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SAVING MR. TAX ARBITRATION: USE OF INSTITUTIONAL ARBITRATION FOR TAX TREATIES

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CONTENTS

SAVING MR. TAX ARBITRATION – USE OF INSTITUTIONAL ARBITRATION FOR TAX TREATIES

Ahan Gadkari[*]

[*Abstract*: *Article 25 of the Model Tax Convention of the Organisation for Economic Co-operation and Development on Income and on Capital ("OECD Model Tax Convention") and Article 25 of the United Nations Model Double Taxation Convention between Developed and Developing Countries ("UN Model Tax Convention") had counted solely on the Mutual Agreement Procedure ("MAPr"), a process of dialogue between the disputing parties, to settle the tax treaty dispute. The MAPr describes the talks between the tax authorities of two Double Tax Agreement ("DTA") participants. The aforementioned Model Tax Conventions aim to resolve tax disputes between treaty parties by referring them to the MAPr. Thus, there was no legally binding instrument in the Model Tax Conventions to force the treaty parties to negotiate a solution to tax issues.*

In order to increase the efficacy of the MAPr mechanism, the OECD in 2008 and UN Tax Committee in 2011 included Article 25(5) provision for binding ad hoc arbitration to each of their Model Tax Conventions. Nonetheless, the OECD and UN Model Tax Conventions recognise the restricted role of arbitration in solving tax treaty issues. Unresolved problems are only subject to arbitration if the parties to a treaty are unable to achieve an agreement on those issues within a MAPr process within a certain time limit. As a result, arbitration is best seen as a continuation of the MAPr procedure rather than as a separate and alternative means of resolving international tax disputes.

Keywords: Tax Arbitration, Disputes, Treaty Interpretation, OECD Model Tax Convention**]**

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I

INTRODUCTION

Article 25 of the Model Tax Convention of the Organisation for Economic Co-operation and Development on Income and on Capital (*hereinafter* referred to as "**OECD Model Tax Convention**") and Article 25 of the United Nations Model Double Taxation Convention between Developed and Developing Countries (*hereinafter* referred to as "**UN Model Tax Convention**") had relied on a negotiation-based Mutual Agreement Procedure (*hereinafter* referred to as "**MAPr**") as the only means by which tax treaty problems could be settled. MAPr refers to the negotiating process between the tax authorities of the two parties of a Double Tax Agreement (*hereinafter* referred to as "**DTA**").[1] Model Tax Conventions encourage treaty parties to "attempt" to resolve their tax disputes using the MAPr. Consequently, the Model Tax Conventions lacked any legally enforceable document that would have required the treaty parties to negotiate a settlement to tax issues.

To strengthen the functionality of the MAPr mechanism, the OECD in 2008 and the UN Tax Committee in 2011 included an Article 25(5) binding *ad hoc* arbitration provision in each of their Model Tax Conventions. The OECD and UN Model Tax Conventions, however, recognise the limited role that arbitration plays in resolving disputes arising out of tax treaties. Unresolved matters may only be subject to arbitration if the parties to a treaty fail to come to an agreement on those issues under the MAPr procedure within a certain time frame. In this sense, arbitration is not considered a stand-alone method for resolving international tax disputes but rather an extension of the MAPr process.

This paper is divided into five sections. **Section I** introduces the topic and sets the scope for the rest of the paper. **Section II** examines the success of the current framework of tax treaty dispute resolution. **Section III and IV** discuss the existing methods of arbitration and compares the current state of tax dispute resolution with it, thus bringing out the need for reform. **Section V** recommends the use of institutional arbitration for tax dispute resolution and discusses its efficiency. **Section VI** addresses various arguments which might be raised against the proposed system of institutional arbitration. **Section VII** sums up the paper and concludes.

II

[1] Ksenia Polonskaya, *The Strategies of the International Chamber of Commerce to Eliminate Double Taxation*, 25 JOURNAL OF INTERNATIONAL ECONOMIC LAW 74–90 (2022).

EFFECTIVENESS OF CURRENT FRAMEWORK OF TAX TREATY ARBITRATION

According to the present language of the OECD Convention Article 25(5), any outstanding problems in a MAPr case shall be brought to arbitration if the taxpayer so desires. Additionally, a period of two years must have passed from the date on which all essential information was supplied to the appropriate tax authorities in both countries. If the competent authorities cannot achieve an agreement to resolve the disagreement within three years of the presentation of a MAPr case, the matter must be brought to arbitration in accordance with Article 25(B)(5) of the UN Convention, unless a competent authority requests otherwise. These adjustments are widely regarded as the most significant improvements to the OECD and UN Conventions since their inception.[2] However, the critical point is - what happens if the authorities establish an agreement, but the accord gained via the MAPr is inadequate or unjust? It is self-evident that this agreement will preclude taxpayers from pursuing their claims via arbitration. However, the number of pending cases has remained constant despite the fact that the new provision was supposed to improve the MAPr by reducing case inventories. It was stated in 2012 that only a small number of OECD member nations have enacted arbitration laws. According to De Ruiter and Barrett, arbitration provisions were incorporated in just 17% of Double Taxation Agreements (*hereinafter* referred to as "**DTA**") and protocols negotiated by OECD member nations between 2005 (when the arbitration provision under OECD was initially presented in draft form) and 2012.[3] It's worth noting that as of data collected up to 2012, the majority of DTAs containing an arbitration clause are negotiated between OECD members and non-OECD members.[4] According to Pit (2014), 158 DTAs, including an arbitration provision, were agreed upon between OECD members and non-OECD members, 63 between OECD members, and 13 between non-OECD members.[5] While the author believes that arbitration is a generally sound legal tool for resolving cross-border or domestic disputes, the author believes that

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[2] Hugh Ault & Jacques Sasseville, *OECD - 2008 OECD Model : The New Arbitration Provision*, 63 BULLETIN FOR INTERNATIONAL TAXATION (2009).

[3] Qiang Cai & Pengfei Zhang, *A Theoretical Reflection on the OECD's New Statistics Reporting Framework for the Mutual Agreement Procedure: Isolating, Measuring, and Monitoring*, 21 JOURNAL OF INTERNATIONAL ECONOMIC LAW 867–884 (2018); Konstantinos Taramountas, *Coordinating the Global Tax Orchestra*, 4 LSE LAW REVIEW 39–62 (2019).

[4] Marlies Ruiter & Edward Barret, *OECD Work On The Resolution Of International Tax Disputes*, WORLD COMMERCE REVIEW (2012).

[5] H. M. Pit, *Arbitration under the OECD Model Convention: Follow-up under Double Tax Conventions: An Evaluation*, 42 INTERTAX 445-447 (2014).

the manner in which it was approved by the OECD and, subsequently, the UN Conventions warrants significant criticism. The benefits of the present arbitration clause will be evaluated as a starting point. After discussing the drawbacks of arbitration, an assessment of the pros and cons of using arbitration in DTAs will be presented.

When weighing the benefits and drawbacks of arbitration in tax matters, it becomes clear that taxpayers reap the greatest gain from the process. The conclusion of an international tax dispute arbitration is the settlement of previously unsettled conflicts that may have resulted in double taxation. The greatest substantial cost of arbitration, however, is borne by countries that relinquish fiscal sovereignty in order to resolve a tax dispute without external intervention. Unsurprisingly, governments are resistant to inserting arbitration clauses in DTAs. As of 2014, arbitration clauses were incorporated in just 178 DTAs (out of almost 3,500 DTAs globally).[6] After the arbitration was included in the OECD Convention, 90 of the 178 listed DTAs adopted the clause.[7]

Nonetheless, arbitration in cross-border tax disputes offers a number of benefits and downsides for governments and taxpayers. The decrease in administrative and legal expenses is one of the advantages of arbitration for governments. Arbitration, when handled correctly, prevents tax authorities from spending money and time on a futile MAPr procedure.[8] A cross-border tax issue that remains unresolved after two or three years of substantial time and resource expenditure on discussions amongst competent authorities is likely to remain unsettled even if the procedure is continued. Arbitration may establish clear guidelines on retaliatory acts and bring the issue to a close.

The second potential benefit of international tax arbitration is that it might help tax administrations in nations with weak political or economic systems. The reasoning for this is that, unlike the MAPr, arbitration does not include negotiations between two treaty partners' tax agencies. Thus, the 'stronger' Member States' bargaining strength is irrelevant. This means that the more powerful party in a DTA may not always hold sway over the weaker one and that the more powerful party may have less leeway to administer taxes during the arbitration process. International arbitration has a better chance of

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[6] *Id.*

[7] *Id.*

[8] Michelle Andrea Markham, *Arbitration and Tax Treaty Disputes*, 35 ARBITRATION INTERNATIONAL 473–504 (2019); Spyridon E. Malamis, *The Future of OECD Tax Arbitration: The Relevance of Investment Treaty and WTO Dispute Settlement Practice in Promoting a Gradual Evolution of the International Tax Dispute Resolution System*, 48 INTERTAX (2020); Zvi Daniel Altman, *Dispute Resolution Under Tax Treaties* 315 IBFD - ACADEMIC COUNCIL (2005).

successful enforcement than the MAPr. The reasoning for this is that under the terms of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*hereinafter* referred to as "**NYC**"), an arbitration decision is often simpler to enforce globally than the conclusion of bilateral discussions between two tax agencies (the MAPr).[9] The NYC is an international arbitration convention which over 160 nations have ratified.[10] Courts are compelled to enforce an arbitral judgement under the NYC.[11] Additionally, the arbitrators' independence, impartiality, and non-affiliation make arbitration significantly less biased than national conflict resolution systems like domestic courts or tax administrations.

The main benefit of arbitration for taxpayers would be the distribution of taxing powers between competing nations, allowing for a final and fair resolution of disputes with tax authorities. In comparison to the MAPr, taxpayers' rights will be better safeguarded owing to the arbitrators' independence, impartiality, and neutrality. Another benefit of international arbitration is that it may be used to relieve political pressure on competent officials to provide MAPr rulings that favor their respective nations' national interests and aspirations. In other words, tax administrations impose an unfair burden on competent authorities, expecting competent authorities to reach judgments that increase income and safeguard the tax base for their respective governments. Not only does this national influence undermine the effectiveness of authorities, but it also fosters bias and national prejudice. Arbitration benefits the competent authorities participating in a dispute settlement process as well by relieving this burden.

Despite the tremendous benefits of arbitration, the majority of issues relating to international arbitration in DTAs stem from the manner the OECD and UN Conventions accepted arbitration. After a MAPr matter has been presented to the other competent body, the taxpayer may submit the case to arbitration within two years (three years under the UN Convention) at the taxpayer's request under the modified 2008 OECD Convention.[12] The amendment's purpose is to strengthen the dispute resolution systems and prevent an indefinite MAPr, which might result in no settlement of the matter and, ultimately, taxes inconsistent with the Convention.[13] The question now is

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[9] Hans Mooij, *Tax Treaty Arbitration*, 35 ARBITRATION INTERNATIONAL 195–219 (2018); Marike Paulsson, *The 1958 New York Convention in Action*, KLUWER LAW INTERNATIONAL (2016).

[10] *Id*.

[11] *Id*.

[12] Spyridon E. Malamis, *supra* Note 8.

[13] Raffaele Petruzzi & Karoline Spies, *Tax Policy Challenges in the 21st Century (Linde)* 285 (2014).

whether or not this kind of *ad hoc* arbitration method is a feasible way to improve the current MAPr process.

Arbitration under the OECD and UN Conventions is neither a substitute for the MAPr nor a mechanism for taxpayers to appeal MAPr rulings. Any time two authorities can settle a dispute, even if it is in the 'wrong,' the subject cannot be taken to arbitration. According to these Conventions, only the unresolved problems regarding the implementation of the Convention may be referred to arbitration throughout the course of a MAPr case. To deconstruct, arbitration can be employed only if the appropriate authorities are unable to settle the dispute on their own. Thus, even if the taxpayer believes that the MAPr's result is obtained in an erroneous method or is inaccurate in content, the taxpayer has no recourse. Thereby, while arbitration enables taxpayers to play a considerable part in settlement of disputes and thereby increases their position under the DTAs, it does not constitute an autonomous and independent mechanism under the DTAs. As a result, adopting the present *ad hoc* arbitration mechanism featured in the OECD Convention and its Commentaries would not reduce the possibility of 'horse trading' and political transactions. For example, in a cross-border tax dispute, a case may be resolved by concessions between tax authorities regardless of the case's technical analysis and only with the purpose of dividing the income generated by a specific taxpayer's tax due between the contracting jurisdictions involved. Arbitration is seen as a complement to the MAPr, enhancing its efficacy. These analyses show that the role of arbitration under the OECD and UN Conventions is limited to providing a backup plan in the event that competent authorities are unable to reach a MAPr agreement due to one or more contested topics and no other resolution mechanism is feasible. In a MAPr case involving a transfer pricing disagreement, for instance, treaty partners may reach an agreement on a transfer price methodology but disagree on other issues, such as permissible comparables. In this scenario, the arbitration procedure should be limited to the unresolved comparables issue. In accordance with the OECD and UN Conventions, this is the function of arbitration.

Incoherence is another feature of *ad hoc* arbitration, which is incorporated in the OECD and UN Conventions. According to the OECD Convention, arbitration is required in DTAs only at the request of the party impacted by the unresolved problem, and according to the UN Convention, arbitration is required only at the request of the competent authorities. As a result, governments are under no duty to send comparable cases to arbitration or to handle similar future conflicts similarly. There are a number of problems with international arbitration that are not specific to how it is administered under the OECD and UN Model Tax Conventions but rather are inherent to the nature of international arbitration itself. For example, arbitration violates national

sovereignty since it prevents countries from resolving their own disputes without outside interference. The ability of tax authorities to back out of treaty obligations on the basis that their interpretation differs from the wording of DTAs is also curtailed by the use of arbitration. In the hands of tax officials, this might be used as an excuse to skirt MAPr treaty obligations.[14]

This would mitigate the harm to their worldwide image since it is obvious that a DTA's terms may be interpreted differently at times. Arbitration, on the other hand, disarms tax authorities and removes their discretion to refuse their duties on the basis of a divergent interpretation of the DTA regulations in place between them and another state.

Additionally, the individual who sought arbitration is permitted to participate in the arbitration process in principle.[15] To prevent political deals and cooperation between the two tax administrations, taxpayer participation is crucial. While the participation of affected taxpayers increases the legitimacy and value of the operation in the eyes of the law, it also comes with costs for both taxpayers and governments. This decision-making process is already lengthy and convoluted. This is because, according to the OECD and UN Conventions, a period of two to three years must pass before the dispute may be presented to arbitration, and also because of legislative deadlines for taxpayer involvement in the arbitration procedure. The arbitration process could get drawn out if taxpayers who have requested it submit arguments to the arbitrators through their agents.[16] Legal, communication, and travel expenses associated with attending arbitration sessions will be added to the problem.

Moreover, setting up an *ad hoc* arbitration system in cross-border tax disputes may be costly, similar to many other legalistic processes. It is possible for governments and taxpayers to incur administrative and financial expenditures as a result of it. Due to the ad hoc nature of arbitration in cross-border tax disputes, expenditures related to ex-ante agreements concerning the terms and manner in which arbitration should function will be incurred. When these factors are considered, tax authorities from developing nations may lose their advantages if they choose to resolve an international tax dispute through *ad hoc* arbitration. This may have an effect on underdeveloped nations, especially those with inadequate funds for lengthy talks necessary to conclude an ad hoc arbitration. There may also be other expenditures, such as those associated with sub-par experience and competence. These considerations likely explain

[14] Zvi Daniel Altman, *supra* Note 8, 321.

[15] OECD, COMMENTARIES ON THE ARTICLE OF THE MODEL TAX CONVENTION 384 (2010).

[16] *Id*.

as to why, during a 1987 UN-appointed Group of Experts debate on this subject, less developed nations regarded arbitration with suspicion.[17] These nations were concerned about the arbitration option and typically opposed it, while developed countries favored it. Finally, arbitration is confined to instances involving two signatory nations to a DTA. This rules out the possibility of submitting to arbitration multi-jurisdictional issues involving "triangular situations," such as transfer pricing disputes concerning third countries that are not signatories to the relevant DTA. Due to the expanding needs of today's globalised world, in which multinational firms routinely operate in more than two nations, such disputes are becoming more frequent, and arbitration, as foreseen by the United Nations and the OECD Conventions, is unable to resolve them.

To summarize, the author believes that the UN and OECD Conventions have underutilized the possible advantages of arbitration. The Conventions treat arbitration as a last resort for resolving tax disputes, despite the fact that it may be the most reliable technique for doing so. That is to say, unless and until the relevant authorities have exhausted all other means of resolving the dispute and have failed to do so, no arbitration proceedings can be commenced. Both the OECD Convention (Article 25(5)) and the United Nations Convention (Article 25(B)(5)) reiterate that competent authorities may not resort to arbitration unless and until all other means of mutually acceptable resolution have been exhausted. Thus, it looks as if the function of arbitration in settling tax disputes has been largely disregarded. Rather than maximizing its multiple potential advantages, arbitration seems to be mostly a ceremonial tool used to compel competent authorities to resolve disputes within a certain time limit.

III

CURRENT STATE OF AD-HOC ARBITRATION AND THE NEED FOR INSTITUTIONAL ARBITRATION

Generally speaking, there are two primary sorts of arbitration.[18] One type of arbitration is called institutional arbitration, and it occurs when the parties to a dispute select an established arbitration institution to handle the proceedings. Numerous arbitration institutions exist, including the International Chamber of Commerce (*hereinafter* referred to as "**ICC**"), the Chicago International Dispute Resolution Association (*hereinafter* referred to as "**CIDRA**"), the

[17] G.K. Kwatra, *Arbitration in International Tax Disputes: a New Approach*, 5 JOURNAL OF INTERNATIONAL ARBITRATION 151 (1988).

[18] Harry Arkin, *International Ad Hoc Arbitration: A Practical Alternative*, 15 INTERNATIONAL BUSINESS LAWYER (1987); Gordon Blanke, *Institutional versus Ad Hoc Arbitration: A European Perspective*, 9 ERA FORUM 275–282 (2008).

American Arbitration Association (AAA), the London Court of International Arbitration (*hereinafter* referred to as "**LCIA**"), the Stockholm Chamber of Commerce (*hereinafter* referred to as "**SCC**"), the Australian Centre for International Commercial Arbitration (*hereinafter* referred to as "**ACICA**"), and the International Centre for the Settlement of Investment Disputes (*hereinafter* referred to as "**ICSID**"), a division of the World Bank in Washington, D.C.

By contrast, *ad hoc* arbitration occurs when the parties to a dispute develop their own arbitration rules and processes. No single arbitral institution will be in charge of the process.[19] Neither the OECD nor the United Nations has an entity that arbitrates international tax issues. Hence, *ad hoc* arbitration is used in the OECD and UN Model Tax Conventions. In accordance with the OECD Commentary:

> *"The simplest way to establish the evidentiary and other procedural rules that will govern the arbitration process and that have not already been provided in the agreement or the Terms of Reference is to leave it to the arbitrators to develop these rules on an ad hoc basis. In doing so, the arbitrators are free to refer to existing arbitration procedures, such as the International Chamber of Commerce Rules, which deal with many of these questions. It should be made clear in the procedural rules that, as a general matter, the factual material on which the arbitral panel will base its decision will be that developed in the mutual agreement procedure. Only in special situations would the panel be allowed to investigate factual issues which had not been developed in the earlier stages of the case."* [20]

Nevertheless, the OECD offers a "Sample Mutual Agreement on Arbitration."[21] This is a draft form of agreement that the appropriate authorities can use as a starting point for a mutual arbitration agreement in accordance with Article 25. (5). The OECD Commentaries on the Model Tax Convention Articles, for instance, make guidance for selecting arbitrators. Each responsible authority must appoint one arbitrator, as stated in the OECD Model Tax Convention's Article 25(5) commentary.[22] A third arbitrator will be chosen by the two nominated arbitrators to act as chair. If an appointment is not made within the timeframe stated in the commentary, the Director of the OECD Centre for Tax Policy and Administration must appoint the remaining arbitrator(s) within ten days after receiving a request from the person who started the request for arbitration. Competent authorities may alter, supplement, or omit any provision of this sample agreement in negotiating the final terms of their

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[19] OECD, COMMENTARIES ON THE ARTICLES OF THE MODEL TAX CONVENTION (2017), Commentary on Art. 25, para. 18, 391.

[20] *Id*. at 391.

[21] *Id*.

[22] *Id*. at 382.

bilateral agreement. This is due to the fact that the OECD Model Tax Convention and its Commentaries are not recognized as legally binding by the OECD Member States.

Particularly noteworthy is the OECD's policy of allowing the party that requested arbitration of a dispute to also participate in the arbitration session.[23] Taxpayers who have sought the filing of outstanding disputes to arbitration may convey their arguments in writing to the arbitrators in the same manner as during the MAP process. Moreover, taxpayers may submit their viewpoints verbally during the arbitration hearings with the arbitrators' approval.[24]

Furthermore, the Model Tax Conventions' arbitration clause is mandatory and conclusive.[25] However, if the competent authority of the other contracting party has not addressed the dispute within two years, the taxpayer may submit the subject to arbitration in accordance with Article 25(5) of the OECD Model Tax Convention. Any competent authority may request that a dispute be submitted to arbitration within three years, per Article 25(B)(5) of the United Nations Model Tax Convention (not the taxpayer). The UN Model Tax Convention states that the plaintiff has just the right to "be informed of the request."

This means that tax authorities or a party's representative can request arbitration if they have reason to suspect that taxes in one or both of the contracting countries is inconsistent with the DTA's provisions.[26]

In any situation, it is crucial to highlight that the taxpayer must first seek remedy under the current MAPr before initiating the arbitration procedure. Consequently, the arbitration option is a complement to the MAPr and not a replacement for it. This means that if the existing MAPr processes have failed to resolve a cross-border tax dispute, then the parties to the dispute may turn to DTA arbitration to address the lingering issues in the case. That is to say; a taxpayer is not permitted to file an appeal if the MAPr procedure results in a poor and ineffective settlement.

Arbitration institutions include the American Arbitration Association (AAA), ACICA, CIDRA, the Hong Kong International Arbitration Centre (hereinafter referred to as "**HKIAC**"), ICC, LCIA, and the SCC. Ad hoc arbitration, on the other hand, takes place when the parties to a dispute create their own arbitration procedures, which are then handled by the parties themselves

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[23] *Id*. at 384.

[24] *Id*.

[25] OECD, IMPROVING THE RESOLUTION OF TAX TREATY DISPUTES (2007) https://www.oecd.org/tax/dispute/38055311.pdf (last visited Jun 25, 2022).

[26] *Id*.

rather than a third-party arbitral institution.[27] In the following paragraphs, I will demonstrate why institutional arbitration is preferable to *ad hoc* arbitration.

The following issues are related to the Model Tax Conventions' present approach to arbitration alternatives: One major flaw of the current arbitration procedures under the OECD and UN Model Tax Conventions is that they are inconsistent with one another. In the OECD and UN Model Tax Conventions, and by extension, in the DTAs, the arbitration provision is based on *ad hoc* proceedings. When it comes to resolving international tax disputes, neither the OECD nor the United Nations have their own internal arbitration bodies. Institutional arbitration processes typically delegate administrative arbitration duties to trained arbitrators employed by the arbitral institution. However, each party may select its own arbitrators if they so desire.[28] These arbitrators are often experts who are familiar with the institution's history, regulations, and processes.[29] Instead of "reinventing the wheel" for each arbitration agreement, institutional arbitration allows the parties to employ norms that have already been proven effective.[30] In contrast, ad hoc arbitration cannot occur until all procedural procedures have been negotiated. Developing an ad hoc arbitration agreement involves additional time and resources. According to Redfern, "the distinction between ad hoc arbitration and institutional arbitration is comparable to the difference between a custom-tailored suit and a ready-made suit."[31] Although ad hoc arbitration may be the sole viable option for certain specialized and unusual sorts of disputes, this style of arbitration takes a much greater amount of procedure than institutional arbitration. Applying tested and established procedures in institutional arbitration processes often results in time and cost savings.[32]

Furthermore, in institutional arbitration, the parties are not required to nominate arbitrators themselves, which is typically a stumbling block in international *ad hoc* arbitration. Under more institutional arbitration norms,

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[27] Gerald Aksen, *Ad Hoc versus Institutional Arbitration*, 2 ICC BULLETIN 8 (1991); Wallgren-Lindholm C, *'Ad Hoc Arbitration v. Institutional Arbitration' in Giuditta Cordero-Moss (ed), International Commercial Arbitration: Different Forms and their Features*, CAMBRIDGE UNIVERSITY PRESS (2013).

[28] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 47 SWEET & MAXWELL (2007).

[29] *Id*.

[30] *Id*. at 50.

[31] Alan Redfern, Why Arbitrate Transnational Disputes? Should Institutional or Ad Hoc ArbitrationBe Provided? As quoted in Tibor Varady et al., International Commercial Arbitration : A Transnational Perspective, 22 WEST ACADEMIC (2015).

[32] Redfern & Hunter, *supra* Note 27, at 50.

each party nominates an arbitrator, who is subsequently approved by the institution. In addition, it is accepted that institutional arbitration lacks a precedent system. However, the uniformity of tax treaty interpretation in institutional arbitration proceedings can, at least in theory, be better protected and developed when only one or two international arbitration institutions (ideally under the United Nations or the OECD) are involved, as opposed to a multitude of bilateral ad hoc arbitration adjudications. It should not be forgotten that the arduous processes and various problems involved with establishing ad hoc arbitration may be the reason why arbitration has been so infrequent in reality. Brownlie's experience tells it all:

> *"Anyone who has worked on cases in front of Courts of Arbitration and also in front of the International Court of Justice (ICJ) will know very well the problems faced by the agent of the State and his team when you are setting up an ad hoc court of arbitration where the two agents are, so to speak, building the court, finding a registrar, and setting the whole thing up. And litigation of that kind is difficult enough without, as it were having to design the building you are going to go into, in procedural terms. And since the experience of many States will be to have only one major arbitration or one case before the ICJ every 50 years, there is considerable advantage in being able to go to an institution that has an existing registry and an accumulation of experience already accumulated. That is a very important practical difference."* [33]

Various arbitration institutions have translated their Rules into several languages to ensure that all parties, regardless of their native language, are familiar with the rules of arbitration. For parties in a dispute, arbitration institutions provide a detailed and well-thought-out set of guidelines to follow. Further, arbitration organisations may help the parties find arbitrators who are fluent in both the relevant laws and the parties' native languages. It is possible for arbitration institutions to assist in the removal of arbitrators in cases of misconduct or disqualification. In ad hoc arbitration, a court must act to remove an arbitrator who refuses to step down voluntarily after a suitable disqualifying incident. An individual ad hoc hearing may not have the same success as institutional arbitration hearings, but in ad hoc arbitration processes, nothing can stop a court from enforcing rulings based on ad hoc arbitration. There are some jurisdictions, most notably the United States, where it may be more challenging to seek enforcement of an ad hoc arbitration ruling because courts are less likely to be conversant with the procedures of an ad hoc session than with those of institutional arbitration. Therefore, national courts are more likely to enforce the result of arbitration conducted in accordance with the

[33] Ian Brownlie, *The Rule of Law in International Affairs*, 58 MARTINUS NIJHOFF (1998).

norms of a recognized organization.[34]

In institutional arbitration, however, the Rules of each institution are exclusive to that institution. Therefore, these Rules are not a suitable model for ad hoc arbitration procedures. The United Nations Commission on International Trade Law (UNCITRAL) established the Model Law on International Trade to address this issue.[35] UNCITRAL adopted the UNCITRAL Arbitration Rules in 1976.[36] The release of these guidelines has been hailed by some as a watershed moment in the development of effective arbitration.[37] Countries around the world are currently looking to update their arbitration laws, and the UNCITRAL Model Law is serving as a template. Currently, disputing parties may resort to the UNCITRAL Model Legislation if the appropriate law for arbitration is grounded on the Model Law.[38]

Though the OECD and UN Model Tax Conventions are founded on ad hoc arbitration, institutional arbitration may provide considerable practical and enforceability benefits in this setting. As a result, two new questions arise. The first issue to consider, given that most tax arbitration proceedings are ad hoc is whether or not the OECD and the UN Model Tax Conventions have the authority to form their own arbitral courts within their respective frameworks. Second, can the adoption of the UNCITRAL Model Law into the domestic legislation of various states enhance cross-border tax dispute resolution processes?[39]

In reality, there are compelling reasons in favor of establishing an arbitral organization to resolve international tax disputes. The following advantages are briefly recognized and may be described in favor of institutional arbitration. First, according to Schwenzer, a key benefit of institutional

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[34] *See*, *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 Int'l. Ltd.*, 888 F.2d 260 (2d Cir. 1989); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989).

[35] Redfern & Hunter, *supra* Note 27, at 66.

[36] *Id*.

[37] *Id*.

[38] United Nations, THE 2ND REPORT OF THE SECRETARY-GENERAL TO THE GROUP OF EXPERTS, PART TWO: ISSUES RELATING TO TAX TREATIES BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, SECTION VII: THE POSSIBILITY OF ESTABLISHING AN INTERNATIONAL PANEL OF EXPERTS, UN Doc. E/4936, ST/ECA/137 (1970).

[39] William W. Park, *Control Mechanisms in International Tax Arbitration, in Resolution of Tax Treaty Conflicts by Arbitration*, 49 (G. Lindencrona ed., IFA. Congress Series 1994) (quoted in Maya Ganguly, Tribunal and Taxation: An Investigation of Arbitration in Recent US Tax Conventions, 29 WIS. INT'L L.J. 735, 743 (2012)).

arbitration is that the institution undertakes considerable administrative duties.[40] The institution ensures the fast appointment of arbitrators, the impartial conduct of the arbitration, and the payment of all associated fees and costs. Since the arbitral institution manages fees, the arbitrators are relieved of the responsibility of negotiating them with the parties. The institution's arbitration procedures have also proven to be reliable and effective over the years, able to resolve a wide range of potential disputes. This may discourage the losing side from appealing a decision. Therefore, according to Altman, the bigger the number of cases referred to an institution, the better its reputation.[41] For instance, if the participation of private parties, meaning taxpayers, is ensured, more and more problematic situations would be sent to the proposed institution. Because of this, a precedent-like structure may emerge and quickly establish the institution's reputation, much as the *stare decisis* concept. What this means is that arbitrators frequently look to previous rulings even though there is no theoretical precedent system in international arbitration. It should be emphasized, however, that these precedents are not regarded as binding, and deviating from a precedent is permitted in practice.

Second, since the processes are handled by the institution, institutional arbitration is harder to obstruct or delay than ad hoc arbitration. One of the major drawbacks of ad hoc arbitration procedures for international tax disputes becomes obvious when one of the parties purposefully obstructs the process. In the absence of an administrative institution, the parties may be unable to go further with the tax dispute settlement procedure. Therefore, if arbitration is institutionalised, the complaint, whether it be from a taxpayer or another contracting state, does not need the help and consent of another tax administration that may, for whatever reason, choose to sabotage or postpone the arbitration procedure. If there is a valid arbitration agreement between the parties, but one of them refuses to nominate an arbitrator, then the institution will appoint one on that party's behalf in accordance with ordinary institutional arbitration standards.[42]

Third, adopting the tried and established standards of institutional arbitration can save the disputing parties time and money, despite the fact that it can take a significant amount of time and resources to achieve an agreement on the rules to govern the arbitration.[43]

A fourth benefit of institutional arbitration is that it is simple to create an

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[40] Ingeborg Schwenzer (quoted in Margaret Moses, The Principles and Practice of International Commercial Arbitration, 1st ed. Cambridge U. Press 9–10 (2008).

[41] Zvi D. Altman, *Dispute Resolution Under Tax Treaties*, 1st ed. IBFD 315 (2005).

[42] Margaret Moses, *supra* Note 40.

[43] Redfern & Hunter, *supra* Note 27, at 47.

agreement outlining the procedures that will govern the arbitration. Institutional arbitration allows the parties to adopt methods that have been proven to be effective in the past, whereas *ad hoc* arbitration cannot occur without agreements on all procedural problems. This suggests that "reinventing the wheel" is not necessary for each and every arbitration agreement under institutional arbitration. In some institutional arbitrations, the institution will provide a list of potential arbitrators for the parties to pick from. Most arbitration organizations mandate that each party pick an arbitrator, and if the parties can't agree on a third arbitrator, the institution will choose one for them. These arbitrators may be experts familiar with the institution's history, regulations, and processes.

Fifth, institutional arbitration may lead to more uniform interpretations of tax treaties. This is due to the fact that when just a single international arbitration institution is involved, institutional arbitration may ensure more consistency in its rulings compared to bilateral ad hoc arbitration proceedings.

Sixth, institutional arbitration processes have a stronger track record of success when it comes to the enforcement of arbitration rulings.[44] This is due to the fact that, unlike institutional arbitration procedures, *ad hoc* arbitration proceedings are more likely to be foreign to local courts. The court might not be as confident that all due process rules have been met when it is asked to enforce the outcome of an *ad hoc* arbitration procedure.[45] Consequently, national courts are more likely to enforce an arbitration ruling that was rendered in accordance with the norms of an established organization. Institutions for arbitration provide parties in disputes with a detailed and well-thought-out set of guidelines for resolving their disagreements. Further, arbitration organizations may help the parties find arbitrators who are fluent in both the relevant laws and the parties' native languages. If an arbitrator is found to have committed misconduct or to have been disqualified from serving, the institution that employed them might remove them from their position. When an arbitrator refuses to recuse herself despite the occurrence of a true disqualifying event, a court must intervene in ad hoc arbitration procedures to remove the arbiter.[46]

Seventh, many arbitration organisations have made their rules available in more than one language, making it so that all parties, regardless of their native tongue, may follow the proceedings.[47]

The conclusion that may be derived from this debate is that an arbitral

[44] *Id*. at 27-28.
[45] Tibor Varady, *supra* Note 31, at 28.
[46] *Id*. at 25.
[47] *Id*. at 24.

organization providing soft law[48] comparable to that offered by the OECD seems to be a more acceptable technique for resolving cross-border tax disputes. As is the case with the OECD Model Tax Convention, governments initially have the option of adhering or not adhering to OECD declarations. In this regard, OECD statements (including the OECD Model Tax Convention, Commentaries, and Guidelines) might be seen as soft law. Similarly, the present proposal takes into account the principles of public international law, which stipulate that states are free to agree to a method of dispute settlement and, in general, states cannot be compelled into a binding dispute resolution system without their agreement. A more adaptable dispute resolution system, as opposed to an international tax court, would be a good first step towards more binding dispute mechanisms in the context of international taxation. Most arbitral institutions allow the parties to modify these established arbitral standards, so even though the arbitration process is formalised and supervised by an arbitral institution, this approach preserves its flexibility.[49] Flexibility is used to describe the parties' ability to determine the details of the arbitration procedures.

It may be argued, however, that the idea of "soft law," which is based on the consent of the parties, runs counter to the very premise of a judicial procedure, which is to ensure that rights and obligations are upheld. Although the results of these arbitration proceedings are binding on the parties who have submitted to them, the parties' agreement is required before any dispute can be referred to these mechanisms. For the proposed international tax arbitration institution, it is true that disputing parties would voluntarily submit their disputes to the arbitral tribunal, yet, the tribunal's judgements in cross-border tax difficulties would be enforceable and binding. Therefore, while it is initially voluntary to agree to submit disputes to arbitration after a dispute has arisen and there is an *ex-post* or *ex-ante* arbitration agreement between the parties, the arbitration process becomes required to employ unless both parties agree otherwise.

Despite its initial soft law character and the fact that the filing of disputes to it is largely a voluntary act, it is reasonable to say that the proposed arbitral institution would be able to accomplish its assigned purpose, namely the settlement of conflicts. In addition, it should be underlined that soft law recommendations may serve as a contemporary style of regulation in the future and might precede hard legislation. This is because the first phase of such a

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[48] *Id*.

[49] Alireza Salehifar, The Role of the OECD in the Current International Tax Law: Voluntary or 'Obligatory'? 10(1) J. AUSTRALASIAN TAX TEACHERS ASS'N 151, 155 (2015); Van der Bruggen, *About the Jurisdiction of International Courts to Settle Tax Treaty Disputes* (quoted in Michael Lang & Mario Zuger, *Settlement of Disputes in Tax Treaty Law*, 1st ed. KLUWER LAW INT'L 3 (2002)).

procedure is often voluntary.[50] Consequently, this notion may play a unique role in the future construction of a more standard and efficient international tax dispute system for the settlement of cross-border tax disputes.

Furthermore, the author believes that the rarity of ad hoc arbitration is due to the extensive work and numerous hurdles involved in setting it up.

The OECD Model Tax Convention, the UN Model Tax Convention, and later DTAs all use ad hoc procedures for their arbitration clauses.

Neither the OECD nor the UN has established mechanisms for the arbitration of international tax disputes. It appears legitimate to ask for the formation of an arbitration organization for these reasons. After explaining why institutional arbitration is preferable to ad hoc arbitration, it is essential to assess whether or not the plan can actually be implemented. The selection of an appropriate organisation within which to integrate the arbitral institution could be the first step in the search for a competent arbitral institution for the settlement of cross-border tax disputes.

While there are already a number of international arbitration organisations, their rules are not often designed to meet the needs of foreign taxpayers or tax authorities. Not only that, but every single arbitration body operates under its own set of rules and regulations. As a result, there is a risk that the requirements of DTAs will be implemented and interpreted inconsistently if various arbitration institutions are used. Taking all of this into account, it becomes clear that a new type of arbitration institution dedicated solely to international tax issues and the resolution of international tax disputes would be superior to the existing types of arbitration.

IV

WHICH ORGANIZATION MIGHT BE SUITABLE FOR INCORPORATING THE ARBITRATION INSTITUTION WITHIN ITS STRUCTURE?

There is currently no indication that a global body for tax cooperation will be established any time soon. Such a body may, among other things, provide a venue for the resolution of tax treaty disputes. For this reason, the authors argue that the driving force should preferably be an established organization with current, proven experience in both international taxes and arbitration. It would appear that the OECD is the most suitable group for this task. When it comes to international tax disputes and arbitration, the OECD is in a league of

[50] Yariv Brauner, *An International Tax Regime in Crystallization*, 56 TAX L. REV. 259, 316 (2003).

its own, with substantial and unmatched knowledge and experience. Since the 1960s, the OECD has concentrated on international tax issues,[51] and it has been active in international arbitration since 2008, after the addition of arbitration to its Model Tax Convention.

It could be argued that the United Nations is a more suitable international organisation for this task than the OECD, which only includes 36 industrialised countries, due to the diversity of its 193 Member States (developed and developing nations alike). Additionally, similar to the OECD, the United Nations is active in international tax affairs via the UN Committee of Experts on International Cooperation in Tax Matters (*hereinafter* referred to as "**UN Committee of Experts**"). Twenty-five tax policy and tax administration professionals have been handpicked by their various countries to serve on the UN Committee of Experts for a period of four years. The United Nations Committee of Experts provides a forum for discussion about improving and expanding tax cooperation between countries' tax authorities, and it assesses the potential effects of new developments on this cooperation.[52] In addition to making recommendations on capacity-building and the provision of technical assistance to developing and transitioning economies, the UN Committee of Experts is also responsible for reviewing and updating the UN Model Tax Convention and the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries. Thus, the United Nations is not completely unfamiliar with international tax difficulties.

The author suggests that the United Nations Committee of Experts might work to advance this idea. Nevertheless, the author believes that the OECD is a better choice for this role than the United Nations for a number of reasons. The United Nations Committee of Experts has made little progress toward its goal of improving tax dispute settlement as it relates to a process for resolving cross-border tax disputes. The OECD framework, in comparison, is technically sounder and has developed more concrete suggestions on international taxes and dispute resolution that are regularly cited around the world.

Moreover, it is impossible and superfluous to first implement this suggestion within the framework of an organization with a large number of diverse member states. That is to say; it may prove challenging to win over a majority of the 193 UN members on this subject. It's important to remember that, just like any other international organisation, it's preferable and more feasible to begin with, a little organisation and work toward expanding the proposed plan gradually over time. General Agreement on Tariffs and Trade (*hereinafter*

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[51] *Id*.

[52] Michael Lennard, *The Purpose and Current Status of the United Nations Tax Work*, 14(1) ASIA- PACIFIC TAX BULL. 23, 28 (2008).

referred to as "**GATT**"), the forerunner of the present World Trade Organization (*hereinafter* referred to as "**WTO**"), was first founded by twenty-three nations (twelve developed and eleven developing economies). There are now 164 members of the WTO. In 1945, when the United Nations was created, there were only fifty-one member states. Currently, there are 193 Member States in the United Nations.[53]

In addition, many OECD countries are among the world's most powerful economies. These countries, which include France, Germany, the United Kingdom, and the United States, will have a significant impact on the creation and spread of rules regarding the referral of disputes to the proposed arbitration institution throughout the network of international DTAs of numerous other nations.

In addition, the OECD should not be seen as a forum for the development of tax policy for its 35 Member States. The OECD has been a central hub for international tax policy coordination in recent years. For the purposes of international tax coordination and the implementation of its declarations, the OECD has gathered a sizable number of governments and jurisdictions. For instance, 137 countries are represented equally in the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes. Additionally, in June 2016, the OECD's 'Base Erosion and Profit Shifting (*hereinafter* referred to as "**BEPS**") Inclusive Framework' signified a turning point in international tax cooperation by enlisting the help of more than eighty countries and jurisdictions in working towards a common goal of putting the BEPS Package into effect. Since then, each year in Paris, France, officials from over a hundred nations convene under the auspices of the OECD Global Forum on Competition to debate tax competition concerns. When it comes to international tax issues, the OECD is likely to be more global and experienced than the UN Committee of Experts.

Last but not least, the OECD has put a premium on its interactions with countries that are not members. As it is, the OECD Model Tax Convention and the UN Model Tax Convention are largely identical in their most important aspects. If the United Nations and the Organization for Economic Cooperation and Development (OECD) agree on a standard set of rules for institutional arbitration, international tax policy could become more consistent. Therefore, there is no compelling reason to start building the proposed arbitral tribunal within the UN framework rather than the OECD framework.

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[53] Id.

RECOMMENDATION AND WAY FORWARD

The authors advocate for the establishment of an arbitration institute dedicated only to tax-related issues. In principle, the proposed arbitration organization, which should ideally be established around the OECD framework, should establish certain broad procedural norms, time limitations, and mechanisms for enforcing and interpreting the commitments embodied in a treaty between two opposing parties. It will improve the reliability and uniformity of the DTAs' obligations. The current issue of a lack of rules controlling tax administrations will be eliminated as a result of these pre-defined procedural restrictions and time constraints. Additionally, if differences are adjudicated by an independent and external arbitration body, the conclusion will be more authoritative and fair rulings. In the following sections, we will delve deeper into the inner workings of this arbitration body.

Access by Private Parties

Whether or not taxpayers have easy access to such an arbitral tribunal is a major procedural question in this discussion. In general, it is commonly agreed that private parties and people have rights and duties under international law.[54] In 1928, the Permanent Court of International Justice stated that '*It cannot be denied that the very object of international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts.*'[55] The mere fact that individuals may be subject to international law's protections and duties is not, however, sufficient to conclude that those individuals can bring international claims to enforce their rights or assert immunity from those duties.[56] Individuals and private parties can only bring claims inside the international legal system if they can persuade their respective governments to do so on their behalf, which is a fundamental principle of international law.[57] Thus, the assertion is technically not of private parties' international rights but of a state's own.[58] This viewpoint, according to which individuals may not directly raise claims against international entities, began to shift over the twentieth century.[59] Since then, numerous international agencies have been established, such as arbitration institutions, to mediate disagreements between

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[54] Malcolm D Evans, *International Law*, OUP 284-288 (2018).

[55] Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, PCIJ, Ser. B, No. 15, 17–18.

[56] Malcolm D Evans, *supra* Note 54, 288.

[57] *Id*.

[58] *Id*.

[59] *Id*. 289; *Also see*, Panevezys-Saldutiskis Railway, Judgment, PCIJ, Ser. A/B, No. 76, 4; La Grand (Germany v. United States), Merits, Judgment, [2001] ICJ Reports, para. 42.

sovereign states and, among other responsibilities, the evaluation of individual claims.[60] These entities include the Central American Court of Justice, the Mixed Arbitral Tribunals in Europe, the League of Nations' minority protection programme, and the International Labour Organization's dispute resolution processes. In a similar vein, DTAs are international agreements that set forth the parameters under which taxpayers (private parties) may pursue claims. To begin the arbitration process under the current MAPr system or the majority of DTAs' arbitration provisions, tax administration approval is necessary.[61] This safeguards both a tax administration's ability to control its own spending and its independence from scrutiny by other tax administrations. Reduced trade and investment barriers, and the dispute settlement procedure in particular, are typically in the best interests of taxpayers. As a result, additional government expenses are predicted as a result of taxpayer engagement. Altman is an advocate for private parties having direct access to conflict settlement procedures.[62] Altman argues that allowing taxpayers access to a tribunal develops a precedent-setting mechanism and generates a favorable reputation more quickly than state-state international dispute settlement can. Additionally, Altman argues that a conflict resolution structure that permits only state-state dispute settlement hearings is less likely to create large-scale litigation.[63] According to Altman, another significant benefit of enabling taxpayers' direct access to international courts is the increasing quantity of cases.[64] It is very improbable that an international conflict resolution agency that is seldom utilized can create a precedent-setting mechanism or adopt a worldwide reputation for itself. A scenario in which the institution receives little attention and handles a small number of cases would impede the formation of a precedent-setting system that might eventually result in a more uniform dispute resolution mechanism in international tax law. Thus, the building of a precedent-setting system and the development of a worldwide reputation for the tribunal (arbitration institution) are inextricably tied to the volume of cases presented to it. Allowing private parties access to this conflict settlement process increases the likelihood of its survival and growth.

Keohane et al. also discussed the downsides of not privatizing international adjudication.[65] According to Keohane et al., denying private parties the ability

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[60] Malcolm D Evans, *supra* Note 54, 288.

[61] Zvi Daniel Altman, *supra* Note 8, 360.

[62] *Id*.

[63] *Id*.

[64] *Id*.

[65] Robert O. Keohane *et. al*., *Legalized Dispute Resolution: Interstate and Transnational*, 54 International Organization 457, 473-479 (2000).

to get involved in the dispute resolution process ultimately results in political considerations influencing the choice to submit claims. In fact, governments that want to limit the political fallout from making a claim would rather settle the matter behind closed doors, out of the reach of the courts. As a result, the inaccessibility of this tribunal to taxpayers may violate taxpayers' rights and enable governments to compromise taxpayers' interests for political ends. A consensus can be reached in this way, but it usually isn't based on the merits of any one instance.

Interestingly, most DTAs created in accordance with the OECD and UN Conventions currently allow qualified private parties to participate by directly requesting the initiation of a MAPr procedure. DTAs are unusual among FTAs because they can be triggered by private parties. Unlike trade agreements, DTAs are meant to be implemented immediately under domestic law. Because DTAs often have a direct impact, private parties may bring them before national courts. Direct effects may result from a properly worded DTA. This means that the courts of the contracting governments have an obligation to recognise and enforce the rights conferred upon individuals under this treaty. Thus, in essence, granting private parties access to international courts is conditional on a condition that is a direct outcome of the treaty.[66] This requirement is met by DTAs. Therefore, DTAs are already beneficial to private parties from an accessibility standpoint, and taxpayers are afforded far greater protection under tax treaties than under the vast majority of other international treaties. Hence, it would not be a novel concept to advocate for taxpayer participation in the dispute settlement process.

As it stands, most DTAs allow taxpayers to bring disputes before the courts of the other party's country. Keep in mind, though, that there are a number of reasons why domestic courts aren't very good at settling disputes. To begin, foreign taxpayers naturally lack faith in local courts when it comes to bringing cross-border tax issues before them.[67] Taxpayers typically do not want to litigate tax disputes in the domestic courts of a foreign country in which they have little faith.[68] As a corollary, the tax administration of a foreign nation may not be able to refer interstate tax disputes to the domestic courts of another treaty partner, resulting in both taxpayer-government conflicts and interstate tax disputes. In this context, domestic court appeals or other unilateral remedies are not sufficient because they cannot effectively resolve international tax issues involving two or more states. Thirdly, as a consequence of the NYC, international arbitration decisions are significantly simpler to enforce than

[66] Zvi Daniel Altman, *supra* Note 8, 361.
[67] *Id*., at 5.
[68] *Id*.

court judgements in foreign countries. Therefore, it appears that both taxpayers and tax administrations need ready access to a supranational organization in order to settle double taxation issues efficiently and to protect individual rights against governments, as the authors suggest.

Constitution of the Tribunal

Procedural autonomy is a hallmark of arbitration rules.[69] The majority of national laws of civil process are more convoluted, inflexible, and complex than these rules.[70] One of these flexible regulations is the choice of arbitrators. As a result of this provision, international arbitration is viewed more favourably by disputants from other countries and by some tax administrations who were previously concerned about threats to national sovereignty.[71] By mutually selecting their arbitrators, for instance, the parties to arbitration have the ability to define their own dispute settlement procedure. The parties' ability to select arbitrators they believe will give them a fair hearing could increase the use of arbitration.

The current mechanism for selecting arbitrators is established by the OECD ad hoc Arbitration Sample for Mutual Agreement on the Implementation of Article 25 paragraph 5 (*hereafter* referred to as "**OECD ADAS**"). Therefore, under the principles of customary arbitration, Article 5 of the OECD *ad hoc* Arbitration Sample gave the parties to the dispute the ability to select the arbitrators. This methodology ensures a fair and reasonable arbitration process by efficiently selecting arbitrators. A neutral third party is selected by mutual agreement by both parties involved in the dispute. When competent authorities defend taxpayers in disputes with the government, the tax authorities must also introduce the arbitrator. Together, tax officials and individuals accomplish this. In addition, the two administrative bodies responsible must agree on a third arbitrator's nomination. If the parties are unable to reach a consensus on the remaining arbitrators, the Director of the OECD Centre for Tax Policy and Administration may do so, as is the case with the current OECD ADAS. The number of arbitrators serving on arbitral tribunals is often set by the parties themselves, either in a DTA or an *ex-post* agreement. An unbalanced number of arbitrators is required for a binding decision to be reached if more than one is used. There is a common framework among the various sets of arbitration rules, despite the fact that each has taken a slightly different tack in terms of the arbitration's structure and procedure. For example, Article 8 of the Dubai International Arbitration Centre's

[69] Won Kidane, *The Culture of International Arbitration*, OUP (2017).
[70] *Id*., at 108.
[71] *Id*.

(*hereinafter* referred to as "**DIAC**") Arbitration Rules provides that, similar to the OECD's ADAS, each party's right to appoint an arbitrator in an arbitration agreement is to be read as a request to nominate an arbitrator for appointment by the arbitration institution.[72] If the claimant is expected to propose an arbitrator and does not do so in the request or within the applicable deadline, the arbitral institution may do so on its own.[73]

Unless otherwise agreed upon by the parties, the number of arbitrators shall be determined by the Hong Kong International Arbitration Centre (hereinafter referred to as "**HKIAC**") in accordance with Article 6(1) of the HKIAC Administered Arbitration Rules. This arbitration body will decide whether a single arbitrator or a panel of three is required to resolve the dispute based on the evidence presented. Whenever a sole arbitrator is to resolve a dispute, the parties to that dispute must choose that arbitrator within 30 days of the respondent receiving the Notice of Arbitration.[74] The HKIAC shall appoint a sole arbitrator if the parties are unable to do so within the required time frame.[75]

In light of this, no appointing authority should be designated in the institutional arbitration for international tax disputes that are being proposed. The Director of the OECD Centre for Tax Policy and Administration can act as the appointing authority for the third arbitrator, just like the OECD ADAS.

Decisions Are Final

International law establishes the idea of finality for tribunal rulings, which includes arbitral awards. To cite an example, Article 60 of the International Court of Justice (*hereinafter* referred to as "**ICJ**") Statute provides that the decisions of the ICJ are final and without appeal. Awards issued in international arbitration cases fall under this category as well. Indeed, although an appeal to a higher tribunal is feasible in civil courts, it is seldom practicable in international arbitration processes, which do not recognize a superior arbiter. Nonetheless, a limited review of the award may be available on occasion. As a result, even if the arbitrator made obvious mistakes, it is very difficult to challenge their decisions in court (except in a few systems like the International Centre for Settlement of Investment Disputes). One of the first pieces of evidence supporting this assertion dates all the way back to the *Antoine Fabiani Case* in 1905.[76] After being heard and settled by the President of

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[72] DIAC Rules, Art. 9(2).

[73] *Id*. Art. 9(3).

[74] HKIAC Administered Arbitration Rules, Art. 7(1).

[75] *Id*. Art. 7(2).

[76] Antoine Fabiani Case (31 July 1905), X UN Reports of International Arbitral Awards,

the Swiss Federation, who acted as an arbitrator in this matter, the same claim was presented to the French-Venezuelan Commission for adjudication.[77] Citing the earlier case, the French-Venezuelan Commission argued that "*This board has no means of knowing upon what grounds the decision of the umpire was made, nor has it any power of correcting his errors, mistakes, or omissions, even if there was clear evidence of the existence of such errors or omissions*."[78] Arbitration could be useful because it can provide a final resolution to a dispute, allowing the parties to move on with their lives. As such, the proposed arbitral tribunal's decisions in cross-border tax disputes must be final in order to comply with international law standards.

Enforceability

As a consequence of the NYC, arbitration rulings are more broadly and easily enforceable than national court verdicts. Almost every significant trade nation on the planet is a signatory to this Convention. Under the New York Convention, domestic courts are required to recognise and enforce foreign arbitral awards in limited circumstances. When comparing the enforceability of domestic court decisions and international arbitration awards, Knull and Rubins made the observation that even if a foreign disputant wins domestic litigation in the home courts of another disputant, the court judgement cannot be enforced if the losing party's only significant assets are located in a third country.[79] Knull and Rubins argue that arbitration is not only a superior method of resolving international conflicts but also the only feasible one.[80] Arbitration accords make it easier for awards to be enforced in foreign jurisdictions than domestic court decisions do.[81] Judiciary systems in the states that have agreed to the New York Convention are required to honour and enforce arbitration agreements and the decisions reached in them. According to Article III of the NYC, contracting states must recognise and enforce arbitration awards in accordance with their own procedural procedures, which must be no more stringent than those applicable to domestic judgements. NYC accordingly directs the parties to existing domestic laws in place governing the enforcement of awards.[82] Thus, if domestic awards are difficult to enforce, NYC

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[77] *Id*. 83-84.

[78] *Id*. 134.

[79] *Id*.

[80] *Id*.

[81] M. Hunter, *International Commercial Dispute Resolution: The Challenge of the Twenty-first Century*, 16 ARBITRATION INTERNATIONAL 379–392 (2000).

[82] R. Doak Bishop & Elaine Martin, *Enforcement of Foreign Arbitration Awards*, *available at*- http://www.kslaw.com/library/pdf/bishop6.pdf.

does not make overseas awards easier to enforce.[83] Last but not least, an arbitration agreement's enforceability depends on its validity. An arbitration agreement's legality is determined either by the law governing the contract or, if that is unclear, by the law of the country seeking enforcement.[84] A written arbitration agreement is required by Article II of the NYC for it to be recognized by the states that have ratified it.[85] A contract, arbitration agreement, or even a letter or telegram between the parties can contain an arbitration clause.[86] Thus, even if the arbitration agreement is legitimate under domestic law, an award may be unenforceable under the NYC if the requirements of Article II(2) regarding 'in writing' are not followed. As a result, if the arbitration agreement is not 'in writing' as required by Article II, it may be preferable to seek enforcement under domestic arbitration law or a more favourable treaty (as allowed by Article VII of the NYC) rather than relying on the Convention.[87] The NYC's Article V presupposes the enforceability of judgments. The Party opposing enforcement under this Article has the burden of proving invalidity. An original or properly certified copy of the award and the original or properly certified copy of the arbitration agreement (with a translation, if necessary) are both required for recognition and enforcement.[88] Article V of the NYC establishes a limited number of reasons for declining to accept or enforce a judgement.

An arbitration award will not be recognised under international law if it meets any of the reasons listed above.

Arbitration Seat and Venue

While the OECD's headquarters are in Paris, France, the arbitration procedure does not have to take place there. Indeed, it is conceivable and customary to designate a location other than the headquarters of the arbitral organization. It should be noted that the arbitration venue is not synonymous with the arbitral seat.[89] The arbitration venue is simply the location where the hearings will take place.[90] The location of an arbitration hearing is chosen based on its

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[83] *Id*.
[84] *Id*. 13.
[85] Marike Paulsson, *supra* Note 9, 119.
[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] Devansh Garg, *The Seat and the Venue of Arbitration under the Arbitration and Conciliation Act, 1996: The Controversy Still Prevails*, 3 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES (2020).
[90] *Id*.

convenience. In contrast, the applicable procedural law and the jurisdiction in which a judgement must be enforced depending on the location of the arbitration.[91]

For example, although the HKIAC's headquarters are in Hong Kong, Article 14(1) of the HKIAC Administered Arbitration Rules indicates that the disputing parties may agree on the seat of arbitration. Again, the flexibility of an arbitral institution's rules is what makes it the ideal approach for resolving international tax disputes. For example, the HKIAC Administered Arbitration Rules facilitate the parties' access to the venue: "*Unless the parties have agreed otherwise, the arbitral tribunal may meet at any location outside of the seat of arbitration which it considers appropriate for consultation among its members, hearing witnesses, experts or the parties, or the inspection of goods, other property or documents. The arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the seat.*"[92] Thus, another element of institutional arbitration that makes this proposal an appealing choice for resolving cross-border tax disputes is the flexibility of selecting a seat and venue for arbitration.

Arbitrators' Fees and Expenses

Some fees are necessary to cover procedural and administrative expenses and to discourage frivolous litigation, as is the case with other methods of conflict resolution. The arbitrators' fees and expenses shall be reasonable with respect to the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators, and any other relevant circumstances of the case, in accordance with the practices of other arbitration tribunals.[93] In theory, the losing party or parties must bear the expenses of the arbitration.[94] However, the arbitral tribunal may allocate such costs between the parties if it determines that doing so is equitable in light of the circumstances.[95]

Scope of Arbitration Agreement

The OECD acknowledges that some countries may limit the scope of their arbitration to only a few scenarios. Paragraph 68 of the OECD Convention's Commentary on Article 25 allows parties to place restrictions on who can

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[91] *Id*.

[92] HKIAC Administered Arbitration Rules, Art. 14(2).

[93] John Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICHIGAN JOURNAL OF INTERNATIONAL LAW (1999).

[94] *Id*. 5.

[95] *For eg.*, HKIAC Administered Arbitration Rules, Art. 33(2); London Court of International Arbitration Rules, Art. 28(2).

participate in MAPr arbitration.[96] This suggests limiting arbitration to cases where there are no legal questions to be answered, such as in the case of transfer pricing or the existence of a permanent establishment. As a matter of fact, a few OECD countries have restricted arbitration altogether.[97] Ad hoc arbitration is included in the Model Tax Conventions, but the OECD wants to strike a balance by proposing to restrict access to it or to reduce its extent. This would encourage countries to embrace arbitration with a limited scope rather than reject it outright.[98] Tillinghast argues that there is no compelling reason to restrict the scope of arbitration in this way.[99] Otherwise, he cautions inconsistency and incorrect implementation of tax treaty terms are a certain conclusion.[100] In a similar spirit, Markham rebuts this approach to arbitral scope limitation.[101] Markham claims, based on the most up-to-date OECD data on MAPr cases, that the proliferation of conflicts provides irrefutable evidence that adopting arbitration selectively or piecemeal is not recommended.[102] As pointed out by Markham, there are no limits on when competent authorities may agree that arbitration is not suitable, and tax administrations are not required to provide proper justifications for their judgements to limit the scope of arbitration.[103]

According to Markham, this restriction on the scope of arbitration is also inconsistent with the OECD's policy on the evaluation of creative techniques for implementing complete solutions.[104] Reducing the scope of mandatory arbitration in DTAs, as Monsenego has pointed out, may increase complexity and raise challenging concerns about income qualification.[105] Monsenego illustrates this problem with the example of a tax administration notifying a business of a reassessment of its revenue.[106] There could be complications if the

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[96] OECD, PUBLIC DISCUSSION DRAFT BEPS ACTION 14: MAKE DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE (2014), para. 43; Michelle Markham, *Seeking New Directions in Dispute Resolution Mechanisms: Do We Need a Revised Mutual Agreement Procedure?*, 70 BULLETIN FOR INTERNATIONAL TAXATION (2016).

[97] Michelle Markham, *Id*. 82, 92.

[98] OECD, *supra* Note 60, para. 45.

[99] David Tillinghast, *Issues in the Implementation of the Arbitration of Disputes Arising under Income Tax Treaties*, 56 BULLETIN FOR INTERNATIONAL TAXATION (2002).

[100] *Id*.

[101] Michelle Markham, *supra* Note 97, 93.

[102] *Id*.

[103] *Id*.

[104] *Id*.

[105] Jérôme Monsenego, *Designing Arbitration Provisions in Tax Treaties: Reflections Based on the US Experience*, 42 INTERTAX 163-8 (2014).

[106] *Id*.

other treaty partner's tax administration argues that the income distribution is a dividend and the reassessment is based on non-length arm's length pricing. One of the tax authorities may claim that the matter is not arbitrable, while the other may insist that it should be, depending on whether the arbitration clause is narrowly tailored to apply only to transfer pricing or to dividends.[107] In conclusion, the authors of this paper concur with previous arguments arguing that arbitration's scope should not be restricted. The authors furthermore believe that, under the proposed arbitration institution, an agreement between the two tax administrations of a DTA to restrict the scope of arbitration is anti-taxpayer. In addition, it lengthens the procedure and increases uncertainty, both of which diminish the openness and efficiency of the arbitration institution. Consequently, this approach shouldn't be taken, and arbitration shouldn't be limited to only certain scenarios.

Conclusion

This research aims to add to the existing body of knowledge by introducing a new concept to the existing body of literature: the establishment of a permanent arbitral institution, specifically an international tax arbitration institution. This proposed body would be in charge of interpreting DTA laws and making sure they are consistently applied across similar situations. In other words, the purpose of this article is to propose and elaborate on its central proposition, which is that taxpayers and governments alike would benefit from the creation of an international arbitration institution dedicated to the resolution of international tax disputes and the enforcement of its established and preexisting rules.

The proposed international tax arbitration institution is counted on to perform crucial administrative tasks such as a timely selection of arbitrators, a transparent and fair arbitration process, and the accurate collection of all associated fees and costs. Since an international tax arbitration tribunal would be handling the case, neither party to the dispute could delay or obstruct it. The parties to the dispute would also have the option of selecting their own arbitrators under this proposal. Thus, concerns about government tax authority can be allayed in this way. The current scenario, with its myriad of bilateral ad hoc arbitration adjudications, may not be as uniform as the proposed tax arbitration institution, which could make the implementation and interpretation of tax treaty commitments more uniform. When compared to the current ad hoc arbitration system, which requires tax administrations to construct the procedure on a case-by-case basis, all of these features are likely to increase the use of arbitration.

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[107] *Id*.