Dispute Resolution under the 2017 Multilateral Tax Convention: Belgian constitutional and EU law aspects

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Título

Resolución de conflictos según el Convenio fiscal multilateral de 2017: aspectos constitucionales belgas y comunitarios

Resumen

A la luz de las nuevas posibilidades que ofrece el Convenio Multilateral BEPS, este artículo explora cómo concretarlas en el caso de un Estado miembro de la Unión Europea como Bélgica, garantizando el respeto de la norma constitucional y los requerimientos del Derecho comunitario, en el ámbito particular de la resolución de conflictos en materia tributaria.

Palabras clave

Resolución de conflictos, Convenio multilateral BEPS, reservas, opciones

Abstract

In the light of the new possibilities offered by the BEPS Multilateral Tax Convention, this article explores how a European Union Member State such as Belgium has given shape to it, in order to ensure the respect for the constitutional rule and the Community Law requirements, in the particular field of dispute resolution in tax matters.

Keywords

Dispute Resolution, BEPS Multilateral Convention, reservations, options

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Sumario

Part I. The Multilateral Agreement

Tax treaties

Tax treaties aim theoretically at avoiding double taxation. Most countries avoid this unilaterally by way of exemption or credit. Many issues, however, are not resolved by tax treaties. Tax treaties to date have implemented the "benefits principle", taxing business income at source (permanent establishment - PE) and passive investment income at residence and limiting the right of the source country to tax this income. Under conditions of tax competition, a treaty would not even be necessary because if taxation at source is too high, foreign direct investment will go elsewhere. The US, e.g., eliminated withholding on interest in 1984.

BEPS moves to a new principle: The Single Tax Principle. Source taxation should not be reduced unless residence taxation takes place. This can be achieved for active income without a treaty by Controlled Foreign Companies (CFC) rules. If, for individual taxpayers, a treaty on exchange of information would suffice, for corporate taxpayers, treaties and the Multilateral Instrument (MLI) are necessary. Treaties with a limitation on benefits (LOB) clause guarantee that source taxes are not reduced unless there is taxation at residence.

International tax law was based, during a century, on bilateral treaties influenced by an internationally developed model. History shows that attempts at multilateralism failed, during the League of Nations period, because of an impossibility to reach consensus regarding the treatment of mobile capital, ie., dividends and interest [1]. A few tax treaties of a multilateral nature were concluded, e.g., the Nordic Treaty between Scandinavian countries [2].

BEPS Action 15: A multilateral treaty

According to the Action Plan on Base Erosion and Profit Shifting, achievement of the objectives of the Plan required swift implementation of the various actions desired. Though some actions required domestic law provisions or changes to be made merely to the Commentary of the OECD Model Tax Treaty or the OECD Transfer Pricing Guidelines, others would require changes to the OECD Model Tax Convention itself. They would be meaningless until such time as the bilateral treaties modeled on the OECD Convention or on the United Nations Model Tax Convention had been negotiated and approved by numerous countries. Examples include:

- introduction of an anti-treaty abuse provision;
- changes to the definition of "permanent establishment";
- changes to transfer pricing provisions; and
- provisions relating to hybrid mismatch arrangements.

1 D.M. Broekhuijsen, A Multilateral Treaty, Designing an Instrument to Modernize International Tax Law, Thesis, University of Leiden, E.M. Meijers Instituut, 2017, p. 13.

2 A. Ribes Ribes, La multilateralidad en la fiscalidad internacional al hilo de la acción 15 BEPS, *in* C. Hoyos Jiménez, C. García Novoa, J.A. Fernández Cartagena, New Taxation, Studies in honor of Jacques Malherbe, Bogotá, Instituto Colombiano de Derecho Tributario, 2017, p. 581.

In order to avoid protracted bilateral negotiations, the OECD proposed in action 15 of the BEPS plan [3] the drafting and adoption of a multilateral instrument. The plan itself left the issue open, calling for an analysis of the tax and public international law issues raised by the development of such an instrument. Elements of analysis were provided in a document published in September 2014.

Aside from a few attempts, such as the Nordic treaty, this will be the first time that a multilateral instrument in the tax field addresses not only procedural rules, such as exchange of information, but also substantive rules such as those mentioned. In the field of international investment, efforts were made to create multilateral agreements. They failed [4]. In the field of trade law, the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) Agreements are examples of relative success, together with the various multilateral trade agreements supplementing them.

Several solutions could be considered to achieve swift implementation of BEPS [5]. The first would be a mere adjustment of the OECD Commentary. This would be effective only if the adjustment could be reconciled with the treaties already signed and the commentary in force at the time of signature, even if an ambulatory treaty interpretation were to be adopted. This was unlikely to happen. The changes to Article 7 and its commentary relating to income attributable to a permanent establishment, insofar as the commentary changes applied to previous treaties, have already been the subject of much controversy.

A second solution would be to sign a general multilateral treaty replacing the network of bilateral treaties. This solution seems unrealistic in view of the number of treaties concerned (some 3,000) and their differing provisions.

A third solution would be a framework multilateral treaty to which various States could adhere by declaration without modifying its terms.

A fourth solution, in the same vein, would be a multilateral treaty amending bilateral treaties but on which Contracting States could formulate reservations.

In its report on the topic, the OECD started out from the premise that the BEPS Action Plan would require changes to the current tax treaty system in order *inter alia*:

- to curb treaty abuse;
- to modify the definition of "permanent establishment";
- to improve dispute resolution procedures; and
- to introduce provisions targeting specific issues such as treaty abuse in hybrid mismatch arrangements and other anti-BEPS measures that may be incompatible with existing treaties [6].

The prime benefits of the multilateral treaty route would be speed and unity of interpretation. It would also facilitate inclusion in BEPS of developing countries, which often find it difficult to sign bilateral treaties.

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3 OECD, (2015) Developing a Multilateral Instrument to modify bilateral tax treaties, Action 15 2015 Final Report, hereinafter cited as the Multilateral Instrument Report; M. Helminen, The Problem of Double Non-Taxation in the European Union – To What Extent Could This Be Resolved Through a Multilateral EU Tax Treaty Based on the Nordic Convention?, Eur. Tax., 2013, p. 306, P.D. Morrison, BEPS (Part 2) – A Multilateral Tax Treaty, Tax. Mgt. Int'l J., 2013, p. 306.

4 G. Loibl, *in* M.D. Evans, International Law, 4th ed., Oxford, 2014, p. 710.

5 J. Lutz, Een multilateraal instrument – Denkpistes en verhouding tot de Belgische income rechtsorde, Algemeen Fiscaal Tijdschrift, 2014, p. 25; D.M. Broekhuijsen, Naar een multilateraal fiscaal raamwerkverdrag, Weekblad Fiscaal Recht, 2013, p. 1143.

6 Multilateral Instrument Report, nr. 4, p. 15.

To a certain extent, globalization makes the bilateral approach obsolete: the mobility of factors and the existence of global value chains are likely to generate multi-country disputes and require multilateral Mutual Agreement Procedures (MAPs), which could better be addressed in a multilateral treaty [7].

The multilateral treaty would not supersede existing bilateral agreements but would complement them by addressing anti-BEPS measures and securing their compatibility with existing or future treaties. It would be negotiated at an International Conference [8], as was the case, for instance, with several multilateral treaties in the fields of private international law, civil procedure, arbitration, criminal extradition procedure and mutual assistance.

In the OECD's view, the multilateral treaty would apply only to signatories that had signed a bilateral treaty among themselves, the only potential exception being a multilateral dispute- resolution mechanism [9].

Conflicts with existing provisions in bilateral treaties would be resolved by compatibility clauses in the multilateral instrument. Definitions in the multilateral text would also prevail over existing definitions in bilateral agreements [10].

In the document supplementing the Report, drafted by international law experts and somewhat irreverently labeled "A Toolbox for a Multilateral Instrument", it is made clear that the instrument should include compatibility or conflict clauses defining its relationship with prior, or even future, bilateral treaties. The resolution of conflicts with existing treaties should not be left to the "lex posterior derogat priori" rule enshrined in Article 30.3 of the Vienna Convention on the Law of Treaties [11].

The treaty-to-be was characterized as presenting "flexibility". Besides core commitments, several opt-outs, opt-ins or alternatives could be included [12]. This would undoubtedly weaken the instrument and could make it as complex as a series of protocols amending bilateral treaties, an option that was pointedly ruled out by the OECD. Reservations to a multilateral treaty raise practical difficulties as the treaty loses its uniformity between contracting parties. The treaty becomes "fractioned" or "divisible" and is hard to apply effectively [13] when the treaty is the result of a compromise as could have been the case with the BEPS treaty – reservations are excluded. This was the case with the Montego Bay Treaty on the Law of the Sea [14].

If a State's reservations are too significant, other Contracting States may refuse to allow the Treaty to enter into force vis-à-vis the State making those reservations [15].

As the Report rightly points out, several measures contemplated in the BEPS Action Plan are multilateral in nature, such as multilateral MAPs or tackling dual-residence structures, transparent entities in hybrid arrangements, triangular PE cases and treaty abuse [16].

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7 Multilateral Instrument Report, nr. 14, p. 19.

8 Multilateral Instrument Report, nr. 22, p. 21; D. Carreau, Droit International, Paris, Pedone, 2004, pp. 110-111; P. Dailliet, M. Forteau & A. Peel, Droit international public, 8th ed., Paris, LGDJ, 2009, p. 184.

9 Multilateral Instrument Report, nr. 13, p. 31.

10 Multilateral Instrument Report, Annex 1, nr. 20, p. 32.

11 The VCLT.

12 Multilateral Instrument Report, nr. 16, p. 19.

13 D. Carreau, supra, at 134; P. Dailliet et al., supra, at 197; M. Fitzmaurice, *in* M.D. Evans, ed., International Law, op. cit. n. 5, 191.

14 D. Carreau, supra, at 135.

15 D. Carreau, supra, at 138.

16 Multilateral Instrument Report, nr. 14, p. 19.

Aside from the difficulties relating to drafting and signing such a treaty, consideration should be given to its future amendments. Amending a multilateral treaty is a slow process, to wit the changes made in 2011 to the 1988 multilateral treaty of the Council of Europe and the OECD on Exchange of Information. Traditionally, revising a treaty may require either unanimity or the consent of a majority of the Contracting Parties. If the majority rule is adopted, revision may or may not be binding on the minority States. If they are binding, a minority State may or may not have the right to withdraw [17].

In this respect, a procedure is conceivable that is already applied in international law and is provided for by Article 11 of the Vienna Convention on the Law of Treaties: a Member State's agreement may be expressed not only by its signature but also by all other means provided for by the treaty. In various fields, such as the environment, transportation, health or labor law, States have submitted to the majority decision of a treaty-designated body or an international organization. Examples are agreements relating to the division of water resources among a number of States.

In international tax law, which body should have that power? In spite of its ground-breaking work, the OECD does not seem to be ideal: it represents only the tax administrations of its Member States. The international Court of Tax Justice, which several writers dream of, seems far off. It would have been worthwhile creating an independent body under the treaty itself.

Another problem lies in the very ambit of the BEPS Action Plan, which contemplates changes in domestic provisions and in treaty provisions that might replace, supplement or amend domestic provisions. The United States favors the "first do no harm" rule: a bilateral treaty or multilateral agreement may not restrict the benefits granted by the law of the United States [18]. It is true that this rule does not appear in the OECD Model, although the model does specify in various provisions that "a contracting State may tax", or "shall not tax". The treaties signed by the United States include a saving clause, leaving unchallenged the right of the United States to tax its citizens as if the treaty did not exist, except in very restricted fields. As the BEPS Action Plan's objectives include eliminating not only double taxation but also double non-taxation, the multilateral instrument should include restrictions on the application of a treaty where an element of income or wealth is not taxed in another contracting State. For the United States, a treaty is no place for a provision, even an indirect one, that a State will tax such income or wealth [19].

The Multilateral Agreement (2017)

BEPS is described as the "most significant re-write of international tax rules in a century" [20]. It culminated in the release on 24 November 2016 of the Multilateral Instrument, a multinational convention providing for the simultaneous amendment of more than 3,000 existing bilateral double tax conventions, subsequently signed in 2017.

The financial crisis, maybe as a pretext, and various "leaks" induced more than 100 countries to eliminate BEPS by making international tax rules coincide with modern business practices and securing the principle that taxation takes place where economic value is created. The OECD Action Plan on Base Erosion and Profit Shifting was launched in 2013 and Final Reports on 15 Actions were issued in 2015. Action 15 on the development of a multilateral instrument arose from the acknowledgement that present DTC norms were old-fashioned, as were domestic international tax rules. Both sets of rules had to be modernized.

17 D. Carreau, supra, at. 169-171.

18 P.D. Morrison, BEPS (Part II – A Multilateral Tax Treaty?), Tax Mgt. Intl J., 2013, p. 626.

19 See Art. 1.2 of the 2006 US Model Treaty. "This convention shall not restrict in any manner any benefit now or hereafter accorded (1) by the laws of either Contracting State".

20 On the BEPS plan, see e.g. A.P. Dourado, Governação Fiscal Global, Coimbra, Almedina, 2017, p. 43; R. Danon (ed.), Base Erosion and Profit Shifting (BEPS), Impact for European and international tax policy, Geneva-Zurich-Basel, Schulthess, 2016; J. Malherbe, C.P. Tello, M.A. Grau Ruiz, La Revolución fiscal de 2014, FATCA, BEPS, OVDP, Bogotá, Instituto Colombiano de Derecho Tributario, Legis, 2015.

The MLI is the instrument which aims at adapting DTC rules in order to fill gaps allowing "legal" tax avoidance. MLI provisions are divided into three categories:

The first category includes the minimum standard provisions, which are necessary to achieve the goal of the exercise:

- a preamble stating that treaties aim at avoiding double taxation without creating opportunities for non-taxation;
- a principal purpose test (PPT), preventing the unjustified granting of treaty benefits;
- the commitment of parties to apply a mutual agreement procedure (MAP) to solve problems of interpretation and application of treaties.

The provision relating to corresponding adjustments in State B after a transfer pricing primary adjustment favorable to State A must also be considered as part of the minimum standard [21].

A second category includes provisions relating to:

- income derived through transparent entities;
- granting DTC benefits to dual-resident legal entities;
- the treatment of dividend payments;
- the treatment of income attributable to permanent establishments (PEs);
- artificial avoidance of PE status.

Parties may reserve their rights in connection to those provisions, totally or partially.

A third category includes optional provisions which may be chosen by parties to a DTC:

- the proper method to avoid double taxation;
- the avoidance of PE status through the misuse of certain activity exemptions;
- an additional preamble wording;
- a simplified limitation on benefits (LOB) clause;
- an agreement to arbitrate tax disputes not resolved within the framework of a MAP.

The procedure of ratification and the effect of reservations on the introduction of provisions in existing treaty relationships is therefore extraordinarily complex. These may, in addition, be modified in the future.

21 A. Langer, The Legal Relevance of the Minimum Standard in the OECD/BEPS Project, *in* M. Lang, P. Pistone, A. Rust et al., The OECD Multilateral Instrument for Tax Treaties, Analysis and Effects, Alphen aan den Rijn, Wolters Kluwer, 2018, p. 98.

Part II. Improving dispute resolution

Chapter I. Article 16: Mutual Agreement Procedure (MAP)

The application of bilateral treaties as modified by the multilateral agreement and the reconciliation of reservations made by treaty partners is likely to result in legal disputes.

Action 14 of the BEPS report aimed at making Dispute Resolution Mechanisms more effective [22]. The Multilateral Agreement includes provisions which could fulfill this promise.

The Action Plan invited the drafters to address obstacles preventing countries from solving treaty-related disputes under MAP, including the absence or denial of arbitration.

The BEPS recommendations included a minimum standard, calling on countries to include Article 25 of the OECD Model Treaty in their tax treaties even when the disagreement between taxpayer and tax authority bears on the conditions for the application of a treaty anti-abuse provision or on whether the application of a domestic anti-abuse provision conflicts with a treaty [23]. A timely resolution – 24 months – should be the outcome of the MAP [24]. The effectiveness of the MAP should be improved [25]. Compliance with the minimum standard should be subject to a peer review [26] in the Forum of Tax Administration (FTA), securing a monitoring process based on Terms of Reference reflecting the minimum standard and an Assessment Methodology to be developed by the OECD Committee for Fiscal Affairs [27].

Guidelines should be published informing taxpayers about access to and use of the MAP and the MAP staff should have the power to resolve MAP cases independently. The staff should be provided with adequate resources [28].

The relationship between MAP and local audit settlement should be made clear to treaty partners. Audit settlement should not preclude access to MAP. If a dispute resolution process exists, independent of the audit, access to MAP may exclude matters resolved through that process [29].

A number of changes to the OECD Model Treaty audit commentary were recommended in order to secure that taxpayers meeting the requirements of a MAP process have effectively access to it. These changes were inserted principally in the 2017 version of Art. 25 and other articles of the Model Treaty and their Commentary [30].

The request for MAP could be directed to the competent authority of either State [31]. The Report also identifies several "best practices" which are not part of the minimum standard. Where they call for amendments to the OECD Model Treaty Commentary, changes were made in 2017.

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22 Action 14 2015 Final Report.

23 Making Dispute Resolution Mechanisms More Effective, Action 14 2015 Final Report, p. 6.

24 Id., 1.3, pp. 15 and 16.

25 Id ., 1.4, p. 16.

26 Id., 1.6., p. 37 and Annex A, p. 43

27 Id., 60, p. 38.

28 Id., 2.1 to 2.5, pp. 18-19.

29 Id., 2.6, p. 19.

30 Id., 3.1 to 3.3, pp. 21-27.

31 Id., 3.1., p. 22.

Article 16 of the MLI first reproduces paragraphs 1 to 3 of Article 25 of the OECD Model Treaty, as modified following the Action 14 BEPS Report, with some terminology changes.

The MAP is available when a person considers that the actions of a Contracting State result for him in taxation not in accordance with the Convention. It is available irrespective of domestic remedies. The request may be presented to either of the two competent authorities. It must be presented within three years from the first notification of the disputed action [32].

Those provisions shall apply in place or in the absence of similar provisions in the Covered Tax Agreements [33].

Various compatibility clauses are inserted in Article 16.5.

The Parties to the MLI may reserve the right not to apply those provisions of paragraph 1 to their Covered Tax Agreements if they intend to meet the minimum standard by reaching the same result under each of their Covered Tax Agreements other than those permitting the taxpayer to present his case to either competent authority [34]. The taxpayer must present his case to the competent authority of the State of which he is a resident or a national, as the text stood before the 2017 modifications [35].

The Parties may reserve the right to omit the time-limit language for presentation of the claim if they intend to meet the minimum standard by ensuring that the claim may be presented within at least three years of the notification of the disputed action [36].

The competent authority shall endeavor to resolve the case by mutual agreement with its counterpart. However, it will do so only if the objection appears to it to be justified. It may also solve the case unilaterally [37].

The agreement reached shall be implemented notwithstanding any domestic time limits [38].

The Parties may reserve the right not to apply the time-limit provision in their Covered Tax Agreements if the same result is reached otherwise [39].

The Parties may also reserve this right if they intend to implement the minimum standard by another treaty provision under which no adjustment would be made to the profits of a permanent establishment or an associated enterprise after a period mutually agreed, except in the case of fraud, gross negligence or willful default [40].

The competent authorities shall also endeavor to resolve questions related to the interpretation or application of a Covered Tax Agreement [41].

32 Art. 16.1.

33 Art. 16.4.

34 Art. 16.5, a).

35 EM, nr. 196, p. 49.

36 Art. 16.5, b).

37 Art. 16.2, first sentence.

38 Art. 16.2, second sentence.

39 Art. 16.5, c) (i).

40 Art. 16.5, c) (ii).

41 Art. 16.3.

The competent authorities may consult together for the elimination of double taxation in cases not provided for in the Covered Tax Agreement [42].

In the event of reservations, appropriate notifications shall be made to the Depositary of the Convention [43].

Chapter II. Article 17: Corresponding adjustments

After a transfer-pricing primary adjustment, in which one of the Contracting Jurisdictions is recognized as having the right to tax profits which have been charged to tax in the other one, the latter shall make an appropriate secondary adjustment of the tax charged on such profits [44].

Chapter III. Articles 18 to 26: Arbitration

Section I. Principle and time period after which mandatory binding arbitration may be requested

§ 1. Principle

Parties to the Multilateral Convention may elect [45] to enter into Mandatory Binding Arbitration if the competent authorities acting under the MAP are unable to reach an agreement within a period of two years starting on one of two dates [46] which depend on the course of the procedure (see hereunder).

Indeed, the unresolved issues must be submitted to arbitration if the person concerned requests it in writing.

§ 2. Suspension and extension of the two- (or more) year period before start of arbitration

This period of two or more years stops running if a competent authority suspends the MAP because the same issue is pending before a Court or an administrative tribunal. The suspension will last until a final decision is rendered by the judicial or administrative instance or the case has been suspended or withdrawn.

Also, if a person and the competent authority have agreed to suspend the MAP, the period stops running until the suspension is lifted [47].

If both competent authorities agree that a person affected by the case has failed to provide additional material information in a timely manner after the start of the period, the period is extended by an amount of time equal to the period elapsed between the request of the information and the date on which it is provided [48].

§ 3. Procedure upon start of arbitration

The competent authority which received the initial MAP request notifies it to the other competent authority within two months [49].

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42 Art. 16.3.

43 Art. 16.6.

44 Art. 17.1.

45 Art. 18; J. Owens, Mandatory Tax Arbitration: The Next Frontier Issue, 46 Intertax 2018 at 610.

46 Art. 19.1.

47 Art. 19.2.

48 Art. 19.3.

49 Art. 19.5.

Within three months of receipt of the request, a competent authority shall either notify the person and the other competent authority that it has received the information necessary or request additional information [50].

If additional information has been requested, the competent authority shall, within three months of receipt of the information, notify the person and the other competent authority that the information was received or that some is missing [51].

§ 4. Influence of the procedure on the start date to complete arbitration

If no competent authority has requested additional information after receiving the request for a MAP, the start date shall be the earlier date on which both competent authorities have notified the person who has presented the case that they have received the information necessary or three months after the competent authority which has received the request has notified it to the other competent authority.

If additional information is requested, the start date shall be the date on which both competent authorities have notified the person that they have received the additional information or three months after both competent authorities have received all information requested by either one.

§ 5. Settlement of the mode of application of the arbitration

The competent authorities shall then, by mutual agreement according to the MAP procedure, settle the mode of application of the provisions relating to arbitration, including the minimum information necessary. Such agreement must be concluded before the date on which unresolved issues are eligible for submission to arbitration and may be modified thereafter [52].

It is expected that a model competent authority agreement will be produced [53].

§ 6. Reservation on time period after which arbitration may be requested

In any event, a Party may reserve the right to replace the two-year period by a three-year period [54].

§ 7. Reservations as to the principle of arbitration

A Party may reserve the right not to submit an unresolved issue to arbitration if a decision on the issue has already been rendered by a court or administrative tribunal.

A reservation may also be made to the effect that, if such a decision is rendered after a request for arbitration and before the decision of the arbitration panel, the arbitration process shall terminate [55]. Indeed, in some jurisdictions, a MAP cannot override a judicial or administrative decision. This reservation avoids the possible conflict [56].

§ 8. Implementation of the arbitration decision

The arbitration decision shall be implemented through the MAP and shall be final and binding on both Contracting Jurisdictions.

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50 Art. 19.6.

51 Art. 19.7.

52 Art. 19.10.

53 EM, nr. 203, p. 58.

54 Art. 19.11.

55 Art. 19.12.

56 EM, nr. 231, p. 59.

However, it shall not be binding on those Jurisdictions in three cases:

1°. A person directly affected by the case does not accept the mutual agreement implementing the decision;

2°. A final court decision in one of the Contracting Jurisdictions holds the arbitration decision as invalid;

3°. A person directly affected by the case pursues litigation on the issues resolved.

In the second case, a new request for arbitration may be made. The Arbitration process shall be considered not to have taken place [57].

The third exception on the binding character of arbitration aims at avoiding that, in the case of concurrence of court and arbitration proceedings, it be asserted that the court decision binds one Contracting Jurisdiction and the arbitration decision the other one [58].

Section II.Article 20: Appointment of arbitrators

The arbitration panel consists of three individual members with expertise or experience in international tax matters. They must be impartial and independent. The Chair shall not be a national or resident of either Contracting Jurisdiction.

Each competent authority appoints one member within 60 days of the date of the request for arbitration. The two appointed members appoint a Chair within 60 days of the last appointment.

In the event of failure to appoint, the appointment shall be made by the highest-ranking official of the Center for Tax Policy and Administration of the OECD who is not a national of either Contracting Jurisdiction [59].

Section III.Article 21: Confidentiality

For purposes of the application of the arbitration part of the Multilateral Convention and of the domestic laws of the Contracting Jurisdictions, panel members and a maximum of three staff per member shall be considered as persons or authorities to whom information may be disclosed. Information received shall be considered as information exchanged pursuant to the exchange-of-information clause of the Covered Tax Agreement.

Panel members and staff have to agree to confidentiality as described in the Covered Tax Agreement [60].

Section IV.Article 22: Resolution of a case during the procedure

If the competent authorities reach an agreement before the decision of the arbitration panel or if the initiator of the request withdraws it, the MAP and the arbitration process shall terminate [61].

Section V.Article 23: Type of arbitration process

The following rules shall apply to the arbitration unless there exists another agreement.

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57 Art. 19.4.

58 EM, nr. 224, p. 57.

59 Art. 20.

60 Art. 21.

61 Art. 22.

§ 1. Final offer procedure – Resolutions proposed by competent authorities

Each competent authority shall submit to the arbitration panel, by a date set by agreement, a proposed resolution on all unresolved issues limited to specific monetary amounts or a maximum rate of tax for each adjustment.

If there is no agreement between the competent authorities on a "threshold question" regarding the conditions for application of a provision of the Covered Tax Agreement, such as residence or the existence of a permanent establishment, alternate resolutions may be proposed [62].

The competent authorities may also submit supporting papers.

The arbitration panel shall select as its decision one of the proposed resolutions on each issue and threshold question, without any rationale or explanation [63].

This expeditious procedure corresponds to the "final offer", "last best offer" or "baseball" arbitration [64].

§ 2. Independent opinion procedure – reservations and application of other rules

A Party may reserve the right not to apply the "final offer" procedure. Then, except when there is another agreement, the following rules shall apply under an approach known as the "independent opinion" approach [65].

The competent authorities shall provide all necessary information to the panel members. The panel shall decide the issues in accordance with the Covered Tax Agreement and, subject to the provisions of this Agreement, those of the domestic laws of the Contracting Jurisdictions, as well as any other sources which the competent authorities identify by mutual agreement [66].

§ 3. Disagreement as to procedure

If one Party has not made the reservation as to the expeditious procedure and the other one has, the competent authorities shall endeavour to reach agreement on the type of arbitration to apply.

Until such agreement, Mandatory Binding Arbitration provisions shall not apply [67].

§ 4. Reservation on non-disclosure

A Party may choose to apply a non-disclosure rule: the competent authorities ensure that each person presenting the case and its advisors agree not to disclose information received from a competent authority or the panel. If this agreement is breached before the decision of the panel, the arbitration process terminates [68].

Section VI.Article 24: Reservation on agreement on a different resolution

A Party may reserve the right to elect that the arbitration decision will not be binding if the competent authorities agree on a different resolution on all unresolved issues within three months of delivery of the arbitration decision. This rule will apply only if both Contracting Jurisdictions have notified this

62 Art. 23., a) and b).

63 Art. 23, c).

64 EM, nr. 242,p. 61.

65 EM, nr. 245,p. 62.

66 Art. 23.2.

67 Art. 23.3.

68 Art. 23.4 and 5.

reservation to the Depositary [69]. The reservation may be limited to the "independent opinion" type of arbitration process [70].

Part III. Compatibility of the dispute resolution provision of the MLI with the Belgian Constitution and EU law

Reservations

In Belgium, a monistic country, international treaties are hierarchically superior to domestic law. The Constitution is silent in this respect but the principle is well established under case law [71]. According to the European treaties, European law benefits however of an overriding superiority [72].

Belgium has submitted almost all of its bilateral tax treaties to the Multilateral Agreement, except the DTT concluded with Japan which already took the BEPS project into account and some conventions which are in the process of renegotiation (Germany, the Netherlands, Norway and Switzerland). Reservations were formulated in respect of various articles, concerning a.o. the arbitration clause.

According to Belgian law, the Belgian competent authority may not depart from a judicial decision favorable to the taxpayer. A reservation enables Belgium not to submit a case to arbitration when a court decision has been issued.

Another reservation enables Belgium to apply Part VI of the MLI only to its treaties which do not already provide for arbitration.

The option provided under article 24(1) and a reservation under article 24(3) enable the competent authorities of Belgium and its treaty partner to derogate from the decision of the arbitration commission if they agree on another solution within three months [73].

EU Law

The Achmea decision of the European Court of Justice stated, in respect of an arbitration under a treaty for the protection of investments, that, as an arbitral tribunal may not address preliminary questions to the ECJ, not being a State jurisdiction, the arbitral mechanism was in contradiction with EU law as the arbitral panel could be called upon to interpret EU law. Article 267 of the TFUE, providing that the Court is competent to interpret the EU treaties, and article 344, by which Member States commit themselves not to submit disputes relating to the interpretation or application of the Treaty to methods of solution not provided in the treaties, prevent the arbitration provided, *in casu*, in the investment treaty between the Netherlands and Slovakia [74].

This raises the question of the compatibility of tax arbitration with the treaty, as the arbitration commission set up according to the MLI is not a jurisdiction [75].

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69 Art. 24.1 and 2.

70 Art. 24.3 referring to Art. 23.2.

71 Cassation (Belgium), 27 May 1971, Société Fromagerie franco-suisse Le Ski, Journal des Tribunaux, 1971, p. 417.

72 CJEC, 6-64, 15 July 1964, Costa IENEL ; S. Van Raepenbusch, Droit institutionnel de l'Union européenne, 2nd ed., Brussels, Larcier, 2016, p. 556.

73 Question of Mr Roel Deseyn, Answer nr. 1727, 54th Legislature, Bull. Q&A nr. B128, 23 August 2017.

74 ECJ, C-284/16, 6 March 2018, Achmea.

75 M. Villar Ezcurra, Implicaciones del caso « Achmea » en asuntos fiscales : limites al arbitraje, jurisdicción exclusiva del TJUE y Convenios de doble imposición internacional, Quincena Fiscal, 2019, nº 1.

Conclusion

The MLI provides a balance between minimum standards and flexibility. It aims to achieve a large participation.

A country must decide: first, whether it will take part in the MLI – all OECD countries normally will except the US; second, which rules of the instrument it wishes to apply –there are many options; and third, it must contact all countries with which it has a bilateral treaty to see which rules they would be willing to accept.

The European Union adopted hastily an anti-tax avoidance directive (12 July 2016) in order to avoid that the BEPS action plan be implemented in a different way in the various EU countries. The result is the adoption of several BEPS recommendations which are not compulsory, such as the limitation on deductible interest, CFC rules and a general anti-abuse clause – similar, however, to the MLI clause. It would have been wise to organize coordination between Member States as to which of the MLI options they would elect. Brexit creates a huge gap insofar as the treaties with the United Kingdom are concerned.

Much was expected by way of solutions of tax disputes, the number of which may be increased by implementation of the BEPS actions. The Multilateral Treaty brings few novel elements to the field. The MAP Procedure is patterned along traditional OECD practice. An arbitration clause was inserted in the OECD Model Treaty in 2008. A "Manual on Effective Mutual Agreement Procedures" (MCMAP) has been developed by the organization. Arbitration clauses had been inserted in several treaties[76] although a few elect the jurisdiction of an international body: the European Court of Justice in the treaty between Austria and Germany, the International Court of Justice in the treaty between Sweden and Germany[77].

The arbitration clause included in the Multilateral Convention rests mostly on the OECD precedent. It provides for an arbitration between States, no role for the taxpayer, delays which fit administrative traditions but not business needs and ignore the brevity of human life.

Such delays are of general concern and efforts have been made in commercial arbitration to shorten them[78]. The International Chamber of Commerce created a special commission which published a brochure on "Techniques for Controlling Time and Costs in Arbitration"[79] and addressed the concern in its modified arbitration rules providing for the possibility given to the Arbitral Tribunal to shorten the – very reasonable – time allowed by the Rules at various steps of the procedure[80]

76 C. del Campo, General Report, International Fiscal Association, 2016 Madrid Congress, Cah. dr. fisc. Intern., vol. 101 A, Dispute resolution procedures in international tax matters, p. 59.

77 E. Reimer and A. Rust, ed., Klaus Vogel on Double Taxation Conventions, 4th ed., Alphen aan den Rijn, 2015, Art. 25, espec. p. 1819; F. Serrano Antón, El Arbitraje Tributario en el Derecho Internacional Tributario: Su Desarrollo en el Marco del Procedimiento Amistoso, *in* H. Taveira Torres, coord., Direito Tributário internacional Aplicado, vol. VI, São Paulo, Quartier Latin, 2012, p. 127.

78 B. Hanotiau, Mieux maîtriser le temps, réduire les coûts dans l'arbitrage international, *in* Liber Amicorum Guy Keutgen, Brussels, Bruylant, 2008, p . 377.

79 ICC Publication nr. 861-I, ENG.

80 Art. 38.