PROPOSAL FOR AN ARBITRATION CONVENTION IN MATTERS OF TAXATION FOR MEMBER COUNTRIES OF THE NAFTA

By Luis Roberto Lara Ramos

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INTRODUCTION [1] [2]

This paper offers a proposal for an arbitration convention in matters of taxation (AC). Because this task is very complex, if not impossible, for all of the member countries of the Organization for Economic Co-operation and Development (OECD) to agree in a multinational arbitration convention, I have decided to narrow the subject matter in the context of the North American Free Trade Agreement (NAFTA).

First of all, and as background, in the first chapter there is a brief explanation of the arbitration experiences in the field of taxation and in the NAFTA. In regards to arbitration clauses in bilateral tax treaties, the suggestions made by the OECD, and the current use of these clauses by many countries (especially by OECD members), are mentioned. The necessity of a mandatory arbitration procedure, the scope of the bilateral arbitration clauses and the procedure rules established therein are also explained.

Following in this chapter, it was essential to review the European experience. The European Community members signed an Arbitration Convention with the finality to eliminate cases of double taxation with respect to transfer pricing issues. In this part of the chapter, there is a short explanation of the scope of the convention, the mutual agreement procedure, the arbitration procedure and an insight as to its real applicability and effectiveness.

In the final part of this introductory chapter, I examine, in a very concise manner, the NAFTA experience in the field of arbitration. From all the arbitration procedures established in this agreement, the most significant one is that stated in chapter XIX. There is an explanation of the scope of this procedure, a justification for its use as a model for other international dispute resolution bodies, a review of the procedural rules of the panels, the use of an *ad hoc* institution which reviews the decision of the panel and the expressed success of this alternative resolution system.

The second chapter is dedicated to analyzing the scope of the proposed arbitration convention. It starts with a review of the material scope. It has been considered to be a correct approach in both the general arbitration tax clauses established in the bilateral tax treaties and the limited, or rather, specific scope of the EC arbitration convention. The proposed convention considers both approaches. There is a study of the detailed and general provisions that the convention will cover. The personal and territorial scopes are mentioned briefly giving due consideration to the concept of residence and to the NAFTA. Afterwards, the cases to which the convention does not apply are identified. The experiences from the EC arbitration convention and the bilateral arbitration clauses are also considered.

In the last part of this chapter, the principles that the convention should follow are analyzed. The arm's length principle is practically transcribed from the OECD Model Tax Convention. Even though it is not the central subject of this paper, a concise review of the interpretation and application issues and the proposals of some authors in how the bilateral tax treaties shall be interpreted and applied is made.

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[1] The author holds graduate studies at the University of Leiden (LLM in International Taxation), and he is a PhD Candidate at the Universidad Nacional Autónoma de México.

[2] The author wants to thank Professor Kees van Raad, Jorge Garcia Gonzalez and Nicolas Muñíz for their invaluable comments when preparing this paper.

In chapter three, the purpose of the Mutual Agreement Procedure (MAP) is explained. It is important to maintain this procedure in the proposed convention. Afterwards, two issues regarding the time limits of the MAP are examined. Firstly, the limitation in time to request for a MAP, and secondly, the time limit to implement an agreement reached between the competent authorities.

Chapter four studies the rights and obligations of the participants in the panel procedure. It particularly mentions the rights of the taxpayers that are to be inferred and specifically established in the proposal. It mentions why the system used in the NAFTA has been a success with its *sui-generis* institution to review panels' decisions.

The procedural rules of the panels are analyzed in chapter number five. The panel procedure will start either after the MAP has failed or by waiving the MAP time limits. In the first mentioned alternative, the current legal techniques used by some international and national legislation's that establish arbitration mechanisms are examined; afterwards, a solution that the proposed AC should follow is considered. Detailed rules for the composition of a panel are proposed giving due regard to the achievements made by the NAFTA and the EC arbitration convention. The directives for the implementation of a code of conduct are also established.

In this chapter, the briefs and replies of briefs that allow the participants in the procedure to state their positions are analyzed. The right to a hearing, which could be *in camera* to protect secret information, is also established. The basis of the decision that the panel must respect is explained in the next section. Finally, additional rules, time limits and costs are considered in order to give complete legal certainty to the participants in the panel procedure.

The following chapter is dedicated to various issues. The institution that is entitled to review the decision of the panel, which is known in the NAFTA as the extraordinary challenge committee is briefly discussed. When the elimination of double taxation is considered to be removed, the option that the competent authorities and the taxpayers involved have with respect to the fulfillment of the decision of the panel, and finally, the duration of the convention are studied in this chapter.

Chapter seven is an insight of the real acceptance of this convention among the member countries of the NAFTA. Finally, as a conclusion, the text of the proposed arbitration convention is transcribed in chapter eight.

It is my intention that the proposal stated in this paper may help the development of the international tax practice among the NAFTA countries and, at the same time, it could benefit taxpayers that deal with the tax revenue authorities of these three countries.

CHAPTER ONE

BACKGROUND

Before the study of the proposed Arbitration Convention (AC), it is necessary to briefly review the current approaches in regards to the problem that the Mutual Agreement Procedure (MAP) represents in the field of taxation. The MAP does not always ensure the avoidance of double taxation. It is my intention, as a background, to concisely examine first, the arbitration clauses that are currently accepted in some bilateral tax treaties; second, the European Communities' Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (EC arbitration convention), and finally, the North American Free Trade Agreement (NAFTA) binational panels established in its chapter 19.

After reviewing the important developments achieved by the EC arbitration convention in this subject and its poor development obtained by the Organization for Economic Co-operation and Development (OECD), the reader may realize that it is necessary to propose new and revised international arbitration law provisions with respect to issues of international double taxation.

This paper focuses in analyzing a proposal of an arbitration convention in taxation. Because it is very difficult, if not impossible, for all of the member countries of the OECD to agree in a multinational arbitration convention, I have decided to narrow the subject matter in the context of the NAFTA.

The fundamental goal of the NAFTA is to facilitate cross-border trade and investment. Tariffs and legal restrictions on foreign investment are obvious barriers to cross-border activities. Tax measures may also constitute serious impediments to cross-border investment. It is said that tax matters are a subsidiary factor concerning financial decisions, but once the non-tax barriers are eliminated, tax consequences increase in importance.[3]

A. Bilateral Arbitration Clauses in Tax Treaties (Current Practice)

a) The arbitration clause

The OECD Model Tax Convention on Income and on Capital states that even though the MAP has proven to be effective, there are still cases in which the Contracting States are not able to reach an agreement. In these cases, it proposes the use of an advisory opinion emitted by a third party. Another solution that this model suggests is the use of arbitration.[4]

Many countries have established a bilateral arbitration clause in their bilateral tax treaties. This is proof that the use of arbitration in taxation matters is being accepted on a world-wide basis, especially by OECD members.[5]

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[3] Arnold Brian J. and Harris Neil H. "Colloquium on NAFTA and Tradition: NAFTA and the Taxation of Corporate Investment: A View From Within NAFTA". New York University Tax Review. Summer, 1994. 49 Tax L. Rev. 529, (Lexis-nexis) pages 1,2.

[4] Commentary on Article 25 of the OECD Model Tax Convention points 45-48.

[5] For example, in the Tax Treaties data Base of the IBFD, as of June 1997, the USA had concluded seven conventions with an arbitration clause, the Netherlands six, Canada and Kazakhastan five, Germany, France and Mexico three each, and Ireland, Israel, Italy, Latvia, Russia, Pakistan, Singapore, Sweden, Switzerland, South Africa, the Ukraine, the United Kingdom have each concluded one. Data in Züger, Mario, "Mutual Agreement and Arbitration Procedure in a Multilateral Tax Treaty", in Michael Lang & others (ed.), Multilateral Tax Treaties, Kluwer, 1998, page159.

Under the NAFTA, the tax legislation is nil. Direct tax issues have been left to the existing bilateral tax treaties. Thus, tax treaties between NAFTA members are very important and the basic international legislation of our subject. Nevertheless, NAFTA represents a very important step in cross border investment, which may help to harmonize the tax systems among member countries.[6]

An arbitration clause is established under the United States-Mexico tax treaty. An arbitration clause does not exist under the Canada-Mexico tax treaty and under the US-Canada it is only established in limited cases. Because of the nature of this paper, it is impossible to review all of the existing arbitration clauses in tax conventions, thus, any time I refer to an arbitration clause, it will be the one contained in the United States-Mexico tax treaty.

b) Mandatory vs. non-mandatory

It is important to mention that these clauses are, in general, not mandatory in nature but optional clauses and, consequently, not as effective as they should be. This situation has been severely criticized by some authors.[7] The protocol to the above mentioned tax treaty states that if the competent authorities fail to reach an agreement within two years after the case was submitted to a MAP, they may agree to invoke arbitration in that specific case. In my opinion, the use of arbitration should be mandatory in order to give legal certainty to the taxpayers concerned.

c) Scope of the arbitration clause

As tax treaties are written in very general terms, uncertainties in their interpretation and application are inevitable. The settlement of disputes involving the interpretation and application of tax treaties under the mutual agreement procedure needs to be improved with regards to its application as it does not always ensure the elimination of double taxation. The arbitration clause covers the same issues that the MAP tries to resolve.

d) Procedural rules

An arbitration board will be composed after the parties agree upon submitting the case to arbitration. This arbitration board shall consist of not fewer than three members. The competent authorities have the right to establish the criteria of selection of the third arbitrator.[8] This could give room to the competent authorities to appoint as arbitrators even individuals who may be related with one of the parties.

There are no specific procedural rules established either in the arbitration clause or the protocol of the convention. This situation leaves the taxpayers involved with a high degree of uncertainty in regards to the minimum legal principles such as the appointment of the chairman of the panel, procedures to reach a decision, and time limits, among others. The own arbitration board will stipulate these additional rules. I consider that the Contracting States should previously adopt these rules.

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[6] Situation that is very difficult to achieve considering that each country tries to keep as much as possible complete fiscal autonomy. The European Community has done important developments in this area, see Terra/Wattel, European Tax Law, Kluwer, 1997.

[7] As an example, Profs. Lindencrona and Mattson proposed since 1981 that if a conflict of double taxation is not solved under the MAP, there *shall* start an arbitration procedure. “Arbitration in Taxation”, Kluwer, 1981, pages 64 and 65, and in Lindencrona, Gustaf, “Recent Development of Tax Treaty Arbitration”, IFA, Congress in Florence, 1993, Seminar E: Resolution of Tax Treaty Conflicts by Arbitration, Kluwer, pages 7 and 8.

[8] Protocol of the US-Mexico Tax Treaty, point 18, b (ii).

The taxpayers concerned have the right to present their positions to the arbitration board.[9] They are not considered to be a part of the procedure because it is carried out only between the competent authorities. The taxpayers should be entitled to more procedural rights because they are, after all, the most interested in eliminating double taxation.

The arbitration board will issue its decision on the basis of the bilateral tax treaty and it has to give due consideration to the domestic laws of the Contracting States and principles of international law.[10] There are no rules in regards to how this decision will be enacted (i.e. written) and if the arbitration board has to state its reasons in its resolution.

The costs incurred in the arbitration procedure will be shared equally between the competent authorities concerned. However, the arbitration board may decide a different allocation of costs. What is really surprising is the fact that a competent authority may require the taxpayers involved to agree to bear its share of the costs *as a prerequisite for arbitration*.[11]

2. Multilateral Arbitration Clauses (The EC Arbitration Convention experience)

When studying the arbitration clauses, it is essential to review the development achieved by the members of the European Community.

a) Scope of the Convention

The material scope of this convention is rather narrow because it is limited to cases of transfer pricing.[12] This conflict seems to be the most important because of the amount of taxes that they could represent to the revenues of the Contracting States. The convention will not apply to cases in which one of the enterprises concerned is liable to a serious penalty.[13] Unfortunately, these serious-penalty cases could range anywhere from minimum infractions to fraudulent penalties. This is due to the lack of the convention to specifically state what is the meaning of “serious penalty” cases.[14]

b) Mutual agreement procedure

The EC arbitration convention establishes the same principles of the MAP as stated in the OECD Model Convention. Where an enterprise considers that actions of a Contracting State result or will result in double taxation, it may present its case to the competent authority of its country of residence. The time limit stipulated in this convention is also the same as that established in the Model Convention.[15]

c) Arbitration procedure

If the competent authorities are not able to reach an agreement after two years of negotiations under the MAP, an advisory commission shall be set up. Enterprises have the right to have

[9] Protocol of the US-Mexico Tax Treaty, point 18, b (iv).
[10] Protocol of the US-Mexico Tax Treaty, point 18, b (v).
[11] Protocol of the US-Mexico Tax Treaty, point 18, b (vi).
[12] EC arbitration convention, article 1.
[13] EC arbitration convention, article 8.
[14] See Hinnekens, Luc, “The European Tax Arbitration Convention and its Legal Framework”, British Tax Review, 1996, part II, pages 283 and 284.
[15] Article 6, EC arbitration convention.

recourse to domestic remedies, but when this situation occurs, the time limit of two years will start after the judgment of the final court of appeal is delivered.[16]

The EC arbitration convention establishes the composition of an "advisory committee" with greater detail than the bilateral arbitration clauses. Two representatives of each competent authority concerned, an even number of independent persons of standing, and a chairman will constitute this commission. The independent persons will be selected by mutual agreement between the competent authorities involved, but if they cannot reach an agreement, they will be appointed by drawings of lots. Members of the commission will select the chairman, and he or she must be a judge or a recognized jurisconsult.[17]

The enterprises involved are not involved with the procedure, but they may appear or be represented before the advisory commission. They have the obligation to provide any information, evidence or documentation requested by the commission.[18]

An "opinion" of the advisory commission shall be issued within the six months after the case was submitted before it. This is an important juridical development because the commission has the obligation to find a solution within a specific time limit. The convention under review establishes that the opinion must be based on the principle stated in article 4. This is the wholly accepted "arm's length principle" in transfer pricing issues.

Finally, the authorities may find a solution under a mutual agreement that differs from the opinion of the advisory commission. But, If they are incapable of achieving an agreement, they will be obliged by that opinion.[19]

d) Current application, is it really effective?

The convention was initially established to last for a period of five years. It entered into force in January 1995; thus, the EC convention has been twice renewed afterwards[20]. I agree with Profs. Wattel and Terra who mention that its preventive effect is greater than its actual application. They mention that "Under, the Convention, Member States have a good reason to do their utmost to arrive at a solution without arbitration…one of them will ultimately have to give in…and both of them will incur costs". They continue saying that "The Convention changes the nature of transfer price dispute procedures *from merely diplomatic to more or less supranational*".[21] According to Lee Sheppard "Mandatory arbitration has been working well in the European Union, according to Bruno Gibert of CMS Bureau Francais Lefebvre. Cases are being resolved more quickly because the parties have to face the prospect of mandatory arbitration if they remain unresolved for two years. Two cases, both involving France, with Italy and Germany on the other side, went to arbitration; the decisions cannot be published without the permission of the taxpayers."[22] As a conclusion, I may say that this convention is of an experimental nature and that it has fulfilled, to a certain degree, its objective to eliminate double taxation issues but which still needs improvement in many aspects, as I will further explain in the following chapters.

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[16] Article 7, EC arbitration convention.
[17] Article 9, EC arbitration convention.
[18] Article 10, EC arbitration convention.
[19] Article 12, EC arbitration convention.
[20] Van Raad, Kees, EC Arbitration Convention Extended Beyond Year 2000, at http://www.taxanalysts.com/www/tadiscus.nsf/Archives/03DFDA2CCB032F058525660F00586D94?OpenDocument.
[21] Terra/Wattel, European Tax Law, Kluwer, 1997, pages 287 and 288.
[22] Sheppard, Lee A. "News Analysis: U.S. and Canadian Competent Authorities Sign Case Resolution Pact", Tax Analysts, (www.taxanalysts.com) citation: Doc 2005-12259, 6 June 2006.

3. Multilateral Arbitration Clauses (The NAFTA experience)

a) Scope of Chapter XIX of the NAFTA

As I have already mentioned, the NAFTA is an agreement that regulates cross-border trade and investment issues. The most significant dispute solution procedure among those established within the NAFTA is that covered in chapter XIX. The panels set up under this alternative system replace judicial review of final antidumping and countervailing duty determinations.[23]

b) Is it a model for other international dispute resolution bodies?

According to Mr. Eric Pan, what makes the NAFTA dispute resolution system an important model for other international regimes is its use of adjudicatory panels. In this agreement, panels composed of foreign adjudicators decide disputes that are normally resolved through the domestic courts of member states. More so than other methods of dispute resolution, such as mediation or consultation, formal adjudication fulfills the desire for procedural and substantive fairness, efficiency, transparency, consistency, impartiality, and reasoned decision-making based upon the rule of law. The system used by the NAFTA has proven to meet these objectives.[24]

I consider that the strict rules established in chapter XIX of the NAFTA, its time framework, and its wide acceptance by the NAFTA countries, make this alternative dispute system a perfect model to be followed in regards to taxation issues.

c) Procedural Rules[25]

i) Initiation of the procedure

The interested person who intents to request a judicial review of a final determination (in the case when it has been enacted by the Mexican authorities) will have to notify the corresponding parties of his or her intention to request a domestic judicial review within 20 days following the day of its emission.[26] This brief is known as "Notice of intent to Commence judicial review".

A request for a panel, besides complying with the requirements established in sub-rule 55(1) of the rules of procedure, shall contain the title of the appealed final determination, file number, investigating authority who dictated this determination, date of publication or of notification, where a notice of intent was filed and a service list.[27]

Any interested person will be entitled to file a "complaint" against the final determination under revision. In this document the complainant makes allegations of errors of fact or law, including challenges to the jurisdiction of the investigating authority. This complaint shall be filed 30 days after the request of the panel.[28] A notice of appearance will be filed by all the other interested

[23] Article 1904 of the NAFTA
[24] Pan, Eric J. "Assessing the NAFTA Chapter 19 Binational Panel System: An Experiment in International Adjudication", in Harvard International Law Journal, Vol. 40, No. 2, spring 1999, pages 380 and 440 and followings.
[25] Please refer to annex one for a timetable diagram
[26] Rules of Procedure for Article 1904 (Rules of Panels), rule 33(1) b. It is important to mention that the purpose of this notice is to notify to all the concerned parties that a final determination is going to be appealed before a domestic court and not before a binational panel.
[27] Rules of Panels, rule 34(2)
[28] Rules of Panels, rule 39(1)

persons who will participate in the procedure. This shall be filed within 45 days after the request of a panel was presented.[29]

ii) Constitution of the panel

The panel will be composed by five panelists that will be designated by the parties (two panelists by each competent authority and the fifth under agreement). The parties will establish a roaster of 75 arbitrators. Each party will select 25; however, the Contracting States will be able to select specialists who are not included in that list. The panelists must be nationals of the Contracting States, of good character, high standing and repute, among other characteristics. They must be lawyers and, if possible, judges.[30]

iii) Code of Conduct

The NAFTA establishes in its article 1909 that in the date of its entrance into force, the parties will set up, through an exchange of notes, a code of conduct to be respected by the panelists and committee members. Any member shall avoid impropriety and the appearance of impropriety and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process is preserved.[31]

Annex 1901 states that the panelists shall not be affiliated to any party and, besides, the members of the panels should not receive instructions from any of them. The employees chosen by popular election cannot be panelists. However, due to fact that the list of panelists must include judges, this annex establishes that the judges will not be considered as being affiliated.[32]

iv) Briefs

Any party that has filed a complaint will have the right to file a brief. Any Competent Authority and any party that has presented a notice of appearance will do the same. The complainant has the opportunity to reply to these briefs. The briefs presented by the interested parties shall have the objective to set forth the grounds and arguments supporting the allegations of each participant. Reply briefs shall be limited to rebuttal of matters raised in the briefs filed by the other parties. The briefs must contain, among other things, a table of contents, the authorities concerned, a statement of the case, a statement of issues, arguments and relief requested.[33]

v) Oral proceedings

A hearing will be carried out in the offices of the responsible secretariat. This procedure gives the parties the opportunity to orally and personally discuss the arguments established in their briefs. There can be a pre-hearing conference for the purpose of answering technical questions, setting up the hearing proceeding and any outstanding motions. Any time when confidential information has been presented to the panel, the hearing will be in camera.[34]

vi) Resolution

[29] Rules of Panels, rule 40
[30] Cruz Miramontes, Rodolfo, "El Capitulo XIX del Tratado de Libre Comercio", brief presented in the International Seminar on Unfair Competition Practices, organised by the SECOFI, Mexico, October 27-29, 1993, pages 65 and 66.
[31] Code of Conduct of the procedure to resolve disputes established in Chapters XIX and XX of the NAFTA, article 1.
[32] Cannon junior, James R, "Resolving Disputes under NATFA, Chapter 19", McGraw-Hill, Inc, USA, 1994, page 23.
[33] Rules of panels, rules 57 and 59.
[34] Rules of panels, Part VI.

A decision has to be granted by the panel within 315 days after the request of a panel was filed. The requirements that the decision shall fulfill are that it has to be in writing including any dissenting opinions, and it has to mention the reasons for the decision (taking into account the factual and legal issues).[35]

d) Extraordinary Challenge Committee

There is the possibility to request an extraordinary challenge committee when one of the parties affirms that a member of the panel has been guilty of a serious penalty, of partiality, has incurred a serious conflict of interests, or has by any other manner materially violated the norms of conduct. The parties may also request this committee when the panel has seriously violated a fundamental procedural norm, it has extensively exceeded its powers, authority or jurisdiction established under this convention, and any of those actions has materially affected the panel's decision and threatens the integrity of the procedure under the binational panel.[36]

This institution has to deliver its decision within 90 days after it was requested. The procedure is very similar to that established for the panels; for example, the parties may file a brief and a hearing is carried out (it can also be *in camera*). The decision must be limited to either confirm the decision of the panel, to nullify that decision, or to remand the decision to the panel with special directives to be followed by the panel within a specific time limit.[37]

e) Success of the binational panels.

In general, this *sui-generis* system has been a success. The binational panels have resolved all of the disputes that have come before them. Even parties who have disagreed with the decisions, ultimately complied and showed themselves willing to use this system again to solve other disputes.[38] The quality of this procedure can be better assessed by the use of polls gathering opinions of practitioners who litigate in binational panels. The trade bar's assessment of Chapter 19 has been overwhelmingly positive. In a poll of lawyers, business executives, financial analysts and academics, 75 % said that the NAFTA dispute system is solid, zero percent disagreed, and 25 % responded "other".[39]

As I have already mentioned, with the binational panels established in the NAFTA, country members seek to solve unfair international competition issues utilizing a very sophisticated procedure. As a consequence, I have considered these detailed rules as one of my points of reference.[40]

Following the line of juridical developments regarding the inclusion of arbitration clauses into tax treaties, the EC arbitration convention and the NAFTA experience, it is important to clearly determine in what aspects this dispute settlement system could be improved.

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[35] Rules of panels, rule 72.
[36] Article 1904.13 of the NAFTA.
[37] Rules of Procedure for Article 1904, Extraordinary Challenge Committees.
[38] Pan, Eric J. op. cit. page 441
[39] Latin Am. Advisor, Feb. 27, 1998, at 1-2, The person who responded as "other", explained that this system is quite slow. Cited by Pan, Eric J. Id.
[40] I have also taken as guide provisions stated in arbitration clauses of bilateral tax treaties and the EC arbitration Convention.

CHAPTER TWO

SCOPE OF THE CONVENTION

1. Material Scope

The scope of the arbitration clauses in tax treaties is rather broad. It aims, in general, at resolving problems of interpretation and application of the Conventions. As in the mutual agreement procedure, the arbitration clauses follow the same approach, they both try to solve any dispute regarding the interpretation and application of the convention. The main difference is that in the former the parties are not obliged to find a solution and, in the latter, the contracting states will be bound by the decision of the arbitration board.

The Committee on Fiscal Affairs of the OECD has accepted that the Mutual Agreement Procedure is not entirely satisfactory from the taxpayer's viewpoint. The typical example is when the Contracting States *interpret and apply* differently the Convention. In that case and when the Competent Authorities are not able to reach an agreement, there is still double taxation.[41] From this explanation, it can be inferred that the scope the arbitration clauses in the bilateral conventions (following the OECD Model) cover is focused as to the interpretation and application of the Double Tax Treaty.

The EC arbitration Convention states a limited objective, but of the same (or more) practical importance: transfer pricing issues (although in a limited extent). This idea has been confirmed by scholars like Dr. Killius who stated that the EC Arbitration Convention is much narrower in scope than Article 25 of the OECD Model, since it is restricted to cases of reallocation of profits between two enterprises or between an enterprise of a contracting state and its permanent establishment in another contracting state.[42]

Transfer pricing issues are very important for multinational enterprises, according to a survey. Following its results, 90 % of the survey respondents find transfer pricing issues important.[43] Due to this situation and because of the expected increase in the cross-border flow of capital, products and services (regarding the European Community's open free market), Member States opted on signing the EC arbitration convention limited to transfer pricing controversies.

It has been considered to be a correct approach in both the general arbitration tax clauses established in the Bilateral Tax Conventions and the limited, or rather, specific scope of the EC arbitration Convention.

A proper scope of the convention that is proposed herein may be in two-folds: Firstly, it can state some specific issues that it should cover (detailed and non-exhaustive rules) and, secondly, a general provision for all other cases. This two-fold approach is in response to the necessity to cover a broad scope, but at the same time to establish detailed dispositions in more delicate issues. In other words, it is not more than trying to take the best of two worlds, the broad scope of the arbitration clauses (following the track drawn by the Mutual Agreement Procedure) and the detailed rules and principles of the EC Arbitration Convention.

[41] This is because the competent authorities are not obliged to find a solution. Model Tax Convention on Income and on Capital. June of 1998, OECD, Commentary on Article 25, paragraph 45.
[42] Killius, Dr. Juergen, "The EC Arbitration Convention", Intertax 1990/10, page 440
[43] Ernst & Young, "2005-2006 Global Transfer Pricing Surveys" , 2005, page 5.

It is necessary to establish the two approaches because of the importance in clearly defining and writing down the principles that the proposed Convention must follow, thereby avoiding legal uncertainty for the Contracting States and the taxpayer (s) interested in the outcome of the arbitration procedure.

Firstly, there will be a revision of the specific issues that I consider should be particularly enunciated in the Convention and, secondly, the general or broad provision for all other cases.

a) Detailed Provisions

i) Adjustment of profits of associated enterprises and of a company and its permanent establishments (Transfer Pricing issues).

In order to explain this subject, it is important to briefly discuss the arm's length principle. When a taxpayer sells, buys or shares resources with a related person, the transfer or intercompany price has to be similar to that established between independent parties. This means that the transfer price is contrasted with the market price. For example, if company A in Country A sells a product to a related party B in Country B, the price stipulated in the transaction has to be similar to as that of a transaction between unrelated parties.

A Multinational Enterprise (MNE) can avoid income taxes of a country (high tax jurisdiction) by using this practice, through the manipulation of transfer pricing.[44] In most of the OECD countries, the competent authorities have the power to adjust these prices in order to charge the correct taxes on what they consider to be the correct transfer price. On the other hand, the other taxing authority has the obligation to make the corresponding adjustments, granting the shift of the income tax to the first mentioned competent authority.

This is better explained with an example. If, in the example above, Country A adjusts the price of the product sold by company A to company B (primary upward adjustment) into a higher price, then Country B should make (under the Bilateral Convention) the corresponding downward adjustment.[45] The OECD Model covers neither the secondary adjustment nor the corresponding adjustment to the secondary adjustment (this is resolved under the domestic legislation of some countries establishing a constructive transaction or a secondary transaction and its subsequent adjustments).

Taking into account that the Mutual Agreement Procedure helps to solve problems of double taxation, as I have already pointed out, it does not always fulfill this objective. Sometimes the competent authorities are not able to reach an agreement and the double tax issue is not solved. As a consequence, the taxpayer is generally the only one who suffers from this disagreement.

Arbitration is one alternative dispute resolution procedure in which the MNE may find its requirements satisfied. There are other very important procedures, like the International Court or a World Tax Court, which are inapplicable at the present time. Tax arbitration has been encouraged by many of scholars.

[44] Arnold, Brian J. and McIntyre, Michel J. "International Tax Primer" Kluwer Law International, 1995, page 57.

[45] This Principle is provided in Article 9, paragraph 2 of the OECD Model Convention. The other authority is not obliged to make automatically the corresponding adjustment. The adjustment is due only if the State B considers that the figure of adjusted profits correctly reflects what the profits would have been if the transactions had been at arm's length. Commentary on Article 9, paragraph 6.

As a result, the now proposed Convention must be able to resolve any disagreement between the competent authorities regarding the primary adjustment and the corresponding adjustment provided for under article 9 of the OECD Model Convention.

It has to be pointed out that the proposed Convention will not cover (because of an impossibility *de jure* stated by Mexico[46]) secondary adjustments (of the secondary or constructive transaction) and the corresponding adjustment of this secondary adjustment. Thus, these issues fall outside the Convention.

What the proposed Arbitration Convention does cover with respect to inter-company pricing is as follows:
1) Adjustment of profits between associated companies resident in (and only) the contracting states (primary and corresponding adjustment); and
2) Transfer pricing problems when one company resident in one contracting country has a permanent establishment in another contracting state.

ii) Conflicts in determining the source and the characterization of particular items of income.

Problems of characterization or qualification are closely related with conflicts of laws. The latter legal concept is defined as the inconsistency or difference between the laws of different states or countries, arising in the case of persons who have acquired rights, incurred obligations, injuries or damages, or made contracts, within the territory of two or more jurisdictions.[47] In the field of taxation, conflicts of qualification can be defined as the situation when two states treat one and the same set of facts differently for tax purposes[48]. Thus, for tax law the qualification conflict should be limited to the problem arising whenever a tax treaty uses terms derived from domestic law.

An issue may be originated when a State characterizes one item of income as one specific thing and another State characterizes the same item of income as another thing, making it difficult for the States to agree on how, where and whom to charge the tax liability to. This can be better understood with the following list of examples of problems of qualification:

1) whether remuneration paid to an orchestra conductor for recording is a 'royalty' or is a compensation for personal services under article 14 of the tax treaty;
2) whether interest paid by a partnership to its partners constitutes business profits of the partners under article 7 or interest under article 11 of the tax treaty;
3) whether a payment made upon a dissolution of an employment relationship (golden handshake) constitutes income from dependent personal services under article 15 or income not dealt with otherwise in the tax treaty under article 21;
4) whether a commission agent or trading agent carries on a business within the meaning of article 7 or has income from independent personal services according to article 14;
5) whether participation in a real property holding company constitutes immovable property within the meaning of article 6, 13 (1) and 22 (1) or capital assets;
6) whether shares of stock issued without payment of consideration, such as stock dividends, constitute income from shares according to article 10(3) or whether they do not constitute taxable income at all;

[46] This is explained because Mexican authorities have not the competence under the domestic law to eliminate double taxation in cases not provided for in the Convention. Commentary on Article 25, paragraph 55.
[47] Black, Henry Campbell. "Black's Law Dictionary", Sixth Edition, Centennial Edition (1891-1991) West Publishing Co. page 299.
[48] Piltz, D.J., "Qualifikationskonflikte" im internationalen Steuerrecht der Personengesellshaften, 37 RIW 306 (1991) cited by Vogel, K. "Klaus Vogel on Double Taxation Conventions", Kluwer Law International, third edition, page 52.

7) whether interest proceeds of a public limited partnership in the context of a real estate project are income from immovable property in the sense of article 6 or if they are interest under article 11;
8) whether proceeds received by a majority shareholder for serving as the company's director are income from dependent services or if they are income from independent services or if they are other income under article 21.[49]

These examples may help to better understand the problem of qualification in the tax area, which is a very important subject of study among tax scholars.

iii) Different applications of treaty terms

Any conflict of terms originated in the application of a tax treaty, may be solved by any of the following manners:

a) By applying the term as defined in the tax treaty;
b) By inference from the context of the treaty;
c) In following the meaning of the term that the contracting state (applying the Convention) has under its domestic law;
d) What the competent authorities agree as a common meaning pursuant to the provision of article 25 (mutual agreement procedure), or
e) By arbitration.

I consider that the order established in the above mentioned list should be followed when solving any conflict of terms not defined in the Convention.[50] Although, in case of disagreement, and to protect the taxpayer's legal certainty, the Competent Authorities should be obliged to submit the controversy to arbitration.

When the term is a legal term which is not defined by the law of the contracting state that is applying the Convention, no problem of qualification arises (as explained in the segment above), but it is rather a pure problem of conflict of terms *not* legally defined in the domestic laws of that contracting state. This is the purpose of this point, and this is why it is studied separately from the qualification problems.

As an example it can be mentioned that when the contracting state (the one applying the Convention) has not a legal term definition, but a commercial or even an accounting term, which could be contrary to what the other contracting state understands of that term, it could originate a conflict between the contracting states, which could end up in an unsolved double taxation that is prejudicial to the taxpayer.

iv) Different applications of the permanent establishment concept

This is a continuation of the conflict of terms just explained. It is necessary to separate it from the above section because of its importance. It does not mean that the other conflicts are less important, but it does mean that this one is more common and could cause more repercussions for MNE's.

[49] Vogel, K. "Klaus Vogel on Double Taxation Conventions", Kluwer Law International, third edition, page 52
[50] But when defined by the Contracting State applying the Convention, thus constituting a problem of qualification.

Most of the countries, under their domestic laws, try to establish a very broad concept of the term "permanent establishment". It is often wider than that constituted by the OECD in the Model Convention. For example, Mexico infers that an insurance company has a permanent establishment when it collects premiums in Mexican territory or the insurers' risks are situated therein.[51] The multiple conceptualization of the concept and the difficulty of knowing exactly whether or not a permanent establishment exists may produce disagreements when applying the Tax Convention.

v) Income distributed by an estate or trust

It is important to eliminate double taxation with respect to income distributed by an estate or trust. This section is further understood when reading the following segment because of the similarity of topics.

vi) Income with respect to a partnership

This is another type of characterization problem. It occurs when each contracting state treats a partnership differently. For example, when one state treats a partnership as an independently taxable entity whilst the other one treats it as a transparent entity, and thus attributing its profits and assets to the individual partners.

Tax laws of most countries do not contain a special definition for partnerships; consequently, they are constituted according to domestic civil or commercial law. Furthermore, difficulties arise where income is derived from an entity that is constituted under the laws of another jurisdiction.[52]

Even though that there is a report on the application of Tax Conventions to Partnerships, published by the OECD, and some subsequent updates have been made on the commentaries of the Model Convention in relation to this topic, I consider, for the sake of simplicity and to maintain legal certainty for the taxpayer, that it should be specifically covered by the proposed Arbitration Convention.[53]

b) General Provision

Other cases of application and interpretation

All of the above conflicts may have been easily covered by this broad provision. The above mentioned specific provisions were stated separately because of the necessity to clarify the issues that are within the scope of this Arbitration Convention. In this manner, it will be possible to achieve a finer legal certainty for taxpayers.

This comprehensive section covers all the other, but not less important, issues of double taxation that may occur when applying a Double Tax Treaty. This is a very well accepted legislative technique used by legislative bodies all over the world. A general provision comprises any other issues that the particular dispositions would not have legislated. For example, the competent authorities may seek agreement on a uniform set of standards for the use of exchange rates, or agree on consistent timing of gain recognition with respect to a transaction to the extent necessary

[51] Article 2, Mexican Income Tax Legislation.
[52] OECD, "The application of the OECD Model Tax Convention to Partnerships", 20 January 1999, Committee on Fiscal Affairs.
[53] What is established in the Competent Authority Mutual Agreement Between the US and México signed at December 30, 2005 could also be used by the Panel in this regard.

to avoid double taxation.[54] Another example could be the attribution of expenses to a permanent establishment.[55]

It is necessary to point out that the Arbitration Convention (at least from the Mexican view point) will only cover issues governed by the Double Tax Conventions because the Mexican authorities do not have the power under Mexican laws to eliminate double taxation in cases not provided for in the Tax Convention.[56]

This is not the case of the United States and Canada because according to article 25 of their Double Tax Convention, they may also consult together for the elimination of double taxation in cases not provided for in the Convention.

2. Personal Scope

The Arbitration Convention should apply to the same persons to which the Tax Convention between the contracting states apply. The three Double Tax Conventions signed among the contracting states (United States, Mexico and Canada) under article 1, state that the Conventions shall apply to persons who are residents of one or both of the Contracting States, except as otherwise provided in the Convention.

The concept of residence is taken from the tax treaties in order to determine if the person asking for the application of the Arbitration Convention is entitled to its benefits. Even thought the concept of residence is not defined in the Arbitration Convention, it is directly linked with the tax treaties in the text of the AC. In applying the AC, and when an individual is a resident of both contracting states, it is necessary to invoke the tie breaker rule stipulated in the tax convention. The same recourse from the tax treaty may be necessary in order to solve a conflict of a dual resident corporation.[57]

3. Territorial ambit

Bilateral arbitration clauses are of limited territorial scope because they apply only to both Contracting States, thus, in those issues in which a third country has some kind of implication, those are not solved under those provisions. The limited territorial scope of the Bilateral Conventions is obvious and at the same time unavoidable because of the practical impossibility that all of the countries in the world (or at least all those who have signed tax treaties) enter into a Multilateral Tax Arbitration Convention.

The EC convention was the first tax Convention to provide for procedures in triangular cases.[58] The proposed Convention will do the same, but in a more reduced context, because there will be only three contracting states.

It would be ideal that a Multilateral Arbitration Convention were signed between all the countries in the American continent, but it is very unlikely for the time being because of economic and other

[54] Examples taken from the "1996 US Model, Technical Explanation", Art 25, paragraph 3, subparagraph 4.
[55] See Tillinghast, David R, "The Choice of Issues to be Submitted to Arbitration Under Income Tax Conventions", Intertax 1994/4, pages 164 and 165, originally from: 'Essays on International Taxation in honour of Sidney I. Roberts', Kluwer Law and Taxation Publishers, 1993.
[56] Commentary on article 25, reservation made by Mexico, paragraph 55.
[57] Article 4 of the three Tax Conventions stipulate the tiebreaker rule and how to solve conflicts of companies or other bodies of persons. These rules are not explained herein because they do not represent the main topic of this paper.
[58] Menk in: Becker et al (eds.), DBA-Kommentar II, Art. 6 Arbitration Convention, paragraph 12, cited by Züger, Mario, "Mutual Agreement and Arbitration Procedure in a Multilateral Tax Treaty, in Michael Lang and others (ed.), Multilateral Tax Treaties (Kluwer, 1998), page 158.

multiple differences.[59] Consequently, I contemplated a limited territorial ambit for the application of this Convention, which is conformed by the NAFTA countries. These countries have more integrated trade and financial transactions because of the benefits of that commercial treaty. Thus, as a consequence, the territorial application of the proposed AC should, for the time being, be the same as that covered by the NAFTA.

4. Excluded cases of application of this convention

The effect of fraudulent actions has been argued among scholars. Some of them point out that the consequence of the *fraus omnia corrumpit* is not a reason to deny the elimination of double taxation (especially in transfer pricing issues where tax evasion intention of the MNE's can be observed).[60] For other authors, it is necessary to reasonably repress the negative intentions of the taxpayer by negating the benefits of the elimination of double tax liability.[61]

The latter tendency is the one adopted by both the bilateral arbitration clauses and the European Arbitration Convention.

Under the European Arbitration Convention, the competent authority is not obliged to initiate the mutual agreement procedure or to set up the advisory commission (arbitration board) referred to in the Convention where legal or administrative proceedings have resulted in a final ruling giving rise to an adjustment of a transfer of profits (transfer pricing conflict), where one of the enterprises concerned is liable to a *serious penalty.*[62]

What has been criticized is the broad ambit to which this concept of serious penalty could be applied. Since this concept was not known in the international tax practice, its definition was laid down in individual declarations of the contracting states. Thus, in some Countries the concept of serious penalty may be so broad that it could go from fraudulent actions to petty offenses, such as failure to file a tax return (U.K), failure to supply taxation details (Greece), to make documents and records available for inspection (Ireland), liability for administrative fine for any infringement of the tax legislation (Germany), breach of tax laws (Finland), intentional or negligent evasion of tax (Australia), lack of good faith and abuse of rights (France).[63]

In the proposed Convention this situation of uncertainty and different conceptualization should be avoided by clearly stipulating in the text of the provisions the cases in which the Convention will not be applicable.

In regards to bilateral arbitration clauses established in some tax treaties, it is usual to exclude matters of tax policy or domestic law from the application of the arbitration board.

For example, the diplomatic exchange notes agreed between Mexico and the United States with respect to the elimination of double taxation by arbitration states as follows: "The competent authorities will not accede to arbitration with respect to matters concerning the tax policy or domestic law of either State." This disposition is understandable because of the necessity of the Countries to keep control of internal matters. The so-called sovereignty issues.

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[59] Perhaps it might be possible in the future when a Free Trade Area in the Americas enters into force. Bamrud, Joachim, with additional collaboration of Blount, Jeb. "La Agenda: de Miami a Brazil" Latin Trade Magazine, June 1997. p. 3A.
[60] They argue that those fraudulent actions are dealt with by the appropriate administrative and judicial proceedings.
[61] Hinnekens, Luc. "The European Tax Arbitration Convention and its Legal Framework-II", British Tax Review, 1996, No 3, page 283.
[62] Article 8 of the EC Arbitration Convention.
[63] Hinnekens, Luc, op. cit. page 284.

As a conclusion, I can say that whilst it is true that with this Convention the taxpayer will have more legal certainty, it is also true that there is a necessity to limit its benefits only to all of those cases where the taxpayer is not liable for a serious penalty (specified cases of fraudulent intention or absence of good faith) and to avoid matters concerning tax policy or domestic law of the contracting states.

5. Taxes covered by the convention

The taxes that the proposed AC will cover are those covered by in the existing bilateral conventions between the Contracting States. In this manner, only the taxes covered therein will be the subject matter of the Convention. This is because the objective of this Convention is to solve issues regarding the application and interpretation of double taxation treaties, and these treaties cover income taxes.

6. Definitions

The article of definitions is relevant in this Convention. The notion of panels used herein is a new concept for the International Tax practice. This concept is currently used in other branches of International Law, for example in trade law (it is wholly accepted in the NAFTA). On the other hand, it is very important to specify who the competent authorities are. In general the Ministers of Finance of the Contracting States are the authorities competent to carry out the procedures established under the Convention.

7. Principles of the convention

It is important and necessary to refer to the principles that the convention must follow. It has to ensue the same track established in the material scope. These represent what the competent authorities must comply with when applying the AC and the grounds on which the Binational Panel will issue its awards.

The issues were mentioned above when we studied the material scope. Now the questions would be, how is the arbitration board going to resolve these issues? On the basis of what principles? Following what directives? Trying to answer these questions is the purpose of this section.

a) Transfer Pricing issues

As in the European Arbitration Convention, the proposed arbitration treaty will explicitly enunciate the arm's length principle to be applied to between associated enterprises and between an enterprise and its permanent establishment.

In order to fulfill this objective, it was necessary to practically transcribe the wording of article 9, paragraph 1, and of article 7, paragraph 2, of the tax treaties signed between the three contracting states. The proposed text would be as follows:

"(1) Where:
a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of another Contracting State, or
b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of one Contracting State and an enterprise of another Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

(2) Where an enterprise of a Contracting State carries on business in another Contracting State through a permanent establishment situated therein, there shall be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealings wholly independently with the enterprise of which it is a permanent establishment."

b) Interpretation and Application issues

It is difficult to establish a common and wholly accepted principle that could help to solve the interpretation and application problems that may arise when applying the tax conventions. Not even learned authors necessarily agree on a common solution. However, it is essential to reach a general principle which could assist the arbitration board to issue its resolutions based on the law provisions stated in the AC and for the sake of juridical certainty for the taxpayer that the provisions of the AC be correctly applied.

This principle must be general in the sense that it has to cover all the other issues that are comprised in the material scope (characterization issues, treaty terms, the use of the permanent establishment concept, income derived from estate or trusts and from partnerships, and the "joker" provision which covers all other conflicts of interpretation and application of tax treaties).

In principle, there is the Vienna Convention on the Law of Treaties, which has a special section for the interpretation of treaties. This authoritative Convention states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its purpose. The context shall comprise (besides the text, the preamble and annexes) parallel agreements or instrument in connection with the conclusion of the treaty. Any subsequent agreements, subsequent international practice and rules of international law applicable to the treaty have to be taken into account.[64]

It may help to use, as a supplementary means of interpretation, the preparatory work of the treaty or the circumstances of its conclusion, to confirm the interpretation inferred or to determine it when the former leaves an ambiguous or obscure meaning or leads to a result which is manifestly absurd or unreasonable.[65]

The judicial authority of the OECD commentaries is unclear. These can be considered either an agreement of all parties in connection with the conclusion of the treaty, or an instrument made by one party and accepted by the other; or any subsequent agreement or practice; or supplementary means of interpretation, including *travaux préparatories.* A pragmatic answer is to say that the Commentaries might be referred to under any of these headings.[66]

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[64] In this sense, and notwithstanding the fact that the US is not part of such convention, it is important to recall that this should be considered to set up principles of international law which should be followed by the US.

[65] Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, entered into force on 27 January 1980, articles 31 and 32.

[66] Bakker, Philip, "Double Taxation Conventions and International Tax Law" A manual on the OECD Model Tax Convention on Income and on Capital of 1992. Second Edition, Sweet and Maxwell, 1994, pages 29-30.

Some specific terms used in the Model Convention are defined therein like resident, permanent establishment (with its own problems as explained in the material scope section), immovable property, dividends, interest, royalties and professional services. In addition, article 3, paragraph 2 of the OECD Model Convention provides as follows:

> 'As regards the application of the Convention by a Contracting State any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the law of the State concerning the taxes to which the Convention applies'

There are some problems in applying this tax treaty provision:

1) The "unless the context otherwise requires" problem;
2) State's laws to be applied;
3) Domestic definition to be applied, and
4) Static and ambulatory approaches.[67]

With respect to the "unless the context otherwise requires" statement, it has been said that it is not clear what the context constitutes. It must be remembered that this special provision is itself a treaty text, which must to be interpreted in accordance with the Vienna Convention rules, thus, the lack of the concept of, or what the context constitutes may be interpreted under the rules of that authority Convention.[68] And according to those rules, the context is composed by travaux *preparatoires*, subsequent agreements and supplementary means of interpretation.

In regards to the problem of what state's laws are to be applied, the question is as follows: is each contracting state to apply its own domestic law definitions, or is the definition of one of the two states to be preferred? In a seminar organized by the International Fiscal Association, David Ward suggested the idea that the definition in the law of the state of source should be applied.[69]

This solution was also proposed by Prof. John F. Avery Jones[70]. He argues that the key problem of the effect of article 3(2) lies in the meaning of the world application. According to him, the conclusion is the same under the actual treaties that the Source State always applies its own law to categorize the item of income. The result of doing this could give three outcomes. The first, he says, is that the source state applies the treaty by exempting the income as determined by its internal law classification, and the residence state does not apply the treaty at all. The second possibility is that the source state taxes the income under its own domestic law and, thus, it does not apply the treaty at all, leaving only the residence country to apply the treaty, which it does in a way which means that it does not need to apply its own internal law categorization of the income, but all that it is required to do is to satisfy itself that the source state's taxation is in accordance with the treaty (taking into account the source state law and its categorization). As a third possibility, he pointed out, that the source state applies the treaty by charging a reduced withholding tax, thus applying the treaty in the same way as the second case, (without using its own categorization of that income). [71]

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[67] These problems are studied more in detailed by Bakker, Philip, op. cit.
[68] Sinclair, Sir Ian, in "Interpretation of Tax Treaties", Bulletin of the International Fiscal Association, February 1986, International Bureau of Fiscal Documentation, page 77.
[69] *Ibidem.*
[70] Avery Jones, John F. "Qualification Conflicts: The Meaning of Application in Article 3 (2) of the OECD Model" in Festschrift fur Karl Beush 43 (1993).
[71] This idea was described by Prof. Vogel as something which "appears to carry little conviction". Vogel on Double Taxation Conventions, Kluwer, 1991, article 3, mn 60.

The above explained theory was supported by Prof. Kees van Raad who said "Given the choice between application by each State of its own law and application by both States of the source country's law, I am inclined to opt for the latter, that is: interpretation on the basis of the law of the source State as the best among imperfect solutions".[72]

The problem consisting of which domestic definition should be applied is different from the previous one. It is necessary to observe what article 3(2) states in relation with it. It stipulates that any term not defined shall have the meaning that it has under the law of that State for purposes of the *taxes*. Thus, it is inferred that it has to be from the tax legislation. If a tax definition does not exist, the concept can be taken from the general law.

Finally, the static and ambulatory issue was wiped out by the Committee of Fiscal Affairs when it included in the commentaries that the ambulatory interpretation should prevail.[73]

After this explanation, what I stated at the beginning of this paragraph b), that not even learned authors have been able to reach a common solution, is confirmed. This discussion could easily be a subject for many papers, however there are some interesting ideas that we could use to think about the general principle of interpretation and application of the double tax treaties stated in article 3(2).

My suggestion consists of including, in the studied Arbitration Convention, the text of the existing article 3 (2) with slight improvements in order to make it clearer and to give directives as to how a Double Tax Convention should be applied and interpreted. The text in the AC would be as follows:

> 'In applying the Double Tax Convention and unless the context otherwise requires, the Contracting State may give, to a term not defined therein, the meaning which it has under the tax law of that State concerning the taxes to which that Convention applies. In the case that the term is not defined within its domestic tax legislation, then, that Contracting State may apply the definition from its general law.'

I consider that the arbitration board should follow the source state's definition proposed by Prof. Avery Jones for the sake of simplicity and in order to avoid unnecessary and many times unsolved conflicts, which are in prejudice to the taxpayer. By doing this, the binational panel will have a clearer basis to emit its awards with respect to what States' legislation and to what domestic law are to be applied. On the other hand, the Contracting States and the taxpayers will have a better legal certainty. With respect to the problem of the context, it will be necessary for it to follow what the Vienna Convention establishes. Finally, the static/ambulatory issue is solved (as explained above) with the commentaries of the Model Convention of the OECD.

With respect to conflicts with Partnerships, I only need to point out that the arbitration board should follow the recent report on the application of Tax Conventions to Partnerships, published by the OECD. It proposed changes to the commentaries of the Model Convention that will assist for the application of these *sui-generis* institutions. I consider that the outcome of this report should constitute the principle that the binational panel may use when solving these kinds of conflicts.

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[72] Van Raad, Kees, in "Interpretation of Tax Treaties", Bulletin of the International Fiscal Association, February 1986, International Bureau of Fiscal Documentation, page 81.
[73] Commentary on Article 3(2) paragraph 11, of the OECD Model Tax Convention.

CHAPTER THREE

MUTUAL AGREEMENT PROCEDURE (MAP)

1. Purpose of the MAP

As in the European Arbitration Convention, the procedure rules of the proposed AC are divided in two sections. These two parts consist in a mutual agreement procedure and the panel procedure. The former is going to be explained in this chapter and the latter will be the subject of the following chapter.

The MAP, as we already saw, is aimed at resolving a dispute on an amicable basis.[74] The scope of this special procedure is to solve problems relating to the interpretation and application of the Convention. In relation to the procedure itself, it is necessary to consider two distinct stages into which it is divided. In the first stage (taxpayer-Competent Authority), the taxpayer presents his claim to the competent authorities of his State of residence. On the other hand, that competent authority is under obligation to consider whether the objection is justified or not. If it considers that the claim is justified and it is due to a measure taken by the taxpayer's State of residence, it must resolve the problem by itself (by giving the complainant satisfaction by making adjustments or allowing relief). If it considers the objection justified due to a measure taken in the other state, then it will have the obligation to ask for a MAP. The latter constitutes the second stage of procedure, which is a dealing between authorities (authority-authority).[75]

Something that is very important to take notice of is that whilst the authorities are obliged to use their best efforts, they are not obliged to resolve the problem if they do not agree on a mutual solution. This situation is clearly stated in the commentaries of the OECD Model when it states that "…the competent authorities are under a duty merely to use their best endeavors and not to achieve a result".[76]

2. Purpose of the proposed Arbitration Convention.

The purpose under the proposed AC is to allow the competent authorities the opportunity to resolve the conflict by using a MAP and not to withdraw this effective mechanism. In achieving this objective, all that is necessary is to practically transcribe what article 25 of the OECD Model Convention stipulates and make some adjustments. The European Arbitration Convention constitutes the best example to be followed in drafting the text of the proposed AC because it captured the essence of the MAP explained in the OECD Model Convention.

In relation to this European Arbitration Convention there are two slight changes to be made to adjust it to the NAFTA Countries. The two specific points to be reviewed are related with the time limit issues cited in the above mentioned Convention.

3. Time limits

The first issue is regarding the time limit stipulated by both the OECD Model Convention and the European Arbitration Convention that enables the taxpayer to present his or her case to the

[74] Commentary on Article 25 paragraphs 1 and 2, point 6.
[75] Commentary on Article 25 paragraphs 1 and 2 points 19, 20, 21, 22 and 25.
[76] Commentary on Article 25 paragraphs 1 and 2, point 26.

competent authority within three years from the first notification of the action which may result in double taxation. This three-year time limit rule cannot be established in the proposed AC because Canada made a reservation in which it stated that it could not accept such a long time limit.[77] What Canada has seemed to accept is a maximum time limit of two years.[78] As a consequence, the maximum time limit to file a claim in the proposed AC will be of two years.

The second issue is constituted by the provision which states that any mutual agreement reached shall be implemented irrespective of any time limits prescribed by the domestic laws of the Contracting States concerned. Mexico and Canada, among other countries, made a reservation in regards to this issue. These countries' governments believe that the implementation of relieves and refunds following a mutual agreement ought to remain linked to time limits prescribed by their domestic laws.[79] Following the position of these two countries, the proposed AC should not cover this provision.

[77] Reservations on Article 25 point 50.
[78] This two-year time limit was accepted in many tax treaties signed by Canada, among them, with Mexico and the Netherlands.
[79] Reservations on Article 25 point 53.

CHAPTER FOUR

RIGHTS AND OBLIGATIONS OF THE PARTICIPANTS IN THE PANEL PROCEDURE

Prof. Luc Hinnekens has pointed out an ample list of rights that the taxpayer should have in these proceedings.[80] Many rights of the taxpayers are derived from the text of the proposed AC. These rights are: to request the commencement of a panel, to appear in the procedure, to present information, to refuse to provide certain information requested in the procedures, to reply to the positions stated by the competent authorities, to appear in hearings (publics or *in camera*), to formulate well-founded decisions, to request a revision of the panel's decision, and to a specific time framework.

The above-mentioned rights are derived from the whole text of the Convention; however, I consider it necessary to establish a specific list of rights in an article of the Convention. This list is not exhaustive, but declarative. Besides, this specific list will cover other rights not enunciated within the text of the Convention. These are the rights to require the discontinuation of the procedure and to have access to information within the procedure and to information from previous cases resolved by the panel.

A step forward in the effectiveness of the award of the panel was made by the NAFTA. It is established in article 1904 that "a final determination shall not be reviewed under any judicial review procedures of the importing Party if an involved Party requests a panel with respect to that determination within the time limits set out in this Article. No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts".[81] This means that the interested parties will not have the right to appeal or request for a revision of the panel decision under their domestic laws. But the decision of the panel will not be absolute. It is important to make notice that the NAFTA establishes a procedural system that allows the parties concerned to request a revision of the panel revision. This *sui-generis* procedure substitutes the domestic appeal established within the Contracting States legislation's.[82]

The principle stated in the preceding paragraph acknowledges the NAFTA panels as real jurisdictional and supranational institutions. In order to make the proposed AC as effective as possible, it is of fundamental importance to establish the same principle in it. The provision will be written in a negative sense because it will deny the right of the taxpayers to appeal the decision awarded by the panel. Finally, it will order the Contracting States to amend or to do not enact domestic legislation in which a decision of the panel could be appealed.

[80] Hinnekens, Luc, "The European Tax Arbitration Convention and its Legal Framework" (II), British Tax Review, 1996, No 3 and "Legal sources and interpretation of European Tax Arbitration Convention and its recognition of the taxpayer", in IFA (International Fiscal Association) Congress Florence 1993, Seminar E: Resolution of Tax Treaty Conflicts by Arbitration (Kluwer).
[81] Article 1904(11) of the NAFTA.
[82] This institution is called the Extraordinary Challenge Committee, see chapter I.

CHAPTER FIVE

PROCEDURAL RULES FOR THE BINATIONAL PANELS[83]

1. Initiation of the Procedure

Due to the very special nature of this dispute resolution mechanism, the arbitration procedure may start in two ways:

- When the competent authorities fail to reach an agreement after two years of negotiation under the MAP; or
- Before that time limit, when the taxpayer(s) and the competent authorities agree on waiving that two-year provision stated in the above paragraph a).

a) After the Mutual Agreement Procedure.

As I have already mentioned, keeping the MAP mechanism is very important, because of the necessity to give the competent authorities the opportunity to solve the issue in a more relaxed environment in which they could negotiate their specific positions in order to achieve a satisfactory settlement. This is the reason why the competent authorities should encourage the MAP.

Afterwards, whenever the competent authorities are not able to achieve an agreement under the MAP, and in order to avoid double taxation issues completely, it is necessary to establish a *mandatory*, post-MAP, arbitration procedure. The notable difference between this position and the one taken by the Bilateral Arbitration Clauses is that, in the former, the arbitration procedure is obligatory when an agreement has not been reached under the MAP, and in the latter, the competent authorities are not obliged to submit the issue under an arbitration procedure, but only when they agree on doing that.

This "mandatory requirement" was successfully established in the EC Arbitration Convention. The same will be suggested for the proposed AC.

On the other hand, it is important to review some of the different procedural techniques used to initiate an issue under arbitration. This revision will help to establish the best option that I consider the proposed AC should cover.

For example, the EC arbitration convention states that taxpayers have the right to the remedies available under the domestic law of the contracting state concerned. It continues regulating that where a case has been submitted to a domestic court, the term of two years will be computed from the date on which the judgment of the final court was given. [84]

Because domestic laws of some countries in Europe do not allow their competent authorities to derogate (through administrative decisions) juridical resolutions of their judicial bodies, the member states agreed on including a provision in which it stated that the rule mentioned in the above paragraph would not apply to these countries (example: France). This rule would apply once the taxpayer allows the time provided for the appellation to expire, or when he has withdrawn such appeal before a decision was delivered.[85] This situation may be similar for the NAFTA

[83] See annex two for a timetable diagram.

[84] This will not be suggested in the proposed AC because Mexican laws do not allow the competent authorities to derogate judicial resolutions.

[85] European Arbitration Convention, Article 7, paragraphs 1 and 3.

countries but the conclusion (allowing the time to appeal to expire or withdraw the appeal) seems to be excessive.

It is now a proper time to recall what the NAFTA regulates in relation to the initiation of the binational panels' procedure. As I have already explained, after the administrative resolution, the interested party may take one of two options. The first one is to take recourse of the remedies under domestic laws and the second possibility is to inquire for the setting of a Binational Panel. This is a very interesting procedure that allows the interested party to take a decision in regards to where and by whom the conflict will be resolved.

Under the Mexican Tax Code, the taxpayer also has two options when an international double taxation issue arises. He can either ask for the remedies provided for under the domestic law or request a MAP (and a subsequent arbitration procedure). If the taxpayer opts for the latter, the right to file an appeal under domestic law will be suspended until the MAP and the arbitration procedure are terminated.[86]

As a conclusion, I may say that it is of fundamental importance that the proposed convention allow the taxpayer to have recourse, on the one hand, of the domestic remedies and, on the other hand, of an arbitration procedure. In achieving this objective, it is necessary to clearly establish an option between asking for an arbitration procedure or making a direct request for domestic remedies.[87] The right to take the option will be exercised after the mutual agreement procedure has failed. It means that the right or obligation to opt will be only between the domestic jurisdictional procedure and the panel procedure and not an option between the domestic courts and the mutual agreement procedure. This is necessary to adjust the proposed AC to what is established in the OECD Model Convention under article 25 (mutual agreement procedure), which is the accepted principle by the OECD members (among them, the three Contracting States of the NAFTA).

When, under the proposed AC, the taxpayer concerned opts for a domestic judicial procedure; he or she will not be entitled to request the initiation and composition of a panel. Afterwards, the procedure would be entirely domestic. The taxpayer involved will not be able to request a panel in the same case after the resolution of the domestic judicial procedure is enacted.

A request for a panel shall be filed within 30 days after the end of the two-year term provided for in the Mutual Agreement Procedure. The request should contain a declaration that the taxpayer(s) involved did not file or that they will not file an appeal under the domestic jurisdictional procedures established by the Contracting States. If an interested taxpayer requests for the initiation of a panel and he also files an appeal before a domestic court, in a clear infringement of the proposed convention, the competent authorities interested will be obliged to notify this situation to the panel. As a sanction to the infringing taxpayer, the panel will have to end the procedure and charge all the expenses incurred by the panel, until that time, and the proper panelists' fees for the time that they were acting as panelists.

There could be the case in which more than one taxpayer is involved in the conflict (transfer pricing issues), and one of them requests a panel procedure and the other requests a domestic remedy. In these cases, and in order to avoid duplication of decisions of the same issue, it is proposed that the taxpayer who is the first in time to file a request for a domestic remedy or a request for a panel, whichever the case could be, will establish the jurisdiction in which the conflict

[86] Mexican Tax Code articles 121 and 207.

[87] In achieving this conclusion, it would be necessary for Mexico to amend the mentioned articles in the sense that the taxpayer will have to opt between submitting its case under domestic judiciary procedure or requesting for the establishment of an arbitration board.

shall be resolved. To achieve this objective, the taxpayer requesting a panel will have the obligation to notify to the competent authorities of all the other taxpayers that may constitute interested parties. The competent authority that receives the request for a panel shall immediately notify the other possible interested taxpayers that a request for a panel was filed before it.

Another possibility could be that a concerned taxpayer who did not request a panel is still interested in participating in the procedure. When this is the situation, this taxpayer will have to file a notice of appearance before any competent authority concerned within a specified time in order to participate in the panel procedure.

In regards to administrative penalties, what the EC arbitration convention states is transcribed. This means that when a case is submitted to arbitration, a contracting state will not be prevented from initiating or continuing proceedings for administrative penalties.

b) Without a Mutual Agreement Procedure.

If the parties concerned completely disagree from the beginning of the conflict, and there are indications that they will not reach any mutual agreement, it would be better to request an arbitration procedure without any other delay. This situation is covered by the proposed convention.

2. Composition of a Binational Panel

It is vital to the ultimate success of the procedure the make up of the arbitration panel.[88] Thus, the composition of the panel must be strictly regulated. It has to cover many important issues such as the selection of the panelists, attributes needed by international arbitrators, rights of the participants to disqualify from appointment to the panel candidates proposed by the other party, and duties and removal of arbitrators, among others.

As we have already seen, bilateral arbitration clauses of tax treaties almost completely omit these regulations. The protocol of the tax treaty between the US and Mexico only states that the arbitration board will consist of not fewer than three members, each competent authority will nominate one member and it leaves to the same authorities the criteria to be used in the selection of the third member. It states that the arbitrators must agree in writing to be subject to the confidentiality rules of the contracting states.

The European Arbitration Convention has a more complete provision that regulates the composition of the advisory commission. It establishes, among others, the number of arbitrators and how they will have to be appointed, the designation of an alternate for each arbitrator, objections, establishment of a list of persons of standing, rules to the election of a Chairman and secrecy obligations.

Even though the European Convention has made important developments in this topic, the NAFTA still regulates this issue in a more detailed manner. All the minimum requirements stated in the first paragraph of this section are extensively covered by Article 19 of the NAFTA. Thus, the proposed convention should follow the same direction taken by the NAFTA[89], giving due consideration to the European Arbitration Convention.

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[88] Fogarasi, Andre P. and others, "Use of International Arbitration to Resolve Double Taxation Cases", Tax Management International Journal, Vol. 18, No. 8, August 1989, page 325.
[89] Besides the situation that the NAFTA regulates this subject more in detail, the fact that the members of the NAFTA have already accepted these provisions may facilitate its inclusion in the proposed convention.

3. Code of Conduct

Due to the extension that it would implicate to state all the principles that a code of conduct requires, it is necessary to simply insert an article, which will regulate that the contracting states shall agree upon a code of conduct and shall be established by notes to be exchanged through diplomatic channels. This Code should regulate among other things, responsibilities of the panelists in the process, disclosure obligations, performance of duties by the panelists, independence and impartiality of the panelists, maintenance of confidentiality, and responsibilities of the assistants and staff of the panel.

4. Written and oral proceedings

Like it is established in the NAFTA,[90] the Competent Authorities and the taxpayer(s) concerned will be entitled to file a brief in which they will explain their positions with respect to the conflict. The brief or summary should contain at least the minimum information and documentation in order to explain to the panel the issue and the position taken by each party in the conflict. It should be simple and easy to understand; although, sometimes that will not be possible, due to the very specialized issues that the panel will address.

Filing a brief is optional. The Competent Authority or the taxpayer(s) concerned should decide whether to file a brief or not. For example, sometimes it would not be necessary for the taxpayer(s) to present a brief because he, she or they can embrace the same position as the one taken by one of the Competent Authorities. The panel should give the same importance to all briefs filed before it.

In order to give the taxpayer the opportunity to counter the arguments stated by the competent authorities, the proposed AC establishes that no later than 15 days, the taxpayers will be entitled to file a reply of the briefs presented by the competent authorities involved in the procedure. This reply should focus only on answering the grounds and arguments exposed in the replied briefs. Giving the opportunity to the taxpayer to rebut the arguments of the competent authorities would provide the taxpayer with the right of plea, which is an internationally accepted requirement in jurisdictional cases.

The competent authorities and the taxpayer(s) are entitled to a hearing. In this conference, they may submit oral arguments of their positions in relation to the conflict. The hearing should take place within 90 days after the panel is installed. It is important to establish the right of the participants in the hearing to oral proceedings *in camera*. These types of proceedings are necessary to protect secret information that will be presented during the hearing.

5. Basis of the decision

In regards to how the arbitration board will emit its decision of the conflict, what the EC arbitration convention states with relation to this subject is recoverable. What the Protocol of the US-Mexican tax treaty regulates is also important.

In the EC arbitration convention, the advisory commission must base its opinion on the principles stated within the convention.[91] On the other hand, the bilateral arbitration clause states that the

[90] Rules of Panels, rules 57-60
[91] EC Arbitration Convention, article 11(1).

arbitration board will issue its decision on the basis of the bilateral tax treaty, with due regard to the domestic laws of the contracting states and principles of international law.[92]

If these two provisions are combined, we could have as a result a very complete provision, ideal for the proposed AC convention. Thus, the decision has to be well founded on the grounds of the arbitration convention, the bilateral tax treaty, the domestic laws of the contracting states and principles of international law.

On the other hand, the panel's decision has to be motivated. In other words, it is necessary to require the panel to state its reasons for issuing its decision. Finally, it would be characteristic of a fair procedure to establish in the decision any dissenting opinions of the panelists.

6. Additional rules of procedure

The procedural rules established in the Convention will represent the minimum requirements of procedure accepted by the Contracting States; however, they will be entitled to agree upon additional and more specific procedural rules that the Panel will have to follow in order to pronounce its decision. If the Contracting States are not able to reach an agreement in regards to these additional rules, then the Panel, composed by the competent authorities in a specific double taxation case, will establish its own procedural rules. Notwithstanding this, the rules proposed by the panel must not infringe what is stated in the proposed Convention.

7. Time limits

Time limits represent a step forward in arbitration because it gives the parties certainty in regards to when the conflict will come to an end. Thus, it is important to establish a strict time limit framework. Every step of the procedure, in order to be fulfilled, has to be limited in time, and if it is not done within its scheduled time, then it will not be performed in that specific panel procedure.

I consider that the time limit established by the European Arbitration Convention with regards to the maximum time that the Advisory Commission has to pronounce its opinion is ideal. The rule stated in that Convention is of no more than six months from the date on which the matter was referred to it.[93] It gives the parties concerned the opportunity to transmit their positions and it allows the Advisory Commission to resolve the issue within a specific time framework. Unlike the NAFTA, the European Convention does not provide for a step-by-step scheduled time frame. One more time, the track drawn by the NAFTA is a perfect example to be followed.[94]

An adjustment would be necessary in the proposed AC in relation to the maximum time established for the panel to emit its decision. Because of the very strict schedule that I am proposing for the panel to follow, it is necessary to widen the time limits. The conflict will have to be finished within seven months after the two-year term settled for the MAP had expired. The panel will be obliged to issue its decision within 210 days (approximately seven months) after its composition.

[92] Protocol of the US-Mexican Tax Treaty with reference to paragraph 5 of article 26 (Mutual Agreement Procedure), section (b), (v).
[93] EC Arbitration Convention, article 11(1).
[94] NAFTA, article 1904(14).

8. Costs

It is a controversial issue. Should the two States split the cost or should the taxpayer bear the cost of the procedure? Use of non-government arbitrators, retaining expert witnesses or undertaking economic studies can become very expensive.[95]

The protocol of the bilateral arbitration clauses of tax treaties does generally provide for a rule in regards to the allocation of the costs of the arbitration boards. This rule consists in that each state shall bear its own costs and all other costs would be borne equally between the contracting states. On the other hand, it gives the arbitration board the power to establish a different allocation. However, a competent authority may, if it deems appropriate in a specific case, require the taxpayer to agree to bear that State's share of the costs as a prerequisite for arbitration.[96] I consider this latter provision inappropriate because a competent authority may make abusive use of its position to establish this as a general prerequisite for arbitration.

In my opinion, the solution proposed by the International Chamber of Commerce is more suitable. It proposes that the costs will be shared between the Contracting States as they have not found a solution to the problem of double taxation through the MAP.[97] In assuming this idea, the contracting states will be pressed to find a solution to the conflict before the case reaches the arbitration board, because they will know that the issue will have to be resolved afterwards and that they will absorb all the arbitration expenses. This solution was adopted by the EC Arbitration Convention.[98] As a consequence of the pressure effect that it could cause on the competent authorities, it is important for the proposed AC to cover the costs in the same manner as in the before mentioned Convention.

[95] Fogarasi, Andre P. and others, op. cit. page 327.
[96] Protocol of the US-Mexican Tax Treaty with reference to paragraph 5 of article 26 (Mutual Agreement Procedure), section (b) (vi) (C).
[97] International Chamber of Commerce, "The Resolution of International Tax Conflicts", ICC Doc. 180/240, 146th Session in Stockholm on 16 June 1984. Reprinted by IFA (International Fiscal Association) Congress Florence 1993, Seminar E: Resolution of Tax Treaty Conflicts by Arbitration (Kluwer).
[98] EC Arbitration Convention, article 11(3). It reads: "The costs of the advisory commission procedure, other than those incurred by the associated enterprises, shall be shared equally by the Contracting States concerned".

CHAPTER SIX

EXTRAORDINARY CHALLENGE COMMITTEE AND OTHER PROVISIONS

1. Extraordinary Challenge Committee

Some authors[99] have proposed the possibility that the decisions of the advisory commission, as established in the EC arbitration convention, could be reviewed by an *ad hoc* institution in cases in which the Contracting States or the taxpayers concerned consider the opinion to be unreasonable or not in accordance with the Convention.[100]

What the NAFTA regulates with regards to the review of the decisions issued by a Binational Panel is recoverable. In order to establish a similar procedure in the AC, it will be necessary to aggregate an article that will cover this *sui-generis* institution. This article would cover minimum rules of procedure such as basic time limits, the legal basis to request a revision of the panel decision, the composition of a committee, written and oral proceedings, costs and the basis of the final decision of this special revision institution. Consequently, the Contracting States may adopt additional rules in order to implement the extraordinary challenge committee.

2. Elimination of double taxation

The double taxation issue will be removed where either only one Contracting State charges tax on the profits which were in conflict, or where both Contracting States charge tax on those profits but one of them reduces the amount charged in the other State. This is the same solution proposed by the EC arbitration convention but, as we know, the latter is limited to conflicts of transfer pricing.

3. Fulfillment of the Decision

Taking into account that the tax policy of the Governments is to maintain their fiscal sovereignty, the Contracting States will be able to agree, within six months after the panel delivered its decision, to a resolution that may deviate from the panel decision. This resolution would necessarily have to eliminate the double taxation issue, and the consent of the taxpayer(s) concerned would be essential.

This procedure was established by the EC arbitration convention after the objection made by some EC members in which they pointed out that the binding arbitration, as envisaged in the Commission's 1976 proposal, impinged upon the fiscal sovereignty of the Member States.[101]

Establishing this principle does not mean that the panel will be only an advisory institution. It would be, as following the intention of the Contracting States, a supranational arbitration institution, which will have the power to deliver its decision. In providing for this option, the Contracting States and the taxpayers involved would be able to reach an amicable resolution, even after a panel resolved the conflict. It is of fundamental importance to give the right to the involved taxpayer(s) to participate in this differing solution.

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[99] Hinnekens, Luc, "The European Tax Arbitration Convention and its Legal Framework", British Tax Review 1996/2 and 3 page 311; and Dirk Schelpe cited by the before mentioned author in the same article.
[100] They mentioned that the obvious choice would be the European Court of Justice.
[101] Farmer, Paul and Richard Lyal, "EC Tax Law", Oxford University Press, Oxford 1995, page 385.

If the parties to the procedure are not able to reach an agreement, the decision will have to be adopted by the competent authorities, within six months after its emission.

Finally, the decision would be published after the competent authorities agree upon doing that. In reaching this objective, the acceptance of the taxpayers concerned would be required. This is necessary in order to respect the secrecy rights established under the Convention.

4. Duration of the Convention

The duration of the EC arbitration convention was drastically criticized by many scholars.[102] They have said that the limited time specified by in the Convention may result in some problems with regards to its implementation. It is true that a five-year period was not enough time to let the Convention demonstrate its real effectiveness. In order to avoid this situation, the proposed AC will be in force for ten years.

[102] Werner EC Heyvaert, "Transfer Pricing Planning in an integrated Europe: The 1990 Arbitration Convention", Tax Notes International, 1997, Vol. 15, No. 23. Hinnekens, Luc, "The Tax Arbitration Convention: Its significance for the EC based enterprise, the EC itself, and for Belgian and International Tax Law", EC Tax Review, 1992/2. Schelpe, Dirk, "Opportunities and weaknesses of the multilateral arbitration convention", International Transfer Pricing Journal, 1995/2.

CHAPTER SEVEN

A REAL OR A RHETORICAL PROPOSAL?

It is an appropriate moment to contemplate the real impact of the proposal. Will this proposal be widely accepted? Or does it represent only an alternative, which will be difficult to adopt? There could be convincing arguments for either of these two positions.

In favor of the latter argument, the position that was taken by the OECD to resolve transfer-pricing issues by arbitration in its report of 1984 could be quoted. It established that "the Committee does not, for the time being, recommend the adoption of a compulsory arbitration procedure to supersede or supplement the mutual agreement procedure". It pointed out that the need for arbitration was not necessarily demonstrated and that it would represent a surrender of fiscal sovereignty.[103] This situation reflected the position of most of the countries at that time, with respect to international arbitration. This subject, nevertheless, has been developing very slowly. The EC arbitration convention was proposed since 1976.

Afterwards, and in favor of the argument that encourages the real applicability of the proposed AC, since the 1990's the safeguarding tax policy in many countries has been changing. Many bilateral tax treaties include a bilateral arbitration clause. The European countries have taken a major step forward with the EC Arbitration Convention. Besides the fact that the OECD has fully accepted the use of arbitration, the Committee on Fiscal Affairs has agreed to undertake a study of this topic.[104]

On the other hand, the NAFTA countries have acceded to arbitration procedures in matters of taxation through bilateral tax treaties signed by these States.[105] The Internal Revenue Service of the United States performed a two-year test of a binding arbitration procedure for factual issues that were already in the Appeals administrative process and which were not docketed in any court. It was optional in nature, and it was addressed in Announcement 2000-4, This notice provided for the basis of the procedure, its scope, selection of arbitrators, confidentiality, disqualification of arbitrators, arbitrator's report, appeals procedures and precedential use, among others[106]. The OECD is currently reviewing the best MAP practices and it is considering mandatory arbitration[107].

By June 3, 2005, the US and Canada signed a memorandum of understanding with the purpose to establish principles and guidelines to improve the performance and efficiency of the MAP. The Canada Revenue Agency (CRA) and U.S. Internal Revenue Service have reached an agreement in a key portion of a memorandum of understanding (MOU) that will allow the two nations to resolve factual disputes by referring them to a joint appellate panel, Robert H. Green, the U.S. competent authority, announced on December 8, 2005.

[103] OECD, "Report of the OECD Committee on Fiscal Affairs on Transfer Pricing and Multinational Enterprises: Three Taxation Issues (1984)", edited by the International Bureau of Fiscal Documentation, 1987, page 36.
[104] OECD "The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations", Report of July 1995 with supplements, edited by the International Bureau of Fiscal Documentation, 1996 and 1998, pages 126 and 127. Currently, the OECD has a group of experts working on the improvement of the MAP (and considering the application of mandatory arbitration).
[105] In the United States-Mexico and in the United States-Canada Bilateral Tax Treaties.
[106] Internal Revenue Service, Internal Revenue Bulletin, Bulletin No. 2000-3, January 18, 2000, pages 317 and followings.
[107] Bell, Kevin A. OECD Closer to Adopting Mandatory Arbitration Under Model Tax Treaty, March 1, 2004, at www.taxanlysts.com. The OECD held sessions to discuss how to improve the MAP and best practices on March 13 in Tokyo.

The NAFTA binational panels represent a clear example that these countries believe in the arbitration mechanism to solve international problems. Now, it is time to move forward and to establish an arbitration system for conflicts of taxation.

It is my intention that the proposal stated in this article may assist in the development of the international tax practice among the NAFTA countries and, at the same time, possibly benefit taxpayers that deal with the tax revenue authorities of these three countries.

I hope that the reader will become more interested in this topic after having read this paper. That was exactly my objective because it is necessary to encourage the further study of this subject in order to improve the system of arbitration in the field of taxation.

CHAPTER EIGHT

CONCLUSION AND PROPOSAL:
TEXT OF THE PROPOSED ARBITRATION CONVENTION

The conclusion of this paper is constituted by the text of the proposed Arbitration Convention, which should govern matters of double taxation among the member countries of the NAFTA.

NORTH AMERICAN ARBITRATION CONVENTION ON THE ELIMINATION OF DOUBLE TAXATION

CHAPTER I
General Provisions

Article 1
Scope of the Convention

1. This Convention shall apply to

   Where, for the purposes of taxation, profits which are included in the profits of an enterprise of a Contracting State are also included or are also likely to be included in the profits of an enterprise of another Contracting State on the ground that the principles set out in this Convention and applied either directly or in corresponding provisions of the law of the State concerned have not been observed.
   For purposes of this Convention, the permanent establishment of an enterprise of a Contracting State situated in another Contracting State shall be deemed to be an undertaking of the State in which it is situated.
   This paragraph shall also apply where any of the undertakings concerned have made losses rather than profits.

2. This Convention shall also apply to conflicts of:

a) Determining the source and the characterization of particular items of income;
b) Different application of treaty terms;
c) Different application of the permanent establishment concept;
d) Income distributed by an estate or trust;
e) Income with respect to a partnership, and
f) Other cases of application and interpretation of the double tax conventions signed between the Contracting States.

Article 2
Excluded cases of the Convention

The competent authority of a Contracting State shall not be obliged to initiate the mutual agreement procedure or to set up a panel and, if the case, an extraordinary challenge committee where legal or administrative proceedings have resulted in a final ruling in which one of the taxpayers concerned is liable to cases of fraudulent intention or absence of good faith. The competent authorities will not be obliged to set up an arbitration procedure with respect to matters concerning the tax policy or domestic law of either State.

Article 3
Taxes covered by the Convention

1. This Convention shall apply to taxes on income. The existing taxes to which this Convention shall apply are those established in the double tax conventions signed between the Contracting States.

2. This Convention shall also apply to any identical or similar taxes which are imposed after the date of signature thereof in addition of, or in place of, existing taxes. The competent authorities of the Contracting States shall inform each of any changes made in the respective domestic laws.

Article 4
Definitions

1. For purposes of this Convention:
a) Panel means a panel established pursuant to article 9 of this Convention for the purpose of eliminating a double taxation conflict.
b) Competent Authority shall mean:

-In Canada; the Minister of National Revenue or his authorized representative;
-In Mexico; the Ministry of Finance and Public Credit or his authorized representative;
-In United States of America; the Secretary of the Treasury or his authorized representative.

2. Any term not defined in this Convention shall, unless the context otherwise requires, have the meaning which it has under the double taxation convention between the Contracting States concerned.

Article 5
Principles of the Convention

1. Where:

   a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of another Contracting State, or
   b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of one Contracting State and an enterprise of another Contracting State,
   and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where an enterprise of a Contracting State carries on business in another Contracting State through a permanent establishment situated therein, there shall be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealings wholly independently with the enterprise of which it is a permanent establishment.

3. In applying the Double Tax Convention and unless the context otherwise requires, the Contracting State may give, to a term not defined therein, the meaning which it has under the

tax law of that State concerning the taxes to which that Convention applies. In the event that the term is not defined within its domestic tax legislation, then, that Contracting State may apply the definition from its general law.

CHAPTER II
Mutual Agreement Procedure

Article 6

1. Where a person considers that, in any case to which the Convention applies, the principles set out herein have not been observed, he may, irrespective of the remedies provided by the domestic law of the Contracting States concerned, present his case to the competent authority of the Contracting State of which he is a resident or in which his permanent establishment is situated. The case must be presented within two years of the first notification of the action which results or is likely to result in double taxation within the meaning of this Convention.

   The person shall at the same time notify the competent authority if other Contracting States may be concerned in the case. The competent authority shall then without delay notify the competent authorities of those other Contracting States.

2. If the complaint appears to it to be well-founded and if it is not itself able to arrive at a satisfactory solution, the competent authority shall endeavor to resolve the case by mutual agreement with the competent authority of any other Contracting State concerned, with a view to the elimination of double taxation on the basis of the principles set out in this Convention.

CHAPTER III
Rights and Obligations
Article 7

1. For purposes of the procedures referred to in chapters IV and V, the taxpayers and the competent authorities of the Contracting States concerned shall give effect to any request made by the panel or by the extraordinary challenge committee to provide information, evidence or documents. However, the competent authorities and the taxpayers involved shall not be under obligation:
   a) To carry out administrative measures at variance with its domestic law or its normal administrative practice;
   b) To supply information which is not obtainable under its domestic law or in its normal administrative practice, or
   c) To supply information which would disclose any trade, business, industrial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

2. The taxpayers concerned will be entitled to the following:
   a) To request for the initiation of a panel;
   b) To appear or be represented before the panel or the extraordinary challenge committee;
   c) To file a brief;
   d) To provide any information, evidence or documents necessary in the procedure;
   e) To reply the briefs filed by the competent authorities;
   f) To require the discontinuation of the procedure;
   g) To access to information;

h) To a fair process;
i) To a well-founded decision, and
j) To any other rights derived from this convention.

3. The taxpayers participants of the procedures established in chapters IV and V will not be entitled, under their domestic laws and their domestic judicial systems, to request for a judicial or administrative revision of the decision of the panel. No Contracting State may provide in its domestic legislation for an appeal from a panel decision to its domestic courts.

CHAPTER IV
Panel Procedure

Article 8
Initiation of the Panel Procedure

1. If the competent authorities concerned fail to reach an agreement that eliminates the double taxation within two years of the date on which the case was first submitted to one of the competent authorities in accordance with chapter II, they shall, with the exception as stated in point 2, set up a panel charged with delivering its resolution on the elimination of the double taxation in question.
2. The taxpayers concerned may have recourse to the remedies available to them under the domestic law of the contracting states concerned; however, if they so take that option to have recourse of those remedies, they will not be entitled to request for a panel on that specific issue, and the Competent Authorities will not be obliged to commence and to establish a panel on the same issue.
3. The taxpayers concerned may, individually or jointly, request, within 30 days from the day that the mutual agreement procedure's time limit as established in chapter II expired, the installation of a panel to any of the competent authorities involved. In the request of a panel, the taxpayers shall insert a declaration stating that they did not or that they will not take recourse of the remedies available to them under the domestic law of the contracting states concerned. If an interested taxpayer requests for the initiation of a panel and he also files an appeal before a domestic court, in a clear infringement of this Convention, any interested competent authority, once it acknowledged this transgression, will be obliged to notify it immediately to the panel. As a sanction to the infringer taxpayer, the panel will terminate automatically the procedure. The taxpayer will also be obliged to cover all the expenses incurred by the panel and the proper panelists' fees for the time that they were in exercise of their duties as panelists.
4. If there is more than one taxpayer interested in the conflict, the taxpayer who is the first in time to file a request for a domestic remedy or a request for a panel, whichever is the case, will establish the jurisdiction in which the conflict shall be resolved.
5. The taxpayer requesting a panel shall insert, in the request, a list of names and addresses of all the other taxpayers that may be interested in the conflict. The competent authority that receives the request for a panel shall immediately notify the other possible interested taxpayers that a request for a panel was filed before it.
6. If a taxpayer did not request a panel, but he knows that another taxpayer made a request, and the first mentioned taxpayer is interested in participating in the procedure, he shall file a notice of appearance in the panel procedure within 30 days after the expiration time limit established to request for a panel.

7. The submission of the case to the panel shall not prevent a Contracting State from initiating or continuing judicial proceedings or proceedings for administrative penalties in relation to the same matters.
8. The competent authorities may, by mutual agreement and with the consent of the taxpayers concerned, waive the time limits referred to in paragraph 1.
9. Insofar as the provisions of paragraphs 1 to 8 are not applied, the rights of each of the taxpayers interested, as laid down in the mutual agreement procedure article, shall be unaffected.

Article 9
Composition of the Panel

1. On the date of entry into force of this Convention, the Contracting States shall establish and thereafter maintain a roster of individuals to serve as panelists in disputes under this Chapter. The roster shall include only persons of standing. The Contracting States shall consult in developing the roster, which shall include at least 15 candidates. Each Contracting State shall select at least 5 candidates, and all candidates shall be citizens of Canada, Mexico or the United States. Candidates shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international taxation. Candidates shall not be affiliated with a Contracting State, and in no event shall a candidate take instructions from a Contracting State. The Parties shall maintain the roster, and may amend it, when necessary, after consultations.
2. Within 10 days after a request for a panel, each involved Competent Authority shall appoint two panelists, in consultation with the other involved Competent Authority. The involved Competent Authorities normally shall appoint panelists from the roster. If a panelist is not selected from the roster, the panelist shall be chosen in accordance with and be subject to the criteria of paragraph 1. Each involved Competent Authority shall have the right to exercise two peremptory challenges, to be exercised simultaneously and in confidence, disqualifying from appointment to the panel up to two candidates proposed by the other involved Competent Authority. Peremptory challenges and the selection of alternative panelists shall occur within 20 days of the request for the panel. If an involved Competent Authority fails to appoint its members to a panel within 10 days or if a panelist is struck and no alternative panelist is selected within 20 days, such panelist shall be selected by lot on the one tenth or 21st day, as the case may be, from that Competent Authority's candidates on the roster.
3. Within 25 days of the request for a panel, the involved Competent Authorities shall agree on the selection of a fifth panelist. If the involved Parties are unable to agree, the fifth panelists will be selected by the drawing of lots, by the 30th day, from the roster, excluding candidates eliminated by peremptory challenges.
4. On appointment of the fifth panelist, the panelists shall promptly appoint a chairman from among the members of the panel by majority vote of the panelists. If there is no majority vote, the chairman shall be appointed by lot from among the members of the panel.
5. Panelists shall be subject to the code of conduct established pursuant to Article 10. If an involved Competent Authority or the taxpayer(s) concerned believes that a panelist is in violation of the code of conduct, the involved Competent Authorities shall consult and if they agree, the panelist shall be removed and a new panelist shall be selected in accordance with the procedures of this Article.
6. When a panel is convened pursuant to this Convention each panelist shall be required to sign:
(a) an application for protective order for information supplied by the United States or its persons covering business proprietary and other privileged information;

(b) an undertaking for information supplied by Canada or its persons covering confidential, personal, business proprietary and other privileged information; or

(c) an undertaking for information supplied by Mexico or its persons covering confidential, business proprietary and other privileged information.

7. On a panelist's acceptance of the obligations and terms of an application for protective order or disclosure undertaking, the taxpayer(s) concerned shall grant access to the information covered by such order or disclosure undertaking. Each Contracting State shall establish appropriate sanctions for violations of protective orders or disclosure undertakings issued by or given to any Competent Authority. Each Contracting State shall enforce such sanctions with respect to any person within its jurisdiction. Failure by a panelist to sign an application for a protective order or disclosure undertaking shall result in disqualification of the panelist.
8. If a panelist becomes unable to fulfill panel duties or is disqualified, proceedings of the panel shall be suspended pending the selection of a substitute panelist in accordance with the procedures of this Article.
9. Subject to the code of conduct established pursuant to 10, and provided that it does not interfere with the performance of the duties of such panelist, a panelist may engage in other business during the term of the panel.
10. While acting as a panelist, a panelist may not appear as counsel before another panel.
11. With the exception of violations of protective orders or disclosure undertakings, signed pursuant to paragraph 7, panelists shall be immune from suit and legal process relating to acts performed by them in their official capacity.

Article 10
Code of Conduct

A Code of Conduct shall be agreed upon and shall be established among the Contracting States by notes to be exchanged through diplomatic channels.

Article 11
Filing of Briefs

1. The Competent Authorities and the taxpayers concerned may file a brief, which should contain an index, relevant facts, issue(s) in conflict, legal arguments, and, when it is the case, the relief requested; within forty five days following the expiration of the term of a request for a panel.

2. The taxpayers involved in the procedure may file a brief replying to the grounds and arguments set forth in the briefs filed by the competent authorities concerned no later than fifteen days after the expiration of the time period for filing of briefs referred to in paragraph 1.

Article 12
Oral proceedings

The panel shall commence a hearing of oral argument no later than 90 days after the expiration of the term of a request for a panel. Oral proceedings may or may not be carried out in camera. These proceedings will be in camera whenever requested by the Contracting States or by the taxpayer(s).

Article 13
Basis of the Decision

1. The panel must decide each specific case on the basis of this convention, giving due consideration to the double tax convention signed between the Contracting States concerned, their domestic laws and the principles of international law.

2. Decisions of the panel shall be by majority vote and based on the votes of all members of the panel. The panel shall issue a written decision with reasons, together with any dissenting or concurring opinions of panelists within 210 days after the expiration of the term of a request for a panel.

Article 14
Costs

The costs of the panel, other than those incurred by the taxpayer(s) involved, shall be shared equally by the Contracting States concerned.

Article 15
Additional rules of procedure

1. To implement the provisions of this chapter, the Contracting States may agree on additional rules of procedure. Such rules shall be based, where appropriate, on judicial rules of appellate procedure, and shall include rules concerning: the content and service of requests for panels; a requirement that the competent authorities transmit to the panel the administrative record of the proceeding; filing and service; the form and content of briefs and other papers; form of hearing conferences; voluntary termination of panel reviews and all other rules required in a fair process. The rules shall be designed to result in panel decisions within 210 days after the expiration of the term of a request for a panel, and shall respect the time limits specified within this Convention.

2. If the Contracting States do not agree on additional rules of procedure before the commencement of a specific panel procedure, the panel, immediately after it has been composed, will be able to establish these additional rules. These rules will have to be consistent with this Convention and they will be in force only for the specific conflict that the panel is deciding.

CHAPTER V
Extraordinary Challenge Committee

Article 16

1. It is possible to request a revision under the Extraordinary Challenge Committee when, within a reasonable term after a panel decision has been issued, any of the contracting states or the taxpayers concerned affirms that:

a)
   i) A member of the panel has been guilty of a serious penalty, of partiality, or has incurred a serious conflict of interests, or has by any other manner materially violated the norms of conduct;
   ii) The panel has seriously violated a fundamental norm of the procedure;
   iii) The panel has extensively exceeded from its powers, authority or jurisdictions that has been established in this convention.

b) Any of the actions stated in paragraph a) has materially affected the decision of the panel and threatens the integrity of the procedure under the binational panel.

2. A request for an Extraordinary Challenged Committee should be filed within the following thirty days after the issuance of the decision of the panel, and it should be presented before any of the competent authorities concerned.
3. Within ten days after the request for an Extraordinary Challenge Committee is filed, a competent authority or a taxpayer participant in the panel procedure who intents to participate in the extraordinary challenge proceeding shall file a notice of appearance with any of the competent authorities concerned.
4. The competent authorities shall establish an Extraordinary Challenge Committee within fifteen days of a request. The committee will be comprised of three members that are selected from a fifteen-person list consisting of judges or former judges of a federal judicial court of the United States or a judicial court of superior jurisdiction of Canada, or a federal judicial court of Mexico. Each competent authority shall name five persons to this roster. Each involved competent authority shall select one member from this roster and the third member will be appointed by mutual agreement from the same list. If the involved parties are unable to agree, the fifth panelists will be selected by the drawing of lots, by the sixtieth day following the expiration of the term of the request.
5. The competent authority or the taxpayer who has filed the request for an Extraordinary Challenge Committee and every other participant who has filed a notice of appearance shall file a brief, setting forth grounds and arguments in support of the request, no later than twenty one days after the request for an Extraordinary Challenge Committee is filed. The briefs, which should contain an index, facts, issue(s) in conflict, legal arguments, and relief requested.
6. Oral proceedings may or may not be carried out in camera. These proceedings will be in camera whenever requested by the Contracting States or by the taxpayer(s) concerned.
7. The decision of this committee will be taken by a majority of the votes of the members of the committee, and it shall:

a) Affirm the decision of the panel;
b) Nullify the decision of the panel; and
c) Remand the decision of the panel to the panel for action not inconsistent with the decision of the committee.

The concerned competent authorities with the consent of the taxpayer(s) involved may also mutually agree on the termination of this procedure.

8. The costs of the Extraordinary Challenged Committee, other than those incurred by the taxpayer(s) involved, shall be equally shared by the Contracting States concerned.
9. The Contracting States may establish additional rules of procedure for committees by the date of entry into force of this Convention. The rules shall provide for a decision of a committee within 90 days of its establishment.

CHAPTER VI
Elimination of double taxation and fulfillment of the Panel decision

Article 17
Elimination of double taxation

For purposes of this Convention, the double taxation issue shall be regarded as eliminated if either:

a) The profits are included in the computation of taxable profits in one State only; or
b) The tax chargeable on those profits in one State is reduced by an amount equal to the charge taxable on them in the other.

Article 18
Fulfillment of the panel decision

1. The competent authorities concerned shall comply with the decision of the panel within six months of the date on which the panel delivered it.

2. The competent authorities may, with the consent of the taxpayer(s) concerned, take a decision that deviates from the decision of the panel. If they fail to reach agreement, they shall be obliged to act in accordance with that decision within the time established in paragraph 1.

3. The competent authorities may agree to publish the decision referred to in paragraph 1, subject to the consent of the taxpayer(s) concerned.

CHAPTER VII
Final Provisions

Article 19

Nothing in this Convention shall affect the fulfillment of wider obligations with respect to the elimination of double taxation resulting either from other conventions to which the Contracting States are or will become parties or from the domestic law of the Contracting States.

Article 20

The territorial scope of this Convention shall be that defined in the annex 201.1 of the article 201 of the North American Free Trade Agreement.

Article 21

This Convention shall be ratified by the Contracting States and shall enter into force on the first day of the third month following that in which the last exchange of written notification certifying the completion of necessary legal procedures in the Contracting States is made. The Convention shall apply to proceedings referred to in Article 6(1) which are initiated after its entry into force.

Article 22

This Convention is concluded for a period of ten years. Six months before the expiration of that period, the Contracting States will meet to decide on the extension of this Convention and any other relevant measure.

Article 23

Each Contracting State may, at any time, ask for a revision of this Convention. In that event, a conference to revise the Convention will be convened among the Contracting States.

Article 24

The English, French and Spanish texts of this Convention are equally authentic.

ANNEX ONE

IDEAL TIMELINE FOR A NAFTA CHAPTER 19 PANEL REVIEW AS PER THE RULES OF PROCEDURES.[108]

Request for a panel review filed	Day 0
Complaints to be filed by	30 days after Request for Panel Review
Notices of Appearance to be filed by	45 days after Request for Panel Review
Panel Selection to be completed by parties by	Day 55
Final Determination, Reasons, Index and Administrative Record to be filed by	15 days after filing of Notice of Appearance
Parties to select 5th Panelist by (if Parties unable to agree)	Day 61
Briefs by Complaints to be filed by	60 days after filing of Administrative Record
Briefs by Investigating Authority or Participants in support to be filed by	60 days after Complainants' Briefs
Reply Briefs to be filed by	15 days after Authority's Briefs

[108] Timetable taken from the web site of the Secretariat of the NAFTA, www.nafta.com

Appendix to the Briefs to be filed by	10 days after Reply Briefs
Oral Argument to begin by	30 days after Reply Briefs
Panel Decision due by	Day 315

ANNEX TWO

DAYS	TIMETABLE OF THE PROCEDURE BEFORE THE PANELS IN THE PROPOSED ARBITRATION CONVENTION IN MATTERS OF TAXATION.
0	Within 30 days after two years of MAP negotiations, the taxpayers concerned may request for a Panel procedure.
10	Appointment of panelists (2 each Competent Authority).
11	If a Competent Authority fails to appoint its panelists, they will be selected by the drawing of lots.
20	Peremptory challenges and selection of alternative panelists.
21	If no alternative panelists were selected by the 20th day, they will be selected by the drawing of lots.
25	Selection of 5th panelist under a mutual agreement.
30	If no agreement, the 5th panelist will be selected by the drawing of lots.
30	Notice of appearance of other interested taxpayers.
Promptly	Appointment of Chairman from among the members of the panel.
45	Filing of Briefs

60	Reply of Briefs
90	Oral hearings
210	Decision of the Panel (7 months approximately)

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