

INCEPTION IMPACT ASSESSMENT			
TITLE OF THE INITIATIVE	Initiative on Improving Double Taxation Dispute Resolution Mechanisms		
LEAD DG – RESPONSIBLE UNIT – AP NUMBER	TAXUD/D2 2016/TAXUD/007	DATE OF ROADMAP	30/06/2016
LIKELY TYPE OF INITIATIVE	To be determined		
INDICATIVE PLANNING	4th quarter 2016		
ADDITIONAL INFORMATION	-		
<p style="text-align: center;">This Inception Impact Assessment is provided for information purposes only and can be subject to change. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.</p>			

A. Context, Subsidiarity Check and Objectives

Context
<p>The issue of having effective and efficient mechanisms in place for resolving disputes between Member States on how double taxation is to be eliminated (double taxation dispute resolution mechanisms) available in the EU has been on the spot for several years, with various reports insisting on the importance of tackling this issue (e.g., the 2010 "Monti report"¹⁵ or the European Commission's communication "Towards an internal Market without tax obstacles"¹⁶). A public consultation on examples of double taxation cases which was launched by COM in 2010 confirmed that existing instruments to resolve double taxation disputes between States as they stand now need to be improved and that these disputes on double taxation involve significant amounts of tax: for instance, by average more than 20% of the cases are above EUR 1 million for corporate taxpayers.</p> <p>The economic crisis of recent years requires contributions to the consolidation of public finances from all taxpayers. However, while many citizens and corporations face an inescapable increase in taxes, at the same time in a significant amount of cases they feel that they are unfairly double taxed. Although Double Taxation Conventions ('DTC') which contain rules for allocating the taxing rights and the elimination of double taxation are broadly available in the EU, disputes arise between Member States ('MS') on the application of these Conventions. Inefficient mechanisms for resolving such disputes result in increased costs for tax administrations and tax payers and create uncertainty for taxpayer influencing business decisions. Ensuring the efficient resolution of double taxation disputes will therefore have a positive impact on the investment climate and the development of the EU Capital Market Union.</p> <p>In its Communication of an Action Plan for a Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action¹⁷, the Commission included the objective of improving double taxation dispute resolution mechanisms. Although this Action Plan focusses strongly on measures to ensure fair taxation in a sense of avoiding so called base erosion and profit shifting ("BEPS"), improving mechanisms for the resolution of double taxation disputes is seen as addressing potential side effects of the measures taken to address BEPS. The Action Plan stresses that double taxation in the Single Market has a negative impact on cross border investment and leads to economic distortions and inefficiencies. The initiative of improving the mechanisms to resolve disputes between MS on how to eliminate double taxation is therefore in line with the EU policy aimed at removing tax obstacles that create barriers to cross-border activities and investments and thus impeding the completion of the Internal Market. The present initiative is in line with recent initiatives adopted in the context of the OECD BEPS Project. Action 14 ("Make Dispute Resolution Mechanisms more effective") which resulted in recommendations for a more efficient dispute resolution system to complement the actions taken to counter BEPS and to ensure certainty and predictability for business. In addition to these conclusions, the OECD envisages developing an arbitration clause with a group of willing States (MS and non EU countries) which then should be implemented in bilateral DTC by way of a multilateral instrument to be developed under OECD BEPS Action 15.</p> <p>However, implementation of OECD BEPS Action 14/15 alone would not constitute sufficient action to ameliorate</p>

¹⁵ Report to the President of the European Commission by Mario Monti 'A New Strategy for the Single Market at the Service of Europe's Economy and Society'. 9 May 2010.

¹⁶ Commission (EC), 'Towards an Internal Market without Tax Obstacles' (Communication) COM (2001) 582 final, 23 October 2001 and Commission (EC), 'Co-ordinating Member-States' direct tax systems in the Internal Market (COM(2006)823 final, 19.12.2006)

¹⁷ (COM (2015) 302, 3.2

http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/fairer_corporate_taxation/com_2015_302_en.pdf

existing dispute resolution mechanisms. Rather there is a risk that it possibly downgrades the achievements of the EU through the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises 90/463/EEC (the "**Arbitration Convention**")¹⁸ by not covering all EU States, eventually allowing different procedures and therefore creating the risk of conflicts between the legal tools and by these divergences being less suited to multilateral situations.

Issue

Double taxation issues are addressed in Double Tax Conventions ('DTC') which are based on the OECD Model Tax Convention ('MTC'). Generally it is distinguished between two kinds of double taxation, **juridical double taxation** and **economic double taxation**. In the case of juridical double taxation two comparable taxes are applied to the same taxpayer in respect of the same income or capital. Generally the expression economic double taxation is used when different taxpayers are taxed in respect of the same income or capital. For solving issues arising from the interpretation of these DTC or the determination of the amounts allocated by the respective provisions, DTCs traditionally contain a dispute resolution mechanism (Mutual Agreement Procedure 'MAP'). The procedure foresees that tax administrations consult on request of the taxpayer to resolve disputes regarding the application of a DTC. This procedure, however, traditionally obliges the States only to endeavour to remove double taxation.

The underlying **problems that call for action are the shortcomings of the existing mechanisms for solving disputes on how to eliminate double taxation effectively and efficiently** as identified by taxpayers and confirmed by international organisations and academia. Shortcomings identified are, e.g. non-mandatory resolution of the dispute, the long duration in practice and the limited involvement of the taxpayer¹⁹.

In some limited instances, States have not yet entered into a DTC or a DTC was cancelled before a new DTC was negotiated. This leaves double taxation problems unresolved unless it is avoided by provisions in domestic law. In the EU 8²⁰ of 378 bilateral relationships between MS are not covered by a DTC.

As of today, the **most developed tool** to solve double taxation disputes is the **EU Arbitration Convention**. This multilateral convention is applicable to all MS but limited to disputes related to transfer pricing and profit attribution to permanent establishments and provides for binding arbitration if a case is not resolved through mutual agreement within 2 years.

In 2008, the OECD introduced an **arbitration provision in its MTC**. According to paragraph 5 of its Article 25, if the competent authorities of a State are unable to reach an agreement to resolve a case within two years, they should submit the case to arbitration if the taxpayer so requests. However, up to date an arbitration clause was agreed only in 14 DTC of 378 bilateral relationships within the EU²¹.

A public consultation launched by the Commission in 2010 (the '**2010 public consultation**')²² revealed that bilateral DTCs with or without an arbitration clause as well as the Arbitration Convention have deficiencies in effectively and efficiently resolving double taxation disputes. Not to mention the complete absence of double tax conventions in some instances.

As a **follow-up to the 2010 public consultation**, COM took the following measures to examine the scope and magnitude of the problem:

- November 2011: Communication From the Commission on double taxation in the Single Market (COM (2011) 712 final)²³
- March 2012: Change of statistics on functioning of the EU Arbitration Convention²⁴
- December 2012: Organisation of a Fiscalis seminar on double taxation issues and insufficiency of international agreements
- March 2013: Launch of Study to identify and describe most frequent double taxation cases in the internal market (delivered by E&Y in June 2013)
- April 2013: Discussion incl. questionnaires to MS and stakeholder meetings
- October 2013 to March 2015: Discussion in EU Joint Transfer Pricing Forum ('JTPF')²⁵ on improving the functioning of the Arbitration Convention
- June 2014: Creation of an expert group on cross border tax obstacles for individual within the EU
- June 2014: Creation of expert group on inheritance tax obstacles within the EU

¹⁸ 90/436/EEC: Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41990A0436:en:HTML>

¹⁹ see e.g. OECD report "Making Dispute Resolution Mechanisms more effective" <http://www.oecd.org/ctp/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report-9789264241633-en.htm> or Pit, EC tax review 2015-2

²⁰ CY/LV, CY/LU, CY/NL, CY/FI, CY/HR, DK/ES, DK/FR, HR/LU

²¹ AT/DE, BE/UK, EE/NL, FI/NL, FR/DE, FR/UK, DE/LU, DE/SE, DE/UK, IT/SI, NL/PT, NL/SI, NL/UK, ES/UK

²² Consultation on Double Tax Conventions and the Internal Market: factual examples of double taxation cases http://ec.europa.eu/taxation_customs/common/consultations/tax/2010_04_doubletax_en.htm

²³ [http://ec.europa.eu/taxation_customs/resources/documents/common/whats_new/com\(2011\)712_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/whats_new/com(2011)712_en.pdf)

²⁴ http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2013/jtpf_013_2013_en.pdf

²⁵ The EU Joint Transfer Pricing Forum is an expert group advising the European Commission on transfer pricing tax matters http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm

- March 2015: Report of the JTPF ("JTPF") on Improving the functioning of the Arbitration Convention²⁶

Based on this work, the following **main shortcomings** of the existing instruments were identified :

- DTCs do not include an arbitration provision covering disputes (significant number 356 of 370 DTC)
- Taxpayers accept double taxation in light of barriers created by length, costs and in some instances the uncertainty of the current mechanisms (17% of corporate taxpayers 31% of individual taxpayers answering to the 2010 consultation).
- Access to the Arbitration Convention or the MAP under a bilateral treaty is denied (e.g. 14 cases in 2014 for the AC)
- Member States seem not to open the arbitration phase agreed in the Arbitration Convention for reasons not foreseen in the Arbitration Convention (115 bilateral cases at the end of 2014)

94 % of the corporate taxpayers which participated in the 2010 public consultation have already encountered a dispute concerning double taxation in cross-border situations. Transfer pricing cases were mentioned as the most frequent reason for disputes according to corporate taxpayers (34%). The statistics on transfer pricing cases, i.e. cases under the Arbitration Convention show 640 open bilateral cases (end of 2014), 253 new bilateral cases versus 105 completed cases (in 2014). The OECD statistics show a similar development as regards the increase of case numbers.

This **problem is likely to further increase in the future**. Data from the JTPF as well as from the OECD show a significant increase in the number of MAPs initiated vs. the cases completed over the last years. Moreover, an increasing number of MAPs take more than two years to be completed. The statistics on cases under the Arbitration Convention show an increase of bilateral cases from 428 (end of 2012) to 640 (end of 2014) Cases taking longer than 2 years for reasons not foreseen in the AC nearly doubled from 61 (end 2012) to 115 (end of 2014). The OECD statistics show a similar development on open cases (4073 end of 2012 to 5423 end of 2014). The OECD/G20 BEPS project resulted in various measures to close opportunities for base erosion and profit shifting. Generally, the interpretation and application of novel rules could introduce elements of uncertainty and therefore there is a risk that this increase of disputes may even accelerate even more in the near future.

Subsidiarity check

a) Legal basis

Article 115 of the Treaty on the Functioning of the EU (TFUE) is the legal basis for legislative initiatives in the field of corporate taxation. Although no explicit reference to direct taxation is made, Article 115 refers to directives for the approximation of national laws where their differences directly affect the establishment or functioning of the internal market, which implies that legislative initiatives of a cross-border nature fall within this Article. The envisaged dispute resolution mechanisms deal with cross-border situations and aim at removing tax obstacles to the internal market.

b) Subsidiarity

The envisaged proposals comply with the principle of subsidiarity for the reasons explained below.

As already mentioned, the shortcomings of the double taxation dispute resolution mechanism in the EU are a serious impediment to business activity in the Single Market. Bilateral treaties adopted by Member States or a multilateral agreement such as the Arbitration Convention alone don't provide effective solutions for the efficient and timely resolution of such disputes. The different aspects of this issue and its bi- and multilateral nature require a common approach in the EU to achieve the best outcome

The design of a more enforceable and efficient double taxation dispute resolution mechanism at the EU level is expected to limit the duration of and the costs and uncertainty associated with the resolution of these disputes as well as unresolved cases of double taxation in the EU. The measures therefore attenuate the hurdles to the exercise of the EU freedoms in the internal market.

The analysis demonstrates that this issue will be dealt with more efficiently by taking action at the EU level. The principle of subsidiarity will be respected: uncoordinated action by Member States would fail to achieve the intended results while a European common approach would permit it.

Main policy objectives

The initiative is part of the **Action Plan** for a Fair and Efficient Corporate Tax System in the EU and **aims at improving the double taxation dispute resolution mechanisms**. In order to achieve this general objective, three aspects must be dealt with:

- ensure the application of the available dispute resolution methods ("**Enforceability**");

²⁶ http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/final_report_ac_jtpf_002_2015_en_final_clean.pdf

<ul style="list-style-type: none"> - improve the effectiveness of the dispute resolution mechanisms ("Efficiency"); - promote the implementation of effective mechanisms where they are not yet available in bilateral DTC and as regards the taxes and cases covered ("Scope").
B. Option Mapping
Baseline scenario – no EU policy change
<p>Currently, beside the EU Arbitration Convention and its related Code of Conduct no specific EU Action exists for the settlement for double taxation disputes. Some Member States may implement OECD BEPS Action 14 and sign the multilateral instrument foreseen under BEPS Action 15 but may make use of various options that may be provided, others may amend their bilateral treaties in a way that differs from the conclusions of the OECD or take no action.</p>
Options of improving implementation and enforcement of existing legislation or doing less/simplifying existing legislation
<p>One option would be that the EU would encourage Member States to adopt or revise the mechanisms for double taxation dispute resolution in their DTC or agree on a multilateral convention in accordance with the conclusions reached during the monitoring process of the EU Arbitration Convention at the level of the EU Joint Transfer Pricing Forum and the OECD BEPS Action 14, including an arbitration clause (OPTION A i)</p> <p>Another option would be that the EU would encourage Member States to introduce a specific enforcement mechanism in their tax treaties which refers to Article 273 of the Treaty on the Functioning of the European Union ('TFEU') and gives power to the Court of Justice of the European Union ('CJEU') to ultimately decide on any remaining double-taxation dispute between EU Member States after a limited period of time. An example of such a mechanism can be found in Art. 25 of the German-Austrian tax treaty²⁷ (OPTION A ii)</p>
Alternative policy approaches
<p>An alternative policy approach at EU level, however, limited to corporate tax would be the CCCTB providing a common and consolidated tax base and thus avoiding double taxation for companies but would also include a mechanism on how to solve disputes. The staged approach adopted for its implementation foresees a first step to be taken in 2016 which alone will, however, not address the issue subject to this initiative. The second step will probably take more time. Furthermore, the CCCTB may not be applicable to all areas of business taxation/all taxpayers.</p>
Alternative policy instruments
<p>An alternative policy instrument would be to use the EU's legislative power to require broadening advanced dispute resolution mechanisms to areas where they are not yet available and to address specifically the shortcomings identified as regards enforceability and effectiveness. It would foresee</p> <ul style="list-style-type: none"> - a requirement for EU Member States to implement measures that foresee reaching a decision or a mutual agreement on eliminating a double taxation case within a given time limit (e.g. 2 years) after a justified claim of a taxpayer. If Member States fail within this period – including by denying access to the procedure -, a fast-track recourse will be open to the same taxpayer with his national court to take steps, so that Member States are requested to appoint an arbitration or mediation body to be in charge of taking a final decision on the elimination of the disputed double taxation, binding towards the Member States and - a requirement that EU Member States who have agreed in bilateral treaties with a third country or another Member States to apply a more effective dispute resolution mechanism (e.g. arbitration), will be committed to apply the same mechanism with all the other Member States (Most Favoured Nation clause). (OPTION B) <p>This option could benefit from option A i) or A ii) as regards the measures to be taken by MS for solving disputes on the elimination of double taxation.</p> <p>Another alternative policy instrument would replace the existing dispute resolution mechanisms with a new comprehensive EU legal instrument providing for an effective elimination of double taxation at EU level. This would foresee specific and targeted substance-based solutions for all identified conflicting tax legislations</p>

²⁷ See http://ec.europa.eu/taxation_customs/taxation/individuals/treaties_en.htm

triggering double taxation for cross-border situations within the scope of this directive, and would contain a dispute resolution mechanism which ensures that disputes on the interpretation of these provisions are solved with legal certainty as well as guaranteed recourses before court given to taxpayers. (OPTION C)
Alternative/differentiated scope
The extension to other areas of taxation is not excluded. An extension of the scope to VAT issues is regarded as not appropriate as VAT is already harmonised by the EC VAT directive. It seems difficult to introduce arbitration in the field of a harmonised tax, as it would transfer the interpretation of a directive away from the ECJ to a panel of arbitrators.
Options that take account of new technological developments
Not relevant: The problems identified are not linked with and do not derive from the insufficient use of technology and none of the options foresee technological changes.
Preliminary proportionality check
<p>The solutions identified are structured around the problems which cannot be solved by the Member States working individually or concluding DTC on a bilateral basis. They focus on measures that could be taken within the political and financial constraints of the situation. They take into account the international developments in the area of direct taxation, in particular the works of the OECD in the context of the BEPS project (Action 14). In doing so, they strive to build on and complement the existing arrangements or solutions already available, focusing on their better enforcement and ultimately improvement of the overall efficiency of resolving cross-border tax disputes.</p> <p>The BEPS objectives under Action 14 are to be predominantly achieved based on the multilateral commitment of the OECD countries to implement better, faster and more comprehensively the provisions of the tax treaty models. However and as demonstrated by the experience with the EU Arbitration Convention, a bi- or multilateral agreement which foresees arbitration alone will most likely not ensure enforceability and effectiveness. The Commission's action is complementing these efforts by enhancing the recourse possibilities for the taxpayers. It also strives to establish a mechanism that, in spite of it being designed for business income taxation in this initiative, could be, if wished so and considered appropriate, extended to other taxes. The principles of proportionality, additionally and universality of the solutions have therefore been actively followed.</p>
C. Data Collection and Better Regulation Instruments
Data collection
Although COM and the OECD already collect meaningful information on the number of disputes and the time to resolve them ²⁸ , there is a need to more precisely measure the effects shortcomings of the procedures to solve double taxation disputes , the economic costs associated with them and the amount or frequency of legal conflicts as well as how the risk of an unsolved double taxation dispute impacts the behaviour of companies and of individuals before engaging in a cross-border activity or of citizens exercising their EU Treaty freedoms. In 2010 the Commission ran a public consultation on factual cases of double taxation ²⁹ and commissioned a study on remaining cases of double taxation (excluding transfer pricing cases) ³⁰ .
Consultation approach
Stakeholders and Member States as well as Commission Expert Groups have been consulted on the issue. A public consultation on factual cases of double taxation was launched in 2010 and the results gave rise to investigating the source of the problems. Information about the problem has been collected and will be continuously updated and completed. With respect to the direction, objectives and the concrete options envisaged for improving double taxation dispute resolution mechanisms an open public consultation was launched on 16 th February 2016. To obtain information on concrete cases, the amounts and costs at stake as well as on the implications on business decisions a questionnaire was launched towards affected stakeholders through 2 expert groups of the Commission, the Joint Transfer Pricing Forum (on 4 th March) and the Platform for Tax Good Governance (9 th March) to collect the relevant information. The results of the public consultation and discussions with interested stakeholders should be available by beginning of May 2016. Data from affected

²⁸ 2012 0 2014 Statistics on pending MAPS under the Arbitration Convention

http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf0082015acstatistics2014.pdf

²⁹ Consultation on Double Tax Conventions and the Internal Market: factual examples of double taxation cases http://ec.europa.eu/taxation_customs/common/consultations/tax/2010_04_doubletax_en.htm

³⁰ Ernst & Young: "Study to identify and describe typical and most frequent double taxation cases in the internal market" June 2013

stakeholders is expected to be received in the second half of April.
Will an Implementation plan be established?
<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
D. Information on the Impact Assessment Process
<p>Preparatory steps for the Impact Assessment have been initiated. An Interservice Steering Group will be called under the new better regulation framework and the Impact Assessment process will start formally.</p> <p>The Interservice Steering Group will consist of the following Commission Services:</p> <ul style="list-style-type: none"> – Secretariat-General; – Taxation and Customs Union; – Legal Service; – Economic and Financial affairs; – Competition; – Justice and consumers; – Financial Stability, Financial Services and Capital Markets Union; – Internal Market, Industry, Entrepreneurship and Small and Medium Enterprises; – Communication Networks, Content and Technology; – Trade; and – Research and Innovation – Growth
E. Preliminary Assessment of Expected Impacts
Likely economic impacts
<p>The main expected impact is a better tax environment deriving from legal certainty and the timely resolution of double taxation disputes between Member States, the reduction of the corresponding legal and administrative costs and of the costs and distortions caused by the aspiration to avoid expected international double taxation.</p> <p>Subject to the results of further analysis, we expect the following economic impacts.</p> <p>The fact that tax administrations will be obliged to reach a solution would enhance legal certainty and the predictability of tax charges. The review of empirical studies of taxes and economic growth shows the consensus among experts that the threat of double taxation on income earned has a negative impact for business and enterprises³¹ and leads them to focus resources on potential tax disputes rather than on profitability. Furthermore, many sources conclude that DTCs as intending to avoid double taxation are positively associated with foreign direct investment in the host country³². Consequently, with the initiative the distortions and economic costs associated with shortcoming on the mechanisms for solving disputes between MS on how to eliminate double taxation are expected to diminish. This is of particular importance in a context where double taxation disputes are expected to grow quite significantly³³ worldwide.</p>
Likely social impacts
To be determined. Improved double taxation dispute resolution mechanisms may attract investments in the EU which would have a positive impact on employment.
Likely environmental impacts
Unlikely.
Likely impacts on simplification and/or administrative burden
To be determined. The new legal context should contribute to reduce administrative burden and costs for taxpayers. The cost arising for the procedure should be seen as an alternative to not having a solution to the case at all or to having longer duration of procedures.

³¹ see e.g. Michelle Bertolini and Pamela Weaver (2013) Mandatory Arbitration within Tax Treaties: A Need for a Coherent International Standard. The ATA Journal of Legal Tax Research: December 2013, Vol. 11, No. 2, pp. 1-20

³² (see e.g. Barthel, Busse, Neumayer LSE Research Online August 2012 with further sources)

³³ see e.g. The Economist, "New rules, same old paradigm", October 10th 2015

<p>Likely impacts on SMEs</p> <p>To be determined. We can anticipate that SMEs will not be facing new costs since no new obligations would be imposed, but instead they would enjoy new opportunities to use more efficient legal remedies, reducing the administrative and legal costs, which for the SMEs are proportionately higher than for the big companies. The increase in legal certainty will also be positive for SMEs.</p>
<p>Likely impacts on competitiveness and innovation</p> <p>To be determined. The availability of effective and efficient double taxation dispute resolution mechanisms and the resulting reduction of costs and risks linked to unsolved double taxation disputes and of the distortions caused by tax planning aiming at circumventing disputes should result in increased competitiveness and innovation.</p>
<p>Likely impacts on public administrations</p> <p>To be determined: The resolution of double taxation disputes already creates certain costs and administrative burden. For the Member States losing the case, the resolution of a double taxation dispute already involves refunding taxes already paid, eventually containing an interest component. However, making sure that disputes after an appropriate time of negotiation actually arrive at the level of arbitration and are consequently finally solved in shorter time and based on an efficient procedure, reduces the costs and administrative burden and also the uncertainty which are created by long duration of negotiations and disputes encountered currently. Member States should therefore have an interest in efficient and enforceable double taxation dispute resolution mechanisms.</p> <p>The fact that the initiative aims at creating an obligation for Member States to eliminate double taxation within an appropriate period of time which would also be enforceable by the taxpayer through a recourse to domestic courts e.g. against an unjustified lack of action or unjustified denial of access may create an incentive for MS to reach an agreement at an earlier stage of the currently applicable procedures.</p>
<p>Likely impacts on third countries, international trade or investment</p> <p>The tax policy options are addressed to Member States and EU taxpayers. The initiative is limited to issues arising in intra EU cross border situations (MS to MS disputes). An extension to EU third party disputes (MS vs third country) is excluded by the nature of an EU instrument. However the initiative will take into account the increase of multilateral situations involving third countries ('non EU triangular cases') as regards the design and application of bilateral agreements.</p>