

WU Institute for Austrian
and International Tax Law

Series Editor: Michael Lang

Editors: Michael Lang / Jeffrey Owens

International Arbitration in Tax Matters

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European and International
Tax Law and Policy Series

IBFD

International Arbitration in Tax Matters

Why this book?

The last two decades have seen an unprecedented integration of national economies, the emergence of new players and the growth of global corporations. These forces of globalization have an impact on all aspects of economic life. Tax has not been immune to these pressures – it has become increasingly challenging to operate national tax systems in a borderless world. Politicians, the press and citizens have engaged in an intense debate on whether multinational enterprises (MNEs) are paying their fair share of the tax burden and whether the tax they pay in each of the jurisdictions in which they operate reflects where the value is created. All these developments have been accompanied by an intensification of tax competition, with countries using their tax systems to attract increasingly mobile economic activities.

The lack of a globally accepted set of rules to govern the taxation of MNEs has led to a very significant increase in cross-border tax disputes. Yet, little has changed in the way that governments try to resolve them. The mutual agreement procedures (MAPs) found in tax treaties are the main mechanism to resolve such disputes. Despite some improvements in the MAP process, a MAP is slow and the number of unresolved cases continues to grow, which has led to an increase in unrelieved double taxation. In today's uncertain economic environment, MNEs have the right to expect that differences of views between national tax authorities will be resolved in a principled and timely manner.

This publication brings together the main papers discussed at a conference in January 2015 at the Vienna University of Economics and Business (WU). It examines the concerns put forward against arbitration and explores possible solutions. This book aims to contribute to the ongoing debate on how to resolve cross-border tax disputes.

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The Scope of Arbitration under Tax Treaties

Brian J. Arnold

5.1. Introduction

The topic of this paper is the scope of arbitration provisions under bilateral tax treaties, with particular emphasis on the arbitration provisions in the OECD and UN Model Tax Conventions. To provide a basis for comparison, the paper also discusses briefly the arbitration provisions under selected non-tax treaties.

The inclusion of arbitration provisions in tax treaties is a recent development. Article 25(5) of the OECD Model, which provides for compulsory arbitration, was adopted in 2008. Article 25 of the UN Model was amended in 2011 to add an optional arbitration provision. Because arbitration has been added to the OECD and UN Models so recently, it has been included in relatively few bilateral tax treaties to date, and those treaties are invariably between developed OECD member countries. As a result, information about the actual experience of countries with arbitration is scarce and at best anecdotal.

For the purposes of this contribution, the topic – the scope of arbitration – includes not only the issues that qualify for arbitration but also the conditions that must be satisfied in order for an issue to be submitted for arbitration. It is difficult to separate the two aspects of the topic from related issues, such as domestic law barriers to arbitration. Therefore, there may be some overlap between this chapter and other papers prepared for this project. However, where issues are clearly dealt with in other chapters, the author does not deal with them or only mentions them here. For example, in some countries there may be constitutional constraints on access to arbitration, which effectively restrict the scope of the arbitration provision in a treaty; the constitutional aspects of arbitration are dealt with in a separate chapter (*Ed.*: see chapter 8) and are not dealt with here. Similarly, the EU Arbitration Convention is dealt with in a separate chapter (*Ed.*: see section 2.4.1. in this volume) and therefore is not discussed here.

The chapter commences with a brief description of the scope of the arbitration provisions of the OECD and UN Models. It then analyses in detail the purposes of arbitration, the conditions for the submission of issues to arbitration and the types of issues that qualify for arbitration under the provisions of the OECD and UN Models. The chapter also examines several issues involving the scope of arbitration, including the effect of the non-discrimination article, the risk of double non-taxation and the relationship between arbitration and domestic measures for the resolution of disputes. Lastly, this chapter briefly analyses the scope of arbitration provisions under non-tax treaties such as bilateral trade agreements, the Energy Charter and the General Agreement on Trade in Services (GATS).

5.2. The scope of arbitration under the OECD and UN Models

5.2.1. Introduction

5.2.1.1. Arbitration as part of the mutual agreement procedure

This section describes and compares the scope of the arbitration provisions of the OECD and UN Models. It looks first at the purpose of the arbitration provisions; second, at the requirements for the submission of an issue for arbitration and, third, at the types of issues that qualify for arbitration.

At the outset, it must be recognized that arbitration forms part of the mutual agreement procedure (MAP) provided in article 25 of both Models.¹ Arbitration is not available independently of MAP or if the competent authorities of the contracting states agree that taxation has been imposed in accordance with the treaty; it is available only where the competent authorities have not been able to reach an agreement on one or more issues. In effect, arbitration is a mechanism for resolving certain issues within a case that is subject to a MAP. It is not available for an entire MAP case since the resolution of a case as a whole is the function of the MAP; rather, arbitration is used to resolve certain issues within the MAP that the competent authorities are unable to resolve. Because arbitration is a part of MAP, it is subject to any and all of the limitations on MAP. Therefore, to take an example, in most situations a taxpayer would have the right to reject a MAP agreement that resulted from the arbitration procedure.

1. OECD Commentary on art. 25, paras. 5 and 64; UN Commentary on art. 25, para. 18, quoting OECD Commentary on art. 25, para. 64.

Article 25 is sufficiently broad to permit contracting states to agree to an arbitration mechanism even if the treaty does not explicitly provide for arbitration (i.e. it does not contain a provision similar to article 25(5) of the OECD Model and article 25 (alternative B) of the UN Model).² In such cases, all aspects of the arbitration procedure, including its scope, must be settled by mutual agreement between the contracting states.

5.2.1.2. Article 25(5) of the OECD Model

Article 25(5) of the OECD Model provides that a taxpayer can request that any unresolved issues in a case submitted for mutual agreement under article 25(1) be resolved by arbitration if the competent authorities are not able to resolve the case within 2 years.³ However, arbitration is not available if the unresolved issues have been decided by a domestic court or administrative tribunal. Unless the MAP agreement based on an arbitration decision is rejected by the taxpayer, the decision of the arbitrators is binding on the competent authorities and must be implemented irrespective of any time limits in domestic law. The competent authorities are authorized to settle the details of the arbitration process by way of a mutual agreement. A sample mutual agreement on arbitration is included in an annex to the Commentary on article 25.

5.2.1.3. Article 25(5) (alternative B) of the UN Model

Article 25 of the UN Model provides two alternative versions of the MAP, only one of which provides for arbitration. Under article 25(5) (alternative B), unresolved issues in a MAP case under article 25(1) that have not been resolved within 3 years can be submitted for arbitration if *one* of the competent authorities so requests. The taxpayer is entitled to be notified of the request. The major differences between arbitration under the UN Model and the OECD Model are as follows:

- arbitration is an alternative under the UN Model;
- arbitration under the UN Model is available at the request of the competent authorities rather than at the request of the taxpayer, as under the OECD Model;

2. OECD Commentary on art. 25, para. 69; UN Commentary on art. 25, para. 18, quoting OECD Commentary on art. 25, para. 69.

3. For an excellent discussion of mandatory arbitration under the OECD Model, see H.J. Ault, *Recent Treaty Developments in the Arbitration of International Tax Disputes*, in *Tax Polymath: A Life in International Taxation, Essays in Honour of John F. Avery Jones* (IBFD 2010) pp. 297-312.

- issues can be submitted for arbitration only if they have not been resolved by the competent authorities within 3 years, rather than the 2-year period under the OECD Model; and
- under the UN Model, the competent authorities have 6 months after the arbitration decision has been made to reach a different resolution of the issues.

Apart from these differences, arbitration under the UN Model is the same as under the OECD Model as described above.

Obviously, the most important difference between the OECD and UN Models with respect to arbitration is that under the UN Model, arbitration is not truly mandatory because it is initiated by one of the competent authorities rather than the taxpayer. Consequently, both competent authorities can agree to prevent an unresolved issue from proceeding to arbitration.

5.2.2. The purpose of arbitration provisions in tax treaties

According to the OECD, the purpose of arbitration is to enhance the effectiveness of the MAP by providing a dispute resolution mechanism for issues about which the competent authorities cannot agree.⁴ Although this is undoubtedly true, it does not fully explain the importance of the role of arbitration in the MAP.

Under article 25(2) of both the OECD and UN Models, the competent authorities are required only to “endeavour” to resolve MAP cases involving taxation not in accordance with the provisions of the treaty; they are not required to actually resolve such cases.⁵ Therefore, from a taxpayer’s perspective, arbitration has the effect and, arguably at least, the purpose of forcing the resolution of issues submitted to arbitration in a manner that is binding on the competent authorities. Typically, in a MAP where the competent authorities cannot agree, the result will be unrelieved double taxation. Therefore, forcing the competent authorities to agree through arbitration provides taxpayers with certainty and will often eliminate double taxation,

4. OECD Commentary, para. 64.

5. See Commentary on art. 25 of the OECD Model, para. 37. The OECD’s *Proposed Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective* (hereinafter “OECD Discussion Draft on Action 14”) proposes to add a provision to the Commentary on art. 25 to emphasize that the obligation on the competent authorities to resolve disputes under art. 25(1) is part of a contracting state’s obligation to perform a tax treaty “in good faith.” (See para. 10.)

to the benefit of taxpayers. However, in any particular case, double taxation may not necessarily be relieved in the manner expected or proposed by the taxpayer.

From the perspective of the competent authorities of the contracting states, the effect and, arguably, the purpose of arbitration is to force the competent authorities to agree to resolve issues through the MAP in a timely manner and avoid recourse to arbitration. To the extent that issues are submitted to arbitration, the competent authorities give up control over the resolution of these issues to independent arbitrators who may not fully appreciate the significance of the issue for a country's tax system. In order to avoid having the issue decided through arbitration, the competent authorities are effectively nudged toward the resolution of the issue themselves. Thus, arbitration imposes discipline, which would otherwise be lacking, on the competent authorities to resolve cases subject to a MAP.

Even if the competent authorities were required to resolve MAP cases within a certain period of time, there might arguably still be a role for arbitration. Although in this situation arbitration would not be necessary to impose discipline on MAP cases, it could play an important role as an outlet or safety valve for the competent authorities. For example, there could be controversial or sensitive issues that the competent authorities might prefer not to resolve themselves, but instead to refer to arbitration.

5.2.3. Conditions for the submission of issues to arbitration under the OECD and UN Models

5.2.3.1. Presentation of case to competent authorities for MAP

Under both the OECD and UN Models, arbitration is available only if a person has presented a case under article 25(1) to the competent authority of the state of which the person is resident. The case must involve actions by one or both of the contracting states that have resulted or will result in taxation contrary to the provisions of the treaty and it must be presented to the competent authority within 3 years of the first notification to the person of the actions. A MAP that arises under the residence tiebreaker rule in article 4(2)(d), which requires the competent authorities to settle questions of dual residence in certain circumstances, is covered by article 25(1).

Therefore, if the competent authorities fail to agree and this failure results in taxation contrary to the treaty, arbitration is available under article 25(5).⁶

MAP cases under article 25(3) that involve the interpretation or application of the treaty or the elimination of double taxation not provided for in the treaty do not qualify for arbitration, although contracting states have the option of extending arbitration to article 25(3) issues.⁷

Other provisions of the OECD and UN Models that refer explicitly to the MAP are articles 10, 11 and 27(1) of the OECD Model and articles 10, 11, 12 and 27(1) of the UN Model. Articles 10 and 11 of the OECD Model and articles 10, 11 and 12 of the UN Model, dealing with the taxation of dividends, interest and royalties, provide that the competent authorities “shall settle the mode of application” of the limitations on source country taxation. Possibly, the purpose of this provision is to deal with the procedural aspects of the reduced rates of source country tax on dividends, interest and royalties and, in particular, whether the reduced rate is applied to the amount withheld or whether the full rate of domestic tax is withheld and the excess over the rate specified in the treaty is subsequently refunded. However, the Commentaries indicate that this issue is a matter for domestic law.⁸ Despite the mandatory nature of the wording of these provisions, as far as the author is aware, very few of these mutual agreements have actually been entered into. In any event, since any such mutual agreement would involve procedural issues only, it would not likely involve taxation inconsistent with the treaty and therefore arbitration would not be available. A similar analysis applies to the authority provided to the competent authorities under article 27(1) to settle the mode of application of the assistance-in-collection provision, although the language of that provision is permissive (“may settle”).

Arbitration is limited to issues arising under MAP cases under article 25(1). Neither the Commentary on article 25 of the OECD Model nor the Commentary on article 25 (alternative B) of the UN Model provides any reasons for this limitation. Since article 25(3) is permissive rather than mandatory, perhaps there is concern that the prospect of mandatory arbitration would have the unintended consequence of discouraging the competent authorities from even attempting to resolve doubts or difficulties about the interpretation of the treaty or the elimination of double taxation not

6. OECD Commentary on art. 25, para. 73; UN Commentary on art. 25, para. 18, quoting OECD Commentary on art. 25, para. 73.

7. *Id.*

8. E.g. *see* OECD Commentary on art. 10, para. 19.

provided for in the treaty. The Commentary provides that states are free to extend arbitration to MAP cases under article 25(3).⁹ However, it might be more appropriate in these circumstances for the Commentary to provide for a voluntary arbitration process that is available only if the competent authorities agree.

Finally, it is worthwhile keeping in mind that even if a treaty does not provide for arbitration, the competent authorities have authority through the MAP to implement an arbitration procedure that would apply generally or just in a particular case. However, it seems unlikely at this stage in the development of arbitration that a competent authority would do so in the absence of an explicit decision by its government to adopt arbitration in its treaties as a mechanism for resolving tax disputes.

5.2.3.2. Initiation of arbitration

Under the arbitration provision of the OECD Model, arbitration is initiated at the request of the taxpayer who presented the case to the competent authority under article 25(1). In this regard, arbitration under the OECD Model is fundamentally consistent with the MAP. Both are initiated by the taxpayer; however, once initiated, both are state-to-state processes controlled by the competent authorities. Although article 25(5) does not specify any particular method for submitting issues to arbitration, the sample mutual agreement in the annex to the Commentary on article 25 indicates that a request should be made in writing with sufficient information to identify the case and the unresolved issues.¹⁰ As noted above, however, even if a treaty does not explicitly provide for arbitration, under article 25 the competent authorities of the contracting states have the ability to initiate arbitration on an ad hoc basis in a particular case without the taxpayer's consent.¹¹

In contrast, under the arbitration provision of the UN Model, arbitration is initiated at the request of one of the competent authorities. The sample agreement in the Annex to the UN Commentary on article 25 indicates that the request should be made in writing to the other competent authority, with notice to the taxpayer who presented the case for MAP and sufficient information to identify the case and the unresolved issues. Alternatively,

9. Commentary on art. 25, para. 73. The OECD Discussion Draft on Action 14, *supra* n. 5, suggests that countries should make increased use of art. 25(3). (See para. 18.)

10. See the OECD *Sample Mutual Agreement on Arbitration*, para. 1 and para. 1 of the *Mutual agreement on the implementation of paragraph 5 of Article 25 in the Annex to the Commentary on Paragraph 5 of Article 25 (Alternative B)* of the UN Model.

11. OECD Commentary on art. 25, para. 69.

the Commentary on the UN Model also provides that the contracting states may wish to submit issues for arbitration only if both competent authorities agree.¹² This voluntary arbitration is discussed below. The UN Commentary also recognizes that countries that wish to use taxpayer-initiated arbitration, as provided in the OECD Model, are free to do so.¹³

At first glance, the contrast between the OECD and UN Models concerning the person who is entitled to initiate arbitration may appear to reflect the fundamental reluctance of developing countries to allow arbitration. However, in practice, the author suspects that arbitration initiated by one of the competent authorities under the UN Model will operate in largely the same manner as taxpayer-initiated arbitration under the OECD Model. If one competent authority can force the other competent authority to accept arbitration of unresolved issues, it seems likely that the requesting competent authority would consult with the taxpayer involved and in most cases would accede to the taxpayer's wishes concerning recourse to arbitration. However, the competent authority requesting arbitration must take into account other factors that would be irrelevant to taxpayers, such as the ongoing relationship with the other competent authority. It is unclear whether these other factors are sufficient to make a significant difference between taxpayer-initiated and competent authority-initiated arbitration.

Allowing taxpayers to initiate arbitration provides certainty for taxpayers that issues concerning the proper application of tax treaties on which the competent authorities cannot agree after a reasonable period will be decided. The only obligation of the competent authorities under article 25(2) is to endeavour to resolve MAP cases presented to them; if they cannot resolve a MAP case, in the absence of arbitration, there is nothing to force them to do so. Taxpayers usually suffer the consequences of the inability of the competent authorities to agree: double taxation contrary to the provisions of the treaty. Allowing taxpayers to initiate arbitration reflects the important interest that taxpayers have in an effective dispute resolution mechanism that prevents double taxation. Moreover, once arbitration is requested by a taxpayer, the contracting state of which the taxpayer is a resident is effectively required to support the taxpayer's claim against the tax authority of the other contracting state.¹⁴

12. UN Commentary on art. 25, para. 14.

13. Id.

14. See H.J. Ault & J. Sasseville, *Taxation and Non-Discrimination: A Reconsideration*, 2 World Tax J. 2 (2010), pp. 101-25 at 125.

For countries that want to maintain control over access to arbitration, the UN alternative provision requires both competent authorities to agree to submit cases to arbitration on a case-by-case basis.¹⁵ Under this voluntary arbitration process, taxpayers' interests in certainty and the elimination of double taxation are subordinate to the governmental interests of the contracting states. According to the UN Commentary, this system of voluntary arbitration allows countries to "preserve great flexibility" concerning the types of issues submitted for arbitration and the number of arbitration cases.¹⁶ However, the UN Commentary notes that compulsory arbitration initiated by one of the competent authorities or by taxpayers provides greater certainty that treaty disputes will be resolved effectively.¹⁷ A voluntary arbitration process would allow countries that are sceptical about the necessity for and benefits of arbitration to experiment with it temporarily without making a permanent commitment.

5.2.3.3. Time for competent authorities to reach agreement before submission of issues to arbitration

Under the OECD Model, issues cannot be submitted for arbitration until 2 years after the case has been presented to the competent authorities of both states.¹⁸ Under the UN arbitration provision, the period is 3 years. Under both Models, the time period begins only when the competent authority to which the MAP case is presented under article 25(1) presents the case to the other competent authority. In addition, the sample mutual agreements on arbitration in the OECD and UN Commentaries specify that the presentation of the case must contain the requisite information, which is to be set out in the mutual agreement implementing the arbitration process (paragraph 2 of the sample agreement).¹⁹

The choice between a period of 2 or 3 years (or some other period) before issues can be submitted to arbitration is a matter of judgement that requires balancing the interests of taxpayers and the contracting states. The

15. UN Commentary on art.25, para. 14.

16. UN Commentary on art. 25, para. 15. In this context, "great flexibility" appears to mean "complete control".

17. UN Commentary on art. 25, para. 16.

18. The submission of the issue to arbitration after the expiry of the stipulated time period is automatic. The OECD Discussion Draft on Action 14 proposes to amend article 25(5) to allow the submission of unresolved issues for arbitration to be deferred in certain circumstances.

19. OECD Commentary on art. 25, para. 75 and UN Commentary on art. 25, para. 18, quoting OECD Commentary on art. 25, para. 75.

competent authorities should be given a reasonable period of time in which to resolve a case presented for MAP. The time period should reflect the resources available to fulfil the responsibilities of the competent authorities, (especially for developing countries), the number of cases handled by the competent authorities and the complexity of the cases. Taking these considerations into account, both the 2-year and 3-year time periods seem to afford the competent authorities a reasonable period in which to resolve MAP cases.

5.2.3.4. Contrary domestic court decisions

Under the arbitration provisions in both the OECD and UN Models, arbitration is not available for issues on which a domestic court or administrative tribunal of either contracting state has already rendered a decision.²⁰ The Commentary indicates that the competent authorities of the contracting states have the authority to delete this limitation from article 25(5) if they have the authority to deviate from domestic decisions.²¹ This limitation is consistent with the similar limitation on the MAP generally.²²

The rationale for the exclusion from arbitration of issues that have already been decided by domestic courts or tribunals is that arbitration would not be meaningful where the competent authorities cannot implement an arbitration decision contrary to a domestic court decision. It may not always be obvious, of course, whether an issue has been decided by a domestic court or tribunal. The OECD and UN Commentaries do not provide any clarification of this point. The Commentaries provide that an issue has been resolved if “any court or administrative tribunal of one of the Contracting States has already rendered a decision that deals with these issues and that applies to that person”.²³ It is unclear whether this statement means that the domestic decision applies to the taxpayer because the taxpayer was a party in the domestic litigation or whether a domestic decision applies to the taxpayer because the issues involved in the arbitration are the same as the issues resolved in the domestic litigation. If the taxpayer was not a party to the prior domestic litigation, the result in that litigation is not binding on the taxpayer. However, if the same issues were to be litigated by the taxpayer, it seems likely, at least in many countries, that the domestic court or tribunal

20. Art. 25(5), second sentence.

21. OECD Commentary on art. 25, para. 74 and UN Commentary on art. 25, quoting OECD Commentary on art. 25, para. 74.

22. OECD Commentary on art. 25, para. 76. *See* below for a discussion of the relationship between arbitration and domestic remedies.

23. *Id.*

would reach the same conclusion. Each competent authority would seem to have the authority to decide whether a domestic court decision precludes arbitration, although in some countries the actions of the competent authority might be subject to judicial review.

5.2.3.5. Other conditions

A footnote to article 25(5) of the OECD Model cautions that the arbitration provision should be included in a tax treaty only if both contracting states consider it to be appropriate, taking into account “national law, policy or administrative considerations”. The footnote also indicates that countries may wish to agree to arbitration only with certain other countries. The OECD Commentary elaborates that constitutional requirements may prevent a country from agreeing to arbitration.²⁴

This caution is unnecessary with respect to the UN Model because article 25(5) (alternative B) is an alternative provision. Countries that do not want to include arbitration will follow article 25 (alternative A), which does not provide for arbitration.²⁵

The sample mutual agreement on arbitration in the Annex to article 25 of the UN Model provides that issues do not qualify for arbitration where the amount of tax involved in the MAP is less than an amount agreed by the contracting states through bilateral negotiations unless the competent authorities agree that arbitration is appropriate. Presumably, the reason for denying access to arbitration for *de minimis* amounts of tax in dispute is that the cost does not justify arbitration.²⁶ Nevertheless, the competent authorities can agree to submit a case to arbitration that involves a small amount of tax where they consider it appropriate to do so – e.g. where an important issue of principle is involved.

5.2.4. The types of issues qualifying for arbitration

In principle, all issues involving the interpretation or application of a tax treaty should qualify for arbitration. The availability of arbitration for all types of issues is consistent with the purposes of arbitration discussed above, namely, to enhance the effectiveness of the MAP to resolve disputes

24. OECD Commentary on art. 25, para. 65.

25. UN Commentary on art. 25, para. 13.

26. Sample agreement, para. 1, Annex, para. 1.

involving tax treaties. However, despite the desirability in principle for all types of issues to qualify for submission to arbitration, it is clear this is not the case under either the OECD Model, the UN Model or actual bilateral tax treaties. Nonetheless, it is always possible for the contracting states to agree to expand the types of issues that can be submitted to arbitration.

Under the arbitration provisions of both the OECD and UN Models, arbitration is available only for cases presented by a person for a MAP under article 25(1) where the actions of one or both of the contracting states have “resulted for the person in taxation not in accordance with the provisions of this Convention”. It is clear that article 25(1) does not include all issues involving the interpretation and application of the treaty because if that were so, article 25(3) would not be necessary.

Therefore, the question is, what provisions of the Models do not affect the taxation imposed on a taxpayer? The only obvious provisions are the MAP itself, article 26 dealing with exchange of information (because the exchange of information does not result in taxation contrary to the treaty) and article 27 providing for assistance in the collection of taxes (because the collection of tax is different from the imposition of tax). All of the other provisions of the Models, including articles 1 and 2, definitions, article 24 (Non-discrimination) and articles 29 and 30, dealing with entry into force and termination, could potentially give rise to tax contrary to the treaty. In most cases, however, it seems likely that taxation contrary to the treaty will usually result from the incorrect interpretation or application of the distributive articles of the treaty (articles 6 through 21).

The availability of arbitration for all article 25(1) MAP cases is appropriate because one of the purposes of arbitration is to protect taxpayers from taxation by one or both of the contracting states that is contrary to the treaty. However, the interests of taxpayers must be balanced against the interests of the contracting states. In the case of the UN Model, arbitration must be initiated by one of the competent authorities.

MAP cases arising under article 25(3), including the elimination of double taxation not provided for in the treaty, do not qualify for arbitration, although the Commentary indicates that contracting states are free to extend arbitration to such cases. As noted above, in principle there is no reason why arbitration should not apply to all issues involving the interpretation and application of a treaty. However, taxpayer-initiated arbitration is inappropriate in cases covered by article 25(3), since these cases do not involve taxation

Contact

IBFD Head Office
Rietlandpark 301
1019 DW Amsterdam
P.O. Box 20237
1000 HE Amsterdam, The Netherlands
Tel.: +31-20-554 0100 (GMT+1)
Email: info@ibfd.org
Web: www.ibfd.org



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