

International Regulation of Corporate Taxation: A New Prospect for the WTO?

by

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Introduction.

It is the purpose of this dissertation to address the existing problem in regards to the lack of an international regulation of corporate taxation. At the moment there are only bilateral and some multilateral treaties in regards to international taxation in general. These treaties however, refer to issues as *per se* double taxation and exchange of information; there is no international treaty at the moment that deals with the regulation of corporate taxation in itself. It will be demonstrated throughout this dissertation that because there is no treaty or convention which regulates corporate taxation, multinational companies take advantage of the issue and through different manoeuvres such as: transfer pricing, deferral, thin capitalization, treaty shopping and the use of tax havens, they are able to avoid taxes and many times even get money back from their governments when they should be paying taxes instead.

Therefore, a homogenous international regulation of corporate taxation is needed to smooth over the differences between countries and disallow companies to use this deficiency on their advantage in order to avoid paying taxes. The question that arises is, which would be the correct body to embark on such a task? The answer the present study proposes is the World Trade Organization, for not only does it have the stature and powers of enforceability to do so, but also as it will turn out the agenda desperately needs refreshment and this issue can even twist the current 'negative' image that the WTO has for many NGOs and protesters worldwide.

This dissertation will be composed of four chapters. The first chapter will make a brief explanation of the most common methods that companies use in order to avoid taxes as well as showing the inefficiency, of the governments to deal with the avoidance of taxes by companies. Next, as there are no specific efforts targeting the international regulation of corporate taxation, Chapter two will refer to the international efforts and more specifically to the institutional efforts realized in regards to the regulation of international taxation in general. Chapter three will demonstrate why the WTO is the suitable institution in which an international regulation of corporate taxation can be achieved. Finally, chapter four will explain how NGOs are of crucial importance for the successful establishment of an international regulation of corporate taxation.

In regards to amounts lost to tax avoidance, in the year 2000 Oxfam reported, “poor country governments are being denied at least \$50 billion a year because large corporations and rich individuals are escaping their tax obligations... almost three times the cost of achieving universal primary health care.”¹

In June 2003, Jeffrey D. Gramlich and James E. Wheeler published a paper entitled “How Chevron, Texaco and the Indonesian Government structured transactions to avoid billions in U.S. income taxes”², which was the ultimate product of a ‘homework’ in which the students apparently did their research far too well. This paper, explains how these two companies³ avoided approximately \$8.6 billion in federal taxes and \$433 million in state taxes from 1964 to 2002. The report is accurate, the authors actually examined the documents themselves; the company has been identified and it has been researched thoroughly because the documents are available.⁴ As opposed to the Enron scandal, for example, in which the documents were destroyed.

Considering that Chevron-Texaco is now one company the amount is staggering. It is known for a fact that there are at least 500 Multinational

¹ http://www.oxfam.org.uk/press_old/releases/tax.htm

² Gramlich, J. and Wheeler, J. “How Chevron, Texaco and the Indonesian Government structured transactions to avoid billions in U.S. Income Taxes.” (2003)17No.3 Accounting Horizons. pp107-122 referenced as ‘Gramlich’.

³ Before the merger.

⁴ www.usm.maine.edu/~gramlich/caltex

Enterprises (MNEs) with such capacity thanks to the obvious 'Fortune 500' magazine. If at least each company for the past 20 years has been avoiding \$4.3 billion dollars, the result is \$2,150 billion dollars lost. However, this is a speculation and most probably the figure is very much underestimated.

These costs are no longer bearable, the government loses out and eventually a higher tax burden goes directly to the individual taxpayers. "Considering that corporate profits have soared in recent years something here does not compute."⁵

Furthermore, it seems that all the problems of the world including, education, health, poverty and a decaying environment can be solved if only multinational corporations paid their taxes. Instead some of them have developed what is called Corporate Social Responsibility (CSR), which is immeasurable, smokescreen and in most cases it results in an ultimate profit for the company itself ⁶, and eventually in some cases can cause more harm than benefits to the community.

It is essential for the international community to address the problem; millions of pounds are being avoided by MNEs around the world⁷ and since there is no direct Regulation of International Corporate Taxation that can manage the problem as a whole, MNEs keep going from jurisdiction to jurisdiction avoiding their obligations insofar as the domestic legislations of each country allows them to do so. Therefore a harmonisation of corporate taxation is required to eliminate the problem which can only be achieved at a multilateral level as will be demonstrated throughout this study.

⁵ Dorgan, B. "Global Shell Games". [2000] Washington Monthly. Obtained from: <<http://www.alternet.org/story/9464>>, referenced as 'Dorgan'.

⁶ Murphy, Richard. "The Tax Gap Index" From seminar: 'Tax Competition and tax avoidance: implications for Global Development' at the University of Essex 1-2 July, 2004.

⁷ In the UK avoidance is calculated at £18 billion a year.-see Duncan, G. "International Tax Force to be set up." The Times, Saturday, 24-04-2004.

Schulman, J. "Fact sheet on corporate war profiteering and tax avoidance" Institute for Policy Studies. At: <<http://www.ips-dc.org/citiesforpeace/profiteer.htm>> states "offshore tax dodges cost the US government at least \$70 billion in revenue each year."

Chapter 1. HOW COMPANIES AVOID TAXES.

It is important to highlight firstly, that corporate tax regulation⁸ is dealt at the moment at a domestic level, through the respective legislation of each country. In other words, a government only has power to legislate over the companies that reside within its territory and hence it can only tax the profits from those specific companies; any subsidiaries, which are outside the territory, are obviously out of reach for the government as well. Hence, the fact that companies have the advantage of being able to 'move' their headquarters virtually anywhere in the world⁹, and also that domestic tax legislations have become so complex and therefore inefficient, it makes it that much simpler and moreover, provides an incentive for MNEs to avoid taxes.

This chapter will deal primarily with the manoeuvres that companies employ in order to avoid taxes; a detailed explanation of how each country deals with tax avoidance is out of the scope of this dissertation, however, examples will be given throughout so as to be able to have a clear picture of the problems regarding tax avoidance in an international setting.

A company's purpose is to make money, plain and simple. "Whether it is called wealth creation or profit making- the name of the game in popular parlance is money making."¹⁰ This is achieved through cutting costs; apparently avoiding taxes has just become another way to cut costs. However, just because the term 'avoidance' is considered legal, it does not mean that it is correct. Following will be an explanation of the differences between evasion, avoidance and mitigation as well as some of the mostly

⁸ It is noteworthy, to distinct between corporations and individuals in regards to tax, according to the OECD "the basic distinction is that corporation income taxes, as distinct from individual income taxes, are levied on the corporation as an entity, not on the individuals who own it, and without regard to the personal circumstances of these individuals." See: *Revenue Statistics 1965-2001*. OECD. October 10, 2002. Under subheading: *Classification of Taxpayers*.

⁹ Huffington, A. "Tax Avoidance and a Tan: Why I'm Thinking of Moving this Column to Bermuda." May 15, 2002. <<http://www.ariannaonline.com/columns/files/051502.html>>

¹⁰ Van der Borgh, K. *Essays on the Future of the WTO: Finding a new balance*. Cameron May Ltd. 2003. p.89, referenced as "Essays on Future of WTO"

used schemes that companies employ to avoid taxes, taking advantage of the ineffectiveness of domestic legislation.

1.1. Evasion, avoidance & mitigation.

Such is the need for a homogenous¹¹ regulation of international corporate taxation that the terms evasion, avoidance and mitigation are still not well defined. The general or common knowledge is that tax evasion is illegal, tax avoidance is legal and yet undesirable and finally tax mitigation, which is considered legal and desirable.

It seems however, that the confusion amongst these words is not recent, it was established in 1980 that “there [is] too often a confusion between tax evasion, which was a criminal offence, and tax avoidance, which was perfectly legal.”¹² Twenty-four years later and the confusion has not yet been cleared.

Even the OECD on its ‘Harmful tax competition report’ seems to use the words tax avoidance and tax evasion interchangeably.¹³ In different countries the terms tax avoidance, tax evasion and tax fraud can have different connotations. And still today these three terms have acquired “a new moral dimension”¹⁴ of what is wrong and what is not. It is not strange that companies seek the most profitable option since governments have drawn the line between legality and illegality so thin. “In fact, tax avoidance most often t[akes] advantage of loopholes in tax legislation.”¹⁵

¹¹ It has been recognized that the EC requires tax harmonization to be more competitive. See: “Meeting how to make the EU more competitive.” Financial Times Information, Global News Wire, The Warsaw Voice. June 6, 2004.

In Latin America in FTAs such as Mercosur the need for tax harmonization has been recognized. See: “Argentine Minister opens Mercosur summit, proposes observer status for Mexico.” Financial Times Information. Global News Wire-Asia Africa Intelligence Wire. BBC monitoring international reports. July 8, 2004.

¹² “Colloquy on International Tax avoidance and Evasion” Compendium of Documents. Council of Europe Parliamentary Assembly. Strasbourg 5-7 march 1980. p3, referenced as ‘Colloquy’

¹³ Baker, P. “Tax Avoidance, Tax Mitigation and Tax Evasion”-Obtained at: <www.taxbar.com/artic/12.htm>

¹⁴ Companies are not the only ones being confused with these terms but also natural persons.: Saker, A. “Private Clients: Taxing Times.” The Lawyer. April 12, 2004.

¹⁵ Colloquy see n.12.

For the purpose of this study the explanation given in the *Willoughby case*¹⁶ in defining the differences between tax avoidance and tax mitigation will be taken. Lord Nolan established,

“The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option.”¹⁷

Tax evasion as opposed to the previous two is a crime and is generally considered as such when the taxpayer is completely aware of his wrongdoing and yet continues doing it.¹⁸

In order to understand why it is imperative to have a harmonized regulation in corporate tax matters, a brief explanation of the different kinds of strategies that companies use in order to avoid taxes must be given. Among them are, (i) transfer pricing, (ii) deferral, (iii) thin capitalization, (iv) treaty shopping and (v) the use of tax havens; money laundering will not be considered because it assumes criminal activity which is of no concern to this study.

1.2. Transfer Pricing

Transfer pricing refers to “a means of allocating costs between units of a large organization or multinational company for goods or services supplied. The pricing may be based on allocating true profits to the individual units, although in the case of multinational companies, the price may be chosen to avoid paying excessive taxes or duties in one particular country.”¹⁹

¹⁶ *Inland Revenue Commissioners v Willoughby and related appeal*. House of Lords [1997] 1WLR 1071, STC 995, 70 TaxCas57

¹⁷ *Ibid*

¹⁸ It has been firmly recognized that there is a difference between what accountants consider as a legal and acceptable activity and “tax evasion, which is unequivocally illegal.”: Skypala, P. “Avoidance stars face beefed-up scrutiny: Pauline Skypala explains how taxpayers and their advisers will have to comply with the chancellor's new rules.” *Financial Times*, London, England. March 20th, 2004.

¹⁹ *A Dictionary of Finance and Banking*. Oxford University Press. 2nd Ed. p357, referenced as ‘Oxford Dictionary’.

For the sake of simplicity, it should be highlighted that transfer pricing occurs between a company and its subsidiaries in other countries or country. 'Allocating costs'²⁰ refers to when multinationals sell/buy products between themselves and the prices would be either extremely high²¹ or extremely low depending on which jurisdiction they wanted to money to remain in. These transactions could help avoid in some cases millions of dollars. Governments realized the problem and implemented legislation accordingly. Among some of the different methods²² that governments implemented, the 'arm's length principle'²³ was instituted, which basically established that the sale prices would have to be according to market prices, in other words, "what the price would have been if the entities really had been independent of one another."²⁴

At this point, it seems that governments have taken control of the irregularities, but apparently not in the way it might be thought. As very eloquently established by Dorgan in the USA "[t]he latest chapter in this administrative fiasco is something called Advanced Pricing Agreements or APAs. Basically the corporations sit down with the IRS behind closed doors and negotiate their transfer prices. In effect, they negotiate their own tax bills."²⁵ Why corporations would have this great benefit as opposed to every other normal taxpayer is something that needs thorough explanation. It would seem almost ludicrous if a person, or even a small company, would demand the same benefit. Apparently it does not matter that losses in regards to transfer pricing are estimated only in the USA at \$117 million a day.²⁶ On the other hand, this is what possibly incentives the tax authorities to negotiate and get at least a part of those \$117 million.

1.3. Deferral

²⁰ For an outstanding example of the use of transfer pricing in practice see: Gramlich, n.2

²¹ In the Chevron-Texaco Case mentioned in p.1, transfer prices of oil between Chevron, Texaco and Caltex (in Indonesia,) were inflated in order to help move money from the US to Indonesia.

²² It is out of the scope of this study to give a detailed explanation of all the methods, however the methods according to OECD guidelines are: The comparable uncontrolled price method, the cost plus method, the profit split method, the transactional net margin method and global profit allocation.

²³ Ogley, Adrian. *The principles of international tax*. Intersfisc Publishing. 1993 p155. Referenced as 'Ogley'.

²⁴ Dorgan see n.5

²⁵ Ibid

²⁶ Ibid.

Deferral means as the name implies, to defer a tax payment to another year or years. Tax deferral has been defined as “The postponement of taxes to a later year, usually by recognizing income or a gain at a later time [however,] this only delays [the] tax liability; it does not eliminate it.”²⁷ Again the line between deferral and tax avoidance is very slim, even though legislation might provide for deferral as a benefit; if there is to be a relocation of companies offshore with the sole purpose of deferring it can be hence considered tax avoidance. For example, “If someone buys a freehold reversion to a lease with a trifling ground rent, they can expect to be richer every year, but they will pay no tax until they sell. That is deferral. But if when they sell they are resident in Monte Carlo - though they may have to stay away for more than five years - that is avoidance.”²⁸ For multinationals this can take place when they move their plants abroad, the company will pay no tax until its income goes back to its own country, for which there is not a fixed time limit.²⁹

1.4. Thin capitalization.

“A form of company capitalization in which capital of a company consists of too few shares and too much loan stock in view of the tax authority”³⁰ is known as thin capitalization. The reason why a tax authority opposes to the fact that a company finances itself with loans as opposed to equity capital, is that a company can deduct the interest paid on its loans as a business expense for tax purposes, hence reducing its tax burden.³¹ It is not uncommon for companies to finance themselves with loans; the problem is when all of its operations are being financed in this way. “By financing their operations by borrowings which generate tax deductible interest expenses,

²⁷ Definition by Bankrate Inc. (self-defined as an Internet Consumer Finance Marketplace) obtained at: <https://www.bankrate.com/brm/itax/edit/definitions/definitions_taxes8.asp#t>

²⁸ Grundy, M. “Offshore: Paradise Lost?” [2002] *The Lawyer*. Centaur Communications Ltd. p.OS9

²⁹ Dorgan, see n.5- Senator Dorgan states that the tax legislation actually rewards companies who move their plants abroad by subsidizing them and that this subsidy costs federal tax payers some \$3.4 billion a year.

³⁰ Oxford Dictionary see n.19

³¹ “The typical *modus operandi* is to minimise profits in higher tax jurisdictions, such as the UK and the US. It includes loading the business with debt because interest payments are tax deductible - the “thin capitalisation” approach.” See: “Less taxing times: The bigger fish are slipping through the corporate tax net”. *Financial Times*. London, England. Friday, July 23,2004.

they erode the country's tax base and may well enjoy a lower effective charge than a domestic competitor."³²

1.5. Treaty Shopping

The concept of treaty shopping is not a specific action *per se* as the activities mentioned before; it is rather a preparation for a future possible tax avoidance scheme. This concept refers to when a company researches the bilateral treaties between countries and establishes a subsidiary or another company in a country with the sole purpose of taking advantage of the benefits of the treaties a certain country possesses with other countries. According to Ogley, "Switzerland... introduced domestic legislation to prevent the use of its network of double tax agreements for the purpose of treaty shopping,"³³ so as to be able to give a higher degree of protection to its trading partners.³⁴

Treaty shopping is the best example, to illustrate the problem that exists with having bilateral treaties. Every country has different treaties and therefore different benefits for companies, so all a company has to do is 'shop around' for the best option, establish a company in that country and reduce its tax payments. This would not be a problem if all countries agreed on a homogenous regulation of corporate taxation, companies would only have one option, competitiveness would remain the same because they would all be subject to the same rules and multinationals could not escape their taxes in this manner.

1.6. The use of tax havens

Starchild defines a tax haven as, "a foreign country with tax legislation specially designed to attract the formation of branches and subsidiaries of parent companies based in heavily taxed industrial nations."³⁵

The subject of taxation has always been seen as an intrinsically national matter³⁶; it is where the government gets the money to act and

³² Dorgan, see n.5

³³ Ogley, see n.23 p160

³⁴ Ibid

³⁵ Starchild, A. *Tax Havens for International Business*. Macmillan Press. 1994. p1

provide its citizens with security, infrastructure and health services among others. Being a national matter it means that once a company is out of its jurisdiction, its basically untouchable. So when a parent company sets up a subsidiary in another country, usually a tax haven, the money in that subsidiary is out reach for the tax authorities.³⁷

The governments' response to this practice was the implementation of Controlled Foreign Companies (CFC) legislation, "designed to prevent the accumulation of corporate funds beyond the reach of ...tax collectors"³⁸ What CFC legislation does is to identify certain circumstances³⁹ that would enable the tax authorities to consider a subsidiary as a CFC and hence a possible 'tax avoider', among them the fact that the subsidiary is in a tax haven. When those conditions are met the subsidiary is officially identified as a CFC, and so the tax authorities are able to tax the income of that subsidiary.

In 1998 the OECD released a report called 'Harmful Tax Competition' which stated that "tax schemes aimed at attracting financial and other geographically mobile activities can create harmful tax competition between States, carrying risks of distorting trade and investment and could lead to the erosion of national tax bases"⁴⁰ The statement can obviously be seen as "contradictory because countries have always manipulated and 'distorted trade' by implementing different tax schemes to either close their own economies or to open them, it is biased to consider a tax haven as distorting trade by itself."⁴¹ All of the countries, which at the time endorsed this report, had already passed CFC legislation, hence the strong contempt against Tax Havens.

This topic has been the subject of controversy for many years; the OECD considers tax havens as harmful tax competition between countries

³⁶ For example, the Irish government has argued that taxation is a national matter and that it "is fundamental to the relationship between citizens and national governments.": Staunton, D. "States that reject treaty may have to leave EU, says Prodi". The Irish Times, December 3,2003.

³⁷ See n.7 for approximate loss to the use of tax havens.

³⁸ Doggart, C. "Tax havens and their uses." The Economist Intelligence Unit.1997. p1

³⁹ s.747(1) of the Income and Corporation Taxes Act 1988, defines a CFC as a company: a)resident outside the UK, b)controlled by persons resident in the UK and c)subject to a lower level of taxation in the territory, which it is resident.

⁴⁰ *Harmful Tax Competition: an emerging global issue*. OECD,1998.

⁴¹ Robles, M. "An analysis of Controlled Foreign Companies legislation: are they a cure for harmful tax competition?" 2nd Term Essay, University of Essex, 2004.

whilst the ICC claims its healthy tax competition⁴² because it gives companies more options and keeps countries on their 'toes' in this area. Every country has different views and in the meantime the ones benefiting are multinationals and exceptionally wealthy people.

1.7. Inefficient Tax Legislation.

From the brief explanation given before, it is possible to observe how companies manoeuvre in order to avoid taxes and the not so effective attempts⁴³ of the governments to stop them. Much of the fault lies in the governments themselves; tax legislation in most countries is extremely complicated and continuously changing.⁴⁴

An example will illustrate the preceding argument better: Birch comments on the following, "Under a classical corporate tax system such as that prevailing in the United States, income from equity-financed corporate investment is taxed twice: at the corporate level a tax is levied on corporate profits after deduction for interest payments, and at the shareholder level dividends and realized capital gains on shares are subject to full personal income tax."⁴⁵ Further on the author describes that this double taxation reduces the investment level and forces capital into other sectors.⁴⁶

In Mexico for example, when distributing dividends, the situation is the same with a certain addition, not only is the income of the company taxed and the income of the shareholder's taxed but the company is taxed again when it gives out those dividends. Art. 11 of 'La ley de ISR'⁴⁷ establishes that when a company is to give out dividends it should multiply the amount by the factor 1.4706; from that result the legislation refers to art 10, which establishes that

⁴² Task Force on CFC legislation. "ICC Statement on Controlled Foreign Corporations (CFC) Rules." <www.iccwbo.org/home/statements_rules/statements/2003/Controlled%20Foreign%20Corporations%20Rules.asp> Referenced as: 'ICC statement on CFCs.'

⁴³ In South Africa, it has been recognized that "tax legislation and ineffective tax collection allowed people to divert large chunks of income to tax shelters and tax havens.": Hazelhurst, E. "Tax Morality. A net gain." Financial Mail. South Africa. March 21, 2003.

⁴⁴ Chennels, L. and Griffith, R. *Taxing Profits in a changing world*. Institute of Fiscal Studies, 1997. Referenced as: 'Chennels'.

⁴⁵ Slemrod, J. "Tax Policy in the real world". Cambridge University Press. 1999. p27

⁴⁶ Ibid

⁴⁷ Mexican Income Tax Law. Available at:<www.sat.gob.mx>

the resulting amount shall be multiplied by 32% and eventually, that will be the amount payable to the tax authorities. In other words the actual percentage of tax will be approximately 47%. From this example the complexities of tax law can immediately be identified, without considering of course the issue of triple taxation.

The preceding example refers to only one country, however tax legislations around the world are filled with such puzzling laws. The UK is no exception Tax Journals are full of laments on behalf of the authors on just how complicated the new changes to the legislation are.⁴⁸

The fact that there are loopholes becomes unmistakably clear and taking into account the level of taxation it is obvious that companies will seek to reduce their tax burdens. The rest of the people, however, can do nothing since it is impossible for all natural persons to hire tax lawyers and high profile accountants.

It is of importance to highlight that when referring to normal taxpayers or 'the rest of the people', it is not simply a matter of juristic persons, but also of natural persons; the burden intensifies on both. Small companies trying to compete with multinationals simply do not prevail because they don't have the monetary ability to employ big accounting firms. The point however, is not to give incentives or preach that everyone should avoid their taxes, but to force multinationals to pay their fair share of the tax burden and the only way to do it, is with a homogenous, efficient and clear international regulation of corporate taxation.

1.8. Concluding Comments

From the previous explanations it seems that multinationals, tax authorities and governments are suddenly all on the same side⁴⁹; when supposedly it was the multinationals who were trying to cheat both the tax authorities and hence the governments themselves. So it seems as established by Tabb, that "at the start of the twenty-first century the inadequacy of the nation-state as the sovereign unit of political organization

⁴⁸ For an example see: Butt, P. "Modern Legal Drafting." (2002)23(12) Statute Law Review.

⁴⁹ As with APAs.

and economic regulation is increasingly clear. The question remains, however, whether this is because governments are unable or unwilling to take the steps necessary to more effectively regulate Transnational Corporations and financial markets,”⁵⁰ In regards to transfer pricing for example, it seems that governments are unwilling rather than unable to regulate the issue, otherwise how could APAs be explained. In regards to deferral governments are unable to do so, for they cannot prohibit a person or company to change its residence. Concerning thin capitalisation, it is apparently a matter of inability, but it can also be seen as a matter of unwillingness because it could be lessened with a more efficient legislation. The subjects of treaty shopping and the use of tax havens refer also to an inability of governments to regulate, for they cannot legislate in other jurisdictions. Inefficient legislations are obviously a matter of unwillingness, because even though it is recognized that legislations are inefficient governments have not yet solved a problem, which is within their hands to solve.

This unwillingness or inability on behalf of the governments can be solved or at least lessened to a minimum if there is an agreement on the regulation of corporate taxation, both the peer pressure from other governments as well as external help or advice would help tremendously in order to combat the ever increasing tax avoidance of behalf of companies.

⁵⁰ Tabb, W. *Unequal Partners*. The New Press. 2002. p.1

Chapter 2. INTERNATIONAL EFFORTS

As there has already been an explanation of the different types of actions that MNEs take in order to reduce their tax burdens, an analysis of the international efforts done in the area will be given following. There are mainly two types of efforts in regards to the generalities of international taxation, institutional efforts and 'Treaty' efforts.

Under the subheading of institutional efforts it is the aim to give a brief up to date history of the work performed by institutions such as the OECD, the ICC and the United Nations. It is noteworthy, that the efforts carried out by these institutions are mostly in regards to the suggestion of Model Laws and agreements, as well as recommendations; none of these however, are binding, with the exception of the OECD⁵¹ a matter that will be analysed later on.

In regards to treaty efforts, it is necessary to underline that at the moment there is no international regulation of corporate taxation, as it is being proposed in this study, it is in fact this issue, which inspired the topic of this dissertation. At the moment there are only bilateral treaties among countries in regards to matters of taxation, sometimes also multilateral treaties⁵². Furthermore, these treaties relate mostly to issues of Double Taxation^{53 54} or

⁵¹ Being that the organization involves a membership, agreements reached at the OECD are binding, however, members can use art. 6.3 as an exit. See general discussion under OECD subheading.

⁵² Examples of multilateral treaties are: the NAFTA and the EC. There is no treaty that embodies such a large number of countries as the WTO.

⁵³ Governments are obviously able to tax profits on their territory, however, when a person is not a national of the territory in question, his/her government can have claim to tax his/her profits too. Double taxation conventions are able to avoid a double taxation of the profits of an individual.

customs, duties and indirect taxes (issues dealt with at the WTO) among others. Since it is essential to have a type of guide in regards to the regulation proposed in this study, certain areas of the EC in regards to competition law and generally tax harmonisation in the EC will be explored.

The fact that international taxation is a matter that needs serious attention is no news to the international community. As mentioned earlier in the Colloquy of 1980⁵⁵ there have been concerns for quite a while about the complexities of tax legislation and the new problems that arise in regards to an ever growing trade market in a world that seems to become more connected each day.

It is important to indicate that cooperation among States in regards to tax matters can be divided at least into three different areas: administrative assistance, juridical assistance and cooperation with regards to different types of taxes.⁵⁶ Administrative assistance relates to the “cooperation between...tax authorities in the form of assistance with the assessment or recovery of tax or...both.”⁵⁷ Juridical assistance is usually invoked in criminal affairs as *per se* in cases relating to tax fraud there is cooperation between the judicial authorities.⁵⁸ Finally in regards to cooperation in different types of taxes refers to either, income or capital taxes and direct or indirect taxes to name a few.⁵⁹

2.1. Brief general history of International Efforts on tax matters.⁶⁰

Even though tax at a national level has been around for thousands of years, the concept of tax cooperation among states started flourishing around

“The purpose of double taxation conventions is to promote, by eliminating international double taxation, exchanges of goods and services, and the movement of capital and persons.” See: Davis, Ward & Beck. “Canada: Abuse Of Tax Treaties: Part 1 of 2.” Business and Management Practices, Mondaq Business Briefing. July 14,1998.

⁵⁴ For a comprehensive compilation of tax conventions see generally: Baker, P. *Double Taxation Conventions and International Tax Law*. 2nd Ed. Sweet and Maxwell.1994

⁵⁵ Colloquy, see n.12

⁵⁶ Colloquy, see n.12 – Helmers, D. “Taxation levels and disparities in relation to the problem of tax avoidance and evasion.” Federation of Swedish Institutes.

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Although not entirely most of the history given is partly based upon: Jelezniakov, D. “International Tax Law: Introduction Sources and History.” Handout from course LW608 International Tax Law. Sent through e-mail on January 20,2004. Referenced as: ‘Jelezniakov’

the nineteen-twenties. “[I]t was in 1928, under the auspices of the League of Nations, that the General Meeting of Government Experts on Double Taxation and Tax Evasion drew up four model bilateral agreements based on the recommendations produced by a number of technical experts in 1925.”⁶¹ Along the years of 1929-1939 about 35 comprehensive double taxation agreements (DTAs) were drafted.⁶² In 1935 a draft convention was developed on the allocation of business income between States. There were another two meetings in Mexico and London in the years of 1943 and 1946 respectively. From the financial and fiscal committees established by the League of Nations were developed solutions for double taxation, the concept of permanent establishment arose, there were debates for solutions on transfer pricing in regards to separate accounting and fractional apportionment.⁶³

“The League of Nations ceased its activities after failing to prevent the Second World War.”⁶⁴ Afterwards, in 1956 the OEEC⁶⁵, built to aid the reconstruction of Europe, established a Fiscal Committee, which produced in 1963 (by then already the OECD) a Draft Double Taxation Convention on Income and Capital then in 1966 the Model Double Taxation Convention on Estates and Inheritances and on Gifts. Around this time in 1967 the UN in resolution 1273(E&SC) established an Ad Hoc Group of Experts on Tax Treaties. It is essential to specify that the OECD represents mostly developed countries while the UN is more concerned with developing countries.

In 1971 the Fiscal Committee of the OECD “became the Committee on Fiscal Affairs and was given broader terms of reference than simply the drafting of model conventions.”⁶⁶ On 1977 the OECD released the Model Double Taxation Convention on Income and on Capital. In 1982, the multilateral Administrative Assistance Convention, 1992 the OECD Model Tax Convention, 1995 Transfer pricing guidelines, 1998 Report on Harmful Tax Competition (mentioned earlier), 2000 a new version of the Model Tax

⁶¹ Colloquy, see n.12

⁶² Jelezniakov, see n.60

⁶³ Ibid

⁶⁴ “About the United Nations/History.” At: <<http://www.un.org/aboutun/history.htm>>

⁶⁵ Organization for European Economic Development.

⁶⁶ Colloquy see n.12

Convention and an update in 2003, also in 2004 a progress report on the Harmful Tax Competition of 1998.

In the meantime the UN developed in 1979 through their own Ad Hoc Group of Experts on International Cooperation Matters, a manual for the Negotiations of Bilateral Tax Treaties between developed and developing countries, 1980 the UN Model Double Taxation Convention between Developed and Developing countries and a revision of it on 2001. The latest work of the UN in this area, was achieved at and after the Monterrey Consensus in 2003 were the need for a higher cooperation in tax matters was acknowledged, this issue will be discussed thoroughly further on.

2.2. Institutional Efforts

2.2.1 The Organization for Economic Cooperation and Development.

“The OECD grew out of the Organization for European Economic Cooperation... [its] vocation has been to build strong economies in its member countries, improve efficiency, hone market systems, expand free trade and contribute to development in industrialised as well as developing countries.”⁶⁷ It has only 30 member countries approximately a 15% of the member states that compose the UN. However, the OECD establishes that it has an active relationship with 70 other countries as well as with NGOs and the civil society.⁶⁸

The ‘specialty’ of the OECD is to develop reports, statistics and analysis, it has thirty-one researchable topics listed in its web page, among them taxation. There is no doubt about the great contributions the work of the OECD has done for the international community in general and as described earlier the OECD has done quite more than the UN *per se* in matters of taxation, perhaps because as mentioned before it represents developed countries, which having more multinational companies in their territories have a pressing need for solutions on tax money escaping their reach.

⁶⁷ “Overview of the OECD: How has it developed?”

At:<http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html>

⁶⁸ “About the OECD” At:<http://www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1,00.html>

The organization provides a forum for its members where discussions, negotiations and sometimes agreements⁶⁹ take place. Model conventions or laws and guidelines are perhaps some of the best works of the organization; binding agreements however, are another issue. “[M]utual examination by governments, multilateral surveillance and peer pressure to conform or reform are at the heart of OECD effectiveness,”⁷⁰ the organization claims. Perhaps this is because the binding agreements that could come out of negotiations between countries are not completely binding.

Article 6.3 of the ‘Convention on the Organization for Economic Cooperation and Development’ provides an exit, stating

“No decision shall be binding on any Member until it has complied with the requirements of its own constitutional procedures. The other Members may agree that such a decision shall apply provisionally to them.”⁷¹

Something that could take years to achieve or might as well not be achieved at all, furthermore, an agreement would only bind the member countries. And in matters of corporate taxation, where companies as has been mentioned before, will move anywhere if it’s more convenient, thirty countries is not much.

However, the OECD is not known for its agreements, it is the research performed by the organization that has most impact especially when it cooperates with other international organizations such as the WTO.⁷² Nevertheless, since the organization will tend to do reports that represent the ideology of all or maybe of only some of its members, there are at times clashes with other organizations in the same field of work such as it happened with the International Chamber of Commerce (ICC) and the Harmful Tax Competition Report, which will be detailed later on.

2.2.2. The International Chamber of Commerce

⁶⁹ “ The OECD: What is it?”

At:<http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html>

⁷⁰ Ibid

⁷¹ At:<http://www.oecd.org/document/7/0,2340,en_2649_201185_1915847_1_1_1_1,00.html>

⁷² The need for cooperation in different areas, between these two specific organizations has been recognized since 1995. See: “Commission proposes worldwide investment instrument.” Commission of the European Communities, Rapid. March 1,1995. also; Kristiansen, J. “OECD states set negotiations on investment treaty”. Agence France Presse – English. May 23,1995.

As opposed to the OECD the ICC is not an organization with member states, but rather claims to be the “voice of world business... [and] it has direct access to national governments all over the world through its national committees.”⁷³ Established since 1919 it certainly exceeds the OECD in experience and because there are no memberships, its views and policies may be closer to the global business sentiment than those of the OECD.

The ICC has been quite successful in the setting of Rules and Standards; banks worldwide apply the ICC’s Uniform Customs and Practice for Documentary Credits (UCP 500)⁷⁴, the ICC’s Incoterms are globally known as standard international trade definitions⁷⁵ and furthermore it quickly adapts to the needs of business, being one of the first to offer models for the regulation of e-commerce.⁷⁶ The ICC is well known and respected and just as the OECD, it too provides its expertise to other international organizations such as the UN and the WTO.

Taxation is of course an area also researched by the ICC, yet it leaves the mind to wonder if the ICC is the ‘voice of world business’ as it claims then could that be interpreted as it being more inclined towards the side of businesses and corporations? Maybe that is the reason behind the policy statement of the ICC establishing that Tax competition is not harmful but in the contrary healthy to world trade.⁷⁷ And moreover, it has also suggested that, “the price for the protection of the national tax base is a loss of economic efficiency for that country in the longer term;”⁷⁸ an opinion that governments would not share. Furthermore, it states for example, that “it is generally recognized that the arm's length principle in transfer pricing is an effective measure to protect the national tax base,”⁷⁹ as can be seen from the Chevron-Texaco Case the ‘arm’s length principle’ was not enough to prevent the abuse of transfer pricing rules. One has only to examine the UCP500 to realize that

⁷³ “What is ICC” At:<http://www.iccwbo.org/home/menu_what_is_icc.asp>

⁷⁴ Ibid. “What is ICC: Setting Rules and Standards”

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ ‘ICC Statement on CFCs’ see n.42.

⁷⁸ Ibid

⁷⁹ Ibid

most of the articles give far more protection to the banks than to the actual clients.⁸⁰

Another Policy Statement from the ICC in 2000 on the 'Application of Anti-Avoidance Rules in the Field of Taxation', maintains that "it is essential that tax authorities understand the need of businesses, in order to be competitive, to seek out the most efficient means of carrying out legitimate business transactions...[and also that] Tax authorities should respect the form of a legitimate business transaction even where such a form allows a reduction of overall tax costs."⁸¹

In regards to the position of the ICC towards a proposal for an international regulation of corporate taxation, it can be assumed that the ICC would be against it, for it has already established that, "The ICC is strictly against any attempts to harmonize tax burdens or tax systems on a world-wide scale."⁸²

The point of view of the ICC, as in that of supporting international companies, is obvious and at a certain degree it constitutes a fair point; but the reality is that what companies are doing lately is not merely a reduction in costs but a complete nullification of tax payments. Additionally, the issues of being 'competitive' and of 'paying taxes' are different subjects that should not be discussed under the same heading. Whilst one refers to market competition, the other is an obligation that every person whether juristic or natural has, a burden that everybody must carry because everybody eventually benefits. In other words as established by Moore, "tax is the price you pay for civilization"⁸³; which among other things, allows for trade itself, tax is simply another cost companies have to pay to continue doing business.

2.2.3. The United Nations

The successor of the League of Nations, the UN, was born in 1945 after a devastating Second World War, initially with a primary focus to

⁸⁰ For an analysis of the protection provided by the UCP500 see: Robles, M. "Study the Operations of Bancomext." 2nd Term Essay for course LW601. University of Essex, 2004.

⁸¹ "Application of Anti-avoidance Rules in the field of taxation" Commission on Taxation, 27 June 2000. At:<http://www.iccwbo.org/home/statements_rules/statements/2000/anti_avoidance.asp>

⁸² 'ICC Statement on CFCs' see n.42 -under subheading 'Relationship with harmful tax competition'

⁸³ Moore, M. *A world without walls*. Cambridge University Press. 2003. p.214, referenced as 'Moore'

“maintain international peace and security, develop friendly relations among nations and promote social progress, better living standards and human rights.”⁸⁴ However, the work of the UN is quite extensive, maintaining security and peace, promoting democracy, human rights, protecting the environment, preventing nuclear proliferation, strengthening international law, aiding refugees, reduce child mortality, fight parasitic diseases, fight drug abuse and promote economic reforms, just to name a few.⁸⁵ It is without a doubt one of the most recognized international organizations and also one of the most well respected throughout the world.

It is composed of 191 States, which virtually represent all the countries of the world.⁸⁶ It provides a forum for nations to discuss and debate problems of all types. Its agencies, each one specializing in fields such as health, children’s rights, human rights, etc.; contribute invaluable information and knowledge to the world’s governments and since as mentioned before the UN is more concerned with developing countries, the knowledge that the UN provides through its agencies can truly impact the life and well being of thousands of people.

In the area of taxation, which is the one concerning this study, one of the most important achievements of the UN occurred in Mexico, in the city of Monterrey in March 2002 during the ‘International Conference on Financing for Development’ known also as the Monterrey Consensus. One hundred and seventy-eight governments were represented in that Consensus.⁸⁷ The importance to the area of concern is that the imminent need for a body or committee in the area of fiscal affairs was recognized. However, before analysing the Monterrey Consensus it is important to mention The Report of the High-level Panel on Financing for Development, otherwise known as the Zedillo Report⁸⁸, which could be interpreted as the motivation for the decisions or better said, the conclusions that took place in and after the Monterrey Consensus.

⁸⁴ “Questions and answers about the United Nations.” At:<<http://www.un.org/geninfo/ir/index.html>>

⁸⁵ “United Nations Millennium Declaration the Goals.” At:<<http://www.un.org/geninfo/ir/index.html>>

⁸⁶ Supra n.83

⁸⁷ “Report of the International Conference on Financing for Development.” United Nations 2002 p.19-at:<<http://www.un.org/esa/ffd/aconf198-11.pdf>>

⁸⁸ At:<<http://www.un.org/reports/financing/panel.htm>>

2.2.3.a. The Zedillo Report

Commissioned in December 2000, this was a 'Technical Report of the High-Level Panel on Financing for Development' completed under the chairmanship of President Zedillo.⁸⁹ The report analyses diverse issues with a primary focus on the fact that the governments are not keeping up with the pace of the changes occurred during the last years. In its own words the reports states, "[i]t is clear...that the challenges of globalisation today cannot be adequately handled by a system that was largely designed for the world of 50 years ago. Changes in international economic governance have not kept pace with the growth of international interdependence."⁹⁰

The report proposes the creation of an International Tax Organization that would take over the following issues:

- "At the least, compile statistics, identify trends and problems, present reports, provide technical assistance, and develop international norms for tax policy and administration.
- Maintain surveillance of tax developments in the same way that the IMF maintains surveillance of macroeconomic policies.
- Take a lead role in restraining tax competition designed to attract multinationals with excessive and unwise incentives.
- Slightly more ambitiously, develop procedures for arbitration when frictions develop between countries on tax questions.
- Sponsor a mechanism for multilateral sharing of tax information, like that already in place within the OECD, so as to curb the scope for evasion of taxes on investment income earned abroad."⁹¹

Obviously the proposals are very interesting, but it seems that all this work is already being done by other organizations like the OECD and the ICC as was explained previously. The only item that could be considered as 'different' is the proposal on a procedure of arbitration in regards to 'frictions' between countries on tax issues. At the moment it is only within the European Union at

⁸⁹ Ibid

⁹⁰ "Report of the High-level Panel on Financing for Development: Executive Summary of the Report"
<<http://www.un.org/reports/financing/summary.htm>>

⁹¹ Ibid

the European Court of Justice (ECJ) that such matters take place and not only between countries but individuals can actually make a claim indirectly to the ECJ, through their national courts, when they have been unfairly double taxed for example.⁹² On the other hand, the ICC has also proposed arbitration to resolve tax disputes.⁹³

The proposals of the report are good and as it remarks

“Developing countries would stand to benefit especially from technical assistance in tax administration, tax information sharing that permits the taxation of flight capital, unitary taxation to thwart the misuse of transfer pricing, and taxation of emigrant income.”⁹⁴

However, the report does give special focus in the area of taxation to another matter; it promotes the appeal of an international tax source to help finance the supply of public global goods.⁹⁵ It is this type of reasoning that keeps making the tax burden heavier of natural persons and provides more reasons for multinationals to avoid taxes. Perhaps the report should firstly encourage the international community to find ways in which to properly recover all the taxes that either through avoidance or evasion are escaping the grasp of the authorities, before new taxes are proposed as a solution for the actual problem. There are already plenty of taxes; the problem is that with such complicated tax laws, loopholes and such different provisions between countries, inevitably multinationals will find ways to keep avoiding their obligations.

At the Monterrey Consensus the conclusion to which the countries arrived, was not however, that an International Tax Organization should be set up, as was proposed in the Zedillo Report, but that a Fiscal Committee should be established and that the UN was the right forum in which to address the

⁹² See Generally: De Burca, G. and Scott, J. (Eds). *The EU and the WTO, Legal and Constitutional Issues*. Hart Publishing. 2001

⁹³ See comments under Chapter 2.4. of this study.

⁹⁴ “Report of the High-level Panel on Financing for Development: Executive Summary of the Report” <<http://www.un.org/reports/financing/summary.htm>>

⁹⁵ Ibid

issue.⁹⁶ After the meeting at Monterrey, the follow-up resulted in a 'Report on the Panel Discussion on International Cooperation in Tax Matters', which was emitted in October 2003, approximately a year and half after the Consensus.

2.2.3.b. Report on the Panel Discussion on International Cooperation in Tax Matters (hereinafter the follow-up report)

The opening statement in the panel of the follow-up report was on behalf of Julian R. Hunte, who after pointing out the importance of the Monterrey Consensus,

“noted that taxation is a major instrument in fulfilling internationally agreed development goals and mobilizing revenues. He stressed that there was a need to develop universal standards, principles and norms in respect of internal and external financial resource mobilization through tax policy, tax administration and international taxation and tax cooperation. A key point made was the need for an institutional framework through which developed and developing countries can cooperate and participate equally.”⁹⁷

An important point in this statement refers to the need of developing universal standards not only for external but also to *internal* financial resource mobilization through tax policy. As it has already been mentioned taxing is inherently national and even though countries will take advice and recommendations on certain issues from international organizations as for instance the OECD and the ICC, when it comes to merely internal matters it is highly unlikely that any country would agree to a universal standard.

Moreover in this meeting, it was discussed that the currently Ad Hoc Group of Experts⁹⁸ that already served in the UN “should be transformed into an intergovernmental commission or committee.”⁹⁹ Further on, Mr. Abdel Hamid made an especially important point when he observed “tax systems have evolved in a way where governments wish to exercise their rights to tax within their territory as well as in a country that is not the investor’s country or

⁹⁶ “Report on the Panel Discussion on International Cooperation in Tax Matters.” UN Headquarters, 2003 at: <www.un.org/esa/ffd/1003CRP_on_tax.pdf> - referenced as ‘Report on Tax Matters’

⁹⁷ Ibid

⁹⁸ See mention made above p.16

⁹⁹ Report on tax matters see n.96

residence.”¹⁰⁰ And hence, why there was a need for a framework that would deal with international cooperation matters.

This last comment touches a very sensitive point, and refers indirectly to the application of CFC legislation. As was mentioned earlier¹⁰¹ CFC legislation is an Anti-avoidance legislation, it is however, a rather questionable legislation. Parting from the base that tax is an intrinsically national activity it means that by applying CFC legislation, a country is going beyond its borders to collect a tax, which will go into its treasury from another territory. This area has been debated before, as mentioned by Sandler, Switzerland had established in 1987 on a study of the OECD that “such legislation...results, in effect, in an extra-territorial application of domestic tax law.”¹⁰²

The Panel went on to recognize that the only ‘proper forum for action’ is the UN and that bilateral tax treaties are not good in addressing certain issues, precisely because they are bilateral, and that a multilateral agreement is needed in order to address services and investment issues, as well as goods.¹⁰³ Furthermore, it was remarked that

“WTO is not an appropriate forum for resolving international tax matters because WTO focuses on trade, its dispute settlement mechanism is not efficient ways of solving problems, and countries are not willing to give up sovereignty...[moreover] the WTO has no jurisdiction over services and their enforcement ability is limited.”¹⁰⁴

Firstly, it is important that it was recognized that bilateral treaties do not work on these issues and that a multilateral agreement is needed. Secondly, the mere fact that explanations were given on why the WTO was not the appropriate forum to resolve international tax matters, means that it had already been considered as a possible forum. However, the ‘explanations’ offered are not convincing for they detail all of the WTO’s advantages to why it would be a good forum but then it is simply stated that its abilities are not good or effective enough. Whilst, perhaps it is true that the WTO is not the correct forum to address so many varied issues such as the UN Panel is

¹⁰⁰ Ibid

¹⁰¹ See p.10

¹⁰² Sandler, D. *Pushing the boundaries: the interaction between tax treaties and CFC legislation*. The Institute of taxation and Institute of Fiscal Studies.1994.p.113

¹⁰³ Report on tax matters see n.96 p.3

¹⁰⁴ Ibid

proposing, it is imperative to remember that this is not what the present study is proposing, but only a regulation of international corporate taxation.

The WTO focuses mainly on trade, being that it was the original conception in the GATT, but far from being a disadvantage this provides a benefit in itself. Focusing on trade, it already deals with a specific type of taxes, that is, customs and tariffs. It is one of the primary objectives of the WTO to keep these customs and tariffs from rising and moreover, the aim is to reduce them as much as possible. Even though it is only countries who are involved in the negotiations, it is obvious that they do so in order to promote trade for their own companies, after all it is no longer an era where countries themselves trade, but rather companies belonging to those countries.¹⁰⁵

There is obviously a considerable amount of knowledge in regards to the general needs and aims of companies, this gives the WTO an advantage over other organizations in regards of a possible regulation of corporate taxation. Moreover, the WTO not only focuses on trade as will be reviewed later on, but in fact it is negotiating services as well, as opposed to what was stated by Prof. Avi-Yonah in the follow-up report.¹⁰⁶

In regards to the DSB it is one of the most effective, transparent and well respected dispute settlement mechanisms internationally speaking, otherwise member countries of the WTO would not submit their complaints to the DSB.

The reference in regards to the idea that countries would not be willing to give up their sovereignty is somewhat absurd, especially when a claim for the 'need of universal standards' was just made a few paragraphs before in the same report. The issue of sovereignty could very well apply for any international organization including the UN. When a country signs an agreement with the UN or any other body for that matter, it is not giving up its independence or power, but are rather recognizing the benefit that certain association(s) can bring. Moreover, the capacity of the State to conclude treaties has already been recognised in The Vienna Convention on the Law of

¹⁰⁵ For a brief discussion on the subject see: Trebilcock, M. and Howse, R. *The regulation of international Trade*. Routledge 2nd Edition. Great Britain, 1999. Chapter 1. Referenced as 'Trebilcock'

¹⁰⁶ Report on tax matters, see n.96

Treaties of 1969 (hereinafter the Vienna Convention).¹⁰⁷ Nevertheless, if the 'sovereignty issue' could become a problem "it should be noted that the legal ability to withdraw within a reasonable period, [the Uruguay Round allows for six months] of notice arguably reduces the worry about 'infringement on sovereignty.'"¹⁰⁸

Finally, the reference made in the follow-up report to the limited enforcement ability of the WTO seems rather strange, especially when it is stated by an organization, which has no enforcement ability at all. It has always been the main criticism to the UN¹⁰⁹, that while its aims are high and noble it cannot actually make them enforceable. It is also most likely this ability of enforcement that the WTO has, that is the target of attack on behalf of NGOs and protesters in general, being as they view it as a loss of power and sovereignty from the countries themselves.

The conclusion of the panel was basically a proposal for the transformation of the Ad Hoc Group of Experts on International Tax Matters into an intergovernmental commission or committee. It was explained that once the transformation took place it would gain quite more efficiency and effectiveness. According to the Panel the new 'UN Committee or Commission on International Cooperation on Tax Matters' would be in charge of the following:

"Assisted by a competent secretariat, should help in identifying fiscal trends and standards, provide a forum for the exchange of ideas and experience, develop norms for tax policy, tax administration and international cooperation, direct provision of policy advice and technical cooperation to member states, compile statistics and monitor macroeconomic policies affecting tax policy and international taxation. It could also contribute to the restraining of tax competition to attract foreign direct investment, develop a mechanism for multilateral sharing of tax information with a

¹⁰⁷ Art 6. states "Every State possesses capacity to conclude treaties." Available online at: <http://www.un.org/law/ilc/texts/treaties.htm>

¹⁰⁸ Jackson, J.H. *The World Trade Organization Constitution and Jurisprudence*. The Royal Institute of International Affairs. 1998 p.34

¹⁰⁹ General Wesley Clark, former Nato Supreme Allied Commander Europe. Quoting the Economist "under the ambit of the 1945 U.N. Charter is exposed beyond economic sanctions, which have already failed or have been scuppered by U.N. members, there is no enforcement mechanism except American leadership." *Hearing of the senate armed services committee*. Federal News Service. September,23,2002.

view to curbing tax avoidance, tax evasion and capital flight, as well as engaging in tax arbitration procedures.”¹¹⁰

2.2.4. Concluding comments on the follow-up report compared to the Zedillo Report, the OECD and the ICC.

The proposals of the panel are not new and neither are the proposed activities for the new ‘Committee or Commission’. Much of what is described above is already being done already by either the OECD, the ICC or the actual Ad Hoc Group of Experts of the UN. It is not the purpose to diminish the much needed work of these organizations but rather to point out that the work is already being done, moreover the Ad Hoc Group of Experts would pretty much be doing the same work it has been doing until now, but just under a different name. There is not an imminent need for yet another organization with the same attributions, but there is a necessity for one that can actually have some enforcement that will back up all the reports and statistics available.

Just as in the Zedillo Report the only highlight of the follow-up report, is in regards to the tax arbitration procedures, this concept however is not innovative either. As mentioned earlier, the ICC has been “promoting arbitration as an appropriate and efficient means of resolving such taxation disputes... [since]1984,”¹¹¹ and has furthermore, emitted a new Policy Statement in May of 2000. The statement however, focuses on the use of arbitration in regards to matters that concern double taxation and how arbitration clauses should be included in double taxation treaties. As a follow up in 2002 and “in order to assist in the implementation of arbitration in tax matters in conformity with the guidelines established in the ICC Policy Statement, the Commission...prepared a model article, which could be adopted in bilateral taxation convention.”¹¹²

¹¹⁰ Ibid

¹¹¹ “Arbitration in International Tax Matters” Commission on Taxation. ICC.2000 – At: <www.iccwbo.org/home/statements_rules/statements/2000/arbitration_tax.asp>

¹¹² Document n° 180/455 Rev. 2.2002

At:<www.iccwbo.org/home/statements_rules/statements/2002/Arbitration%20in%20International%20Tax%20Matters.asp>

In regards to the OECD, Article 25 of the OECD Model Tax Convention refers to a Mutual Agreement Procedure (MAP), which states “where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of th[e] Convention he may... present his case to the competent authority of the Contracting State of which he is a resident... or national.”¹¹³ Afterwards the competent authority will go to the competent authority of the other contracting state and they shall resolve the case through Mutual agreement.

As can be observed from the ICC and the OECD, in this aspect the Panel of the UN is not giving new proposals either. If the aim of this new Committee proposed by the UN is to do same work as the OECD *per se* except with a focus towards developing countries¹¹⁴ then the proposal is commendable. However, an International Tax Organization as it seemed to have been proposed in the Zedillo Report remains still just an idea.

It is hard to envision countries agreeing to international tax standards especially in regards to internal tax matters, but for countries to agree on standardizing a specific area, which has been out of control for quite a while is another issue. Governments would most likely embrace the idea of reducing tax avoidance to a minimum. If a government were approached with the proposal of standardizing a certain area, like international corporate taxation, where it has been losing tremendous amounts of money, it would be more inclined to agree on this subject rapidly than that of a general tax standard. On the other hand, some governments, generally in developing countries as well as tax havens, give less importance to tax income and look more on the benefits a new company might bring, i.e. employment, investments and a general boost to the economy and in some countries corruption acts as yet another reason for the unwillingness of countries to agree to an international corporate tax regulation.

2.3. A Brief look at the EU and EU Competition Law.

¹¹³ Article 25-OECD Model Tax Convention.

¹¹⁴ As was mentioned before the OECD is known to focus on developed countries.

In this subsection some aspects of the EU and more specifically EU Competition Law, in regards to the regulation of multinationals, will be analysed briefly in an attempt to gain insight from what has already been achieved in this area, *albeit* at a regional level, it can offer invaluable knowledge.

2.3.1. The EU

“After the Second World War three European Communities were created. The Treaty of Paris in 1951 established the European Coal and Steel Community; The Euratom Treaty in 1957 created the European Atomic Energy Community; and the Treaty of Rome in 1957 established the European Economic Community, now the European Community.”¹¹⁵

It is noteworthy, that upon its creation “much of the co-operation between EU countries was about trade and the economy,”¹¹⁶ however, nowadays it deals with varied subjects such as, human rights, labour issues, data protection, environment and regional development.¹¹⁷ It is interesting to see how its development shares similarities with that of the WTO itself, which at first was merely about trade, through the establishment of the GATT, but has evolved to comprehend other issues such as the intellectual property, services and the environment.¹¹⁸

The EU is probably the only possible example to look upon as a guide in regards to the proposal of an international regulation of corporate taxation. At the moment it is constituted of 25 countries, matching almost the size of the OECD, but the most important aspects are that its treaties are binding¹¹⁹ and it has enforcement abilities just as the WTO. It is essential to highlight that the following is not a comparison between the EU and the WTO, nor a proposal to turn the WTO into a similar body as the EU; but rather to take it as a role model in certain aspects where its experience might be of help. There are two areas in which the EU can be of help in regards to the subject at hand, the

¹¹⁵ Jones, A. and Sufrin, B. *EC Competition Law*. Oxford University Press.2001. Referenced as ‘Jones and Sufrin’.

¹¹⁶ “The European Union at a Glance.” At:<http://europa.eu.int/abc/index_en.htm>

¹¹⁷ Ibid

¹¹⁸ See generally the website of the WTO, at:<www.wto.org>

¹¹⁹ The ECJ has established the supremacy of EC Law once a member accepts an EC obligation. See: *Costa v. ENEL*. Case 6/64 [1965]ECR 585;[1964]CMLR425.

area of Competition Law and the European Court of Justice (ECJ) either through the Commission or national courts in regards to the implementation of legislation, specifically in the area of taxation.

The most relevant aspect of the EU in regards to the WTO is that not only are its agreements binding, but they are also enforceable through the ECJ just as the DSB assures enforcement for WTO members. The main problem with other treaties or agreements is their lack of enforcement. It has been thoroughly criticized that the main problem with international law and treaties in general is that there are no enforcement mechanisms.¹²⁰ The previously mentioned Vienna Convention establishes the principle of *pacta sunt servanda* in Art. 26 stating “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”¹²¹ In other words, each party must rely entirely on the good faith for the compliance of the other party and there is basically nothing that can be done if by any reason the treaty is not respected. Agreements arising from the EU and the WTO on the other hand, are enforceable and therefore are more likely to be complied with.

2.3.2. EU Competition Law

Even though, Competition law is not directly related to tax matters, the way it has developed in the sense of what it protects and what is penalized is important because it very much resembles the proposal of this study of an international regulation of corporate taxation. At the moment only EU Competition Law is of significance, because although competition law is also of high importance in the US it is only applied to one country, hence there is no clash of legislations as it happens when different countries try to cooperate. Moreover, it is the actual application of Competition Law, which is

¹²⁰ “Despite all this, international law's "Achilles heel" is enforcement. There is no enforcement mechanism for effective implementation of international laws, Langenkamp and other experts concede.” See: Dinesh, M. “US Vows To Follow Law As Occupier Of Iraqi Oil Fields.” Energy Intelligence Group, Inc. Energy Intelligence Briefing. March 10,2003. See also: “Intellectual activist and author Noam Chomsky discussed his new book, 'Hegemony or Survival: America's Quest for Global Dominance.'” Washingtonpost.com November 26,2003 Wednesday 02:00PM

¹²¹ Entire Convention available at:<<http://www.un.org/law/ilc/texts/treaties.htm>>

of importance to this study in regards to both its requirements for application and the enforcement itself, which will be analysed later on.

Competition Law is embodied in articles 81 and 82 of the Treaty of the European Communities (EC Treaty). Craig and De Burca have stated that among the objectives of competition law are the enhancement of efficiency, the 'protection of consumers and smaller firms from large aggregations of economic power' and a 'creation of a single European market'.¹²² Competition Law refers, to state the obvious, to the regulation of market competition among companies; the part that concerns this study is the 'protection of smaller firms from large aggregations of economic power'.

The first chapter explained how multinationals are able to get away with tax avoidance augmenting at least 'indirectly' the tax burden of individuals as well as smaller companies. A regulation of international corporate taxes is definitely needed, but the point is for it to target 'big multinationals' rather than smaller companies who are trying to commence selling their goods in international markets. In this sense is where competition law should be a kind of 'model' for corporate tax regulation.

Article 82 states that "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States."¹²³ The key factor is that of 'dominant position'; it is recognized that companies can come to obtain a privileged position in the market and hence there is need for regulation so this dominant position is not abused. The determination of this dominant position can be through the "actual size of the market share possessed"¹²⁴ The amount is not stated *per se* in the articles, but has been established by the European Commission and the European Court of Justice through out cases. Albeit it is not the only determining factor, an amount of 40-45%¹²⁵ and 50%¹²⁶ of the market share have been held to cause dominant position.

¹²² Craig, P. and De Burca, G. *EU Law, text, cases and materials*. 2nd Ed. Oxford University Press. 1998. p.891

¹²³ Ibid p.940

¹²⁴ Ibid p.950

¹²⁵ Ibid, *United Brands*

¹²⁶ Ibid, *Azco Case*

Something similar needs to be done in regards to regulation of corporate taxation; certain multinationals depending on their size, profits and amount of subsidiaries it has, should be the ones eligible to be regulated. A sort of dominant position can be established in order to identify them, this way smaller companies will not be affected and on the other hand, can be encouraged to engage in more trade and become more competitive.

2.4. Concluding comments about international efforts.

Throughout this chapter a somewhat brief description of the international efforts performed by several international organizations towards tax cooperation and harmonization has been given. Even though there are other organizations that do research in the same area, both national and international as well as non-governmental, it would be impractical and due to the length of this dissertation impossible, to name and analyse all of them.¹²⁷ The OECD, the ICC and the UN were chosen due to the importance of their contributions and the influence they can exert.

As has been seen, the work performed by the OECD, the ICC and the UN are all tremendously needed and commendable. However, none of these organizations are suited to take on the task of setting up an international regulation of corporate taxation.

The ICC is an organization that even though it can have direct contact with government representatives; it has no enforcement abilities whatsoever. The OECD has perhaps a little more power being that it constitutes a membership and agreements are binding, but as has already been pointed out there is a way out in regards to the binding area and most countries come to certain understandings or similar policies but not often to agreements. Also, the fact that it has so few member countries, fails to achieve a truly international regulation.

¹²⁷ For further research organizations doing work that relates to the topic of this study are to name a few: Oxfam, Tax Justice Network, ATTAC, Berne Declaration and AABA.

The UN can be seen as the most apt from these three organizations, its members are governments that represent almost the entire world and not only focuses on developed countries but also developing ones; it has however, no power of enforcement. The proposals of the follow-up report are a good beginning, one that should have occurred years ago, nevertheless it will be years until the new Committee establishes itself and it is yet to be seen if it will engage in tax arbitration procedures as well.

The amount of money lost is enormous and the current necessities of the world call for solutions, the organization required needs to have a strong international stance, to be respected among governments, to have representatives from most of the trading world, it should provide a forum for countries to negotiate and have a dispute settlement mechanism that can actually solve problems and be able to make the binding agreements enforceable. To create an international tax organization with these characteristics would take a lengthy amount of time. However, an organization, which could take over the task of regulating international corporate tax, already exists; it took 47 years to create and in 1995 it became official, what was previously known, as the GATT became the World Trade Organization.

Chapter 3. THE INTERNATIONAL REGULATION OF CORPORATE TAXATION: A NEW PROSPECT FOR THE WTO's AGENDA?

The “WTO is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.”¹²⁸ As of the 23rd of April 2004¹²⁹ it is composed of 147 members and thirty-one observer countries, compiling approximately 95% of world trade.

It is not the organization itself, which ensures the flow of trade; but the countries that have signed agreements and continue negotiations that actually make it happen. It is the set of rules agreed on by countries, even before the organization was created¹³⁰, which have bound countries ever since.

The most common misconception pertaining the WTO is that it is an organization with power over the member countries, i.e. it tells countries what to do. This perception is mistaken; above all, the WTO is a negotiating forum¹³¹; Art.II.1 of the Marrakesh Agreement¹³² states “[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal

¹²⁸ “The WTO in brief.” At:<www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm>

¹²⁹ Nepal became a member.

¹³⁰ “[T]he GATT remained the only multilateral instrument governing international trade from 1948 until the WTO was established.” See: *The Uruguay Round-What Happened to the GATT*.

At:<www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm>

¹³¹ “What is the World Trade Organization”

At:<www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm>

¹³² Establishing the World Trade Organization.

instruments.”¹³³ In other words the WTO is the framework, but it is the agreements themselves which bind the countries as ascertained in Art.II.2, “[t]he agreements and associated legal instruments...are integral parts of this Agreement, binding on all members.”¹³⁴ The ability of ‘implementation, administration and operation’ as well as the administration of the DSB are provided for in Art.III of the aforementioned agreement; it is only under this type of framework in which an international regulation of corporate taxation can be successfully implemented.

It is of course necessary at the outset, for an agreement to be reached, by all the members, at the WTO on the subject of corporate taxation, in order for the agreement to be ‘supervised’ by the WTO and therefore be subject to the enforcement abilities of the DSB as well. The agreement would also have to be asserted as a ‘covered agreement’ for it to fall under the umbrella of the GATT/WTO regime.

3.1. Why an agreement for the International regulation of corporate taxation can only achieved at the WTO.

At the already mentioned Colloquy of 1980¹³⁵ Mr. Westerburgen, chairman of the OECD Working Party No. 8, at the time, stated

“that, while national administrative structures were still evolving, the time was not yet ripe for a multilateral agreement on mutual assistance in tax matters. In th[ose] circumstances bilateral agreements which could be tailored to the needs and possibilities of interested countries seemed a more suitable approach.”¹³⁶

Indeed at that period, the time was ‘not yet ripe’, the Internet boom was still to come and with it an increased expansion on trade and the so-called globalisation.

The Internet made communications easier, in a matter of a few years it was possible to do business with virtually anyone on the planet who was connected to the web and in general gave way to a ‘globalised’ world. “Yet globalisation involves more than technological change. It is also a political

¹³³ *The Legal Texts: The results of the Uruguay Round of Multilateral Trade Negotiations*. WTO. Cambridge University Press. 2003. p.4, referenced as “The Legal Texts.”

¹³⁴ Ibid

¹³⁵ Colloquy see n.12

¹³⁶ Ibid at-p.16

choice. It involves consciously opening national borders to foreign influences.”¹³⁷ Whether or not countries were ready to open their borders in such a manner is another issue and each country deals with the matter in the way it best suits it, as Legrain held “The Internet cannot be uninvented, but access to foreign websites can be restricted- just ask the Chinese Government.”¹³⁸

Trade on the other hand, has been expanding for over fifty years and countries are recognizing now more than ever the importance of a multilateral trade system. The recent events at Geneva have put the focus back on multilateral trade, as opposed to the panorama after the failure in the Cancun meetings. Thailand for example, was negotiating a bilateral free trade agreement with the US, after the agreement reached at the WTO of the 31st of July, 2004¹³⁹, Manarang a professor of International economics at the university of Chulalong in Bangkok, stated “The Thai government will have to reconsider its stress on bilateral trade negotiations. It will be difficult for the government to praise the FTA [Free trade agreements] over the WTO deal, because it is important for Thailand to pay attention to the bigger global trade platform.”¹⁴⁰ This approach, surely does not only belong to Thailand, many other countries will be giving the multilateral system the acknowledgement needed for its proper functioning.¹⁴¹ If indeed the time was not yet ripe for a multilateral negotiation of international tax matters, now is certainly the moment to bring the issue at the table and the subject of corporate taxation is ready.

3.1.1. A suitable institution?

¹³⁷ Legrain, P. *Open world: the truth about globalisation*. Abacus. 2003. p.6 Referenced as ‘Legrain’.

¹³⁸ Ibid p 7

¹³⁹ An agreement to “cut [down] rich countries’ farm subsidies in return for developing countries opening markets for manufactured goods” was reached on this date.

See:<<http://news.bbc.co.uk/1/hi/business/3525602.stm>> Published: 2004/08/01 13:29:46GMT

¹⁴⁰ “Radar Screen.” [2004] Commonwealth Business Media Journal of Commerce.

¹⁴¹ “At the end of the day, what counts is not the gain and loss to one country but the benefits that accrue to multilateralism itself, particularly when regional trading agreements and extension of preferential trade pacts among participants make mockery of free and fair global trade.” See: Srinivasan, G. “Revised WTO framework agreement: affirming faith in multilateral trade.” FBLN. August 4, 2004.

In order to be able to come to an agreement countries need a forum to negotiate, a familiar place in which important negotiations have already taken place, will incite further negotiations; there is no more suitable setting for negotiations than the WTO. Furthermore, negotiations take time and can easily be deviated or come to deadlock, without the constant 'supervising'¹⁴² of the WTO, countries would give priority to other issues, "[t]he process thus monitors the extent to which members are meeting their commitments and obligations, as well as providing information on newly opened trading and investment opportunities."¹⁴³

Moreover, every member is the same, it does not matter whether it is a developed, developing or a least developing country, each member has one vote and additionally all the decisions are taken in a consensus, meaning that everybody must agree in order to come to an agreement, even if there is opposition from only one country the decision cannot be passed.

In regards to the implementation of an international regulation of corporate taxation, the only way it can work is if it's a multilateral agreement. It is composed of 147 members most of whom have multinational companies in their territories either directly or indirectly and as opposed to the UN; the WTO does have enforcement abilities. An International Tax Organization with enforcement abilities, would be seen at the moment as too intimidating and would most likely face immediate opposition by many sectors; as has happened at times with the WTO. A negotiating table where countries can put forth their necessities and concerns and more importantly where they can actually look at the numbers, in regards to money loss, would encourage countries to address the matter.

3.1.2. International Recognition and Know-how of the WTO.

¹⁴² On 2003 after reviewing the results of WTO's International trade statistics, General Director Supachai Panitchpakdi established that "the world's political leaders must focus their attention on the stalled Doha Development Agenda and demonstrate their willingness to spur the global economy through greater trade liberalization and more equitable trade rules. The near stagnation of trade growth in the first half of 2003 underlines the urgency for governments to get back to the negotiating table and to work towards building a stronger and more vibrant trading system." See: "Supachai: Sluggish trade growth calls for urgent pick up of stalled trade talks." Press 363. 5th Nov, 2003.
At: <www.wto.org/english/news_e/pres03_e/pr363_e.htm>

¹⁴³ *From GATT to the WTO: the multilateral trading system in the new millennium*. WTO Secretariat, Kluwer Law International. 2000.p.17 referenced as 'WTO secretariat'

Even though the WTO has faced some opposition¹⁴⁴ on behalf of NGOs, these same organizations continue attempting to push their agendas into the WTO in matters of environment *per se*, the query is why if they believe it to be a bad organization. The answer is simple, because the system works; things get done, agreements are respected and when they are not there are consequences. “The WTO finds itself at the heart of ...issues of world governance for one simple reason, which is that as the century dr[ew] to a close the WTO is the universal economic institution *par excellence*.”¹⁴⁵

The international respectability of the WTO along with its benefits is thoroughly recognized, something which has been achieved through years of experience, from correcting mistakes and keeping up the spirit of a multilateral system, which will benefit everyone.

For years, NGOs have claimed that at the WTO countries lobby for their companies.¹⁴⁶ The fact is that there is much truth in this statement, while it is not the whole reason; the WTO does deal with trade and the ones who perform the actual trade are not the countries but companies, as mentioned earlier. However, this fact alone makes the WTO uniquely qualified to deal and negotiate matters of Corporate Taxation; it has the company’s needs and concerns at hand. Governments have for many years negotiated over the expansion of trade, a direct benefit for companies, it is time to negotiate a benefit for governments in which the ultimate aim to be able to provide better services and quality of life for its citizens.

Additionally, “the WTO...provide[s] the best possible protection against incitements to corruption. For example, [the] non-discrimination [principle] prevents the arbitrary decision-making which favour certain parties and gives them artificial rents.”¹⁴⁷ In other words, even though there is lobbying of corporations by governments, the possibility of corruption is reduced to a minimum due to the constant compliance of the principles governing the WTO.

¹⁴⁴ See generally the ‘Greening of the WTO’.

¹⁴⁵ WTO Secretariat, see n.143 p.83

¹⁴⁶ Flanigan, J. “U.S. is playing Shell game with subsidies.” Los Angeles Times. August 15,2004. Referenced in this dissertation as ‘Flanigan’.

¹⁴⁷ Ibid p.95

Furthermore, the assurance of predictability in trade is one of the greatest assets that was offered by GATT and subsequently by the WTO. Upon investing businessmen look for security, this is perfectly known at the WTO and hence why it was so important to move on after the failed talks in Cancun.¹⁴⁸

Moreover, by providing information¹⁴⁹ the WTO aids governments to make better decisions, since the information provided is not biased. As established by Anderson,

“one of the reasons protectionist trade policies persist is that the losers from those policies... are poorly informed about the nature and extent of their loss. Insofar as they underestimate the loss, so they under-invest in lobbying against such distortionary policies... yet many governments choose to under-supply such information, presumably at the request of those interest groups gaining from incomplete transparency.”¹⁵⁰

This is a crucial point, governments at the moment are very poorly informed to the extent of their loss due to tax avoidance either because they are ignorant of it or because they choose to be; the point in fact is that governments are still at a loss and it is time to affront the issue.

3.1.3. The WTO is not only limited to trade issues.

The scope of the WTO has been spreading since its creation, whereas the GATT was only limited to trade in goods, agreements at the WTO now extend to services, intellectual property, antidumping, subsidies and safeguards as well, there are also plurilateral agreements regarding civil aircrafts and government procurement.

Also, conscious of the impact of trade on several other areas as for example the environment, and even though there is not an environment agreement *per se*, a Trade and Environment Committee was created which connected environmental and sustainable development matters to the work of the WTO.¹⁵¹ Of course, the committee is focused in upholding the principles of

¹⁴⁸ Supachai, See n.136

¹⁴⁹ See above, n.137

¹⁵⁰ Ibid

¹⁵¹ “The environment a new high profile.”

At:<http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm>

the WTO such as non-discrimination and transparency and it is precisely on this matter that the WTO has been perceived as an organization that is not environment-friendly such as it happened in the *Shrimp-Turtle*¹⁵² and *Dolphin-Tuna*¹⁵³ cases. However, the fault in those cases did not lie in the WTO, but in the failure of its members to comply with WTO principles. Electronic commerce, investment and competition are other issues currently under review at the WTO, even labour standards which has been hotly debated might be considered as a matter of future discussion.¹⁵⁴

A question that arises is that if the WTO only deals with trade, why would it take on such different areas as the ones mentioned above? The answer goes back to the issue that the WTO is a forum for discussion and negotiations. If such matters as environment, investment and competition are being analysed, it would seem unreasonable not to venture into the area of corporate taxation, which seems to relate far closer to trade than the environment *per se*; because when the first is a direct result of trade, the second a more of a side effect.

3.1.4. Main principles of the WTO

The WTO works in compliance to certain principles, these principles are not only fundamental parts of certain agreements, but they spread out throughout the whole WTO system and logically would affect new agreements or areas, which could be negotiated in the WTO. If an agreement were reached at the WTO for the regulation of corporate taxation, this agreement would also have to comply with these principles.

Before the WTO or the GATT, trade was operated in a type of 'law of jungle' ambit as Ambassador Lacarte once explained, where the big animals eat the small ones and basically it's the survival of the fittest.¹⁵⁵ This meant that in a place without rules big countries could exert more pressure upon smaller countries whereas in a multilateral system everyone has the

¹⁵² *United States – Import Prohibition of Certain Shrimp and Shrimp Products*. WT/DS58/RW, 15/06/2001. Doc # 01-2854.

¹⁵³ *United States - Restrictions on Imports of Tuna*. [GATT Panel Report] DS29/R, 16/06/1994.

¹⁵⁴ See generally <www.wto.org>

¹⁵⁵ "From GATT to the WTO", Video. Available at:

<www.wto.org/english/res_e/webcas_e/webcas_e.htm#wtosystem>referenced as: "GATT to WTO"

possibility to be heard.¹⁵⁶ The principles form an important part of the WTO and assure the effectiveness of the multilateral trading system.

(3.1.4.i) Non-discrimination principles: The Most Favoured Nation Treatment and The National Treatment Principles.

“The principle of non-discrimination [is] often viewed as the cornerstone of the GATT,”¹⁵⁷ and hence the WTO, this principle embodies two others: the Most Favoured Nation (MFN) treatment and the National Treatment principle.

The most favoured nation principle is consecrated in Article I of GATT,¹⁵⁸ which establishes that

“any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”¹⁵⁹

There are two exceptions in regards to the MFN principle and they refer to treatment of developing and least developed countries. Known as the ‘Enabling Clause’, it was adopted in 1979 as ‘Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.’¹⁶⁰ Conscious of the economic differences between developing and developed countries,

“the Enabling Clause is the WTO legal basis for the Generalized System of Preferences (GSP). Under the GSP, developed countries offer non-reciprocal preferential treatment (such as zero or low duties on imports) to products originating

¹⁵⁶ Ibid

¹⁵⁷ Trebilcock, see n.105 p.26

¹⁵⁸ Also in art. II of GATS and art. 4 of TRIPS.

¹⁵⁹ Article I of GATT 47

¹⁶⁰ Decision of 28 November 1979(L/4903)

in developing countries. Preference-giving countries unilaterally determine which countries and which products are included in their schemes.”¹⁶¹

In regards to least developing countries the exception towards article I is not an enabling clause but rather a waiver. In June 15th 1999 the General Council adopted a Decision on Waiver regarding Preferential Tariff Treatment for Least-Developed Countries, where it was decided that “the provisions of paragraph 1 of Article I of the GATT 1994 shall be waived until 30 June 2009, to the extent necessary to allow developing country Members to provide preferential tariff treatment to products of least-developed countries, designated as such by the United Nations, without being required to extend the same tariff rates to like products of any other Member.”¹⁶²

The National Treatment Principle is established in article III of GATT¹⁶³, stating

“The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic product.”

The point of this article is to impede governments from interfering with imported products once they are inside their territories. For example, a country could apply an internal tax (not a duty or custom at importation) to international products, in order to protect its own domestic goods.

The main difference between the most favoured nation treatment principle and the national treatment principle is that the first is applied at the border, meaning at the moment of importation, when the goods will be introduced into the country. Whereas the national treatment is applied after the goods have crossed the border, at that moment all goods must receive the same treatment including not only other imported goods but also the one given to national goods as well.¹⁶⁴

(3.1.4.ii) Security, Predictability, Transparency & Fair Trade.

¹⁶¹ “Work on special and differential provisions.”

At:<www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm>

¹⁶² WT/L/304 17th June 1999. (99-2452) At:<www.wto.org/english/tratop_e/devel_e/1304_e.doc>

¹⁶³ Also art.17 of GATS and art.3 of TRIPS.

¹⁶⁴ ‘GATT to WTO’ see n.155

One of the main reasons countries are interested to join the WTO is because it provides security, through predictability. The fact that countries are bound by their agreements offers the security that tariffs will not be raised. If countries were not bound and countries could freely change their positions, there would be no purpose for the WTO.

In matters of transparency, which is another aspect of predictability the WTO, as opposed to certain public perceptions, is a very transparent institution. Its agreements can be found easily online as well as the cases in the Dispute Settlement Body (DSB), it provides everything from WTO and GATT history to current news and explanations of the works of each division. The web page is user friendly and whatever one has trouble finding, it will come up quickly by doing a search in the web page. If an agreement on corporate taxation is achieved, this transparency is essential and mostly in regards to educating the public on the area of corporate taxation.

The WTO promotes, is fair trade not so much 'free trade'. "More accurately, it is a system of rules dedicated to open, fair and undistorted competition."¹⁶⁵ Fair competition is promoted through issues of antidumping and subsidies, the most recent illustration is the cut down of subsidies in agriculture by 'rich' countries¹⁶⁶ a matter that marks a historic breakthrough¹⁶⁷ for the WTO and the Doha Round. "These fairness rules are fundamental to instilling confidence in the world trading system."¹⁶⁸

Economic development is clearly one of the main objectives of the WTO; it was after all, this incentive that led to its creation. It is erroneous to think that the WTO only supports rich developed countries, because whilst that could have been somewhat truer from the GATT, the establishment of the WTO brought with it a more balanced table towards developing and least developed countries. By applying preferential treatment towards less developed countries, as was explained previously, equality is achieved not only through equal treatment but with certain privileges that can give an edge to countries with less advantages.

¹⁶⁵ Ibid

¹⁶⁶ See n.139

¹⁶⁷ <www.wto.org>

¹⁶⁸ WTO Secretariat, see n.143 p.9

3.2. The Dispute Settlement Body (DSB)

It has been established that “The WTO’s sharpest teeth are its dispute settlement body and its cross-retaliation provisions, both of which enable it to force nations to comply with WTO rules.”¹⁶⁹ “Dispute settlement is the central pillar of the multilateral trading system, and the WTO’s unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules [as well as the principles of the WTO] could not be enforced.”¹⁷⁰

The DSB as it is now, was established by the Uruguay Round¹⁷¹ as opposed to the previous system, where rulings were adopted by consensus¹⁷², rulings are now adopted by negative consensus, which means that “rulings are automatically adopted unless there is a consensus to reject a ruling any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view.”¹⁷³

3.2.1. Making a complaint.

The Understanding on Rules and Procedures Governing the Settlement of Disputes also known as Dispute Settlement Understanding (DSU) is an integral part of the agreements made at the end of the Uruguay Round. Article 2 embodies the authority given to the DSB stating that

“The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultations and dispute settlement provisions of the covered agreements.”¹⁷⁴

Settling disputes at the DSB is composed of various stages, countries are firstly encouraged to settle their disputes through what is known as ‘consultations’ or mediation before going through with the actual complaint.¹⁷⁵

¹⁶⁹ Balanya, Doherty et alia. *Europe Inc.* Pluto Press. 2000.p.24

¹⁷⁰ http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

¹⁷¹ “[A] dispute settlement procedure existed in the pre-Uruguay Round GATT but it was handicapped by the refusal of countries, particularly developed countries, to bring cases before it or, on those rare occasions, to respect its final rulings.” See: Adamantopoulos, K. *An anatomy of the world trade organization.* Kluwer Law International. 1997.p.24

¹⁷² http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

¹⁷³ Ibid

¹⁷⁴ The Legal Texts, see n.133 p.354

¹⁷⁵ Articles 4-24 of the DSU cover the process from consultations to compensation.

The first stage of consultation is calculated to last 60 days, time after which if the consultations fail, “the complaining party may request the establishment of a panel.”¹⁷⁶ The second stage is the actual setting up of the panel and the deliberations in which 45 days are allowed for the panel to be set up and six months for it to deliberate.¹⁷⁷ The second stage could be considered as the actual ‘trial’ for lack of a better word, there are hearings, rebuttals, experts, drafts, interim reports, and a final report from the panel, which becomes the ruling.¹⁷⁸ After the ruling there can be an appeal, which can last between 60 and 90 days; the whole process is calculated to last between a year (without appeal) and a year and three months (with the appeal).¹⁷⁹ After the panel has given the ruling, the aim is that the infringing country will correct its policy; there can be retaliation in the form of trade sanctions (the suspension of concessions).¹⁸⁰

Another measure is that of compensation, however, “compensation is voluntary and, if granted, shall be consistent with the covered agreements.”¹⁸¹ Since the compensations are voluntary it is the retaliatory provisions, which give a major enforcement however, to a developing country whose target is to be able to enter a market of say Country A, it serves it no purpose to close its own market to Country A as a retaliatory provision if Country A does not want to comply with the ruling of the DSB, for it would still not be able to enter Country A’s market. This is a small gap yet to be analysed by the international community, it is however, outside the scope of this study.

A brief analysis of two cases will provide a better panorama of the dispute settlement mechanism of the WTO. The following two cases are of importance to the present study because they show the willingness and openness of the DSB to give ruling in matters that are related to other areas apart from trade. If it is expected for the DSB to eventually give ruling in matters of corporate taxation it is of interest to see how it has acted before when being confronted with other areas as well.

¹⁷⁶ Ibid p.358

¹⁷⁷ <http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm>

¹⁷⁸ Ibid

¹⁷⁹ Ibid

¹⁸⁰ Ibid

¹⁸¹ The Legal Texts. Article 22 of the DSU, p.370

3.2.2. *The Shrimp- Turtle*¹⁸² & *The Asbestos Cases*¹⁸³

In 1996, the US imposed a ban on “certain shrimp and shrimp products”¹⁸⁴ originating from countries which did not use a turtle exclusion device (TED), which serves to protect turtles that get trapped in the nets when fishing shrimp. The following year, the countries of Thailand, Pakistan, India and Malaysia brought a complaint against the U.S. at the DSB with the following three objections, “[a)] The imposition of a ban on shrimp exports per se; [b)] Discriminatory treatment in terms of greater time allowed to countries of the Gulf of Mexico/Caribbean/Western Atlantic; and [c)] Imposition of process-related environmental requirements.”¹⁸⁵ “The Appellate Body ruled that the U.S. measures fell under an exception provided for in the GATT 1994 (Article XX(g)) which states that measures relating to conservation of exhaustible natural resources are exempted from GATT disciplines . However, the U.S. measures were struck down because they were imposed arbitrarily and unilaterally without any consultation from countries which would be affected by the measures.”¹⁸⁶ This shows the openness of the DSB to give rulings in regards to non-trade matters. Further on, the Appellate Body “stated that the position it took in Shrimp-turtle, was not just an observation but had legal significance. The intention was that this ruling should act as a guide for future panels on this issue.”¹⁸⁷

Moreover, this is the implementation of the principles of the WTO, whilst it is known that there is a need to protect the environment, it is also important that these matters are not used as ‘covers’ for protectionist measures. The DSB just didn’t allow for the measure to be applied arbitrarily

¹⁸² *United States –Import Prohibition of Certain Shrimp and Shrimp Products*.WT/DS58/RW, 15/06/2001. Doc # 01-2854.

¹⁸³ *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products - Communication from the Appellate Body*. Communication from the Appellate Body. 08/11/2000, WT/DS135/9, Doc. # 00-4729

¹⁸⁴ <http://docsonline.wto.org>

¹⁸⁵ “Trade as an instrument of environment policy.” Global News Wire - Asia Africa Intelligence Wire. Sept.15,2002.

¹⁸⁶ Mitsuo, M. “A new round of trade negotiations and dispute settlements at the WTO.” Journal of Japanese Trade and Industry. December 3,2001. Referenced as ‘Mitsuo’.

¹⁸⁷ “Assertive Jurisprudence on Non-trade issues.” Global News Wire –Asia Africa Intelligence Wire. June 11,2004. Referenced as ‘Assertive Jurisprudence’

In the *Asbestos Case*¹⁸⁸ once again the DSB upheld the exception of Article XX(b) which allows for restrictions on the basis that they are 'necessary to protect human, animal or plant life or health'. In 1996 France issued a decree "banning the production, transformation, sale, importation and marketing of asbestos and asbestos-containing products, with certain exceptions."¹⁸⁹ Canada challenged the decree at the DSB, at the end the Appellate Body concluded that the French decree complied with WTO agreements and furthermore that "Asbestos and its substitutes were not "like products", and therefore there was no discrimination between domestic and imported products."¹⁹⁰

The main difference between the *Shrimp-Turtle* and the *Asbestos Cases* is that in *Shrimp-Turtle* there was discrimination because the measure was arbitrary towards certain countries who did not use certain devices, and the *Asbestos Case* the decree was towards all products coming from whichever country hence, there was no discrimination; nevertheless in both cases the exception to protect human, animal or plant life or health was upheld. The rulings in these cases "exhibit a more significant and visible departure from the jurisprudence that evolved in the *Tuna-Dolphin* disputes"¹⁹¹, which occurred before the creation of the WTO and where it was decided that in a dispute between environment and trade the matter should be resolved in favour of trade¹⁹². These rulings also offered protection to developing countries that cannot afford to apply every measure to protect the environment. On this aspect the WTO brings equality, in favour of non-discrimination adopting views that will not harm the trade possibilities of the poorer countries. To pressure poorer countries to adopt certain standards puts further strains on their already weak economies.¹⁹³

¹⁸⁸ Supra n.183

¹⁸⁹ "Landmark ruling of WTO Appellate Body on asbestos: France allowed to uphold its legislation." The Royal Society of Chemistry. July 25,2001.

¹⁹⁰ Mitsuo, see n.186

¹⁹¹ Assertive Jurisprudence see n.187

¹⁹² Ibid

¹⁹³ Weinstein, M. and Charnovitz, S. "The Greening of the WTO." Council on Foreign Relations, Inc. Nov-Dec. 2001 p.147

3.3. The Agreement on The Regulation of Corporate Taxation¹⁹⁴

It has been explained how the WTO is the correct forum in which to reach an agreement on the international regulation of corporate taxation, however, if an agreement were to be reached, what would be some of the issues that it would necessarily have to include? Due to the length of this study it is difficult to do a thorough analysis of each of the issues such a complex agreement would include; and furthermore, it has not been the aim to do so, but rather to demonstrate that such an agreement could only be agreed and implemented correctly at the WTO. Nevertheless, following are some suggestions in regards to some provisions the agreement would have to address in regards to the proposals of the present dissertation.

Initially, the agreement would have to be recognized as a multilateral agreement and not plurilateral, so it could be binding on all members and fall under the scope of articles II and III of the Marrakesh Agreement.¹⁹⁵ Overall the agreement would be subject to the same principles implemented by the WTO as for instance non-discrimination.

One of the crucial points of the present proposal is that the agreement should only aim to regulate corporate taxation of MNEs, and not of all companies in general. As mentioned before, EU Competition Law could serve as a guide in this area. The agreement should firmly stipulate the conditions to be fulfilled for an MNE to fall under the scope of the new regulation. This would serve two purposes: (i) the amount of companies regulated would be limited in number, for it would be very hard to regulate *all* existing companies under one agreement; and (ii) smaller firms would be able to increase their competitiveness as they would not be restricted by the new regulations.

MNEs would also benefit from the agreement, in regards that they would have to deal with only one tax system. Paperwork would be diminished and furthermore, they could also acquire protection. Even though it might not seem so *prima facie*, some multinationals do suffer from discrimination and harassment on behalf of the countries themselves. In Romania for instance,

¹⁹⁴ Since there is no literature regarding this subject, this section should be considered as a mere outline for further and more thorough studies in regards to the technicalities of the agreement as well as the possible future role of the DSB.

¹⁹⁵ The Legal Texts see n.133

“foreign investors still believe they are under tighter tax scrutiny to make up for tax relief given to Romanian companies... [and additionally that] “tax harassment” of Western firms is common.”¹⁹⁶ In this aspect the agreement would also have to determine the position of the MNEs in regards to their ability to ‘sue’ a non-complying country at the DSB. The present study proposes that MNEs should have *locus standi*, since it is the companies who will be directly affected by the regulation, they should also be provided with the ability to contest the non-compliance of the agreement on behalf of countries.

The agreement should establish limits on countries in regards to ‘tax competition’. It has been discussed by scholars that “[r]educing the price [in regards to tax] of locating in a particular country makes that country more attractive relative to others, but in the long run other countries are likely to respond by reducing their tax rates too. The result of this competitive process could be that prices fall to zero, i.e. tax rates fall to zero in a ‘race to the bottom’.”¹⁹⁷ Under the agreement all countries would be on the same platform and if one country offers ‘a lower tax regime’, other members could take the matter to the DSB and ‘sue’ for non-compliance.

The agreement on a tax regime would be one of the most difficult provisions, the issue has been somewhat addressed but solely in regards to corporate tax harmonisation in Europe¹⁹⁸, where it has been established that the fact that it would apply only to members of the EU would make it less effective. Considering that the present proposal assumes the participation of all WTO members, that problem would be eliminated. Some of the tax regimes proposed by Bond *et alia*, are (i) a harmonisation of the corporate tax base, which “would involve standardising the definition of taxable profits”¹⁹⁹, (ii) the harmonisation of corporate tax rates to a single rate or an agreed range of tax rates, (iii) a EU (in this case a WTO or world) corporate income

¹⁹⁶ “One Romanian-based foreign multinational, which declined to give its name for fear of retribution by the government, said it was audited by government tax inspectors 22 times last year.” See: Bilefsky, D., “Romania Risks being left out of EU: Graft and Rights Issues Make outcome uncertain; warnings rattle optimists.” The Wall Street Journal Europe. Vol. XXII No.162, Monday, September 20,2004.

¹⁹⁷ Bond, S. (*et alia*). *Corporate tax harmonization in Europe: a guide to the debate*. Institute for fiscal studies, 2000.p.49

¹⁹⁸ Ibid

¹⁹⁹ Ibid

tax, which would bring about problems such as the apportionment of such revenue to all member countries, (iv) a Home State taxation and finally (v) the abolition of corporate income taxes.²⁰⁰ The present dissertation disagrees with the last option offered by Bond (*et alia*), the purpose is to be able to collect tax more effectively not to abolish it.

The concept of 'permanent establishment' and residency would also have to be considered, as well, as how banks could be affected. Banking secrecy rules make tax evasion and avoidance simpler.²⁰¹ When establishing the abilities of the DSB in regards to this particular agreement, it should be stipulated whether the DSB would be able to demand, as courts do, for banks to disclose certain documents and information.

The general role of the DSB would have to be meticulously ascertained; some of the issues will be analysed in more detail in the following subsection. In regards to the DSB as well, the participation of NGOs needs to be stipulated. This dissertation does not propose for NGOs to have *locus standi* such as MNEs, but rather that reports emitted from certain members of the civil society and NGOs²⁰² should *have* to be admitted, studied and considered thoroughly. Also a stipulation should establish that in case an NGO or any other member of the civil society were to possess a report or well documented information regarding the non-compliance of either an MNE or a country, this information should be accepted and opened for debate.

3.3.1. Implementation: The DSB and The Regulation of Corporate Taxation.

In regards to the implementation of the agreement the DSB could play one of two roles, to either work only as clarification method meaning, countries or MNEs could bring forward questions in regards to the application of the agreement or to continue working as with the rest of the agreements as

²⁰⁰ Ibid, see chapter 5

²⁰¹ Ibid, p.61

²⁰² Obviously not only NGOs but also members of civil society would have expertise in the area of concern, which could in turn shed light to the DSB in a possible dispute.

a dispute settlement mechanism and do similar a work as the European Court of Justice (ECJ)²⁰³.

Until now the DSB has been in charge of ascertaining that the agreements at the WTO are complied with and it has been doing so with success for the increasing amount of cases presented towards it²⁰⁴, shows the growing confidence of the members in the system.

It has already been explained how the DSB works at the moment and there is no reason to believe that it would change its functionality if another agreement were to be incorporated. In the case of an agreement of the international regulation of corporate taxation, it would be like any other agreement; i.e. it would be subject to the DSB.

The fact that an agreement has been signed is to be assumed for the sake of argument, as well as the fact that MNEs would have *locus standi*, i.e. they could bring complaints to the DSB and of course complaints could be brought against them.

Once again it is necessary to look upon the EU for guidance, specifically how the Commission and the ECJ deal with these matters. It is crucial to emphasize yet again, that it is not in any way a proposal for a 'one government of the world', but it is necessary to regulate these multinational companies, and if governments cannot do it alone, then they must cooperate in order to be able to obtain control upon the matter.

The particularities of Competition Law have much in common with the present proposal, specifically in regards to that, it is not a proposal meant to be applied towards all corporations in general; but rather to a specific sector due to their position.²⁰⁵ It is suggested in this study as mentioned before, that specific MNEs, taking into account factors such as size, profitability, position in the market, number of subsidiaries and their international locations; should be eligible to be regulated.

²⁰³ It is of course recognized that matters of fiscal and national sovereignty need to be studied thoroughly to be able to make a precise comparison, however as was mentioned above this can be the subject of a future study.

²⁰⁴ Mitsuo, M. "A new round of trade negotiations and dispute settlements at the WTO." Journal of Japanese Trade and Industry. December 3,2001.

²⁰⁵ As is the term 'Dominant position' for competition law.

(3.3.1.a.) *The EU as a role model.*

The European Commission, described as the driving force and execution body, is one of the five official institutions of the EU.²⁰⁶ “The Commission [has] powers to implement legislation where the council has chosen to give it power to adopt ‘implementing measures’ when adopting the original ‘parent’ law... Even where the commission has these ‘implementing’ powers, it is subject to various oversight committees of experts appointed by the Council.”²⁰⁷

In regards to the implementation of Competition law Art. 81 of the EU Treaty establishes the powers of enforcement of the Commission stating that

“[w]ithout prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a member State or on its own initiative, and in cooperation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.”

To recapitulate the Commission has investigative powers, moreover, it has a duty of confidentiality and also it has the ability to impose sanctions in the form of fines and penalties,²⁰⁸ in other words, “[t]he Commission plays the part of law-maker, policeman, investigator, prosecution, judge and jury.”²⁰⁹ The Commission has been criticized due to the amount of activities it performs; however, its powers and enforcement are subject to review by the ECJ.²¹⁰

At the WTO, the proposal for the arrangement would be somewhat different; obviously the powers derived for the creation of any committee would come from the agreement itself. Firstly, a Specialised Advisory Committee in matters of taxation would certainly have to be established; secondly, it would have to be decided whereas the ability to ‘prosecute’ would belong only to the countries or if the Committee would play this part as well. In other words if, for example, the UK would be able to bring a complaint against

²⁰⁶ “The European Union at a glance.” At:<http://europa.eu.int/abc/index_en.htm>

²⁰⁷ Peers, S. “Constitutional Law of the European Union.” Notes provided for Constitutional Law Course, 1st August, 2003. Referenced as ‘Peers’.

²⁰⁸ Steiner, J. and Woods, L. *Textbook on EC Law*. Oxford University Press.2003.

²⁰⁹ Jones and Suftrin. See n.115 p.850

²¹⁰ Ibid

a MNE within its territory²¹¹ or would it have to go through the Committee in order to do it. Generally, if a comparison could be made, then the DSB would equate the Commission of the EU and the Appellate Body would be the ECJ. Being that the DSB would emit rulings and there could be a further appeal towards the Appellate Body in case there is no compliance or if the losing party wishes to appeal the ruling.

In regards to multinationals having *locus standi*, in the EU under article 234 EC, when individuals want to 'sue' a member state, they must go to their national courts or tribunals, which in turn depending if it is a lower court or a final court may or must accordingly, refer the issue and their questions to the ECJ.²¹² Also considered as the 'direct effect provision' the issue that EC law affects individuals directly was thoroughly recognized in *Van Gend en Loos v Nederlandse Tariefcommissie*.²¹³ On this aspect it would have to be determined whether MNEs would act in the same way, i.e. go to their governments who in turn would submit questions to the DSB or if they could go directly to the DSB.

It is noteworthy that "[t]he EEC's [EC's] common market was modelled party on the GATT,"²¹⁴ perhaps now the DSB could do the same and look upon the EC and the ECJ as a role model for the implementation of an international regulation of corporate taxation.

3.4. The weak link: Governments.

The only reason why an international regulation of corporate taxation could not be achieved would be due to the governments themselves; which seems ironic because they are the ones who have the most to gain.

The question, which arises, is that since governments make up the WTO, will they accept an agreement on a regulation of international corporate taxation or will they bend to the pressure exerted by corporations? This

²¹¹ The biggest problem that might be encountered would be the establishment of residency of a company. "Establishing whether a company is resident is a crucial step in calculating its tax liability." See: Whiting, S. "Corporation Tax 2001/2002." The Institute of Chartered Accountants in England and Wales.2001.

²¹² Peers. See n.207

²¹³ Case 26/62 [1963] ECR 1; [1963] CMLR 105.

²¹⁴ De Burca, G. and Scott, J. (Eds). The EU and the WTO, Legal and Constitutional Issues. Hart Publishing. 2001.p.2

'bending' of governments is already known to happen, as Tabb states "there are a large number of very rich people...cheating on their taxes...by having (through lobbying and influence pedalling) tax laws written to serve their interests."²¹⁵

Moreover, it seems that Governments are fearful of their own MNEs and organizations. In a document analysing the recent approval to the cutting of subsidies to farmers at the WTO, Flanigan²¹⁶ explains how the U.S. and American farmers will get around the agreement and hence continue enjoying subsidies. It further states that "those at the negotiating table were realists, keenly aware of two things: that any larger trade pact must be approved by the U.S. Senate, and that American lawmakers are not about to approve any accord if it risks incurring the wrath of the farm lobby."²¹⁷ Likewise, in matters of taxation an article discussing tax avoidance and a solution proposed by a Senator and Co chairwoman of the Legislature's Joint Committee on Taxation, stated that "the business lobby w[ould] howl"²¹⁸ against the proposition of a minimum tax.²¹⁹

The image is certainly confusing and the impression is that countries cannot handle the job alone, it appears to be true as stated by Moore, that "no one nation can enjoy clean air, run a tax system, cure AIDS or find political security on its own, without the cooperation of others."²²⁰ There is an imminent need for corporations to be regulated otherwise child labour, bad salaries and inhumane working conditions would be the rule of the day.

Furthermore, governments are not only pressured or taken advantage by multinationals but by other governments as well, as can be seen in the Chevron-Texaco Case²²¹ where Indonesia cooperated with these two companies because obviously it was in its best economic interests to do so.

Assuming the worst-case scenario where governments would be under too much 'pressure' by their multinationals not to sign an agreement on the

²¹⁵ Tabb, see n.50p.39.

²¹⁶ Flanigan, see n.146

²¹⁷ Ibid

²¹⁸ Bailey, S. "It's share and share unalike." The Boston Globe, 3rd Edition, June 16,2004. Referenced as "Bailey"

²¹⁹ Ibid

²²⁰ Moore, see n.83 p.224

²²¹ See p.11

international regulation of corporate taxation and thus could fail to do so, NGOs could be the only ones able to 'save the day'. If the protesting efforts of NGOs were placed into revealing that certain companies were pressuring governments because they did not want to pay their fair share of taxes; multinationals would be under a serious threat of losing their consumers permanently.

Chapter 4. HOW NGOs CAN HELP THE ESTABLISHMENT OF AN INTERNATIONAL REGULATION OF CORPORATE TAXATION.

NGOs have been continuously emerging since the 1850s.²²² It has been calculated, that throughout this time, around 35,000 NGOs have been established around the world,²²³ the Red Cross²²⁴ and the YMCA²²⁵, for example, where amongst the first international organizations to be created.

Even though it might not be obvious, the help of NGOs for the successful establishment of an international regulation of corporate taxation is crucial. There are two aspects in which NGOs can contribute on this subject: (i) by applying external pressure towards companies and (ii) within the WTO at the DSB setting.

4.1. Applying pressure to companies.

Since the meetings in 1999 at Seattle, it seems that the media has only chosen to show antiglobalisation demonstrators when it comes to depicting the sentiment of NGOs towards the WTO, and although there are some

²²² Boli, J. and Thomas, G.M., *Constructing World Culture*, Stanford University Press, 1999,p.20

²²³ Ibid

²²⁴ "History of the International Committee of the Red Cross" At:

<http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/About_the_ICRC:History?OpenDocument>

²²⁵ "A brief history of the YMCA movement." Available at: <http://www.ymca.com/index.jsp>

groups with a strong anti-WTO attitude²²⁶, the media has failed to show the cooperation between NGOs and the WTO. However, it is the use of the media itself, which NGOs can take advantage of in order to apply external pressure towards companies.

Multinationals have a strong concern for keeping the good image of their brands, after all when it comes down to it, a consumer trusts a brand to make sure he is getting good quality however lately it also seems to be a sign of 'fashion' as well. "Companies are [now] in the business of building brands, not products, they may reshape themselves along those lines."²²⁷

It is no surprise that in the last years several brands of clothes for example, specify in their labels 'no child labour' or cards claim the paper to be 'eco-friendly'. Public relations debacles are not something multinationals can afford for example, "Shell in Nigeria-its complicity with the killing of the Ogoni activists who resisted the depredations and environmental genocide of their lands,"²²⁸ "Gap workers from Indonesia, Lesotho and El Salvador...describe[d] how they were paid very little to work long hours making Gap clothes in factories full of health hazards and brutal working conditions"²²⁹ during a conference in Manhattan. Even "Nike... has awakened to the fact that its labour policies, including those of its exploitative subcontractors, cost them money once their consumers knew about them."²³⁰ Consumers have power and they know it, these recent changes have been achieved through previous protests, the same can be done for the international regulation of corporate taxation.

However, in taxation it would not be enough to only exert pressure, some NGOs²³¹ already acknowledge the fact that multinationals avoid taxes, but their efforts have yet to take effect. "Multinational companies have long

²²⁶ However, Weinstein. and Charnovitz, have stated that these attacks to the WTO are unwarranted. See n.160 "The Greening of the WTO."

²²⁷ Legrain, see n.137 p.121

²²⁸ Tabb, see n.50, p.34

²²⁹ "Gap hit by sweat shop protests." BBC News. 21 Nov. 2002.

At:<<http://news.bbc.co.uk/1/hi/business/2497957.stm>>

²³⁰ Tabb, see n.50,p.34

²³¹ For the excellent work that some organizations do in regards to raising awareness about the issue of tax avoidance, see generally the following URL which has other good links as well: "Global Tax Justice Network" at:<www.taxjustice.net>

been accused of representing the unacceptable face of capitalism.”²³² There is a multitude of books²³³ out in the market claiming that MNEs are taking over the world; however, as was stated by Dan Briody, author of the Halliburton Agenda “this company [Halliburton] is about money is not about conspiracies to run the world. It is about making money and about making a lot of money and it has done very well.”²³⁴ Every other multinational in the world works under the same assumption after all it is their whole purpose of being to make money.

Companies will not change out of good will; they will change because they have to and are forced to do so by regulations. If NGOs fit into their agenda the issue of International Corporate Taxation, they can help ‘twist’ the arms of companies into accepting a regulation of corporate taxation. Brands will not be able to cope, with all people knowing that on top of all the human rights debacles that are already present, Multinationals also resist to pay their fair share of taxes. Furthermore, the request is not outrageous, but only that companies pay taxes as all taxpayers do, “[t]here is no reason why the juridical persons should not become as law-abiding as natural persons are!”²³⁵ NGOs on this aspect need to establish a well-structured strategy and approach, it is imperative to take advantage of their efficient targeting and that they combine effective campaigning with long term aims.

4.2. NGOs and the DSB

NGOs could be able to cooperate with the WTO at the DSB as they have done before with submission of reports and *amicus curiae* among others.

Article 13 of the DSU establishes the following:

- “1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate.
2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue

²³² *Essays on Future of WTO* see n.10. p.91.

²³³ For books on this subject see: Klein, Naomi. “No logo, no space, no choice: taking an aim at the brand bullies.” And, Hertz, Noreena. “The Silent takeover: global capitalism and the death of democracy.”

²³⁴ Interview in the documentary by: Moore, M. “Fahrenheit 9/11”,2004. Distributed by Lions Gate and IFC.

²³⁵ *Essays on Future of WTO*. n.12 p.92

concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.”

As established by Matsushita *et alia*, “This broad investigative power is essential if the panel is to fulfil its mandate... to make an ‘objective assessment of the matter before it, including an objective assessment of the facts of the case.’”²³⁶ Especially in the field of taxation, the DSB will need the knowledge of specialised NGOs in order to make an objective assessment. In the UK for example, tax adjudication does not go under the ordinary court system but rather to specialised tribunals.²³⁷

It is commonly recognised that tax laws have become more complex as time goes on.²³⁸ Companies themselves hire “highly qualified experts [for] advise on how to reduce or avoid altogether the unacceptable proportion of the tax burdens.”²³⁹ The DSB taking advantage of Article 13.2 will have to as well compose expert review groups in order to make a correct assessments of the cases presented before it.

4.2.1. Amicus Curiae

The term *amicus curiae* is Latin for ‘a friend of the court’.²⁴⁰ In the DSB setting briefs from third parties, for example, NGOs can be submitted in order to ‘shed light’ on the subject at hand and provide the DSB with essential information in regards to the case being analysed. The subject of *amicus curiae*, however, does not only pertain to dealings with the WTO; other organizations such as the Inter-american Court of Human Rights and the European Court of Human Rights also accept *amicus curiae* briefs.²⁴¹

In regards to the DSB, the acceptance of *amicus curiae* was officially recognized in *United States –Import Prohibition of Certain Shrimp and Shrimp*

²³⁶ Matsushita, Shoenbaum and Mavroidis. *The World Trade Organization: Law, practice and policy*. Oxford University Press. 2003p.35

²³⁷ Norris, W. “Tax and the Rule of Law.” Vol 87 No.13 Law Society’s Gazette. April 4,1990.p.2

²³⁸ Chennels, see n.44

²³⁹ Glautier, M. and Bassinger, F. *A reference guide to international taxation*. Lexington Books,1987. Referenced as ‘Glautier’

²⁴⁰ It is also defined as ‘a disinterested advisor.’: Stone, J. *More Latin for the Illiterati*. Routledge,1999. p.46

²⁴¹ Moyer, C. *The Role of Amicus Curiae in the Inter-American Court of Human Rights*. La Corte Interamericana de Derechos Humanos, Estudios y Documentos. 1999.

*Products*²⁴² also known as the *Shrimp-Turtle Case*. However, the way in which the DSB would treat the information that was provided was something that would be dealt with after the submission of the briefs.²⁴³ If and when an international regulation of corporate taxation is to be established at the WTO, the DSB would very urgently have to deal with the subject of *amicus curiae*. Because, even though there seems to be no problem in regards to the acceptance of briefs; in the *Asbestos Case*²⁴⁴ after guidelines were issued for the submission of *amicus briefs*, NGOs who attempted to make submissions were denied the opportunity to do without being given reasons for this action.²⁴⁵

In matters of taxation the DSB could not afford to lose out on information submitted by experts with a conscience towards the common good, being that most of the experts in the field are already being employed by MNEs.²⁴⁶

²⁴² Report of the Appellate Body (AB-1998-4), 12 October 1998, WT/DS58/R, para.104

²⁴³ “The WTO and the civil society, comments by the Director-General to US NGOs.” Para. 5
At: <http://www.wto.org/english/forums_e/ngo_e/ngospe_e.htm>

²⁴⁴ *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products - Communication from the Appellate Body*. Communication from the Appellate Body. 08/11/2000, WT/DS135/9, Doc. # 00-4729.

²⁴⁵ After filing their submissions NGOs received a standard letter of refusal. : “A Court without friends?” Available at: <http://www.ciel.org/Announce/asbstospr.html>

²⁴⁶ Glautier, see n.239

CONCLUSION

“Particular concerns have been expressed about the coexistence of different corporate tax regimes in a world where globalisation of business activities has increased.”²⁴⁷ In the US for example, “[t]he political heat is rising...over the issue of corporate tax evasion. The General Accounting Office has released a report that shows over 60% of US corporations paid no federal taxes between 1996 and 2000... the contribution of corporate taxation [has] declined to its second-lowest percentage since 1934.”²⁴⁸ Considering avoiding taxes is not a trend of the past few years²⁴⁹, the only plausible answer to why now it is such a big preoccupation is that not only are corporations avoiding, but also they are avoiding in such proportions that is virtually impossible to turn a blind eye to the issue.

The time is already ‘ripe’, it is critical that the issue of corporate tax avoidance be addressed as established by Lang, “When the EC elaborated a draft for a multilateral tax treaty 30 years ago, the internationalisation of

²⁴⁷ Chennels, see n.44

²⁴⁸ Auger, J. “Report reveals rife corporate tax evasion in US.” World Markets Analysis. April 6,2004.

²⁴⁹ The Chevron-Texaco fiasco is calculated since 1964. see p.2

economic activities had not been that significant. As economic relations [cross] borders...there is now a greater demand for tax treaties.”²⁵⁰

An international regulation of corporate taxation is not only needed, but already overdue, it is the first step required towards an international cooperation in tax matters in general. “A ‘big fix’ is utopian and unworkable. But a solid step can be made, rather than a great, but unworkable leap.”²⁵¹ An agreement in international corporate taxation is that solid step and as has been shown throughout this dissertation the WTO is the correct body in which it needs to take place.

The aim should not be as proposed in by the Zedillo Report to implement a new tax, but to efficiently be able to collect the taxes that already exist and which are being avoided. This can only be achieved through intensive cooperation between countries, as the one that takes place now at the WTO. It is imperative however, that countries come together for it is this unity which makes the WTO a strong organization, “[t]he WTO belongs to all of its members and it would be pointless to hope for a strong Organization as long as part of its membership remains weakened or excluded.”²⁵²

Whilst it is obvious that there will be certain countries that will reject an international regulation of corporate taxation just as they do in certain areas of tax cooperation, *per se* confidentiality in regards to tax havens; the international community and the NGOs will have to do their part to impact and pressure companies *directly* instead of pressuring governments.

The technicalities of the actual agreement, are out of the scope of this study, and obviously should be proposed and analysed by far more competent scholars. The objective has been to highlight the obvious need for an international regulation of corporate taxation and how the WTO is the only capable body in which it can take place.

The encouragement to companies has proven good to the economy; jobs were created, consumers benefited and in general they created a boost to a country’s economic situation. There is no doubt that they have created

²⁵⁰ Lang *et alia*. *Multilateral tax treaties, new developments in international tax law*. Kluwer Law International. 1998

²⁵¹ Moore, see n. 83 p.237

²⁵² “First African deputy at WTO urges solidarity among Africans.” Agence France Presse. October 1, 2002.

benefits, but there is also no doubt that because of their nature a company's only goal is to make money, this does not mean however, that they should be allowed to use any means possible to achieve that aim. Throughout time abundant legislation has been passed in order to protect that which was being taken advantage of, and to regulate the conduct of companies; the implementation of trade unions, legalization of strikes, abolition of slavery, environmental regulations, competition law among others. The Regulation of International Corporate Taxation is needed to once more regulate the conduct of companies, which have evolved from national companies to multinational enterprises.

Laws and Regulations are of imperative importance and in this area much needed. Governments need to start acting more like sovereign bodies and seek the better good of all rather than take care of the goods of just a few. They need to accept each other's help and also look for the help of NGOs who throughout time have achieved many triumphs in areas like human rights and the environment.

"Globalisation is all-embracing and yet profoundly misunderstood"²⁵³, it is no longer possible to reject an inevitable situation and to keep reasoning only in national terms, multinationals have adapted and benefited from this changing world, if governments do not adapt the ones who will be mostly damaged are citizens from all around the world who will end up paying what multinationals have not.

²⁵³ Legrain, see n.137 p.4