TRIBUNALS AND TAXATION: AN INVESTIGATION OF ARBITRATION IN RECENT US TAX CONVENTIONS

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ABSTRACT

The United States has entered into three international tax treaties that include a provision for mandatory arbitration in the event of a dispute. Surprisingly, this substantial shift in policy has not grown out of extensive academic research, public policy debate, or empirical study. Little work has been done regarding the historical importance of tax arbitration, and few have published case studies regarding the outcome of disputes handled though tax arbitration. Perhaps this is because these treaties include confidentiality provisions that make such case studies nearly impossible. Therefore, this article aims to show the reader the possible strengths and downfalls of these treaties as well as offer insight regarding the history and strengths of arbitration as a tool for settling tax disputes.

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INTRODUCTION

Over the past thirty years, arbitration has garnered increasing interest as a means of resolving issues of double taxation in international tax.[1] After first explaining the history and nature of arbitration as a means of resolving disputes, this paper looks at arbitration and considers the advantages and disadvantages in instituting mandatory arbitration in tax conventions.[2] Then, this paper investigates arbitration's role in recent tax conventions. Though arbitration may be a valuable tool, arbitration as currently written in the recent United States tax conventions and in the Organization for Economic Co-Operation and Development (OECD) Model Tax Convention suffers from many of the disadvantages of arbitration without capturing arbitration's many advantages.

This paper is both a historical investigation and an academic analysis of arbitration and its application to tax treaties. Part I will explain some basic issues about arbitration, then outline the advantages of arbitration, before investigating whether arbitration is an appropriate

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[1] *See, e.g.*, GUSTAF LINDENCRONA & NILS MATTSSON, ARBITRATION IN TAXATION (1981); MARIO ZÜGER, ARBITRATION UNDER TAX TREATIES: IMPROVING LEGAL PROTECTION IN INTERNATIONAL TAX LAW (2001).

[2] Please note, tax convention and tax treaty are used interchangeably throughout the paper.

mechanism for resolving tax disputes. Part II focuses on the OECD and its Model Tax Convention, which includes arbitration as a method for resolving tax disputes. Finally, Part III looks at three recent tax treaties to which the United States is party.

I. ARBITRATION: HISTORY AND PROCEDURE

While often thought of as a modern, innovative, and streamlined alternative to the court system for settling disputes, arbitration has been around for hundreds of years. Arbitration procedure and rules can be (and often are) as complex as litigation procedure and rules. International tax arbitration stands on the cutting edge of alternative dispute resolution; understanding its implications and judging its efficacy and appropriateness requires a substantial grounding in the history and operative details of traditional international arbitration.[3]

Arbitration originally developed out of the guild system, not the court system. Seen as a 'rudimentary' or 'primitive' system of settling disputes, it required submission not to the courts, filled with lawyers and judges, but rather to ordinary men.[4] In medieval times, when a dispute arose between two traders, the traders would request that a third trader help settle the dispute, rather than enter into a formal court proceeding.[5] From these humble beginnings, arbitration has developed into one of the most complex, and at times controversial, areas of international law.[6]

A. WHAT IS ARBITRATION?

Arbitration is a method of settling disputes outside the jurisdiction of any particular court. The two (or more) parties agree to settle their dispute by the decision of one or more third party neutrals of

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[3] TIBOR VÁRADY, JOHN J. BARCELÓ III & ARTHUR T. VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 1 (3d ed. 2006).

[4] ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 2 (4th ed. 2004).

[5] *Id.* at 3.

[6] While arbitration can take place in the domestic setting, the focus of this section is on international arbitration. By international, I am referring to arbitration which takes place between the following: (1) two parties that are located in different nations, (2) one multinational party and another party from one of the multinational's national state, (3) one multinational and another party from a different and unrelated nation, (4) two multinational parties, (5) one nation and party from another nation or nations, or (6) two different nation states – in short arbitration that transcends any particular national border. *See id.* at 12–17.

their choosing.[7] Though arbitration is an alternative dispute resolution method, it is similar to litigation in that by entering into it, the parties give up the right to determine the outcome of their dispute. In litigation, that third party is known as a judge; in arbitration, that third party is known as an arbitrator.[8] The arbitrator or arbitral tribunal adjudicates the dispute and issues an award.[9] Unlike a negotiated settlement or mediation, an arbitral award is binding and final, foreclosing further avenues of redress.[10] Therefore, if the parties do not carry out the award voluntarily, the party desiring enforcement of the award has the option to petition a court. As a general rule, the court will compel the non-compiling party to follow the arbitration decision.[11]

The arbitration process is one that the parties enter into via a contract known as an arbitration agreement.[12] The arbitration agreement is a contractual agreement typically included as a clause in commercial contracts. At its core, it is a contractual agreement.[13] In a typical arbitration agreement, parties agree in writing to settle any current or future disputes through arbitration rather than in a particular court.[14] A party can be compelled to arbitrate so long as a valid agreement to arbitrate exists.[15]

A valid arbitration agreement is considered the cornerstone of modern international arbitration.[16] The identity or qualifications of the third party arbitrator, how the arbitrator is chosen, the number of

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[7] JEAN-FRANCOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 1 (Stephen Berti & Annette Ponti trans., 2d ed. 2007); *see also* VÁRADY ET AL., *supra* note 3, at 1.

[8] H. RODERIC HEARD, SUSAN L. WALKER, & JOHN W. COOLEY, INTERNATIONAL COMMERCIAL ARBITRATION ADVOCACY 43 (2010).

[9] PHILLIPE FOUCHARD, EMMANUEL GAILLARD, BERTHOLD GOLDMAN & JOHN SAVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 12 (Emmanuel Gaillard & John Savage eds., 1999); REDFERN & HUNTER, *supra* note 4, at 5.

[10] *Id.*

[11] REDFERN & HUNTER, *supra* note 4, at 5.

[12] *Id.*

[13] POUDRET & BESSON, *supra* note 7, at 3.

[14] *See id.* at 5–7.

[15] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. 5(1)(a), 2(3) ("The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, *shall*, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.")(italics added), June 10, 1958, 21 U.S.T. 2517; UNCITRAL MODEL LAW art. 36(1)(a)(i) (2006); *see also* HEARD, WALKER, & COOLEY, *supra* note 8, at 94.

[16] *See generally* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 15.

arbitrators, and the limits of their power are dependent on the arbitration agreement executed between the parties.[17]

In modern international arbitration, the adjudication is usually presided over by two or more arbitrators who are selected by the parties to the dispute.[18] The customary process for modern international arbitration involving two parties is for each party to appoint its one arbitrator, and the two arbitrators together then appoint a third arbitrator who serves as the chair.[19] In theory, this process allows all parties to have some power to ensure that those adjudicating the dispute are not biased toward the other side. This structural balance supports a primary policy aim of international commercial arbitration: that the dispute should be determined in a neutral setting.[20] However, because arbitration is contractual, such customary procedure is not instantiated in law or civil procedure and relies on the parties to the dispute having specified such a process for selecting arbitrators in the arbitration agreement.[21]

Arbitration is dependent on the basic contract that creates it; it is therefore imperative that the arbitration agreement address all the specific procedural issues prior to beginning the arbitration. If the arbitration agreement lacks the procedural elements, it is possible that a valid arbitration agreement will never lead to arbitration if the parties cannot agree on procedures at the time of the dispute.[22] The amount of specificity required for even a basic arbitration agreement can be great, and the parties may fail to consider certain pitfalls, which again could lead to procedural deadlock in the case of an actual dispute.[23] In order to avoid this outcome, parties interested in including an arbitration agreement in a commercial contract often rely on previously established procedural rules promulgated by institution that administers arbitrations and other forms of alternative dispute resolution.[24]

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[17] *See* James H. Carter, *Dispute Resolution and International Agreements*, *in* INTERNATIONAL COMMERCIAL AGREEMENTS 435–45 (1995), *reprinted in* VÁRADY ET AL., *supra* note 3 at 18–20.

[18] *See generally* REDFERN & HUNTER, *supra* note 4, at 46.

[19] VÁRADY ET AL., *supra* note 3, at 281.

[20] *Id*. at 265.

[21] POUDRET & BESSON, *supra* note 7, at 331.

[22] REDFERN & HUNTER, *supra* note 4, at 5, 9.

[23] *Id.*

[24] Gerald Asken, Ad Hoc Versus Institutional Arbitration, 2 ICC ICARB. BULL. 8–14 (1991), reprinted in VÁRADY ET AL., *supra* note 3, at 22.

In general, there are two types of arbitrations: institutional and ad hoc.[25] Institutional arbitration occurs when parties chose to use the rules of an arbitral institution.[26] In contrast, ad hoc arbitration refers to an arbitration that does not depend on administration by a particular arbitral institution, and the parties create their own procedures for arbitration.[27] In institutional arbitration, an arbitration specialist from the institution handles the administrative and procedural tasks associated with the arbitration.[28] The parties can still select their own arbitrators, but those arbitrators are selected from a list of arbitrators approved (though not individually endorsed) by the institution, all of whom know the institution's procedures, rules and background.[29]

The advantage of institutional arbitration is the ease with which an arbitration agreement can be written and the arbitration can occur without requiring negotiations on all the procedural points of the arbitration. Rather than "reinvent the wheel" for each arbitration agreement, institutional arbitration allows the parties to use rules that are known to work.[30] The rules of most of these arbitration institutions are decades old and are frequently updated to meet the changing needs of dispute settlements.[31] Additionally, the rules of many arbitration institutions are translated into multiple languages, thus ensuring that all

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[25] A halfway point between ad hoc and administered arbitration does exist, and it is not necessary to discuss at length for purposes of this paper. For reference purposes, the International Institute for Conflict Prevention & Resolution ("CPR") provides limited arbitral services and encourages parties to apply its rules. CPR even adopted the 2000 Rules for Non-Administered Arbitration of International Disputes. *See 2000 Rules for Non-Administered Arbitration of International Disputes*, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/612/2000-Rules-for-Non-Administered-Arbitration-of-International-Disputes.aspx. The CPR encourages the parties to apply its arbitral rules, yet it does not administer arbitrations. Instead, the parties use CPR services to assist in selecting a panel of arbitrators. The parties then manage their own proceedings.

[26] Asken, *supra* note 24, at 22. Some examples of arbitration institutions are the International Chamber of Commerce (ICC) in Paris, France, Chicago International Dispute Resolution Association (CIDRA), the American Arbitration Association, JAMS in New York, United States, London Court of International Arbitration, Stockholm Chamber of Commerce, Australian Centre for International Commercial Arbitration, and International Centre for the Settlement of Investment Disputes, a subsection of the World Bank in Washington, D.C., United States.

[27] *Id*.

[28] REDFERN & HUNTER, *supra* note 4, at 47.

[29] *Id* at 48; Asken, *supra* note 24, at 25.

[30] Asken, *supra* note 24, at 23; REDFERN & HUNTER, *supra* note 4, at 48, 50.

[31] Asken, *supra* note 24, at 23.

parties properly understand the terms of the arbitration, irrespective of native language.[32]

In addition to offering a well thought out set of rules, arbitration institutions are able to assist with the process of selecting a competent arbitrator who is familiar with both the laws in question, and the languages spoken by the parties.[33] Additionally, the institution acts as a clearinghouse for all costs and fees associated with the arbitration.[34] In the event of arbitral misconduct or disqualification, the institution can assist in an arbitrator's removal.[35] In contrast, in ad hoc arbitration, if an arbitrator refuses to disqualify him or herself based on a valid disqualifying event, a court would be required to assist in the removal of that arbitrator.[36] Thus, though an arbitral institution may not be involved in the substance of a dispute, it can nonetheless act as quality control.[37]

The quality most arbitral institutions require of their arbitrators, in addition to their rules and their administrative support has not gone unnoticed by national courts.[38] Because of their long proven record, national courts tend to be more willing to enforce the award of an arbitration that is run under the rules of an established institution.[39] In addition, the United States Supreme Court has gone so far as to allow the International Chamber of Commerce (ICC) and the American Arbitration Association (AAA) to file amicus briefs about the procedures of international arbitration and even cited the ICC's brief in expanding the range of issues resolvable in 1985 international arbitration.[40] While nothing prevents a court from enforcing awards based on ad hoc arbitration, an individual ad hoc proceeding simply does not have the same proven record of accomplishment.[41] Moreover, since the court is likely to be less familiar with the procedures of an ad hoc proceeding

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[32] *Id.* at 24.

[33] *Id.*

[34] *Id.* at 25; REDFERN & HUNTER, *supra* note 4, at 48.

[35] Asken, *supra* note 24, at 25.

[36] *Id.*

[37] REDFERN & HUNTER, *supra* note 4, at 48.

[38] Asken, *supra* note 24, at 26.

[39] *Id.*; *see e.g.*, Arab African Energy Corp. Ltd., v. Olieprodukten Nederland B.V., [1983] 2 Lloyd's Rep. 419; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche International, Ltd., 888 F.2d 260 (2d Cir. 1989); Apollo Computer, Inc. v. Berg, 886 F.2d 469, 473 (1st Cir. 1989).

[40] Asken, *supra* note 24, at 26; *see also* Mitsubishi Motors Corp., 473 U.S. 614, at 634 n. 18, 637 n. 19.

[41] Asken, *supra* note 24, at 27–28.

than with those of institutional arbitration, the court may be less easily satisfied that due process requirements have been met when asked to enforce the award of an ad hoc arbitration.[42]

While the logistical and enforceability advantages of institutional arbitration appear overwhelming, there are situations where ad hoc arbitration is valuable and where institutional arbitration has distinct disadvantages. Institutional arbitration generally comes with up front fees for administrative costs relating to the entire arbitration process.[43] Should the arbitration process conclude swiftly, or the parties come to a negotiated agreement outside of arbitration, the substantial administrative fees are a sunk cost.[44] For involved and complicated arbitrations, this fixed fee may be an advantage; however, in many cases, this premium for administrative services would be better be spent on actual attorneys and arbitrators fees.[45]

Ironically, while the institutional rules that ensure due process (and thereby court enforceability) require significant time compared to some ad hoc arbitrations, scholars of arbitration note that the time limits required by many arbitral institutions put significant burden on the respondent.[46] These limits are nearly impossible for a state or state entity to comply with, since state actors are required go through the official channels in order to get the needed approval.[47] As a result, ad hoc arbitration has become the favored arbitration approach used when a state entity is involved, because it does not have these time constraints.[48]

As noted scholar Alan Redfern once quipped, "the difference between ad hoc arbitration and an institutional arbitration is like the difference between a tailor-made suit and one which is bought off the peg."[49] While it may be the only option to suit odd shaped clients, ad hoc arbitration is a significantly more involved process than the institutional alternative; applying proven, preexisting rules usually saves time and money.[50] But the pay off is less control over the process, and having a

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[42] This issue is mainly for American courts, *see id.* at 28.

[43] REDFERN & HUNTER, *supra* note 4, at 49.

[44] *Id.*

[45] *See* Asken, *supra* note 24, at 23.

[46] *Id.* at 22–23; REDFERN & HUNTER, *supra* note 4, at 49.

[47] *Id.*

[48] *See id.* at 50.

[49] Asken, *supra* note 24, at 22 (quoting Alan Redfern, Why Arbitrate Transnational Disputes? Should Institutional or Ad Hoc Arbitration Be Provided? (unpublished remarks at the Institute for Transnational Arbitration.)); *See also* REDFERN & HUNTER, *supra* note 4, at 49.

[50] REDFERN & HUNTER, *supra* note 4, at 50.

third party institution tracking and dealing with the dispute, which may be of a particularly sensitive nature.

Because each institution's rules refer to the institution, these rules are not a good choice to use as a model for ad hoc arbitration. To provide such a model, the United Nations Commission on International Trade (UNCITRAL) adopted the Model Law on International Trade, which can be used for ad hoc arbitration.[51] In 1976, UNCITRAL promulgated the UNCITRAL Arbitration Rules.[52] The promulgation of these rules is considered by some to be the most significant event in the development of efficient ad hoc arbitration.[53] In 1985, the UNCITRAL Model Law was created by the United Nations Working Group and now serves as a model for nations interested in modernizing their arbitration law.[54] Prior to UNCITRAL, parties to ad hoc arbitration had little alternative but to draft their own set of procedures; now it is possible for ad hoc arbitration to rely on the UNCITRAL Model Law.[55] The UNCITRAL Model Law is highly relevant to our discussion of tax and arbitration since most tax arbitrations are ad hoc, but can use the Model Law.[56]

B. WHY ARBITRATION?

In recent years, international arbitration has evolved into an established method of adjudicating international commercial and investment disputes.[57] Scholars primarily cite the following reasons when explaining the increase arbitration's popularity: predictability, neutrality of panel, expertise of panel, finality, limited discovery, less time consuming, less expensive, and generally more amicable.[58] However, as

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[51] *Id.* at 66; VÁRADY ET AL., *supra* note 3, at 57.

[52] Asken, *supra* note 24, at 23; PIETER SANDERS, THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION 1 (2d ed., 2004).

[53] Asken, *supra* note 24, at 23.

[54] SANDERS, *supra* note 52, at 53; POUDRET & BESSON, *supra* note 7, at 67.

[55] SANDERS, *supra* note 52, at 54 (noting that although the UNCITRAL Model Law was conceived for international commercial arbitration, the Model Law is malleable and can be appointed for the domestic setting as well).

[56] William W. Park, *Control Mechanisms in International Tax Arbitration*, *in* RESOLUTION OF TAX TREATY CONFLICTS BY ARBITRATION 49 (1994).

[57] REDFERN & HUNTER, *supra* note 4, at 1; *See* WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 4–7 (2006).

[58] James H. Carter, *Dispute Resolution and International Agreements*, *in* INTERNATIONAL COMMERCIAL AGREEMENTS 435–45 (1995), *reprinted in* VÁRADY ET AL., *supra* note 3, at 18; Christian Bühring-Uhle, *Arbitration and Mediation In International Business: Designing*

demonstrated by Christian Bühring-Uhle's survey, results excerpted in Table 1, some of the oft-cited benefits of arbitration are dramatically more important to real world arbitrating parties than others. For example, though it has been noted that arbitration is generally seen to be more predictable and thus more appealing to parties,[59] Table 1 shows that the great majority of survey respondents do not believe that they gain greater predictability when arbitrating versus litigating.

TABLE 1: EXCERPTED INFORMATION FROM A SURVEY ON ARBITRATION AND SETTLEMENT IN INTERNATIONAL BUSINESS DISPUTES[60]

Reason	Highly Relevant	Significant	One Factor among Many	Not Relevant	Advantage does not Exist
Forum is neutral	72%	11%	11%	2%	5%
Forum has Expertise	36%	28%	14%	3%	19%
The results are more predictable	3%	8%	8%	5%	75%
Greater degree of voluntary compliance	7%	33%	9%	4%	47%
Treaties ensure enforcement of results abroad	64%	27%	4%	0%	5%
Confidential Procedures	32%	32%	27%	2%	7%
Limited Discovery	23%	35%	16%	5%	21%
No appeal	37%	23%	18%	0%	23%

Procedures for Effective Conflict Management, app.1, at 395–96 (1996), *reprinted in* VÁRADY ET AL., *supra* note 3, at 20; FOUCHARD ET AL., *supra* note 9, at 1.

[59] Carter, *supra* note 58, at 18.

[60] Bühring-Uhle, *supra* note 58, app.1, at 20.

Procedure is less Costly	8%	13%	21%	8%	51%
Less time Consuming	11%	24%	24%	4%	37%
More amicable	11%	31%	11%	6%	41%

1. NEUTRALITY OF FORUM

As previously discussed, creating a neutral panel for arbitration is critical to its value as a dispute resolution tool. In Bühring-Uhle's survey, respondents unequivocally indicate it as one of the most important benefits that arbitration secures.[61]

As defined by Tibor Várady,[62] John Barceló,[63] and Arthur von Mehren,[64] the neutrality of arbitration is two tiered.[65] On one hand, there is the assurance that the selected arbitrators have no business or personal ties to the parties.[66] On the other hand, there are broader classes of potential bias, including nationality, religion, ethnic background, and language knowledge that can be neutralized by each party's selection of their own arbitrator.[67] Whether or not a personal connection to the parties or a shared religious, ethnic, national, or language background would make an adjudicator biased toward one party is less important than how the parties perceive the situation.[68]

Obviously, such selection of the adjudicating authority is not an option in the court system. If the nationality of an arbitrator can affect a

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[61] *Id.*

[62] Internationally recognized scholar on international trade, transactions and despite settlement. In the former Yugoslavia, he taught at Novi Sad Law School, currently teaches at Emory University Law School. *See Tibor Varady-Faculty Profiles*, EMORY UNIV. SCH. OF LAW, http://www.law.emory.edu/faculty/faculty-profiles/tibor-varady.html (last visited Nov. 15, 2011).

[63] Noted scholar on international trade and European Union law who teaches at Cornell University Law School. *See John Barceló-Faculty Profiles*, CORNELL UNIV. LAW SCH., http://www.lawschool.cornell.edu/faculty/bio.cfm?id=3 (last visited Nov. 15, 2011).

[64] Deceased professor at Harvard University. *See* Wolfgang Saxon, *Arthur T. von Mehren, 83, Scholar of International Law, is Dead*, N.Y. TIMES, Jan. 29, 2006, http://www.nytimes.com/2006/01/29/national/29mehren.html; *see also Arthur von Mehren-Faculty Memorials*, HARVARD LAW SCH., *available at* http://www.law.harvard.edu/memorials/faculty/vonmehren (last visited Nov. 15, 2011).

[65] VÁRADY ET AL., *supra* note 3, at 265.

[66] *Id.*

[67] *Id.* at 265–66.

[68] *See* REDFERN & HUNTER, *supra* note 4, at 202–4.

party's perception of bias, it thus follows suit that a foreigner walking into a national court might likewise believe that other side might be favored.[69]

By contracting out of the courts of any particular nation, the parties have also ensured that this additional neutrality exists.[70] As one commentator has noted, the '[l]aw is not an impersonal and scientific matter and the litigation planner will expect differences in sympathies."[71] Moreover, different courts may have different standards for what neutrality is.[72]

Neutrality in tax arbitration disputes may be of special importance. In contrast to most purely commercial disputes, resolving the matter in a chosen forum results in resolving the matter before an interested party.[73] Each government has its own policy and political concerns to look after and may have concerns about setting precedent that overrides neutral consideration of the facts of any individual case. Switching forum does not solve the problem, as simply substituting one state's interests for another's interests does nothing to resolve the issue. Only by contracting out of the national courts can both parties truly be heard before a disinterested tribunal.

2. EFFICIENCY COST & TIME

In many cases, arbitration truly is a more time efficient method of dispute resolution than litigation, avoiding the delays that have become inherent in going to court.[74] The limited discovery period and the lack of appeals combine to move disputes through arbitration faster than the same disputes could move through the courts.[75] Protracted legal battles are commonly associated with huge legal bills, and with good reason; conversely, the speediness of arbitration leads to the impression that it must be cost-efficient as well. This is often a false impression.[76]

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[69] *See* PARK, *supra* note 57, at 423.

[70] *See id.* at 424.

[71] DETLEV F. VAGTS, WILLIAM S. DODGE & HAROLD HONGJU KOH, TRANSNATIONAL BUSINESS PROBLEMS 33 (3d ed. 2003).

[72] *Id.*

[73] *See* PARK, *supra* note 57, at 609.

[74] Brener v. Becker Paribas, Inc., 628 F. Supp. 442, 448 (S.D.N.Y. 1985).

[75] *See* REDFERN & HUNTER, *supra* note 4, at 24; *see also* HEARD, WALKER, & COOLEY, *supra* note 8, at 16, 115–122.

[76] *Id.*

Fifty-one percent of those surveyed by Bühring-Uhle felt that arbitration offered no cost advantages, while a further eight percent felt than any such advantages were unimportant.[77] Unlike litigation, parties must pay the expenses of the arbitrators.[78] Parties also must pay the arbitrators' fees as well as the fees of administrators and arbitral institutions.[79] Finally, whereas in litigation parties are able to use public facilities of the court for meeting and hearings, parties must cover the costs of finding and renting rooms for these things in arbitration.[80] In some cases, this overhead may be more costly than any time saved thereby.

All these overhead costs do not take into account that parties will generally still also have to pay the fees of their own attorneys, since at this level few chose to enter into arbitration without counsel. The costs to retain high quality counsel and to have that counsel develop the best possible case is not intuitively much different than it would be in litigation, unless there were a special case where the discovery in litigation would be unusually costly.[81]

One cost and efficacy advantage that should not be overlooked is that, in arbitration, one need not pay for counsel to learn all the procedural rules of another country or resort to a second set of lawyers more familiar with another country's laws.[82]

In the context of international tax treaties, there seems to be little likelihood that expediency will be a major benefit to arbitration. In almost all cases, arbitration for disagreements under tax treaties can only take place after a period of negotiation fails (usually a minimum of two years), ensuring that speedy resolution cannot happen.

3. CONFIDENTIALITY

Unlike court proceedings, arbitration is confidential. While the public and the press are generally present and in some cases entitled to be at a court proceeding, no such right exists in arbitration.[83]

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[77] Bühring-Uhle, *supra* note 58, at 20.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *See generally*, PARK, *supra* note 57, at 45–65 (discussing arbitral procedure and the issues regarding the emergence of "soft law" and problems regarding efficiency.)

[82] *See generally* VAGTS ET AL., *supra* note 71, at 33, 41.

[83] REDFERN & HUNTER, *supra* note 4, at 27.

Confidentiality has always been a hallmark of arbitration and one of arbitration's main appeals.[84] Confidential proceedings allow protection of trade secrets and proprietary information without sacrificing the ability to present one's case fully and completely.[85] It can also be a means of keeping a company's persistent misbehavior out of the public eye by dealing with multiple infractions or malfeasance in separate, confidential proceedings.

In the context of a tax dispute, or any dispute with a state/public entity, this confidentiality draws critics.[86] For example, because third parties are affected in investment arbitrations, the confidential nature of those disputes is often raised as a concern.[87] For this reason, in investment disputes, a *public interest exception* is raised from time to time to allow outside parties to intervene.[88] Alan Redfern and Martin Hunter have noted that when public interest is concerned, there has been a noted erosion of strict confidentiality.[89] In two North American Free Trade Agreement ("NAFTA") arbitrations, arbitral panels accepted amicus briefs from non-parties but denied them full access to the hearing.[90]

Additionally, Swiss scholars Jean-François Poudret and Sébastien Besson point out that confidentiality "implies a restriction to freedom of expression," and note that the confidentiality should be traced back to the parties' agreement to undergo arbitration.[91]

As with confidentiality itself, the lack of precedent that effectively flows therefrom has both benefits and liabilities in the realm of tax arbitration. As noted earlier, states may have interests beyond neutral enforcement of law and treaty, especially with regard to creating precedent that might prevent them from neutrally adjudicating an international tax issue in court.[92] Arbitration both creates the necessary neutrality and removes the threat of a potentially costly or far-reaching

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[84] *Id.*

[85] *Id.*

[86] *See* REDFERN & HUNTER, *supra* note 4, at 32–33, 35; *but see* POUDRET & BESSON, *supra* note 7, at 7–8.

[87] *See* REDFERN & HUNTER, *supra* note 4, at 32–33, 35; *See* POUDRET & BESSON, *supra* note 7, at 316.

[88] *See* POUDRET & BESSON, *supra* note 7, at 316.

[89] REDFERN & HUNTER, *supra* note 4, at 32.

[90] *See* POUDRET & BESSON, *supra* note 7, at 316.

[91] *Id.* at 316–17.

[92] *See* PARK, *supra* note 57, at 609.

precedent arising out of a court case.[93] The downside is that the lack of precedent prevents the creation of settled law that might be sufficiently clear to avoid future disputes altogether.[94] For this reason, it has been suggested that in the context of tax arbitration, confidentiality should simply not exist.[95]

4. TREATIES AND ENFORCEABILITY

Though arbitration is an alternative to a court, it is nonetheless dependent on the courts.[96] In contrast to negotiated settlements or mediation, arbitration awards can be legally enforced by a court of law, inexorably binding the two systems.[97]

Treaties, more so than the reputation of any arbitral institution, ensure that arbitration ultimately will be enforced.[98] The decision of an arbitral tribunal is international in its enforceability, while the decision from a court of law may not be internationally enforceable.[99] The reason behind this is that international treaties govern the enforcement of arbitral awards, the standards for which are not subject to the fiat of a national government.[100] Generally these multinational arbitration treaties have a much greater acceptance than treaties for the reciprocal enforcement of court judgments.[101]

C. ARBITRATION AND TAXATION

In recent years, there has been much discussion on how best to resolve disputes between nation states when issues such as double taxation arise. Arbitration has been suggested as a possible method of resolving these double taxation issues.[102] Arguably when two countries sign a tax treaty, they both share similar fiscal objectives. Yet in practice, these two countries might arrive at radically different functional

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[93] *See supra* Table 1.

[94] *See* LINDENCRONA & MATTSSON, *supra* note 1, at 34.

[95] *Id.*

[96] VÁRADY ET AL., *supra* note 3, at 58.

[97] *See id.*

[98] *See* VAGTS ET AL., *supra* note 71, at 31.

[99] REDFERN & HUNTER, *supra* note 4, at 23.

[100] *Id.*

[101] *Id.* (noting that currently there is only one multilateral treaty on the recognition and enforcement of court judgments and widespread acceptance of this is still a long way off).

[102] *See* ZÜGER, *supra* note 1, at 3.

interpretations when they apply the treaty language.[103] As scholar Mario Züger has pointed the simple fact that different parties are independently responsible for the enforcement of tax treaties makes conflicts inevitable.[104] The tax authorities or national courts are thus given the task of sorting out the issues; and these proceedings lack political neutrality and yield conflicting results.[105]

The general disagreement usually involves the issues of double taxation, wherein a taxpayer, be it a multinational corporation or citizen, is taxed by two different jurisdictions and is forced to pay twice.[106] This double taxation can burden the taxpayer to the point that it destroys the benefits of engaging in cross-border activity.[107] Traditionally, when this sort of international tax dispute arises, the tax authorities of both nations meet in a mutual agreement procedure (MAP) - a negotiation that has been authorized by a tax treaty between the two nations.[108] MAP is the main way that most international tax disputes are resolved.[109] However, since there is no guarantee of resolution, it is possible that the MAP will produce no resolution at all. Even when there is resolution, institution of a MAP can take years to resolve an issue completely, while the dispute can become more entrenched and complicated as time passes.[110]

Because of the shortcomings of MAP, arbitration has been suggested as one way that the MAP can be improved.[111] While the MAP would still exist, once the negations have broken down, either the taxpaying entity or the national governments would have the option of forcing all parties into arbitration. Though arbitration has significant advantages over litigation, there is still much debate about whether arbitration is an appropriate mechanism for settling tax disputes.

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[103] *Id.*

[104] *Id.*

[105] PARK, *supra* note 57, at 609.

[106] ALLISON CHRISTIANS, SAMUEL A. DONALDSON & PHILIP F. POSTLEWAITE, UNITED STATES INTERNATIONAL TAXATION 61 (2008) ("Individuals and corporations are commonly subject to double taxation due to the overlap of source and residence: both the jurisdiction in which income is generated (the country of source) and the jurisdiction in which the income earner is resident or organized as a matter of law (the country of residence) claim jurisdiction to tax).

[107] *Id.* at 61–62.

[108] Chloe Burnett, *International Tax Arbitration*, SYDNEY LAW SCH. RESEARCH PAPER NO. 08/31, at 174, *available at* http://ssrn.com/abstract=1120122.

[109] *Id.*

[110] *Id.* at 178.

[111] *See* LINDENCRONA & MATTSSON, *supra* note 1, at 16-18.

When scholars discuss whether a tax dispute should be determined by arbitration, they often do so by using the word 'arbitrable.' A dispute is arbitrable if it meets two criteria: 1) the parties must be on a footing relative to each other and to the arbitration tribunal such that the tribunal can make a reasonably enforceable award,[112] and 2) the subject matter of the dispute must be conducive to arbitration.[113] With regard to the first issue, the fact that both countries have signed the tax agreement should be enough to assure any tribunal that its award will ultimately be enforceable. Though either country might ultimately refuse to enforce an award, the tax treaty should force compliance. The second criteria remains an issue of scholarly debate for issues that will be outlined below.

Though arbitration is very time efficient, part of the reason for that time efficiency is that arbitration streamlines and limits procedural elements such as discovery.[114] Arbitration sacrifices fairness for efficiency compared with traditional American court proceedings.[115] In a tax dispute, the question becomes: should a process that sacrifices some due process to procedural efficiency be used to resolve issues that are often among the most complex of all civil disputes? As the complexity of a dispute increases, so to does the possibility of a miscarriage of justice if both the parties and the arbitral tribunal do not have adequate time to work through all of the relevant issues. Thus, the question arises can a tax dispute be an arbitrable issue, if fairness must be sacrificed?

Another issue that could render tax disputes not arbitrable is arbitral error. One of the ways the above-noted administrative efficiency is achieved is through elimination of the appeals process.[116] In undertaking arbitration, both parties agree to forgo certain judicial processes, such as discovery and appeal (including the appeal of error), as a matter of informed self-interest. [117] A taxpayer who is bound to similar conditions without consent has simply had his or her access to those judicial rights curtailed by administrative fiat. Moreover, in the event that a nation state is unwilling to accept the error, the taxpayer is left in an awkward position.

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[112] FOUCHARD ET AL., *supra* note 10, at 312–13.

[113] POUDRET & BESSON, *supra* note 7, at 282.

[114] *See, e.g.*, IBA Rules on the Taking of Evidence in International Arbitration, art. 3, May 29, 2010. These rules propagated by the International Bar Association try to limit the discovery process.

[115] PARK, *supra* note 57, at 48.

[116] *See* REDFERN & HUNTER, *supra* note 4, at 24.

[117] PARK, *supra* note 57, at 71.

A third issue that arises in considering if tax is arbitrable is sovereignty. Many nations treat taxation as a sovereign right, one with which no other entity should interfere.[118] The concern about a country giving up its sovereignty is a strong objection to the use of arbitration in international tax disputes. As American Supreme Court Chief Justice John Marshall wrote, "the power to tax involves the power to destroy."[119] Some American legal scholars see tax as a confiscation, since the transfer of wealth occurs involuntarily.[120] In this context the fear and suspicion with which tax is treated suggests that Americans are uncomfortable with their own government's power to tax, let alone their government ceding authority in this realm to a person who is not an American citizen and might not even have a background in American law. This discomfort could rise to the level of an American court could being unwilling to enforce tax arbitration.

While sovereignty concerns are important and could cause a legal quagmire in the American courts, in our increasingly global world, unfettered sovereignty is disappearing. As John Young pointed out in his introduction to *Arbitration in Taxation*, "the walls of sovereignty have long since been breached."[121] Each time one country agrees not to act a particular way, that country begins a process wherein it gives up some of its free will in order to attain something more important. The simple fact is that by accepting MAPs and treaties that limit the ability of tax, sovereignty has indeed been diminished.[122] Nations coming to the realization that sovereignty has its practical limits is not, perhaps, a bad thing.

Entering into an arbitration to settle an issue of double taxation does not equate to relinquishing abilities to tax, just the manner of settling one tax dispute under one treaty with one other country. If confidentiality were to be maintained for the arbitration, then the decision reached by that panel would not even have value as precedent.[123]

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[118] *See* John H. Young, *Introduction*, *in* LINDENCRONA & MATTSSON, *supra* note 1, at 7.

[119] *See* McCulloch v. Maryland, 17 U.S. 316, 327 (1819).

[120] William W. Park, *Arbitrability and Tax*, *in* ARBITRABILITY IN INTERNATIONAL ARBITRATION 184–85 (L. Mistelis & S. Brekoulakis, eds., 2008).

[121] Young, *supra* note 118, at 7.

[122] *See id.*

[123] Arbitration does not create binding precedent, however, the fact that one panel determined an outcome a particular way could have persuasive authority. If the proceedings were completely confidential this persuasive authority would not exist.

Furthermore, the amount a country receives from one taxpayer is unlikely to affect the greater functions of that nation.[124]

Though arbitration has proven effective in a number of investment treaties that involve nation states and private investors,[125] it does not automatically follow that arbitration will prove to be a useful tool for settling tax disputes. Because arbitration is private and confidential, arbitral decisions generally lack precedential value.[126] However, though arbitration is generally a private and confidential process does not mean that it must remain so. In the case of an arbitration dealing with an international tax dispute, it is entirely appropriate for a treaty including an arbitration clause to stipulate that the arbitration will not remain confidential.[127] It is important to note that the Model Tax Convention that will be discussed in the next section does not include the stipulation that the decision be confidential.[128] However, all of the ratified treaties examined in this paper explicitly require confidentiality.[129]

Though the advantages and disadvantages of arbitration in tax have not been settled, the United States and other countries are currently using arbitration in their tax treaties.[130]

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[124] PARK, *supra* note 57, at 612.

[125] *See* ZÜGER, *supra* note 1, at 7–8 (2001) (discussing the ICSID Convention and the treaties for protecting foreign investment); *Id.* at 25 (discussing the WTO dispute settlement system which also involves arbitration, however, it is important to note that the arbitral panels lack jurisdiction over tax issues); *see also* WILLIAM W. PARK & DAVID R. TILLINGHAST, INCOME TAX TREATY ARBITRATION 12–14 (2004) (discussing NAFTA and the investment arbitration available for foreign investors).

[126] *See* LINDENCRONA & MATTSSON, *supra* note 1, at 34.

[127] *See id.*

[128] *See generally* OECD Articles of the Model Convention with Respect to Taxes on Income and on Capital, *infra* note 159.

[129] *See* Michael J. McIntyre, *Comments on the OECD For Secret and Mandatory Arbitration of International Tax Disputes*, 7 FLA. TAX. REV. 622, 635 (2006).

[130] *See generally, e.g.,* Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, *infra* note 181; Convention Between the United States of American and The Federal Republic of Germany For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, *infra* note 188; Convention Between the Government of the United States of America and the Government of the Kingdom of Belgium, *infra* note 191.

II. ORGANIZATION FOR ECONOMIC AND CO-OPERATION DEVELOPMENT (OECD)

This section gives a brief overview of the OECD and looks at the OECD Model Tax Convention. Subsection A discusses the OECD's history and membership rules, while subsection B discusses the Model Tax Convention.

A. HISTORY AND MEMBERSHIP

The current OECD grew out of the Organization for European Economic Co-Operation (OEEC), an organization created for the express purpose of administering Canadian and American aid under the Marshall Plan after World War II.[131] In 1961, Convention on the Organization for the Economic and Co-Operation Development transformed the OEEC into the OECD.[132] The Purpose of this new organization, according to article 1 of the Convention is:

> (a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
>
> (b) to contribute sound economic expansion in Member as well as non-member countries in the process of economic development; and
>
> (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.[133]

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[131] *History of OECD*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36761863_1_1_1_1_1,00.html (last visied Nov. 15, 2011).

[132] *Id.*

[133] *Convention on the Organization for Economic Co-Operation and Development*, OECD, http://www.oecd.org/document/7/0,3343,en_2649_201185_1915847_1_1_1_1,00.html (last visited Nov. 15, 2011).

At the time of the Convention, the members of the OECD included twenty countries, some outside of Europe.[134] The OECD has since grown to thirty countries,[135] and in May 2007, the OECD member countries invited five more countries to discuss membership and offered "enhanced engagement, with a view to possible membership" to five more countries.[136]

The OECD is unlike other international organizations because membership is by invitation only.[137] The process of joining the OECD involves all three branches of the OECD: the Council, the Committees, and the Secretariat.[138] The OECD Council oversees the organization and makes strategic decisions.[139] The OECD has about 250 Committees specializing in all the areas that the OECD is involved. These Committees research, discussion, and suggest implementation plans.[140] The Committees work closely with the Secretariat branch of the OECD.[141] The Secretariat, along with the Secretary-General and Deputy Secretaries-General, help to support the activities of the Committees and carry out the work of the Council.[142] This branch analyzes the

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[134] The following countries were part of the original Convention: the Republic of Austria, the Kingdom of Belgium, Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of Greece, the Republic of Iceland, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Kingdom of Norway, the Portuguese Republic, Spain, the Kingdom of Sweden, the Swiss Confederation, the Turkish Republic, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. *Id.*

[135] *Members and Partners*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html (Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States comprise the current members of the OECD) (last visited Nov. 15, 2011).

[136] *Id.* The five countries the OECD agreed to allow open discussions with were Chile, Estonia, Israel, Russia, and Slovenia. *Id.* The five countries offered 'enhanced engagement' were Brazil, China, India, Indonesia, and South Africa. *Id.*

[137] *Becoming a Member of the OECD: The Accession Process*, OECD, http://www.oecd.org/document/11/0,3343,en_2649_34489_1958091_1_1_1_1,00.html (last visited Nov 28, 2011).

[138] *OECD Enlargement*, OECD, http://www.oecd.org/document/42/0,3746,en_2649_201185_38598698_1_1_1_1,00.html.

[139] *Who Does What*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1_1,00.html.

[140] *Id.*

[141] *Id.*

[142] *Id.*

information produced by the Committees and makes proposals to the Council.[143]

1. THE MEMBERSHIP PROCESS

The invitation process only comes *after* member countries meet in the OECD council to determine if a country should be invited to join the OECD and what the terms and conditions of joining the OECD should be.[144] The decision making body of the OECD, the OECD Council, determines if the organization should invite a country to engage in discussion about joining the OECD.[145] The Council is composed of one representative of each member country in addition to a representative from the European Commission.[146] If the majority of the OECD Council agrees that a particular country would be appropriate, it then determines which of OECD's many Committees would be appropriate to examine the particular country's policies and regulations to ensure that the country is truly ready to become part of the OECD.[147]

In order to become part of the OECD, a country must demonstrate that it shares the same values as the OECD membership, specifically, an open market economy, democratic pluralism, and respect for human rights.[148] Though there are many Committees that are involved in this evaluation, the Investment Committee examines how the country would implement the OECD's Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisible Operations. These two codes are treated as legally binding on all Member countries, and they are used to determine whether a particular country is ready to join the OECD.[149]

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[143] *Id.*

[144] *Becoming a Member of the OECD: the Accession Process*, *supra* note 137.

[145] *Id.*

[146] *Who Does What*, *supra* note 139.

[147] *OECD Enlargement*, *supra* note 138.

[148] *Id.*; It is interesting to note these standards of the OECD and compare the fact that Spain under the Franco dictatorship was a founding member of the OECD, and the Franco government was not democratic or known for its respect of human rights. *See* WILLIAM L. LANGER, AN ENCYCLOPEDIA OF WORLD HISTORY 993–995 (2001). Nick Caistor, *Spanish Civil War Fighters Look Back*, BBC ONLINE, Feb. 28, 2003, http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/2809025.stm.

[149] *A General Procedure for Future Accessions*, OECD, *available at* http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=C(2007)31/Final&doclanguage=en; *OECD Investment Committee*, OECD, http://www.oecd.org/document/24/0,3746,en_2649_34863_2373464_1_1_1_1,00.html; OECD,

Together with the Secretariat, whose job is to analyze and make proposals, the Committees present recommendations to the Council. In the event that the Council determines that the necessary criteria are met, the Council will invite the country to accede to the Convention.[150]

After the country has acceded to the Convention, it is then understood that additional time will be required in order for the country's parliament to approve the Convention.[151] Though the amount of time required to become part of the OECD is not mentioned on the OECD's website, a process this intricate takes years.[152] Additionally, though the invitation process protects the OECD Codes, this also means that the OECD is not an open market of ideas proposing what is best for all countries, but rather for the countries that are OECD members.[153]

B. OECD MODEL TAX CONVENTION ON INCOME AND ON CAPITAL

In recent years, tax policy initiatives have come from nongovernmental organizations, like the OECD, rather than from sovereign states themselves.[154] Although nations are still entitled to self-determination of regulatory matters, like taxation, this self-determination conflicts with the efficient function of international economic activity.[155]

FORTY YEARS' EXPERIENCE WITH THE OECD CODE OF LIBERALISATION OF CAPITAL MOVEMENTS 25, 58 (2002), *available at* http://www.oecd.org/dataoecd/7/16/44784048.pdf; *The Experience of the OECD with the OECD Code of Liberalisation of Capital Movements*, OECD, http://www.oecd.org/document/10/0,3746,en_2649_34887_1933130_1_1_1_1,00.html.

150 *A General Procedure for Future Accessions*, *supra* note 150.

151 *Id.*

152 According to the OECD's website, "[t]he accession procedure is complex and can be long," and therefore reaches out to potential members with significant care. It further notes that its desire to enlarge does not happen quickly. Although it does not explicitly state how long the accession process takes, one can assume that it takes at least a year, if not more. *See OECD Enlargement*, s*upra* note 138,

153 The criticism of the process to the becoming a member of the OECD and the fact that that a country must be invited to become part of the OECD is beyond the scope of this paper. However, the author would like to point out that there is significant room for favoritism in the current system. Though the system does protect the Codes of the OECD, the other side of the equation is that OECD remains an exclusive club. This exclusivity is a potential weakness to any idea that the OECD brings forth, since the writings are likely to favor those within the OECD. *See* Allison Christians, *Sovereignty, Taxation, and Social Contract*, 18 MINN. J. INT'L L. 99 (2009) ("Because of the economic power of the thirty member countries of [the OECD], the simple answer may be that the recommendations are not voluntary at all but really demands backed by significant coercive capabilities."); *Id.* at 117–18; Arthur J. Cockfield, *The Rise of the OECD as Informal "World Tax Organization" Through National Responses to E-Commerce Tax Challenges*, 8 YALE J. L. & TECH. 136 (2006).

154 Christians, *supra* note 153, at 99.

155 *Id.* at 101.

Therefore, the fact that the OECD, or organizations like the OECD, is able to suggest solutions to tax issues makes a type of intuitive sense. The OECD is a non-governmental organization; hence, its suggestions in no way mandate the behaviors of any particular country. It simply does not have the power to require any of its member countries to comply with its proposals. At the same time, because of the importance of its member countries, and of the organization, it is able to command the attention of its members and other countries.[156]

The OECD has been influential in discussing how countries should resolve issues of double taxation.[157] For years it put forth a Model Tax Convention containing its ideal of a bilateral tax treaty.[158] The current Model Convention with Respect to Taxes on Income and Capital includes a MAP as detailed in article 25, it reads as follows:

> 1) Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.
>
> 2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be

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[156] *See* LINDENCRONA & MATTSSON, *supra* note 1, at 16.

[157] *See id.*

[158] *See Model Tax Convention on Income and on Capital – An Overview of Available Products*, OECD, http://www.oecd.org/document/37/0,3746,en_2649_33747_1913957_1_1_1_1,00.html.

implemented notwithstanding any time limits in the domestic law of the Contracting States.

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

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

5) Where,

> a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and
>
> b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented

> notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.[159]

In the previous version of the Model Convention with Respect to Taxes on Income and Capital (Model Convention), paragraph 5 was missing entirely.[160] Paragraphs one through four, however, were identical to the newest version of the Model Convention.[161] Arbitration as a method for resolving tax disputes was not mentioned anywhere in the main article; however, it was mentioned in the commentary.[162] Near the end of the commentary on Article 25, it is mentioned that arbitration could be another solution to the problem of double taxation, and that there were bilateral agreements that allowed for the option of arbitration.[163] Including arbitration in Article 25 appears to be first proposed by the Committee on Fiscal Affairs in 2007,[164] though it is likely that it had been discussed and considered prior to the formal suggestion that arbitration be added to the Model Convention.

Although the most recent Model Convention includes binding arbitration, it does so with significant caution. As paragraph 5 appears in the Model Convention, it includes a footnote that mentions that many countries might not be in full agreement as to whether arbitration is an appropriate method of resolving a tax dispute.[165] The note also mentions that paragraph 5 should only be included in treaties where both countries feel that it is appropriate.[166] Since the Model Convention is only a model, the fact that the drafters go to such lengths to point out the optional

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[159] OECD Articles of the Model Convention with Respect to Taxes on Income and on Capital, July 17, 2008, *available at* http://www.oecd.org/dataoecd/43/57/42219418.pdf.

[160] *See* OECD Articles of the Model Convention with Respect to Taxes on Income and on Capital art. 25, July 15, 2005, *available at* http://www.oecd.org/dataoecd/50/49/35363840.pdf.

[161] *Id. Compare with* OECD Articles of the Model Convention with Respect to Taxes on Income and on Capital, *supra* note 159, art. 25.

[162] *Commentary on Article 25*, OECD, at 311 ¶ 48, *available at* http://www.oecd.org/dataoecd/52/25/36221048.pdf.

[163] *Id.*

[164] OECD Committee on Fiscal Affairs, *Improving the Resolution of Tax Treaty Disputes* (Feb. 2007), *available at* http://www.oecd.org/dataoecd/17/59/38055311.pdf.

[165] OECD Articles of the Model Convention with Respect to Taxes on Income and on Capital, *supra* note 159, art. 25, ¶ 5.

[166] *Id.*

nature of paragraph 5 underscores the unsettled position of arbitration in tax matters.[167]

Though arbitration is included in the newest Model Convention, it appears as a last resort. It is important to note that arbitration will not be instituted until the competent authorities have been approached, and they have failed to reach an agreement.[168] Looking at Article 25(5) and the proposed commentary, the competent authorities are not given the option of arbitration; rather they must enter arbitration in the event that a mutually agreeable decision has not been rendered.[169] Additionally, though the taxpayer has the power to institute the arbitration, this power is available only in the event that the competent authorities have reached no decision.[170]

In this context, arbitration appears to serve primarily as a mechanism to force the competent authorities to submit a fair and reasonable solution within a fixed period.[171]

III. UNITED STATES TAX TREATIES CONTAINING MANDATORY ARBITRATION

The interest in mandatory arbitration in tax treaties has not been confined to nongovernmental organizations like the OECD. [172] Mandatory arbitration does not exist in the US Model Tax Treaty; however, in all three recent tax treaties to which the US is signatory, mandatory arbitration will occur in the event that the competent authorities from either country are unable to come to an agreement.[173] The three countries whose treaties include mandatory arbitration are Canada,

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[167] *Improving the Resolution of Tax Treaty Disputes*, *supra* note 164, ¶ 65 ("The arbitration decision is only binding with respect to the specific issues submitted to arbitration. Whilst nothing would prevent the competent authorities from solving other similar cases . . . each State therefore has the right to adopt a different approach to deal with these other cases.")

[168] OECD Articles of the Model Convention with Respect to Taxes on Income and on Capital, *supra* note 160, art. 25, ¶ 5.

[169] *Id.*; *Improving the Resolution of Tax Treaty Disputes*, *supra* note 164, ¶ 65.

[170] OECD Articles of the Model Convention with Respect to Taxes on Income and on Capital, *supra* note 159, art. 25, ¶ 5.

[171] PARK, *supra* note 57, at 610 ("[T]he prospect of arbitration would serve to focus the minds of the administrative authorities on finding a sensible solution, for fear of seeing the matter taken out of their hands altogether for decision by a neutral tribunal.")

[172] *See generally* United States Model Tax Convention of November 15, 2006, *available at* http://www.irs.gov/pub/irs-trty/model006.pdf.

[173] *Mandatory Binding Arbitration*, INTERNAL REVENUE SERV., http://www.irs.gov/businesses/international/article/0,,id=201209,00.html.

Germany, and Belgium.[174] All three countries are members of the OECD, as is the US.[175]

A. CANADA

The Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital entered into force in 1980 and had no arbitration provisions.[176] The treaty has been updated a total of five times since 1980, and the most recent revision added mandatory arbitration to the treaty.[177] The Internal Revenue Service (IRS) Bulletin explains that the purpose of this new treaty is to establish principles and goals by which tax disagreements can be resolved.[178] If the competent authorities cannot reach an agreement as to the facts after six months of negotiations, then the competent authorities are to turn to a joint panel of tax administration officials whose opinion as to the facts of the case shall be binding.[179]

The agreement was signed on September 21, 2007, and entered into force on December 15, 2008.[180] Thus, it was written and signed prior to the promulgation of the OECD's 2008 Model Convention. Despite this fact, the provisions dealing with arbitration in the two documents are quite similar. Like the OECD Model Convention, in the US-Canada treaty, once the competent authorities have been working, "but are unable to reach a complete agreement . . . the case shall be resolved through arbitration."[181] Additionally, both share the same time limits of giving the competent authorities two years to reach an agreement, although the US-Canada treaty allows for the two year period to be extended in the event that both authorities do not agree to the

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[174] *Id.*

[175] *Compare with List of OECD Member Countries*, OECD, http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_1,00.html.

[176] *See generally* Protocol Amending the Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., Sept. 26, 1980.

[177] *See generally* Protocol Amending the Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital, *infra* note 181.

[178] INTERNAL REVENUE SERV., BULL. NO. 2005-28, Announcement 2005-47, at 71 (July 11, 2005). *See generally* Protocol Amending the Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital, *infra* note 181.

[179] INTERNAL REVENUE SERV., *supra* note 178.

[180] *See generally* Protocol Amending the Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital, *infra* note 181.

[181] Protocol Amending the Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., art. 21, ¶ 6, Sept. 21, 2007.

arbitration.[182] Finally, just as the OECD Model Convention approves of arbitration that is confidential and binding, one of the stipulations for entering into arbitration under the US-Canada treaty is for the parties to agree in advance that the arbitration will be confidential.[183]

The actual treaty between the US and Canada makes it slightly more difficult for a case to enter into arbitration, whereas the Model Convention only requires that the taxation not be in accordance with the convention and the competent authorities have already received to two years to resolve the despite, the US-Canada treaty requires more. Paragraph 6 of Article 21 reads as follows:

> 6) Where, pursuant to a mutual agreement procedure under this Article, the competent authorities have endeavored but are unable to reach a complete agreement in a case, the case shall be resolved through arbitration conduced in the manner prescribed by, and subject to, the requirements of paragraph 7 and any rules or procedures agreed upon by the Contracting States by notes to be exchanged through diplomatic channels, it:
>
> > (a) Tax returns have been filed with at least one of the Contracting States with respect to the taxable years at issue in the case;
> >
> > (b) The case:
> >
> > > (i) Is a case that:
> > >
> > > > (A) Involves the application of one or more Articles that the competent authorities have agreed in an exchange of notes

[182] *Id.* art. 21, ¶ 7(c) ("Arbitration proceedings in a case shall begin on the later of; (i) Two years after the commencement date of that case, unless both competent authorities have previously agreed to a different date; and (ii) The earliest date upon which the agreement required by subparagraph (d) has been received by both competent authorities.").

[183] *Id.* art. 21, ¶ 7(d) ("The concerned person(s), and their authorized representatives or agents, must agree prior to the beginning of arbitration proceedings not to disclose to any other person any information received during the course of the arbitration proceeding from either Contracting State or the arbitration board, other than the determination of such board. . . .").

> shall be the subject of arbitration; and
>
> (B) Is not a particular case that the competent authorities agree, before the date on which arbitration proceedings would otherwise have begun, is not suitable for determination by arbitration; or
>
> (ii) Is a particular case that the competent authorities agree is suitable for determination by arbitration; or
>
> (c) All concerned persons agree according to the provisions of subparagraph 7(d).[184]

Thus, during the dispute, the competent authorities are able to determine for themselves if arbitration is even appropriate before arbitration can proceed. Additionally, in order to undergo arbitration, all parties must agree for the arbitration to be confidential.[185] This not only means that the records of the taxpayer will remain private but also likely means the decision will not be precedent for future issues that arise.[186]

B. GERMANY

As of 1991, the US Treaty with the Federal Republic of Germany included an arbitration clause in the mutual agreement procedure. It read:

> Disagreements between the Contracting States regarding the interpretation or application of this Convention shall, as far as possible, be settled by the competent authorities. If a disagreement cannot be resolved by the

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[184] Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, *supra* note 181.

[185] *See id.*

[186] *Id.* art. 21, ¶ 7(d).

> competent authorities it may, if both competent authorities agree, be submitted for arbitration. The procedures shall be agreed upon and shall be established between the Contracting States by notes to be exchanged through diplomatic channels.[187]

Unlike the arbitration agreement in the US-Canada Treaty, or the amended US-Germany treaty, the competent authorities only have the option to utilize arbitration. Arbitration is not an ultimatum in the event that no agreement can be reached. Likewise, there is no time limit for the competent authorities to conclude a mutually acceptable agreement. While this earlier version of the US-Germany treaty suggests that both countries see arbitration as a mechanism that may be helpful as a means of resolving a tax dispute, the countries do not embrace the idea of an independent panel with binding authority determining how their tax dispute will ultimately be enforced.

In the most recent version of the US-Germany treaty, paragraph 5 of Article 25 (Mutual Agreement Procedure) has changed so that the arbitration is not voluntary. Paragraph 5 now reads:

> Where, pursuant to a mutual agreement procedure under this Article, the competent authorities have endeavored but are unable to reach a complete agreement in a case, the case shall be resolved through arbitration conducted in the manner prescribed by, and subject to, the requirements of paragraph 6 and any rules of procedures agreed upon by the Contracting States, if:
>
> a) tax returns have been filed with at least one of the Contracting states with respect to the taxable years at issue in the case;
>
> b) the case
>
> aa) is a case that

[187] Convention Between the United States of America and The Federal Republic of Germany For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, U.S.-Ger., art. 25, ¶ 5, Jan. 1, 1991.

> A) involves the application of one or more Articles that the Contracting States have agreed shall be the subject of arbitration, and
>
> B) is not a particular case that the competent authorities agree, before the date on which arbitration proceedings would otherwise have begun, is not suitable for determination by arbitration, or
>
> bb) is a particular case that the competent authorities agree is suitable for determination by arbitration; and
>
> c) all concerned persons agree according to the provisions of subparagraph d) of paragraph 6.[188]

Thus, rather than allowing the competent authorities to enter into arbitration, like the OECD Model Convention and the US-Canada Treaty arbitration provision, the competent authorities are required to enter into arbitration in the event that the competent authorities have not agreed upon a solution.

Though paragraph 5 does not contain a time limit, it is included in paragraph 6(c). In language almost identical to the US-Canada Treaty it reads:

> Arbitration proceedings in a case shall begin the later of:
>
> aa) Two years after the commencement date of that case, unless both competent authorities have previously agreed to a different date, and

[188] Protocol Amending the Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain other Taxes, U.S.-Ger., art. 25, ¶ 5, June 1, 2006.

> bb) The earliest date upon which the agreement required by subparagraph d) has been received by both competent authorities[189]

Thus, the competent authorities are given two years to resolve the tax dispute. In the event that the tax dispute has not been resolved, then the arbitration procedures begin. As with the US-Canada Treaty, all parties are required to keep the proceedings of the arbitration confidential.[190]

C. BELGIUM

The final treaty this paper examines is the recently signed Tax Convention between the US and the Kingdom of Belgium. The treaty negotiations concluded with a signature on November 27, 2006, and the Senate ratified the document on December 14, 2007.[191] The US-Belgium treaty now includes the following paragraph regarding the mutual agreement procedure between the two countries:

> Where, pursuant to a mutual agreement procedure under this Article, the competent authorities have endeavored but are unable to reach a compete agreement in a case, the case shall be resolved through arbitration conducted in the manner prescribed by, and subject to, the requirements of paragraph 9 and any rules or procedures upon by the Contracting States, if:
>
> a) tax returns have been filled with at least one of the Contracting States with respect to the taxable years at issue in the case;

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[189] *Id.* art. 25, ¶ 6.

[190] Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, *supra* note 181.

[191] Convention Between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.- Belg., Letter of Transmission, June 21, 2007; *See also Search Treaties*, THOMAS, http://thomas.loc.gov/home/treaties/treaties.html (search Treaty Number 110-3).

> b) the case is not a particular case that the competent authorities agree, before the date on which arbitration proceedings would otherwise have begun, is not suitable for determination by arbitration; and
>
> c) all concerned persons agree according to the provisions of subparagraph d) of paragraph 8.[192]

As in the other two treaties examined in this paper, the arbitration in this treaty is mandatory and binding. Moreover, the competent authorities have the ability to determine that the issues involved in the dispute are not arbitrable. Additionally, the aspect of confidentiality is part of the US-Belgium Convention as it is for the US-Canada and US-Germany Conventions.[193]

D. COMPARISON

In comparing these three treaties, certain similarities become clear. Specifically, all three have similar procedures, limit the scope of what will be arbitrable, define when arbitration will occur, and specify that the arbitration should be confidential and private.

None of the treaties specify a particular arbitral institution - all are ad hoc arbitrations. There is good reason ad hoc arbitration is the chosen method, since any choice of arbitral institution on the part of these governments would appear to unfairly advantage one arbitration institution over others. Therefore, even though the International Chamber of Commerce (ICC) in Paris has created its own institutional rules for settling an international tax disputes,[194] it remains to be seen if any country will chose to incorporate those rules into a tax treaty with the

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[192] *Id.* art. 24, ¶ 7.

[193] *See* Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, *supra* note 181, art. 21, ¶ 7(d); *see also* Convention Between the United States of American and The Federal Republic of Germany For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, *supra* note 188, art. 25, ¶ 6(d); *see also* Convention Between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, *supra* note 191, art. 24, ¶ 8(d).

[194] *Arbitration in International Tax Matters*, INT'L CHAMBER OF COMMERCE, http://www.iccwbo.org/policy/taxation/id501/index.html.

knowledge that this sort of favoritism might bode poorly for national policy.[195] Additionally, since tax arbitration is a new and developing field, the rules of arbitral institutions, which have traditionally focused on commercial arbitration, might not be appropriate for tax and dealing with nation states.

All three treaties involve ad hoc arbitrations, however, only the US-Germany treaty lays out a full set of procedural requirements that will be followed in the event that arbitration occurs.[196] In the IRS Bulletin announcing the US-Germany treaty, the Memorandum of Understanding Between the Competent Authorities of The Federal Republic of Germany and The United States of America (US-Germany MOU) is also published. In the US-Germany MOU, the basic guidelines for chair appointment, payment of board members, and terminating a proceeding appear. In contrast, the Memorandum of Understand Between the Competent Authorities of the United States and Canada Regarding the Mutual Agreement Procedure (US-Canada MOU) devotes only three paragraphs to the procedural issues.[197] The procedural section of the US-Canada MOU specifies that procedural delays will not be tolerated by either country, and that any administrator who is found to be delaying the process will be removed.[198] Not included in the US-Canada MOU are the processes for selecting chair, payment, and termination of a proceeding, suggesting that these issues have not be resolved and will be dealt with in negotiations to take place after the countries have realized the need to instigate an arbitration. Similarly, the US- Belgium treaty appears to be lacking since no memorandum of understanding was found.[199] In the event that the need for arbitration arises, it is highly likely that only the US-Germany arbitration would actually take place because it is the only treaty that contains a comprehensive set of arbitration procedures.

If the need for arbitration were to occur under any of the three treaties that have been discussed in this paper, prior to the arbitration

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[195] *Compare with* INTERNAL REVENUE SERV., BULL. NO. 2005-52, Announcement 2008-124, ("[T]he expenses of members of the arbitration board will be set in accordance with the International Centre for Settlement of Investment Disputes (ICSID) Schedule of Fess for arbitrators.").

[196] *Id.*

[197] INTERNAL REVENUE SERV., *supra* note 178.

[198] *Id.*

[199] This could be the result of a research gap, but this author was unable to locate any Memorandum of Understanding on the IRS website or in IRS bulletins.

even beginning, all three treaties allow the competent authorities to consider whether the dispute is even arbitrable.[200] Therefore, even though the treaties all contain a mandatory arbitration provision,[201] either side could sidestep the mandatory arbitration by declaring the issue not arbitrable.

As the three treaties currently read, the arbitration will only take place in the event that the competent authorities have been unable to reach mutual agreement for at least two years.[202] One of the key features of arbitration is its timeliness. Therefore, it should be unsurprising that the tax treaties are taking advantage of this streamlined procedure by utilizing it only for the disputes that are the most time consuming. In each treaty, the competent authorities are given two years to come to a mutually agreeable solution before arbitration will be implemented. As previously suggested, arbitration in this context is more of a threat than a reality. In his criticism of the OECD Model Convention, Professor Michael McIntyre suggests that the OECD proposal, which imposes an additional limit of six months for the arbitrators to decide a tax dispute, is unrealistic, especially after the matter has been disputed by the competent authorities for two years.[203] In civil litigation, one party may seek to extend the timeframe for litigation for a number of reasons; one of arbitration's advantages is that it forecloses such gaming of the system. However, when the parties to a dispute are sovereign nation states, it is

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[200] *See* Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, *supra* note 181, art. 21, ¶ 6(b)(i)(A); *see also* Convention Between the United States of American and The Federal Republic of Germany For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, *supra* note 188, art. 25, ¶ 5; *see also* Convention Between the Government of the United States of America and the Government of the Kingdom of Belgium, *supra* note 191, art. 24, ¶ 7(b).

[201] *Compare* Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, *supra* note 181, art. 21, ¶ 6, *and* Convention Between the United States of American and The Federal Republic of Germany For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, *supra* note 188, art. 25, ¶ 5, *with* Convention Between the Government of the United States of America and the Government of the Kingdom of Belgium, *supra* note 191, art. 24, ¶ 7.

[202] *Compare* Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, *supra* note 181, art. 21, ¶ 7(c)(i), *and* Convention Between the United States of American and The Federal Republic of Germany For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, *supra* note 188, art. 25, ¶ 6(c)(aa), *with* Convention Between the Government of the United States of America and the Government of the Kingdom of Belgium, *supra* note 191, art. 24, ¶ 8(c).

[203] McIntyre, *supra* note 129, at 640–641.

difficult to imagine that any pre-arranged set of rules will produce timely resolution unless both parties actually desire timely resolution.

Despite the drawbacks of confidential tax arbitration discussed previously, all three treaties make it clear that all arbitrations that take place under them will be confidential.[204] In fact, in all cases the arbitration will simply not take place until all parties have agreed to confidentiality.[205] On one hand, in the event the arbitration does not yield results that one nation agrees with, though it is bound to the judgment and the award, it will likely not be bound to a similar finding in the event that another dispute arises. Conversely, it also means that the arbitral decision will not be able to help guide later disputes. Again, Professor McIntyre notes in his criticism to the OECD Model Convention that "the single most objectionable feature . . . is its provision for total secrecy."[206]

For McIntyre, the fact that most taxpayers in these disputes are not simple taxpayers who have done some work in Canada even though they live in Detroit, but rather multinational corporations that do not want to share what their profits really look like, is a major shortcoming of current tax treaties.[207]

The Conventions have a stronger similarity between each other than the OECD Model Convention. Moreover, it is notable that the US-Canada Convention, the government Convention predates the OECD Model Convention.[208]

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[204] *Compare* Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, *supra* note 181, art. 21, ¶ 7(d), *and* Convention Between the United States of American and The Federal Republic of Germany For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, *supra* note 188, art. 25, ¶ 6(d), *with* Convention Between the Government of the United States of America and the Government of the Kingdom of Belgium, *supra* note 191, art. 24, ¶ 8(d).

[205] *Id.*

[206] McIntyre, *supra* note 129, at 631.

[207] *Id.* at 632.

[208] *Compare* Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, *supra* note 181, *with* OECD Articles of the Model Convention with Respect to Taxes on Income and on Capital, *supra* note 159.

CONCLUSION

Like any system, arbitration is imperfect. However, its significant advantages over traditional litigation have established its value in resolving commercial disputes. These same advantages could be valuable in resolving international tax issues, but recent US tax conventions as written do not fully embrace these advantages. For example, the arbitration process only functions when the rules of the arbitration have been fully established prior to a dispute; at present only one of the three US tax conventions has an arbitration procedure in place. A greater issue of concern, however, is the inclusion of the confidentiality requirement in all three conventions.

While confidentiality is one of the hallmarks of international arbitration, it is not appropriate for all arbitrations. Confidentiality is simply not an appropriate characteristic for tax arbitration. Though confidentiality protects nations from having to follow precedent with which they do not agree, it also keeps the public from having full knowledge of the taxation process.

Unfortunately, since all the recent US tax conventions include a clause for confidentiality, if and when arbitration were to occur under them, the public will be kept in the dark. In order for the experiment of arbitration in tax conventions to be successful, confidentiality needs to be removed from the process. This would additionally require that all parties to the tax convention accept that some element of sovereignty would need to be laid aside in favor of international cooperation.