



Judicial review of revenue authority decisions in a specific tax treaty context – a study of the extent of convergence in the reasoning of different courts reviewing revenue authority decisions under model-based tax treaties

By

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Abstract

This minor dissertation analyses how different courts review the exercise of discretion under specific model-based tax treaty clauses that confer wide decision-making powers to officials. The aim is to identify whether there is convergence in argument that may be of relevance to other courts for the uniform interpretation of tax treaties.

The research methodology adopted in this dissertation is doctrinal research. It was conducted primarily through foreign case law sourced from the International Tax Law Reports and the International Bureau of Fiscal Documentation.

It is concluded in this minor dissertation that there is evidence of convergence on the justiciability of requests for the cross-border exchange of taxpayer information. The courts are recognising the principle of legality with differences in their approach to judicial review. There is an extent of convergence in respect of the interpretation of the standard of foreseeable relevance as condition to legality in this context, with most courts applying a deferential approach. There is also evidence of convergence in relation to confidentiality provisions with the courts applying principles of procedural fairness with slight divergence on issues of disclosure.

It is not possible at this stage to determine convergence in respect of the model-based mutual agreement procedure and principal purpose test. Case law analysed in these contexts are however instructive and provide arguments that may be of value to other courts.

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1. INTRODUCTION

1.1. Background and objectives

It is said that one of the most basic principles of political morality is that officials should comply with standards of rationality, purposiveness and morality when exercising discretionary powers.¹ These concepts are complex, but they provide the basis from which more specific legal principles of accountability can be developed.² In turn, these principles form the basis for review of decision-making powers by, *inter alia*, the courts.³ In its most basic form, rationality refers to the reasons for a decision whilst purposiveness refers to the ends and goals sought to be achieved.⁴ Galligan states, with reference to morality, that

‘[p]erhaps the most basic moral principle in this context is that the rights and interests of individuals be treated with understanding and respect; from this more specific principles, including ideas of fairness, both in substance and procedure, and non-discrimination, may be generated.’⁵

This dissertation considers specific model-based tax treaty clauses that confer wide discretionary decision-making powers to officials. It analyses how these clauses are interpreted by different courts considering the standards of judicial review in different countries.

The idea for this dissertation stemmed from the 2017 judgment of the Court of Justice of the European Union (CJEU) in the *Berlioz* case.⁶ The CJEU confirmed in this cross-border exchange of information matter that the taxpayer ultimately has a right to judicial review of the legality, i.e., lawfulness, of an information order issued by a revenue authority even when national law does not provide for it. The Court set aside the limitation on access to a court imposed by Luxembourg law on the basis that it violated the EU Charter of Fundamental Rights. It was an important decision for the taxpayer’s ability to challenge a cross-border exchange of information request within the EU. Globally, states have been under pressure to facilitate the effective exchange

¹ D.J. Galligan *Discretionary Powers: A Legal Study of Official Discretion* (1990) 5.

² *Ibid* at 5.

³ *Ibid*.

⁴ *Ibid*.

⁵ *Ibid*.

⁶ Judgment of the Court (Grand Chamber) of 16 May 2017, *Berlioz Investment Fund SA v. Directeur de ‘administration des Contributions directes*, Case C-682/15, ECLI:EU:C:2017:373.

of taxpayer information which has led to legislative adjustments in several states that have affected the rights and safeguards of taxpayers.

In December 2017, the High Court of New Zealand delivered a judgment in a cross-border exchange of information case where it confirmed that the Commissioner of Inland Revenue's decision to issue information notices was susceptible to judicial review.⁷ It was said that the decision, if unaltered on appeal, had 'seismic implications for the defence of information notices issued under this and like procedures'.⁸

Further research led to consideration of more judgments in different jurisdictions where revenue officials' decisions in terms of wide open-ended tax treaty provisions were taken on judicial review. These model-based provisions confer broad discretionary powers to revenue authorities which if applied arbitrarily and unreasonably, could have a significant impact on the rights of taxpayers.

There is no universal framework for taxpayers' rights, but different countries have different frameworks within which state power, including the power to tax, may be exercised. Consensus holds that constitutions fix the framework within the limits of which tax power can be exercised.⁹ Georgopoulos note that

'[t]hese constitutional constraints cannot be ignored in the case of tax treaty-making power. Coherence of the national legal order and, above all protection of constitutional rights demand that tax treaty provisions also comply with these requirements'.¹⁰

According to Anton, 'taxpayers' anxieties are not caused by the legal instruments [e.g. human rights instruments such as the EU Charter of Fundamental Rights], which offer a similar wording of the fundamental rights, but rather the dispute resolution bodies that apply the instruments'.¹¹ He refers to a growing interest in the field of tax treaty disputes to measure convergence and judicial interaction between national courts.¹² It is suggested that 'future research should make an attempt to find good arguments in the reasoning of courts and tribunals that can be replicated and recontextualized by

⁷ NZ: *Chatfield & Co Limited v The Commissioner of Inland Revenue* [2017] NZHC 3289 [22 December 2017].

⁸ David W Marks QC 'Exchange of tax information under DTAs: NZ case has wide import' available at www.davidwmarks.com, accessed on 17 December 2019.

⁹ Theodore Georgopoulos 'Tax Treaties and Human/Constitutional Rights' available at www.law.nyu.edu, accessed on 17 December 2019.

¹⁰ Georgopoulos op cit note 9.

¹¹ Ricardo Garcia Anton 'The Fragmentation of Taxpayers' Rights in International Dispute Resolution Settings: Healing Anxieties through Judicial Dialogue' (2018) 10(1) *WTJ* 131 para 3.2.

¹² *Ibid* para 3.2.2.

different courts, following Pasquet's idea of judicial bricolage'.¹³ Pasquet views judges as bricoleurs who use diverse sources, including foreign judicial decisions, to justify their interpretation and application of the relevant law - they reproduce solutions developed by other courts in different contexts.¹⁴

1.2. Research question and scope

The aim of this minor dissertation is to determine whether there is convergence in the arguments used by different courts when judicially reviewing decisions by revenue authorities to exchange information cross-border, to settle taxpayer disputes through mutual agreement, and to deny tax treaty benefits under model-based open-ended clauses in tax treaties. Rational legal reasoning should be identified that can be replicated or recontextualised by other courts that in future may need to judicially review the exercise of revenue discretion in this context. It has been argued that judicial review currently requires 'to an increasing extent, that national courts must take into account international law'.¹⁵ It can be especially relevant 'when courts have to deal with domestic legislation that has been enacted to give effect to international obligations concluded by the executive'.¹⁶ A tax treaty is an example of a source of an international obligation.¹⁷

From a tax treaty perspective, there is a need for the uniform interpretation of tax treaties.¹⁸ In the Australian case of *Bywater Investments Ltd*, the High Court of Australia stated that

'[i]f the terms of an instrument enacted into Australian law were interpreted strictly in accordance with domestic principles of statutory interpretation, there would be a risk that the treaty would be interpreted differently even though other countries had adopted the same instrument. That risk is significant with double tax agreements'.¹⁹

¹³ Ibid.

¹⁴ Luca Pasquet 'Dialogue or Interaction? A Non-Cosmopolitan Reading of Transjudicial Communication' in Amrei Müller et al (eds) *Judicial Dialogue and Human Rights* (2004) 498. Pasquet rejects an idealistic cosmopolitan approach to judicial dialogue which is based on a shared framework of common values and prefers the term 'judicial interaction'.

¹⁵ Martin Pohlman *The Development of Judicial Review* (LLM Research Paper, Victoria University of Wellington, 2017) 22.

¹⁶ Pohlman op cit note 15 at 23.

¹⁷ United Nations *Statute of the International Court of Justice Article 18* April 1946, Art. 38(1)(d).

¹⁸ Wim Wijnen and Justice Tony Pagone 'Special Issue – Introduction' (2019) 73(8) *BIT* 382 at 382-83.

¹⁹ AU: *Bywater Investments Limited v Commissioner of Taxation* [2016] HCA 45.

In terms of public international law, treaties should be interpreted according to the Vienna Convention on the Law of Treaties (Vienna Convention) which is a codification of customary international law.²⁰ Customary international law is one of the sources of international law.²¹ It is said that to the extent that the Vienna Convention accurately codifies customary international law, it applies to all treaties because all treaties are governed by customary international law.²²

The general rule of interpretation is 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 object and purpose.²³ Recourse to supplementary means of interpretation is allowed to confirm a meaning derived at under the general rule or to determine the meaning, should the interpretation be ambiguous or obscure, or lead to a result which is manifestly absurd or unreasonable.²⁴ It is said that whilst the ‘ordinary meaning’ rule also forms the starting point of an international interpretation, it differs from its application in a domestic statutory context and refers to an international uniform legal use of the term.²⁵ There are differing views as to whether foreign case law should be regarded as a supplementary means of interpretation, but there is authority in many countries that foreign case law may be used as an aid to the interpretation of tax treaties.²⁶

It has been said that ‘[w]here there is a need to construe a tax treaty, any foreign cases that have considered the same or like articles in the agreement can assist the court in the construction of the agreement, in accordance with ... the Vienna Convention’.²⁷ The foreign judgment need not be that of the other contracting state

‘if a domestic court construes a treaty provision, the interpretation may be persuasive even in cases involving other treaties with the shared language. A domestic court may also find relevant other countries’ interpretations of the treaty at issue or even parallel treaties’.²⁸

²⁰ Lynette Olivier & Michael Honiball *International Tax A South African Perspective* 5 ed (2011) 307.

²¹ Statute of the International Court of Justice, Art. 38(1)(b).

²² Michael Edwardes-Ker ‘Tax Treaty Interpretation’ available at *core.ac.uk*, accessed on 21 June 2020.

²³ Vienna Convention on the Law of Treaties 1969, Article 31.

²⁴ Vienna Convention on the Law of Treaties 1969, Article 32.

²⁵ Olivier & Honiball op cit note 20 at 307 - 309.

²⁶ I. du Plessis ‘The interpretation of double taxation agreements: a comparative evaluation of recent South African case law’ (2016) 3 *Journal of South African Law* 484 at 497.

²⁷ Justice Jennifer Davies ‘Precedent and Law – Australia’ (2019) 73(8) *BIT* 402 at 406.

²⁸ Rebecca M. Kysar ‘Interpreting Tax Treaties’ (2016) 101 *Iowa L. Rev.* 1387 at 1431.

The courts of common law countries are more likely to consider foreign case law than courts of civil law countries.²⁹ However, it has been stated that ‘despite all differences, the judicial systems of these countries have two things in common: (i) on one side they do not recognize foreign case law as a binding precedent, and (ii) on the other side there are no rules that prevent courts to take foreign case law into consideration’.³⁰

Foreign case law may also be relevant to South African courts for the interpretation of tax treaties insofar as it is considered under the principles of the Vienna Convention. South Africa is not a signatory to the Vienna Convention, but the Constitution determines that customary international law forms part of South African law unless inconsistent with the provisions of the Constitution or an act of Parliament.³¹ It further provides that when the courts interpret any legislation, they must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.³² Tax treaties are incorporated into domestic law.³³ South African courts should therefore be guided by the Vienna Convention when interpreting tax treaties and should give preference to an interpretation that is consistent with international law.³⁴

The Constitution also determines that the courts must, when interpreting any legislation or when developing the common law, promote the spirit, purport and objects of the Bill of Rights.³⁵ It further states that the courts must consider international law and may consider foreign law when interpreting the Bill of Rights.³⁶

It is said that whilst South Africa has an international law friendly constitutional framework, the more problematic issue is whether international law can be identified and interpreted.³⁷ The Statute of the Court of International Justice provides that judicial decisions can be a subsidiary source for the determination of rules of international law.³⁸ Dugard notes that

²⁹ Wijnen & Pagone op cit note 18 at 382.

³⁰ Ibid at 383.

³¹ Section 232 of the Constitution of the Republic of South Africa, 1996.

³² Section 233 of the Constitution of the Republic of South Africa, 1996.

³³ Constitution of the Republic of South Africa, 1996, s231(4); Income Tax Act 58 of 1962, s108(2).

³⁴ Olivier & Honiball op cit note 20 at 306 – 9.

³⁵ Section 39(2) of the Constitution of the Republic of South Africa, 1996.

³⁶ Section 39(1)(b) and (c) of the Constitution of the Republic of South Africa, 1996.

³⁷ Dire Tladi ‘Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga’ (2016) 16(2) *Afr. Hum. Rights law j.* 310 at 311.

³⁸ Statute of the International Court of Justice, Art. 38(1)(d).

‘in practice...courts turn to the judicial decisions of international tribunals and domestic courts, both South African and foreign, and to international law treatises for guidance as to whether or not a particular rule is accepted as a rule of customary international law...’.³⁹

If international law cannot be identified, foreign case law may still be of persuasive value to a different court.

1.3. Research method

The research methodology used in this minor dissertation is doctrinal research that is desktop based. It was primarily conducted through analysis of foreign case law sourced from the International Tax Law Reports and the International Bureau of Fiscal Documentation’s (IBFD) tax treaty case law collection. Cases were selected if they dealt with an application for judicial review in the context of model-based clauses on the cross-border exchange of information on request, the mutual agreement procedure, or discretionary tax treaty benefits.⁴⁰ The analysis also draws from model tax treaties and related commentaries of the Organisation for Economic Co-operation and Development (OECD), the commentary of international researchers on case law and model-based tax treaty clauses as well as the issue of taxpayers’ rights. The theory of judicial review was researched through various publications by local and international authors and researchers.

1.4. Structure of this paper

Chapter II provides a brief introduction to the foundations of judicial review as well as an overview thereof in specific jurisdictions representing the main legal families. The purpose is to provide a basic background and understanding of the law of judicial review as it exists today. Chapter III considers the need for judicial review in curtailing the exercise of discretion by revenue officials. It analyses the interaction between specific tax treaty articles and the rights of taxpayers.⁴¹ Chapter IV critically analyses selected case law in the field of cross-border exchange of information on request with the aim of identifying whether there is convergence between courts on the justiciability of information notices, the interpretation and application of the standard of foreseeable

³⁹ John Dugard *International Law: A South African Perspective* (2000) 52.

⁴⁰ The method for case selection is set out in Chapter IV and Chapter V, respectively.

⁴¹ A brief history to these articles is provided before the aspects affecting the rights of taxpayers are discussed.

relevance as well as confidentiality provisions. In Chapter V, case law on judicial review in the context of mutual agreement procedure as well as discretionary tax treaty benefits are discussed. Limited foreign case law in this context prevents the identification of potential convergence at this stage, but these cases are nonetheless relevant for identifying legal arguments that may be considered by other courts. The final chapter will synthesise the findings and provide recommendations and/or suggestions for a theoretically responsible framework within which courts may make their decisions. It will also briefly consider allied areas identified for further research.

2. JUDICIAL REVIEW

The aim of this chapter is to provide a basic outline of the role of judicial review as a mechanism to control the exercise of public power. It is not an in-depth analysis of the foundations and principles of judicial review. It is often easier to demonstrate uncertainties when studying the law of judicial review than to discern consistent principles in its application.⁴² Yet, it has also been stated that ‘for most areas of law in most countries... similarities overwhelm differences’.⁴³

2.1. The foundations of judicial review

Judicial review is the process by which the courts enforce compliance by public authorities with the law – a fundamental principle of the rule of law.⁴⁴ It lays down ‘general principles governing the fair and legal and reasonable exercise of power by all those exercising such power in a democracy’.⁴⁵

All developed legal systems have recognised the need to establish principles to govern the exercise of public power.⁴⁶ The grounds for judicial intervention in relation to unlawful administrative action have increased significantly during the last quarter of the twentieth century.⁴⁷ The powers of judicial review have been exercised more extensively over the past thirty to forty years than before, but such powers are in fact old powers which have been exercised for centuries.⁴⁸

An Australian case defined judicial review as

‘neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly’.⁴⁹

⁴² C.T. Emery and B. Smythe *Judicial Review: Legal Limits of Official Power* (1986) Preface - ix.

⁴³ Martin Shapiro ‘The Success of Judicial Review’ in S.J. Kennedy et al (eds) *Constitutional Dialogues in Comparative Perspective* (1999) 193.

⁴⁴ Tom Bingham *The Rule of Law* (2010) 60.

⁴⁵ Sir Harry Woolf, Jeffrey L. Jowell *de Smith, Woolf & Jowell’s Principles of Judicial Review* 5 ed (1999) 4.

⁴⁶ Woolf & Jowell op cit note 45 at 3.

⁴⁷ Ibid.

⁴⁸ Bingham op cit note 44 at 60.

⁴⁹ *Church of Scientology v Woodward* [1982] HCA 78, [1982] 154 CLR 25 at 70.

2.1.1. Rule of law

Rule of law is a fundamental legal principle that governs the relationship between a citizen and the state.⁵⁰ There is no exact definition of the rule of law. It contrasts ‘the supremacy of law with the supremacy of arbitrary power and maintains that an individual is entitled to equality before the law and should not be subject to the arbitrary whim of the ruling class’.⁵¹

The core of the existing principle is that

‘all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts’.⁵²

There are different and opposing views as to what constitutes the rule of law, with much of the debate centred around the antitheses between substance and form.⁵³ Some are of the view that the rule of law encompasses concepts such as procedural due process, no retrospective punishment, and a formal conception of equality.⁵⁴ It deals with the mechanics of the law and not its substance, i.e. it relates to the organisation of the legal system, the administration of justice and securing observance of the law.⁵⁵ Others adopt a broader view in which the rule of law demands the adoption of certain substantive rights.⁵⁶ Many commentators agree that a legal system cannot stop with the rule of law – it must ensure desirable substantive law, especially in the field of individual liberty.⁵⁷ It is argued that ‘the law’s chief concern about the use of power is not who is exercising it but what the power is and whom it affects’.⁵⁸

The principle of legality, which provides that executive action is only legitimate where lawful, is viewed by some commentators as part of the rule of law and equated thereto by others.⁵⁹ It essentially provides that citizens should be protected against

⁵⁰ Pasquale Pistone, Jennifer Roeleveld & Johann Hattingh et al *Fundamentals of Taxation: An Introduction to Tax Policy, Tax Law and Tax Administration* (2019) para 2.3.1.

⁵¹ Geoffrey A Flick *Natural Justice: Principles and Practical Application* (1979) 2.

⁵² Bingham op cit note 44 at 8.

⁵³ Sir John Laws ‘Judicial Review and the Meaning of Law’ in Christopher Forsyth (ed) *Judicial Review and the Constitution* (2000) 183.

⁵⁴ Laws op cit note 53 at 184.

⁵⁵ B. Beinart ‘The Rule of Law’ 1962 *Acta Juridica* 99 at 103.

⁵⁶ Laws op cit note 53 at 184.

⁵⁷ Beinart op cit note 55 at 103.

⁵⁸ Sir Stephen Sedley ‘Public Power and Private Power’ in Christopher Forsyth (ed) *Judicial Review and the Constitution* (2000) 306.

⁵⁹ Pistone et al op cit note 50 para 3.3.6.

arbitrariness, partiality, unfairness, abuse of power, inaction, as well as unlawful or wrongful acts.⁶⁰

The kinds of unlawfulness which will establish a successful application for judicial review have been described in somewhat different terms by different commentators and authorities, but there are certain principles that the exercise of statutory power should adhere to: the exercise of discretion in good faith, fairness (which is influenced by the principles of natural justice), the *ultra vires* principle, the test of unreasonableness or irrationality.⁶¹ The principles of natural justice constitute the right to a fair hearing (*audi alteram partem*) and the rule against bias (*nemo iudex in causa sua*).⁶²

Woolf and Jowell suggest that ‘the standards applied by the court in judicial review must ultimately be justified by constitutional principles, which govern the proper exercise of public power in any democracy’.⁶³

In the analysis to follow consideration is given to the doctrine of judicial review in certain countries as examples of jurisdictions representing common law, civil law and mixed legal systems.

2.2. Jurisdictional overview

2.2.1. The position in the UK as common law jurisdiction

The doctrine of parliamentary supremacy is still today a fundamental principle of UK constitutional law.⁶⁴ Parliament is supreme and as a result the judiciary has a lower rank to the democratically elected Parliament.⁶⁵ There is, in fact, no written or codified constitution. The UK’s constitutional laws derive from Acts of Parliament, law reports of court judgments and conventions.⁶⁶ New Zealand is another jurisdiction that to date

⁶⁰ Kader Asmal ‘Administrative justice and democracy within the South African context’ in Hugh Corder and Fiona McLennan (eds) *Controlling public power: Administrative justice through the law* (1995) 16.

⁶¹ Bingham op cit note 44 at 61-5.

⁶² LG Baxter ‘Fairness and Natural Justice in English and South African Law’ (1979) 96 *SALJ* 607 at 608.

⁶³ Woolf & Jowell op cit note 45 at 15.

⁶⁴ Michael Gordon ‘The UK’s Fundamental Constitutional Principle: Why the UK Parliament is still sovereign and why it still matters’ (2015) 26(2) *KLJ* 229.

⁶⁵ D M Davis ‘Administrative justice in a democratic South Africa’ in Hugh Corder and Fiona McLennan (eds) *Controlling public power: Administrative justice through the law* (1995) 22.

⁶⁶ Robert Blackburn ‘Britain’s unwritten constitution’ available at <https://www.bl.uk>, accessed on 7 October 2018.

has not adopted a written constitution and still follows the doctrine of parliamentary sovereignty.

Some legal commentators and academics hold that the *ultra vires* doctrine forms the basis of judicial review. This doctrine rests upon the supremacy of Parliament, i.e. the courts implement the will of Parliament through judicial review.⁶⁷ In this sense, judicial review is nothing more than the enforcement of implied statutory limits on discretionary powers.⁶⁸ According to this view, the role of the courts is ‘to police the boundaries stipulated by Parliament’.⁶⁹ Some of the major grounds of criticism include the argument that Parliament could never have formed an express or implied intention on the subtle and various principles of the law of judicial review as we know it today. To illustrate this, it is stated that concepts such as natural justice, irrationality, etc., are concepts that have developed through the courts.⁷⁰

Other commentators argue that the principles of judicial review derive from the common law. Under English common law the courts have the inherent power to develop the law by applying standards of a higher-order law.⁷¹ This view finds the basis of judicial review to be the normative values which have historically formed part of the common law.⁷² The proponents of this model argue that the principles of judicial review are in reality developed by the courts – ‘[t]hey are the creation of the common law’.⁷³ The major criticism of this model is that it confers open-ended law-making power on unelected judges.⁷⁴ This is known as the ‘counter-majoritarian dilemma’.

The rule of law is employed by both views to limit the power of officials although emphasis is placed on different aspects of the rule of law:⁷⁵ Whereas the *ultra vires* doctrine views the rule of law as the principle of legality, the common law view sees

⁶⁷ Jeffrey Jowell ‘Of Vires and Vacuums: The Constitutional Context of Judicial Review’ in Christopher Forsyth (ed) *Judicial Review and the Constitution* (2000) 327.

⁶⁸ Mark Elliott ‘Legislative Intention Versus Judicial Creativity? Administrative Law as a Co-operative Endeavour’ in Christopher Forsyth (ed) *Judicial Review and the Constitution* (2000) 341.

⁶⁹ Paul Craig ‘Competing Models of Judicial Review’ in Christopher Forsyth (ed) *Judicial Review and the Constitution* (2000) 374.

⁷⁰ Christopher Forsyth ‘Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review’ in Christopher Forsyth (ed) *Judicial Review and the Constitution* (2000) 29.

⁷¹ Jowell op cit note 67 at 327.

⁷² Ibid at 328.

⁷³ Craig op cit note 69 at 374.

⁷⁴ Jowell op cit note 67 at 328.

⁷⁵ Ibid.

the rule of law as a ‘disabling principle’, i.e., officials cannot breach certain fundamental principles such as legal certainty, access to justice, rationality etc.

Other commentators recognise the need to move beyond the conventional *ultra vires* doctrine but maintain that there is a need to retain legislative intention as part of the constitutional explanation for judicial review.⁷⁶ Elliot describes it as follows:

‘Whereas the methodology of *ultra vires* confines the judicial function to the implementation of Parliament’s will, the more modern approach recognizes the creative role which the judges undoubtedly play in the development of legal limits on public power. In this way, it has been possible to relate judicial review to broader constitutional principles such as the rule of law and the separation of powers which, many writers have cogently argued, furnish a more convincing – and more constitutionally satisfying – basis for judicial review’.⁷⁷

The principles that must ultimately form the basis of a decision is to be sought in the necessary qualities of a modern constitutional democracy, whether endorsed in statutory form or not.⁷⁸

Oliver notes that ‘judicial review has moved on from the *ultra vires* rule to a concern for the protection of individuals, and for the control of power, rather than powers, or *vires*’.⁷⁹ The UK has no written constitution and the doctrine of parliamentary supremacy still prevails, but domestic law must be interpreted in light of the UK’s Human Rights Act of 1998 which incorporates the rights in the European Convention of Human Rights (ECHR) into domestic law.⁸⁰

The UK’s acceptance of parliamentary sovereignty distinguishes the UK from all other members of the European Union, the United States, almost all the former dominions, and those former colonies to which the UK granted independent constitutions.⁸¹ It is submitted that Lord Bingham was correct in his view that the principle of

⁷⁶ Elliott op cit note 68 at 342.

⁷⁷ Mark Elliott ‘The *Ultra Vires* Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law’ in Christopher Forsyth (ed) *Judicial Review and the Constitution* (2000) 85.

⁷⁸ Jowell op cit note 67 at 340.

⁷⁹ Professor Dawn Oliver ‘Is the *Ultra Vires* Rule the Basis of Judicial Review?’ in Christopher Forsyth (ed) *Judicial Review and the Constitution* (2000) 3.

⁸⁰ Equality and Human Rights Commission ‘What does Brexit mean for Equality and Human Rights in the UK?’ available at www.equalityhumanrights.org, accessed on 3 February 2020. After Brexit, the UK will be bound to the ECHR whilst the Human Rights Act remain effective, but the Charter of Fundamental Rights of the European Union will no longer be applicable.

⁸¹ Bingham op cit note 44 at 160.

parliamentary sovereignty can no longer be fully respected as the possibility exists that Parliament could enact legislation that could infringe fundamental rights.⁸²

2.2.2. The position in the US as common law jurisdiction

The principles of American judicial review are founded on the doctrine of separation of powers. During the 18th century the courts became an equal and independent part of a modern tripartite government.⁸³ Legislators were not seen to be sovereign as was the case with parliamentary supremacy in Britain. Instead, sovereignty rested with the people and judges were seen as agents of the people that were equal in authority with the legislators and executives.⁸⁴

On the development of the American Constitution, Wood comments that

‘[a]most all eighteenth-century Englishman on both sides of the Atlantic had recognized something called fundamental law as a guide to the moral rightness and constitutionality of ordinary law and politics’.⁸⁵

Even Blackstone, a proponent of parliamentary sovereignty, believed in an overriding natural law.⁸⁶ The adoption of a written constitution gave this fundamental law and the first principles that derived from English law a ‘degree of explicitness and reality’ that was not experienced before.⁸⁷

Judicial review was regarded as a natural function of the judiciary even before the constitution was introduced.⁸⁸ The origins of constitutional judicial review (i.e. the power of a court to invalidate a statute or other action of government because it is in conflict with the constitution) in the United States is synonymous with the landmark case of *Marbury v Madison* in which the Supreme Court created its authority to declare federal statutes unconstitutional.⁸⁹ However, as judicial review is not explicitly referred to in the text of the US Constitution, it has been the subject of much debate and criticism and some commentators argue that chief justice Marshall’s reading of

⁸² Bingham op cit note 44 at 163.

⁸³ Gordon S. Wood ‘The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less’ (1999) 56(13) *Wash. & Lee L. Rev.* 787 at 793.

⁸⁴ Wood op cit note 83 at 794.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid at 795.

⁸⁸ Gustavo Fernandes de Andrade ‘Comparative Constitutional Law: Judicial Review’ (2001) 3 *U.P.A.J.CONST.L.* 977.

⁸⁹ Marshall, John, and Supreme Court of the United States. U.S. Reports: *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

the Constitution fell short of absolutely proving that the Constitution authorises judicial review.⁹⁰

Others are of the view that judicial review finds its origins in the Constitution's text and structure as understood by those who drafted and ratified it:

‘A written constitution creates a structure in which the individual branches of government may not change its provisions unless acting through the specific procedures, established in the document itself, for amendment. Judicial review also arises from an understanding of the separation of powers as creating three branches of government that bear independent obligations to interpret and enforce the Constitution within their respective spheres’.⁹¹

The US Constitution is ‘famously difficult to amend’ although theoretically not impossible.⁹² Supermajorities are required which is practically difficult given the nature of US constitutional politics.⁹³

2.2.3. Continental Europe and its civil law systems

Common law systems have a ‘robust’ judicial review which is attributable to the respect and esteem given to judges within the doctrine of the strict separation of powers.⁹⁴

Judges play an active role in common law systems to shape and reform the law. In this regard

‘[i]t is thus unsurprising that society readily accepts an independent judiciary situated to review legislative acts and ensure their conformity with higher legal principles. The fact that any principle can be “higher” as compared to another implies that some hierarchy of laws persists within the system’.⁹⁵

According to Garnaas-Holmes, such hierarchies have been present in common law system for many years – unlike in civil law systems.⁹⁶

⁹⁰ Saikrishna B. Prakash & John C. Yoo ‘The Origins of Judicial Review’ (2003) 70(3) *U Chic L Rev* 887 at 898.

⁹¹ Prakash & Yoo op cit note 90 at 891 - 3.

⁹² Drew Desilver ‘Proposed amendments to the US Constitution seldom go anywhere’ available at <https://www.pewresearch.org>, accessed on 23 December 2019.

⁹³ Richard Albert ‘America’s Unamendable Constitution’ available at <https://www.cato-unbound.org>, accessed on 21 December 2019.

⁹⁴ Daniel Garnaas-Holmes ‘Judicial Review: Fostering Judicial Independence and Rule of Law’ available at <http://lawdigitalcommons.bc.edu>, accessed on 5 August 2018.

⁹⁵ Garnaas-Holmes op cit note 94 at 2.

⁹⁶ Ibid at 3.

Common law systems have their origin in judicial decisions dating back to the early period of the British royal monarchy.⁹⁷ The common law evolved through case law and the doctrine of precedent – the principle that earlier judicial decisions, usually of a higher court, should be followed by subsequent cases.⁹⁸ Civil law systems find its origins in a European system of law known as the *ius commune* – a common law of Roman law, canon law, local customs and commercial law.⁹⁹ Roman law, in the form of Emperor Justinian's *Corpus Iuris Civilis*, was the main source of the *ius commune*.¹⁰⁰ The *Corpus Iuris Civilis* was not a code as we know it today – it consisted of a collection of legal materials over a period of time.¹⁰¹ It was the precursor to the codification of the law that occurred from the Renaissance through to the 18th century.¹⁰² As a result, the main source of civil law, is legislation in the form of codes which is a body of general principles that moves on to specific rules as opposed to the particular rules found in the legislation of common law jurisdictions.¹⁰³ The differences between the two systems also manifest in the structure and procedure of courts, e.g. some civil law jurisdictions have specialised courts that adjudicate on administrative law as opposed to courts of general jurisdiction as found in common law jurisdictions.

It is sometimes said that in civil law tradition judges are merely required to technically apply the law and not interpret it.¹⁰⁴ Such view is not necessarily correct in modern times.¹⁰⁵ The courts in civil law jurisdictions

‘perform a law-making function through an extension by a flexible process of interpretation and by express legislative instruction.... Judicial adaptation to changing circumstances is facilitated by the so-called “general clauses” which leave lots of discretion to the judge’.¹⁰⁶

⁹⁷ SN Carlson et al ‘Intro to Civil Law Legal Systems’ available at <https://www.inprol.org>, accessed on 9 August 2018.

⁹⁸ Caslav Pejovic ‘Civil Law and Common Law: Two Different Paths Leading to the Same Goal’ (2001) 40 *VUWLR* 7 at 9.

⁹⁹ Pistone et al op cit note 50 para 3.2.1.; Helmut Coing ‘The Sources and Characteristics of the Ius Commune’ (1986) 19(3) *CILSA* 483.

¹⁰⁰ Coing op cit note 99 at 483 - 4.

¹⁰¹ Ibid at 484.

¹⁰² Pistone et al op cit note 50 at para 3.2.1.

¹⁰³ Joseph Dainow ‘The Civil law and the Common law: Some Points of Comparison’ (1966) 15(3) *Am. J. Comp. Law* 419; Pejovic op cit note 98 at 9.

¹⁰⁴ Garnaas-Holmes op cit note 94 at 2.

¹⁰⁵ Seon Bong Yu ‘The Role of the Judge in Common Law and Civil Law Systems: The Cases of the United States and European Countries’ (1999) 2(2) *Int. Area Rev.* 35 at 42.

¹⁰⁶ Yu op cit note 105 at 42.

France and Germany are examples of where the courts need to fill legislative gaps and where, although there is no doctrine of precedent, the courts do in fact refer to previous decisions.¹⁰⁷

In a country such as France, discretion was originally considered an area outside of the law.¹⁰⁸ The court system in France came into existence before the German court system and decisions were short with reference only to the relevant provisions and limited or no reference to doctrine.¹⁰⁹ In contrast, German court decisions were longer with reference to legal opinion, doctrine, etc.¹¹⁰ Throughout the 20th century, civil law tradition started to recognise that discretion is granted by law and that legal limits should be established to limit the exercise of discretion.¹¹¹

After World War II, civil and common law systems started to converge with many civil law countries realising ‘the fallibility of legislatures and the dangers inherent in granting any one branch supreme power’.¹¹² Both the common law and the civil law are placing increased emphasis on the legal protection of human rights.¹¹³

2.2.3.1. Germany as example of a civil law system

Judicial review was introduced in Germany after World War II. Although there were certain legal mechanisms by which political disputes were resolved, Germany had no established tradition of judicial review until after the war.¹¹⁴ After World War II, human rights obtained new significance.¹¹⁵

The scope of judicial review in German law is determined by the separation of powers on the one hand and Article 19(4) of the Basic Law (German Constitution) on the

¹⁰⁷ Ibid at 43.

¹⁰⁸ Ana Paula Dourado ‘Revenue Authority Discretions and the Rule of Law – Some Thoughts in a Legal Theory and Comparative Perspective’ in C. Evans, J Freedman & R.E. Krever (eds) *The Delicate Balance: Tax, Discretion and the Rule of Law* (2011) 9.

¹⁰⁹ Pistone et al op cit note 50 para 3.2.1 – 4.

¹¹⁰ Ibid.

¹¹¹ Dourado op cit note 108 at 9.

¹¹² Garnaas-Holmes op cit note 94 at 3.

¹¹³ John Henry Merryman ‘On the Convergence (and Divergence) of the Civil Law and the Common Law’ (1981) 17 *Stan. J. Int’l L.* 357 at 388.

¹¹⁴ Christoph Schoenberger ‘The Establishment of Judicial Review in Postwar Germany’ in Pasquino & Billi (eds) *The Political Origins of Constitutional Courts: Italy, Germany, France, Poland, Canada, United Kingdom* (2009) 79.

¹¹⁵ Schoenberger op cit note 114 at 79.

other.¹¹⁶ Article 19(4) stipulates the fundamental right of recourse to the courts should any person's rights be violated by public authority:

‘[T]he defence and the enforcement of an individual right is the basis, legitimacy and limit of the administrative judicial review in Germany; the subjective right is the cardinal point to understand the concept of judicial administrative review in Germany’.¹¹⁷

The development of judicial review was also influenced by a deep mistrust of politics and politicians and the idea of parliamentary sovereignty never rooted in German law.¹¹⁸ In Germany, the Constitution is supreme.¹¹⁹ The Basic Law confirms the ‘*rechtstaatprinzip*’ – a concept related to the rule of law.¹²⁰

The Basic Law contains a provision which is known as the ‘eternity’ clause (*‘Ewigkeitsklausel’*).¹²¹ It provides that certain fundamental principles such as the rule of law is entrenched against amendment.

2.2.4. The position in South Africa as example of a mixed legal system

South Africa's Constitution provides in article 1 that one of the values South Africa is founded on is the ‘[s]upremacy of the Constitution and the rule of law’.¹²² Du Plessis notes that ‘the hallmark of such a political system is the power of judicial review: the power of the courts, and in particular the Constitutional Court, to declare invalid and strike down legislation which is not in conformity with the requirements of the constitution’.¹²³

The South African interim Constitution of 1993 and the final Constitution of 1996 brought about the end of the era of Apartheid and introduced an era of constitutional supremacy. Historically, South African administrative law was heavily influenced by English law, especially the doctrines of legislative supremacy and parliamentary

¹¹⁶ Jan S. Oster ‘The Scope of Judicial Review in the German and U.S. Administrative Legal System’ (2008) 9(10) *Ger. Law. J.* 1267 at 1273.

¹¹⁷ Dr. Carsten Günther ‘Administrative Justice in Europe’ available at <http://www.aca-europe.eu>, accessed on 27 October 2018.

¹¹⁸ Schoenberger op cit note 114 at 80.

¹¹⁹ Pohlman op cit note 15 at 37.

¹²⁰ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 CC para 56.

¹²¹ Michael Hein ‘Constitutional Norms for All Time General Entrenchment Clauses in the History of European Constitutionalism’ (2019) 21(3) *EJLR* 226 at 238.

¹²² Constitution of the Republic of South Africa, 1996.

¹²³ Max du Plessis ‘The legitimacy of judicial review in South Africa's new constitutional dispensation: insights from the Canadian experience’ (2000) 33(2) *CILSA* 227 at 228.

sovereignty.¹²⁴ The similarities with English law was formal rather than substantive in nature.¹²⁵ The South African Parliament had never been a truly democratically elected Parliament.¹²⁶ It enjoyed supreme power and conferred wide powers on the executive with vaguely worded legislation.¹²⁷ It is said that prior to the democratic era, the courts acted deferentially and applied formalistic reasoning as opposed to substantive principle.¹²⁸ The courts did not focus on the fundamental question of what administrative justice required in a particular case – instead, the courts tried to restrict the administrative grounds for review.¹²⁹ The jurisdiction of the courts were often ousted, leading to a weakening of the rule of law.¹³⁰

Under the new constitutional order, the institutional role of the courts is recognised. The ‘separation of powers’ doctrine is not referred to in the text of the South African Constitution, but the Constitutional Court has on several occasions declared it to be part of the constitutional framework on the basis that South Africa’s Constitution provides for separation between the three spheres of government.¹³¹

The Constitution specifically refers to the rule of law.¹³² However, not all principles of the rule of law lend themselves to constitutional entrenchment, e.g. the principle that discretions should not be readily entrusted to the government and officialdom of other persons.¹³³ Although the Bill of Rights contains an administrative justice clause, the national legislation enacted to give effect to such right is narrow in its application.¹³⁴ The Constitutional Court has, however, recognised that the principle of legality forms part of our law:

‘The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the

¹²⁴ Lawrence Baxter *Administrative Law* (1984) 30.

¹²⁵ Baxter op cit note 124 at 32.

¹²⁶ Ibid.

¹²⁷ Ibid at 33.

¹²⁸ Cora Hoexter ‘The Principle of Legality in South African Administrative Law’ (2004) 4 *Macquarie L.J.* 165 at 167-8.

¹²⁹ Hoexter op cit note 128 at 168.

¹³⁰ Baxter op cit note 124 at 33.

¹³¹ Judge Phineas M Mojapelo ‘The doctrine of separation of powers (a South African perspective)’ available at <https://www.sabar.co.za>, accessed on 17 December 2019. In terms of section 173 of the Constitution, the Constitutional Court, the Supreme Court of Appeal, and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

¹³² Section 1(c) of the Constitution of the Republic of South Africa, 1996.

¹³³ Beinart op cit note 55 at 137.

¹³⁴ Hoexter op cit note 128 at 177.

constitution. It entails that both the Legislature and the Executive “are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by the law”¹³⁵.

The Supreme Court of Appeal has recognised the role of the common law in giving effect to the right to just administrative action, noting that action which does not meet the requirements of natural justice is procedurally unfair and therefore equally unconstitutional. It stated that the common law grounds for review were intended to remain intact provided it is consistent with the Constitution.¹³⁶ This view is shared by the Constitutional Court.¹³⁷

The *ultra vires* doctrine also remains relevant. The Constitutional Court has stated that it will provide the point of departure for the inquiry:

‘The framework for the investigation will continue to be the objectives sought to be achieved by the enabling law. What is new...is the constitutional requirement of legality, in this connection in relation to the substantive character of the measure concerned. In this context legality requires compliance not only with the empowering statute, but with general constraints on the exercise of public power flowing from the nature of our constitutional democracy, in particular the requirement that government be open, responsive and accountable’.¹³⁸

It is evident that both the *ultra vires* doctrine and the common law continue to be relevant to the South African law of judicial review, subject always to the Constitution. South African courts are also faced with the task of adopting a rights-based jurisprudence.¹³⁹ These courts have to adopt ‘a theory of constitutional interpretation’, i.e., judges cannot merely rely on the text of the Constitution, but also have to interpret the values underlying it to give effect to individual rights. It is said that South African

¹³⁵ *Affordable Medicines Trust v Minister of Health* (CCT 27/04) [2005] ZACC 3. See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* (CCT7/98) [1998] ZACC 17, *President of the Republic of South Africa v South African Rugby Football Union* (CCT16/98) [1999] ZACC 12, *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* (CCT31/99) [2000] ZACC 1.

¹³⁶ *Commissioner for Customs and Excise v Container Logistic (Pty) Ltd, Commissioner for Customs and Excise v Rennies Group Limited t/a Renfreight* [1999] ZASCA 35 (Container Logistics) para 20.

¹³⁷ *Pharmaceutical Manufacturers* supra note 135 para 45.

¹³⁸ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14 para 632.

¹³⁹ Du Plessis op cit note 123 at 229.

courts give practical effect to such an approach through a purposive approach to interpretation.¹⁴⁰

It has been stated that the foundation of judicial review in the democratic era is in the Constitution.¹⁴¹ The Constitution itself is however a product of Parliament. Although it is true that the Constitution establishes ‘institutional and procedural safeguards’ for the amendment thereof, none of its provisions are protected from amendment.¹⁴² More importantly, an amendment cannot be tested for constitutionality.¹⁴³ The Constitution does not impose ‘substantive limits on the power of constitutional amendments’.¹⁴⁴ Regressive amendments is a possibility (though it may seem remote) given South Africa’s political climate, e.g. the removal of the provisions that embed the separation of powers doctrine. A more convincing basis for judicial review is constitutional principles such as the rule of law and the separation of powers and it may be asked whether these principles should not be entrenched against amendment in a written constitution that is the supreme law.

2.3. Concluding comments

The above jurisdictional analysis illustrates that the justification for judicial review is no longer limited to the *ultra vires* doctrine.

Coughlin notes that ‘traditionally, judicial review has afforded an important check on the exercise of administrative power – it functions to protect the legislative intent behind the statutory authorization of the exercise of administrative power’.¹⁴⁵ It also ensures that ‘common law requirements of clarity, consistency, and fundamental fairness are observed by regulatory agencies’.¹⁴⁶ He states that whilst these reasons remain valid justifications for judicial review, judicial review also safeguard two

¹⁴⁰ Ibid at 239.

¹⁴¹ Kate O’Regan ‘The Constitution and Administrative Law: Insights from South Africa’s Constitutional Journey’ available at <https://adminlawblog.org>, accessed on 21 October 2018.

¹⁴² Adem Kassie Abebe ‘The substantive validity of constitutional amendments in South Africa’ (2014) 131(3) *SALJ* 656 at 659.

¹⁴³ Pierre de Vos ‘Explainer: What’s involved in changing the Constitution’ available at <https://mg.co.za>, accessed on 23 December 2019.

¹⁴⁴ Abebe op cit note 142 at 691. Abebe notes that there are various factors that may prevent regressive amendments from being made, such as domestic and international pressure. The Constitutional Court itself may also need to consider the substance of an amendment in order to determine whether the procedural requirements were met.

¹⁴⁵ John J Coughlin ‘The History of the Judicial Review of Administrative Power and the Future Regulatory Governance’ (2001) 38 *Idaho L. Rev.* 89 at 92 – 3.

¹⁴⁶ Coughlin op cit note 145 at 94.

constitutional values, being the constitutional doctrine of the tripartite separation of powers and the protection of personal autonomy through individual rights.¹⁴⁷

The UN's Universal Declaration of Human Rights in 1948 inspired a post-World War II 'phenomenon' in relation to the international protection of human rights.¹⁴⁸ Since the international protection of human rights is relatively new, it is not universally accepted that the rule of law requires that fundamental human rights be adequately protected. However, in the late Lord Bingham's view that is exactly what the rule of law requires:

'It is, I think, possible to identify the rights and freedoms which, in the UK and developed Western or Westernized countries elsewhere, are seen as fundamental, and the rule of law requires that those rights should be protected'.¹⁴⁹

Lustig and Weiler are of the view that judges, whether exercising administrative or constitutional judicial review, in both instances 'hope to constrain and check the state apparatus in the name of the rule of law and increasingly to the advantage of disempowered individuals'.¹⁵⁰ In Shapiro's view, a conjunction of rights-based judicial review and division of powers-generated judicial review is most likely to generate successful review.¹⁵¹

¹⁴⁷ Ibid.

¹⁴⁸ Bingham op cit note 44 at 116.

¹⁴⁹ Ibid at 68 - 84.

¹⁵⁰ Doreen Lustig and J.H.H. Weiler 'Judicial review in the contemporary world – Retrospective and prospective' (2018) 16 *I-CON* 315 at 320.

¹⁵¹ Shapiro op cit note 43 at 201.

3. SPECIFIC ASPECTS OF TAX TREATIES AND TAXPAYERS' RIGHTS

In the previous Chapter, consideration was given to the foundations of the doctrine of judicial review as a mechanism to control the exercise of public power. This chapter will focus on the exercise of discretion by revenue authorities in a tax treaty context and the effect it may have on the rights of taxpayers if left unfettered. The analysis is focused on specific model-based tax treaty clauses with open-ended wording, namely i) exchange of information on request, ii) mutual agreement procedure and iii) the principal purpose test.

3.1. The exercise of discretion by revenue authorities

De Cogan writes that the exercise of discretion by revenue authorities is an aspect of tax law that generates strong feelings.¹⁵² In this regard, he states that

‘particular vigilance is needed that discretionary powers are not shifted progressively to revenue officials, without sufficient reason and to the detriment of traditional rule of law values. It is important that a common language is developed, with which these matters may be discussed and contested openly’.¹⁵³

Revenue authorities can easily act outside of their intended authority if tax law is uncertain or if there is uncertainty in its interpretation and application.¹⁵⁴ Judicial review is seen as a mechanism by which a taxpayer can challenge a revenue official’s use of discretion, either because it exceeds the intended ambit, or that it is exercised in an improper way.¹⁵⁵ It is necessary to balance the rule of law with the efficient administration of a tax system.¹⁵⁶

In Dourado’s view, the differences between common law and civil law countries are not relevant any longer in its basic framework in respect of the topic under analysis:

¹⁵² D de Cogan ‘Tax, Discretion and the Rule of Law’ in C. Evans, J. Freedman & R.E. Krever (eds) *The Delicate Balance: Tax, Discretion and the Rule of Law* (2011).

¹⁵³ De Cogan op cit note 152 at 1.

¹⁵⁴ Michael Walpole & Chris Evans ‘Revenue Authority and the Rule of Law in Australia’ in C. Evans, J. Freedman & R.E. Krever (eds) *The Delicate Balance: Tax, Discretion and the Rule of Law* (2011).

¹⁵⁵ J. Freedman & J. Vella ‘HMRC’s Management of the U.K. Tax System: The Boundaries of Legitimate Discretion’ in C. Evans, J. Freedman & R.E. Krever (eds) *The Delicate Balance: Tax, Discretion and the Rule of Law* (2011).

¹⁵⁶ De Cogan op cit note 152 para 3.2.

‘It is common to every Member State of the EU, the OECD and other countries, that rules involving transactions among multinational companies...are vague and often lead to indeterminacy, which is progressively determined by regulations, administrative rulings and (other) soft law instruments. Their compatibility with the law, as well as the interpretation of such administrative rules, are to be checked by the courts and any remaining indeterminacy is to be progressively determined by case law’.¹⁵⁷

3.2. Tax treaties and the rights of taxpayers

In the context of tax treaties and human rights, Baker writes that

‘[t]here is no reason why double taxation conventions should be immune from scrutiny to ensure consistency with international human rights instruments. Nor is there any reason in principle why taxpayers might not challenge the application to them of the provisions of double taxation conventions on grounds that those provisions infringe human rights norms’.¹⁵⁸

There is generally, for numerous reasons, a weakening of the practical protection of taxpayers’ rights in cross-border situations.¹⁵⁹ This is mainly due to the fact that procedures such as exchange of information and the mutual agreement procedure are carried out among states and as a result taxpayers ‘are not bound to intervene in these procedures’.¹⁶⁰ These procedures nonetheless impact the rights of individual taxpayers. The OECD has recognised that the rights to privacy, to confidentiality, of access to information, and to appeal against decisions of the administration are fundamental rights in democratic societies.¹⁶¹ However, since there is no universal framework for taxpayers’ rights, the existence of and interaction of fundamental rights with taxation depend on each legal system.

Neve writes that

‘[w]e are currently also seeing a constitutionalisation of international law, whereby constitutionally protected civil rights are becoming increasingly important in the

¹⁵⁷ Dourado op cit note 108 at 10.

¹⁵⁸ Philip Baker QC ‘Double Taxation Conventions and Human Rights’ in Baker & Bobbett (eds) *Tax Polymath: A life in International Taxation: Essays in Honour of John F. Avery Jones* (2010) 64.

¹⁵⁹ Philip Baker and Pasquale Pistone ‘General Report’ in International Fiscal Association et al (eds) *The Practical Protection of Taxpayers’ Fundamental Rights* (2015) 58.

¹⁶⁰ IBFD ‘Observatory on the Protection of Taxpayers’ Rights’ available at <https://www.ifbd.org>, accessed on 7 January 2019.

¹⁶¹ OECD *Taxpayers Rights and Obligations: A Survey of the Legal Situation in OECD Countries* (1990).

application of international law... This new perspective on international law can also be seen from a global administrative law perspective, with the intention being to apply the principles of administrative and constitutional law in the field of international law, and the core idea being that the exercising of institutional authority should be restrained and controlled by procedures and processes under law...[t]his great focus on human rights in international law applies also in tax law'.¹⁶²

3.3. Exchange of taxpayer information

Three forms of exchange of information are recognised, being on request, automatic and spontaneous. This dissertation will only consider exchange of information on request.¹⁶³ It is said that, although there is an undeniable shift towards an automatic exchange of information, the exchange of information on request will remain an important tool for gathering information outside the scope of the instruments for automatic exchange of information.¹⁶⁴

3.3.1. Origin and development of the exchange of information model-article

The exchange of information article in the OECD Model Tax Convention (OECD MTC) has its roots in the 1927 League of Nations draft of a Bilateral Convention on Administrative Assistance in Matters of Taxation.¹⁶⁵ This draft agreement, *inter alia*, provided for exchange of information upon request.¹⁶⁶ Although not finalised, the League of Nations published its model bilateral tax treaty in 1928 which would form the basis of future bilateral tax treaties.¹⁶⁷ Since then, the provision has undergone several changes, most notably during the last decade in response to the OECD's 2008 report on harmful tax competition.¹⁶⁸

¹⁶² Leo E.C. Neve 'The Peer Review Process of the Global Forum on Transparency and Exchange of Information for Tax Purposes: A Critical Assessment on Authority and Legitimacy' (2017) 10(2) *Erasmus L. Rev.* 89 at 100.

¹⁶³ Automatic exchange of information is a separate research topic and beyond the scope of this dissertation. However, many of the issues raised in this dissertation will also be relevant in the context of automatic exchange of information insofar as it affects taxpayers' rights.

¹⁶⁴ Niels Diepvens 'The taxpayer's rights in international exchange of information on request procedures; after the ECJ Sabou Case' available at chrome-extension://oemmndcbldboiebfnladdacbfmadadm/http://www.econtaxmons2015.be/wp-content/uploads/2015/03/ECONTAX-Diepvens-Niels-16-09-2015.pdf, accessed on 7 January 2019.

¹⁶⁵ Diane Ring 'Article 26: Exchange of Information – Global Tax Treaty Commentaries' available at www.ibfd.org, accessed on 23 December 2020.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ Neve op cit note 162 at 90.

In a 1998 report the OECD noted how exchange of information provisions at the time were inadequate in facilitating cross-border exchange of information, specifically where secrecy laws prevented information exchange on taxpayers that benefited from preferential tax regimes.¹⁶⁹ The OECD's work in this regard also led to the formation of the Global Forum on Taxation (Global Forum), an organization that initially consisted of OECD countries and other jurisdictions which agreed to adopt and implement measures relating to transparency and exchange of information.¹⁷⁰

One of the Global Forum's first tasks was to assist in the development of the OECD Model Tax Information Exchange Agreement (TIEA).¹⁷¹ The TIEA obliged countries to restrict domestic secrecy provisions that could prevent the exchange of information relating to foreign residents.¹⁷² It was designed to facilitate exchange of information with so-called 'tax havens' and also with other countries with which a country had no bilateral treaty in force.¹⁷³ The provisions of the TIEA model were subsequently incorporated into the 2005 OECD MTC and the 2010 UN MTC.¹⁷⁴

The Global Forum was responsible for developing the initial international standard for exchange of information on request.¹⁷⁵ Currently, the international standard on exchange of information results from Article 26 of the OECD MTC, Article 1 of the 2002 OECD Model Agreement on Exchange of Information and its 2005 Commentary and the 2010 Protocol to the Council of Europe/OECD Convention on Mutual Administrative Tax Matters.¹⁷⁶ After being restructured as the Global Forum on Transparency and Exchange of Information for Tax Purposes in 2009, it launched the peer review process on instruction of the G20 international forum. This entailed the review of member jurisdictions' ability to cooperate with other revenue authorities in accordance with the international standard for exchange of information on request, i.e. assessing the effectiveness of the legal and regulatory mechanisms in place to facilitate

¹⁶⁹ OECD 'Harmful Tax Competition: An Emerging Global Issue' available at <https://read.oecd-ilibrary.org>, accessed on 7 January 2019.

¹⁷⁰ OECD 'Global Forum on Transparency and Exchange of Information for Tax Purposes' available at <http://www.oecd.org/tax/transparency>, accessed on 7 January 2019.

¹⁷¹ Ring op cit note 165 at 1.2.5.3.

¹⁷² Neve op cit note 162 at 90.

¹⁷³ Ring op cit note 165 at 1.2.5.2.

¹⁷⁴ Neve op cit note 162 at 90.

¹⁷⁵ Ring op cit note 165 at 1.2.5.3.

¹⁷⁶ Ana Paula Dourado 'Exchange of Information and Validity of Global Standards in Tax Law' available at <http://cadmus.eui.eu>, accessed on 7 January 2019.

exchange of information on request.¹⁷⁷ The involvement of the G20 represented an ‘unprecedented high level political commitment to the regime’.¹⁷⁸ Some countries had to amend legislation on timely and effective processes of exchange of information to get a positive rating.¹⁷⁹ It is said that the Global Forum’s authority and strength of its recommendations are such that countries were forced to amend laws.¹⁸⁰ It represents a multilateral convention, i.e. no parliamentary approval is required for international commitment.¹⁸¹ It is a non-legislative body that sets the rules and as a result constitutionally protected rights of taxpayers have been trumped by the need for a universal efficient system for exchange of information.¹⁸²

As a result of this peer review process, taxpayers’ rights have been affected.¹⁸³ An example is the legislative amendments that were introduced in The Netherlands with effect from 1 January 2014. Up to 31 December 2013, taxpayers were notified of the decision to exchange information with a foreign competent authority. For ten days, the information could not be exchanged, and the taxpayer could object to the Tax and Customs Administration and thereafter an appeal to the court was possible.¹⁸⁴ One of the reasons given by the State Secretary for the abolishment of this notification procedure was that the Global Forum’s peer review report recommended it.¹⁸⁵

Luxembourg also amended legislation in 2014 to no longer provide a remedy for taxpayers against a request for exchange of information or against a decision ordering the production of information. The only remedy available was against the penalty imposed for non-production of information.¹⁸⁶ Luxembourg justified these amendments on the basis that the Global Forum required them.

¹⁷⁷ OECD op cit note 170.

¹⁷⁸ Richard Ecclestone *The dynamics of Global Economic Governance: The Financial Crisis, the OECD, and the Politics of International Tax Cooperation* (2012) 89.

¹⁷⁹ Neve op cit note 162 at 91.

¹⁸⁰ Ibid.

¹⁸¹ Ibid at 94.

¹⁸² Ibid at 103.

¹⁸³ Ibid at 91.

¹⁸⁴ Anke Feenstra ‘It takes two to tango: international exchange of information on tax matters and the protection of taxpayers’ rights’ available at <https://www.ibanet.org>, accessed on 24 December 2018.

¹⁸⁵ Neve op cit note 162 at 91.

¹⁸⁶ Ibid.

Commentators have stated that it is ‘wholly inappropriate that existing and apparently effective protections for taxpayers’ right should be removed through pressure placed on states concerned’.¹⁸⁷

3.3.2. Exchange of information and taxpayers’ rights

The European Commission on Human Rights expressed the view in 1982 that the gathering of information from a taxpayer by a revenue authority was *prima facie* a breach of the right to privacy and could only be justified if it were in accordance with the law, necessary in a democratic society and was not disproportionate.¹⁸⁸

Article 26 of the OECD MTC, which incorporates the international standard on exchange of information on request and facilitates the exchange of information in terms of tax treaties, provides for rights and obligations of the contracting states.¹⁸⁹

The Terms of Reference as developed by the Global Forum to assess compliance and implementation of the exchange of information on request standard does not provide for rights of the taxpayer or third-party information holders.¹⁹⁰

It is said that

‘[a]ll in all, except for the foreseeable relevance of the request and confidentiality of the information exchanged, no minimum legal standard concerning taxpayers’ rights in domestic legal systems is required as a condition for bilateral or multilateral exchange of information, and it is not certain that both legal requirements will be duly observed by the contracting states’.¹⁹¹

These two legal requirements will be analysed below as well as other rights of taxpayers that are relevant to the exchange of information process.

3.3.2.1. The standard of foreseeable relevance and a right to privacy

The main rule concerning exchange of information is contained in the first sentence of the paragraph.¹⁹² Article 26(1) of the 2017 OECD MTC provides that

‘the competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the

¹⁸⁷ Baker and Pistone op cit note 159.

¹⁸⁸ *X (Hardy-Spirlet) v. Belgium*, application number 9804/82, 7 December 1982.

¹⁸⁹ Neve op cit note 162 at 94.

¹⁹⁰ Ibid at 95.

¹⁹¹ Dourado op cit note 176 at 10.

¹⁹² OECD (2017) ‘Commentary on Article 26’ in *Model Tax Convention on Income and on Capital 2017* para 5, available at www.oecd.org, accessed on 7 January 2019.

administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States...'.¹⁹³

Up to 2005, the OECD MTC article required that the information be 'necessary'. There are arguments to be made that the new wording ('foreseeably relevant') is not a clarification as stated by the OECD, but that there is in fact a broader meaning to it given the global developments in this context.¹⁹⁴ The standard of foreseeable relevance is intended 'to clarify that Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer'.¹⁹⁵ The phrase 'fishing expedition' is generally understood as a request for information where the state does not have a specific taxpayer or person in mind but anticipates that the information might lead to the identification of taxpayers engaging in tax avoidance or evasion behaviours.¹⁹⁶

It is immaterial whether the requested information proves to be relevant – all that is required is a reasonable possibility at the time that the request is made that the information will be relevant.¹⁹⁷ The new expression makes it more difficult to determine the boundaries between foreseeable relevance and fishing expeditions and it may facilitate fishing expeditions.¹⁹⁸

The OECD/Global Forum has been controlling the interpretation of the standard as contained in Article 26.¹⁹⁹ Compliance is monitored through the Global Forum peer review process.²⁰⁰ Interpretations that were too restrictive led to adverse findings.²⁰¹ Such an approach has 'led to a skewed process in which requesting states drive the interpretation of the foreseeable relevance standard, whereas requested states and taxpayers are forced to remain passive even though the standard also aims to protect their interests'.²⁰² The role of the judiciary in the requested state should not be

¹⁹³ OECD (2017) 'Article 26' in *Model Tax Convention on Income and on Capital 2017* available at www.oecd.org, accessed on 7 January 2019.

¹⁹⁴ Dourado op cit note 176 at 3.

¹⁹⁵ OECD op cit note 192 para 5.

¹⁹⁶ Ring op cit note 165 at 2.1.3.

¹⁹⁷ OECD op cit note 192 para 5.

¹⁹⁸ Dourado op cit note 176 at 11.

¹⁹⁹ Bob Michel 'Exchange of Information on Request: Whenever, Wherever? Shakira's (and Berlioz's) Right to Judicial Review of the Foreseeable Relevance Standard' (2019) 73(2) *Bull. Intl. Tax.* 90 at 91.

²⁰⁰ Michel op cit note 199 at 91.

²⁰¹ Ibid.

²⁰² Ibid.

overlooked.²⁰³ Judicial scrutiny of the standard of foreseeable relevance could contribute to clarifying how the standard should be applied in practice.²⁰⁴ Judicial decisions in this regard is considered in Chapter IV.

3.3.2.2. Confidentiality of the information exchanged

Article 26(2) provides that information received under paragraph 1 shall be treated as secret and in the same manner as information obtained under the domestic laws of the State.²⁰⁵ It is said that this confidentiality limit does not grant the necessary protection to the taxpayer since the current standard cross-refers to domestic law and therefore only assures a non-discrimination or equivalence principle, i.e. different procedural rules and different levels of protection will be applicable in the various contracting states.²⁰⁶ The standard of protection that would apply would be that of the requesting state, resulting in less protection for the taxpayer or third-party information holder should the requested state have a higher standard of confidentiality.²⁰⁷

3.3.2.3. Other rights

The OECD has recognised that taxpayers have the right to be informed of an information request and its essential content, to participate in the process of gathering information, and to appeal the legitimacy of the request.²⁰⁸ However, the various OECD models have never included these rights.²⁰⁹ Any references only state that the rights as set out in domestic law of the contracting states are respected.²¹⁰ The situation becomes problematic when different levels of protection are awarded in different states.²¹¹

A right to be informed or notified is not required under the Global Forum's terms of reference as it affects the timeliness of exchanges.²¹² As a result, due to increasing pressure, some states have removed such a right (refer 3.3.1 above). The Commentary

²⁰³ Ibid.

²⁰⁴ Ibid at 104.

²⁰⁵ OECD op cit note 193.

²⁰⁶ Dourado op cit note 176 at 15.

²⁰⁷ Neve op cit note 162 at 97.

²⁰⁸ OECD *Tax Information Exchange Between OECD Member Countries* (1994) para 66.

²⁰⁹ Sergio Andre Rocha 'Exchange of Information and the Protection of Taxpayer Rights: General Comments and the Brazilian Perspective' (2016) 70(9) *Bull. Intl. Tax.* 502 at 503.

²¹⁰ Ibid at 503.

²¹¹ Yurika Ishii 'International Law and the Global Forum on Transparency and Exchange of Information for Tax Purposes' (2017) 21(13) *ASIL Insights* para 24.

²¹² Michel op cit note 199 at 92.

provides that if states include notification procedures in domestic law, it should not be applied in a manner that would prevent or delay effective exchange of information.²¹³

Commentators view the right to be informed of potential limitations of rights by the state, e.g., of property (taxes), as a fundamental human right that should function as a minimum standard of protection.²¹⁴ It should only be excluded if there are grounds to believe that an investigation may be compromised.²¹⁵ Absent this right, one may question how a taxpayer would be able to participate in the information gathering process or question the legitimacy of a request for exchange of information. These aspects are considered in Chapter IV.

3.4. Mutual agreement procedure

The mutual agreement procedure (also referred to as MAP) is a tax treaty procedure which allows contracting states to negotiate to endeavour to resolve by mutual agreement cases of taxation which are not in accordance with the treaty. Baker refers to MAP as the ‘black hole of taxpayer rights’.²¹⁶ In the analysis to follow, consideration is given to the history and wording of Article 25 as well as the influence of the OECD/G20 Base erosion and profit shifting (BEPS) Action 14 minimum standard and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (Multilateral Instrument).²¹⁷

3.4.1. Origin and development of Article 25

Historically, there have been three types of mutual agreement procedure. The first being the specific case provision allowing a taxpayer to approach the state of nationality if taxation was not in accordance with the terms of the tax treaty; the second being the interpretative provision providing for the two contracting states to resolve interpretation and application difficulties; and the third being the legislative provision which provides for contracting states to resolve cases of double taxation outside of the

²¹³ OECD op cit note 192 para 14.1.

²¹⁴ Carlos E. Weffe H. ‘The Right to Be Informed: The Parallel between Criminal Law and Tax Law, with Special Emphasis on Cross-Border Situations’ (2017) 9(3) *WTJ* 430.

²¹⁵ IBFD op cit note 160.

²¹⁶ Baker op cit note 159 para 9.6.

²¹⁷ The current wording of Article 25 is set out in Annexure A paragraph 16.

treaty.²¹⁸ These provisions were found in early tax treaties concluded in the 1920s, 1930s and 1940s.²¹⁹

The focus of the discussion will be on the specific case provision as contained in Article 25(1) and (2) of the 2017 OECD MTC — that is on the basis that it requires the taxpayer's involvement, which is not necessarily the case with the second and third types of mutual agreement procedure.²²⁰ Brief comments will be made on the second type of agreement.

The wording of Article 25, as it read prior to the BEPS era, stems from the 1961 OEEC MTC.²²¹ The 2017 version of the OECD MTC reflects a consolidation of treaty-related measures resulting from the BEPS Project, *inter alia*, the work done in respect of Action 14 on more effective dispute resolution mechanisms.²²² The Multilateral Instrument, known as the MLI, facilitates the implementation of the agreed BEPS measures in a widely varied network of existing treaties.²²³ Article 16 of the MLI is the equivalent of Article 25 absent the arbitration clause.

The 2014 version of Article 25(1) provided that a taxpayer could present his case to the competent authority of the contracting state of which he was a resident if he believed that there was taxation that was not in accordance with the relevant tax treaty. The 2017 version provides that a taxpayer may present his case to the competent authority of either contracting state. The Commentary states that it 'is intended to reinforce the general principle that access to the mutual agreement procedure should be as widely available as possible and to provide flexibility'.²²⁴ Contracting states are however not obliged to implement this change.²²⁵ The minimum standard in Action 14 merely requires that a contracting state rejecting a case should implement a bilateral notification or consultation process so that the other contracting state can also provide

²¹⁸ John F. Avery Jones et al 'The Origins of Concepts and Expressions Used in the OECD Model and their Adoption by States' (2006) 60(6) *Bull. Intl. Taxn.* para 3.22.

²¹⁹ *Ibid* para 3.22.

²²⁰ John F. Avery Jones et al 'The Legal Nature of the Mutual Agreement Procedure under the OECD Model Convention' (1979) 6 (1980) 1 *The Brit. Tax Rev.* 333 at 335.

²²¹ Zvi Daniel Altman *Dispute Resolution under Tax Treaties* (2006) 59.

²²² OECD 'Tax treaties: update to OECD Model Tax Convention released' available at <http://www.oecd.org>, accessed on 29 December 2018.

²²³ OECD 'Explanatory Statement to the Multilateral Convention to implement tax treaty related measures to prevent Base Erosion and Profit Shifting' available at <http://www.oecd.org>, accessed on 6 January 2019.

²²⁴ OECD (2017) 'Commentary on Article 25' in *Model Tax Convention on Income and on Capital 2017* para 17, available at www.oecd.org, accessed on 13 September 2019.

²²⁵ *Ibid*.

its view on the matter.²²⁶ Such notification or consultation should not be interpreted as consultation as to how to resolve the case.²²⁷

Article 25(2) provides that the contracting states shall endeavour to resolve a taxpayer's case, if justified, by mutual agreement in the absence of a unilateral solution. Paragraph 2 was not amended. The legal nature of the specific case provision is that of a mere *pactum de negotiando* or *pactum de contrahendo*, i.e., there is no obligation to reach a result – merely a duty to endeavour to resolve the case.²²⁸ It is 'neither a judicial nor an arbitration procedure'.²²⁹

Article 25(5) contains the arbitration clause. It was introduced in 2008 to provide a mechanism that will allow an agreement to be reached if there are issues which the competent authorities cannot resolve through negotiations.²³⁰ Unfortunately, the arbitration clause has not been made a mandatory and binding provision. Most existing tax treaties do not contain Article 25(5). The arbitration clause is not a minimum standard of Action 14 and hence parties to the MLI can opt not to apply it.

If a mutual agreement is concluded, it will in most jurisdictions not replace judicial proceedings – the taxpayer or the competent authority can appeal to the courts should the taxpayer not accept the mutual agreement.²³¹ The validity of a mutual agreement does not arise in practice under the specific case provision as the taxpayer needs to accept the agreement before it is to have effect.²³² The issue does, however, arise in the context of the interpretative agreement.²³³ In some countries such as France and Sweden, an interpretative agreement would be binding, but in other countries such as Germany and the Netherlands, the courts have the final authority.²³⁴ One of the changes effected to the 2017 OECD MTC, is an amendment to Article 3(2) which relates to a mutual agreement concluded under Article 25. Article 3(2) determines that an undefined tax treaty term will follow its domestic law meaning unless the context

²²⁶ OECD 'Making Dispute Resolution Mechanisms More Effective: Action 14 - 2015 Final Report' para 35, available at www.oecd.org, accessed on 21 September 2019.

²²⁷ Ibid.

²²⁸ Avery Jones et al op cit note 220 at 337.

²²⁹ Ibid at 338.

²³⁰ OECD op cit note 226 para 37.

²³¹ Avery Jones op cit note 220 at 340. It is said that it may be possible in some states for the mutual agreement procedure to follow court proceedings after a judicial decision has been reached, although other states will not permit it and in some the question has not been decided.

²³² Ibid at 342. See also 338.

²³³ Ibid.

²³⁴ Ibid at 347-8.

requires otherwise. The amended Article 3(2) provides for another exception to the domestic law meaning: if the competent authorities have agreed on a meaning in terms of a mutual agreement.²³⁵

The amendment stems from a change to the Commentary in 1995 allowing contracting states that entered into a mutual agreement to take such agreement into account when interpreting a term not defined.²³⁶ The updated Commentary on Article 25 provides that competent authorities can enter into an agreement to either define an undefined term or to complete or clarify the definition of a defined term if it could assist in resolving difficulties or doubts arising as to the interpretation or application of the treaty, e.g. when conflicting meanings under domestic law create difficulties or leads to an unintended or absurd result.²³⁷

Article 3(2) of the US Model Tax Convention (US MTC) was amended in a similar way in 1996. The Technical Explanation provided a different justification – it would allow the contracting states to establish a common meaning in order to prevent double taxation or to further any other purpose of the convention.²³⁸ It seems that the Commentary envisages a broader power for the competent authorities than the application intended by the US. The 2017 amendment to Article 3(2) of the OECD MTC ‘attempts to enlarge the powers of competent authorities to interpret tax treaties autonomously from domestic law to avoid, for example, results that they consider to be unintended or absurd’.²³⁹ The question as to whether such delegated legislative power is compatible with the constitutional doctrine of separation of powers will depend on the application thereof in each contracting state.²⁴⁰

It remains to be seen how courts will deal with the amended Article 3(2) and a meaning arrived at under Article 25. Will the courts allow such meaning to trump a domestic law meaning especially if it does not consider the agreement to be binding? Perhaps

²³⁵ OECD (2017) ‘Commentary on Article 3(2)’ in *Model Tax Convention on Income and on Capital 2017* para 13.2, available at www.oecd.org, accessed on 12 September 2019. The Commentary allows for contracting states to either omit this amendment (if the view is taken that the domestic law meaning should prevail) or to make it more specific by referring to an agreement reached under Article 25(3).

²³⁶ Ibid para 13.2.

²³⁷ OECD op cit note 224 para 6.1.

²³⁸ United States Model Income Tax Convention of September 20, 1996 Technical Explanation.

²³⁹ Johann Hattingh ‘Legal Considerations Arising from the Use of Memoranda of Understanding in Bilateral Tax Treaty Relations’ in Prof Guglielmo Maisto (ed) *Current Tax Treaty Issues* (2020) 379.

²⁴⁰ Ibid.

the more pertinent question is whether the courts will scrutinise the justification for establishing a different meaning pursuant to a mutual agreement.

3.4.2. Mutual agreement procedure and taxpayers' rights

The taxpayer's involvement in the mutual agreement procedure depends on the discretionary power of the competent tax authorities.²⁴¹ In Baker's view, the mutual agreement process (without arbitration) fares abysmally under the scrutiny of international, established fair trial standards.²⁴² Resolution of the dispute is in the hands of the two authorities.²⁴³ The mutual agreement procedure does not contain principles nor provide the guarantees of formal legal proceedings.²⁴⁴

3.4.2.1. Access to the mutual agreement procedure

The 2017 amendment which allows the taxpayer to present its case to the competent authority of either contracting state is a welcome development. However, contracting states are not obliged to adopt this change and can choose to make use of the alternative rule. The Commentary states that such state should take appropriate measures to ensure broad access to the mutual agreement procedure and that the decision as to whether a case should proceed to the second stage of the mutual agreement procedure is appropriately considered by both competent authorities.²⁴⁵ The Commentary is however silent on what measures should be taken.

In the absence of the incorporation of the BEPS Action 14 recommendations, a competent authority can declare a request to be valid, invalid or refuse to accept it and often the taxpayer would have no legal remedy to contest such a decision.²⁴⁶ If a taxpayer is not allowed to approach another competent authority under the tax treaty, there would be a clear denial of access to dispute resolution as that competent authority may be able to unilaterally resolve the double taxation.

²⁴¹ Katerina Perrou 'Participation of the Taxpayer in Mutual Agreement Procedure and Arbitration: Handicaps and Prospects' in Michael Lang et al (eds) *International Arbitration in Tax Matters* (2016) para 11.2.1. Perrou comments that 'consistent with the nature of proceedings as international law proceedings, no individual access is granted to taxpayers to the international system remedies'.

²⁴² Philip Baker 'Establishing a New International Framework' in Michael Lang et al (eds) *International Arbitration in Tax Matters* (2016) para 20.2.

²⁴³ Baker op cit note 242.

²⁴⁴ Mario Zuger *Arbitration under Tax Treaties* (2002) para 1.2.

²⁴⁵ OECD op cit note 224 para 18.

²⁴⁶ CFE Fiscal Committee 'Opinion statement FC4/2017 on the Proposed Directive on Double Taxation Dispute Resolution Mechanisms in the European Union' (2017) 57(8) *Eur. Taxn.* para 3.2.

3.4.2.2. Limitation of access – is it justified?

One of the justifications advanced is that taxpayers have a right of recourse to domestic courts.²⁴⁷ The problem with such an argument is that domestic courts do not have jurisdiction to rule on the levying or reduction of taxes in another jurisdiction.²⁴⁸ Although the most common mechanism to resolve cross-border tax disputes is to bring a claim before a national court or the revenue authority, it is mostly not effective due to the unilateral nature thereof.²⁴⁹ In some instances mutual agreement procedure may provide the only path to an effective remedy.²⁵⁰

A further reason why access to mutual agreement procedure is an issue, is that states want to protect their sovereignty and their tax base. African countries cannot afford to lose significant amounts of revenue and are therefore hesitant to agree to a mutual agreement procedure.²⁵¹ Treaties are however concluded with the aim of promoting economic relations between the two states and increasing the mobility of human resources, capital, and services.²⁵² A mutual agreement procedure is not aimed at negotiating the most revenue for a contracting state.²⁵³

Several states have a strong constitutional history to preserve the principle of legality.²⁵⁴ The argument is that ‘tax authorities cannot, within the ambit of a MAP, refrain from charging a tax created by the law’.²⁵⁵ Commentators are of the view that the principle of legality is not affected and that the treaty itself is drafted to provide for negotiations in case of conflict.²⁵⁶

It is suggested that there is no legitimate aim that could justify a blanket denial of the taxpayer’s direct access to an international tax dispute resolution system.²⁵⁷

²⁴⁷ Perrou op cit note 241 para 11.3.1.

²⁴⁸ CFE Fiscal Committee op cit note 246 para 3.1.

²⁴⁹ S. Govind & L. Turcan ‘Cross-Border Tax Dispute Resolution in the 21st century: A Comparative Study of Existing Bilateral and Multilateral Remedies’ (2017) 19(5) *Derivs. & Fin. Instrums.* 1.

²⁵⁰ Baker op cit note 242.

²⁵¹ Annet Wanyana Ogutto ‘Resolving Treaty Disputes: The Challenges of Mutual Agreement Procedures with a Special Focus on Issues for Developing Countries in Africa’ (2016) 70(12) *Bull. Intl. Taxn.* para 7.3.

²⁵² Mario Zuger *Arbitration under Tax Treaties* (2002) para 1.1.

²⁵³ Ogutto op cit note 251 para 8.

²⁵⁴ Luis Eduardo Schoueri ‘Arbitration and Constitutional Issues’ in Michael Lang et al (eds) *International Arbitration in Tax Matters* (2015) para 8.3.

²⁵⁵ *Ibid* para 8.3.

²⁵⁶ *Ibid* para 8.2.

²⁵⁷ Perrou op cit note 241 para 11.3.1.

The problem with the mutual agreement procedure is that it is a state-to-state procedure that excludes taxpayers from the process – it is similar in nature to diplomatic protection - a procedure by which a state acts extra territorially to demand that international law be observed in the person of its nationals.²⁵⁸

Almeida is of the view that diplomatic protection, which was developed for and applied in international law, should not be adopted to international tax resolution.²⁵⁹ Perrou shares this view and suggests that taxpayers should participate as an equal party.²⁶⁰ There is however also a need to refine diplomatic protection to incorporate the protection of individual rights.²⁶¹

3.4.2.3. Other rights

It is said that ‘[u]nder the MAP, the taxpayer is deemed to be a mere spectator, waiting for a decision of the contracting states’.²⁶²

Article 25 determines that the competent authority to which an objection is made must determine whether the objection is justified. It therefore has a wide discretion and as a result some states tend to deny access to mutual agreement procedure, e.g., where a transaction is covered by a domestic anti-avoidance provision.²⁶³ The 2014 Commentary on Article 25 provided no guidelines as to when a complaint is justified. All that was required was that a competent authority should not reject a taxpayer’s complaint without good reason and without explaining what such good reason might be.²⁶⁴ The updated Commentary clarifies that an objection would be justified if there is, or if there is reason to believe that there will be, taxation not in accordance with the treaty in either of the contracting states.²⁶⁵ A taxpayer should have a right to be informed of the reasons why a complaint is considered not to be justified, i.e. if there are grounds to conclude that taxation is in accordance with the treaty. Article 25 places

²⁵⁸ David Leys ‘Diplomatic Protection and Individual Rights: A Complementary Approach’ (2016) 57 (Online) *Harv. Int. Law J.* para II.

²⁵⁹ Gilda Almeida ‘Should Taxpayers Have Access to the International Tax Arbitration Procedure?’ available at <https://ssrn.com>, accessed on 27 June 2020.

²⁶⁰ Katerina Perrou *Taxpayer Participation in Tax Treaty Dispute Resolution* (2013) para 2.5. Perrou notes that the structure of the mutual agreement procedure is not satisfactory, as it does not consider the special characteristics of double taxation disputes that differentiate them from traditional international law disputes for which diplomatic protection was tailored.

²⁶¹ Leys op cit note 258.

²⁶² Schoueri op cit note 254.

²⁶³ Oguttu op cit note 251 para 6.1.

²⁶⁴ G. Groen ‘The Nature and Scope of the Mandatory Arbitration Provision in the OECD Multilateral Convention’ (2017) 71(11) *Bull. Intl. Taxn.* para 2.3.

²⁶⁵ OECD op cit note 224 para 31.1.

the competent authority under an obligation to endeavour to resolve the dispute if the objection appears to be justified and there is no unilateral solution. If there are no valid grounds for concluding that the objection is unjustified, a decision not to initiate a mutual agreement procedure could be unlawful.

The obligation to initiate cannot be enforced by the taxpayer in the absence of access to a court or tribunal.²⁶⁶ If the competent authorities fail to agree on a solution, the taxpayer should be informed of the reasons for failure.²⁶⁷ Although the taxpayer cannot force the competent authorities to agree on a solution, it should have the right of appeal in terms of domestic procedural rules.²⁶⁸

The procedure itself is often time-consuming, and taxpayers are often not aware of the current standing of the procedure.²⁶⁹ It is therefore important to inform taxpayers and to involve them in the proceedings. The absence of a right to participate in the proceedings means that the taxpayer's involvement is limited and as a result the proceedings lack transparency.²⁷⁰ If the taxpayer is involved in the procedure it would allow 'a common understanding of facts and law finding' which in turn would be beneficial to tax authorities as taxpayers would be held to their statements and positions throughout the procedure.²⁷¹ The taxpayer should also be granted access to documentation unless there are valid reasons not to do so.²⁷²

Baker notes that the possibility of arbitration goes some way towards remedying the failure of the mutual agreement procedure to satisfy fair trial standards. However, it is not a perfect solution and there is still no right to a fair trial – the reason being, as Baker accurately summarises, that 'it is parasitic on an initial procedure between competent authorities'.²⁷³ Groen notes that 'cases that have been rejected by one or both of the competent authorities and never made it to the international stage of the

²⁶⁶ Zuger op cit note 252 para 1.2.

²⁶⁷ Philip Baker & Pasquale Pistone 'BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy Under the European Law in Cross-Border Situations' (2016) 25 (5/6) *EC Tax Review* 335 at 341.

²⁶⁸ Baker & Pistone op cit note 267 at 342.

²⁶⁹ Jasmin Kollman and Laura Turcan 'Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges' in Michael Lang et al (eds) *International Arbitration in Tax Matters* (2016) para 2.3.1.3.1.

²⁷⁰ Kollman and Turcan op cit note 269 para 2.3.1.3.1.

²⁷¹ Baker & Pistone op cit note 267 at 341.

²⁷² Ibid.

²⁷³ Philip Baker 'Establishing a New International Framework' in Michael Lang et al (eds) *International Arbitration in Tax Matters* (2016) para 20.2.

MAP cannot be resolved through arbitration’.²⁷⁴ Therefore it can be stated that even if a tax treaty contains an arbitration clause, it may not be effective if the request is rejected in the first place. The taxpayer should have the right to approach a national court to review the competent authority’s grounds for rejecting a request or failure to initiate a mutual agreement procedure.

3.5. The principal purpose test

The principal purpose test (PPT) is a treaty-based anti-avoidance rule.²⁷⁵ As of 6 February 2020, all of the 94 signatories to the MLI adopted the PPT.²⁷⁶ It is viewed as the most significant change introduced by the MLI - ‘it is clear that an international autonomous meaning is intended to be introduced through the uniform adoption of the PPT’.²⁷⁷

3.5.1. Origin and development of the PPT

The PPT as contained in the MLI and Article 29(9) of the OECD MTC stems from the recommendations in the BEPS Action 6 Final Report.²⁷⁸ It is not an entirely novel concept. The development spans over 40 years of case law, doctrine and work by the OECD.²⁷⁹ It appears to have a ‘mixed lineage’.²⁸⁰

The PPT stems from US tax treaty practice.²⁸¹ Article 22(6) of the US MTC of 2016 is known as the ‘discretionary benefits provision’ and is found in the Limitation on Benefits Article.²⁸² It refers to a principal purpose test.²⁸³

UK tax treaty practice is another source of the PPT as ‘main purpose’ provisions have been included in the passive income articles of tax treaties in recent years.²⁸⁴

The UK’s general anti-avoidance rules (GAAR) also had an influence on the wording of the PPT. This was possibly due to the fact that the UK developed a GAAR (which

²⁷⁴ Groen op cit note 264 para 3.2.3.

²⁷⁵ Craig Elliffe ‘The Meaning of the Principal Purpose Test: One Ring to Bind Them All?’ (2019) 11(1) *WTJ* 47.

²⁷⁶ KPMG ‘BEPS Action 15 - MLI’ available at <http://tax.kpmg.us>, accessed on 20 Feb. 2020.

²⁷⁷ Elliffe op cit note 275 at 50.

²⁷⁸ The wording of Article 29(9) is set out in Annexure A paragraph 21.

²⁷⁹ Stef van Weeghel ‘A Deconstruction of the Principal Purpose Test’ (2019) 11(1) *WTJ* 3 at 43.

²⁸⁰ Elliffe op cit note 275 at 53.

²⁸¹ Johann Hattingh ‘The Impact of the BEPS Multilateral Instrument on International Tax Policies’ (2018) 72 (4/5) *Bull. Intl. Taxn.* 234 at 242.

²⁸² Refer Annexure A paragraph 22 for the full text of the Article 22(6).

²⁸³ This provision was the subject of a recent US case which is discussed in Chapter V.

²⁸⁴ Philip Baker QC ‘The BEPS Action Plan in the Light of EU Law: Treaty Abuse’ (2015) 3 *BTR* 408 at 412.

was adopted in 2013) when the OECD was actively engaged in an effort to address tax avoidance.²⁸⁵ Although the UK GAAR refers to ‘main’ and not ‘principal’, it is said in the Explanatory Memorandum to the MLI that both terms are acceptable.

Another influence is the ‘guiding principle’ which was introduced in the Commentary on Article 1 in the 2003 update to the OECD MTC:

‘A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions’.²⁸⁶

It is said that the PPT does not merely confirm the guiding principle but adds a dimension to it.²⁸⁷ It reduces the weight of the principal purpose of the tax treaty (the avoidance of double taxation) in favour of an ancillary purpose (the prevention of tax avoidance).²⁸⁸

3.5.2. The PPT and taxpayers’ rights

It is at this stage unknown what the practical effects of the PPT will be. Contracting states are still in the process of including the PPT in existing tax treaties through the process of ratification. It is said that

‘[o]nce enforced by the tax authorities the following step regarding the effectiveness of the rule is the interpretation of domestic courts around the world...The way in which the rule is adopted in each juridical system is yet to be seen. However, it has features that would encourage taxpayers to challenge its application. In particular, the principle of legal certainty and predictability of the rules that have negative consequences’.²⁸⁹

²⁸⁵ Judith Freedman ‘The UK General Anti-Avoidance Rule: Transplants and Lessons’ (2019) 73(6/7) *Bull. Intl. Taxn.* 332.

²⁸⁶ OECD (2017) ‘Commentary on Article 1’ in *Model Tax Convention on Income and on Capital 2017* para 61, available at www.oecd.org, accessed on 7 August 2019. Van Weeghel notes that the 2003 changes introduced a ‘fundamentally different approach to tax avoidance and tax treaties in that from that moment one of the purposes of a tax treaty is to prevent tax avoidance’ (refer op cit note 279 at 9).

²⁸⁷ Van Weeghel op cit note 279 at 44.

²⁸⁸ Ibid at 18.

²⁸⁹ Alejandro Theodosopoulos *The Principal Purpose Test of the OECD Multilateral Agreement and the General Anti-Avoidance Rule of the Anti-Avoidance Directive* (unpublished Master thesis Tilburg University, 2018) 53.

3.5.2.1. Compatibility with the rule of law

The principle of legality requires that rules be clear and their application predictable and not left to the discretion of tax authorities and courts.²⁹⁰ This is however also an issue with GAARs. A GAAR is a legislative provision which defines impermissible tax-avoidance arrangements.²⁹¹ Specific anti-avoidance rules (SAARs) are often drafted in detail, which creates opportunities for exploitation of loopholes.²⁹² SAARs are also ‘a reactive response to known schemes’.²⁹³ Some states have therefore adopted statutory GAARs which impose general limits on acceptable avoidance arrangements.²⁹⁴ It is intended to deter tax avoidance schemes.²⁹⁵

GAARs by their nature must be drafted vaguely to be flexible.²⁹⁶ There is no universal definition of impermissible tax avoidance and this contributes to the uncertainty of drafting clear legislative provisions.²⁹⁷ GAARs are therefore usually wide and rely on indicators of impermissible tax avoidance. These indicators can in turn be imprecise.²⁹⁸ The issue is that legislators ‘cannot predict all circumstances that give rise to tax avoidance in general’.²⁹⁹ This creates a constitutional issue for the separation of powers as the executive is left to decide whether the legislation applies to a particular arrangement or transaction. GAARs can therefore be tested for constitutional validity.³⁰⁰

In the Canadian case of *Canada Trustco*, it was stated that ‘[t]he courts cannot search for an overriding policy of the Act that is not based on a unified, textual, contextual

²⁹⁰ Ibid.

²⁹¹ Benjamin T. Kujinga ‘Factors that limit the efficacy of general anti-avoidance rules in income tax legislation: lessons from South Africa, Australia, and Canada’ (2014) 47(3) *Comp. & Int’l L.J. Afr.* 429.

²⁹² Reuven S. Avi-Yonah and Amir Pichhadze ‘GAARs and the Nexus between Statutory Interpretation and Legislative Drafting: Lessons for the U.S. From Canada’ (2017) 7(1) *Account. Econ. Law* 1 at 3.

²⁹³ Ibid at 3.

²⁹⁴ Ibid at 4.

²⁹⁵ UN ‘The Role of a General Anti-Avoidance Rule in Protecting the Tax Base of Developing Countries’ available at <http://www.un.org>., accessed on 16 January 2020.

²⁹⁶ Reuven op cit note 292 at 17.

²⁹⁷ Kujinga op cit note 291 at 439.

²⁹⁸ Ibid at 442.

²⁹⁹ Ibid at 449.

³⁰⁰ Reuven op cit note 292 at 17.

and purposive interpretation of the specific provisions in issue’.³⁰¹ Put differently – the ‘object, spirit or purposes’ must be clearly conveyed by the legislation.³⁰²

Kuzniacki argues that the PPT poses a threat to the principle of ‘[n]o taxation without representation’, i.e., taxes can be levied only by virtue of statutory law (legality of the imposition of taxes).³⁰³ A lack of clarity, precision and certainty in the application of tax provisions will cause revenue authorities to have too wide a discretion, causing them to fulfil a quasi-legislative function.³⁰⁴

Some academics are of the view that the PPT does not contravene the principle of legal certainty.³⁰⁵ There is, however, a justifiable concern that individual countries may develop divergent views on the interpretation and application of the test.³⁰⁶ This may occur at the level of the revenue authority but also at the level of national courts.³⁰⁷ It is important to have an international autonomous meaning as the same test is now found throughout treaty networks around the world as a result of the MLI.³⁰⁸

3.5.2.2. Interaction with domestic GAARs

GAARs ‘generally apply only where the sole or dominant purpose of a transaction or arrangement is to obtain a tax benefit’.³⁰⁹ In contrast, the PPT will apply if at least one of the principal purposes was to obtain the benefit.³¹⁰

The South African GAAR determines that an avoidance arrangement is impermissible if its ‘sole or main purpose’ was to obtain a tax benefit and certain other tainted elements are met.³¹¹ If the GAAR conflicts with the PPT, the provisions of a treaty are likely to prevail based on current South African law and public international law.³¹²

³⁰¹ *Canada Trustco Mortgage Co. v Canada* 2005 SCC 54 at 41.

³⁰² Reuven op cit note 292 at 15.

³⁰³ Blazej Kuzniacki ‘Constitutional Issues Arising from the Principal Purpose Test: The Lesson from Poland’ (2017) 27(2) *Studia Iuridica Lublinensia* 95 at 98.

³⁰⁴ Ibid.

³⁰⁵ Baker op cit note 284 at 5.

³⁰⁶ Elliffe op cit note 275 at 50.

³⁰⁷ Ibid.

³⁰⁸ Ibid at 52.

³⁰⁹ David G. Duff ‘Tax Treaty Abuse and the Principal Purpose Test: Part II’ available at <https://commons.allard.ubc.ca>, accessed on 12 July 2019.

³¹⁰ OECD (2017) ‘Commentary on Article 29’ in *Model Tax Convention on Income and on Capital 2017* para 180, available at www.oecd.org, accessed 15 on August 2019.

³¹¹ Income Tax Act 58 of 1962 s80A.

³¹² PwC ‘A South African Perspective on the Multilateral Instrument’s principal purpose test’ available at www.pwc.co.za, accessed on 16 August 2019. Also see the Commentary on Art 1 para 70 (op cit note 286).

In the context of the Indian GAAR provisions, it is said that '[i]t is unlikely for GAAR to apply if the PPT rule is met'.³¹³ The Indian GAAR is largely modelled on the South African GAAR.³¹⁴

From a Canadian perspective, some commentators argue that the Canadian GAAR 'effectively ousts the PPT' due to the way in which Canadian tax treaties and the MLI are enacted. The better view would be that the GAAR should be considered if a treaty benefit is not denied under the PPT – if denied under the PPT, there would be no benefit to which the GAAR could be applicable.³¹⁵

Another issue raised by the interaction between the PPT and GAARs is whether the procedural and administrative aspects of GAARs will also apply to the application of the PPT.

The first question is whether notice will be given to the taxpayer of the intended application of the PPT and whether the taxpayer will be given an opportunity to respond before a final decision is reached. In South Africa, for example, section 80J of the GAAR provides that the Commissioner must, prior to determining a tax liability, give the party notice that he or she believes that the GAAR may apply in respect of an arrangement and the notice must also contain the reasons for said view. The taxpayer then has a limited period within which to respond.

Weber comments that whilst a taxpayer can always dispute the denial of a treaty benefit because of the PPT by objecting to an assessment or before a court, in practice tax authorities will request the relevant facts and circumstances prior to applying the PPT.³¹⁶

A further question is whether the application of the PPT would be subject to approval by an advisory committee as is often the case in jurisdictions that have a statutory GAAR. In England, for example, the GAAR Advisory Panel advises HMRC on the applicability of the UK GAAR. Other jurisdictions such as Canada and Australia have

³¹³ Ashley Coutinho 'Invoke either GAAR or the principal purpose test: Asifma tells Centre' available at <https://www.business-standard.com>, accessed on 15 August 2019.

³¹⁴ KPMG 'General Anti-Avoidance Rule in India' available at <https://assets.kpmg>, accessed on 15 August 2019.

³¹⁵ Michael N. Kandev and John J. Lennard 'The OECD Multilateral Instrument: A Canadian Perspective on the Principal Purpose Test' (2020) 74(1) *Bull. Intl. Tax.* 54 at 59.

³¹⁶ Dennis Weber 'The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) versus the EU Principle of Legal Certainty and the EU Abuse of Law Case Law' (2017) 10(1) *Erasmus L. Rev.* 48 at 51.

similar panels. South Africa does not have such a panel. The Commentary also refers to the use of such a panel:

‘These types of approval processes reflect the serious nature of disputes in this area and promote overall consistency in the application of the rule. States may wish to establish a similar form of administrative process that would ensure that paragraph 9 is only applied after approval at a senior level within the administration’.³¹⁷

PwC is of the view that whilst an advisory panel may assist in ensuring that the PPT is applied consistently on an individual state-by-state basis, it is highly unlikely that all states will apply it in the same manner.³¹⁸ As a result, taxpayers engaged in cross-border activities will continue to face uncertainty in relation to treaty benefit entitlement — at least until the administrative approaches of the different jurisdictions are known.³¹⁹

It remains to be seen whether a decision under the PPT would be subject to objection and appeal in terms of Article 104 of South Africa’s Tax Administration Act, thereby ousting the jurisdiction of the High Court until all internal remedies have been exhausted. Currently, a decision under South Africa’s domestic GAAR provisions is subject to objection and appeal.³²⁰

Further procedural issues arise in relation to the burden of proof and evidence. These are discussed in more detail under 3.5.2.3 below.

Lastly, the question of a remedy arises. Once a treaty benefit has been denied, will a taxpayer have the right to object against an assessment or to take the decision on judicial review? This aspect is discussed in Chapter V of this dissertation.

3.5.2.3. Burden of proof and revenue authority discretion

The PPT can be divided into two parts, the ‘principal purposes’ part and the ‘object and purpose’ part, also referred to as the subjective and objective tests.³²¹ Elliffe points out that the subjective test actually ‘requires a court (or in the first instance, a tax authority) to reach a reasonable conclusion based on objective criteria that one of the

³¹⁷ OECD op cit note 310 para 183.

³¹⁸ PwC ‘Anti-abuse themes in the OECD’s Final BEPS reports’ available at www.pwc.com, accessed on 20 August 2019.

³¹⁹ Ibid.

³²⁰ Section 3(4)(b) of the Income Tax Act read with Section 104 of the Tax Administration Act 28 of 2011.

³²¹ Van Weeghel op cit note 279 at 11.

principal purposes of the arrangement or transaction was to obtain a tax benefit under the tax convention'.³²² The objective test is also referred to as the proviso to the subjective test, i.e. the PPT will not apply if it is established that granting the benefit would be in accordance with the object and purpose of the relevant provisions of the tax treaty.³²³ The Commentary suggests that the burden of proof in respect of the objective test falls on the taxpayer.³²⁴ Some commentators are of the view that the PPT 'alters the division of the burden of proof regarding treaty abuse'.³²⁵ Under the 'guiding principle', revenue authorities have to prove both the subjective and objective element, whilst under the PPT the revenue authority need only prove the subjective element.

Kuzniacki is of the view that the criticism of many authors regarding the PPT's burden of proof is not justified.³²⁶ One of the arguments advanced by him is that the split in the burden of proof is in line with national rules on the burden of proof under anti-abuse provisions - tax authorities must prove as a first step that an arrangement is abusive in terms of e.g., a GAAR, and taxpayers must then provide counterevidence. He is further of the view that the burden of proof under the guiding principle is in fact not so different from the burden of proof under the PPT:

'Indeed, the tax authorities will take in account the second element of the PPT at the concluding stage of their first element consideration, even though the wording of the PPT does not require them to do so. The need to consider the purpose of tax treaties according to the rule of interpretation under Article 31(1) of the Vienna Convention on the Law of Treaties supports this observation too.'³²⁷

He however notes that 'a dangerously low threshold for treaty abuse appears to be invoked by the phrase "one of the principal purposes of any arrangement or transaction"'.³²⁸ The Commentary provides that it is not necessary to find conclusive proof of the intent of a person concerned with an arrangement or transaction, but it must be reasonable to conclude, after an objective analysis of the relevant facts and

³²² Elliffe op cit note 275 at 66.

³²³ Ibid at 69.

³²⁴ OECD op cit note 310 para 170.

³²⁵ Luc De Broe and Joris Luts 'BEPS Action 6: Tax Treaty Abuse' (2015) 43(2) *Intertax* 122.

³²⁶ Blazjez Kuzniacki 'Untangling the PPT's burden of proof' available at kluwertaxblog.com, accessed on 10 August 2019.

³²⁷ Ibid.

³²⁸ Blazjez Kuzniacki 'The Principal Purpose Test (PPT) in BEPS Action 6 and the MLI: Exploring Challenges Arising from Its Legal Implementation and Practical Application' (2018) 10(2) *WTJ* 233 at 255.

circumstances, that one of the principal purposes of the arrangement or transaction was to obtain the benefits of the tax convention.³²⁹ In Lang's view, this creates bias in favour of the revenue authority — the revenue authority need not produce full evidence.³³⁰ The rule makes it easier for revenue authorities to assume an abuse — even if the taxpayer succeeds in providing proof that the arrangement he chose is also motivated by reasons other than fiscal ones, the revenue authority can retort that, for the anti-abuse rule to apply, it suffices if he also targeted the tax benefit.³³¹

Weber disagrees with Lang's interpretation of the phrase 'reasonable to conclude'. In his view, the wording 'reasonable to conclude' does not mean the *weight* of the burden of proof on the tax authorities. Instead, it requires that the revenue authority must reach a conclusion based on an objective analysis of all facts and circumstances.³³² Weber refers to the importance of judicial review. He argues that

'[w]hen the tax authority only applies the PPT rule on the basis of the fact that there is a tax benefit, then the application of the PPT rule must... be refused by a national court'.³³³

Vikram states that it might seem at first sight that the tax authorities have 'tremendous discretion' when applying the PPT.³³⁴ However, in his view, if the proper factual inquiry leads to the conclusion that 'non tax purposes' outweigh 'tax purposes', the subjective element should not be met:

'In the end, based on an objective of the facts, the Court will have to decide whether or not the transaction/arrangement satisfied the PPT. If the existence of "abuse", "tax avoidance" or "artificial nature of the arrangement" is not clear to the Court, then the benefit of the doubt, in the author's opinion, shall go to the taxpayer'.³³⁵

3.6. Concluding comments

The above analysis of certain open-ended model-based tax treaty provisions illustrates the various difficulties that taxpayers may face if these provisions are not interpreted

³²⁹ OECD op cit note 310 para 178.

³³⁰ Michael Lang 'BEPS Action 6: Introducing an Antiabuse Rule in Tax Treaties' (2014) 74(7) *Tax Notes Int'l* 655 at 658.

³³¹ *Ibid* at 659.

³³² Weber op cit note 316 at 51.

³³³ *Ibid*.

³³⁴ Vikram Chand 'The Principal Purpose Test in the Multilateral Convention: An in depth Analysis' (2018) 46(1) *Intertax* 18 at 23.

³³⁵ *Ibid* at 21 - 3.

and applied in a consistent and fair manner. The next chapter considers the justiciability of decisions to exchange information cross-border as well as the interpretation and application by different courts of the relevant tax treaty article.

4. SELECTED DECISIONS BY FOREIGN COURTS REVIEWING REVENUE AUTHORITY DECISIONS CONCERNING THE EXCHANGE OF TAXPAYER INFORMATION

The aim of this chapter is to determine whether there is convergence in arguments used by different courts on the justiciability of cross-border exchange of information requests, the interpretation and application of the standard of foreseeable relevance and confidentiality provisions. Lastly, the issue of third-party notices is discussed. Each subsection has its own conclusion summarising the findings.

4.1. Selection of cases

Disputes regarding exchange of information between revenue authorities have multiplied.³³⁶ This is no doubt because of, *inter alia*, the influence of the Global Forum and its peer review regime over the last decade. Cases analysed were selected from the IBFD Tax Research Platform and the International Tax Law Reports.³³⁷ The selection was limited to cases on judicial review in the requested state.³³⁸ Cases were selected from both common law (e.g., New Zealand) and civil law jurisdictions (e.g., Luxembourg). Cases dealing with treaties that have different wording to the model-based clauses were excluded.³³⁹ CJEU cases dealing with EU Directives with similar wording have been included as well as cases decided in the context of TIEAs. To limit the scope of this minor dissertation, cases dealing with specific issues have been excluded.³⁴⁰ The findings of the research are summarised under each of the subheadings below.

4.2. The legality of information orders may be challenged through judicial review

The question discussed under this subheading is the justiciability of a decision taken by a revenue official pursuant to a request for information in terms of a model-based tax treaty.

³³⁶ Jonathan Schwarz 'Exchange of information: disputes multiply' available at www.kluwertaxblog.com, accessed on 26 June 2020.

³³⁷ Searches were based on 'exchange of information' and 'judicial review'. For example, a search within the International Tax Law Reports rendered 17 decisions in the last decade in this context.

³³⁸ Schwarz (op cit note 336) note that disputes arise most frequently in the requested state as an objection to provision of information to the requesting state.

³³⁹ Example: the US case of *Hanse v United States* Case No. 17-cv-4573, 5 March 2018.

³⁴⁰ Example: cases dealing with illegally obtained data have been excluded as well as the recent Privy Council decision in *Volaw Trust and Corporate Services Limited v Comptroller of Taxes* [2019] UKPC 29] that dealt with the privilege against self-incrimination.

4.2.1. CJEU decisions – a rights-based approach

It was stated in the Introduction that the 2017 CJEU case of *Berlioz* was an important judgment regarding judicial review of cross-border exchange of information on request. The 2013 CJEU judgment in *Sabou* is considered first since *Berlioz* refers to it.³⁴¹ The case concerned the implementation of the EU Directive on Mutual assistance by Member States in the field of direct taxation and taxation of insurance premiums.³⁴²

The Court had to determine whether the taxpayer had a right to participate in the exchange of information process and to what extent fundamental rights as guaranteed by the EU Charter of Fundamental Rights (EU Charter) had bearing on the existence of such a right.³⁴³

The EU Charter was not applicable since it came into force after the date of the additional assessment.³⁴⁴ Nonetheless, the CJEU recognised, with reference to its previous case law, that the rights of defence, including the right to be heard, was a fundamental right that formed part of EU law.³⁴⁵ National legislation had to be compatible with such rights whenever it came within the scope of EU law.³⁴⁶

The Court's view was that although the Directive conferred certain obligations on the Member States, it did not confer specific rights on the taxpayer and, it did not lay down any obligation for the competent authorities to consult the taxpayer.³⁴⁷

The Court considered, in the absence of legislative procedural protection, whether the taxpayer may nevertheless derive from the rights of the defence a right to participate in the exchange of information process. It referred to a previous decision where it was held that it is a general principle of EU law that a person who is adversely affected by

³⁴¹ Judgment of the Court (Grand Chamber), 22 October 2013, *Jiří Sabou v Finanční ředitelství pro hlavní město Prahu*, Case C – 276/12, ECLI:EU:C:2013:678. The facts are set out in Annexure A paragraph 1.

³⁴² Directive 77/799: Mutual assistance by Member States in the field of direct taxation and taxation of insurance premiums.

³⁴³ CFE ECJ Task Force 'Opinion Statement ECJ-TF/2014 of the CFE on the Decision of the European Court of Justice in *Sabou* (Case C-276/12), Concerning Taxpayer Rights in Respect of Exchange of Information upon Request' (2014) 54(7) *Eur. Taxn.* 318.

³⁴⁴ *Ibid* para 25.

³⁴⁵ *Ibid* para 28.

³⁴⁶ *Ibid*.

³⁴⁷ *Sabou* supra note 341 para 35 - 36. The competent authority of the requested state had to apply its national law and in particular its own rules of procedure when replying to a request.

an executive decision should have the opportunity to present their views on the information underlying such decisions.³⁴⁸

It was held that EU law did not confer on the taxpayer the right to be notified of the request, nor the right to partake in formulating the request or to take part in the examination of witnesses.³⁴⁹ This ruling was based on the distinction the Court drew between the investigation stage (i.e. the stage during which information is collected) and the contentious stage which only begins once the taxpayer receives the proposed adjustment.³⁵⁰ The Court failed to explain why the rights of the taxpayer could not be affected by the decisions of tax authorities taken during the investigative stage.³⁵¹ The distinction between the two stages appeared artificial and the Court failed to strengthen the position of the taxpayer in terms of EU law.³⁵² The CJEU made it a matter of domestic law by stating that Member States could still extend the right to be heard to the investigation stage.³⁵³

In 2017, after the EU Charter became applicable, the CJEU ruled in the *Berlioz* case.³⁵⁴ In this case, the CJEU had to consider whether a person could rely on its EU right to a fair trial to challenge the legality of a decision directing that person to provide information in the context of exchange of information between two revenue authorities.³⁵⁵ On the facts, *Berlioz* had received a financial penalty for non-compliance with the information order. Only the decision to levy the penalty could be reviewed in terms of Luxembourg legislation.

The CJEU reiterated what was said in *Sabou*, namely that it was trite EU law that a relevant person in *Berlioz*'s situation should be protected against arbitrary or disproportionate intervention by public authorities.³⁵⁶ It confirmed that the principle of effective judicial protection is a general principle of EU law which is now contained in Article 47 of the Charter.³⁵⁷ The Court confirmed that a person such as *Berlioz* can invoke such protection as provided by the right to a fair trial in respect of adverse

³⁴⁸ Ibid para 38.

³⁴⁹ Ibid para 46.

³⁵⁰ Ibid para 40.

³⁵¹ CFE ECJ Task Force op cit note 343 para 22.

³⁵² Niels op cit note 164.

³⁵³ *Sabou* supra note 341 para 45.

³⁵⁴ *Berlioz* supra note 6. The facts are set out in Annexure A paragraph 2.

³⁵⁵ *Berlioz* supra note 6 para 43.

³⁵⁶ Ibid para 51.

³⁵⁷ Ibid para 54.

measures affecting him — such as the information order and the penalty at issue.³⁵⁸ It was held that compliance with such right

‘assumes that a decision of an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body that must, in particular, have jurisdiction to consider all the relevant issues’.³⁵⁹

The *Berlioz* case does not grant participation rights to the taxpayer, but it confirms that a national court should be entitled to review the legality of the information order.³⁶⁰ It is said that the CJEU implicitly rejected *Sabou*’s distinction between the investigative and the contentious stage.³⁶¹

It was questioned whether the *Berlioz* decision would be relevant where an information request had been sent but no penalty had been imposed for non-compliance.³⁶² Nothing in the ruling indicated that there must be a penalty to look at the legality of the information request.³⁶³ This question was considered in the *Shakira* case in which Luxembourg’s Administrative Tribunal (Tribunal) rendered a decision in 2018.³⁶⁴

The Tribunal found that the domestic provision, which provided that only the decision to levy a penalty was subject to judicial review, contravened the right to an effective remedy and fair trial. Not only was access to judicial review delayed but there was also a cost involved in accessing such remedy.

³⁵⁸ Ibid para 52.

³⁵⁹ Ibid para 55.

³⁶⁰ Filip Debelva ‘Berlioz: EoI and taxpayers’ rights: we’re not quite there yet’ available at *eutaxblog.com*, accessed on 29 December 2020. It is said that although it may seem that the CJEU in *Berlioz* departed from *Sabou*, it is not the case since *Sabou* is distinguishable from *Berlioz*. In *Sabou*, information was exchanged between tax authorities, and Mr Sabou (a national of the requesting state) wanted to participate in the process. In *Berlioz*, the information was requested from a third party (Berlioz) and would have been sent to the revenue authority of the requested state first. A penalty was levied for refusal to comply with the information request and that penalty had to be challenged through assessment of the legality of the decision to exchange information. The European Commission, relying on *Sabou*, argued that a request for information could not be challenged on the basis that it was preparatory to the final decision. This argument was not upheld since Mr Sabou never received an information order which led to the imposition of a penalty.

³⁶¹ Katerina Pantazatou ‘Luxembourg: Fundamental right in the era of information exchange – The Berlioz case (C-682/15)’ in Michael Lang et al (eds) *CJEU – Recent Developments in Direct Taxation* (2017) 149.

³⁶² L. Neve ‘The Berlioz-decision of the CJEU provides legal protection for concerned person in transnational setting, but will it hold in the international area?’ (2017) 10(2) *REALaw* 95 at 100.

³⁶³ Neve op cit note 362.

³⁶⁴ The judgment was delivered in French and the IBFD case summary was used for this dissertation. Administrative Tribunal, Nos. 39886 and 39888, 26 June 2018, Tax Treaty Case Law IBFD. The facts are set out in Annexure A paragraph 3.

The Tribunal observed that if the exchange of information request were based on a tax treaty, EU law would not have been implemented and the right to a fair trial would not have been applicable. The judicial review was therefore limited and did not entail assessments of decisions by the revenue authorities on their conformity with tax treaties.³⁶⁵

It was held that the right to a fair trial required the violations of other rights and freedoms granted under the EU Charter and therefore it had to be determined whether there had been an infringement of such other rights to determine the legality of the order.³⁶⁶ This aspect of the case is discussed in more detail under 4.3. The Tribunal *de facto* reinstated the right to judicial review for all parties involved in the exchange of information procedure in the requested state.³⁶⁷

In October 2020, the CJEU delivered another ruling in the context of cross-border exchange of information on request.³⁶⁸ It related to a dispute before the Luxembourg Higher Administrative Court that originated prior to legislative amendments which introduced a legal remedy for the recipient of an information order.³⁶⁹

The CJEU followed the reasoning in *Berlioz* and confirmed that the legality of an information order may be challenged through judicial review.³⁷⁰ It added, however, that national legislation may restrict the exercise of the right to an effective remedy insofar as the provisions of Article 52(1) (the limitation clause) of the EU Charter are adhered to.³⁷¹

It held that respect for the essence of the right to an effective remedy did not require a direct remedy to challenge the particular action provided there were other remedies available before a national court or tribunal that would lead to an incidental judicial review of the measure concerned, e.g. a right of appeal.³⁷² The Court therefore found that legislation preventing a direct action by the taxpayer or third party concerned

³⁶⁵ Ibid.

³⁶⁶ Ibid. In *Berlioz*, a penalty was already imposed.

³⁶⁷ Michel op cit note 199 at 102.

³⁶⁸ *État luxembourgeois v B and Others* ECJ, 6 October 2020, Case C-245/19 and C-246/19 ECLI:EU:C:2020:795. The facts of the case are set out in Annexure A paragraph 15.

³⁶⁹ PwC 'CJEU rules on cross-border exchange of information upon request' available at <https://www.pwc.com>, accessed on 14 November 2020.

³⁷⁰ Ibid.

³⁷¹ Court of Justice of the European Union 'PRESS RELEASE No 127/20' available at <https://curia.europa.eu>, accessed on 14 November 2020.

³⁷² Ibid.

against an information order is not incompatible with the right to an effective remedy.³⁷³ It meets an objective of general interest which is the combat of international tax evasion and avoidance through strengthened international cooperation and furthermore complies with the principle of proportionality.³⁷⁴

It is important to note that the above cases were decided within the context of the EU Directive on cross-border exchange of information and the EU Charter and not in the context of tax treaties.³⁷⁵ It remains to be seen whether a similar result could be achieved if a bilateral tax treaty formed the basis of a request.³⁷⁶

4.2.2. Decisions in common law jurisdictions

The legality of information orders has also been the subject of recent case law in New Zealand. In the *Chatfield* case, the New Zealand High Court in 2017 held that the legality of the decision to issue information notices was susceptible to judicial review if the powers of the Commissioner of Inland Revenue were exceeded or abused.³⁷⁷ This was confirmed on appeal in 2019.³⁷⁸ The case concerned the conformity of the Commissioner's decision to issue notices with the relevant tax treaty. Chatfield argued that the Commissioner erred in law by failing to take the terms of the tax treaty into account.

The Commissioner argued that it is 'simply not in the public interest for judicial review to be available in the circumstances of this case'.³⁷⁹ One of the arguments advanced was that the institution of judicial review proceedings would undermine New Zealand's reputation by delaying the provision of the requested information, contrary to the exchange of information provisions in the tax treaty.³⁸⁰ It was furthermore argued that the subject of the decision to issue the notices and the context in which it

³⁷³ Ibid.

³⁷⁴ Ibid. This ruling may be of relevance in a South African context since the South African Constitution also contains a general limitation clause.

³⁷⁵ The EU Charter applies when EU countries adopt or apply a national law that implements an EU directive or when an EU regulation is applied directly (ec.europa.eu).

³⁷⁶ Neve op cit note 362. PwC 'CJEU judgment in Berlioz Investment Fund SA: Exchange of Information upon Request', available at www.pwc.com, accessed on 29 December 2020. Both PwC and Neve note that in such an instance, relief may be sought based on the European Convention on Human Rights. It should be noted that in the absence of the Charter, the protection of fundamental rights is guaranteed under the constitutions or constitutional traditions of EU countries and international conventions that they have ratified (https://europa.eu/european-union/index_en).

³⁷⁷ *Chatfield* supra note 7 para 36. The facts are set out in Annexure A paragraph 4.

³⁷⁸ *CIR v Chatfield & Co Limited* [2019] NZCA 73.

³⁷⁹ *Chatfield* supra note 7 para 37.

³⁸⁰ *Chatfield* supra note 7 para 37.

was made involved relations between sovereign States. Such decisions were ‘at the “apex of executive responsibility”, and ...inherently unsuitable for resolution by the Courts.’³⁸¹ It was argued that other safeguards exist, such as the international peer review system administered by the OECD.³⁸²

These arguments were firmly rejected by the Court on the basis that the decision to issue notices was the exercise of power available under domestic law.³⁸³ It was not an issue of ‘high policy’ or ‘politically fraught’ and merely required an assessment of whether the domestic statutory requirements were met.³⁸⁴ It raised no comity issue between the two Contracting States nor called the executive’s decision to enter into the treaty into question.³⁸⁵ The interpretation of a tax treaty that formed part of New Zealand law was within the Court’s constitutional competence.³⁸⁶ The OECD’s peer review regime does not involve crucial oversight since the focus is not on individual cases nor individual taxpayers.³⁸⁷ On appeal, the Commissioner again sought to argue justiciability as an affirmative defence. The Court of Appeal firmly rejected it.

In the case of *Bunge*, discussed in 4.4, the Court of Appeal for Bermuda (also a common law jurisdiction) made *obiter* references to the constitutional nature of the issue of justiciability – the Court did not have to decide on the issue as Bermuda law provides for a statutory right to judicial review in the said circumstances.³⁸⁸ It nonetheless observed

‘the submissions for the Minister came close to suggesting that the person on whom a notice is served... must accept the Minister’s decision that the notice is in accordance with the request received from the foreign state, thus (possibly) raising the constitutional issue whether the Minister has an unlimited discretion which cannot be questioned by the Courts’.³⁸⁹

4.2.3. Concluding comments

The decisions analysed provide that a taxpayer may challenge the legality of an order directing it to provide information pursuant to a cross-border request for information.

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ Ibid para 40.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ *The Minister of Finance v Bunge Limited* [2013] CA [BDA] 4 CIV para 25.

The CJEU noted in *Berlioz* that if a decision by an administrative body does not satisfy the conditions of independence and impartiality, it must be subject to subsequent control by a judicial body. In *Chatfield*, the Court made a similar reference, noting that the legality of an information order is susceptible to judicial review if the powers of the Commissioner were exceeded or abused. The *Bunge* case suggested that arguments of non-justiciability may be subjected to a constitutional challenge. Most recently, the CJEU has ruled that a direct remedy to challenge may be restricted under certain circumstances.

4.3. The standard of foreseeable relevance – intensity of review

Article 26 requires that the information sought by a requesting state must be ‘foreseeably relevant for carrying out the provisions of this Convention...’. This section will focus on the interpretation by different courts of the standard of foreseeable relevance as a condition for the legality of an information order.

4.3.1. Decisions in New Zealand and Singapore

In the New Zealand case of *Chatfield*, it was argued that even if the matter is justiciable, the Court could not intervene if it determined that the nature of the information sought could potentially not be necessary for the purpose sought. The relevant treaty provided that the information requested had to be ‘necessary’. Commentators note that this meant something ‘more than simple expediency or desirability’ – it is a different concept than the OECD MTC’s ‘foreseeably relevant’ (refer 3.3.2).³⁹⁰

It was argued that neither the Court nor the Commissioner should be expected to investigate the factual assertions underlying the request nor the law of the requesting state. It was suggested that the Court could be asked to conduct a mini trial and that ‘the Court would be stepping into the shoes of the executive which has responsibility for entering into and enforcing international agreements’.³⁹¹ The High Court ruled that there was nothing in the case at hand that compelled the conclusion that a deferential review was required or appropriate:

‘The power to make the decision [to issue notices for information sought] ...is conferred by the legislation onto the Commissioner, and the Commissioner, when

³⁹⁰ Marks op cit note 8.

³⁹¹ *Chatfield* supra note 7 para 96.

exercising that power, must exercise it properly, and in accordance with the law... Review in this context should be hard-edged, and a “correctness standard” should apply’.³⁹²

A hard-edged approach to review refers to when the reviewing Court is substituting its own conclusion for that of the public authority, typically in relation to questions of law such as the interpretation of a statute.³⁹³

The Court of Appeal agreed that the intensity of review should be the correctness standard, i.e. whether the law was interpreted and applied correctly, but differed from the High Court on the application of the review standard.³⁹⁴ The High Court held that the decisionmaker had to be satisfied by ‘clear and specific evidence’.³⁹⁵ The Court of Appeal disagreed, noting that a ‘hard inquiry’ into the necessity for any exchange overstates the obligation on the competent authority on receipt of a request under the tax treaty.³⁹⁶ It held that the validity of a request could be determined on its face if there was no lack of clarity nor any doubt as to the validity of the request.³⁹⁷ On the facts, the assessment of the request was not lawful on the basis that the relevant decision-maker was not clear on the threshold that was applied – reference was made to both the ‘necessary’ threshold and to the ‘relevance’ threshold.³⁹⁸

Commentators argue that the Court of Appeal decision represents a significant watering down of the high benchmark test for the consideration of exchange of information requests that was outlined by the High Court.³⁹⁹ It is said that the decision sets a low bar for the competent authority to lawfully discharge their obligation when considering an exchange of information request.⁴⁰⁰

³⁹² Ibid para 98.

³⁹³ Michael Fordham QC *Judicial Review Handbook* 6 ed (2012) 2026.

³⁹⁴ *Chatfield* supra note 378 para 52.

³⁹⁵ Ibid para 49.

³⁹⁶ *Chatfield* supra note 378 para 75.

³⁹⁷ Ibid para 74.

³⁹⁸ Ibid para 80.

³⁹⁹ Virag Singh and Jeremy Beckham ‘Chatfield Court of Appeal decision – a triumph for Inland Revenue masquerading as a win for the taxpayer?’ available at <https://www2.deloitte.com>, accessed on 8 October 2019.

⁴⁰⁰ Ibid.

The Court of Appeal referred to the 2015 Singapore case of *ABU* in support of its finding that the validity of the request for information could be determined on its face value absent any evidence of irregularity.⁴⁰¹

The case of *ABU* concerned the exchange of information in terms of the tax treaty between Japan and Singapore. Information held by third parties were protected from unauthorised disclosure and the Comptroller had to obtain a court order from the High Court.⁴⁰² The taxpayer appealed the High Court's decision, but it was dismissed on the basis that the requirement of foreseeable relevance was met based on the domestic legislative requirements for requests for information from other competent authorities. The Court of Appeal stated that:

‘While we agree that s105J requires the High Court to be independently satisfied as to the justification of a request, we do not think it follows from the Minister's statements that Parliament had intended for the High Court to substantively review a request to the extent of inquiring into the truth of the factual assertions contained in it. Taking a purposive as well as a contextual interpretation of the statutory scheme, it seems clear to us that Parliament had intended for the validity of a request to be determined on its face’.⁴⁰³

On the facts, the Court of Appeal found that the order issued was wider than the ambit of the requesting state's request and amended the order to reflect the latter.⁴⁰⁴

The reasoning of *ABU* was followed in the Singapore case of *AXY*.⁴⁰⁵ The case involved a request for information from South Korea in terms of the tax treaty between Singapore and South Korea and concerned production notices sent to banks in Singapore. The entire process was conducted ‘covertly’, i.e., no notice was given to the appellants and the companies concerned.⁴⁰⁶ A High Court order for authorised disclosure was no longer required following legislative amendments in 2013.

The appellants became aware of the request after South Korea's revenue authority informed them thereof and brought an application for leave for judicial review on the

⁴⁰¹ *ABU v Comptroller of Income Tax* [2015] 2 SLR 420; [2015] SGCA 4. The facts are set out in Annexure A paragraph 5.

⁴⁰² The case was commenced prior to legislative amendments that removed this requirement.

⁴⁰³ *Ibid* para 40.

⁴⁰⁴ *Ibid* para 88.

⁴⁰⁵ *AXY and Others v Comptroller of Income Tax* [2017] SGHC 42. The facts of the case are set out in Annexure A paragraph 6.

⁴⁰⁶ *AXY and other v Comptroller of Income Tax* [2018] SGCA 23 para 1.

grounds of irrationality and illegality.⁴⁰⁷ It was alleged that there was not sufficient prior inquiry into whether the request for information complied with the domestic requirements and/or whether the ‘foreseeable relevance’ requirement of the tax treaty was met.⁴⁰⁸ The Comptroller argued that ‘too lenient a judicial review mechanism could delay the entire EOI process and frustrate the purpose of the 2013 Amendments’.⁴⁰⁹ The Court firmly rejected this contention, noting that ‘the EOI regime is not to be privileged with a special judicial review test as compared to other administrative actions or decisions’.⁴¹⁰

On the facts, the application was dismissed with the Judge finding that it was not illegal nor improper for the Comptroller to disregard matters of foreign law and to come to a conclusion based on the face value of the request.⁴¹¹ It was held that the 2013 legislative amendments did not change the standard for determining foreseeable relevance – the only difference was that it was now the Comptroller and not the Court that had to make the determination.⁴¹² The Court found that the assessment of foreseeable relevance generally had to be made at the time of the exchange of information request – subsequent occurrences were not relevant unless ‘exceptional’.⁴¹³

The Court of Appeal agreed with the High Court that the judicial pronouncements on the pre-2013 Amendments concerning the foreseeable relevance of the requested information remained generally relevant and held that judicial review entailed that the decision-making process and powers be examined and not the substantive merits of the decision itself.⁴¹⁴

The Court stated that the Comptroller should think critically and ask clarification from the foreign revenue authority where necessary.⁴¹⁵

⁴⁰⁷ Ibid para 21.

⁴⁰⁸ *AXY* supra note 405 para 10. They also argued that the Comptroller failed to balance their rights to privacy and confidentiality against the Comptroller’s desire to enhance international tax cooperation through an efficient exchange of information regime. This argument was however rejected by the Court on the basis that the appropriate balance of interests was provided by the legislative structure of the Income Tax Act and Article 25 of the tax treaty.

⁴⁰⁹ Ibid para 71.

⁴¹⁰ Ibid para 23.

⁴¹¹ Ibid para 40.

⁴¹² *AXY* supra note 405 para 27.

⁴¹³ Ibid.

⁴¹⁴ Ibid para 45.

⁴¹⁵ Ibid para 58.

On the issue of whether subsequent facts and information should be considered on judicial review of the Comptroller's decision, the Court noted that the general rule is that the Court is ordinarily concerned with assessing legality by reference to the material that was before the decision-maker at the time the decision was made – otherwise the Court may find itself in a position where it must decide on the merits of the case.⁴¹⁶

However, the Court then referred to several British cases where the English High Court allowed the introduction of new material, noting that the courts have been prepared to look at the up-to-date position especially in human rights cases.⁴¹⁷ It stated that:

‘The common rationale justifying the court’s departure from the default position is the emphasis on achieving justice and fairness...the persons of interest in this case...were afforded the opportunity to raise issues to the Comptroller only after his decision on the Request had been made’.⁴¹⁸

These comments are important as it ensures that the rule of law, specifically the rules of natural justice, are adhered to.⁴¹⁹

4.3.2. Decisions in other common law jurisdictions

The Grand Court of the Cayman Islands (a common law jurisdiction) held in 2013 in the *MH Investments* case that the Bill of Rights must lead the Court to apply a more anxious level of scrutiny and standard of review.⁴²⁰ The case dealt with a TIEA between Australia and the Cayman Islands. The Court quoted from another Cayman Islands decision where it was stated that:

‘The Court, being itself bound to give effect to the principles enshrined in the Bill of Rights, should have regard to relevant constitutionally protected Rights when determining the intensity of judicial review appropriate to this case...’.⁴²¹

The relevant question was whether the respondent asked itself the right questions and took reasonable steps to acquaint itself with the relevant information to enable it to

⁴¹⁶ Ibid para 78.

⁴¹⁷ Ibid para 81.

⁴¹⁸ Ibid para 83.

⁴¹⁹ The appeal was dismissed on the basis that no arguable or *prima facie* case of reasonable suspicion was established to conclude that the decision was tainted by any illegality or irrationality.

⁴²⁰ *MH Investments and another v Cayman Islands Tax Information Authority* 16 ITLR 274 Grand Court of the Cayman Islands, 13 Sept. 2013, Case 391/2012. The facts of the case are set out in Annexure A paragraph 12.

⁴²¹ *MH Investments* supra note 420 para 185.

answer whether the request from the Australian revenue authority complied with the domestic law requirements that gave effect to the TIEA.⁴²²

In the 2013 Jersey Court of Appeal decision in the *Volaw Trust* case (also in the context of a TIEA), the Court had a different approach, stating that it is not for the decision-maker to question the correctness of the material provided to it from outside the jurisdiction, as long as it is properly evaluated after, it may be, some probing for the purposes of clarification.⁴²³

In May 2019, the UK's High Court dismissed an application for judicial review of a third-party information notice issued pursuant to a request from the Swedish revenue authority in terms of the tax treaty between Sweden and the UK.⁴²⁴ The Court held that

‘[i]t is not for the officer to investigate the merits of the underlying tax investigation, or whether the investigation itself is reasonably required or justified as a precondition for the giving of a notice...provided there is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith, that is sufficient’.⁴²⁵

4.3.3. Interpretation and application of the standard in the EU

In *Berlioz*, the CJEU said that

‘the “foreseeable relevance” of the information requested by one Member State from another Member State is a condition which the request for information must satisfy in order for the requested Member State to be required to comply with that request, and thus a condition of the legality of the information order addressed by that Member State to a relevant person and of the penalty imposed on that person for failure to comply with that information order’.⁴²⁶

The CJEU ruled that it was not enough to merely verify that the formal requirements of the request were met – the requested state had to verify that the information sought was not ‘devoid of any foreseeable relevance to the investigation being carried out’.⁴²⁷

⁴²² Ibid para 203.

⁴²³ *Volaw Trust and others v The Office of The Comptroller of Taxes* [2013] JCA 239. The facts of the case are set out in Annexure A paragraph 13.

⁴²⁴ *Kotton v First-tier Tribunal (Tax Chamber) & Ors* [2019] BTC 16. The facts of the case are set out in Annexure A paragraph 14.

⁴²⁵ *Kotton* supra note 424 para 60.

⁴²⁶ *Berlioz* supra note 6 para 74.

⁴²⁷ Ibid para 78.

The Court applied a limited review and held that the limits that apply in respect of the requested authority's review are equally applicable to reviews carried out by the courts.⁴²⁸

In October 2017, Luxembourg's Administrative Court delivered its final decision after the CJEU's preliminary ruling in *Berlioz*.⁴²⁹ The matter was decided in *Berlioz*'s favour and the Court ruled that Luxembourg's domestic exchange of information legislation violated the provisions of the EU Directive and the right to a fair trial to the extent that it did not allow the revenue authority to assess the foreseeable relevance of the requested information – it only required that the formal requirements be met.⁴³⁰ The important impact of the CJEU's judgment was that it turned the foreseeable relevance of the requested information into a legal requirement that had to be satisfied to trigger the requested state's obligation to exchange information.⁴³¹

In the *Shakira* case, unlike *Berlioz*, the information order in question contained a brief analysis and confirmation of the relevance of the requested information and the Tribunal could therefore review the revenue authority's assessment.⁴³² The Tribunal restricted its review to establishing that the requested information was not devoid of any foreseeable relevance as established in *Berlioz*.⁴³³

It held that the Luxembourg revenue authority's assessment of the request and subsequent order for information violated the rights to respect for private and family life and protection of personal data of the EU Charter insofar as the company was requested to provide certain items of information that was not foreseeably relevant.

The CJEU gave further guidance in October 2020 on the criteria that a request for information had to satisfy so that it would not be manifestly devoid of foreseeable relevance. It had to state the identity of the information holder, the identity of the taxpayer under investigation and the period covered by the investigation.⁴³⁴

Furthermore, insofar as it related to contracts, invoices and payments not expressly identified, it had to be defined by 'personal, temporal and material criteria' that

⁴²⁸ Ibid para 86.

⁴²⁹ Administrative Court, 26 Oct. 2017, No. 36893Ca.

⁴³⁰ Michel op cit note 199 at 99. The information notices were found to be invalid because the Luxembourg revenue authority did not assess the foreseeable relevance of the requested information.

⁴³¹ Ibid at 101.

⁴³² Ibid.

⁴³³ Ibid.

⁴³⁴ Court of Justice of the European Union op cit note 371.

would establish their links with the investigation and the taxpayer subject to that investigation.⁴³⁵

4.3.4. Concluding comments

The above analysis indicates that the courts tend to follow a deferential approach in reviewing the standard of foreseeable relevance. It is only the High Court in *Chatfield* and the Grand Court of the Cayman Islands that called for a higher level of scrutiny. The New Zealand Court of Appeal and the Singapore Court of Appeal were in favour of determining validity at face value whilst the Jersey Court of Appeal and the UK High Court noted that the underlying investigation and the information provided need not be verified. These cases suggest that questions for clarification purposes would suffice.

Berlioz followed similar reasoning, with the CJEU noting that the competent authority had to ensure that the request was not ‘devoid of foreseeable relevance’.⁴³⁶ In the *Shakira* case, the Court followed the test in *Berlioz* and found that certain substantive rights were violated insofar as information was requested that was not foreseeably relevant.

4.4. Confidentiality of the request and the issue of disclosure

Article 26(2) requires that any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above.

The Commentary provides that the above confidentiality rules apply to all types of information received under paragraph 1, including both information provided in a request and information transmitted in response to a request.⁴³⁷ The Commentary further states that the information may also be communicated to the taxpayer, his proxy

⁴³⁵ Ibid.

⁴³⁶ KPMG Luxembourg notes that this is still a limited approach to review, requiring verification that the requested information manifestly has no foreseeable relevance to the tax purposes provided by the requesting state (refer KPMG Luxembourg Tax Alert 2019-04 ‘Taxpayers’ rights restored in the exchange of information’ available at home.kpmg/lu, accessed on 25 June 2020).

⁴³⁷ OECD op cit note 193 para 11.

or to the witnesses and it can be disclosed to governmental or judicial authorities charged with deciding whether such information should be released to the taxpayer, his proxy or to the witnesses. This section will consider how the courts in different jurisdictions have dealt with the disclosure of the request received from the requesting state.

In *Berlioz*, the CJEU recognised that one must have regard to the secrecy of the document.⁴³⁸ The requesting authority expects secrecy from the requested authority so that the ‘effectiveness of its investigation is not to be jeopardized’.⁴³⁹

However, it quoted *Otis and Others*:

‘In the context of judicial proceedings, it should be borne in mind that the principle of equality of arms, which is a corollary of the very concept of a fair hearing, implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent’.⁴⁴⁰

The Court concluded that the taxpayer or third party does not have a right of access to the whole of the information request as it is a secret document.⁴⁴¹ It is sufficient, in principle, that the relevant person has access to the minimum information prescribed, i.e. the identity of the taxpayer and the purpose for which the information is sought.⁴⁴² Importantly, the Court observed that in the context of judicial review by a court of the requested state, the court must have access to the request for information addressed to the requested Member State by the requesting Member State.⁴⁴³

In the New Zealand case of *Chatfield*, the Commissioner repeatedly refused to make the relevant information request available to the Court. Prior to the 2017 High Court judgment, the Court found in favour of the Commissioner on the grounds of confidentiality.⁴⁴⁴ In the 2017 judgment, the High Court however noted as follows:

⁴³⁸ *Berlioz* supra note 6 para 93.

⁴³⁹ *Ibid* para 94.

⁴⁴⁰ Judgment of 6 November 2012, *Otis and Others*, C199/11, EU:C:2012:684 para 71.

⁴⁴¹ *Berlioz* supra note 6 para 101.

⁴⁴² *Ibid* para 100. It was noted that in some instances the court of the requested state may consider the minimum information to be insufficient and if the requested authority is then requested to provide further information, the court may allow the relevant person access to the information provided the secrecy of such information is considered.

⁴⁴³ *Ibid*.

⁴⁴⁴ *Chatfield & Co Limited v Commissioner for Inland Revenue* [2016] NZHC 1234.

‘The days when a Court will accept an official’s simple assertion that a power had been exercised lawfully are long over...’.⁴⁴⁵

‘When the actions of public authorities are in issue, there is an expectation that public authority defendants will explain themselves, and disclose all relevant documents’.⁴⁴⁶

‘[T]here is a high duty on public authorities to assist the Court with full and accurate explanations and to give the Court all the facts relevant to the matter in issue’.⁴⁴⁷

The Court could only rely on limited materials in front of it and could not conclude that the Commissioner made the appropriate inquiries.⁴⁴⁸

The High Court firmly rejected the Commissioner’s suggestion that the documents be reviewed in confidentiality. Such a proposition was contrary to the rules of natural justice and would not provide an opportunity for the taxpayer or third party to respond.⁴⁴⁹

The issue of court-alone review was taken on appeal, but the Court of Appeal dismissed it holding that the High Court was ‘plainly correct to decline to receive documents which were not disclosed to Chatfield’.⁴⁵⁰ The Court of Appeal quoted *Minister of Foreign Affairs v Benipal*:

‘It is the central aspect of a system of justice which will not accept subjective conclusions affected by personal investigations of the Judge or the influence of impressions he has gained from only one side. Because of its significance in the rapidly developing field of administrative law the audi alteram partem principle is constantly referred to and accepted in that context as fundamental to the achievement of a fair result’.⁴⁵¹

The Court of Appeal concluded that ‘for the future we see no reason why a suitably redacted copy of the request should not be made available to the court and to the recipient of a notice who brings a judicial review challenge’.⁴⁵²

⁴⁴⁵ *Chatfield* supra note 7 para 85.

⁴⁴⁶ *Ibid* para 88.

⁴⁴⁷ *Ibid* para 89.

⁴⁴⁸ *Ibid* para 90.

⁴⁴⁹ *Ibid* para 66. The High Court explored the possibility of having the Court appoint an *amicus* to inspect the relevant background documents and then to address the Court in relation thereto, but the Commissioner decided against such a proposal.

⁴⁵⁰ *Chatfield* supra note 378 para 65.

⁴⁵¹ *Minister of Foreign Affairs v Benipal* [1984] 1 NZLR 758 (CA) para 763 – 764.

⁴⁵² *Chatfield* supra note 378 para 69.

The issue of confidentiality also arose in the *Bunge* case.⁴⁵³ *Bunge*, the taxpayer, applied for an order of mandamus to compel production of the information request received from Argentina.

The Minister contended that the relevant international agreement imposed ‘a strict duty of confidence on the Government of Bermuda, whose international reputation would be seriously damaged if the confidence was broken’.⁴⁵⁴

The Court held that the Minister had a statutory obligation to consider whether the request conformed with the TIEA and whether Argentina provided the relevant information as required by the agreement.⁴⁵⁵ The Court further held that the relevant domestic legislation expressly permitted judicial review of the Minister’s decisions and that the ‘legislators contemplated that the terms of the request would be made available to the court for that purpose’.⁴⁵⁶ Without such information, the Court would not be able to conduct the review.

Whilst the TIEA expressly permitted disclosure to the Court and for the purpose of court proceedings, the more difficult question arose in relation to disclosure of the request prior to court proceedings.⁴⁵⁷ The Court concluded that on a true construction of the relevant legislation, the person on whom the notice is served is entitled to see, and the Minister is bound to produce, the terms of the request ‘so far as they are relevant to the notice that is given’. The Court agreed with the court *a quo*’s ruling that so much of the request as is necessary to show that the statutory requirements for the request have been complied with, but redacted to exclude any sensitive material, should be disclosed. Most importantly, the Court observed that ‘the “principle of justice and fairness” ...both supports the above construction of the 2005 [relevant] Act and provides an independent ground for requiring production of the terms of the Request in a particular case’.⁴⁵⁸

⁴⁵³ *Bunge* supra note 389. The facts of the case are set out in Annexure A paragraph 9.

⁴⁵⁴ *Ibid* para 11.

⁴⁵⁵ *Ibid* para 19.

⁴⁵⁶ *Ibid* para 20.

⁴⁵⁷ *Ibid* para 22.

⁴⁵⁸ *Bunge* supra note 389 para 22. In relation to disclosure prior to commencement the Court noted that ‘the rights of the person on whom the notice is served can be formulated in terms of the order which would be made by the Court, if an Application were made to it. Those rights can and should be recognized before proceedings are begun’.

The Court also observed that the Court *a quo* appeared to have contemplated that in a disputed case, the court might examine the documents alone.⁴⁵⁹ The issue was not raised, but it stated *obiter* that it was unlikely that it would be permissible.⁴⁶⁰

The subsequent unreported 2017 British Virgin Islands (BVI) case of *Friar Tuck Ltd, Quiver Inc. and International Tax Authority* was influenced by the *Bunge* decision.⁴⁶¹ The legal systems of both Bermuda and the BVI stem from English common law. Practitioners in the region commented on the Court's reasoning in respect of the issue of confidentiality and non-disclosure.

Rogers writes that

‘[t]he court began its legal analysis of the issues by stating the general principle that is settled law that whenever a public function is being performed, there is an inference in the absence of an expressed requirement to the contrary, that the function is required to be performed fairly. The inference will be more compelling where it is a case of a decision which may adversely affect a person's rights or interests or when a person has a legitimate expectation of being treated fairly’.⁴⁶²

The Court noted that courts have on occasion gone further to supplement statutory provisions with principles of procedural fairness.⁴⁶³ It found that ‘procedural fairness demands that the [BVI revenue authority] provide a sufficient level and degree of information to enable representations to be made as to the lawfulness of the notice or indeed the request’.⁴⁶⁴ The Court rejected the argument that the duty of confidentiality prevails over common law rights of procedural fairness.⁴⁶⁵

Commentators welcomed the decision stating that bodies such as the BVI revenue authority ‘seem unaware that despite their mandates, they do not operate in a legal vacuum and that general common law principles which have existed for hundreds of years, long before TIEAs, FIUs, and the OECD existed, still apply to them’.⁴⁶⁶

⁴⁵⁹ Ibid para 24.

⁴⁶⁰ Ibid.

⁴⁶¹ The facts of the case are set out in Annexure A paragraph 10.

⁴⁶² Carlyle K Rogers ‘Friar Tuck Ltd, Quiver Inc and International Tax Authority: A British Virgin Islands’ decision with far-reaching consequences in defense of the rule of law’ available at <https://www.caymanfinancialreview.com>, accessed on 8 October 2019.

⁴⁶³ Ibid. Reference was made to De Smith's *Judicial Review* where it is said that the ‘justice of the common law’ may supplement statute.

⁴⁶⁴ Ibid.

⁴⁶⁵ Jonathan Addo and Aki Corsoni-Husain ‘BVI Court protects basic rights of persons subject to tax investigations’ available at www.mondaq.com, accessed on 8 October 2019.

⁴⁶⁶ Ibid.

The approach in *Bunge* was rejected by the Jersey Court of Appeal in the 2017 *Haskell* case where the Court held that there is a presumption of regularity by the competent authority on which the Court is entitled to rely, and unless there is a specific reason to order otherwise, the Comptroller is not required to provide the request itself.⁴⁶⁷

In the *AXY* case, Singapore's High Court in a 2015 judgment allowed the discovery of the actual request for information sent by the requesting authority.⁴⁶⁸ However, subsequent legislative amendments have limited the taxpayer's right to apply for discovery of documents where confidentiality is raised by the foreign revenue authority.⁴⁶⁹ It is noted that a taxpayer may now be denied access to confidential documents that could be relevant to his claim without any judicial assessment of whether there is a real concern of tipping of or prejudicing the foreign investigations and that this could prejudice the taxpayer's chances of succeeding in his claim for judicial review.⁴⁷⁰ This is an alarming development and commentators note that this may give rise to a constitutional challenge in future.⁴⁷¹

4.4.1. Concluding comments

In *Berlioz*, the Court recognised the secrecy of the request and noted that the taxpayer or third party had no right of access to the whole document. The Court however referred to the principle of equality of arms, a principle issued by the European Court of Human Rights that is part of the right to a fair trial and an expression of the *audi alteram partem* rule. The taxpayer should have a reasonable opportunity to present his case and that required access to at least the minimum prescribed information. This sentiment was echoed in *Chatfield*, with the Court of Appeal referring to another case where the *audi alteram partem* rule was described as fundamental to the achievement of a fair result. It ruled that a suitably redacted copy may be made available to the court and the recipient of the notice. The *Bunge* case, referring to the principles of justice and fairness held that the recipient should be entitled to see so much of the request as is necessary to show that the statutory requirements for the request have been complied

⁴⁶⁷ *Haskell v Comptroller of Taxes* [2017] JRC 088, Royal Court of Jersey. The facts of the case are set out in Annexure A paragraph 11.

⁴⁶⁸ *AXY and others v Comptroller of Income Tax* [2016] 1 SLR 615; [2015] SGHC 291.

⁴⁶⁹ Eugene Lim, Allen Tan, Dawn Quek, Peter Tan 'Decisions on Exchange of Information Requests in 2015 – Taxpayers Face Increasing Hurdles in Mounting Challenge' available at <https://www.bakermckenzie.com>, accessed on 8 October 2019.

⁴⁷⁰ *Ibid.*

⁴⁷¹ Daniel Chia 'Singapore Court's Guidance on International Tax Assistance in the Form of Exchange of Information' available at <https://www.lexology.com>, accessed on 20 October 2019.

with, but redacted to exclude sensitive material. The Jersey Royal Court however rejected the automatic disclosure of the request in favour of a presumption of regularity.

Both the High Court and the Court of Appeal in *Chatfield* rejected the contention that the request be reviewed by the Court alone. The Court in *Bunge* noted that court-alone review would likely not be allowed. Most of these cases show that the courts are recognising the procedural rights of taxpayers with strong reliance on principles of fairness and natural justice. In the *Friar Tuck* case, the Court noted that the duty of confidentiality does not prevail over common law rights of procedural fairness. Singapore's legislation, which restricts discovery of the request, should therefore be challenged.

4.5. Third party notices and taxpayers' rights

A Contracting State may not in terms of Article 26(5) decline to provide information to a Requesting State if information is held by third parties such as a bank, other financial institution etc. Accordingly, revenue authorities may use their domestic information gathering powers to request such information. In the analysis to follow, consideration is given to the UK's domestic process for obtaining information from third parties. The section will end with a brief consideration of the Global Forum's influence on domestic information gathering powers.

The UK case of *Derrin Brother Properties (Derrin)* considered the relationship between the domestic powers of the HMRC to request information from third parties and the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).⁴⁷² The case concerned the exchange of information between the UK and Australia pursuant to the applicable tax treaty.⁴⁷³

The issue of third party notices have to be approved by a tribunal known as the First-tier Tax Chamber (the Tribunal) unless the taxpayer consents to it.⁴⁷⁴ The nature of the hearing is *ex parte*. In this case, the Tribunal's decision was challenged on the grounds that the notices were wrongly approved by the Tribunal and issued by HMRC and were

⁴⁷² *R (on the application of Derrin Brother Properties Ltd and others) v a judge of the First-tier Tribunal (Tax Chamber) and others* [2016] EWCA Civ 15,18 ITLR 472 para 1.

⁴⁷³ The facts are set out in Annexure A paragraph 7.

⁴⁷⁴ It should be noted however that no such approval is required if HMRC requests information from the taxpayer.

therefore *ultra vires* and invalid on the grounds that there was a breach of the requirements of the legislation if it was to be interpreted correctly.

It was contended that the relevant domestic legislation, although not incompatible with the Convention, operated unfairly and in breach of the appellants' fair trial and privacy and confidentiality rights as guaranteed by the Convention.⁴⁷⁵ It was argued that if the legislation was interpreted to avoid unfairness, all the appellants (including the taxpayers) ought to have been told in sufficient time and detail prior to the hearing before the Tribunal to be able to make representations. The Tribunal should also have stated in its written decision the substantive reasons and factual basis for its decision in enough detail to enable that to be examined on judicial review.⁴⁷⁶

The Court was not willing to accept the interpretation that the appellants contended for as there was no challenge to the legislation itself. It stated that

‘[t]he absence of a challenge to Sch 36 itself on Convention grounds is understandable since there is nothing in the schedule itself which, in the case of a third party notice, expressly prohibits a taxpayer or third party or non-taxpayer entity from making representations to HMRC or the FTT’.⁴⁷⁷

The Court noted that there was ‘no reason to think that if any such representations had been made, they would not, in accordance with the usual practice of HMRC, have been disclosed by HMRC to the FTT’.⁴⁷⁸ It was also said that none of the appellants sought to challenge the *ex parte* nature of the proceedings before the Tribunal.⁴⁷⁹ It held that the legislation ‘had been applied in an entirely standard way’ in the case at hand.⁴⁸⁰ In the Court’s view, the witness statements that were provided on behalf of HMRC on judicial review set out in detail the background to the third party notices and the various steps taken in relation to them, leading up to the hearing before the Tribunal as well as copies of the application letter to the Tribunal.⁴⁸¹

The Court noted in conclusion that ‘if the issue is simply whether Sch 36 powers have been applied in a proportionate way, then judicial review is a perfectly apt process for

⁴⁷⁵ Ibid para 53. The domestic legislation is Schedule 36 of the 2008 Finance Act.

⁴⁷⁶ Ibid para 51.

⁴⁷⁷ Ibid para 83.

⁴⁷⁸ Ibid para 84.

⁴⁷⁹ Ibid para 93.

⁴⁸⁰ Ibid para 84.

⁴⁸¹ Ibid para 120.

carrying out that judicial assessment'.⁴⁸² It has been asked whether the European Court of Human Rights would have had a different view.⁴⁸³

4.5.1. Subsequent comments in the *Jimenez* case

The *Derrin* judgment was the subject of *obiter dicta* in the subsequent UK High Court case of *Jimenez*.⁴⁸⁴ In this case, the High Court had to decide whether information notices issued under Schedule 36 could be issued extra-territorially. The hearing before the Tribunal was held on a without-notice basis, i.e., no notice was given to the taxpayer or any advisers and the hearing was held in private. The relevance of the case is in the *obiter* comments on the nature of the Tribunal-hearings. The Judge noted that several cases relating to fundamental common law principles were not addressed in *Derrin*. He referred to case law where it was said that what satisfies the principles of fairness is case sensitive and a fundamental issue is whether a person knows the case he must meet.⁴⁸⁵

It was said that 'a transparent monitoring system may better promote the public interest and purpose of Schedule 36 and reduce challenges by way of judicial review'.⁴⁸⁶

The Judge was of the view that HMRC and the Tribunal's approach to the determination of these applications merit reconsideration. Regard must be given to the basic principles of fairness and the general approach taken by the courts to *ex parte* hearings and the application of the principle of open justice.⁴⁸⁷

Commentators have stated that the *obiter dicta* of the Judge have wider bearing: '[w]e believe that this is a fundamental commentary on the application of one of HMRC's most draconian powers, which is undoubtedly tempered as a result' and 'it is to be

⁴⁸² Ibid para 121.

⁴⁸³ Philip Baker QC *R (on the application of Derrin Brother Properties Ltd and others) v a judge of the First-Tier Tribunal (Tax Chamber) and others* 18 ITLR 472, [2016] EWCA Civ 15.

⁴⁸⁴ *R (oao) Tony Michael Jimenez v The First-tier Tribunal (Tax Chamber) & CRC* [2017] EWHC 2585 (Admin). The *Jimenez* judgments will not be discussed as the subject matter did not concern the exchange of information in a tax treaty context. It dealt with the extra-territorial effect of a Schedule 36 notice. It is the only the High Court's *obiter dicta* in relation to Schedule 36 that is relevant to this dissertation.

⁴⁸⁵ *Jimenez* supra note 484 para 65.

⁴⁸⁶ The detailed recommendations are set out in Annexure A paragraph 8.

⁴⁸⁷ Ibid para 24.

hoped that a dissatisfied taxpayer (emboldened by the Judge's concerns) would pursue a judicial review claim that permission would eventually be given'.⁴⁸⁸

It is interesting to note that the Tribunal delivered a decision during November 2018 in which it refused that a hearing for approval of notices take place *inter partes*.⁴⁸⁹ HMRC argued that:

‘It was already established...that, in the case of a notice to the taxpayer for production of documents, the fact the notice came at the investigatory stage as well as the need to avoid frustrating the intention of the legislation led to the conclusion that the taxpayer had no right to demand an *inter partes* oral hearing’.⁴⁹⁰

These comments are reminiscent of the *Sabou* judgment which was heavily criticised for the distinction it made between the investigation stage and the contentious stage. It is disappointing that the UK courts have not strengthened the position of the taxpayer in this regard.

4.5.2. The influence of the Global Forum

Singapore is a country that amended its domestic exchange of information legislation as a result of the influence of the Global Forum. As noted, prior to the 2013 Amendments, the Comptroller had to obtain High Court approval to issue notices to third parties to provide protected information.⁴⁹¹ The Comptroller had to notify the person in respect of whom the protected information was sought unless waiver thereof was justified as provided for in the applicable legislation. The taxpayer still had the opportunity to challenge the production of protected information as the Comptroller had to apply for an order.⁴⁹²

The Inland Revenue Authority of Singapore stated that

‘while Singapore has been able to respond promptly to most requests for information from its foreign partners, removing the requirement for a Court Order will further streamline the administration of exchange of information under the Standard. It will

⁴⁸⁸ Gary Brothers, John Norman ‘Implications of the Jimenez case’ available at <https://www.taxation.co.uk>, accessed on 8 October 2019; Keith Gordon ‘A request too far’ available at <https://www.taxadvisermagazine.com>, accessed on 9 October 2019. On the facts of the case, the High Court quashed the Tribunal’s decision to approve the issue of a Schedule 36 notice to a non-resident. HMRC appealed and the decision was subsequently overturned by the Supreme Court of Appeal. The *obiter dicta* were not addressed on appeal.

⁴⁸⁹ [2018] UKFTT 702 (TC)

⁴⁹⁰ *Ibid* para 71.

⁴⁹¹ *Lim et al op cit* note 469.

⁴⁹² *Ibid*.

not undermine the basic safeguards to taxpayers. IRAS will continue to assess whether the requests are in line with the Standard, and taxpayers will continue to have the right of appeal'.⁴⁹³

Although the Comptroller still has an obligation to notify the taxpayer, such requirement can be waived in specific circumstances. In this regard, it is said by practitioners that the taxpayer

‘may face practical difficulties enforcing his right to legal recourse given that he may not even be aware that his information has been sought by or even handed over to a foreign tax authority. This could be of concern, particularly given that the case of ABU shows that it is possible that the Comptroller may act beyond the scope of the Exchange of Information request’.⁴⁹⁴

Baker comments that:

‘It will often be totally fortuitous that the person of interest (i.e. the data subject) learns of the request. If there is no obligation to notify the person of interest (as would be the case where the court has to authorize the issue of the notice), any safeguard depends essentially on the happenstance that the person of interest learns of the request.’⁴⁹⁵

The UK, currently the only G20 country to require Tribunal approval for third party notices, has considered legislative amendments which will allow HMRC to issue third party notices without approval from the Tribunal.⁴⁹⁶ HMRC’s comments in its consultation document published in 2018 echoed Singapore’s comments in this regard:

‘the UK requirement for tribunal approval was heavily criticised for adding significantly to the time taken to respond to requests for banking information from other jurisdictions, and for requiring more information to justify the request than is expected under the international standard...the UK’s unusually formal and lengthy process for obtaining third party information means that additional resources alone are unable to allow it to meet this aspect of the globally agreed standards. It is important that the UK acts to address this issue.’⁴⁹⁷

⁴⁹³ IRAS ‘Singapore to Significantly Strengthen Framework for International Tax Cooperation’ available at <https://www.iras.gov.sg>, accessed on 9 October 2019.

⁴⁹⁴ Lim et al op cit note 469.

⁴⁹⁵ Philip Baker QC *AXY and others v Comptroller of Income Tax* 20 ITLR 726, [2017] SGHC 42.

⁴⁹⁶ Jake Landman ‘Proposed new tax information notice for UK financial institutions’ available at pinsentmasons.com, accessed on 23 December 2020.

⁴⁹⁷ HMRC ‘Amending HMRC’s Civil Information Powers – Consultation document 10 July 2018’ available at www.gov.uk, accessed on 24 June 2020.

The proposed amendments were met with negative responses. It was, *inter alia*, said that the removal of ‘advance approval of the notice by a tribunal does not adequately safeguard the taxpayer’.⁴⁹⁸

The UK government issued draft legislation in 2020 which proposes to remove Tribunal approval for Financial Institution Notices (FINs) only.⁴⁹⁹ There will be no right to appeal the FIN, only a right to appeal a penalty for non-compliance. It appears that judicial review may then be the only way to challenge a FIN.⁵⁰⁰ Other commentators note that should this abandonment of Tribunal approval for third party notices to FINs be deemed successful, it may pave the way for removal of all approvals in future.⁵⁰¹

⁴⁹⁸ Jason Collins ‘HMRC seeking ‘unprecedented’ information request powers’ available at pinsentmasons.com, accessed on 22 June 2020.

⁴⁹⁹ HMRC ‘Amending HMRC’s Civil Information Powers – Summary of responses 21 July 2020’ available at www.gov.uk, accessed on 23 December 2020.

⁵⁰⁰ Landman op cit note 496.

⁵⁰¹ Mike Lane & Zoe Andrews ‘Tax and the City review for August 2020’ available at taxjournal.com, accessed on 23 December 2020.

5. SELECTED DECISIONS BY FOREIGN COURTS REVIEWING REVENUE AUTHORITY DECISIONS CONCERNING THE MUTUAL AGREEMENT PROCEDURE AND THE PRINCIPAL PURPOSE TEST

This chapter will consider case law on judicial review in the context of mutual agreement procedure (also referred to as MAP) and the principal purpose test (also known as the PPT). There is limited case law in these areas, and it is therefore not possible to determine whether there is convergence in argument at this stage.⁵⁰² These cases are nonetheless considered because they provide arguments that may serve as reference points to a different court. The mutual agreement procedure cases were selected if it dealt with justiciability, the standard of review and disclosure.⁵⁰³ The *Starr International* case was specifically selected for discussion in the context of the PPT. There is an absence of case law and therefore the *Starr* case may be instructive as it deals with a purpose test as found in US tax treaty practice.⁵⁰⁴

5.1. Case law on mutual agreement procedure

In 2017, the District Court of Amsterdam delivered a decision in which it found that the decision of the Dutch revenue authority not to initiate mutual agreement procedure was subject to judicial review.⁵⁰⁵

The Dutch revenue authority rejected the taxpayer's request to initiate the procedure on the basis that in their view on the facts there was no discrimination in terms of Article 24 of the tax treaty between Germany and the Netherlands. Although the taxpayer objected, the Dutch revenue authority held it to be inadmissible on the basis that the rejection was not a formal administrative act.

The District Court rejected this view and found in favour of the taxpayer. It held that had the revenue authority decided to initiate a mutual agreement procedure, the two competent authorities would have been obliged to endeavour to come to an agreement and because of such potential legal effect, the decision constituted a formal administrative act. The decision not to allow the taxpayer's objections was annulled

⁵⁰² A search on the IBFD tax research platform rendered only 4 cases in the last decade in the context of mutual agreement procedure and judicial review.

⁵⁰³ Two Canadian cases dealing with transfer pricing disputes were excluded due to the specific and unusual facts of each case and to limit the scope of this dissertation.

⁵⁰⁴ PwC 'Multilateral instrument coming into force to change many tax treaties from 1 January 2019', available at <https://www.pwc.com>, accessed on 30 June 2019.

⁵⁰⁵ The Netherlands: *Case AMS 16_5412* Rechtbank (District Court) Amsterdam 25 July 2017, Tax Treaty Case Law IBFD. The facts are set out in Annexure A paragraph 17.

by the District Court and the case was returned to the revenue authority for reconsideration.

In 2016, the Canadian Federal Court of Appeal considered whether the failure of the two competent authorities (the US and Canada) to reach a mutual agreement was judicially reviewable.⁵⁰⁶

The taxpayer sought judicial review of the conduct of the Canadian revenue authority through the mutual agreement process.⁵⁰⁷ It argued that its procedural fairness rights were not respected during the process.⁵⁰⁸ The Minister of National Revenue sought to argue that there was no decision to judicially review.⁵⁰⁹ It was also argued that the Court had no jurisdiction over treaty discussions between Canada and the US.

On the issue of jurisdiction, the Court relied on a prior decision that supported the finding that

‘the administrative actions of the Minister even in the context of the MAP process are subject to review, provided the Court, in its supervisory role, shows appropriate deference to the role of the Minister and her prerogative powers over foreign affairs’.⁵¹⁰

There was a decision by the Canadian competent authority to deny the tax refund and that decision brought the mutual agreement procedure to an end. The Court found that such decision formed the foundation for the judicial review application.⁵¹¹

Reasonableness was held to be the standard for review:

‘the Court will only intervene if it can be demonstrated that the decision falls outside the range of possible, acceptable outcomes defensible in respect of the facts and the law’.⁵¹²

The Court found in favour of the Canadian competent authority on the basis that its conclusions were within the range of possible outcomes of the MAP. The Court also found that there was no breach of procedural fairness since the taxpayer was afforded

⁵⁰⁶ *CGI Holding LLC v The Minister of National Revenue* 2016 FC 1086. The facts are set out in Annexure A paragraph 18.

⁵⁰⁷ *CGI* supra note 506 at 12.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Ibid* para 13.

⁵¹⁰ *Ibid* para 18. The case that the Court referred to was *Hupacasath First Nation v Canada (Minister of Foreign Affairs)* 2015 FCA 4.

⁵¹¹ *Ibid* para 44.

⁵¹² *Ibid* para 46 - 50.

the opportunity to provide submissions to the Canadian competent authority and to address their concerns in writing during the procedure.⁵¹³

In the UK case of *McCabe*, the issue of disclosure of MAP related documents arose.⁵¹⁴ The First-Tier Tribunal noted that transparency is an important consideration, but it did not authorise disclosure of the requested documents since they were of low relevance.⁵¹⁵ The Tribunal found HMRC's arguments in favour of confidentiality more convincing. It is said that 'the judgment does leave open the possibility that, in appropriate circumstances, access may be granted to documents used in MAP'.⁵¹⁶ The Tribunal's decision was upheld by the Upper Tribunal on appeal.⁵¹⁷

In contrast, the Belgian Council of State recently reversed the decision of the Belgian tax authority to refuse disclosure of MAP related correspondence.⁵¹⁸ The Court found that it was not properly demonstrated that the interests of confidentiality and of relations with the UK outweighed the public interest served by disclosure.⁵¹⁹ This decision followed a 2013 decision of the Council of State which had a similar outcome.⁵²⁰

5.2. Concluding comments

The decision of the Amsterdam District Court that the rejection of a request is an administrative act is important as it implies that such decision can be subject to judicial scrutiny which in turn provides the taxpayer with the right of access to a court.

The importance of the Canadian case is that it confirms that the mutual agreement procedure is subject to judicial supervision.⁵²¹ It is noted that 'unfortunately, the

⁵¹³ Ibid para 61.

⁵¹⁴ *McCabe v Revenue and Customs Commissioners* [2019] UKFTT 317 (TC). The facts are set out in Annexure A paragraph 19.

⁵¹⁵ The FTT noted that Article 26 (Exchange of Information) permitted documents related to MAP to be disclosed but did not compel it.

⁵¹⁶ Philip Baker *McCabe v Revenue and Customs Commissioners* 21 ITLR 783, FTT 20 May 2019. Baker also notes that the difficulty in this case is the exact nature of the MAP – i.e., is it an intergovernmental negotiation or a dispute-resolution procedure in which the taxpayer should participate?

⁵¹⁷ Philip Baker *McCabe v Revenue and Customs Commissioners* 23 ITLR 267, [2020] UKUT 266 (TCC).

⁵¹⁸ Philip Baker *X v Belgium* 23 ITLR 221. The facts are set out in Annexure A paragraph 20.

⁵¹⁹ Ibid.

⁵²⁰ Philip Baker *Garlon SA v Belgium* 23 ITLR 187.

⁵²¹ Jonathan Schwarz 'Mutual disagreement procedure?' available at <https://www.kluwertaxblog.com>, accessed on 29 October 2019.

decision did not address the central shortcoming of MAP, namely what constitutes an “endeavour” in those cases where mutual agreement is not reached’.⁵²²

Schwarz notes that the English High Court has held that it is possible to give sensible content to an undertaking to endeavour where there is a clearly defined object of the endeavours.⁵²³ He states that in mutual agreement procedure it would be taxation in accordance with the treaty. The Court in that case noted:

‘Whether the party who gave the undertaking has endeavoured to make such an agreement (or used its best endeavours to do so) is a question of fact which a court can perfectly well decide’.⁵²⁴

It has been argued that

‘the deference that courts accord to these decisions and the reasonableness standard by which they are reviewed suggests that judicial review is an extremely limited means of ensuring that a taxpayer’s treaty rights are upheld through the MAP process’.⁵²⁵

In South Africa, SARS’s Guide on Mutual Agreement Procedures stipulates that a person can pursue the mutual agreement procedure and domestic legal remedies simultaneously.⁵²⁶ It is stated that

‘[c]ompetent authorities of contracting jurisdictions use their best endeavours to reach an agreement, however, in instances where no agreement can be reached, the competent authorities will consider the case closed and notify the taxpayer accordingly. If a valid notice of objection or an appeal has been filed, the taxpayer will still have the right to proceed with through the appeals process or the tax court’.⁵²⁷

The problem with the above statement is that if the principle established in the Canadian case is to be followed, the decision by SARS to end a mutual agreement procedure could be subject to judicial review. The appeals process in this instance

⁵²² Schwarz op cit note 521.

⁵²³ Jonathan Schwarz ‘Enforcement of BEPS Dispute Resolution Minimum Standards: Real rights or pious rhetoric’ available at <https://www.kluwertaxblog.com>, accessed 27 June 2020.

⁵²⁴ *Astor Management AG & Anor v Atalaya Mining Plc & Ors* [2017] EWHC 425 para 67.

⁵²⁵ Lang et al *Tax Treaty Case Law Around the Globe 2017* (2018) 387. It is noted that it is not surprising that the Canada-US treaty was amended in 2008 to include a mandatory arbitration provision as ‘the facts of the case leave the impression that the taxpayer may not have received as thorough a hearing of its arguments as it might and that an alternative process would have resolved the issue more efficiently and effectively’.

⁵²⁶ SARS ‘GUIDE ON MUTUAL AGREEMENT PROCEDURES’ available at <https://www.sars.gov.za>, accessed on 27 October 2019.

⁵²⁷ Ibid para 5.2.

refers to the assessment under dispute. The Guide is silent on whether the decision to close the case can be subject to judicial review. Such a decision is not subject to objection and appeal in terms of section 104 of the Tax Administration Act. The taxpayer has an internal remedy under section 9 of the Act which would need to be exhausted first before an application for judicial review can be made to the High Court in terms of the Promotion of Administrative Justice Act (provided such action constitutes ‘administrative action’ as defined).⁵²⁸ If not, the principle of legality will form the basis for the application for review.⁵²⁹ It will be interesting to see if an application for judicial review of the decision to close the case will be stayed pending the outcome of a domestic objection to the assessment.

5.3. The principal purpose test and the relevance of the *Starr* case

This section considers judicial scrutiny of the exercise of discretion in the context of availability of tax treaty benefits. The PPT as found in the MLI and Article 29(9) of the OECD MTC is not an entirely novel concept (refer 3.5.1). One of the sources of the PPT is US tax treaty practice. The recent US case of *Starr* provides insight into how a court has reviewed the application of a principal purpose test in this context.⁵³⁰ The case concerned the application of the tax treaty between the US and Switzerland. *Starr*, a Swiss resident, applied for discretionary tax treaty benefits in terms of Article 22(6) of the relevant tax treaty. The Internal Revenue Service (IRS) denied the treaty relief.

5.3.1. The discretionary benefits provisions – Article 22(6)

Article 22(6) is found in the 2016 US Model Income Tax Convention (US MTC) and is known as the ‘discretionary benefits provision’.⁵³¹ It is known as a residual *bona fide* test in the limitation of benefits article. The limitation of benefits provisions are objective tests that determine which entities qualify for treaty relief. The discretionary benefits provision exists to counterbalance the strict mechanical approach of the

⁵²⁸ Section 7(2) of PAJA.

⁵²⁹ *Minister of Home Affairs v The Public Protector* (308/2017) [2018] ZASCA 15.

⁵³⁰ *Starr International Co Inc v United States of America: United States of America v Starr International Co Inc* 20 ITLR 94, Case No 14-cv-01583 (CR) 14 August 2017. The facts and relevant treaty provision are set out in Annexure A paragraph 23 - 24.

⁵³¹ Refer Annexure A paragraph 22.

objective tests.⁵³² It provides taxpayers with the opportunity to present evidence that treaty benefits was not one of the principal purposes of the arrangement.⁵³³

The discretionary benefits provision allows the competent authority to grant treaty relief, whereas the PPT as found in the MLI and Article 29(9) of the 2017 OECD MTC is a tax treaty general anti-avoidance rule (GAAR) which functions to deny treaty relief. However, both tests refer to ‘one’ of the/its ‘principal purposes’.⁵³⁴

The treaty between the US and Switzerland (the relevant treaty in the *Starr* case) was concluded in 1996 and was therefore based on an earlier version of the US MTC. There was no mention of a ‘principal purpose’ in the treaty text itself. However, the ‘principal purpose’ test was described in the Technical Explanation to the treaty.⁵³⁵

The District Court in the *Starr* case noted that the discretionary benefits provision is ‘at times referred to as the “principal purpose” test’.⁵³⁶

Baker also considers the case relevant and notes that it may prove to be of future significance as the PPT is likely to be a contentious issue which will lead to litigation in many countries.⁵³⁷

The US courts’ findings in 2015 and 2016 in relation to the justiciability of the IRS’s decision to deny treaty benefits is discussed first. Thereafter, the Court’s judicial review of the application of the PPT in the 2017 decision is examined.

5.3.2. Justiciability

The US competent authority denied *Starr*’s request for discretionary treaty benefits in 2010. In 2014, *Starr* brought a tax refund suit for the difference in the tax withheld and

⁵³² Blajez Kuzniacki ‘Discretionary Benefits Provisions under the MLI: A Virtuous Solution or Vicious Circle?’ (2017) 100(145) *Tax Notes Int’l* 451 at 452.

⁵³³ Ibid.

⁵³⁴ Most signatories to the MLI adopted the PPT only (Article 7(1)) and not the limitation on benefits provisions in Article 7(12) which is based on Article 22(6) of the 2016 US MTC. The MLI PPT has an optional discretionary benefits provision in Article 7(4). Kuzniacki (op cit note 532) has pointed out that the OECD’s guidance on the interpretation of ‘one of the principal purposes’ in the Commentary on the discretionary benefits provision is largely replicated in the Commentary on the PPT.

⁵³⁵ Department of the Treasury ‘Technical Explanation of the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income’ available at <https://www.irs.gov>, accessed on 26 June 2019. The Technical Explanation provides that the competent authority of a State will base a determination under the discretionary benefits provision on whether the establishment, acquisition, or maintenance of the person seeking benefits under the Convention, or the conduct of such person’s operations, has or had as one of its principal purposes the obtaining of benefits under the Convention.

⁵³⁶ *Starr* supra note 530 at 101.

⁵³⁷ *Starr* supra note 530.

the tax that would have been withheld had *Starr* qualified for treaty benefits. *Starr's* contention was that the IRS abused its discretion, citing various reasons including that its move to Switzerland was not for treaty shopping purposes and that the IRS failed to consult the Swiss competent authority before denying the request.⁵³⁸ The US Government tried to dismiss *Starr's* tax refund suit by arguing non-justiciability on the basis that the IRS's decision to deny *Starr* treaty benefits was within the agency's exclusive discretion and, in the alternative, that the matter involved a non-justiciable political question which was outside of the Court's jurisdiction.⁵³⁹

In 2015, the District Court found the case to be fully justiciable and dismissed the Government's arguments for non-justiciability. The Court held that

‘[b]ecause the treaty does not reflect an unambiguous intent to foreclose judicial review and the Technical Explanation of the treaty – which the IRS followed here – supplies a meaningful standard for determining whether a Swiss company qualifies for treaty benefits, the Court may review whether the Secretary abused his discretion in not extending those benefits to Starr...’.⁵⁴⁰

One of the arguments advanced by the IRS was that the Court would be infringing on the separation of powers principle if it granted relief under the tax refund suit. The treaty required that the IRS consult with the other competent authority prior to granting treaty benefits. It was contended that the Court would be impinging on the Executive's authority in such instance if it were to dictate the outcome of the consultation process.⁵⁴¹ Since the IRS in this case denied the treaty benefits, the Court did not consider this argument because consultation was not required.⁵⁴² The Government appealed and the Court revised its earlier finding in respect of the consultation process, noting

‘that the court lacked the power to dictate the outcome of the consultation process and that it would impinge upon the executive's prerogative to engage in that process if the court were to render consultation meaningless or dictate its outcome. Yet, ordering the

⁵³⁸ *Starr International Co Inc v United States of America* 18 ITLR 218, Case No 14-cv-01593 (CRC), 18 September 2015.

⁵³⁹ *Starr* supra note 538.

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

⁵⁴² Both the updated US MTC and the MLI text of the discretionary benefits provision now require that consultation take place before either granting or denying treaty benefits. The PPT has no such requirement.

IRS to issue Starr a specific monetary refund – prior to any consultation having taken place – would do precisely that’.⁵⁴³

The Court dismissed the tax refund suit, but it allowed *Starr* to apply for judicial review of the IRS’s decision under the Administrative Procedure Act (APA). This outcome led to the 2017 decision.

5.3.3. The 2017 District Court decision and the relevance thereof

The 2017 decision in *Starr* may warrant consideration by other courts that in future would need to judicially review the exercise of discretion under the PPT as found in the OECD model-based clause. As discussed earlier, commentators attribute the relevance of the case to the absence of case law on the PPT, the lack of guidance from tax authorities and the fact that the interpretation and application of the PPT will likely be disputed in many jurisdictions.

The Court noted that the applicable provision of the APA generally limited judicial review of agency action to the administrative record and that the standard of review under the APA was ‘highly deferential’ and ‘presumes the agency’s action to be valid’. Furthermore, it quoted that

‘[t]he reviewing court is “not to substitute its judgment for that of the agency”’⁵⁴⁴ and, ‘it must nonetheless ensure that “the agency...examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made”’.⁵⁴⁵

Starr argued that the IRS’s determination under the PPT was arbitrary and capricious, arguing that the way the PPT was applied was not correct. It was argued that key information was overlooked by the IRS and it paid attention to irrelevant or incorrect facts leading to unreasonable conclusions.

Starr denied that tax benefits was one of its principal purposes in relocating to Switzerland. The reduction in the withholding tax rate on dividends was the same under the US-Irish treaty with the key difference being that under that treaty it would have been automatic and not discretionary. The Court noted that the Technical

⁵⁴³ *Starr International Co Inc v United States* (2016) No-14-CV-01593, 2016 WL 410989.

⁵⁴⁴ *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016), quoting *Motor Vehicle Mfrs. Ass’n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁵⁴⁵ *State Farm* supra note 544 at 43.

Explanation called for a wider inquiry - ‘the question was not simply why *Starr* chose Switzerland over Ireland, but rather why *Starr* chose Switzerland over any other jurisdiction where it might have moved’. The question was why a company chose to ‘establish’ or ‘maintain’ itself in a certain jurisdiction. The Court also noted that the history of *Starr*’s moves could be considered and not only the most recent relocation. *Starr* argued that a decision matrix provided evidence that a tax motive was not the main concern in relocating to Switzerland.⁵⁴⁶ The Court was not convinced by the authenticity of the decision matrix. The view was held that even if the Court assumed it was a true reflection of the decision-making process, it still showed that tax was one of the principal considerations. The Court stated that although Switzerland was marked as ‘Bad’ for U.S. taxes,

‘it was definitely better in that regard than at least one of the other finalists (Bermuda), and if the company had been afforded discretionary relief ... then Switzerland would have tied for first place in that category with the other jurisdictions’.⁵⁴⁷

The Court concluded that neither the decision matrix nor *Starr*’s decision to leave Ireland in favour of Switzerland lead to the conclusion that treaty benefits were not a ‘principal’ consideration. As such, the Court found that the competent authority’s determination was not arbitrary nor capricious.

Starr’s argument that the competent authority considered irrelevant and incorrect facts rested on their contention that its history of residence and incorporation was irrelevant to the Article 22(6) standard. The Court however found that ‘there is nothing in the Article 22(6) standard that limits the historical lens through which the competent authority may make a “principal purpose” determination’.

It ruled that

‘[b]y applying the correct legal standard to a host of indisputably relevant facts, the Competent Authority satisfied its obligations under the APA to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made”’.⁵⁴⁸

⁵⁴⁶ Other possible jurisdictions guaranteed a lower withholding tax rate which it could only obtain in Switzerland through the discretionary exception.

⁵⁴⁷ *Starr* supra note 530 at 120.

⁵⁴⁸ *Ibid* at 123.

5.3.4. Outcome of the *Starr* case

On appeal, the Court reversed the District Court's 2016 decision which dismissed the tax refund claim and as a result also held that Starr had no cause of action under the APA.

The Court of Appeals reviewed *de novo* whether the case presented a nonjusticiable political question. It held that the question whether *Starr* was entitled to discretionary relief in terms of Article 22(6), was 'a straightforward case of treaty interpretation' and that the IRS's alleged misinterpretation of federal law was 'plainly a matter for a court to decide'.⁵⁴⁹

The Court of Appeals referred the case back to the District Court so that *Starr* could pursue its claim for a tax refund.⁵⁵⁰ It held that *Starr* had no cause of action under the APA since the latter only supported a cause of action when there was no other adequate remedy in a court. It referred to case law where it was held that suits for refunds offered taxpayers a full opportunity to litigate the legality of an IRS decision.

The Court of Appeals decision unfortunately added nothing further to the District Court's explanation of the meaning of the principal purpose test.⁵⁵¹ Although the Court of Appeals revived *Starr's* tax refund claim, Starr and the IRS filed a stipulation of dismissal in April 2019.⁵⁵²

5.3.5. Concluding comments

There were various judgments in the *Starr* matter, and it is therefore necessary to extract the most important aspects of the case:

- The Court of Appeals dismissed the IRS's arguments against justiciability and held that it was a straightforward case of treaty interpretation.

⁵⁴⁹ *Starr International Co Inc v United States of America and others* 21 ITLR 409, No 17-5238 United States Court of Appeals for the District of Columbia, 7 December 2018. The Court noted that 'it is hardly an oddity for courts to adjudicate tax claims based on international agreements, which is all that is required here'.

⁵⁵⁰ The Court of Appeal had four possible outcomes in mind – essentially giving the IRS the opportunity to reconsider its decision not to consult with the Swiss competent authority. These outcomes are summarised in Annexure A paragraph 25. The Court noted that in all possible outcomes other than where the IRS decided to grant treaty benefits, the aggrieved party could seek appellate review.

⁵⁵¹ Philip Baker QC *Starr International Co Inc v United States of America and others* 21 ITLR 409, No 17-5238, 7 December 2018.

⁵⁵² Natalie Olivo 'Top 4 International Tax Cases of 2019: Midyear Report' available at <https://www.law360.com>, accessed on 27 October 2019.

- The District Court’s review under the APA was highly deferential with the Court noting that the reviewing Court is not to substitute its judgment for that of the agency.
- There was a rational connection between the facts found and the IRS’s decision, despite Starr’s contention that it paid attention to irrelevant information.

Commentators note that the *Starr* decision makes clear that, while the US competent authority has broad discretion in determining whether to grant treaty benefits, that discretion is not unfettered and may be subject to judicial review to determine whether the standards applied by the US competent authority depart from the standards established by the treaty.⁵⁵³

The Court’s application of the principal purpose test has been criticised. The Court did not ‘delve into the meaning of “principal purpose”, such as whether it might mean “a first purpose among equals,” as *Starr* argued, or instead an “important” purpose, finding it “inconsequential” as applied to the facts of the case’.⁵⁵⁴

The Court did not consider *Starr*’s reasons for leaving Ireland. These included the limitation on the ability of charitable entities to make distributions to non-Irish recipients and the litigation risk that Starr faced in Ireland because of anticipated AIG lawsuits.⁵⁵⁵

Another commentator has stated that if the availability of treaty benefits had been the dominant factor in *Starr*’s decision making, the company would have gone elsewhere – ‘[i]n fact, it would have done better to stay put in Ireland where withholding relief was a foregone conclusion’.⁵⁵⁶ It therefore begs the question whether a treaty benefit was indeed a ‘principal’ purpose.

⁵⁵³ Steve Nauheim, Oren Margulies, David Ernick ‘DC Circuit subjects requests for discretionary grant of treaty benefits to judicial review’ available at <https://www.pwc.com>, accessed on 27 October 2019.

⁵⁵⁴ Amanda Varma ‘US Court determines IRS properly denied discretionary tax treaty benefits’ available at <https://mnetax.com>, accessed on 5 July 2019.

⁵⁵⁵ Ibid.

⁵⁵⁶ Robert Goulder ‘Who Hijacked the Principal Purpose Test’ available at <https://www.taxnotesinternational.com>, accessed on 27 October 2019.

6. CONCLUSION

The aim of this dissertation was to research the extent of convergence in the reasoning of different courts reviewing revenue authority decisions under model-based tax treaties whilst being cognizant of different legal frameworks.

There is a need for the uniform interpretation of tax treaties which are to be interpreted according to the rules of the Vienna Convention. The courts, through the process of judicial review, fulfil an important role in ensuring that open-ended model-based tax treaty clauses are interpreted and applied based on a purposive approach that is consistent with the rule of law. There is increased support for the rule of law to require the protection of fundamental human rights.

In respect of cross-border exchange of information on request, there is evidence of convergence on the justiciability of the decision to exchange information. Arguments raised by revenue authorities against justiciability have been firmly rejected.⁵⁵⁷ One commentator noted that ‘[i]t may be hoped we do not see this ventured again in a democracy where the Executive is subject to the rule of law’.⁵⁵⁸

The cases analysed suggest that the courts recognise the principle of legality – taxpayers should be protected against arbitrary exercise of discretion by revenue officials. There are however differences in the legal basis for judicial review. In common law jurisdictions such as New Zealand and Singapore, grounds such as irrationality and illegality formed the basis for an application for judicial review. Within the EU, the CJEU recognised that the principle of effective judicial protection is a general principle of EU law. These cases were however decided within the context of the EU Directive on exchange of information and the EU Charter which embodies this principle in the right to an effective remedy and fair trial. It remains to be seen what the outcome will be where a tax treaty forms the basis of the request to exchange information and whether the European Convention on Human Rights will provide protection.

⁵⁵⁷ These arguments included that review proceedings would undermine a country’s reputation by delaying the provision of requested information; such decisions were inherently unsuitable for solution by the courts; other safeguards exist such as the international peer review system; and the legal instruments did not confer rights on the taxpayer.

⁵⁵⁸ David W Marks QC ‘Exchange of information under DTAs: NZ case has wide import’ (2018) 68 *WTB* 3.

There is an extent of convergence in respect of the interpretation of the standard of foreseeable relevance. Most of the decisions analysed concluded that validity of the request should be determined at face value, but that clarification should be requested from the requesting state where necessary. The Courts show deference to the decision-maker.

The Grand Court of the Cayman Island was of the view that the intensity of judicial review should be determined with reference to constitutionally protected rights. Further research should consider whether a stricter standard of review is not required to assess the standard of foreseeable relevance having regard to the fact that fundamental rights could be violated if information is exchanged that is not foreseeably relevant. It is said that exchange of information and its interaction with the right to privacy is still an under researched area.⁵⁵⁹

There is evidence of convergence in relation to the confidentiality of the request. The courts are applying the *audi alteram partem* principle and supplementing statute with procedural fairness. Court alone review is not permitted. There is divergence on the question of whether the actual request should be made available to the taxpayer, with some arguing in favour of a suitably redacted copy being provided whilst others placed more emphasis on the secrecy of the document. One court rejected the disclosure of the request to both the court and the taxpayer based on the presumption of regularity. In this regard, comments of the New Zealand High Court are worth repeating: ‘The days when a Court will accept an official’s simple assertion that a power had been exercised lawfully are long over...’.⁵⁶⁰

It is not possible at this stage to determine convergence in respect of the interpretation and application of the mutual agreement procedure and the PPT. There are nonetheless arguments that have been identified that may be considered by other courts.

The rejection of a request to initiate a mutual agreement procedure is an administrative act that can be subject to judicial scrutiny. The procedure itself can be subject to judicial supervision – a decision to end a MAP can be reviewed by the courts. The question in this regard is whether reasonableness is the appropriate standard for review given the fact that the taxpayer has limited participation rights in the dispute. Future

⁵⁵⁹ Debelva op cit note 360.

⁵⁶⁰ *Chatfield* supra note 7 para 85.

decisions should attempt to give content to the phrase ‘endeavour...to resolve’. Lastly, it appears that grounds of confidentiality no longer justify a blanket refusal to disclose MAP related documents.

In respect of the PPT, the *Starr* case confirmed that the principal purpose test as found in the US discretionary benefits provision is justiciable. It is a matter of treaty interpretation. The issue highlighted by the case, is the Court’s highly differential approach to review of the application of the test. Future decisions should attempt to give meaning to ‘one of the principal purposes’ and provide guidance on when it would be reasonable to conclude that a treaty benefit was a principal purpose.⁵⁶¹ Pasquet states that foreign decisions can also be used to come to an opposite conclusion.⁵⁶² In his view transjudicial communication is multidirectional and interactive – ‘it continuously transmits an indefinite number of compromises among different contrasting rationalities and discourses, each of which has a chance to be selected and replicated by other courts’.⁵⁶³

⁵⁶¹ The US tax case of *Furstenberg v Commissioner of Internal Revenue* (83 T.C. No. 43, 83 T.C. 755, 26 November 1984) is an example of a case that considered the meaning of ‘one of its principal purposes’.

⁵⁶² Pasquet op cit note 14 at 503.

⁵⁶³ Ibid.

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8. ANNEXURE A

1. Facts of the *Sabou* case

- 1.1. The Czech revenue authority requested information from the revenue authorities of several EU Member States in respect of certain expenses that Mr. Sabou, a Czech football player, claimed to have incurred in these States and which he deducted from his taxable income.
- 1.2. After receiving an additional notice of assessment, Mr. Sabou tried to challenge the adjusted notice, but the action was dismissed. He then appealed to the Czech Supreme Administrative Court on a point of law. The Czech Supreme Administrative Court referred these questions to the Court of Justice of the European Union (CJEU) which had jurisdiction since the Directive concerned the application of EU law.⁵⁶⁴
- 1.3. He alleged that the Czech revenue authority obtained information about him illegally as he was not informed of the request and could not take part in formulating questions for the other authorities; and he was not invited to take part in the examination of witnesses – a right which he would otherwise have in terms of domestic law.

2. Facts of the *Berlioz* case

- 2.1. Berlioz Investment Fund SA (Berlioz), a joint stock company governed by Luxembourg law, received dividends from its French subsidiary, Cofima, which were exempt from withholding tax in terms of French law.
- 2.2. The French revenue authority requested information on Berlioz from the Luxembourg revenue authority because of concerns as to the applicability of the exemption. The request for assistance was issued in terms of Directive 2011/16.⁵⁶⁵ The Luxembourg revenue authority then requested information from Berlioz to respond to the request for information.

⁵⁶⁴ Directive 77/799: Mutual assistance by Member States in the field of direct taxation and taxation of insurance premiums.

⁵⁶⁵ Successor of Directive 77/799.

- 2.3. Berlioz provided certain information but refused to provide other information on the basis that it was not foreseeably relevant.⁵⁶⁶
 - 2.4. Due to the refusal, the Luxembourg revenue authority imposed a fine of EUR 250,000.
 - 2.5. Berlioz had a statutory right to judicial review of the penalty only and the Administrative Tribunal refused its request to challenge the validity of the information order.
 - 2.6. Berlioz appealed to the Administrative Court claiming that its right to an effective judicial remedy as guaranteed by Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) had been breached.⁵⁶⁷ The Administrative Court referred several questions to the CJEU, taking into account Article 47 of the Charter of Fundamental Rights of the European Union (right to an effective remedy and to a fair trial) which is based on Articles 13 and 6(1) of the ECHR.
 - 2.7. Since the penalty involved the implementation of the Directive 2011/16 and therefore fell within the scope of EU law, the Charter of Fundamental Rights of the European Union (EU Charter) applied.
3. Facts of the *Shakira* case
 - 3.1. The Spanish revenue authority requested information from Luxembourg in terms of Article 27 of the relevant tax treaty and EU Directive 2011/16.
 - 3.2. The Luxembourg revenue authority in turn issued an order for information to a Luxembourg company of which the taxpayer was allegedly the indirect shareholder and ultimate beneficiary. In conformity with Luxembourg domestic law, the order stated that an appeal could not be lodged against it.

⁵⁶⁶ Article 1(1) of the Directive 2011/16 provides that the Directive lays down the rules and procedures under which the member states shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the member states concerning the taxes referred to in Article 2.

⁵⁶⁷ Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

3.3. The company appealed to the Administrative Tribunal firstly on the basis that the absence of a right to judicial review breached the right to an effective remedy in terms of Article 47 of the EU Charter. In this regard, the company specifically relied on the CJEU's judgment in the *Berlioz* case.

3.4. Furthermore, it was alleged that the Luxembourg revenue authority had not assessed the foreseeable relevance of the request and therefore did not adhere to the Directive nor Article 27 of the tax treaty. As a result, the order infringed on Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the EU Charter.

4. Facts of the *Chatfield* case

4.1. The Korea National Tax Service requested in terms of Article 25 of the tax treaty between the Republic of Korea and New Zealand, information relating to 21 New Zealand taxpayers. Since all of the information requested was not available, the Commissioner of Inland Revenue had to issue notices (to furnish information) to Chatfield & Co Limited, a tax agent for the target companies.⁵⁶⁸

4.2. Chatfield proceeded to institute proceedings to challenge the legality of the notices. Chatfield also requested disclosure of the request made by the Korea National Tax Service. Chatfield's statement of claim rested upon its contention that the Commissioner erred in law in issuing the notices.

5. Facts of the *ABU* case

5.1. The Japanese revenue authority sent the Singapore revenue authority a request for information in terms of the tax treaty between Singapore and Japan regarding bank accounts held by a Japanese national.

5.2. It was suspected that the Japanese national failed to report certain distributions received from foreign securities investment funds.

5.3. The Singapore revenue authority had to apply to the High Court for an order authorizing the production of the bank statements. At the time, Singapore

⁵⁶⁸ Chatfield acted as tax agent for KNC Construction Ltd and several associated companies.

legislation determined that such information was protected from unauthorised disclosure.

6. Facts of the *AXY* case

- 6.1. The Republic of Korea's revenue authority requested information from the Singapore revenue authority in terms of the tax treaty between these two countries. They were investigating possible tax evasion involving four appellants that were Korean nationals living in Indonesia. It was suspected that one of the appellants was the beneficial owner of several companies that were incorporated in Singapore.
- 6.2. After several months of correspondence, Singapore's Comptroller issued production notices to banks in Singapore for the disclosure of banking activities of the appellants and several related companies. The Comptroller had sought to clarify various aspects of the request with the Korean revenue authority and enquired about the relevance of the requested information prior to issuing the production notices. The Korean revenue authority responded and met with the Comptroller.
- 6.3. The appellants and companies were not informed of the issue of production notices to the banks. In terms of the applicable legislation, a High Court order was no longer a requirement and furthermore, the Comptroller could exercise his discretion to conduct the entire process covertly and issue the production notices on a confidential basis.
- 6.4. The appellants subsequently became aware of the request and production after the Korean revenue authority investigators informed them thereof. They applied for leave to seek judicial review of the Comptroller's decision to issue the production notices on the grounds of irrationality and illegality.

7. Facts of the *Derrin* case

- 7.1. The Australian revenue authority requested information from HMRC in terms of the tax treaty between Australia and the UK.
- 7.2. The request stated that a UK accounting firm were providing nominee directors and shareholders to companies incorporated in the UK but beneficially owned by Australian residents which were under investigation.

There were several concerns, including that these companies were tax resident in Australia based on effective management and control.

7.3. The Australian revenue authority specifically requested documents and information held by the UK accounting firm as well as several UK banks.

7.4. The issue of formal third party notices to provide information was subject to approval by a tribunal in terms of Schedule 36 of the relevant UK legislation.

7.5. The workings of Schedule 36 can be summarised as follows:

7.5.1. The notice can only be approved if the third party is informed of the identity of the taxpayer and given a reasonable opportunity to make representations although no express right is conferred to make representations directly to the Tribunal or to be present at the hearing.

7.5.2. The taxpayer in turn must receive a summary of the reasons why the information and documents specified are required but has no express right to make representations. Once issued, the taxpayer must receive a copy of the third-party notice.

7.5.3. Some of the requirements of Schedule 36 can be disappplied by the Tribunal if such action could prejudice the investigation. The practice of the Tribunal is to hear such applications in private and furthermore, the Tribunal does not record in writing the reasons for approving a notice.

7.6. The appellants commenced judicial review proceedings in the High Court which were rejected. On appeal, it was argued that the notices were wrongly approved by the Tribunal and issued by HMRC and was therefore *ultra vires* and invalid on the basis that there was a breach of the requirements of Schedule 36 and/or there was a violation of the right to a fair trial under the European Convention for the Protection of Human Rights read with the right to private life and correspondence.

8. Facts of the *Jimenez* case

8.1. The issue in this case was whether notices issued under Schedule 36 had extra-territorial effect. Mr Jimenez, a British national, lived in Dubai. HMRC argued that it had the power to give such notice to any taxpayer outside of the UK. The underlying issue was the tax residence of Mr Jimenez.

8.2. The relevance of this case was in the *obiter* comments made in respect of the process of approval of taxpayer and third party notices under Schedule 36.

8.3. The Judge observed that the fact that the Tribunal is carrying out a monitoring role and that the taxpayer and third parties do not have a right to an *inter partes* hearing does not mean that the Tribunal cannot or should not, *inter alia*:

8.3.1. call for further explanation or comment in writing from a taxpayer on his position or the summary of his representations that HMRC propose to give to the Tribunal;

8.3.2. hold the hearing in public or direct that the taxpayer can attend to observe and make public what is said and done;

8.3.3. direct that a full record on what is said and done at any hearing and all documents put before the Tribunal are provided to the taxpayer; and

8.3.4. permit the taxpayer to take part in the hearing.

9. Facts of the *Bunge* case

9.1. Bermuda's Minister of Finance appealed against the decision of a lower court to grant an application for judicial review in respect of a request for information made by the Minister.

9.2. The request for information arose as a result of a request made by Argentina in terms of the TIEA between the two countries.

9.3. In terms of Bermuda's domestic legislation which gives effect to its international obligations in terms of TIEA, the Minister may request information from a taxpayer which is required to comply with a request from a requesting authority. Non-compliance with such a request would amount to a criminal offence. However, the taxpayer has a statutory right to judicial review.

10. Facts of the *Friar Tuck* case

10.1. The BVI revenue authority requested by way of notices certain information from both companies (Friar Tuck Ltd and Quiver Inc.) to fulfill their duties under a TIEA. Non-compliance with such a notice was subject to a fine or imprisonment.

10.2. The notices lacked certain information, including the identity of the requesting state, the identity of the taxpayer and the relevant tax years. The BVI revenue authority argued that it had a duty of confidentiality under the TIEA and therefore had no obligation to disclose said information to a third party in receipt of such a notice.

10.3. The companies applied for judicial review of the notices on the basis that it was not possible to assess the validity of the notices in the absence of said information. The foreseeable relevance standard applied to the request under the TIEA.

11. Facts of the *Haskell* case

11.1. The underlying case concerned an application for judicial review of the decision of Jersey's Comptroller of Taxes to issue information notices to various parties in connection with Mr Haskell, a Swedish resident, pursuant to the TIEA between Jersey and Sweden.

11.2. Mr Haskell contended that the Comptroller's affidavit filed during these proceedings in support of his decision to issue the notices, did not meet the required duty of candour in that it was extremely brief, asserted an alleged obligation of confidentiality and merely repeated the working of the OECD MTC.

11.3. The judgment concerned the duty of candour that the Comptroller had to adhere to in issuing the notices. The Court was of the view that disclosure of the actual request was not automatic in judicial review proceedings and that unless a threshold was passed to believe otherwise, the Court would proceed on the presumption of regularity. The Court did however find that the affidavit fell short of meeting the required duty of candour, i.e. it did not contain enough details to determine whether the notices were issued lawfully.

12. Facts of the *MH Investments* case

12.1. This case concerned an application for judicial review of decisions of the Cayman Islands Tax Information Authority (CITIA) to provide information to the Australian Taxation Office (ATO) pursuant to a TIEA concluded between the two countries. The applicants alleged that the decisions were *ultra vires* of the powers granted by the relevant enabling legislation.

12.2. The CITIA failed to seek confirmation from the ATO that information requested would not be used to establish liability in relation to tax years commencing prior to the date that the TIEA came into force. It failed to obtain the statutory required court approvals to consent to the ATO disclosing the information obtained to the United Kingdom and to use documents obtained in court proceedings in Australia. It also acted *ultra vires* by allowing the ATO to use documents in Australian court proceedings which related to tax years prior to the effective date of the TIEA. It further failed to serve the necessary statutory notices on the applicants to inform them of the existence of the requests.

12.3. The Court held that the CITIA's conduct infringed the applicants' rights of privacy and to a fair and public hearing under the Cayman Islands Bill of Rights.

13. Facts of the *Volaw* case

13.1. This case concerned an appeal from the judgment of the Royal Court of Jersey which upheld a notice issued by the Deputy Comptroller of Taxes on Volaw Trust & Corporate Services Ltd. The request was for the production of certain documents and information related to a Norwegian national, Mr Larsen, in terms of a request for information received pursuant to the TIEA between Norway and Jersey.

13.2. There were several grounds of appeal, but most importantly, for purposes of this dissertation, was the question of whether the Comptroller had 'reasonable grounds' as required by the enabling regulations to issue the notice.

13.3. The Court held that it was neither part of the Comptroller's function when deciding to issue a notice in response to a request under the TIEA, nor the Court's function when considering an appeal from such a decision, to resolve contentious issues of foreign tax law or to reach definitive conclusions on whether the subject of the request is liable to tax under foreign law. In the Court's view, it would be impractical to require the Comptroller to obtain expert evidence on foreign tax law in order to perform a detailed evaluation before concluding on whether to respond to a request or not. The

Comptroller's task is simply to ask whether the threshold criteria of the enabling legislation are satisfied.

14. Facts of the *Kotton* case

14.1. Mr Kotton, a Swedish national, challenged the First-tier Tribunal's approval of a Schedule 36 third party information notice to AMEX. The notice was issued pursuant to a request for assistance from the Swedish revenue authority under EU directive 2011/16 and Article 24 of the tax treaty between Sweden and the UK.

14.2. The ground for judicial review was that the information requested was not 'reasonably required' for purposes of determining whether Mr Kotton was tax resident in Sweden.

14.3. The Court stated that if all the material before the decisionmaker is made available to the Court, there is a presumption on the part of the HMRC tax officer in that he/she acted honestly and in good faith in reaching a decision. The claimant would have to prove that it was not the case.

14.4. The question before the Court was the rationality of the decision that the information or documents were reasonably required for the purpose stated and not whether the underlying investigation was lawful.

15. Facts of the joined *Luxembourg State* cases

15.1. The case related to two requests for information sent by the Spanish revenue authority to the Luxembourg revenue authority. A Luxembourg company and bank were then requested to provide information related to the taxpayer under investigation.

15.2. At the time of the above requests and prior to legislative amendments following the *Berlioz* decision, Luxembourg legislation did not allow an action against the information orders. The respective parties nonetheless brought actions before the Administrative Tribunal. It held that such legislation was incompatible with the right to an effective remedy (Article 47) under the EU Charter insofar as rights and freedoms guaranteed by EU law were infringed. The information orders were found to be invalid to the extent that information was requested that was not foreseeably relevant.

15.3. Luxembourg appealed these decisions to the Higher Administrative Court which in turn asked the CJEU for a preliminary ruling on whether Article 47 precludes national legislation from excluding the taxpayer, a person holding information, or third parties concerned by the information from bringing a direct action against an information order.

16. Article 25 of the OECD Model Tax Convention

16.1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

16.2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

16.3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

16.4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

16.5. Where,

16.5.1. under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both

of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

16.5.2. the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

17. Facts of Case *AMS 16_5412*

17.1. The taxpayer, a Dutch resident, received a special German state pension as a result of forced labour in a ghetto during the Second World War.

17.2. She requested that the Dutch revenue authority apply a hardship clause to exempt the pension from Dutch tax. The Dutch revenue authority rejected the request and argued that the legislator did not intend for the exemption that applied to compensation for Holocaust victims to be extended to similar types of compensation.

17.3. The taxpayer argued that the rejection was contrary to the non-discrimination clause in the tax treaty between Germany and the Netherlands on the basis that residents of Germany that received such a pension were exempted. She then requested that mutual agreement procedure be initiated under the treaty.

18. Facts of the *CGI* case

18.1. CGI Holding Inc. (CGI) is a limited liability company incorporated in Delaware in the US. It paid Canadian withholding tax on dividends received

from its related Canadian resident corporation. CGI was a non-resident for Canadian tax purposes. The Canadian revenue authority interpreted the relevant legislation as requiring a 25% withholding tax on dividends paid by a resident to a non-resident.

18.2. The Canadian Tax Court delivered a judgment in 2010, which caused the Canadian revenue authority to change its position on the withholding tax requirement by a LLC, where the tax treaty between Canada and the US applied.

18.3. CGI argued that, based on this judgment, the withholding tax should have been 5% and not 25% of the dividend amount in terms of the tax treaty between the US and Canada. The Canadian revenue authority contended that the facts of that case was different to that of the dividend paid to CGI and accordingly denied the request for a refund.

18.4. CGI requested that the IRS initiate mutual agreement procedure under the tax treaty.

19. Facts of the *McCabe* case

19.1. Mr McCabe applied to the First-tier Tribunal (Tribunal) for an order to direct HMRC to disclose documents and information relating to a mutual agreement procedure.

19.2. HMRC held that Mr McCabe was tax resident in the UK during certain tax years. He appealed to the Tribunal on the issue.

19.3. The UK and Belgian tax authorities initiated a mutual agreement procedure to resolve the issue of Mr McCabe's tax residence. The two revenue authorities applied the tie-breaker provisions of the relevant tax treaty and concluded an agreement that Mr McCabe was tax resident in the UK during the years in question. Mr McCabe was still free to argue the contrary in appeal proceedings before the Tribunal.

19.4. Mr McCabe contended that HMRC adopted a different position in the mutual agreement procedure than the position they adopted in the appeal proceedings and argued that fairness required that he understands how those conclusions were reached. Both tax authorities objected to disclosure of the documents.

19.5. The Tribunal held that the starting position in such a case is that HMRC should disclose relevant documents unless there is a good reason to do so.

19.6. The Tribunal noted that the documents were relevant, but the degree of relevance was low as the documents sought would not have shed light on the primary facts of the dispute.

19.7. It was also stated that the conclusions of the mutual agreement procedure would have been reached as a result of a very different process to what the Tribunal would follow. For that reason, a full understanding of the conclusion reached during such procedure would likely not have been helpful to the Tribunal.

19.8. On the issue of direct disclosure, the Tribunal stated that the mere fact that both competent authorities rejected thereto, was not decisive. The Tribunal agreed that Article 26 of the OECD MTC (Exchange of Information) and its Commentary permits the disclosure of information to certain people, including the taxpayer. It did not however compel the disclosure thereof. The Tribunal referred to the Commentary on Article 25 which provides that disclosure to the taxpayer and his representatives does not seem warranted given the special nature of the mutual agreement procedure.

19.9. The Tribunal recognised that both transparency and confidentiality were important principles but noted that transparency would not only be achieved by disclosure. More importantly, the taxpayer had to understand the reasons for a particular decision and in this case, the reasoning was not challenged. Mr McCabe's application was dismissed.

20. Facts of the *X v Belgium* case

20.1. The case involved a dispute regarding the tax residence of a British citizen resident in Belgium. HMRC argued that the taxpayer was tax resident in the UK. The taxpayer requested that the Belgian revenue authority initiate a MAP in terms of the relevant tax treaty.

20.2. The consultation process led to application of the tie-breaker rules and that resulted in the taxpayer being deemed to be a resident of the UK.

20.3. The taxpayer was not willing to accept the outcome of the consultation process without disclosure of the file and reasons for the decision. The Belgian revenue authority refused disclosure in the interests of confidentiality and of relations with the UK.

21. Article 29(9) of the OECD MTC

‘Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.’

22. Article 22(6) of the US MTC

‘If a resident of a Contracting State is neither a qualified person pursuant to the provisions of paragraph 2 of this Article, nor entitled to benefits under paragraph 3, 4 or 5 of this Article, the competent authority of the other Contracting State may, nevertheless, grant the benefits of this Convention, or benefits with respect to a specific item of income, taking into account the object and purpose of this Convention, but only if such resident demonstrates to the satisfaction of such competent authority a substantial nontax nexus to its Contracting State of residence and that neither its establishment, acquisition or maintenance, nor the conduct of its operations had as one of its principal purposes the obtaining of benefits under this Convention. The competent authority of the Contracting State to which the request has been made shall consult with the competent authority of the other Contracting State before either granting or denying a request made under this paragraph by a resident of that other Contracting State’.

23. Facts of the *Starr* case

23.1. Starr was resident in Switzerland. It was a shareholder of the United States insurance company, AIG. Starr was initially incorporated in the Republic of Panama.

23.2. Starr received \$191 million in dividends from AIG in the 2007 tax year.

23.3. AIG withheld withholding tax on dividends paid to Starr at the rate of 30% on the basis that Starr did not automatically qualify for dividends even though

it was a resident of Switzerland. None of the objective, mechanical tests in the limitation on benefits provision in the tax treaty between the US and Switzerland were met.

23.4. Starr sought treaty benefits under Article 22(6), i.e., it argued that it was entitled to discretionary relief on the basis that its move to Switzerland was not motivated by tax reasons. Instead, it relocated for charitable considerations and because of a litigation risk it faced in Ireland.

23.5. In 2010 the competent authority denied the treaty benefits on the basis that it could not ‘conclude that obtaining treaty benefits was not at least one of the principal purposes for moving Starr’s management, and therefore its residency, to Switzerland’.

23.6. Starr filed a claim for a tax refund for the difference between the tax withheld in 2007 and the amount that would have been withheld had Starr qualified for treaty benefits (a fifty-percent reduction).

23.7. The central question before the Court in the 2015 judgment was whether the competent authority’s denial of treaty benefits was subject to judicial review.

24. Article 22(6) of the tax treaty between the US and Switzerland:

‘A person that is not entitled to the benefits of this Convention pursuant to the provisions of the preceding paragraphs may, nevertheless, be granted the benefits of the Convention if the competent authority of the State in which the income arises so determines after consultation with the competent authority of the other Contracting State.’

25. Possible outcomes following the *Starr* Court of Appeal decision:

25.1. The U.S. competent authority could after consultation have decided that Starr was entitled to treaty benefits.

25.2. The U.S. competent authority could after consultation have decided that Starr was not entitled to treaty benefits. If the District Court then found that the US Internal Revenue Service (IRS) should have granted the treaty benefits under Article 22(6), it could have awarded Starr the tax refund on the basis that consultation had already taken place.

25.3. The IRS could have decided not to consult with the Swiss competent authority. If the District Court then found against the IRS, it could have stayed the proceedings pending the outcome of consultation. The IRS could then have returned to court and presented new evidence that may have been brought forward by the consultation. Starr would have had no right to review of the consultation as it formed part of the IRS's deliberative process, but if the IRS returned to the District Court and cited information obtained during the consultation process as the reason for denying tax benefits, that decision would have been reviewable.

25.4. The District Court could have found in favour of the IRS in the tax refund action.