

# **Taxpayer Participation in Tax Treaty Dispute Resolution**

Katerina Perrou

Thesis  
submitted to the Institute of Advanced  
Legal Studies, School of Advanced Studies,  
University of London in fulfilment of the  
requirements for the degree of  
Doctor of Philosophy

Degree awarded on 31 May 2012



Volume 28  
IBFD Doctoral Series

---

## Table of Contents

<b>Preface</b>		v
<b>Part I</b> <b>Setting the Scene</b>		
<b>Chapter 1: International Tax Dispute Resolution: Past, Present and Future</b>		<b>3</b>
1.1.	Introductory remarks	3
1.2.	A glimpse into the past	7
1.2.1.	The <i>Japanese House Tax</i>	8
1.2.2.	The <i>Administration of the Prince von Pless</i>	12
1.3.	Back to the present: The current status of international double taxation dispute resolution	17
1.3.1.	An unsuccessful MAP	19
1.3.2.	The negative record of the EU Arbitration Convention	24
1.4.	A long established taboo: The direct participation of the taxpayer	29
1.4.1.	The Lindencrona/Mattsson proposal (1980)	30
1.4.2.	The doctoral thesis of Mario Züger (2001)	31
1.4.3.	The International Fiscal Association study (2004)	32
1.4.4.	The doctoral thesis of Zvi Altman (2005)	33
1.5.	A new system proposed (structure of the thesis)	35
<b>Part II</b> <b>Private Parties in International Disputes: The Case of International Tax Disputes</b>		
<b>Introduction</b>		<b>41</b>
<b>Chapter 2: Diplomatic Protection and International Tax Disputes: An Awkward Cohabitation of Two Strangers</b>		<b>43</b>
2.1.	Introductory remarks	43
2.2.	The general framework: International law disputes and diplomatic protection	44
2.2.1.	The concept of “dispute”: When does a dispute exist?	44

## Table of Contents

---

2.2.2.	The concept of “international”: When does a dispute become international?	47
2.2.2.1.	International disputes between an individual and a foreign state	48
2.2.2.2.	International disputes between an individual and his own state	51
2.3.	The concept and nature of diplomatic protection	53
2.4.	Diplomatic protection and the protection of taxpayers’ rights in double taxation conventions	57
2.5.	Conclusion	62
<b>Chapter 3:</b>	<b>International Double Taxation Disputes as Disputes between the State(s) and the Taxpayer(s)</b>	<b>65</b>
3.1.	Introductory remarks	65
3.2.	The particular characteristics of double taxation conventions	65
3.2.1.	The broad context: Double taxation conventions as part of international investment law	66
3.2.2.	The function of double taxation conventions: Distribution of taxing powers between sovereign states	67
3.2.3.	Double taxation conventions as a source of <i>interests</i> for the states and <i>direct rights</i> for the taxpayers	69
3.3.	Private parties as “owners” of double taxation disputes (a substance-over-form approach)	75
3.3.1.	The relationship between the taxpayer and his state of residence: Concurring or opposing interests?	75
3.3.2.	Functional control of the claim	76
3.3.3.	The catalytic role of the taxpayer in the rise of an international tax dispute	78
3.4.	Multiple parties in international taxation disputes	80
3.4.1.	The application of both the formal and substance criterion in order to identify the parties to a dispute	81
3.4.2.	Limitations to the number of parties	82
3.5.	Conclusion	83
<b>Chapter 4:</b>	<b>A Comparative Perspective: Private Parties in International Law Disputes</b>	<b>85</b>
4.1.	Introductory remarks	85
4.2.	Private parties in investment treaties’ disputes	87

4.2.1.	Bilateral investment treaties and direct taxation disputes	88
4.2.2.	Multilateral investment treaties and direct taxation	91
4.2.2.1.	Free trade agreements: Direct taxation matters and the NAFTA	92
4.2.2.2.	The Energy Charter Treaty: Direct taxation matters and the ECT	95
4.2.3.	Taxpayer participation in investment treaty arbitration: Some practical aspects	100
4.3.	The WTO rules and the Dispute Settlement Understanding (DSU)	102
4.4.	Conclusion	105

## Part III

## Dispute Resolution and International Tax Disputes

<b>Chapter 5:</b>	<b>“Access to an Effective Remedy” and International Tax Disputes – The Creation of Positive Obligations for the States</b>	109
5.1.	“Effective remedy” and “access to justice” in (international) tax matters in the universal human rights system	109
5.1.1.	The Universal Declaration of Human Rights (UDHR)	110
5.1.2.	The International Covenant on Civil and Political Rights (ICCPR)	112
5.2.	“Effective remedy” and “access to justice” in (international) tax matters in the regional human rights systems	115
5.2.1.	The Inter-American system	117
5.2.2.	The African System	118
5.2.3.	The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)	120
5.2.3.1.	Article 6 of the ECHR and tax matters: An overview of the current status	121
5.2.3.2.	The application of fair trial guarantees to tax matters: An alternative route	126
5.3.	The creation of positive obligations for the states: Access to an effective remedy for international tax disputes	133
5.4.	Conclusion	137

<b>Chapter 6:</b>	<b>“Access” to an “Effective Remedy”: The Domestic Courts Option</b>	<b>139</b>
6.1.	Introduction	139
6.2.	Recourse to domestic courts of one contracting state: One is none	140
6.2.1.	The risk of non-execution of the decision in the other contracting state	142
6.2.2.	The risk of lack of impartiality	145
6.3.	Recourse (parallel or consecutive) to domestic courts of two contracting states: Two is too many	150
6.3.1.	The costs of (multiple) judicial proceedings	151
6.3.2.	Language barriers in litigation abroad	152
6.3.3.	The length of the (combined) proceedings	153
6.3.3.1.	The need for timely dispute resolution	153
6.3.3.2.	Assessing the reasonableness of the length of the proceedings	154
6.3.3.2.1.	Complexity of the case	155
6.3.3.2.2.	The parties’ conduct	156
6.3.3.2.3.	The implications of the case for the applicant	157
6.3.3.2.4.	Overall assessment	158
6.4.	Conclusion: Access to domestic courts does not guarantee effectiveness for international tax dispute resolution	160
<b>Chapter 7:</b>	<b>“Access” to an “Effective Remedy”: The International Route</b>	<b>163</b>
7.1.	Introduction	163
7.2.	The requirement of effectiveness	163
7.2.1.	Effectiveness of the double taxation conventions mechanism	164
7.2.2.	Effectiveness of the EU Arbitration Convention mechanism	168
7.2.3.	An overall assessment of the effectiveness of the international system	171
7.2.3.1.	One common set of procedures	171
7.2.3.2.	Final decision that binds two competent authorities	171
7.2.3.3.	Resolution within a reasonable and predictable time	171
7.2.3.4.	Low cost for the taxpayer and the tax administration	172
7.3.	The requirement of “access” to an effective remedy	173

7.3.1.	Taxpayer participation under the international dispute resolution system	173
7.3.1.1.	The OECD Model system	174
7.3.1.2.	The EU Arbitration Convention	177
7.3.2.	Does the current level of taxpayer participation satisfy the requirement of “access” to an effective remedy?	178
7.3.2.1.	The impact of the absolute bar of individual access	178
7.3.2.2.	The impact of the limited involvement of the taxpayer	180
7.3.2.3.	An overall assessment: Is individual access to the international system required?	183
7.4.	The requirement of access to a(n) (independent) “tribunal”	184
7.4.1.	What qualifies as a(n) (independent) “tribunal”?	185
7.4.1.1.	The OECD Model “joint committee” and the EU Arbitration Convention “joint committee”	187
7.4.1.2.	The OECD Model “arbitration panel” and the EU Arbitration Convention “advisory commission”	190
7.4.1.2.1.	Power of decision	190
7.4.1.2.2.	Independence	192
7.4.2.	Proposed adjustments to meet the independence requirement	194
<b>Conclusions of Part III: Direct Taxpayer Access to International Tax Dispute Resolution Mechanisms</b>		<b>199</b>
Part IV Summary and Conclusions		
<b>Chapter 8:</b>	<b>Redesigning the International Tax Dispute Resolution Mechanism</b>	<b>205</b>
8.1.	General remarks	205
8.2.	A modern system for the resolution of international double taxation disputes	207
8.2.1.	The basic structure: Compulsory MAP followed by compulsory international arbitration	207
8.2.1.1.	The administrative phase: Mutual agreement procedure	208

## Table of Contents

---

8.2.1.1.1.	Initiation: Application by the taxpayer	208
8.2.1.1.2.	Fair trial standards: Individual access and independence	208
8.2.1.1.3.	The use of experts	209
8.2.1.1.4.	Decision: Final and binding, depending on taxpayer's consent	209
8.2.1.2.	The judicial phase: Multiparty arbitration	209
8.2.1.2.1.	Initiation: Automatic on taxpayer's request	210
8.2.1.2.2.	Multiple parties in international taxation arbitration proceedings	211
8.2.1.2.3.	Independence of the arbitral tribunal	220
8.2.1.2.4.	Decision: Final, reasoned, public, and binding	221
8.2.2.	A less legalistic variation: An enhanced MAP	224
8.2.2.1.	Taxpayer participation	227
8.2.2.2.	Independence	228
8.2.3.	A more legalistic variation: MAP and international (tax) court	229
8.2.3.1.	The administrative phase: MAP	231
8.2.3.2.	The judicial phase: International (tax) court	232
8.2.3.2.1.	Adjudication by an international (tax) court	233
8.2.3.2.2.	Reference for a preliminary ruling	234
<b>Chapter 9:</b>	<b>Taxpayer Participation in DTC Dispute Resolution in a Nutshell</b>	<b>239</b>
<b>Bibliography</b>		<b>243</b>
<b>Table of Cases</b>		<b>289</b>