brussels Convention. To do essentially the same in the context of the ICJ is theoretically possible, but it is needless to say that the prospects for developing such a method of dispute settlement are entirely different from those in the EU. From a perspective of institutional reform, opening up the ICJ to preliminary opinions from domestic courts, is not as difficult as it might seem at a first glance. The creation of a UN organ meant to receive requests from

¹¹³ Waetherhill, S. and Beaumont, P., p.381.; North, P.M., Text, Cases, and Materials on International Private Law, p. 95.; North, P.M., and Fawcett, J.J., Private International Law, (12th ed), p. 280-37.; Lasok, D. and Stone, P.A., Conflict of Laws in the EC, 1987, p. 159.

¹¹⁴ Created by the Protocol of 16 May 1972 (E.T.S. No. 74) to the European Convention on State Immunity, also of 16 May 1972.

¹¹⁵ Janis, M., (ed), International Courts for the Twenty-First Century, p. 31-32.; Schwebel, S.M., "Preliminary Rulings by the International Court of Justice", *Virginia J.I.L.*, vol. 28/2 (1988), p. 497-8.

member states, and passing them on to the ICJ under art. 65-68 of the Statute (advisory opinions), would (on the international level) suffice¹¹⁶.

5.4. The role of the international courts in the settlement of genuinely interstate tax-disputes

Recent years have shown that there is indeed plenty of potential for states to take offence at each other's tax policies or conduct, not in the least by the globalization of business. Actually, it is not so hard to see that internationalization of business is followed by internationalization of business taxation and that this may entail conflicts for the different (competing, overlapping) treasuries of countries. Increasingly internationally working taxpayers require increasingly internationally sensitive tax legislation.

Tax holidays and investment incentives, for instance, have the potential of provoking tax disputes between states, as was clearly illustrated by the OECD's "Harmful Tax Competition" initiative¹¹⁷. International tax avoidance is acting as a catalyst on the potential for tax disputes, as is also illustrated by CFC legislation¹¹⁸, anti-avoidance rules with respect to foreign dividends, etc. Tax treaty termination is a clear indicator of tax disputes between states, often (but not always) for reasons of tax avoidance¹¹⁹. Transfer pricing by taxpayers and the governments' attempts to retain taxing power on a maximum amount of profit have the potential of creating conflicts between states, as is acknowledged by the

¹¹⁶ Schwebel, S.M., *ibid*, ft.115, p.497.

¹¹⁷ OECD Report "Harmful Tax Competition; an emerging global issue", Paris, 1998.; OECD Report "Towards Global Tax Cooperation", Paris, 2000.

¹¹⁸ Sandler, D., *Tax Treaties and CFC Legislation*, Kluwer, 1998, p. 2.

¹¹⁹ The US notified the Netherlands Antilles it wished to terminate their 1955 double taxation convention on June 29th, 1987. A renegotiated treaty of 1986 was never ratified by the US Congress. The US Treasury Department exclusively motivated its policy by considerations of treaty shopping (Crandall, F., "The Termination of the US-Netherlands Tax Treaty", *I.L.B.*, 1988, p. 355-380.; Johnson, M.F., "Antilles Treaty Termination Favored", *Tax Notes*, July 13th 1987, p. 129.; Doernberg, R.L., "Selective Termination or Suspension of Income Tax Treaty Provisions", *T.N.I.*, Nov. 1990, 1130-1135); The UK government followed the US example with regard to the NL-Antilles (UK Inland Revenue Press Release, March 16th, 1989); JAPAN recently announced to terminate the participation of the British Virgin Islands and Montserrat in the UK-Japanese tax treaty (Official Gazette, July 28th, 2000. ; Mori, K., "Japan Says UK Treaty Will No Longer Apply to BVI and Montserrat", *T.N.I.*, 2000, 28480); Denmark terminated its treaty with Portugal in 1994 to close the Madeira loophole (Weizman, L., "Denmark Terminates Portuguese Tax Treaty to Close Madeira Loophole", *T.N.I.*, 15th march, 1994).

Arbitration Convention. Supra-national economic and financial cooperation and integration will have a hard time in succeeding if tax policies are not compatible, as the former prime minister of Belgium Eyskens¹²⁰ argued in a recent article. The failure of the EU to introduce the qualified majority vote for taxation until now, however, goes to show that states have a hard time in accepting the political consequences of that. This clearly creates a friction between economic necessity and fiscal sovereignty. The FSC-dispute before the WTO dispute settlement body between the EU and the US is another example of international tax disputes between states¹²¹, and with the existing body of free trade areas and agreements it can reasonably be expected that we have not seen the last of such conflicts.

The potential for conflicts is thus certainly there, and increasingly so. But also the legal dimension, to make a conflict into an legal proceeding, is more and more to be found. DTA's have become so widespread that for many countries cross-border income that is governed by treaty rules is more the general rule than the exception¹²². Furthermore, international obligations with regard to taxation can be derived from treaties that prima facie have nothing to do with tax, such as free trade agreements¹²³, the European Convention on Human Rights¹²⁴, the American Convention on Human Rights¹²⁵, Treaties for the Guarantee and Protection of Investment¹²⁶, Treaties of Friendship and Cooperation, etc.

A particular mention must be made of EC Law, which in several ways is in a position to provide a framework for the future development of the application and interpretation of international tax rules within the European Community. The settlement of tax treaty disputes can be associated with that and the role of the ECJ in that respect will have to be addressed.

¹²⁰ Eyskens, M, "De Euro an de Toekomst van de Fiscaliteit en Para-Fiscaliteit in Belgie", in Peeters, B. (ed), *Recht zonder Omwegen. Fiscale Opstellen Aangeboden and Prof. Dr. J.J. Couturier, Larcier, Brussel, 1999*, p. 24-27.

¹²¹ Larkins, E.R., "WTO Appellate Decision", *JOIT*, May 2000, 16; and *JOIT*, January 2000, p. 32.

¹²² Easson, A., "Do We Still Need Tax Treaties?", *Bulletin for International Fiscal Documentation*, 2000, p. 619.

¹²³ For an overview see Hotchkiss, C., *International Law for Business*, McGraw Hill, 1994, p.201-229.

¹²⁴ European Convention on Human Rights, 4 November 1950.; Baker, PH., "Taxation and the European Convention on Human Rights", *E.T.*, 2000, 298-374.

¹²⁵ 1969, P.A.U.T.S. 36, 1970.

¹²⁶ Jennings, R and Watts, A., *Oppenheim's International Law*, Longman, 1992, p.1323.

Michael Edwardes-Ker wrote on the use of international courts:

“...in recent years tax treaty disputes solely between states themselves have not been adjudicated upon at a public international level. However, such international adjudication is likely in the next few years ... where supranational adjudication is now no more than a taxpayer’s dream”¹²⁷.

In this context, and keeping in mind the actual disputes already in existence, it is hard to believe that international courts, and even the ICJ, will not play any future role in the adjudication of tax disputes between states, be it one of last resort. The main objection has been that consent of the states concerned would be required, but it has been demonstrated above that, at least with respect to the ICJ, the jurisdiction of the court may be determined *ante hoc*. Most importantly, the compulsory jurisdiction of the ICJ may be derived from the declarations that were delivered under art. 36 (2) of the Statute. Although not every state has issued the necessary declaration (as a matter of fact, there are many conspicuous absences such as those of the US, France, Germany, China and Italy) the ones that did are *sufficiently numerous* (62), *divers* (developing countries, developed countries, tax haven countries, economies in transition, liberal economies) and *economically significant* (UK, Switzerland, Japan, India, The Netherlands, Sweden, Australia, Canada) to be relevant.

The fact still remains that “to haul another state before the ICJ is politically an unfriendly act”¹²⁸, and international courts will obviously remain a method of last resort, but friendship is one thing, losing fiscal revenue another...

¹²⁷Michael Edwardes-Ker, *Tax Treaty Interpretation*, Chapter 1, 1.02.

¹²⁸ Brownlie, I., *Principles of Public International Law*, *ibid*, ft. 98, p. 728.; See also Couvreur, PH., “The effectiveness of the ICJ in the peaceful settlement of international disputes”, in Muller, A.S. et al. (ed), *The ICJ; Its Future Role after 50 Years*, Martinus Nijhoff, 1997, p. 209 (“The central truth about almost one hundred years of practice is that neither states nor international organizations want to use the ICJ very much. This is due in large measure to a perfectly rational desire on the part of governmental officials ...neither to lose political and administrative control of disputes nor to embarrass other states and organizations”).