Miotto in Majdanska/Turcan (Eds), OECD Arbitration in Tax Treaty Law, Chapter 17 – Arbitration under Dutch Tax Treaties

Seite 380 Seite 381 Seite 381 Chapter 17 – Arbitration under Dutch Tax Treaties

Daniel Miotto

1. Seite 381 Seite 382 Seite 382 Introduction

This chapter on Dutch arbitration clauses in income tax treaties (tax treaties) brings an overview of the wide network and variety of clauses negotiated by the Netherlands. It describes how the Dutch economy is influenced by international trade and investment and, consequently, the importance of international treaties as a tool to attract trade and investment, as well as to provide a stable and friendly environment for business.

Is this context, the Netherlands is the country with one of the widest treaty network and the largest number of arbitration clauses included in tax treaties as a method to settle tax disputes.

The core focus in this chapter is on Dutch tax arbitration clauses included in tax treaties, their origin, development and main features. This chapter discusses neither the arbitration procedures foreseen in the EU Arbitration Convention, [1] nor the arbitration clauses included in several bilateral investment treaties signed by the Netherlands.

The second section analyses the international economic context in which Dutch tax policy seeks to provide mechanisms to attract investors to the Netherlands, as well as how the Dutch treaty network has been developed as regards the inclusion of arbitration provision.

The third section analyses in detail the main features of the arbitration clauses included in Dutch tax treaties and compares them with the OECD Model Convention (OECD Model) and or the UN Model Convention (UN Model), seeking to find the main contrasts of Dutch tax policy regarding the arbitration clauses included in its tax treaty network.

The chapter concludes with a description of the extension of the arbitration mechanism in tax treaty disputes involving the Netherlands, and how Dutch tax policy is defined in terms of openly intending to improve the adoption of arbitration in tax treaties.

2. Arbitration Provisions in Dutch Tax Treaties

2.1. Economic Context

In terms of geographical size and overall population, the Netherlands is a relatively small country. Nevertheless, in contrast to its size, when one analyses the economic performance of the Netherlands, it is clear that the country plays a significant role in the global economy. According to the World Bank database, [2] the estimated GDP Seite 382 Seite 383 Seite 383 of the Netherlands was US$ 777 billion in 2016, which places the Dutch economy as the eighteenth largest in the world and the sixth largest in the European Union.

In terms of international trade, the Netherlands has maintained a leading role over the centuries. According to the most recent data, in 2016 the Netherlands ranked fifth among merchandise exporters (US$ 569 billion, or 3.57 % of worldwide total exports). Regarding imports, the Netherlands has ranked eighth in the world (US$ 503 billion, or 3.1 % of worldwide total imports). [3] With respect to export and import of commercial services, the Netherlands is also among the 10 most representative economies, ranking sixth on a worldwide scale of exports (US$ 177 billion, or 3.69 % of worldwide total exports) and eighth for imports (US$ 169 billion, or 3.6 % of worldwide total imports). [4]

These data show how the economy of the Netherlands depends heavily on international trade, which is not surprising in view of its long tradition as an international trading nation. [5]

2.2. Treaty Network Development

Within the international economic context described above, it is recognized that the Netherlands always tends to maintain and promote friendly and sustainable international economic relationships with other countries. This fact is evidenced by the wide range of trade and investment agreements concluded by the Netherlands with other states, such as income tax treaties (tax treaties), bilateral investment treaties and, at a multilateral level, the Treaty on the Functioning of the European Union (TFEU) and the WTO Agreements. [6] Those agreements allow multinational enterprises to have many choices as to where to invest and the treaty environment, especially for tax purposes, is a factor that has a significant influence in favour or against a country. [7]

Nevertheless, as a natural consequence of the existence of treaties, disputes involving conflicts can arise, caused by either different interpretations of a treaty or by factual problems (e.g. due to lack of information) or legal problems (e.g. differing domestic laws).

Seite 383 Seite 384 Seite 384 The Dutch tax treaty network, which has been carefully developed and maintained over more than 80 years, is considered a key asset of the investment climate in the Netherlands, [8] and the existence of provisions with mechanisms for settlement of tax disputes is one of the main aspects to be evaluated by investors and enterprises in the international trade context.

The settlement of disputes must be sought in an effective and timely way, even in a domestic or international context. A key element of increasing certainty in international tax matters is the development of a comprehensive suite of dispute resolution programmes, including the mutual agreement procedure (MAP) and arbitration provisions. [9]

2.3. Tax Treaty Disputes under Dutch Tax Treaties

2.3.1. General Overview

In the Dutch tax treaty network, the MAP is one of the mechanisms to be used in order to find solutions to avoid double taxation. As the MAP as provided for under tax treaties is considered a significant instrument in Dutch international tax policy, all Dutch bilateral income tax treaties for the avoidance of double taxation contain a provision similar to Article 25 of the OECD Model (on the MAP). [10]

In addition to the inclusion of a MAP provision, in most Dutch tax treaties, this procedure does not compel the competent authorities to actually reach an agreement and resolve the tax dispute. Instead, the states involved simply undertake to perform to the best of their abilities. Precisely for this reason, the Netherlands has supplemented the MAP clause by including an arbitration provision in some of its existing tax treaties.

Currently, 48 tax treaties concluded by the Netherlands contain a clause that foresees the arbitration procedure or open the possibility for arbitration, which can be considered the widest treaty network providing for arbitration as a mechanism to resolve tax disputes.

2.3.2. Historical Evolution regarding the Inclusion of Arbitration Clauses in Dutch Tax Treaties

Already in the 1987 Tax Treaty Policy Memorandum, attention was paid to the resolution of tax treaty disputes. This Memorandum briefly mentions the desirability of including an arbitration clause in negotiated Dutch treaties. [11]

Seite 384 Seite 385 Seite 385 The first tax treaty to contain a clause that opens the possibility for arbitration was that with Venezuela (1991). The specific clause does not expressly mention the word ‘arbitration’.

Rather, the clause simply mentions that if a particular case cannot be resolved in a MAP, the case may be resolved peacefully according to any internationally accepted procedure, and that those procedures will be set by the competent authorities. [12]

The 1992 tax treaty with the United States was the first Dutch treaty to properly include a detailed arbitration clause. After the conclusion of that treaty with the United States, the Netherlands concluded a wide network of depending on the negotiations. Those features will be analysed in detail below.

On 18 July 2008, the OECD Council adopted amendments to the OECD Model, by which the MAP of Article 25 was supplemented with an arbitration clause. This clause provides for a mandatory arbitration procedure if contracting states fail to reach a mutual agreement within a two-year period, if the taxpayer so requests. As analysed in the present chapter, as a general rule, the Netherlands has followed the OECD Model, [13] although some deviations can be found in treaties concluded after 2008. In order to consolidate and facilitate an understanding, the Dutch tax treaties that contain an arbitration clause (or open the possibility for arbitration) are summarized in Annex 1.

The Netherlands is signatory to the Multilateral Convention to Implement Tax Treaty related Measures to Prevent Base Erosion and Profit Shifting (the MLI), [14] and in its position the Netherlands has chosen to apply Part VI regarding the arbitration provision, only with reservations regarding the tax treaties that already provide for mandatory binding arbitration of unresolved issues arising from a MAP case. [15]

3. Main Features of Dutch Arbitration Provisions

3.1. Preliminary Remarks

As mentioned, the Dutch tax treaty network is one of widest in the world and has been continuously expanding, as the Dutch economy depends heavily on international trade [16] and international treaties are a critical tool for creating a favourable environment for cross-border business. In an effort to improve the inclusion Seite 385 Seite 386 Seite 386 of mechanisms to settle disputes regarding the interpretation or application of tax treaties, all the Dutch tax treaties in force include an article on the MAP. [17]

Additionally, the Netherlands has supplemented the clause on the MAP, as suggested in paragraph 64 of the Commentary on Article 25 of the OECD Model, by including a provision that can lead to arbitration in 48 of its tax treaties currently in force (which is the most expansive arbitration network in tax treaties). Under Dutch tax policy, the arbitration procedure is not an independent procedure, but rather is incorporated into the MAP. [18]

Since the inclusion of the arbitration clause in Article 25(5) of the OECD Model (2008), the Netherlands has been actively including an arbitration clause in its treaty negotiations as an officially recognized tax policy, [19] albeit not yet fully adopted. [20]

Nevertheless, as will be shown, there are still some contrasts between the OECD Model and the arbitration clauses in force in Dutch tax treaties, even those concluded after the inclusion of the arbitration provision in the OECD Model Convention. [21] Generally speaking, the Dutch arbitration clauses in tax treaties contain different conditions concerning the moment at which the arbitration procedure may be started, what parties must consent to the arbitration procedure, some procedural rules regarding arbitration, the agreement of the taxpayer in order to be bound by the arbitration decision and the confidentiality of communications and information in the arbitration procedure.

The discussion below is dedicated to categorizing and distinguishing the main differences among the arbitration clauses in Dutch treaties, as well as comparing those arbitration clauses with the OECD and/or UN Models. [22] Several Dutch treaties were negotiated prior to the inclusion of the arbitration clause in the OECD Model and, thus, it is to be expected that they do not follow the conditions and rules of the OECD Model.

3.2. Time-Period that Triggers Arbitration

Most arbitration clauses foresee that the earliest moment at which the arbitration procedure may be started is two years after the question was raised and the diffi Seite 386 Seite 387 Seite 387 culty or doubt has not been resolved through the MAP. [23] Indeed, this is the wording found in the arbitration clauses included in the tax treaties with the United States (1992), [24] Latvia (1994), Kazakhstan (1996), Estonia (1997), Iceland (1997), Macedonia (1998), Lithuania (1999), Moldova (2000), Kuwait (2001), Uzbekistan (2001), Poland (2002), Georgia (2002), Slovenia (2004), Albania (2004), Uganda (2004), South Africa (2005), Jordan (2006), Barbados (2006), United Arab Emirates (2007), Ghana (2008), Bahrain (2008) and Bermuda (2009).

The tax treaties signed by the Netherlands after 2008 use different wording concerning the time-period that triggers arbitration, closer to the OECD Model arbitration clause. These treaties establish that arbitration will start when the tax authorities are unable to reach an agreement to resolve the case submitted to a MAP within two years ‘from the presentation of the case to the competent authority of the other contracting state’. Dutch treaties with the following countries contain this wording: Qatar (2008), United Kingdom (2008), Hong Kong (2010), Japan (2010), Germany (2012), Ethiopia (2012), Norway (2013), Curaçao (2013), St. Maarten (2014), Malawi (2015), Zambia (2015) and Kenya (2015). [25]

Another group of tax treaties has somewhat different conditions concerning the time-period that triggers the arbitration clause. The tax treaty with Egypt (1999) provides that the moment to start the arbitration procedure is five years after the question was raised. The tax treaty with Switzerland (2010) establishes that the arbitration procedure will be started if the competent authorities are unable to reach an agreement in a MAP within three years from the presentation of the case to the competent authority of the other contracting state. This is the Swiss policy also expressed in the MLI reservations, [26] as well as the time-period as defined in Article 25B(5) of the UN Model (2011).

Some Dutch tax treaties in force do not specify any time-period requirement for the commencement of the arbitration procedure. In this group are the tax treaties with Venezuela (1991), Canada (1993), Ukraine (1995), Russia (1996), Croatia (2000), Armenia (2001) and Azerbaijan (2008). In these cases, there is no procedure defined to be followed regarding the time-period to trigger the arbitration clause, and the question will be determined in mutual agreement between the states involved in the case. It seems that in these cases the uncertainty regarding Seite 387 Seite 388 Seite 388 the time-period, for either taxpayers or tax authorities, can ultimately compromises the own implementation of the arbitration provision.

Finally, as the majority of Dutch tax treaties provide for a two-year time period to trigger the arbitration, one can conclude that this is the general policy derived from Dutch treaty practice.

3.3. Voluntary, Mandatory Arbitration and the Initiative to Request the Arbitration Procedure

Under Article 25(5) of the OECD Model, arbitration is mandatory, insofar as the competent authorities are unable to resolve a case submitted to the mutual agreement procedure. Furthermore, it is the taxpayer that must request the arbitration procedure.

Notwithstanding the broad inclusion of the arbitration clause in its tax treaty network, most Dutch tax treaties contain only a voluntary arbitration clause, especially those concluded before the inclusion of the arbitration clause in the OECD Model (2008). This includes the treaties with the following countries: Venezuela (1991), the United States (1992), Canada (1993), Latvia (1994), Ukraine (1995), Kazakhstan (1996), Russia (1996), Estonia (1997), Iceland (1997), Macedonia (1998), Egypt (1999), Lithuania (1999), Croatia (2000), Moldova (2000), Kuwait (2001), Uzbekistan (2001), Armenia (2001), Poland (2002), Georgia (2002), Slovenia (2004), Albania (2004), Uganda (2004), South Africa (2005), Jordan (2006), Barbados (2006), United Arab Emirates (2007), Ghana (2008), Bahrain (2008), Azerbaijan (2008) and Bermuda (2009).

The characterization of the voluntary nature of these arbitration clauses follows from the inclusion of the term 'may' in the text of these arbitration clauses. [27] Among the tax treaties that contain a voluntary arbitration clause, there are different rules regarding which party has the initiative to refer the case to an arbitration procedure. These different rules can be categorized as follows:

a) cases where the reference of a case to arbitration is subject to the request of both competent authorities and the taxpayer. This includes the treaties with the following countries: the United States (1992), Kazakhstan (1996) and Iceland (1997);
b) cases where the reference of a case to arbitration is subject to the request of both contracting states/competent authorities. This includes the treaties with the following countries: Venezuela (1991), Canada (1993), Ukraine (1995), Russia (1996), Croatia (2000), Armenia (2001) and Azerbaijan (2008); and,
c) cases where the reference of a case to arbitration is subject to the request of either contracting state. [28] This includes the treaties with the following countries: Seite 388 Seite 389 Seite 389 Latvia (1994), Estonia (1997), Macedonia (1998), Egypt (1999), Lithuania (1999), Moldova (2000), Kuwait (2001), Uzbekistan (2001), Poland (2002), Georgia (2002), Slovenia (2004), Albania (2004), Uganda (2004), South Africa (2005), Jordan (2006), Barbados (2006), United Arab Emirates (2007), Ghana (2008), Bahrain (2008) and Bermuda (2009).

As shown above, by contrast to the OECD Model, which provides that the taxpayer must request arbitration, the taxpayer's role under these Dutch arbitration clauses is limited, insofar as access to, and initiation of, the arbitration procedure will always be left to the discretion of the competent authorities. From a taxpayer perspective, this can be a negative feature, as the entitlement to request to arbitration has some advantages, because this is usually the only chance to reach a solution in an international tax conflict in the situation where the competent authority fails. [29]

Nevertheless, taking into consideration the perspective of tax authorities, their discretion to initiate the arbitration procedure results in room to manoeuvre comparable to that of diplomatic protection. [30] This is because the arbitration procedure can lead to a substantial relinquishing of the states' tax jurisdiction – and this also could lead to constitutional issues. [31] Therefore, this discretion can be used to avoid the implementation of arbitration procedures where the countries could face sovereignty issues. As a practical matter, this could be one of the reasons of why the Netherlands has widely included arbitration clauses in its tax treaties, mainly when one notices the lack of implemented arbitration procedures.

Moreover, only a few Dutch tax treaties contain a mandatory arbitration clause similar to the OECD Model. This includes the treaties with the following countries: Qatar (2008), the United Kingdom (2008), Switzerland (2010), Hong Kong (2010), Japan (2010), Germany (2012), Ethiopia (2012), Norway (2013), Curaçao (2013), St. Maarten (2014), Malawi (2015) and Kenya (2015). In all of these mentioned tax treaties, the taxpayer must request the arbitration procedure, as provided under the OECD Model.

The tax treaty with Zambia (2015) also follows the OECD Model by including a mandatory arbitration

clause, but deviates from the Model text when establishing that either competent authority is the party to request the arbitration procedure.

3.4. Scope of the Arbitration Clause

As provided under the OECD Model, only the 'unresolved issues' in a case may be referred to arbitration. This refers to issues that were not resolved earlier by the competent authorities involved during the MAP. Cases arising under so-called Seite 389 Seite 390 Seite 390 interpretative and legislative MAPs are not eligible for arbitration. [32] In line with these rules of the OECD Model, the Netherlands has concluded the tax treaties with Qatar (2008), the United Kingdom (2008), Switzerland (2010), Hong Kong (2010), Japan (2010), Germany (2012), Ethiopia (2012), Norway (2013), Curaçao (2013), St. Maarten (2014), Malawi (2015), Zambia (2015) and Kenya (2015).

However, considering the fact that most arbitration clauses negotiated by the Netherlands were concluded before the inclusion of the arbitration clause in the OECD Model (2008), the majority of the arbitration clauses have a different wording and can be categorized as follows.

Most of the arbitration clauses foresee that a case may be submitted for arbitration if the competent authorities cannot resolve 'any difficulty or doubt arising as to the interpretation or application of the Convention' in a MAP. This wording is used in the tax treaties with Venezuela (1991), the United States (1992), Canada (1993), Latvia (1994), Ukraine (1995), Kazakhstan (1996), Russia (1996), Estonia (1997), Iceland (1997), Macedonia (1998), Egypt (1999), Lithuania (1999), Croatia (2000), Moldova (2000), Kuwait (2001), Uzbekistan (2001), Armenia (2001), Poland (2002), Georgia (2002), Slovenia (2004), Albania (2004), Uganda (2004), South Africa (2005), Jordan (2006), Barbados (2006), United Arab Emirates (2007), Ghana (2008), Bahrain (2008), Azerbaijan (2008) and Bermuda (2009).

It seems clear from the terms that only cases involving difficulties or doubts for which the MAP was available may be submitted for arbitration, which means that the arbitration clause will follow the same issues that could be subject to a MAP. For almost all these tax treaties, this follows automatically from the wording of the arbitration clause that an arbitration procedure may be started after the mutual agreement procedure ('If after the procedure of paragraphs 1 to 4 […]'). [33]

There are some discussions regarding the fact that the phrase 'difficulties or doubts' could refer only to arbitration disputes involving interpretative and legislative mutual agreement. [34] Nevertheless, this does not seem to be the best interpretation, insofar as the arbitration clauses mention the disputes under all the paragraphs, including paragraph 1 involving specific cases, as well as the term 'application' of the tax treaties also leads necessarily to specific cases.

Furthermore, the discussed differences regarding the scope of the arbitration clause will be relevant only if the arbitration clause may be applied at all, [35] as will be analysed below.

3.5. Seite 390 Seite 391 Seite 391 Application of the Arbitration Procedure

According to the OECD Model, the arbitration procedure is a supplement to the MAP. Thus, the arbitration procedure is not a separate and independent procedure, but it is incorporated into the MAP. [36]

The majority of arbitration clauses in Dutch tax treaties do not prescribe any specific procedural rules. [37]

According to the last sentence of Article 25(5) of the OECD Model, the competent authorities will by mutual agreement settle the mode of application of the arbitration procedure. [38] This wording is copied in some Dutch tax treaties, especially those that used the OECD Model as the basis for the text, as follows: Venezuela (1991), Canada (1993), Russia (1996), Iceland (1997), Egypt (1999), Albania (2004), South Africa (2005), Qatar (2008), Azerbaijan (2008), the United Kingdom (2008), Switzerland (2010), Hong Kong (2010), Japan (2010), Germany (2012), Ethiopia (2012), Norway (2013), Malawi (2015), Zambia (2015) and Kenya (2015).

The tax treaties with Curaçao (2013) and St. Maarten (2014) do not include the last sentence of Article 25(5) of the OECD Model. For these tax treaties, it is unclear how procedural rules are to be established.

Apart from these arbitration clauses that follow the OECD Model, the Dutch tax treaty network has some different arbitration clauses regarding the application of the procedure. For example the application of the arbitration clause in the tax treaty with the United States will have effect only after the Netherlands and the United States have so agreed through the exchange of diplomatic notes. In terms of the memorandum of understanding, diplomatic notes will be exchanged when the experience within the European Communities with regard to the application of the Arbitration Convention or the application of the arbitration clause in the treaty between the United States and Germany has proven to be satisfactory to the competent authorities of the Netherlands and the United States. [39] The tax treaty with Kazakhstan (1996) [40] is another that contains a similar condition.

Seite 391 Seite 392 Seite 392 Notably, the tax treaties with Ukraine (1995), Croatia (2000), Uzbekistan (2001) and Armenia (2001) provide that the arbitration clause will apply only after the competent authorities of both contracting states have established the arbitration procedures mentioned in the clause. In these cases, the arbitration clause cannot be applied directly, as the establishment of procedural rules is a prerequisite to the application for arbitration. As such, it should be viewed as a condition to apply the arbitration as a whole.

Nevertheless, there is understanding that this condition should be interpreted as a simple fact that initial procedural rules must be determined before the commencement of the procedure. As soon as there is a case where all other conditions for applying the arbitration clause have been fulfilled, procedural rules will be established. [41]

The tax treaty with the United Arab Emirates (2007) provides, in a certain sense, more detailed information about the procedure, in that it mentions that the arbitration decision will be provided by a joint committee which consists of representatives of the competent authorities of the contracting states, and both contracting states may be assisted by officials of other public institutions as circumstances may require.

The tax treaties with the following countries do not include any conditions for the application of the arbitration procedure: Latvia (1994), Estonia (1997), Macedonia (1998), Lithuania (1999), Moldova (2000), Kuwait (2001), Poland (2002), Georgia (2002), Slovenia (2004), Uganda (2004), Jordan (2006), Barbados (2006), Ghana (2008), Bahrain (2008) and Bermuda (2009).

The treaty with Japan (2010) also contains detailed procedural rules in the Protocol that follows the concluded tax treaty. One can assume that independent-opinion arbitration is the method of arbitration to be used under the treaty with Japan. [42]

3.6. Effects of the Arbitration Decision

Another relevant aspect of the arbitration procedure is related to the effects of the arbitration decision. Article 25(5) of the OECD Model stipulates that: ‘Unless a person directly affected by the case does not accept the mutual agreement procedure that implements the arbitration decision, that decision shall be binding on both Contracting States […]’. It is clear that under the OECD Model, the arbitration decision is binding on the

contracting states involved in the case under analysis, and the taxpayer holds the right to either accept or reject the arbitration decision. Thus, when the taxpayer rejects the arbitration decision, it will obviously also not be binding on the contracting states. [43]

Seite 392 Seite 393 Seite 393 The following tax treaties have adopted the binding effect of arbitration decision in wording similar to the OECD Model: Qatar (2008), the United Kingdom (2013), Switzerland (2010), Hong Kong (2010), Japan (2010), Germany (2012), Curaçao (2013), St. Maarten (2014), Malawi (2015), Zambia (2015) and Kenya (2015).

The tax treaty with Ethiopia (2012) deviates from the OECD Model, insofar as it does not mention the possibility for the taxpayer to refuse the implementation of the arbitration decision. Therefore, in this case, the arbitration decision will be binding on both contracting states and the taxpayer.

The tax treaty with Norway (2013) also deviates from the OECD Model. Under its arbitration clause, the arbitration decision may not be implemented if either (i) the taxpayer does not accept the mutual agreement that implements the arbitration decision or (ii) the competent authorities agree on a different solution within six months after the decision has been communicated to them.

In the 32 treaties concluded before the inclusion of the arbitration provision in the OECD Model (2008), there are different rules, as follows:

a) Most Dutch tax treaties require the taxpayer's agreement in writing to be bound by the arbitration decision, and provide that the decision will be binding on both contracting states. This is case of the treaties with: the United States (1992), Latvia (1994), Kazakhstan (1996), Estonia (1997), Iceland (1997), Macedonia (1998), Egypt (1999), Lithuania (1999), Moldova (2000), Kuwait (2001), Uzbekistan (2001), Poland (2002), Georgia (2002), Slovenia (2004), Albania (2004), Uganda (2004), South Africa (2005), Jordan (2006), Barbados (2006), United Arab Emirates (2007), Ghana (2008), Bahrain (2008) and Bermuda (2009);
b) Four tax treaties foresee that the arbitration decision will be binding on either the taxpayer(s) or the contracting states, but do not include a requirement for the agreement in writing by the taxpayer. This is the case of the treaties with Ukraine (1995), Russia (1996), Croatia (2000) and Armenia (2001); and
c) A few treaties do not address the effects of the decision, which should be addressed by mutual agreement. This is the case of the treaties with Venezuela (1991), Canada (1993) and Azerbaijan (2008).

3.7. Confidentiality of Information in the Arbitration Procedure

Regarding communications and the confidentiality of information in the arbitration procedure, almost all Dutch tax treaties address the question in the article that concerns the exchange of information. The general treatment is that the information is confidential and will be subject to the limitations on disclosure foreseen in the mentioned article with respect to any information so released.

Seite 393 Seite 394 Seite 394 Only the tax treaties with Canada (1993), Ghana (2008), Azerbaijan (2008) and Bermuda (2009) do not address this question. As such, confidentiality will be defined when the arbitration procedure is established by the contracting states.

3.8. Most-Favoured Nation Clauses

Beyond the arbitration clauses adopted by the Netherlands in its tax treaty network, some tax treaties make reference to arbitration but do not provide for a real arbitration procedure. These clauses are the so-called most-favoured nation clauses. This category includes the tax treaty with Mexico (1993), which provides that

if Mexico agrees to a provision on arbitration in any agreement for the avoidance of double taxation concluded with a third state and this arbitration provision is substantially similar to the provision on arbitration in the OECD Model, such provision will automatically apply between the Netherlands and Mexico from the date on which the agreement between Mexico and the third state enters into force.

The tax treaties with Finland (1995), Saudi Arabia (2008) and Oman (2009) contain clauses providing for future negotiations in the event that they include an arbitration clause in a subsequent tax treaty. These clauses have a limited effectiveness, in that they open the possibility only for future negotiations, which can take years to complete, and states have not shown a willingness to open new discussions about concluded tax treaties.

4. Conclusion

The Dutch economy is highly influenced by international trade and investment and, consequently, the country's international treaties are a critical tool to attract trade and investment, as well as to provide a stable and friendly environment for business. In this context, the Netherlands is the country with one of the widest treaty networks and the largest number of arbitration clauses included in its tax treaties as a method to settle tax disputes.

Moreover, Dutch tax treaty policy enhances the wide inclusion of an arbitration clause in tax treaties. However, as analysed here, most Dutch tax treaties still contain only a voluntary arbitration provision, which can have limited effects in practical terms. Likewise, some features of the included arbitration provisions lead to empirical issues that affect the arbitration provision as a whole, such as most-favoured nation clauses, clauses where only the tax authorities have the right to request arbitration, and an absence of procedural rules when a condition to implement the arbitration. These contrasts are in part a result of the early Dutch practice to include arbitration clauses in its tax treaties, even before the inclusion of Article 25(5) in the OECD Model in 2008.

Seite 394 Seite 395 Seite 395 Indeed, the creation of more uniformity would require that those arbitration clauses that are not based on the OECD Model, be amended. However, it is also unlikely that states will amend their tax treaties only in respect of the arbitration clause. [44] This scenario should be different for those countries that are a party to the Multilateral Convention to Implement Tax Treaty related Measures to Prevent Base Erosion and Profit Shifting (the MLI), and that have chosen to apply Part VI regarding the arbitration provision, also depending on the reservations included by each country.

5. Annex 1

Dutch income tax treaty with:	Signed
Venezuela	29 May 1991
United States	18 December 1992
Canada *	4 March 1993
Mexico *	27 September 1993
Latvia	14 March 1994
Ukraine	24 October 1995
Finland *	28 December 1995

Dutch income tax treaty with:	Signed
Kazakhstan	24 April 1996
Russia	16 December 1996
Estonia	14 March 1997
Iceland	25 September 1997
Macedonia	11 September 1998
Egypt	21 April 1999
Lithuania	16 June 1999
Croatia	23 May 2000
Moldova	3 July 2000
Kuwait	29 May 2001
Uzbekistan	18 October 2001
Armenia	31 October 2001
Poland	13 February 2002
Seite 395 Seite 396 Seite 396 Georgia	21 March 2002
Slovenia	30 June 2004
Albania	22 July 2004
Uganda	31 August 2004
South Africa	10 October 2005
Jordan	31 October 2006
Barbados	28 November 2006
United Arab Emirates	8 May 2007
Ghana	10 March 2008
Bahrain	16 April 2008
Qatar	24 April 2008
Azerbaijan	22 September 2008
United Kingdom	26 September 2008
Saudi Arabia	13 October 2008
Bermuda	8 June 2009
Oman	5 October 2009
Switzerland	26 February 2010
Hong Kong	22 March 2010
Japan	25 August 2010
Panama	6 October 2010
Germany	12 April 2012
Ethiopia	10 August 2012
Norway *	23 April 2013
Curaçao	12 December 2013
St. Maarten	9 July 2014

Dutch income tax treaty with:	Signed
Malawi	19 April 2015
Zambia	15 July 2015
Kenya	22 July 2015
Arbitration clause included through Protocol amending the tax treaty	Arbitration clause included through Protocol amending the tax treaty

6. Seite 396 Seite 397 Seite 397 Annex 2

Issue	*Features*		*Tax Treaties*
Time period that triggers arbitration	Two years after the question was raised		United States, Latvia, Kazakhstan, Estonia, Iceland, Macedonia, Lithuania, Moldova, Kuwait, Uzbekistan, Poland, Georgia, Slovenia, Albania, Uganda, South Africa, Jordan, Barbados, United Arab Emirates, Ghana, Bahrain, Bermuda, Qatar, United Kingdom, Hong Kong, Japan, Germany, Ethiopia, Norway, Curaçao, St. Maarten, Malawi, Zambia, Kenya
	Five years after the question was raised		Egypt
	Three years from the presentation of the case		Switzerland
	Solution via mutual agreement		Venezuela, Canada, Ukraine, Russia, Croatia, Armenia, Azerbaijan
Voluntary and mandatory arbitration and initiative to request arbitration procedure	Voluntary arbitration	Both competent authorities and taxpayer must request the arbitration	The United States, Kazakhstan, Iceland.
		Both contracting states/competent authorities must request the arbitration	Venezuela, Canada, Ukraine, Russia, Croatia, Armenia, Azerbaijan.
		Either contracting state may refer the case to arbitration	Latvia, Estonia, Macedonia, Egypt, Lithuania, Moldova, Kuwait, Uzbekistan, Poland, Georgia, Slovenia, Albania, Uganda, South Africa, Jordan, Barbados, United Arab Emirates, Ghana, Bahrain, Bermuda.
	Mandatory arbitration	Taxpayer must request arbitration	Qatar, United Kingdom, Switzerland, Hong Kong, Japan, Germany, Ethiopia, Norway, Curaçao, St. Maarten, Malawi, Kenya.
		Either competent authority must request arbitration	Zambia.
Scope of the arbitration clause	Specific cases		Qatar, United Kingdom, Switzerland, Hong Kong, Japan, Germany, Ethiopia, Norway, Curaçao, St. Maarten, Malawi, Zambia,

Issue	*Features*	*Tax Treaties*
		Kenya
	Specific cases, interpretative and legislative MAP	Venezuela, the United States, Canada, Latvia, Ukraine, Kazakhstan, Russia, Estonia, Iceland, Macedonia, Egypt, Lithuania, Croatia, Moldova, Kuwait, Uzbekistan, Armenia, Poland, Georgia, Slovenia, Albania, Uganda, South Africa, Jordan, Barbados, United Arab Emirates, Ghana, Bahrain, Azerbaijan, Bermuda
Seite 397 Seite 398 Seite 398 Application of the arbitration procedure	Procedural rules shall be established by contracting states/competent authorities	Venezuela, Canada, Russia, Iceland, Egypt, Albania, South Africa, Qatar, Azerbaijan, United Kingdom, Switzerland, Hong Kong, Japan, Germany, Ethiopia, Norway, Malawi, Zambia, Kenya
	Effect only after exchange of diplomatic notes	United States and Kazakhstan
	Need to establish procedural rules as a condition of the arbitration clause's application as a whole (if the procedural rules are not defined, the arbitration procedure will not be applicable)	Ukraine, Croatia, Uzbekistan, Armenia
	Detailed procedural rules	United States, United Arab Emirates, Japan
	Lack of information about procedural rules	Latvia, Estonia, Macedonia, Lithuania, Moldova, Kuwait, Poland, Georgia, Slovenia, Uganda, Jordan, Barbados, Ghana, Bahrain, Bermuda
Effects of the arbitration decision	Binding decision, but the taxpayer holds the right to either accept or reject the arbitration decision	Qatar, United Kingdom, Switzerland, Hong Kong, Japan, Germany, Curaçao, St. Maarten, Malawi, Zambia, Kenya
	Binding decision, and the taxpayer has no right to refuse the implementation of the decision	Ethiopia
	Binding decision, but the decision cannot be implemented if either the taxpayer refuses or competent authorities agree to a different solution within six months	Norway
	Binding decision requiring the taxpayer's agreement in writing	United States, Latvia, Kazakhstan, Estonia, Iceland, Macedonia, Egypt, Lithuania, Moldova, Kuwait, Uzbekistan, Poland, Georgia, Slovenia, Albania, Uganda, South Africa, Jordan, Barbados, United Arab Emirates, Ghana, Bahrain, Bermuda
	Binding decision without requires the taxpayer's agreement in writing	Ukraine, Russia, Croatia, Armenia
	Effects not addressed	Venezuela, Canada, Azerbaijan

Issue	*Features*	*Tax Treaties*
Seite 398 Seite 399 Seite 399 Confidentiality	Procedure Confidential	Venezuela, United States, Latvia, Ukraine, Kazakhstan, Russia, Estonia, Iceland, Macedonia, Egypt, Lithuania, Croatia, Moldova, Kuwait, Uzbekistan, Armenia, Poland, Georgia, Slovenia, Albania, Uganda, South Africa, Jordan, Barbados, United Arab Emirates, Bahrain, Qatar, United Kingdom, Switzerland, Hong Kong, Japan, Germany, Ethiopia, Norway, Curaçao, St. Maarten, Malawi, Zambia, Kenya
	Not addressed	Canada, Ghana, Azerbaijan, Bermuda
Most-favoured nation clauses	Automatic application of the Arbitration Clause	Mexico
	Negotiations to implement the Arbitration Clause	Finland, Oman, Saudi Arabia

1

The reason for not including the analysis of the EU Arbitration Convention (90/436/EEC) in this chapter is because it is a multilateral convention only applicable in the EU, as well as it has limited scope insofar as only deals with transfer pricing disputes. Thus, it is not suitable for a comparison with tax treaties.

2

World Bank, 'DataBank', available at: https://databank.worldbank.org/data/download/GDP.pdf.

3

World Trade Organisation, 'World Trade Statistical Review 2017', Chapter IX, Table A6, p. 102, available at: https://www.wto.org/english/res_e/statis_e/wts2017_e/wts2017_e.pdf.

4

World Trade Organisation, 'World Trade Statistical Review 2017', Chapter IX, Table A8, p. 104, available at: https://www.wto.org/english/res_e/statis_e/wts2017_e/wts2017_e.pdf.

5

Kees van Raad/Hans Muste/Frank Pötgens, 'Tax Treaty Disputes in the Netherlands', in: Eduardo Baistrocchi (ed.), *A Global Analysis of Tax Treaty Disputes* (Cambridge: Cambridge University Press, 2017), p. 525.

6

Daniël Smit, 'The Netherlands', in: Michael Lang/Jeffrey Owens/Pasquale Pistone/Alexander Rust/Josef Schuch/Claus Staringer (eds.), *The Impact of Bilateral Investment Treaties on Taxation*, Volume 8 (Amsterdam: IBFD, 2017), p. 391.

7

Jasmin Kollmann/Laura Turcan, 'Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges', in: Michael Lang/Jeffrey Owens (eds.), *International Arbitration in Tax Matters* (Amsterdam: IBFD, 2015), p. 15.

8

Kees van Raad/Hans Muste/Frank Pötgens, 'Tax Treaty Disputes in the Netherlands', in: Eduardo Baistrocchi (ed.), *A Global Analysis of Tax Treaty Disputes*, p. 531.

9

IMF/OECD Report for the G20 Finance Ministers, p. 50, available at https://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf.

10

Erik Velthuizen, 'Settlement of Disputes in Dutch Tax Treaty Law', in: Michael Lang/Mario Züger (eds.), *Settlement of Disputes in Tax Treaty Law* (Vienna: Linde, 2002), p. 155.

11

Kees van Raad/Hans Muste/Frank Pötgens, 'Tax Treaty Disputes in the Netherlands', in: Eduardo Baistrocchi (ed.), *A Global Analysis of Tax Treaty Disputes*, p. 568.

12

Erik Velthuizen, 'Settlement of Disputes in Dutch Tax Treaty Law', in: Michael Lang/Mario Züger (eds.), *Settlement of Disputes in Tax Treaty Law*, p. 173.

13

The Netherlands has been an OECD member country since the country deposited its OECD membership instrument of ratification on 13 November 1961.

14

Available at: http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

15

OECD/MLI – Position – The Netherlands, pp. 48–50, available at: http://www.oecd.org/tax/treaties/beps-mli-position-netherlands.pdf.

16

Kees van Raad/Hans Muste/Frank Pötgens, 'Tax Treaty Disputes in the Netherlands', in: Eduardo Baistrocchi (ed.), *A Global Analysis of Tax Treaty Disputes*, p. 525.

17

Kees van Raad/Hans Muste/Frank Pötgens, 'Tax Treaty Disputes in the Netherlands', in: Eduardo Baistrocchi (ed.), *A Global Analysis of Tax Treaty Disputes*, p. 569.

18

H.M. Pit, 'Arbitration under the OECD Model Convention: Follow-up under Double Tax Conventions: An Evaluation', 42 *Intertax* 6/7 (2014), p. 449.

19

Decree of 29 September 2008, No. IFZ 2008/248M, Chapter 1.2.2 *Arbitration Provisions in Tax Treaties*, p. 6.

20

Decree of 29 September 2008, No. IFZ 2008/248M, Chapter 1.2.2 *Arbitration Provisions in Tax Treaties*, p. 6

21

Some treaty negotiations take a long time to be concluded, so in some cases if the country had already agreed on a similar clause, it makes no sense to change the compromise reached just to adapt the wording to the OECD Model.

22

The main features of the arbitration provisions in Dutch tax treaties were consolidated in Annex 2.

23

The wording used in most of the treaties is as follows: 'If any difficult or doubt arising as to the interpretation or application of the Convention cannot be resolved by the competent authorities of the Contracting States in a mutual agreement procedure pursuant to the previous paragraphs of this Article within a period of two years after the question was raised […]'.

24

According to the Memorandum of Understanding concluded in 8 March 2004, as follows: 'If, in applying paragraphs 1 to 4 of Article 29, the competent authorities fail to reach an agreement within two years of the date on which the case was submitted to one of the competent authorities, they may agree to invoke arbitration in a specific case, but only after fully exhausting the procedures available under paragraphs 1 to 4 of Article 29'.

25

Not yet in force.

26

Multilateral Instrument – OECD – Switzerland Reservations to Article 19, para. 11, available at: http://www.oecd.org/tax/treaties/beps-mli-position-switzerland.pdf.

27

H.M. Pit, *Intertax* (2014), p. 457.

28

These arbitration clauses are similar to the UN Model in this regard, as the arbitration is to be initiated by one of the competent authorities.

29

Mario Züger, *Arbitration under Tax Treaties: Improving Legal Protection in International Tax Law* (Amsterdam: IBFD, 2001), p. 30.

30

Mario Züger, *Arbitration under Tax Treaties: Improving Legal Protection in International Tax Law*, p. 30.

31

Jasmin Kollmann/Laura Turcan, 'Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges', in: Michael Lang/Jeffrey Owens (eds.), *International Arbitration in Tax Matters*, p. 42.

32

H.M. Pit, *Intertax* (2014), p. 453.

33

Erik Velthuizen, 'Settlement of Disputes in Dutch Tax Treaty Law', in: Michael Lang/Mario Züger (eds.), *Settlement of Disputes in Tax Treaty Law*, p. 176.

34

Erik Velthuizen, 'Settlement of Disputes in Dutch Tax Treaty Law', in: Michael Lang/Mario Züger (eds.), *Settlement of Disputes in Tax Treaty Law*, p. 176.

35

Erik Velthuizen, 'Settlement of Disputes in Dutch Tax Treaty Law', in: Michael Lang/Mario Züger (eds.), *Settlement of Disputes in Tax Treaty Law*, p. 176.

36

H.M. Pit, Intertax (2014), p. 449.

37

One can find a wide variety of wordings in this sense. Examples include: 'These procedures shall be established between the competent authorities of the Contracting States' (treaty with Venezuela); 'The competent authorities of the Contracting States shall agree on and instruct the arbitration board regarding specific rules of procedure, such as appointment of chairman, procedures for reaching a decision and the establishment of time limits' (treaty with Albania); 'These procedures shall by mutual agreement be established between the competent authorities of both Contracting States' (treaty with Ukraine).

38

The text is as follows: 'The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph'.

39

As far as the conclusion of the present chapter, no notes were exchanged in respect of the arbitration procedure.

40

This is the wording contained in the treaty with Kazakhstan (1996): 'After a period of three years after the entry into force of this Convention, the competent authorities shall consult in order to determine whether it is appropriate to make the exchange of diplomatic notes. The provisions of this paragraph shall have effect after the States have so agreed through the exchange of diplomatic notes'.

41

Erik Velthuizen, 'Settlement of Disputes in Dutch Tax Treaty Law', in: Michael Lang/Mario Züger (eds.), *Settlement of Disputes in Tax Treaty Law*, p. 177.

42

Hugo Vollebregt/Ryann Thomas/William Pieschel, 'Arbitration under the New Japan-Netherlands Tax Treaty', 65 *Bulletin for International Taxation* 4/5 (2011).

43

H.M. Pit, Intertax (2014), p. 454.

44

H.M. Pit, *Intertax* (2014), p. 454.

Miotto in Majdanska/Turcan (Eds), OECD Arbitration in Tax Treaty Law, Chapter 17 – Arbitration under Dutch Tax Treaties