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Mutual assistance in collection of tax debts*

Contents

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1. Introduction

On the threshold of a new century and millennium, the **strengthening of mutual assistance** as a mechanism for administrative cooperation between States remains one of the **outstanding issues in international taxation law**. Despite significant development and evolution during the twentieth century, the progress made has essentially involved the signing of bilateral conventions based on standard Model Conventions, aimed almost exclusively at setting up mechanisms to define tax jurisdiction for different income categories. Model Conventions, for their part, have neglected to regulate procedural aspects guaranteeing the content of such rules, which remain wholly within the jurisdiction of individual States under the ***principle of procedural autonomy***. This does not prevent Model Conventions containing or suggesting inter-governmental collaboration mechanisms of varying scope and type, to ensure correct application of both the convention and domestic laws. Important examples of such mechanisms include informing member States of changes in each other's tax systems, and applying reduced forms in the source State as envisaged for dividends, interest and royalties, friendly procedure, or the exchange of tax information.

Of these, procedures for **exchanging tax information** have **developed and consolidated** furthest, basically as a result of their inclusion in both the Organization for Economic Cooperation and Development (OECD) Model Tax Convention on Income and Capital and the United Nations Model Double Taxation Convention between Developed and Developing Countries (article 26). The same cannot be said about assistance in tax collection. Articles 26 of the OECD and United Nations model conventions both refer exclusively to the exchange of information between States but **make no reference to assistance in recovering each other's tax claims**.[1] Administrative assistance in tax collection is only mentioned in the commentaries on the Model Conventions (paragraph 3 of the commentary on article 26 of the OECD Model Convention), which admits the possibility of strengthening tax collection assistance in a number of ways: either by signing the multilateral Council of Europe and OECD Convention of 1988, or else through bilateral agreements between contracting States. The commentary on the 1980 version of the United Nations Model Convention (MCUN) reproduced the commentary on the OECD Draft Double Taxation Convention on Income and Capital of 1963, but in the 1999 revision, the commentaries on MCUN were adapted literally to the commentaries on the 1981 OECD Model Convention for Mutual Administrative Assistance in the Recovery of Tax Claims.[2]

In this way, the OECD and United Nations model conventions have behaved differently than their predecessors. Work done earlier in the League of Nations, on the other hand, resulted in the formulating a specific model dealing with inter-governmental collaboration in recovering the tax claims of another State (League of

[1] In fact, only the 1996 Model Convention used by the United States in its bilateral negotiations contains a specific clause on tax collection, albeit of limited content and scope.

[2] There is also no mention of the utility and convenience of such specific clauses, or issues to bear in mind in relation to administrative assistance in tax collection in the guidelines for negotiating double taxation conventions contained in the Manual for the Negotiation of Bilateral Tax Conventions between Developed and Developing Countries published by the United Nations (ST/ESA/94).

Nations, *Mexico Draft Model Bilateral Convention for the Establishment of Reciprocal Administrative Assistance for the Assessment and Collection of Direct Taxes*, of 1 July 1943, and *London Draft Model Bilateral Convention for the Establishment of Reciprocal Administration Assistance for the Assessment and Collection of Taxes on Income, Property, Estates and Successions* of 1946).[3] This work has now been partly taken on by **OECD**, which, in **1981** drew up a **specific Model Convention** for Mutual Administrative Assistance in the Recovery of Tax Claims (henceforth referred to as MCOECD 1981),[4] distinct and separate from the one dealing with the avoidance of international double taxation. The practical scope of this OECD Model has been very limited, and to date no international bilateral conventions have been signed based on it. Nonetheless, it has had an influence on the formulation of multilateral cooperative mechanisms, such as the OECD and Council of Europe Convention on Mutual Administrative Assistance in Tax Matters, of 25 January 1988 (ETS No. 127).

1.1 Reasons for the failure to include a tax collection assistance clause in Model Conventions

The general principle of **territorially limited State sovereignty** underlies the absence of such a clause in the model conventions, and hence in most double taxation agreements. According to this principle, sovereignty prevents a State from pursuing its tax claims in the territory of other States, since this would involve extraterritorial exercise of its powers (Ludwig 1975; Johnson et al 1980; Atik 1981; Qureshi 1994). The territorial nature of tax laws limits the use of the powers and faculties granted to public bodies in obtaining full payment of the tax, to within the borders of the State concerned. Domestic tax laws cannot be directly applied on foreign soil, neither can application be made to the courts of other States to claim direct enforcement; nor are domestic tax laws expected to have effects beyond the borders of the State, regardless of the tax significance of economic events occurring outside them.

The territorial limits of tax collection enforcement measures can only be overcome by authorizing and altering enforcement conditions through an international convention, making it obligatory for a State to respond to requests for assistance by another State in recovering the latter's tax claims. Strengthening **international administrative cooperation** through binding international legal instruments is the logical way to overcome restrictions arising from the territorial conception of State sovereignty.

Nonetheless, there are major **obstacles** to lending assistance in tax collection, which so far have prevented this form of administrative assistance from being included in the OECD and United Nations Model Conventions. Obstacles include both substantive and procedural tax problems, compounded by the perception that lending assistance in tax collection is a form of extraterritorial intrusion. Underlying this reluctance is the continuing absence of international consensus on the concept

[3] Previously the League of Nations had drawn up two separate Model Conventions that envisaged administrative assistance on tax collection.

[4] OECD *Convention Between (State A) and (State B) for Mutual Administrative Assistance in the Recovery of Tax Claims*, adopted on 29 January 1981.

of "tax justice", on the elements comprising this and on due process in applying it (Atik 1981, p.162).

Full jurisdiction in regulating substantive and procedural aspects may involve different arrangements regarding the status of private individuals vis-à-vis the faculties, powers, duties and privileges of the tax administration in each State; this clearly makes it difficult to establish global and generally agreed measures, and suggests the need for individual responses that are tailor-made to suit the structure of tax administration in the contracting States. The need to accommodate such disparities and to establish requirements that safeguard individual rights results in complex mechanisms being established to strike a balance between a measure's efficacy and fairness. However, current administrative practice is nowhere near demonstrating the effectiveness of such measures in dealing with situations of unpaid taxes (Johnson et al 1980, p.486).

In addition to these circumstances, States tend to be apprehensive about the negative effects on commercial and foreign relations that could potentially result from such cooperation arrangements. The scant awareness of *fiscal evasion* in the tax administrations of certain States, together with alternative management and recovery mechanisms enabling a tax to be collected in a more effective way, avoiding the need for the complex cooperation mechanisms required by tax collection assistance arrangements, have contributed to the lack of insistence by States on including a tax collection assistance clause in the Model Conventions. This perceived lack of utility should not lead us to forget that administrative cooperation on taxation matters may be very useful in certain situations, especially for: (a) facilitating tax collection when the taxpayer is not present in the State that imposes the tax, and does not possess the means (assets or claims) to pay the tax debt; (b) facilitating tax collection when the taxpayer, despite being present in the State imposing the tax, has removed his assets and claims, or there is a risk that he may do so; and even (c) facilitating the recovery of taxes assessed as result of simultaneous examinations.

1.2 The work of the United Nations Group of Experts on International Cooperation in Tax Matters

Nonetheless, these circumstances do not obviate the need for States to study mechanisms and guidelines to reinforce cooperation in tax collection. As has often been said, in the ongoing process of economic internationalization, it is unacceptable for the international community of States to persist in an entrenched attitude based on a rigid conception of sovereignty circumscribed by territorial borders (Atik, 1981 p.156).

The renewed and continuing interest in this issue has made it the focus of study and analysis at several meetings of the United Nations Group of Experts.[5]

In 1983 the Ad Hoc Group prepared a guideline on tax collection assistance containing the following (Conclusions of the second meeting of the Ad Hoc Group of Experts, 1983, Geneva):

[5] See Amissah, A. *Mutual cooperation in the enforcement of tax liabilities and the collection of taxes, including exchange of information*. Ad Hoc Group of Exports on International Cooperation in Tax Matters, 4th Meeting. United Nations, Geneva. 1987.

"Countries which are not prevented by constitutional or other legal obstacles might consider making arrangements with each other for mutual assistance in the recovery of each other's taxes. Such an agreement might include provisions dealing, among other things, with:

(a) The service of documents in one country relating to the taxes of the other;

(b) Measures of conservancy;

(c) The stage at which proceedings can be started in the other country to recover tax or to enforce the tax rules;

(d) The documentation necessary;

(e) The rules concerning relevant exchanges of information;

(f) The priority status, if any, of the other country's tax;

(g) The limitations necessarily placed on the obligation to provide assistance;

(h) Other administrative matters etc." (*paragraph 171 of the Agreement*).

In 1987, the Ad Hoc Group reviewed this,[6] and while it did not describe precisely how these points could be regulated, fuller indications for adequately addressing them were provided (paragraphs 135-136). In addition, an analysis was made of the diverse conventional practice that had developed in the 1980s for monitoring such guidelines, and the possibility of deciding on the most useful type of agreement based on those already in existence. It was further concluded that the need for such arrangements was neither an urgent matter nor a widely perceived need, as there were other measures available for ensuring the payment of taxes by non-residents (paragraph 139). While acknowledging that such arrangements would only be relevant in relatively few cases or situations, it was thought useful to have the tools available, just as extradition treaties are available for use against a very small number of offenders.

Lastly, it was concluded that the time was not ripe for positive proposals, and that the topic should be studied again at a future meeting of the Group (paragraph 143). As for putting administrative cooperation in tax collection on the Group's agenda for analysis once again, it is worth explaining the reasons justifying its further consideration.

2. Reasons for analysing administrative cooperation in tax collection

Firstly, arrangements for cooperation in tax collection are increasingly being accepted and included in the double taxation agreements currently in force. Despite not being specifically recognized in the Model Conventions, **double taxation conventions increasingly contain a specific clause** on inter-governmental

[6] United Nations Organization, *Contributions to international cooperation in tax matters*, New York, 1988, ST/ESA/203, presenting the conclusions of the 4th meeting of the Ad Hoc Group of Experts on International Cooperation in Tax Matters, held in Geneva in 1987.

assistance in tax collection, or at least make some mention of this in their protocols or clauses on information exchange. Currently, there are over 200 double taxation conventions on income tax that contain such a clause, and also some relating to inheritance tax.

Thus, effective incorporation of assistance in tax collection is an important issue, in fact the most important issue for analysing the content, scope and limits of such assistance. An analysis of the legal reality of conventions can indicate the elements that a tax collection assistance clause should contain, together with the needs perceived by contracting States and the gaps that exist.

It is clear that many States have become aware of the need to strengthen their position as regards recovering tax debts. Very many countries, developed and developing alike, base their convention negotiating policy on the need to include a specific clause on assistance in recovering tax claims, and such clauses have been included in a large proportion of the double taxation conventions to which they are currently party. These include the network of conventions between France, Belgium and the United States — the countries with the largest number of clauses on tax collection assistance — the Nordic States (Denmark, Norway, Sweden, Finland and Iceland), or Holland, in addition to India, Indonesia, Algeria or Morocco, and the Baltic States (Lithuania, Latvia and Estonia) or Armenia and Romania.

Secondly, consideration should be given to the influence of a new international instrument for promoting international assistance in tax collection, namely the **multilateral Convention on Mutual Administrative Assistance in Tax Matters of the Council of Europe and OECD**. This multilateral agreement, which was not in force the last time the United Nations Group analysed tax collection assistance, modifies and considerably enriches the stock of international legislation; accordingly the potential influence of this Convention on the evolution of international tax cooperation needs to be considered.

Thirdly, there are **persistent reasons** for strengthening administrative cooperation in the recovery of tax claims and authorizing such assistance in international legal instruments. Economic internationalization requires appropriate use of enforcement powers by State governments to allow correct application of the tax system and keep it consistent; this implies the **need to prosecute fiscal fraud and control evasion**. Despite the lack of reliable statistics showing the deployment of fiscal avoidance and evasion mechanisms, generated by illegal fiscal planning aimed at avoiding tax liabilities, and tax collection mechanisms, there can be no doubt that greater economic openness vis-à-vis foreign markets and the liberalization of payments increase the risks of evasion and non-payment of tax liabilities in a given country. It therefore seems appropriate for States to have **ways of overcoming the obstacles caused by their territorial structure** enabling them to legally pursue their tax claims in other States. Suitable international administrative cooperation arrangements should be established for this purpose, although their use should be reserved for special cases, as a last resort mechanism that closes the system.

Having said that, the acceptance and progressive inclusion of a clause on administrative assistance in tax collection should not undermine respect for the interests at stake. This requires respect for the rights of the States involved and of taxpayers who liable to suffer coercive public action against their assets. The spread of administrative cooperation in tax collection and the strengthening of mechanisms

for recovering tax claims needs to go hand in hand with **greater international protection and recognition of individual interests and safeguards** against such action.

Thus, authorizing administrative cooperation in tax collection requires **preserving a *minimum guaranteed level*** for the position of individuals affected by cooperation, and recognition of that position (or individual status) in rules of similar rank to those that strengthen administrative autonomy and cooperation. Protection of the individual in domestic tax law has a variety of legal foundations depending on the underlying principles and values in the laws that legitimize the implementation of tax systems in each State. Increased international administrative cooperation in tax collection makes it advisable to seek points in common, or a minimum individual status to be protected against the use of coercive administrative measures in one State on behalf of the tax claims of another State. This should also be included in international rules of the same rank as those authorizing tax collection assistance, for it does not suffice simply to apply the guarantees contained in domestic laws in subsidiary fashion.

Certain **prior procedural channels need to be established** in order to protect individual rights and interests against actions taken by tax administrations. Only by setting parameters for administrative action will it be possible to avoid discretionary administrative action that puts at risk — or even overrides — the legitimate rights and interests of private individuals. Drafting and including such clauses in double taxation conventions may require reconsideration of the traditional principle of procedural autonomy, in order to bring different positions closer together without abandoning the principle. An assistance clause containing the guarantees mentioned above involves recognizing and including procedural steps in favour of assistance, or clauses which, like rules of dispute settlement, determine the State in which certain individual rights shall be exercised, claimed and ruled upon. They should also anticipate the effects of administrative actions by one State on legal situations and due process in the other State.

In accepting administrative cooperation in tax collection, the convention clause should clearly identify which taxes are subject to cooperation, the agencies against which actions can be brought, the stage at which proceedings can be instituted, and how the tax collection assistance procedure is to be carried out, indicating also the rights of private individuals that need to be safeguarded (Johnson et al 1980, p.482). It is not sufficient merely to authorize actions of tax collection assistance, for this would impair legal certainty and also undermine guarantees of citizens' rights and the effectiveness of the clause itself.

The material and procedural differences between regulations in the different States, and the changes that are continuously being made to them, may make it impossible to design a single clause-type valid for all situations. Accordingly, this analysis seeks to describe the guidelines used by conventions currently in force, setting out and commenting on criteria and situations that States need to take into account when including such a clause in their conventions.

3. Tax collection assistance through exchange of information: common and particular aspects

3.1 Common aspects

International administrative collaboration on tax matters requires **explicit regulatory authorization** giving the corresponding tax administration the instruments needed to obtain assistance from the other State, and making it a legal duty of the other State to respond to the request for collaboration. Both in information exchange and in assistance in actually recovering tax claims, States are constrained by the territorial limits on their faculties and powers. As regards the request for assistance, the applicant State cannot act or deploy control mechanisms for verification and collection purposes beyond the territorial scope within which such faculties and powers have effect. Similarly, in responding to the request for assistance, the other State needs legal authorization, established in an international convention, to override its own domestic laws — in the case of information exchange to breach the rules on tax secrecy; when lending assistance in tax collection, to *authorize* the exercise of public functions and powers to help the applicant State satisfy its tax claims.

Authorization to provide information to the applicant State may also perform a **function that complements** tax collection assistance. The request for assistance in tax collection may require prior inquiry (or the obtaining of information) by the requested State, in order to carry out coercive actions against the assets of the debtor to recover the tax due. This situation is envisaged even when the clause dealing with exchange of information is limited to guaranteeing application of the convention itself — *minor clause* — since this authorizes the requesting of information to make tax collection assistance effective (insofar as it involves obtaining information to implement the provisions of the convention, and in particular to prevent fraud or evasion of the taxes concerned).

3.2 Peculiarities and current situation of cooperation in tax collection

The scope of each type of mutual assistance needs to be defined, as there are significant differences; there are a number of specific features involved in lending assistance in tax collection that are not present in other types of assistance. Except where complementing assistance in tax collection, cooperation in information exchange is mostly intended to facilitate and ensure **correct application of the tax rule** concerned by the State/administration responsible for controlling it. On the other hand, assistance in tax collection aims to ensure **correct *enforcement* of the tax rule**, as it has been applied by the authorities of one contracting State — the applicant State — using enforcement measures that are applicable and available in the other State — the requested State. Consequently, it aims to make use of faculties based on the principle of autonomy in satisfying the tax claim of the other State, or at least, to lend assistance through special administrative procedures (paragraph 1 of the commentary on article 6.1 of the 1981 OECD Model Convention).

Cooperation on tax collection generally involves **ex-post collaboration** mechanisms — after the tax debt has been determined or assessed — whereas information exchange requires ex-ante assistance to verify correct assessment of the

claim. The different procedural phases to which these two types of collaboration correspond, and the different nature of the collaboration requested, makes it impossible to implement certain assistance modalities that are available in the case of information exchange. For example, it is impossible to set up *spontaneous* collaboration mechanisms to facilitate tax collection, since this always assumes prior determination of the tax claim to be enforced, and an *express request* for assistance which identifies the claim to be recovered and the targets of any measures, in order to protect individual rights against coercive actions carried out in the course of lending such assistance. It is not sufficient to make a generic submission alleging fiscal fraud and the need to control it, in order to deploy the enforcement faculties contained in the laws of the requested State.

Administrative vs. judicial assistance

Cooperation in tax collection depends on the process or mechanism used to recognize the tax claim in the applicant State, the legal source of such recognition, and the mechanisms for enforcing the tax claim available in the requested State. The **plurality of media** for recognizing the existence of the tax claim determines and **conditions the mechanism** applicable for **enforcing** it.

In general the collection of tax debts and the provision of international cooperation can be carried out through either judicial or administrative measures and bodies. Usually, when the tax debt is recognized in a legal document (for example a judicial sentence or writ), cooperation can be channelled through a variety of legal cooperation instruments; when the debt is established in an administrative document, cooperation is likely to be of an inter-governmental nature (Johnson et al 1980, p.485). Each of these statements is subject to significant nuancing, however.

Judicial assistance and cooperation can be requested not only through the instrument requiring enforcement of the tax claim, but also through the laws of the requested State, using the procedures it normally uses to enforce its own tax claims. Inter-State legal assistance on tax matters is **poorly developed**, however, and submissions can be only made under concrete and highly specific circumstances, because of the persistent influence of sovereignty considerations when enforcing such public claims outside the territorial borders of the requesting State. Appeal can also be made to the principle of comity of nations to facilitate the extraterritorial enforcement of the tax claim (Grau Ruiz <date>, Johnson et al 1980).

This can be seen by verifying that **tax debts and claims** are **normally excluded** from conventions and instruments regulating international cooperation in recognizing and enforcing legal judgments. Such is the case in the Brussels Convention of 27 September 1968, on Jurisdiction and the Enforcement of Judgments on Civil and Commercial Matters. The same solution is adopted by Council of Europe Regulation EC No. 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of rulings on civil and commercial matters, which excludes revenue, customs and administrative matters from its scope of application (article 1.1).

Nonetheless, **attempts to make progress on judicial cooperation** are being made, in terms of protecting citizens against the exercise of coercive enforcement powers and faculties (Johnson et al, 1980). In some situations, instruments of international legal cooperation do include the enforcement of tax claims. This is the

case with debts recognized in court rulings that a **fiscal offence** has been committed. Such offences, originally excluded from the scope of the European Convention on Mutual Assistance on Criminal Matters, of 20 April 1959, were subsequently included via the amendment contained in the Protocol of 17 March 1978, allowing assistance in processing fiscal offences (article 2.1).

Secondly, **Anglo-Saxon common-law countries** are moving away from original attitudes based on applying the *Mansfield rule*, towards facilitating inter-State judicial assistance under certain circumstances (Baker 1993, Akin <date>, Johnson et al 1980, Qureshi 1994).

Lastly, the lending of assistance in tax collection by judicial bodies is not prohibited by **specific conventions on administrative cooperation**, and in some cases there is even express authorization for such actions through cooperative procedures (see the convention between Denmark and Germany, or between Austria and the United States).

Instruments regulating administrative cooperation: bilateral or multilateral scope

In the absence of jurisdiction, international **administrative cooperation** seems to be the **appropriate mechanism** for dealing with the recovery of tax claims and overcoming constraints arising from the territorial conception of sovereignty. Territorial limitations are overcome by giving authorization to request assistance from another State, and by an international obligation to respond to such requests from other contracting States.

International administrative cooperation on tax collection basically means deploying the tax enforcement mechanisms contained in one State's domestic laws on behalf of another State. Consequently, the exercise of these powers, faculties and mechanisms is not based on recognition of administrative autonomy of the taxes themselves. On the contrary, the use of such powers, faculties and mechanisms to deal with the tax debts of another State, is **based on** complying with commitments assumed under an **international convention** and requirements arising from the **principle of reciprocity**. The international convention thus becomes the source or instrument **authorizing** a State to use the mechanisms contained in its own domestic laws for enforcing its own tax claims, to enforce those of the other State. This different legal foundation, and the use of enforcement measures with a specific and distinct purpose, explains their different scope, as well as the exclusion of certain prerogatives and privileges when dealing with the claims of other States.

The faculties and the prerogatives and powers contained in every country's tax administration (and recognized in domestic laws) are far from homogeneous, and sometimes even have to be approved by the respective national legislatures. Examples include the legality principle in relation to declarative and executive administrative acts in applying tax regulations, the principle of administrative autonomy, preference of claims, priority and competing rights, personal and real guarantees ex lege...

Administrative cooperation in tax collection has been implemented internationally through various forms of international convention facilitating multilateral cooperation, or else through bilateral agreements. States wishing to

strengthen tax collection cooperation need to decide which of these approaches best promotes their interests and respects their domestic tax collection structure.

Multilateral cooperation mechanisms

Proposals of a multilateral nature have been developed in a number of international forums, usually within regional international organizations encompassing countries of similar economic, social and development levels.

Given its projection and openness to a larger number of States, mention should first be made of the **Convention on Mutual Administrative Assistance in Tax Matters, of the Council of Europe and OECD**, signed on 25 January 1988.[7] This contains 32 articles and covers both administrative cooperation in the exchange of information, including well developed cooperation arrangements such as simultaneous inspections, as well as assistance in tax collection involving measures for enforcing recovery in another State, the notification of tax assessments issued by the other State, or the adoption of interim or conservancy measures.

The **European Union** has also played a major role in setting up tax collection cooperation and assistance mechanisms between community bodies and the administrative agencies of member States. **Council Directive 76/308/EEC** of 15 March 1976, and its various amendments, provides for mutual assistance in the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies, customs duties and indirect taxes. Approval of this directive has resulted in the development of specific regulations establishing tax collection assistance mechanisms in member States, along with important administrative, jurisprudence and doctrinal practice (Grau Ruiz <date>; Falcón y Tella, 1992). Nonetheless, at the present time this directive does not apply to cooperation in collecting direct taxes on income and capital, despite the existence of a proposal on this,[8] so alternative collaboration mechanisms have to be used.

The administrative cooperation proposed in the **Nordic convention concerning reciprocal administration assistance in matters of taxation** has longer tradition, as well as greater scope and multilateral experience. This agreement was signed in November 1972, subsequently amended and updated on 7 November 1989, 19 June 1991 and 4 December 1997; but the agreement really dates back to the 1940s, when mechanisms were set up to collect taxes from taxpayers leaving one country to take up residence in another (Amissah, 1987). Multilateral conventions supporting administrative cooperation in tax collection have also been signed under the auspices of **other international regional bodies**. For example, the General Convention on Fiscal Cooperation between member States of the African, Malagasy and Mauritian Common Organization, of 29 January 1971, or the Inter-Territorial Convention for the Elimination of Double Taxation in French Equatorial Africa, of 15 October 1957.

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7 European Treaty Series, No. 127. By the end of March 2001, the Convention had been signed by nine countries, and ratified by eight. It came into force on 1 April 1995 in Denmark, Finland, Norway, Sweden and United States, on 1 November 1996 in Iceland, on 11 February 1997 in Holland and on 1 October 1997 in Poland. Ratification is pending in Belgium.

8 Proposed directive modifying Directive 76/308/CEE presented by the Commission on 26 June 1998, (98/C269/06) COM(1998)364 final, expanding its scope of application to include the recovery of claims relating to certain taxes on income and capital.

By adapting to the general circumstances envisaged in the convention, the signing of multilateral agreements to strengthen administrative cooperation in tax collection requires a similar level of administrative development and compatible administrative structures between the countries, together with a similar level of cooperation. This makes the multilateral mechanism unsuitable for countries with scant experience in international taxation matters. It also requires recognition of similar statutory guarantees for the individual, as well as approximation to and recognition of the enforcement procedures applied in other States. Bilateral agreements, on the other hand, make it possible to adapt to the requirements and peculiarities of each nation's fiscal arrangements, and establish more precisely the guarantees and prerogatives that contracting States wish to safeguard. Accordingly, bilateral agreements are the best means of strengthening administrative cooperation to ensure recovery of the taxes concerned. Although specific bilateral model conventions do exist, double taxation conventions have proven to be the most suitable instrument for such assistance, by including a specific clause dealing with tax collection assistance, usually together with or following the clause on information exchange.

Modalities of inter-governmental collaboration on tax collection

Cooperation on tax collection admits and may pursue multiple purposes under the conventions currently in force. Although the ultimate and overarching goal of tax collection assistance is to effectively satisfy the tax claim, administrative assistance may also pursue complementary objectives that are ultimately aimed at tax collection. In the final analysis, the adoption of each of the different modalities of tax collection assistance depends on the enforcement phase the tax claim has reached in the applicant State, and the purpose for which collaboration is requested. The differences that exist between the various assistance modalities are by no means irrelevant, because safeguarding the different interests of the parties involved, and the specific procedures accompanying each modality, depend on them.

In a general sense, inter-governmental collaboration on tax collection can be classified into various *types* or *modalities*.

(a) *Notification measures*. These are intended to help taxpayers comply voluntarily with their tax liabilities in the applicant State, or the normal procedures for payment and collection in that State. Notification measures include all clauses aimed at facilitating the service of administrative documents issued by the applicant State in the requested State (making use of the latter's administrative structure). Cooperation in this field is still rare. It should be remembered that cooperation in recovering tax claims by the authorities of the other State is usually — and should be — replaced by alternative mechanisms to obtain the voluntary payment of tax liabilities, such as the where other persons can be made liable for payment, or by establishing additional payment guarantees. Collaboration in voluntary recovery would require a high degree of cooperation between the different governments, together with a clearance system for the payment and recovery of taxes between the tax administrations involved. Yet, intensifying such collaboration may become unnecessary in the light of new communication mechanisms and telematic payment systems, and actions by the governments of other States that are not of an inquiry or comminatory nature, may no longer be needed. It should be remembered that only a very small fraction of the conventions studied provide for collaboration in the

notification of tax assessments (examples are the conventions between Russia and Belgium, Denmark and Turkey, and Denmark and Germany).

(b) *Interim or conservancy measures*. These measures impose an embargo on certain assets or claims in other States in order to ensure effective recovery of the tax debt in the other State, or else to prevent such assets and claims being removed to elude payment. These are provisional and fungible measures, calling for coercive actions by the requested State that can be requested and applied even if the enforcement procedure in the applicant State has not yet concluded. Accordingly, such measures have the advantage of not having to wait for all tax collection procedures in the applicant State to be exhausted; nor do they require evidence of an intention to defraud on the part of the taxpayer, so they cannot be considered anti-evasion measures. Nonetheless, their provisional and guarantee attributes require greater respect for the rights of individuals affected.

(c) *Measures to enforce the tax claim*. These are the steps taken in lending administrative assistance in tax collection, as envisaged in the laws of the requested State in *order to obtain effective satisfaction of the tax claim*. They normally involve the application of coercive instruments on behalf of the other State — the applicant State — in recovering its previously assessed tax claims. The adoption of such measures generally presupposes prior exhaustion of domestic mechanisms to recover the debt, so in effect they are a last resort mechanism. These are not merely policy measures, but administrative enforcement measures that use coercive faculties against the assets of persons in response to the claim made by the other State, and grounded in the reciprocity implied by signing an international convention. The use of such enforcement mechanisms, which renders the requested government potentior persona in defending the interests of the other State, requires specification of the individual guarantees and rights that need to be upheld against the actions involved in such cooperation, as well as how they are to be protected and which State is responsible for this. Ultimately these represent an additional guarantee ensuring recovery of the tax claim, although in the end their efficacy will depend on how they are formulated and how contracting States interpret any conditions imposed.

Typology of tax collection assistance clauses

Before analysing the content of the different tax collection assistance clauses in conventions currently in force and in the Model Conventions, a few comments are needed on their structure. The absence of a standard clause in the Model Conventions facilitates variety, and is thus an additional reason for the lack of homogeneous or similar content.

Nonetheless, it is possible to classify the existing clauses analysed in terms of their scope and content, and on this criterion tax collection assistance clauses can be classed as reduced, basic or complete.

In conventions containing a *reduced clause*, contracting States indicate their willingness to enhance administrative cooperation on tax collection, while leaving the details of the mechanism to be used for a future agreement.[9] On other occasions, the clause merely establishes monitoring mechanisms to ensure correct application

[9] The conventions between Austria and Luxembourg of 1962, Azerbaijan and Kazakhstan of 1996, or between Iceland and Norway.

of the convention.[10] As can easily be seen, this type of clause does not lay down mechanisms for applying the authorization contained therein, so implementing the clause requires a further agreement between the competent authorities.

Conventions that contain a *basic clause* establish the grounds for authorizing cooperation on tax collection, but omit regulations on certain aspects, which, albeit secondary, are usually still relevant in implementing the clause. These conventions contain authorization to carry out assistance activities and set out the requirements for requesting it. They also contain a *referral clause* specifying the legal regime under which the collection-assistance activities are to be carried out by the requested State, as well as other specific elements included in incomplete fashion. In addition procedures for implementing the clause are specified, along with the documents that need to accompany the request for assistance or the conditions for requesting and adopting interim measures of conservancy. These clauses raise problems concerning issues that are not specifically dealt with in the convention, which therefore require recourse to the domestic laws of member States.[11]

Finally, *complete clauses* contain the most thorough regulation of the conditions, content and scope of tax collection assistance. Conventions of this type deal with authorization for requesting/lending assistance, specification of which tax claims are subject to assistance, the documents that have to accompany the request, the requirements to be satisfied in providing the assistance, mechanisms for recognizing the applicant State's enforcement instrument in the requested State, a referral clause establishing the legal regime applicable to the tax debt, exceptions to the obligation to lend assistance, conditions for adopting interim conservancy measures; and other procedural issues such as the time frame in which actions can taken by the requested State, mechanisms for transferring amounts recovered, and distribution of the costs of the procedure. Generally speaking, a given convention will cover most of the items listed here, but not all of them.

4. Analysis of existing clauses on tax collection assistance

A number of general points can be gleaned by analysing current double taxation conventions that include a specific cause for mutual assistance on tax collection.

Firstly, it has already been mentioned that there is no standard rule or model clause for such provisions to adhere to. The absence of a base text in the Model Conventions, facilitates diversity of wording, content, scope and effects of the different clauses, as well as the absence of a predetermined order in listing the requirements, provisions, scope of application, scope of assistance to be provided, citizen guarantees, necessary procedural aspects, or distribution of the costs of assistance. Nonetheless, for systematic end expository purposes, we can provide a structured outline of the various issues dealt with in such clauses.

[10] The conventions between Belgium and Cyprus, Cyprus and the United States, Belgium and Czechoslovakia or Belgium and Indonesia.

[11] Examples of this type of clause can be found in the following conventions: Armenia-Russia, Austria-United States, Belgium-Denmark, Belgium-Finland, Belgium-Russia, Denmark-Luxembourg, France-Germany, India-Jordan.

4.1 Scope of application

Taxes included in the mutual assistance clause

Most double taxation conventions that offer the possibility of lending assistance on tax collection, limit such this to the **taxes that are the subject of the convention concerned**, i.e. taxes on income and capital.

Nonetheless, there are no legal obstacles to extending such co-operation to **other taxes not explicitly referred to in the double taxation convention** (see for example, the conventions between Armenia and Bulgaria of 1995, between Armenia and Greece of 1999, and between the United States and Canada of 1995). In fact, specific conventions designed to facilitate administrative assistance and information exchange usually also embrace assistance in collecting different taxes (e.g. the 1990 convention for the exchange of information between the United States and Peru), whether direct or indirect, and pertaining to different levels of government. Similarly, the 1981 OECD Model Convention for Mutual Administrative Assistance in the Recovery of Tax Claims (MCOECD 1981) does not specify the taxes for which assistance can be requested, precisely to allow its application to any kind of tax (commentary on article 2, paragraph 1). The 1988 Council of Europe Convention also refers to direct and indirect taxes, along with social security contributions (article 2).

Furthermore, there seems to be an international trend to separate the scope of application of double taxation conventions from the scope of application of administrative cooperation mechanisms such as information exchange and tax collection assistance. Worth mentioning here are the attempts by OECD and the United Nations to extend the scope of clauses on information exchange to encompass all elements of the tax system in contracting States rather than just those covered by the double taxation convention. This shows that mutual administrative assistance does not depend on the scope of the other clauses of the convention; and in fact it is advisable to strengthen and extend their scope of application to achieve better control over tax evasion or avoidance. Nonetheless, this trend still faces major obstacles in the case of tax collection assistance: suffice it to mention that the European Union has still not approved the proposed directive to generalize tax collection assistance and extend it to encompass direct taxation.

At this point, it is also worth mentioning that some double taxation conventions dealing with estate duty and inheritances also contemplate tax collection assistance in recovering amounts owed on this type of tax — in particular, the conventions signed by France on this issue.

Scope of assistance that can be given

Regardless of the taxes covered by assistance, some conventions set a limit on the scope of the assistance to be provided.

This is true where assistance is confined to **ensuring correct application of the anti-abuse clauses envisaged in the convention**. This type of restriction is important, firstly, because it does not authorize assistance to recover any tax debt deriving from the assessment of taxes covered by the convention, but only to lend tax collection assistance to re-establish the correct assignment of tax jurisdictions envisaged in it, and avoid abuse or incorrect use thereof (minor clause). This is the

case, for example, when an enterprise (company A) of a third State C, sets up a nominee company (company B) in a State B to receive royalty payments arising from State A, in order to reduce the tax paid at source — in State A. On discovering that company B has benefited from a reduction in tax withheld at source in State A, the latter may request State B to take action against company B to recover the tax it failed to pay on revenues received from State A, after verifying incorrect application of the effective beneficiary clause.[12] This type of restriction is also important because it alters the basis for lending assistance, which is no longer intended to establish a generic obligation to lend administrative assistance, but to set up an additional mechanism for restoring the tax position of taxpayers based on correct application of the terms of the convention. Accordingly, it is an anti-abuse clause of a procedural nature.

Several conventions contain this restriction — basically those signed by the United States, which has such a clause even in its 1996 model convention. Other conventions contain a variety of anti-abuse mechanisms, such as those between Belgium and Indonesia of 1997, Indonesia and Egypt of 1998, and between Austria and Canada, as established in the 1999 Protocol; as well as others that do not contain this type of mechanism, such as the 1976 convention between Belgium and Czechoslovakia. Application of this limited-scope clause (minor clause) can be problematic, especially when it gives rise to divergent interpretations of the text of the convention in the two contracting States.

The other conventions provide for assistance in collecting amounts owed on the taxes that are the subject of the convention, subject to conditions discussed in later sections.

Components of the tax debt

In national legislations not only are there a variety of coercive provisions relating to the tax concept itself, but the composition of the amount of the *tax debt* even varies according to the circumstances and assumptions contained in the law of the country concerned. As this is a matter of domestic law, it is difficult to establish general criteria and embed them in a model convention. Nonetheless, both the 1981 OECD Model and the Council of Europe Convention provide a generic definition of *tax debt* for the purpose of lending assistance, whereby recovery is not confined to collecting the tax as such but extends to other items of a different type (commentary on MCOECD article 3, paragraph 2), although their content is not identical.

The 1981 OECD Model defines “tax debt” as comprising the tax owed, plus interest thereon and other costs generated by the recovery process that are owed but as yet unpaid (article 3.b)). The Council of Europe Convention includes “related administrative fines” in addition to the terms mentioned above (article 3.1c)). In view of this disparity concerning the composition of “tax debt”, conventions offer a variety of solutions ranging from total lack of specification — basically, conventions containing a reduced clause — to full specification of the components over which the lending of assistance may extend.

[12] With regard to other anti-abuse clauses in the convention, minor clauses on tax collection cooperation may be difficult to apply, because of a lack of definition or specification (Johnson et al, p. 476 and ff).

Absence of definition. In the absence of more precise specification, and unless defined in the convention, the ***tax claim*** on which assistance is applicable must be specified in the laws of contracting States and, in particular, those of the **applicant State**, which will determine the composition of the debt according to its own tax legislation. Thus, any components included for enforcement and considered as forming part of the *tax debt* under the domestic laws of applicant State should be eligible for assistance by the requested State.

No limitation whatsoever can be inferred on this scope — and the consequent power of the applicant State to define the composition of the tax debt — from the fact that collaboration involves collecting another State's tax debts as if they were *its own*. This comparison is made for the purpose of extending administrative assistance, not to compare or establish similarity between the debts, or their components or nature, and still less to define tax debts by comparing and integrating the requirements of both sets of laws. In other words, no condition can be inferred from the statement made in article 11 of the Council of Europe Convention (article 6 of MCOECD 1981), limiting assistance to tax claims recognized as such in both States. It is the State making the request that is competent to define the tax claim under its own domestic laws.

Positive definition. As indicated above, most conventions usually refer to some of the **components** of the tax debt to which assistance applies, specifying their content and thus making it possible to explicitly include those components in the recovery claim.

There is significant **conceptual variation** between conventions, given the diverse names given to the components of the tax claim in the different domestic laws. This include the taxes themselves and their rates, together with additions and surcharges, compensation for delay, interest, expenses and costs of collection procedures, fines of a non-penal nature, civil responsibilities, civil or administrative fines and various other items.

Express reference to specific components of the tax debt raises a number of relevant issues.

Some conventions refer explicitly to assistance in collecting **non-penal *tax fines*** (e.g. the conventions between Spain and France of 1995, Spain and Belgium of 1995, France and Armenia of 1997, and between Belgium and Indonesia of 1997). As we have seen, inclusion of this item results in differences between the proposals contained in the OECD 1981 Model and the Council of Europe Convention. It is true that the commentary on the OECD Model considers that contracting States can extend assistance in tax collection to cover administrative tax fines of a non-penal nature, and blames the failure to include this item in the definition contained in article 3 of the Model on a lack of unanimity between the States and their administrative practices. Nonetheless certain considerations need to be taken into account.

Express reference favours inclusion of such items among the elements on which assistance has to be provided. However, their inclusion and consideration as part of the tax debt, expressed positively in some laws (including article 58 of the Spanish General Tax Act), raises a number of conceptual and legal difficulties, given the different nature of the provisions and the different grounds on which they can be requested. Accordingly, we believe that if they are incorporated or

specifically mentioned there should also be recognition of the individual rights to be applied when lending assistance in charging fines. It should be remembered that penal principles and guarantees extend to the exercise of this repressive administrative faculty in the constitutional jurisprudence of certain States, and it would unacceptable for such guarantees to be invalidated by using convention mechanisms in other States where they are not similarly extended. Consequently, lending assistance in an administrative act of different legal basis (repressive and non-contributory) would require explicit recognition of the corresponding guarantees, as well as the possibility of invoking any precautions envisaged in the other law (for example, immediate suspension of enforcement in the requested State should an action be brought to challenge the validity of the fine).

Some conventions are even more broadly worded, covering fines or penalties related to the tax debt in a generic way, and do not even exclude fines of a penal nature from the possibility of assistance (see for example the 1995 convention between Denmark and the Philippines, and those between Finland and Lithuania, Lithuania and Norway, Iran and Armenia, or Algeria and South Africa). In such cases, however, we believe the faculty to request recovery of such debts will require using timely judicial cooperation mechanisms, so merely signing an administrative assistance convention cannot be considered sufficient.

As regards other components of the tax claim (interest, surcharges and indemnities) that increase the overall size of the tax debt, consideration should be given, among other things, to whether the amount of the debt is fixed at the time of requesting assistance from the requested State (with the corresponding amount stated in the enforcement document), or else adjusted according to the time taken for the requested State to recover it, thereby respecting its compensatory nature.

Negative definition. Other conventions opt for a negative definition, by excluding components that cannot be recovered through mutual assistance (see, for example article 25 of the 1996 convention between the United States and Austria, which **expressly excludes assistance in collecting tax fines**; or the convention between Luxembourg and Sweden). Negative definition raises interpretive problems on items not expressly *in*cluded in the definition: can they be recovered through administrative assistance from the other State, or not?

The answer is simple in the case of some components, such as tax fines of a penal nature. Such penalties are not covered at all in the scope of clauses on tax collection assistance, and recovering them requires specific inter-State judicial cooperation instruments. However, the question does not yield such an immediate reply on other items not expressly mentioned.

Procedural situation of the tax debt

In the wording of some clauses, the tax debt it is intended to recover needs to have been **determined by administrative action**. The scope of the assistance that can be obtained will ultimately depend on the current procedural situation in relation to administrative assessment of the tax debt.

Generally speaking, the request for and provision of tax collection assistance can only relate to a tax debt the existence of which can **no longer be contested** — in other words that it is not open to legal remedy — so that the enforcement faculties available in the laws of the other member State for its own tax debts, may

act upon it. Consequently, there is a precise procedural moment after which — and only after which — assistance can be requested and provided: i.e. the moment when the debt becomes non-contestable in the applicant State. Some conventions, such as that signed between Holland and Macedonia distinguish degrees of "non-contestability" to be required, depending on whether the debt corresponds to a taxpayer not resident in the requested State, or on other factors.

When requesting and adopting other forms of assistance, such as measures of conservancy or use of the other State's administrative apparatus to serve tax documents, it is not necessary to wait for this particular procedural moment.

4.2 Target scope of application: taxpayers and tax debtors affected by the request for tax collection cooperation and response.

The generalization of the tax system in the wake of a greater need for public revenues has resulted in many different legal entities having tax liabilities. Apart from the traditional taxpayer, ultimately responsible for payment as a result of carrying out the taxable act that generates the tax liability, there are other entities that also have a legal liability, such as withholders or taxpayer substitutes. In addition to these, other persons may also be called upon to guarantee payment (responsible parties, tax successors ex lege, intervivos, mortis causa), such that the tax system recognizes a plurality of persons with potential liability for the payment of tax claims.

As the convention requires domestic tax collection mechanisms to have been exhausted before initiating administrative cooperation, the demand for assistance may be directed against a person (or his assets) other than the person originally liable under tax law.[13]

The clauses included in conventions do not usually recognize this variety of procedural mechanisms for ensuring recovery of the tax claim; nor do they lay down any condition or requirement that restricts or prevents the use of tax collection cooperation against any person or entity liable to pay in the applicant State by means of enforcement measures applied by the requested State. Given this lack of express reference, assistance in tax collection does not have to be aimed at the authentic and original taxpayer; it is sufficient for assistance to be provided with regard to any other person with a liability under tax law. The latter must be fully identified in the request for assistance, along with the category under which tax debt can be demanded. In other words, if a tax debt corresponding to a company is unpaid, and the recovery procedure under the law of the State concerned makes its directors liable for payment, then once the enforcement procedure against those responsible is complete, it would be possible to continue proceedings by requesting tax collection assistance against other responsible parties, at the point where the recovery process in the applicant State ended.

The 1981 OECD Model is consistent with such an interpretation, as article 1.2 establishes that the convention **shall apply to any person** who, under the laws of

[13] Otherwise, this requirement could delay the start of cooperation by making it necessary to exhaust possibilities for recovery from these additional personal guarantors or through other legal mechanisms for obtaining payment, before initiating proceedings against the original debtor in the other State.

the applicant State is liable for payment of the tax, whether or not through a withholding procedure. The commentaries on this article — paragraphs 3 to 13 — confirm that the person held liable may be assumed to have a subjective liability for payment of the tax, but in no circumstances may actions to recover a tax be extended to a person affected by tax proceedings based on an assumption of real liability, or by the existence of some real guarantee of payment of the tax (paragraph 10 of the comments).

On the other hand, while the recovery procedure may conclude in one State against a third party other than the original taxpayer, the silence of convention clauses on this point does not seem to require the procedure to continue by demanding payment of the tax from this same person in another State, so the request may be directed against the original taxpayer. Consequently, the appearance of new persons in the recovery procedure in the applicant State does not rule out a request for assistance in recovering the tax from the original or other debtors, against whom proceedings have also been exhausted in the applicant State. It would thus be possible to request assistance from another State to obtain payment of the amount owed from the taxpayer, despite recovery proceedings having mainly been carried out and concluded with regard to a different person. If another solution were allowed, it could undermine the adoption of interim conservancy measures or even make them definitive. In any event, these issues should be given specific treatment — if not in convention clauses, then at least in the commentaries on the 1981 OECD Model Convention or the commentaries on the Council of Europe Convention, which omit any such reference despite the far-reaching nature of the topic.

According to the rules governing the distribution of tax functions, it is up to the **applicant State** under its own domestic laws to **determine who** is covered by the request for assistance, and the requested State has no power whatsoever to review such a decision (paragraph 4 of the commentaries on the OECD Model of 1981). Nonetheless, the commentaries suggest that the requested State may deny the request when the act adduced as generating the tax liability differs substantially from those recognized in its own laws (paragraph 12 of the commentaries on article 1).

4.3 Material and formal requirements of the request for tax collection assistance

The power of one State to request tax collection assistance another State usually needs to be authorized in a convention, and is subject to specific circumstances or conditions. These requirements are both material, relating to the outstanding nature of the debt to which the claim relates, and formal, relating to the externalization of the request.

Material requirements

The most frequent material requirements include the following:

(a) Firstly, concerning the conditions of the act determining the tax debt, the latter needs to be **assessed, enforceable and also no longer contestable**. Tax collection assistance is therefore impeded if there remains the possibility of reviewing the act or the situation recognizing the existence and conditions of the tax

claim under the laws of that State. Three different requirements can therefore be identified:

- The need for prior administrative assessment of the tax, or administrative acceptance of assessment by the individual.
- The tax debt should longer be contestable, either because the period for filing remedies has passed without the taxpayer having done so; or else, where a remedy has been filed, because of a ruling halting administrative or judicial proceedings having not been filed in due time and fashion, or because no further remedy is admissible. Conventions usually require that the debt be uncontestable but not definitive. Nonetheless, the commentaries on the OECD 1981 Model advise States to be cautious when requesting assistance in collecting provisional assessments; it is safer if they are definitive, as this avoids possible restitution of damage caused by administrative cooperation, both to the taxpayer and the requested State. The possibility of filing extraordinary review remedies does not prevent cooperation from this point of view, however, although substantiation of an extraordinary remedy would halt proceedings, following timely notification thereof.
- The debt should be the subject of an instrument permitting enforcement.

The Council of Europe Convention allows these requirements to be modified as deemed appropriate by the contracting parties (article 11.2).

Most conventions do not define the medium through which the tax debt must become uncontestable, and it is sufficient for the debt to be finally determined. Final determination is understood in the commentaries and in some conventions (see that between Canada and the United States), as a situation in which the tax administration has the right to demand payment of the debt, and the cancellation or extinction of administrative or judicial remedies to prevent enforcement or reconsider the existence and content thereof. In other cases, where final determination is subsequent to legal process, the documents required must mention this, or the corresponding legal document must be made available (convention between Denmark and the United States of 1999, article 27.2, or that between Canada and the United States, article 15 of the 1994 Protocol, which adds a new article XXVI.A.2).

Some conventions relax the requirement of final determination, allowing resort to administrative cooperation in recovering the debt in the most favourable way; it is sufficient for this that the tax be finally owed and enforceable, without express mention of it being finally determined (see among others, the protocol to the 1999 Convention between Austria and Canada; also the convention between Armenia and Greece of 1999, from which, a sensu contrario, it can be inferred that remedies do not have to be previously exhausted, because a claim by the individual suspends the cooperation procedure). In other conventions it is even sufficient for there to be no assets available to pay the debt in applicant country to initiate a request for assistance (e.g. the convention between Cyprus and Russia of 1998, or between Latvia and Estonia of 1993).

This note, which is intended as a requirement for a State to be able to initiate a request for assistance, should be distinguished from the other kind that enables the requested State to deny assistance if it finds that the applicant State has not exhausted all the possibilities envisaged in the latter’s domestic laws for recovering

the tax debt (exhaustion rule). These two elements of the assistance clause can either occur in the same convention or appear independently.

(b) As a logical though not necessary consequence of the first requirement, the request for assistance constitutes the **final mechanism** (or measure of last resort) for the applicant State, since in practice conventions require all possibilities, mechanisms and procedures available in the domestic laws of the applicant State to have been exhausted, to authorize the administration to recover the tax claim. Thus, in the case of assistance in enforcing tax collection, the applicant State must have no mechanism left with which to recover the debt.

This requirement can be guaranteed in a number of ways, although the requested State should always favour a challenge as a reason for opposing enforcement measures that could be contested by the taxpayer likely to be the subject of action by the requested State. Despite this motive for opposition not being expressly provided for in the domestic laws of that State, it suffices to mention the requirement discussed in the commentary and its projection to the legal situation of the individual concerned in order to guarantee its effectiveness. Accordingly, it would be possible to guarantee and verify the exhaustion of all procedural mechanisms, guarantees and privileges available to the tax debt under the laws of the State demanding it, both against the tax debtor on whom the recovery request falls, and on the other persons who may be held liable under the domestic laws of the applicant State.

Logically, this requirement cannot be adduced in conventions that allow the remedy of tax collection assistance in situations that do not require final determination of the tax claim, but merely that the tax be enforceable and finally owed.

(c) The second requirement leads to the third. The exhaustion rule makes it **impossible for the applicant State to carry out any further enforcement action**. In other words, the request for tax collection assistance should imply the end or absence of mechanisms for enforcing the debt in the applicant State (since they have already been exhausted). Having said that, nothing would prevent both processes taking place simultaneously if the request for assistance could be made before exhausting all domestic enforcement channels; in other words, assuming assets were found in the applicant State, or one of the potentially liable parties were to be rehabilitated, or it is decided to seek assistance in applying measures of conservancy, which require guarantees and specific conditions as well as independent study.

This consideration, which seems irrelevant, may not be so given its potential effects; for example, in relation to the possible **simultaneous use of authorizations** for tax collection cooperation **contained in different conventions** signed by a given applicant State. Analysis shows that convention clauses do not consider effects arising from the possible simultaneous, parallel or coincident initiation of several requests for tax assistance to different countries, by invoking different conventions containing tax collection assistance clauses. In principle, there is nothing to rule out possible simultaneous use, nor does exercise of one clause restrict the exercise of another, assuming the necessary prior communication to the requested State of successive enforcement actions subsequent to the request, which logically affect the recovery of the debt. Nonetheless, given the second consideration, it should be concluded that a request for assistance from one State would prevent requesting

assistance from another, as the latter could argue that administrative measures aimed at recovering the debt continue to be exercised or implemented in the applicant State.

Nonetheless, this conclusion may be susceptible to nuances in some conventions, where the exception is predicated on the exhaustion of enforcement measures *within the territory of the applicant State*; so it would be possible a priori for that State to simultaneously make several requests for assistance if all conventions involved so allowed (see the 1995 convention between Spain and Belgium).

Consequently, the existence of several conventions containing tax collection assistance clauses allows a signatory State to choose one of the authorizations granted to it (regarding the provision of definitive and non-provisional enforcement measures), but not, in our judgment, to simultaneously exploit several at once. Only after the procedures arising from assistance lent by one State have concluded can procedures be initiated with another, provided the conditions or time limitations imposed by domestic laws or by the respective convention itself so permit, and unless a different solution can be inferred from the set of conventions involved.

Formal requirements: documentation

As regards formal requirements, most conventions pay special attention to formalizing the request, and list the documents that must accompany it. The documents mostly frequently required are as follows, clearly adhering to the requirements contained in article 7 of the 1981 OECD Model:

- Official document requesting assistance.
- Official copy of the enforcement instrument (mutual recognition of enforcement instruments). Some conventions require certification that a similar request made under the law of the applicant State would be enforceable.
- A decision confirming the final determination of the assessment (where appropriate). If this is obtained through legal channels, a certified authentic copy of the decision bringing the legal channel to a conclusion is required.
- Copy or certificate stating that the tax claim concerns one of the taxes or elements thereof covered by the assistance clause (e.g. the convention between Algeria and France).
- Certification of compliance with the conditions established by the convention for lending assistance.
- Some conventions indicate the competent authority that should process the request for assistance (e.g. the 1997 convention between Belarus and India).
- When the rules on the time validity of actions taken by the requested State are expected to be determined by the laws of the applicant State, the latter must attach information on such aspects to its request, so that the requested State can take them into consideration (e.g. the 1995 convention between Denmark and Germany).

In addition, any change in enforceability of the tax claim in the applicant State, which alters enforcement conditions in the requested State, must be communicated.

4.4 Content of tax collection assistance: actions of the requested State

Once a request for assistance has been received, the State must check that the request complies with the terms of authorization contained in the convention. When has been done, the first action should consist of "**establishing equivalence between the enforcement instrument** of the applicant State and the administrative enforcement instrument allowing the tax administration in the requested State to deploy its enforcement powers. This validation is dealt with in most conventions by including a standard clause with the following wording, taken from article 7.2 of 1981 OECD Model:

"The instrument permitting the enforcement in the applicant State shall, where appropriate, and in accordance with the provisions in force in the requested State be accepted, recognized, supplemented or replaced by an instrument permitting enforcement in the latter State."

This *validation* process makes it possible to extend the conditions for enforcing tax claims in the requested State, under its own domestic legislation, to the applicant State's claim. Such recognition extends certain faculties inherent in the tax claim of the requested State to the applicant State's claim.

The content of tax collection assistance will therefore depend on the domestic tax laws in force in the requested State, and on the mechanisms they contain for enforcing that State's own tax claims. Application of these laws is made possible by including a **referral clause** in conventions, authorizing the requested State to apply its own domestic enforcement regulations on behalf of the applicant State, in enforcing the latter's tax claim. According to this clause, which is normally contained in all conventions, "the requested State shall recover tax claims in accordance with the laws and administrative practice applying to the recovery of its own tax claims." Accordingly this will be the law that determines the enforcement mechanism used — whether judicial or administrative — together with the procedures or channels — whether general or specific — applicable to such enforcement. In most cases, recognition of equivalence places the tax claim of the applicant State in a similar administrative position to those of the requested State, albeit with certain differences.

On this point, the convention does not usually set out the prerogatives that the applicant State's tax claim will enjoy, so these will be established in the referral clause mentioned above. This means that the nature, content and scope of the measures, along with the bodies with competency to implement them, will be established by the laws and administrative practice of the requested State.

As mentioned above, these include the possibility of using coercive measures to obtain information that might be relevant or could facilitate recovery of the tax claim. Here, information exchange may be resorted to as a complement to cooperation in tax collection, in order to guarantee the success of assistance (both preventive to ensure the timeliness of the tax collection assistance, and also in a parallel and simultaneous way). Some conventions specify that information requested in a complementary way, or in the framework of a tax collection assistance procedure, can only be used for this purpose, and may not be used by the applicant State to initiate a new tax regularization process (see article 6 of the Benelux convention on tax administration).

This also covers the necessary notification to the taxpayer for the defence of his legitimate rights and interests.

Some conventions expressly admit the possibility of accepting **measures for deferring payment or the possibility of making payment in kind** if permitted in the legislation of the requested State. As with other measures for obtaining payment of the tax, it is the legislation of the requested State that determines the legal regime to be applied. Conventions require the authorities of the applicant State firstly to be informed of any decision to apply such a measure (see the conventions between Holland and Macedonia, Spain and France, the United States and Holland, Armenia and France, and between Spain and Belgium). On the other hand, they do not specify which authority or which contracting State should be the beneficiary of the compensation that can normally be claimed by granting an extension of the period of limitation in making payment. Accordingly, the wording of this clause becomes particularly important in deciding whether, in the absence of such a provision in the convention, the requested State can grant deferral (in any of its various modalities), should this be possible under its own domestic laws. The commentary on article 11 of the 1981 OECD Model, also seems to confirm the clarifying nature of this clause, which can also be inferred from the referral clause (paragraph 2 of the commentary on article 11 of MCOECD). Consequently, we are inclined to interpret this in a declarative sense, that ultimately it should be the laws of the requested State that decide how the taxpayer should make payment resulting from the provision of cooperation/assistance in the recovery of the claim.

Referral is made only when applying the mechanisms needed to enforce the tax debt of the applicant State, so in no way does it oblige — or empower — the requested State to perform **administrative acts or take measures other than those it would use in collecting its own taxes**. Some conventions state this explicitly (e.g. the conventions between Armenia and Iran, Belgium and Cyprus, Belgium and Denmark, Belgium and Germany, Finland and the United States, United States and Holland); but the same conclusion also applies to conventions that omit such reference, as it can be inferred from the very nature of the authorization conferred by the clause on tax collection assistance. This also authorizes implementation of the administrative enforcement measures *envisaged in the laws of the other contracting State*, through its administrative bodies.

Adherence to the enforcement rules and mechanisms of the requested State **does not empower the latter to change the subject** of the enforcement instrument issued by the applicant State, **nor the composition of the tax debt** as it appears therein. Overcoming this limitation would not only involve mechanisms of great complexity (Johnson et al, p.470; Leflar, p.218), but would also mean acting outside the territorial jurisdiction of the requested State, and would infringe the limits of conventional authorization. Some conventions mention this explicitly (such as that between the United States and Denmark of 1999, article 27.5, or the 1995 convention between the United States and Canada), although omission of such a clause does not alter its effects. Cooperation, therefore, does not imply the use of regulatory faculties to defend administrative autonomy, but merely activation of an administrative procedure under the rules envisaged for performing analogous national acts, to achieve the aims of another legal organization (Sacchetto, 1978 pp.178 and ff.).

Limits on referral

Referral to the laws of the requested State in satisfying/enforcing the tax claim is subject to certain **limits** as formulated in the assistance clause,[14] by virtue of the formulation of the referral clause itself — unless the convention provides otherwise.

Firstly, some conventions limit application of the measures and procedures envisaged in the legislation of the requested State to those also contained in the laws of the applicant State (**identical faculties and enforcement procedures**) (article 16a) of the OECD Model). This clause seeks to prevent the applicant State using tax collection assistance as a means of expanding the enforcement faculties available under its own laws, affording the tax debt certain privileges or faculties that are not recognized in its own laws. This involves balancing the reciprocity requirement contained in the convention with respect for taxpayers' rights.

To guarantee fulfilment of this condition, the requested State could oppose an enforcement procedure in favour of the taxpayer, specifically because the latter could allege non-fulfilment of this condition, not to question the validity of the assistance request but to avoid application of a specific measure in the requested State that is not recognized or envisaged in the laws of the applicant State.

Secondly, many conventions limit the application of enforcement mechanisms (embargo, seizure and divestment of assets, coercive action against the taxpayer) to the **existence of sufficient assets to pay the debt in the territory of the requested State** (e.g. the conventions between Algeria and South Africa of 1998, Austria and France of 1993, Denmark and Germany of 1995, and between Algeria and Romania). In other cases this limitation is generally used to protect the rights of successors when recovering taxes owed by a deceased person, or when the inheritor is liable for payment (e.g. the convention between Macedonia and Holland). This limitation has two forms, represented in the OECD Model (article 6.3) and the Convention of the Council of Europe (article 11.3).

In the first case, when recovering tax debts owed by the deceased person, assistance may only encompass the value of property (real estate, movable or immovable or either) belonging to the deceased person's estate.

In the second case, when the applicant State attempts to recover the tax debt from the deceased person's inheritors, the claim that can be enforced is limited to that portion of the inheritance held in assets located in the territory of the requested State. Note that this limitation is not applicable to inheritance tax, but to income tax. The aim here is to prevent the successor's liability for inherited tax debts allowing tax collection assistance to seize assets that originally belonged to the inheritor, in order to recover the taxes owed by the deceased.

Thirdly, in some conventions administrative cooperation excludes, from the request for tax collection assistance, application of tax claim **privileges** granted to the requested State's own tax debts, or priority in recovering such debts (see the conventions between Belgium and Denmark, Finland and Germany, between the United States and Canada, and Finland, and between Denmark and Luxembourg and Germany). Most conventions do not specify what is meant by *tax claim privileges*, so a distinction needs to be made between privilege measures and the faculties and

[14] Some conventions, on the other hand, do not place any restriction on referral, such as the 1997 convention between Holland and Canada.

actions that arise from exercising the power of executive autonomy under the domestic laws of the requested State. Other conventions define *tax claim privilege* as measures giving priority to the recovery of tax claims over other debts (article 5 of the 1952 Benelux convention on administrative assistance). In any event, interpretive problems may arise over the distinction to be made between tax claim privileges and the superior position of the tax claim resulting from implementation of public administrative enforcement faculties. This requirement is also contained in the OECD Model, article 9, and in article 15 of the Council of Europe Convention, in order to protect the taxpayer's own debtors (see commentary on article 9, paragraph 2). The Explanatory Report on the Council of Europe Convention takes a more decisive line by considering this limit as absolute (paragraph 153). Other conventions do allow the requested State's own tax claim privileges to be extended to the tax claim of the State requesting assistance (e.g. the conventions between Algeria and France, and between Romania and Turkey).

4.5 Exceptions to the obligation to lend tax collection assistance

The conventions analysed usually set out a variety of exceptions to the obligation to lend assistance in recovering tax claims. Interpretation of these is extremely important as they can undermine the effectiveness of administrative cooperation. In this section we merely list the most frequent exceptions and make a brief comment on each one.

Frequently there is a standard clause, subject to minor modifications, that makes it possible to deny assistance when this might entail an infringement of **sovereignty, security, public order or the vital interests of the requested State** (see the protocol to the 1999 convention between Austria and Canada, or the convention between Egypt and Indonesia, among others). Other conventions refer only to limits arising from respect for public order (e.g. those between Armenia and Bulgaria, the United States and Canada, or India and Jordan). In double taxation conventions, the inclusion of clauses restricting the provision of assistance is grounded in traditional attitudes towards State sovereignty, whereby the application of tax rules is considered a key element in exercising such sovereignty and, therefore to be left exclusively in the hands of the State concerned. Nonetheless, this clause gives the requested State a discretionary faculty to deny requests for assistance from another contracting State, and thus potentially impairs the effectiveness of the clause.

In addition, some of the items included, such as public order, are exceptionally complex to apply, given their profoundly political nature and doctrinal variations that exist between States (Sacchetto, 1978 p.189 and ff; Atik, 1981 p.165). The reference to public order involves the antithesis of the rule by which the applicant State assesses the debt, and the requested State is responsible only for enforcing it but has no possibility of reviewing its content. Nonetheless, this clause entails accepting the jurisdiction of the requested State, if not to review the tax debt then at least to analyse its content, together with the tax policy or criteria the applicant State employs in imposing such a tax.

Secondly, the exceptions envisaged in conventions seek to **protect certain persons or taxpayers by excluding them from their field of application**. This is probably the most relevant clause, as it may render collection assistance vacuous if

it applies to taxpayers with regard to whom assistance from the requested State is being sought. Its inclusion weakens the clause and undermines its effectiveness. There are several modalities for such an exception.

Nationality clause. Firstly, clauses that allow denial of assistance when this involves enforcement actions against the requested State's own nationals (i.e. physical and legal persons or entities). This exception presupposes the first exception, which was already contained in the League of Nations Model Conventions of Mexico and London of 1943 (article V.d). Some countries, including the United States, tend to include this exception in their clauses (see article XXVI.8 of the 1994 convention between Canada and the United States, along with those between the United States and Holland, and between the United States and Denmark). Elsewhere, however, inclusion of such a clause could be held to breach the principle of non-discrimination on nationality grounds, and might even totally undermine the clause in general. For that reason, the 1981 MCOECD recommends its non-inclusion, removing it from the wording of the clause. The clause might also conflict with the community principle of non-discrimination in the European Union, given the interpretation of the non-discrimination principle made by the Luxembourg Court.

Residency clause. Other conventions make an exception to the obligation to lend assistance in tax collection when the request relates to and calls for action against residents of the requested State (e.g. the convention between Armenia and Bulgaria of 1995, or between Armenia and Iran of 1995).

In other conventions the exception is based on a combination of these two criteria (for example, the 1954 convention between Belgium and Finland).

Thirdly, it is possible to deny assistance when the applicant State has not acted or exhausted all the procedures and avenues for enforcement contained in its own domestic laws. This exception, requiring **prior exhaustion of domestic enforcement measures (the exhaustion rule)**, which is contained in most conventions including the OECD Model (article 6.4) and the Convention of the Council of Europe (article 91),[15] may also require final determination of the tax debt in order to proceed with enforcement in the other State.

In some conventions, this rule does not extend to measures of conservancy. In others, the exception is softened where enforcement in the territory of the applicant State would entail considerable problems or would be particularly difficult (e.g. the 1993 convention between Austria and France).

In other conventions the rule is also qualified by reasonability requirements. Thus, it is not necessary to have exhausted all mechanisms, but it suffices to verify the reasonability of the request given the measures that are available and implemented by the applicant State (e.g. the 1995 convention between Spain and France).

Contravention of the convention. Fourthly, assistance may also be denied when the objective is to collect a **tax debt that is inconsistent with the provisions of the double taxation convention** (e.g. the convention between Holland and Macedonia, or between Algeria and France). Definition of the tax jurisdictions of

[15] The latter article relaxes the requirements of the exhaustion rule, admitting as an exception the fact that exhaustion of such measures would involve disproportionate difficulties.

contracting States is thus ultimately based on the provision of assistance in tax collection. Infringement of the convention could occur either because the assistance requested is at variance with some of its clauses, or because the request has been made through procedures that contravene one of its precepts. Some States, specifically members of the European Union, could also deny assistance on the grounds of infringement a community regulation, given the primacy of these over State laws even in the case of conventions. It should be stressed that this faculty only involves denial of assistance, but not the possibility of reviewing enforcement of the debt by the applicant State.

Applying this exception could be problematic, when the convention is interpreted differently by the two States, for example, and this would undermine the assistance clause (Johnson et al, 1980 pp. 476-477).

Finally, some conventions invoke the **principle of proportionality** as grounds for not lending assistance, making it possible to deny assistance when the administrative burden implied for the requested State is disproportionate to the benefit accruing to the applicant State (article 27.12 of the 1999 convention between the United States and Denmark).

4.6 Legal regime governing the assisted tax claim in the requested State

In accordance with the principle of procedural autonomy, conventions do not specify the legal regime to be applied to the tax claim to be recovered in the requested State. Accordingly, under the principle of lex loci, it will be the legislation of the latter State that determines the applicable regime. This means that questions relating to conditions of payment (time, place, form, requirements for notification, means of payment, deadline), together with enforcement mechanisms in the event of non-payment, are determined in accordance with those laws.

Some conventions establish special rules that act upon some aspects of the enforcement procedure in the requested State, as well as on the procedure and the legal situation of the tax claim in the applicant State.

Conventions often contain a clause regulating the **time frame for assistance actions and their effects in the other State**. As a general rule in conventions, it is the laws of the applicant State that set the period prescribed for actions to be undertaken by the requested State, since the applicant State establishes the period of validity and the outstanding nature of the tax debt. This constitutes an **exception to the referral clause**, and as such is necessary to nullify it. It is therefore advisable for the request for assistance to be accompanied by time conditions to be considered and respected by the requested State.

Having said that, the convention should also explicitly mention the **effects of actions carried out by the requested State on the period of validity/limitation of the tax debt in the applicant State**. It is a common practice among States to interrupt the limitation period as a result of administrative actions. Nonetheless, this provision is only applicable in relation to the State's own debts and the actions of its own tax administration. Accordingly, to give similar effect to the actions taken by the requested State, a clause to that effect needs to be included in the convention article dealing with tax collection assistance. Consequently, to afford the actions of

the requested State the interrupting effect envisaged in the laws of the applicant State for its own actions, a clause is needed establishing similarity of effects between the actions of the requested State and those of the applicant State, to suspend or interrupt the time period.

Conventional practice varies significantly in the way such effects are dealt with. Some conventions accept a generic authorization for actions by the requested State to have the same effects as actions by the applicant State, in determining the time limits applicable to the tax claim (e.g. the convention between Armenia and France of 1997). Other conventions only envisage the possibility of extending the prescribed period, but not so as to avoid expiry (Spain-Belgium, 1995, article 28.6). Other cases refer explicitly to effects on limitation and the expiry of actions (e.g. the 1994 convention between Algeria and Romania).

It should also be remembered that State actions can also prescribe, so it is advisable to **specify in the convention the dies a quo** from which the calculation of the period of limitation on enforcement action in the requested State begins. Few conventions actually specify this term precisely, which consequently tends to be established by resorting to the domestic laws of the requested State (for an exception, see the convention between the United States and Canada, article XXVI.4.a, according to the wording used in the Protocol, which sets as dies a quo the date on which the request is received rather than the date of its acceptance).

Another time-related question sometimes included in convention clauses, albeit relatively few of them, relates to the **maximum duration of tax collection assistance**, in order to protect the legal security of persons liable for payment. The time limit normally varies between 10 years (e.g. the 1994 convention between the United States and Canada), and 15 (e.g. the conventions between Austria and Norway of 1995, and Armenia and France of 1997). In establishing such maximum enforcement periods, it would be useful to establish a dies a quo for ease of calculation.

In a different area, another general principle can be inferred from existing clauses relating to the **jurisdiction of contracting States in dealing with complaints** concerning collection assistance activities. **Two distinct attribution criteria** can be identified.

- All matters relating to **recognition of the debt or declaratives** thereof, correspond to the **applicant State**, for which reason it is the latter's bodies that have jurisdiction to deal with and rule upon the issue. This means that once the request has been transmitted, no new complaint period can be opened in the requested State, which must confine itself solely to enforcing the tax claim (this is explicitly stated in the conventions between Austria and France of 1993, and Austria and Norway of 1995). Another issue involves determining the effects of an action brought in the applicant State against actions taken by the requested State and tax collection assistance. Some conventions state that this does not suspend enforcement in the requested State (e.g. the 1997 convention between Armenia and France).
- On the other hand, or consequently, actions can only be brought against the **legality of the enforcement measure** in the **requested State**. Enforcement measures are therefore challengeable in the requested State — which implements them — in accordance with its domestic legislation, so that State

must verify correct application of the clause on tax collection assistance through its remedies and complaints system.

This should include the possibility of verifying correct application of the convention clause authorizing tax collection assistance, by incorporating the corresponding opposition clauses arising from the limits, conditions and requirements for lending assistance in the recovery of tax claims.

This criterion is also contained in the OECD Model (article 10).

4.7 Other procedural issues

The conventions analysed usually include some additional clauses on procedures, the way they are carried out and their costs.

For example, some specify the procedure for **transferring amounts recovered**, while others establish a mutual agreement between the competent authorities of the contracting States, or else require consultation prior to transfer (Algeria-Romania, Algeria-South Africa).

Other conventions (for example between Macedonia and Holland) indicate a **minimum size of tax claim** necessary to initiate the assistance procedure.

As regards the **costs of the procedure**, most conventions follow the general criterion laid down in the Council of Europe Convention (article 26), distributing costs as follows:

- Ordinary costs are borne by the requested State.
- Extraordinary costs are borne by the applicant State.[16]

Other conventions make the applicant State assume all the costs of the procedure by disbursement, or through reimbursement or non-transfer (the conventions between Bangladesh and India of 1991, and between India and Belarus). Lastly, a few conventions make the requested State pay all costs (e.g. the convention between Armenia and Greece).

4.8 Interim and conservancy measures

The complexity of the procedure, given that it is a last resort measure, compounded by the prior requirement to exhaust all domestic measures (exhaustion rule), the wide range of exceptions to the obligation to lend assistance, and the intricate procedure to be followed, may substantially reduce the effectiveness of the mechanism as a means to overcome the barriers raised by the territorial limitation of tax enforcement faculties.

To overcome such ineffectiveness in assistance, many conventions have a clause that considerably expands the possibilities for using assistance in the recovery of tax claims, fundamentally through the **possibility of requesting**

[16] In this regard, see the conventions between the United States and Canada, Latvia and Estonia, Finland and Lithuania, Norway and Lithuania, Armenia and Iran, or between Macedonia and Holland; the latter contains a clause assigning responsibility for incorrect use of the assistance procedure.

conservancy or interim measures from the requested State, in defence of the tax claims of the applicant State. Such a clause was already in the 1943 League of Nations conventions, and subsequently formed part of the OECD project (article 12) and the of the Council of Europe Convention (article 12), with similar wording in both cases. Nonetheless, the different structure of the two texts may generate different effects: the OECD project contains a second paragraph setting limits on the adoption of conservancy measures, whereas the Council of Europe Convention extends the general limits established in the convention to these measures (articles 19 and 21).

These **clauses** are quite **parsimonious** in **content**, and are essentially intended to authorize request and adoption of interim and conservancy measures to ensure the recovery of tax claims in the other State, even though the assessment of the debt may not be finally determined. Ultimately, the main objective of such authorization is **to avoid the need for final determination of the tax debt** before requesting assistance from the other State and for the latter to be able to provide it.

Nonetheless, the progress made at the time of requesting assistance in some cases **may not be sufficient** to guarantee effective recovery of the claim. The reason for this is that the OECD Model makes the **rule of prior exhaustion of executive procedures in the applicant State (exhaustion rule) applicable to conservancy measures** (article 12.2 referring to article 6.4). Accordingly, while it is possible to request conservancy measures in the other State before the debt is finally determined, such a request cannot proceed if the taxpayer files a remedy or brings an action in the applicant State to challenge the existence and/or content of the debt. If such a remedy involves suspension of enforcement, or is requested together with the respective guarantee, the applicant State will be unable to exhaust mechanisms for enforcing the debt, which would not only prevent the final determination of the assessment but also halt the enforcement procedure in that State, thereby annulling the additional guarantee ensuring the tax claim, inherent in the adoption of conservancy measures. Consequently, we believe this rule should be reconsidered, in view of the objectives pursued in requesting and adopting such measures.

In addition, the texts analysed **do not clearly indicate the point at which assistance can be requested** for adopting conservancy measures. However, they do seem to require, and logically so, although it ought to be stated more clearly in the conventions, that the adoption of such measures requires the prior existence of a tax debt assessed by the tax administration.[17] The commentaries on the OECD Model and the Explanatory Report on the Council of Europe Convention also indicate, and logically so, that the applicant State must have been able to apply the conservancy measures envisaged in its own laws. The two circumstances will concur in most cases, as the OECD model requires enforcement procedures in the applicant State to have been previously exhausted.

Analysis of the Council of Europe Convention puts forward a different argument. Firstly, it has to be determined whether interim and conservancy measures are affected by article 19, on the requirement of prior exhaustion of enforcement procedures in the applicant State. Although it does not say so explicitly, article 9 can be understood as setting generic limits on the different types of assistance mechanisms authorized by the convention, for which reason conservancy measures

[17] Paragraph 127 of the explanatory report on the Council of Europe Convention states this.

would also be affected. Paragraph 177 of the explanatory report confirms this argument by referring to limitations on any of the measures recognized by article 1 of the convention, which explicitly include conservancy measures. Consequently, the same criticisms can be made against the Convention of the Council of Europe.

Conventions that include the possibility of requesting and adopting conservancy measures do not usually demand the exhaustion of procedures in the applicant State to be able to seek this type of assistance. Most conventions refer only to the possibility of requesting such measures while the debt is awaiting administrative or judicial decision — in other words is not yet finally determined (e.g. the conventions between Algeria and France, Algeria and South Africa, India and Belarus, Armenia and Russia, Estonia and Latvia, Denmark and Turkey, Finland and Lithuania, and Lithuania and Norway). On the other hand, they do not require verification of the exhaustion of enforcement measures in the applicant State to be able to request or adopt such measures. It would seem, therefore, that the prior exhaustion requirement would only be demandable in conventions where the conditions for adopting enforcement measures by the requested State are transferred mutatis mutandis to conservancy measures (examples include the conventions between Belgium and Denmark, Belgium and Spain, or Belgium and Germany). Others leave even more room for State action, by allowing their adoption or request in relation to tax debts on which enforcement measures can still be adopted in the applicant State (Denmark-Luxembourg), or even in relation to tax claims that are not contained in an enforcement instrument (Macedonia-Holland).

In another sphere, there is a need to analyse the **specific conservancy and interim measures that the requested State can adopt**. The OECD Model and the Council of Europe Convention refer generically to the adoption of "conservancy measures" but do not specify the type of measures that might be available to the requested State. The commentary on the OECD Model refers specifically, by way of example, only to preventive embargo measures such as the seizure or freezing of the taxpayer's assets (paragraph 1 of the commentary on article 12).

Conventions usually invoke the referral clause in a general way to specify the conservancy measures the requested State can adopt. Under this rule, the requested State may adopt the **conservancy measures envisaged and recognized in its own domestic legislation** (see the conventions between Algeria and France, Algeria and South Africa, India and Belarus, and Spain and Belgium). In the absence of explicit mention, the same conclusion is reached by applying the referral clause, and it was also the solution proposed by the League of Nations Models. Nonetheless, we believe the rule should be reconsidered, to include firstly requirements arising from the principle of reciprocity, and secondly a definition that excludes certain provisional measures which, by their nature, and despite being provided for in the domestic laws of the requested State, ought not to be available for use in international assistance in recovering tax claims. Such is the case, for example, with interim assessments as these can only be made by the applicant State.

Returning to the first reason for reconsidering the referral clause, the administrative assistance clause **should not allow an extension of faculties for adopting conservancy measures envisaged in the laws of the applicant State**, but at most the possibility of applying such or other similar measures in another State,

under its own laws.[18] The particular nature of these measures support this view, which should be inspired by principles of proportionality, transitoriness, provisionality and fungibility (Grau Ruiz, <date>). At the same time, given the transitory nature of the measures, it seems appropriate in this field to clearly demand the necessary safeguards for the rights of individuals who could be required to meet unforeseen liabilities as a result of procedural law that does not correspond to the tax owed. Consequently, in the absence an international taxpayer charter, we believe that strict application of the rule of reciprocity is the best means of safeguarding the interests of private individuals against enforcement measures of a provisional and transitory nature.

In our opinion, the Council of Europe Convention supports this view, for it sets limits on the obligation to lend joint assistance, applicable to both enforcement and conservancy measures. Consequently, article 21.2.a) of the Convention, which considers the requirements of the principle of reciprocity, is also applicable to conservancy measures adopted under article 12 of the Convention.

5. Final considerations

The analysis made above raises a series of general points.

Firstly, the progressive inclusion of specific clauses on assistance in recovering tax claims in double taxation conventions needs to be highlighted, particularly in conventions signed from the 1990s onward. This consolidation of assistance in recovering tax claims reveals a shift in attitude whereby States address the phenomenon of international administrative cooperation, in its different manifestations, as a necessary mechanism to ensure correct application of their respective domestic tax systems.

Nonetheless, this needs to be qualified given the lack of data showing the effectiveness of clauses as a mechanism for controlling and ensuring payment of the tax debt. It should also be stressed that the persistence of certain classic exclusion clauses, such as nationality or public order, undermines the essence and purpose of the clause itself.

Lastly, mention should be made of the scant attention paid to safeguards for private individuals in double taxation conventions. Remission to the domestic laws of one of the contracting States — through the referral clause or its exceptions — does not satisfactorily protect individual rights against administrative enforcement faculties. Mechanisms such as suspension of the procedure in the requested State have to operate consistently with the provisions of the laws of that State based on its requirements, which do not usually pay much attention to the conditions of international assistance. In this regard, given the current embryonic stage of preparations for an international taxpayer charter, we consider that strengthening the principle of reciprocity on this issue is the best mechanism for safeguarding taxpayers' rights, as well as directly recognizing the effect of the limits and conditions imposed on the lending of assistance for the recovery of tax claims, so

[18] If the domestic legislation of a member State does not admit a specific conservancy measure — or none at all — it does not seem logical that the clause on administrative assistance for the recovery of tax claims should enable the applicant State to seek the adoption of such measures on its behalf by the requested State, under the latter's domestic laws.

that they can be denounced by private individuals and judged by the respective national courts, in keeping with the distribution of functions that the clauses themselves establish on this issue.

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