International Taxation in a Changing Landscape

Liber Amicorum in Honour of Bertil Wiman

Edited by

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CHAPTER 5

Arbitrating Cross-Border Tax Disputes in Line with European Union Law: Issues and Solutions

Ana Paula Dourado & Pasquale Pistone

We have known Bertil for long and greatly appreciated his friendship and pleasant sense of humour. When selecting the topic for this essay in his honour, we have thought about a topic that could come close to his research interest, be global enough to reflect his contribution to the development of a global tax law academia and bring something new that could inspire him critical thoughts. We offer our latest reflection on this topic as a sincere expression of our long-lasting friendship.

§5.01 INTRODUCTION

The settlement of cross-border tax disputes has made great progress throughout the past decades, turning from an area for the intellectual elites of international tax law scholars to an effective tool for settling such disputes. Certainly, the increased number of cross-border tax disputes has facilitated this process, pushing the decision-makers to coordinate the exercise of sovereignty in tax matters not only on the nexus and limits of the exercise but also as to how international tax coordination could work in practice and problems be effectively solved.

The settlement of cross-border tax disputes follows a two-tier system, which includes a mechanism for administrative cooperation between tax authorities, generally known as mutual agreement procedure, supplemented by a common binding mechanism that also involves the affected taxpayer(s), usually operating in the form of arbitration, but more recently also including forms of alternative dispute resolutions, such as mediation and conciliation.[1]

Yet, there is a growing perception that cross-border tax disputes are often also arbitrated through mechanisms applicable under the existing bilateral investment treaties, which in many cases either do not or only partially carve out tax disputes.[2]

Our focus hereby is to address the issues connected with arbitrating cross-border tax disputes in Europe with special emphasis on the potential implications of the recent judgment from the European Court of Justice in the *Achmea* case[3] on bilateral investment treaties.

In that judgment, the Court of Justice essentially ruled out the European Union (EU) law compatibility of final decisions by ad hoc arbitrating bodies, insofar as they prevented an effective assessment of the correct interpretation and application of EU law.

The implications of the *Achmea* judgment for settling cross-border tax disputes relevant for this short chapter are not only confined within the ones that arbitrated through bilateral investment treaties but also stretch out to cover the repercussions of this judgment on ad hoc arbitration clauses contained in tax treaties and some ideas for a possible solution to these problems.

§5.02 THE FOUR LEGAL INSTRUMENTS FOR SETTLING CROSS-BORDER TAX DISPUTES

Seen from the European perspective, up to four different sets of rules are mainly used for settling cross-border tax disputes, namely Article 25.5 Organisation for Economic Co-operation and Development (OECD) MC, the Base Erosion and Profit Shifting (BEPS) MLI Arbitration, the EU Tax Arbitration Convention and the EU Tax Arbitration Directive. On top of them, additional mechanisms for cross-border tax dispute settlement are also provided by the UN, which is currently very actively engaged in reaching out for further action in this field.

Some of those instruments, such as Article 25.5 OECD MC and the rules contained in Parts V and VI of the Multilateral Instrument (BEPS MLI) signed in Paris on 7 June 2017, operate in a purely tax treaty dimension. Bilateral tax treaties between European countries frequently include clauses resembling Article 25.5 OECD MC. More recently, various European States have expressed their willingness to upgrade their bilateral tax treaties in order to meet the optional standard of Part VI of the BEPS MLI for arbitrating cross-border tax disputes.

A third set of rules is contained in the so-called EU Tax Arbitration Directive (EU/2017/1852), approved on 10 October 2017 and confined within a purely EU law

1. S. Govind & S. Rao, *Designing an Inclusive and Equitable Framework for Tax Treaty Dispute Resolution: an Indian Perspective*, 46 (4) Intertax, 2018, pp. 313-338.
2. P. Pistone, *General Report*, in M. Lang et aa. (eds), The Impact of Bilateral Investment Treaties, vol. 8 WU European and International Tax Law and Policy Series, IBFD Publications, Amsterdam, 2017, p. 40.
3. CJEU, 6.3.2018, case C-284/16, *Achmea*, ECLI:EU:C:2018:158.

dimension, which it derives from its legal basis being founded on Article 115 Treaty on the Functioning of the European Union (TFEU). Member States are bound to implement this directive into national law by 30 June 2019, in order to allow it to enter into force by 1 July 2019.

Finally, the multilateral arbitration tax convention signed by EU Member States on 23 July 1990 (90/436/EEC), also known as the EU Arbitration Tax Convention, is available for settling disputes on cross-border double taxation related to transfer pricing. This set of rules has a hybrid nature. On the one hand, its legal basis and content keep it out of EU law in strict terms, thus keeping it out of the jurisdiction of the Court of Justice. However, on the other hand, its instrumental nature to the removal of a problem arising in cross-border tax relations within the EU Internal Market bring it within the legal *acquis* of the Union. Therefore, Member States may not derogate it with provisions contained in their bilateral treaties under the *lex posterior* principle.

The issuing of the EU Tax Arbitration Directive neither creates a legal hierarchy among such instruments within the EU nor deprives EU Member States of their right to arbitrate cross-border tax disputes through the other existing instruments. Rather it provides them with a supplementary set of rules that more closely complies with the requirements of EU law, including the protection of taxpayers' fundamental rights, in line with the ones reflected in the EU Charter of Fundamental Rights. In our view, only this directive gives the affected person(s) an actual legal remedy against the States involved in the cross-border tax dispute, since all others are conceived as instruments for settling the conflict of tax sovereignty between States.

Cross-border tax dispute settlement operates under each instrument along similar lines throughout the two-tier system. However, differences can be recorded as to their scope, timeline, rights and obligations under each of such instruments. However, the analysis of such issues falls out of the scope of this short chapter.[4]

In general, we consider the use of arbitration as a major achievement for settling cross-border tax disputes, since it enhances the functioning of mutual agreement procedures and overcomes the absence of a single judicial body with jurisdiction to adjudicate disputes that simultaneously involve tax sovereignty and produce an immediate impact on the legal sphere of taxpayers. In such circumstances, the use of arbitration in cross-border tax disputes is suitable to enhance the effective exercise of taxpayers' fundamental rights without taking such disputes away from the natural judge established by law. The latter conclusion takes into account the circumstances that the jurisdiction of two national courts in the two Contracting States, neither of which capable of involving the other State, prevents the affected person from his right to justice.

The activation of such instruments essentially depends on the choice made by the taxpayer when presenting the case before the competent authority(ies). This puts tax authorities in a condition in which they have little or no say on the selection of the

4. For a comprehensive analysis of such issues, *see* further on this in Pistone, P., The Settlement of Cross-Border Tax Disputes in the European Union, in Terra, B., Wattel, P. (eds), European Tax Law, vol. 1 – General Topics and Direct Taxation, 7th edition, Fiscale Handboeken no. 10, Wolters Kluwer, 2018, pp. 329 ff.

instrument for settling the cross-border tax dispute but also prevents possible problems involving the legal sphere of the taxpayer. Although the taxpayer is generally kept out of such procedures, except under the EU Tax Arbitration Directive, his acceptance of the dispute settlement can solve some of the issues that can affect his legal sphere.

Yet, the acceptance of the taxpayer cannot remove possible problems concerning the incorrect interpretation and application of EU law. It can perhaps solve some of the issues concerning the impact of the decision on his fundamental rights. However, a different answer should be given when the arbitrators incorrectly apply other provisions of EU law, especially in cases where the taxpayer can have no interest to question the result. This can, for instance, occur when the settlement of the cross-border tax dispute generates a selective advantage and thus be questionable from the perspective of its compatibility with the prohibition of State aid.

This and other possible issues affecting the correct application of EU law should be seriously questioned in the light of the position taken by the Court of Justice in its judgment on the *Achmea* case. Not being on taxes, most readers from the tax community are perhaps not familiar with the factual and legal content of this case. For this reason, we will briefly describe it hereby, before starting our own analysis of its potential implications in tax matters.

From the perspective of this judgment, the main issue arising in the context of all four mentioned instruments of cross-border tax dispute settlement is that States have accepted to surrender their sovereignty to the final decision of the arbitrators on the cross-border tax dispute, to the extent that such dispute reaches arbitration. This means that in such circumstances, and unless the taxpayer decides not to be bound by the decision of the arbitration panel, the settlement of the cross-border tax dispute is final.

§5.03 THE ACHMEA JUDGMENT AND ITS IMPLICATIONS FOR CROSS-BORDER TAXATION

On 6 March 2018, the Court of Justice released its judgment on the *Achmea* case. The case concerned the settlement of a cross-border dispute by an ad hoc arbitration panel applying the United Nations Commission on International Trade Law rules under the bilateral investment treaty signed between Czechoslovakia and the Netherlands in respect of the treatment of the investment of a Dutch company in Slovakia.

Under the bilateral investment treaty, the ad hoc arbitral panel has the power to make a final decision that settles the dispute based on the law and taking into account, among others, the national law in force, the bilateral investment treaty and other relevant agreements, including the special ones related to the investment, and the general principles of international law.

The case had reached the Court of Justice through a preliminary ruling procedure by the German *Bundesgerichtshof*, which acted in the framework of recognition and enforcement of the arbitral award pronounced on the German territory. In such context, the German Federal Court of Justice had asked the Court of Justice of the EU to state on the compatibility of such settlement with Articles 18, 267 and 344 TFEU.

Article 18 TFEU is the general non-discrimination clause. Article 267 TFEU sets the reference framework for preliminary ruling procedures, and Article 344 TFEU prohibits EU Member States from submitting disputes on the interpretation or application of EU law to non-EU institutions.

Settlement of disputes under bilateral investment treaties has gained popularity over the years for giving the investor an impartial and speedy settlement of disputes that also involve the State of investment.

This mechanism resembles the one provided by commercial arbitration, though with an important difference, which played a significant role from the perspective of EU law.

According to the Court of Justice, insofar as the Contracting States of a bilateral investment treaty accept to remove the dispute from the jurisdiction of their courts, they also subtract it from the system of legal remedies that secures the effectiveness of relevant EU law. This is so, for the following main reasons: the ad hoc arbitral tribunal is not part of the judicial system of the Member States involved, has an exceptional nature;[5] determines its own procedure, chooses its seat and the law applicable and its decision is final.[6]

In such context, the final nature of the decision rendered by the ad hoc arbitration panel may, therefore, undermine the correct interpretation and application, since such body lacks the typical features of a tribunal for EU law purposes[7] and is not subject to any further judicial control. Therefore, if the arbitral decision raises issues involving the interpretation and application of EU law they may simply not reach the Court of Justice.

Certainly, this does not imply that an international agreement may establish a court that addresses its interpretation with a binding effect. However, this may not deprive the European Court of Justice from its exclusive jurisdiction on the interpretation and application of EU law.

The conclusions reached by the European Court of Justice in the *Achmea* case may potentially block the significant development related to the use of arbitration for settling international tax law disputes. The main sources of this development are the introduction of Article 25(5) OECD MC, and the two-tier procedure of the Multilateral Instrument, which includes arbitration in Part VI. Some States had initially introduced a footnote to Article 25 (5) OECD MC, indicating constitutional or legal obstacles to arbitration in taxes, which are similar in nature to the desire of the European Court of Justice of claiming exclusive jurisdiction on the interpretation of EU law.

As recalled in commentary no. 65 of the OECD MC on Article 25 (5), the footnote was deleted ‘in recognition of the importance of including an arbitration mechanism that ensures the resolution of disputes between the competent authorities where these

5. CJEU, case C-284/16, *Achmea* paras 45, 48.
6. CJEU, case C-284/16, *Achmea*, para. 51.
7. As indicated in CJEU 30.5.2002, case C-516/99, *Walter Schmid*, ECLI:EU:C:2002: 313, para. 29, a tribunal in the sense of Art. 267 TFEU must be established by law, be permanent, have compulsory jurisdiction, apply an *inter partes* procedure, the rule of law and be independent.

disputes would otherwise prevent the mutual agreement procedure from playing its role'.

The analysis of the potential repercussions of the *Achmea* landmark decision from the European Court of Justice on tax matters requires a brief comparison between the settlement of cross-border investment and tax disputes. Both disputes involve States. However, the ones on investment are between the State and the foreign investor and those on cross-border taxation involve the exercise of taxing powers between two States and their impact on one (or more) taxpayer(s). Insofar as one accepts the idea that the latter ones not only affect the taxpayer but also actually involve him, such disputes have a triangular cross-border nature, as compared to the bilateral one of those that involve a foreign investor within the legal system of the State of investment.

Moreover, tax disputes submitted to arbitration under the Arbitration Directive, the Arbitration Convention and Article 25 paragraph 5 OECD ML are all related to double taxation resulting from the allocation of taxing rights. Thus, they are related in most cases to the interpretation of tax treaties (*see* Article 1, Arbitration Directive; Article 25 (5) OECD MC) or transfer pricing rules (Articles 4-7 Arbitration Convention). At first sight, none of the three aforementioned tax arbitration instruments are related to the interpretation of EU law (even if the Arbitration Convention includes the arm's-length principle, the wording is identical to the one in tax treaties based in the OECD MC). However, this may be different, if the interpretation of tax treaty rules by the arbitration panels are not in conformity with EU law. Assuming that many tax cases submitted to international arbitration are related to transfer pricing issues, and the Commission claims there is a EU concept of transfer pricing, international arbitration will often imply interpretation of EU law. The CJEU would then be the last instance competent to interpret EU law.

In turn, investment comes closer to the areas in which the EU can intervene, considering its impact on the internal market, which may also gradually lead to shift competences to the EU level, even in relations with third countries. However, this circumstance is irrelevant in this judgment, where the Court of Justice simply wants to preserve its exclusive jurisdiction on matters concerning the interpretation and application of EU law. For such reason, the view held in this judgment reflects the one expressed in the Opinion on the accession to the ECHR legal system[8] and is sufficiently different from that held in the *Ascendi* case,[9] which we will address later within this chapter. The problem is therefore neither the existence of a bilateral investment treaty nor the settlement of disputes through arbitration, but rather the potential impact of both on the correct interpretation and application of EU law.

When comparing this context with that of cross-border tax disputes, we should therefore not focus on whether taxation and investment are comparable, but rather find out whether the current mechanisms for settling those disputes allow for a review of possible EU law interpretation and application issues by the Court of Justice.

In such terms, the answer is that they do so only in extremely rare circumstances, such as in the case of the Austria-Germany double tax convention, which calls for the

8. CJEU, 18.12.2014, Opinion 2/2013, ECLI:EU:C:2014:2454.
9. CJEU, 12.4.2014, case C-377/13, *Ascendi*, ECLI:EU:C:2014:1754.

intervention of the Court of Justice as arbitral tribunal, or when tax disputes are arbitrated by permanent courts.

However, in the vast majority of cases, cross-border tax disputes are arbitrated by ad hoc panels, whose decisions are final and binding on the parties and the taxpayer unless he objects. The situation is even more complex in cases decided through the so-called baseball arbitration, in which the arbitral tribunal does not even motivate its final verdict.

The ad hoc panels arbitrating tax disputes are structurally no different from those arbitrating the ones on investment and may not meet the requirements established by the Court of Justice for qualifying as a tribunal[10] and thus referring a case to the Court of Justice in the framework of a preliminary ruling procedure. In particular, out of the various criteria set by the Court of Justice for such qualification, the non-permanent nature is the one that appears unsurmountable.

Furthermore, in all such circumstances, except when the taxpayer objects the arbitral decision, their decision is final and there is simply no judicial remedy available to make sure that the interpretation and application of EU law by the arbitral tribunal is correct.

Yet, one can say that, just as it occurred in the *Achmea* case in respect of the bilateral investment dispute, the losing State can refuse to execute the arbitral decision. However, unlike in the arbitral decision, the existence of the dispute between two States would prevent it from falling within the judicial system of one State or have equivalent mechanisms for executing the decision against the losing State.

For this reason, not only the settlement of cross-border tax is similar to that of bilateral investment disputes from the perspective of enforcing EU law but is perhaps even worse than that. While only some EU Member States have bilateral relationships, almost all of them (with five exceptions) have bilateral treaties, and, in a large number of cases, such treaties include final arbitration as procedure for settling cross-border tax disputes.

The (Legal Service of the) European Commission should possibly consider starting the launch of a broad enquiry on cross-border dispute settlement involving all Member States, which could end up in bringing this issue before the Court of Justice in the framework of infringement procedures. Such action should not only involve bilateral investment treaties, but also the ones against double taxation, since, from the perspective of the conclusions reached by the Court of Justice in the *Achmea* case, there would be no reason to differentiate between them.

However, besides its enormous practical repercussions in terms of legal uncertainty, this type of action could perhaps be unsuitable to address the problems of this kind also affecting EU Tax Arbitration Directive, whose equivalent provision should then also be declared as void in line with the procedure under Articles 264 ff. TFEU.

10. *See supra* footnote 3.

§5.04 THE ASCENDI CASE AND ARBITRATION COURTS

Before the *Achmea* case, the CJEU held in the *Ascendi* case that arbitration courts are to be considered courts or tribunals of a Member State for the purposes of Article 267 TFEU, as long as some features occur. Such features are that they are established by law, permanent, their jurisdiction is compulsory, their procedure is *inter partes*, they apply the rule of law and are independent.[11]

Taking into account the aforementioned elements, tax arbitration panels set up by the EU Arbitration Directive and the EU Arbitration Convention, and foreseen in tax treaties based on Article 25 (5) OECD MC, could be held courts or tribunals for the purposes of Article 267 TFEU, as long as they refer interpretation of EU law to the CJEU.

The establishment of arbitration courts by law means that they should be established by a legal instrument, be it national (i.e., the case of the Portuguese tax arbitration courts, dealt with in *Ascendi*), European or international. The fact that arbitration is expressly foreseen in tax treaties, in the EU Arbitration Convention or the EU Directive means that it is established by law. All three instruments rule the situations in which arbitration can be used and in which cases the decision is binding. In all three legal sources, tax arbitration is an alternative means of judicial resolution of tax disputes related to double taxation issues.

The fact that Article 25 (5) OECD MC does not set all details on the functioning of arbitration, leaving the mode of application of Article 25 (5) OECD MC to the Contracting States, does not contradict that there is a legal basis for arbitration. Moreover, paragraph 65.1 of the Commentary on Article 25 (5) OECD MC foresees the possibility for Contracting States to include procedural rules on tax arbitration, and Part VI of the Multilateral Instrument includes many procedural aspects of the arbitration process.

In case EU Member States include Article 25 (5) OECD MC in their tax treaties, they may limit its application to the situations not covered by the EU Arbitration Directive and Convention (*see* commentary no. 66 to Article 25 (5) OECD MC), coordination of the international and EU arbitration instruments being foreseen in commentary no. 67 to Article 25 (5) OECD MC.

Also, Article 25 (5) requires an agreement between the Contracting States on procedural rules, but more detailed procedural rules, such as the appointment of arbitrators and confidentiality, can be addressed by the tax treaty. In contrast, in the case of EU Member States, procedural rules are established both in the Arbitration Directive and in the Arbitration Convention.

According to paragraph 66 of the Commentary on Article 25 (5) OECD MC, some States may wish to limit the application of paragraph 5 to a restricted number of cases, that 'are primarily factual in nature', such as transfer pricing issues and the question of the existence of a permanent establishment. In any case, facts are to be interpreted in light of law.

11. C-377/13, *Ascendi*, para. 23; C-394/11 Belov, EU:C:2013:48, para. 38 and case law cited therein.

For the purposes of compatibility of treaty arbitration with EU law, paragraph 67 of the Commentary on Article 25 (5) OECD MC states that EU Member States may want to coordinate the scope of such provision with their obligations under legal instruments applicable to these members.

It is more difficult to argue that tax arbitration panels set up on the basis of tax treaties or the Arbitration Convention and Arbitration Directive are permanent. On the one hand, compared to the Portuguese tax arbitration courts, that have general jurisdiction on tax matters, international or European arbitration courts are not granted general jurisdiction. On the other hand, taking into account that they are foreseen in legal instruments, that bind the jurisdictions that approved them, they could be held as 'an element of the legal system of judicial resolution of tax disputes'. At least the EU Arbitration Convention and Directive could be so interpreted, as they have been approved multilaterally, in accordance to the TFEU competences. Moreover, the composition of the arbitration panels under the Arbitration Directive and the Arbitration Convention is foreseen in a list previously approved, even if, the concrete panel is ephemeral. But that is also the case of the Portuguese tax arbitration courts, and the CJEU still held them to be permanent.

It could be furthermore contended that the jurisdiction of tax arbitration courts set up in accordance to the aforementioned instruments is compulsory, as long as the underlying issues remain unresolved in the MAP. In the Arbitration Directive and the Arbitration Convention, the decisions by the arbitration panel are binding to the parties, unless they reach an agreement as to how to resolve the question in dispute (Article 15 (2) Arbitration Directive; Articles 11-12 Arbitration Convention); however, under Article 25 (5) 2nd para. OECD MC, the person directly affected may reject the mutual agreement that implements the arbitration decision.

International and EU tax arbitration work as appealing (and therefore complementary) jurisdictions. Unresolved issues shall be submitted to arbitration if the person so requests in writing (Article 25 (5) OECD MC); the same is true under the Arbitration Directive ('… any affected person shall be entitled to submit a complaint on a question in dispute to each of the competent authorities of each of the Member States concerned' (Article 3 (1) EU Tax Arbitration Directive)).

In respect of the other features required by the CJEU, to recognize arbitration panels as courts for the purposes of EU law, it can be argued that they are fulfilled: their procedure is *inter partes*, even if, besides two Contracting States, the taxpayer is the interested party ('the affected person', according to Article 3 (1) of the Arbitration Directive; 'the enterprise', in Article 6 of the Arbitration Convention; 'a person directly affected' in Article 25 (5), 2nd para. OECD MC) of the decision; they apply rules of law, including transfer pricing issues, because they imply interpretation of the arm's-length principle and its application to the concrete case; they have to be independent, as the Arbitration Directive (Article 9) and the Arbitration Convention (also Article 9) expressly require.

§5.05 ALTERNATIVE PATHS TOWARDS EU LAW COMPATIBLE CROSS-BORDER TAX ARBITRATION

Taking into account our previous reflections, on the compatibility of tax arbitration courts with EU law, we would therefore like to explore some possible alternative paths for preserving the very positive effects of arbitration on the settlement of cross-border tax disputes.

The most obvious solution is to follow the example of the Austria-Germany double taxation convention, which would imply referring all cross-border tax dispute settlement to the Court of Justice acting as an arbitral tribunal. However, this result is neither necessary from a methodological perspective nor desirable from a policy one, since it would overload the Court with cross-border tax cases, thus bringing it away from its statutory goals, namely the interpretation and application of EU law.

While searching for suitable solutions, we should first carve out cross-border tax disputes in which the affected taxpayer rejects the verdict of arbitration and thus brings the case before a judicial instance. This situation is of course not ideal, since bringing a cross-border tax dispute before a judicial instance of one Contracting State may only work when the problem mainly concerns one State. However, the existing legal instruments give the taxpayer the right to reject the arbitral decision and therefore, if he chooses to do so, there is in fact a judicial instance, which could raise the issue even ex officio, if the procedural autonomy of the Member State involved allows the national tribunal to do so.

Another possible solution is that, when establishing the set of rules governing the functioning of the arbitration tribunal, the States could agree on a kind of referral mechanism that allows them to interact with the national judiciary of the countries involved. In such circumstances, the national tribunal could then decide whether to refer preliminary questions before the Court of Justice in case of matters that they are unable to address directly. However, also this mechanism could be hard to work in practice, especially considering that there could be different views between the courts of the countries involved as to whether and what questions should be referred to the Court of Justice.

A third option could be to establish a compulsory check of legal consistency by the courts of each Contracting State in order to execute the arbitral verdict. This *ex post* control could give the courts the opportunity to find out whether any relevant issue of EU law arises and, in the affirmative, whether the arbitration tribunal has addressed it in line with the *acte clair/acte éclairé* theory of the Court of Justice.

If the arbitration courts set up by the Arbitration Directive, the Arbitration Convention and Article 25 (5) were to be held as courts, for the purposes of the TFEU, it could be clarified that they are submitted to EU law and therefore they should refer the case to the CJEU, if an issue involving interpretation of EU law was raised unless it were *acte clair/acte éclairé*.

However, we find it appropriate to explore further solutions more in depth, with a view to use the legal interpretation by the Court of Justice as a possible instrument to prompt a significant development in cross-border tax dispute settlement.

Cross-border tax arbitration is a development required by the BEPS project and multilateral coordination to fight against abuse, and disparities will increase double taxation. It is common sense that arbitration is a means to solve it in a faster and more efficient manner.

The EU is not meant to play a secondary role in this development. On the opposite, the fact that the arbitration tax Directive was approved, demonstrates that the EU is aware of the necessity of implementing tax arbitration to solve litigation resulting from the application of bilateral tax treaties.

This could then be an opportunity to a partial reform of the EU judicial system, where an EU tax arbitration court would be granted competence to solve issues involving application of tax treaties between EU Member States, and including triangular situations involving third countries and interpretation of EU law. The competences and procedure of such tax arbitration court could depart from the ones already foreseen in the tax Arbitration Directive concerning the advisory commission or the alternative dispute resolution commission, making it clear that those commissions are an integral part of the TFEU judicial system. Alternatively, such arbitration court would be granted competence to interpret all tax EU law issues, even if not related to the implementation of bilateral tax treaties. Article 257 TFEU already sets the legal basis for both solutions.

On an international level, the OECD and the Inclusive Framework would ideally also think of setting up an international tax arbitration court that would avoid ad hoc decisions by ad hoc panels, where the interpretation criteria and results will vary, depending on the panel and where it will not be possible to reach consistent and coherent settled case law at a worldwide level.