Three's (Not) a Crowd in International Tax Arbitration: International Tax Arbitration as a Development of International Commercial Arbitration Rather than a MAP Fix

Sarah G. Nowland

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Sarah G. Nowland is a J.D. Candidate, 2014 in the Taxation Concentration at U.C. Hastings College of the Law. She received a B.A. in Economics at U.C. Berkeley in 2011 and has published over twenty articles on The Network, a blog by the Berkeley Center for Law, Business and the Economy. Sarah would like to thank Professor Heather Field for her academic support, life advice, and never-ending enthusiasm for tax.
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I. Introduction

Countries around the world, in the interest of their citizens, have developed methods of mitigating the instances of double taxation. One method is through tax conventions (treaties) that the contracting nations negotiate and that contain rules on who can tax what.

Inevitably, disputes arise when taxpayers claim double taxation not in accordance with a convention. To deal with these claims, tax conventions include a Mutual Agreement Procedure (MAP) where government designated competent authorities from each nation meet and agree on a course of action to alleviate that particular taxpayer's instance of double taxation. In the United States, the competent authority is the Internal Revenue Service.

As the number of cases submitted to MAP increased, problems were exposed in the MAP process. The three common problems were: (1) the length of time it took competent authorities to agree; (2) competent authorities did not always reach a decision; and (3) taxpayers were not involved in the process.

The first two problems have been best addressed by the recent inclusion of mandatory binding arbitration provisions within MAP. In the United States, however, only four out of over sixty tax conventions include mandatory binding arbitration provisions. Inconsistent arbitration standards exist across the remaining negotiated and model tax conventions.

The third problem, lack of taxpayer involvement, has yet to be resolved. As this paper suggests, several international commercial arbitration standards should be applied in tax arbitration. Party involvement in commercial arbitration disputes is a key element of its widespread use and success at dispute resolution. It follows that taxpayer involvement in international tax arbitration proceedings will have a similar effect.

Most MAP arbitration provisions in tax conventions were developed for the sole purpose of "fixing" MAP so there would be fewer instances of double taxation. The problems with MAP, however, reflect concerns over time management, agreement between competent authorities, and lack of taxpayer involvement. When viewed in the context of these interests, tax arbitration development seems to parallel some of the goals of international commercial arbitration.
The drafters of arbitration clauses in international tax conventions will benefit by looking to the established international commercial arbitration (ICA) system for guidance. By examining the four United States mandatory binding arbitration provisions in the context of important ICA issues, the weaknesses of the current international tax arbitration (ITA) system can be improved. A better system means fewer instances of double taxation, more taxpayer activity in the global market, and more overall tax revenue for government use.

The inclusion of arbitration provisions in international tax treaties should be considered not just as a MAP fix, but as a separate dispute resolution mechanism. Inclusion of these provisions shows the extension of the private sector’s arbitration success into a government-dominated area. In fact, this is the natural result of an ongoing progression from private party-private party arbitration (ICA), to state-nationals of other states (ICSID arbitration), to state-state arbitration (ITA). This paper suggests that a three-party system of state-state-taxpayer arbitration is the best way to carry out disputes under international tax conventions.

II. International Tax Issues

A. Double Taxation

The United States taxes residents on their worldwide income, meaning “all income from whatever source derived.” Other countries “impose similar residence-based income taxation on residents and source-based income taxation on foreigners.” When a taxpayer’s income is subject to tax in both the United States and another country, there is a risk of double taxation. This “overlap” of multiple tax systems risks “discouraging international business and investment pursuits.” Countries are trying to solve this problem by negotiating new tax conventions.

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1. In this paper I will refer to mandatory binding international tax arbitration in the context of MAP as “ITA.”
4. Id.
B. Tax Conventions

Tax conventions "are bilateral treaties that are negotiated directly between two countries."\(^5\) The conventions seek "to alleviate some of the double taxation issues by defining terms, allocating income, and setting up objective tests for certain jurisdictional issues."\(^6\) Tax conventions incorporate "specific provisions to provide individuals and companies with greater certainty regarding their tax liability and to reduce the risk of double or excessive taxation."\(^7\) They "serve various economic and political purposes as well"\(^8\) because the conventions represent negotiations between countries about how they will treat foreign enterprises. For a taxpayer, however, a "tax treaty is not worth much unless the treaty also contains provisions for the elimination of double taxation when there is a conflict between the two states as to the taxability of a certain item of income."\(^9\) States currently include Mutual Agreement Procedures (MAP) in their tax conventions to handle these conflicts.

C. Mutual Agreement Procedure in Tax Conventions

A common tax convention provision that deals with these conflicts is the Mutual Agreement Procedure (MAP). MAP is included in many tax conventions, and is generally voluntary and nonbinding.\(^10\) MAP "allows a taxpayer who is disturbed by an apparent misapplication of a tax treaty by one of the treaty signatory countries to request a designated bureaucrat — called a competent authority — to engage in efforts to resolve the problem directly with the counter


\(^7\) John Harrington, No Dispute About the Increasing Importance of Arbitration in Tax Treaties, 59 Tax Notes Int'l 753, 753 (2010).


\(^9\) Bertolini & Weaver, supra note 6, at 2.

party's designated competent authority.” The competent authorities then meet as national representatives from each contracting country to try to reach an agreement on the appropriate tax treatment of the taxpayer.

D. Limitations of MAP

1. MAP Agreement Can Take a Long Time

MAP provisions do not establish time limits under which competent authorities must reach a decision. Consequently, there is no incentive for authorities to come to a timely agreement. This “failure of the international tax system to resolve double taxation issues within reasonable time frames not only imposes economic costs directly on both business and governments, but also tends to diminish confidence within the business community in the ability of the international economic system to resolve even routine intergovernmental issues.” IRS data show that from 1995 through 2004, the time it took to resolve a conflict through MAP increased from 20 to 30 months. European data show during the 1990s, MAP resolution took an average of 18 months, and sometimes took up to two years. The OECD’s most recent statistics show that in 2010 it took 27.3 months on average to complete MAP between OECD countries.

2. Competent Authorities Do Not Have To Reach a Decision

Currently, MAP provisions contain a major flaw, as they do not require competent authorities to agree on any final resolution. Sometimes competent authorities “become entrenched in inconsistent positions that each genuinely believes to be superior.” Before arbitration was introduced into MAP, as discussed below,

13. BERTOLINI & WEAVER, supra note 6, at 13.
14. Id.
there was no incentive for competent authorities to agree, thereby resolving the dispute and finishing MAP. In fact, data from the United States Treasury and the Internal Revenue Service (IRS) show out of all the claims submitted to MAP, "a wide range of taxpayer income . . . received partial or no relief"17 because the competent authorities did not reach a conclusion. The most recent statistics from the OECD show 3,328 open MAP cases at the end of 2010, a 41.5% increase from 2006.18 This "empirical evidence shows that the current MAP procedures [without arbitration clauses] are not accomplishing their goal of removing double taxation based upon tax treaty provisions."19

3. Taxpayers Are Not Involved

Currently, a taxpayer who protests double taxation surrenders his claim to his state's competent authorities to argue on his behalf in the MAP proceedings. After MAP begins, the "affected taxpayers are normally excluded from the competent authority deliberations or, in any event, have no official or guaranteed status in such deliberations."20 Some tax scholars find it "unreasonable and unnecessary" that the taxpayer, "despite being the principal stakeholder and at risk to double taxation, has no official means of direct participation."21 Additionally, taxpayers don't always trust their competent authority to represent their interests behind closed doors. For example, the competent authority of the United States is the IRS whom many taxpayers see as an adversary.22 Current mandatory binding arbitration clauses do not give the taxpayer a central role in the resolution of his own tax issue. When writing future arbitration clauses into tax conventions, states should look to the high degree of party involvement in the international commercial arbitration dispute resolution structure and give the taxpayer a bigger

17. Bertolini & Weaver, supra note 6, at 15.
18. OECD Dispute Resolution, supra note 15.
19. Bertolini & Weaver, supra note 6, at 15.
III. Problem: Inconsistent Standards of Arbitration Introduced to Fix MAP Do Not Solve the Overall Problem of Double Taxation

A. How Arbitration Attempts to “Fix” MAP

Arbitration was introduced in an attempt to fix problems with the lengthy process of MAP, competent authority disagreement, and the lack of taxpayer involvement. Arbitration does not exist outside of MAP — in most tax conventions, including those assessed below, an issue must be brought to MAP before it can even enter arbitration. In this way, arbitration “is a supplement to MAP and used when the existing MAP fails to provide a resolution, rather than a substitute for MAP.” Arbitration was initially included in MAP because increasingly overwhelmed and underfunded governments were not able to resolve even the simplest double taxation disputes in a timely fashion. Multinational businesses were forced to wait two years or more in some cases. As shown below, mandatory and binding arbitration clauses are the most effective way to deal with the limitations of MAP.

24. BERTOLINI & WEAVER, supra note 6, at 15.
25. DURST & CULBERTSON, supra note 12, at 2.
1. Response to Length of MAP and Disagreement Between Competent Authorities

States introduced arbitration to MAP in order to decrease the "time taken for the competent authorities to settle the issues."\(^{26}\) Introducing mandatory and binding arbitration clause into MAP kills two birds with one stone. Mandatory binding arbitration clauses require that an issue under MAP that is submitted to arbitration be decided in two years or less.\(^{27}\) The two year deadline provides an incentive for competent authorities to agree if they wish to retain their decision making power, while simultaneously limiting the time interested parties must wait for a solution. Many argue the primary benefit of arbitration is the implementation of an effective deadline, not the actual arbitration proceeding itself.\(^{28}\)

Countries want to maintain control over taxation standards because tax revenue is an integral part of government operations. By "setting a deadline for resolution of an issue by the competent authorities, after which the competent authorities would lose control over that issue, a compulsory arbitration rule can create an incentive for resolution of the issue by the countries involved."\(^{29}\) Voluntary arbitration does not have the same effect since competent authorities do not have to submit to arbitration, and do not fear losing control. This is why the "conclusion by many in the business and the academic community is there needs to be a more forceful and definitive solution to tax treaty disputes, such as true mandatory [binding] arbitration."\(^{30}\)

2. Response to Lack of Taxpayer Involvement

The current arbitration provisions in MAP still do not provide sufficient taxpayer involvement. It is important for taxpayers to be involved in resolution processes so they can be confident their interests are represented. Additionally, taxpayers are more likely to accept an arbitral decision if they are involved in the process. Some arbitration provisions allow the taxpayer limited input "as taxpayers need to

\(^{26}\) Bertolini & Weaver, supra note 6, at 15.

\(^{27}\) See U.S.-France Tax Convention, art. 26; U.S.-Canada Tax Convention, art. 21; U.S.-Belgium Tax Convention, art. 24; U.S.-Germany Tax Convention, art. 25, supra note 23.

\(^{28}\) Durst & Culbertson, supra note 12, at 2.

\(^{29}\) Id.

\(^{30}\) Bertolini & Weaver, supra note 6, at 15.
ensure that they do all they can to help the competent authority that is trying to help them."\textsuperscript{31} The OECD Model allows the taxpayer to present evidence to the arbitration panel.\textsuperscript{32} The EU Arbitration Convention also gives taxpayers "a far greater role in the arbitration proceedings."\textsuperscript{33} The U.S.-France Tax Convention has an "explicit role for taxpayer submissions."\textsuperscript{34} Other arbitration provisions provide a more informal role for taxpayer involvement, but the taxpayer "must remember that the arbitration board must choose one of the positions of the competent authorities."\textsuperscript{35} This means the taxpayer "should not push for the adoption of a position unlikely to be adopted by the arbitration board" since it may result in "the arbiters choosing the position of the other competent authority."\textsuperscript{36}

**B. The Importance of "Mandatory" and "Binding" Arbitration**

It is important to be precise when analyzing and writing about international tax arbitration (ITA) in the context of MAP. The adjectives modifying "arbitration" are game changers.

As discussed above, mandatory arbitration provisions in MAP require disputes to submit to arbitration if not resolved by competent authorities within two years. The mandatory aspect of arbitration creates an effective deadline to competent authority negotiations. It also encourages a final resolution since countries want to retain control. In contrast, nonmandatory arbitration clauses do not require competent authorities to submit an issue to arbitration. It is significant that no MAP disputes under "'voluntary arbitration' U.S. treaties have ever been subject to arbitration."\textsuperscript{37}

\textsuperscript{31} Harrington, supra note 7, at 757.


\textsuperscript{34} Harrington, supra note 7, at 757.

\textsuperscript{35} Id. at 758.

\textsuperscript{36} Id.

Nonmandatory arbitration provisions do not promote resolution; they provide no incentive motivating competent authorities to agree.

Mandatory arbitration that is not binding is equally ineffective to promoting an efficient resolution to tax disputes under MAP. In the four U.S. tax conventions discussed below, the arbitration decision is “binding on the Contracting States.” This means that the arbitral decision “constitute[s] a resolution by mutual agreement ... and will be binding on both competent authorities with respect to that case.” The problem, however, is that the taxpayer who brought his issue to MAP in the first place can still reject the resolution. Although most successful arbitration provisions in MAP are mandatory and “binding,” they can be improved by becoming binding on the competent authorities and the taxpayers, as elaborated below.

C. International Tax Arbitration in Model Tax Conventions

Governments and organizations create model tax conventions to standardize international tax practices and incorporate solutions to ITA problems as they arise. Administratively, it is easier to update one convention rather than each iteration of the convention between countries. The following European model tax conventions have been updated to include arbitration provisions in their MAP clauses.

The Organization for Economic Co-operation and Development’s Committee on Fiscal Affairs has created a Model Tax Convention on Income and on Capital (the OECD Model Tax Convention). The most recent version of the OECD Model Tax Convention was written in 2010, and includes commentaries on each article “intended to clarify the purpose of such rules.”

In 2008, an arbitration provision was added to Article 25 (Mutual

38. See e.g., Protocol amending U.S.-Germany Tax Convention, supra note 23, at 35.


41. See infra pp. 214–216.

42. See OECD Model Tax Convention, supra note 32, at C(25)-2.
Agreement Procedure) of the OECD Model Tax Convention.43 The provision permits "any unresolved issues" the competent authorities could not agree on to be "submitted to arbitration if the person so requests."44 Many articles refer to the OECD arbitration provision as "mandatory," but the language shows that arbitration is only mandatory for the contracting states if the "person" so desires.45 The "person" is the taxpayer who brought the dispute to the competent authority for MAP resolution in the first place.46 As discussed above, part of the benefit of mandatory binding arbitration is providing an incentive for the competent authorities to reach an agreement. Since the "person" submits to arbitration if the competent authorities cannot agree, then arbitration can be thought of as involuntary, or "mandatory," from the competent authorities' perspective. OECD commentary explains that the arbitration "process is not dependent on a prior authorization by the competent authorities: once the requisite procedural requirements have been met, the unresolved issues that prevent the conclusion of a mutual agreement must be submitted to arbitration."47 The arbitral decision is then "binding with respect to the specific issues submitted to arbitration."48 Thus, ITA in MAP under the OECD Model Tax Convention can be considered mandatory binding arbitration.

It is significant that the OECD Model Tax Convention provides for mandatory binding arbitration because it sets the standard for other systems. Most of Europe "follows the lead of the OECD because so many of the members are also members of the European Union."49 The U.N. Model Tax Convention, for example, incorporates OECD's MAP clause but gives countries two options — to include arbitration or not to include arbitration in the MAP clause.50 To the rest of the world, the OECD's mandatory binding arbitration

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43. See generally OECD Model Tax Convention, supra note 32.
44. See OECD Model Tax Convention, supra note 32, at M-59.
45. Id.
46. See id. ("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 . . . present his case to the competent authority of the Contracting State of which he is a resident . . . or national.").
47. OECD Model Tax Convention, supra note 32, at C(25)-23.
48. Id. at C(25)-30.
49. BERTOLINI & WEAVER, supra note 6, at 10.
50. See United Nations Model Double Taxation Convention between Developed and Developing Countries, art. 25, updated 2011 [hereinafter U.N.
arbitration provision “inspires confidence in identifying ‘international tax dispute resolution’ as a discipline,” and is its first “mainstream and global endorsement.” 51

The EU Model Tax Convention also provides for mandatory binding arbitration, but not for double taxation, because double taxation issues were largely dispensed of with the economic integration under the European Union. Since the European Union “has effectively eliminated double taxation within the EU for many taxpayers, specifically those doing business within the EU,” 52 double taxation issues are unlikely to arise between two member countries. Thus, the European Union “has bifurcated the issue with a mandatory arbitration provision in dealing with transfer pricing issues but outside of the normal tax treaty regime.” 53 It is noteworthy, but outside the scope of this paper, that the EU Tax Convention still provides for mandatory arbitration within its specific transfer pricing and establishment issues.

The U.S. Model Tax Convention borrows from the OECD in some ways, but does not include a mandatory binding arbitration provision in MAP. In fact, the U.S. model does not contain any type of arbitration provision, so the “sole method for relief from double taxation is through the voluntary MAP proceedings.” 54 Fortunately “the U.S. position is shifting to one of arbitration” 55 because the international economy is growing rapidly, leading to an increase in international tax disputes that need a more effective resolution process. 56 Moving forward, the U.S. model is likely to look to the OECD for guidance, since it already incorporates some of its laws and model provisions. As discussed below, there are four current U.S. tax conventions that contain mandatory arbitration provisions.

52. BERTOLINI & WEAVER, supra note 6, at 10.
53. Id. at 2.
54. Id. at 10.
55. Id. at 8.
56. DURST & CULBERTSON, supra note 12, at 1.
IV. Mandatory Binding Arbitration Provisions Exist in Four Current U.S. Tax Conventions’ MAP Articles

At this point, I will introduce the four U.S. tax conventions (with Belgium, Germany, Canada, and France) that contain mandatory binding arbitration provisions within their MAP clauses.\(^{57}\) It is important to examine the working tax agreements between countries because ITA decisions that resolve MAP are protected by non-disclosure and confidentiality agreements and provisions. In the United States, public data about mandatory arbitration in MAP is limited because few cases reach resolution and no outcomes are published.\(^{58}\) Consequently, the actual negotiated agreements are the only nonacademic examples of mandatory binding arbitration in U.S. ITA. As discussed below, comparing these arbitration provisions to ICA issues is more helpful than speculating how ITA can improve MAP.

All four mandatory binding arbitration provisions are updates to existing tax conventions. The provisions were introduced through Protocols and explained through “Technical Explanations.” Protocols are official documents included in the body of a treaty. Technical Explanations are separately published guidelines that explain the background and intent of Protocol provisions. Technical Explanations “do not have the force of law and only serve as an aid for interpretation.”\(^{59}\) Procedurally, the arbitration provisions rely on additional agreements like Memorandums of Understanding, Arbitration Board Operating Guidelines, and Diplomatic Notes, which are discussed below.\(^{60}\)

A. U.S.-Belgium Tax Convention

The Convention between the United States and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income (the U.S.-

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57. See Schlaman & Trauman, supra note 37, at 1 (“currently, mandatory arbitration provisions are included in only four US income tax treaties: Belgium, Canada, France, and Germany”); see also Craig A. Sharon, Treaty Arbitration: Where Art Thou?, 41 TAX MGMT’L INT’L J. 91, 92 (2012) (“the United States has incorporated mandatory arbitration into four new treaties (i.e., Germany, Belgium, France, and Canada)”).

58. Sharon, supra note 57, at 92.

59. Bertolini & Weaver, supra note 6, at 18.

60. See infra pp. 196-197.
Belgium Tax Convention) was the first U.S. tax convention to include a mandatory binding arbitration clause. In 2006, the Protocol Amending the U.S.-Belgium Tax Convention entered into force, and updated Article 24 (Mutual Agreement Procedure) to include the mandatory binding arbitration clause. In 2009, a Memorandum of Understanding and Arbitration Board Operating Guidelines were issued to provide procedural guidelines for arbitration under MAP.

B. U.S.-Germany Tax Convention

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 (the U.S.-Germany Tax Convention) also contains a mandatory binding arbitration provision. This provision was included in Article 25 (Mutual Agreement Procedure) in a 2006 Protocol amending the convention. Procedural rules for the arbitration process are included in paragraph 22 of Article XVI of the Protocol, and explained in a 2007 Technical Explanation.

C. U.S.-Canada Tax Convention

The Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital (the U.S.-Canada Tax Convention) contains a mandatory binding arbitration clause from a 2007 amending Protocol. The procedure is set out in a diplomatic Arbitration Note, and explained in a Technical Explanation. The two countries have even released information about MAP decisions that went to arbitration and were resolved. By 2012, the United States had "won" three decisions under mandatory arbitration.

61. See U.S.-Belgium Tax Convention, supra note 23.
62. See U.S.-Belgium Memorandum, supra note 39.
63. See U.S.-Germany Tax Convention, supra note 23.
64. See id.; see also Department of the Treasury Technical Explanation of the Protocol Signed at Berlin on June 1, 2006 [hereinafter the U.S.-Germany Technical Explanation].
65. See U.S.-Canada Tax Convention, supra note 23.
66. See Diplomatic Notes: Annex A to the Convention, signed September 21, 2007 [hereinafter the U.S.-Canada Diplomatic Note]; see also Department of the Treasury Technical Explanation of the Protocol Done at Chelsea on September 21, 2007 [hereinafter the U.S.-Canada Technical Explanation].
binding arbitration against Canada. As a result of these decisions, the IRS has "collected a significant sum of money, possibly in excess of $100 million."

D. U.S. - France Tax Convention

The Convention between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital (the U.S. - France Tax Convention) is the last convention to be updated with a mandatory binding arbitration provision. The provision was added to Article 26 (Mutual Agreement Procedure) by a 2009 Protocol. Similar to the other treaties, the procedural rules are provided in the 2009 Memorandum of Understanding, and explained in the 2009 Technical Explanation.

V. Systems Development: We Should View Tax Arbitration as a Development of International Commercial Arbitration Rather than as a MAP Fix

A. Brief Overview of International Commercial Arbitration

International commercial arbitration "has become the generally acceptable method of resolving disputes between transnational contracting parties." Its success in the private sphere is likely because businesses "wish to avoid the perceived uncertainty and uncertainty and

68. Id.
69. See U.S.-France Tax Convention, supra note 23.
70. Id.
unpredictability of foreign courts." Upon this increase in tax disputes submitted to MAP, the escalation of commercial disputes submitted to arbitration led to the development of a detailed ICA system.

ICA provisions exist in many international agreements, conventions, and treaties. Rules for arbitration proceedings come from many sources as well. For example, the United Nations Commission on International Trade Law (UNCITRAL) has promulgated rules and model laws for ICA. In the United States, the Federal Arbitration Act (FAA) codifies arbitration rules and procedures. Numerous international, regional, and national arbitral institutions have been created to administer these and other ICA rules.

A major part of ICA's success comes from the widespread acceptance of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the N.Y. Convention). The N.Y. Convention ensures that signatories' courts recognize agreements to arbitrate, and also recognize and enforce arbitral awards. A "major purpose of the New York Convention was to ensure the efficacy of awards by limiting the grounds upon which a national court could refuse to recognize or enforce an award." Limiting domestic courts' ability to set aside awards encourages parties to submit to arbitration because a potential award can be binding.

ICA is now a widely accepted dispute resolution system, with issues being resolved constantly by the international community. There has been an "unparalleled proliferation of legislative acts devoted to international commercial arbitration, and at the same

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73. Id. at 27-28.
75. Id.
76. Id.
77. See 9 U.S.C. § 1 et. seq.
80. VÁRÁDY ET AL., supra note 72, at 840.
time arbitration rules and party stipulations have thickened with
detail, and have become more discerning.” 81 It is precisely these
well-developed “details” ITA should look to for guidance. Moving
forward, I will examine the important issues in ICA, and how they
have been addressed in the four U.S. tax conventions that include
mandatory binding arbitration (which will sometimes be referred to
as “example tax conventions”). Instead of looking at mandatory
binding arbitration as a response or solution to MAP, we should
look at how we can improve it based on the ICA model.

B. Important ICA Issues and How They Apply to ITA

1. Goals of ICA

One of the primary goals of ICA is to encourage international
economic growth and development by providing businesses a forum
for dispute resolution they can trust and control. ICA “has been
justified and marketed with emphasis on its ability to be structured,
and restructured, to meet the needs of businessmen.” 82 Its appeal is
the resolution of “business disputes between or among transnational
parties through the use of one or more arbitrators rather than through
the courts.” 83 Unlike the “courts which are tied to procedure and
substantive law which have not been tailored to the needs of the
international business community ... arbitration may be shaped to
meet the wishes of the parties, and it also gives more room for
maneuver in the search for a mutually acceptable compromise.” 84
Therefore, businesses are more likely to expand or invest abroad since
they can include an arbitration agreement their contracts, and be
confident it will be enforced.

Similarly, the ITA is meant to encourage taxpayers to
participate in the worldwide economy. Arbitration within MAP is
meant to eliminate or reduce double taxation in accordance with the
agreed-upon tax conventions. 85 This requires the ITA to provide
governments a fair way to resolve disputes when two countries

81. Id. at 479.
82. Id. at 45.
83. Miccioli, supra note 74.
84. Varady et al., supra note 72, at 45.
85. See U.S.-France Tax Convention, art. 26; U.S.-Canada Tax Convention, art.
21; U.S.-Belgium Tax Convention, art. 24; U.S.-Germany Tax Convention, art. 25,
supra note 23.
would benefit by taxing the same person. Another important goal of ITA is to provide the taxpayer with definitive and certain knowledge of his tax liability. This is particularly important because arbitration can only be invoked by the taxpayer after initiating MAP, so the development of ITA depends upon taxpayer trust and use. By addressing both government and taxpayer needs, “tax treaty arbitration provides one hope for fiscal symmetry, thereby reducing the fiscal barriers to cross-border trade and investment.”

The International Chamber of Commerce (ICC) believes the benefits of commercial arbitration transfer well to mandatory binding arbitration in double taxation disputes. The ICC has even been cited by the U.S. Supreme Court regarding the benefits of “expanding the range of issues resolvable in international arbitration.” The ICC explicitly “recommend[s] that compulsory and binding arbitration in international tax matters should be adopted in bilateral or multilateral tax conventions . . . based upon the broad experience of ICC in commercial arbitration.” The ICC believes that including mandatory binding arbitration in tax conventions is effective because it “always reaches a conclusion, provides for impartial determinations with proper taxpayer participation, and applies law rather than expediency.” This recommendation is based on the ICC’s recognition of ICA success in the private sector. It is clear to the ICC that the goals of ITA reflect the goals of ICA, showing the usefulness of developing tax arbitration based on ICA models.

2. Arbitrability and the Scope of an Arbitration Agreement

Arbitrability is a gateway issue that reflects whether a certain dispute can be resolved by arbitration or whether it must be adjudicated by a court. Broadly, the arbitrability of an issue “depends on the existence, validity, and scope of an arbitration agreement.”

87. See ICC, supra note 20, at 1 (“based upon the broad experience of ICC in commercial arbitration, we believe that this form of dispute resolution is both attractive and effective”).
88. Varady et al., supra note 72, at 33; see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 m. 18, 637, n. 19 (1985).
89. ICC, supra note 20, 1.
90. Id. at 2.
A more narrow interpretation is “whether mandatory law in a given jurisdiction disallows arbitration of disputes dealing with a particular subject matter because that subject matter is infused with high-order public policy concerns.”

The nonarbitrability of issues in ICA is usually based on these public policy concerns. Since arbitration operates in the private sphere, “countries have traditionally been reluctant to allow arbitration in spheres where there is a strong public interest at stake.” In ICA, issues that are usually nonarbitrable because of public policy include disputes about antitrust, securities law, intellectual property, and political embargoes, among others. Taxation is a different type of public interest concern, but it still has public policy implications because it dictates the scope of services a government can provide. These public policy concerns limit the issues the arbitral board can decide; however, party imposed restrictions are more of an issue of scope.

The arbitrability of a double taxation dispute was established with the introduction of mandatory binding arbitration into MAP clauses, although the scope of the resulting arbitration is limited. The U.S. tax conventions with Germany, Canada, and France limit the issues an arbitral board can decide “to a determination regarding the amount of income, expense, or tax reportable to the Contracting States.” Thus, not all double taxation issues are arbitrable because the scope of the arbitration provision is itself limited. Some tax arbitrations will fail because the “arbitration clause . . . remove[s] certain types of tax controversies from the arbitrators’ adjudicatory power,” making the issue un-arbitrable. The ITA might benefit from allowing more tax issues to be arbitrated; however, like ICA’s success despite limitations, “international tax arbitration even in a
limited form is a good thing."\(^{97}\)

Additionally, nonarbitrability has been held to apply to rights that parties cannot freely dispose of. In *Fincantieri-Cantieri v. Ministry of Defense*, the Italian Court of Appeal held that these "diritti indisponibili" are rights within the state's control (like the U.N. Security Council's embargo against Iraq) that parties cannot circumvent by arbitration.\(^{98}\) On the other hand, rights within the party's control, such as economic rights, can be freely disposed of and are capable of arbitration.\(^{99}\)

A decision concerning the arbitrability of an issue is subject to change throughout the life of a dispute. For example, in *Fincantieri* the Italian court decided that the issue was nonarbitrable at the beginning of the dispute, but a Swiss court later held in *Coveme SpA v. Compagnie Francaise des Isolants SA* that the arbitrability of the same issue should be decided at the enforcement stage.\(^{100}\)

Arbitrability issues can arise at four points in the life of an arbitral dispute. First, it can arise "before a national court deliberating whether to enforce an arbitration agreement."\(^{101}\) Second, an issue could come up before the "arbitrators themselves as they try to decide the scope" of their own ability to arbitrate.\(^{102}\) Third, the issue can arise before a court in the "country where the arbitration has taken place, in an action to set aside an award."\(^{103}\) Finally, the issue of arbitrability can come before a court in the country that is being "asked to recognize and enforce an award."\(^{104}\) The last two issues of arbitrability are particularly important since they can potentially allow a court to refuse to enforce an award, as discussed below.

As it stands, the arbitrability of ITA disputes is decided at the first stage of mandatory binding arbitration. The competent authorities must submit to arbitration if they cannot reach an agreement within two years.\(^{105}\) The arbitration clause is part of

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99. *Id.*
100. VÁRÁDY ET AL., *supra* note 72, at 243 (citing *Coveme*).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. See *U.S.-France Tax Convention*, art. 26; *U.S.-Canada Tax Convention*, art.
MAP, which the countries are already engaged in if it reaches arbitration, so there won't be a dispute about whether the provision is valid. Instead, arbitrability will be decided unilaterally by the competent authorities themselves, since they can "agree that the particular case is not suitable for determination by arbitration."106 If ITA evolves to look more like ICA, however, the competent authorities will not necessarily be able to opt out of arbitration, and arbitrability may be debated at the enforcement level as well.

3. Existence and Validity of an Arbitration Agreement

In ICA, arbitration is initiated because of a preexisting arbitration clause or, less often, because the parties mutually agreed to arbitration.107 Often one party will not want to submit to arbitration and will dispute the validity of the arbitration clause. This gateway issue in ICA corresponds to the debated mandatory aspect of submitting MAP issues to arbitration. In order for arbitration to be utilized and effective, parties must be confident their choice to submit a current or future dispute to arbitration will be recognized.

Although parties can challenge the arbitration clause in ICA, courts must "refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."108 Many arbitration clauses are upheld under this sufficiently high standard. This suggests that the "mandatory" aspect of tax arbitration is a key component to its success. The ICC supports this view, and draws on its ICA experience to suggest that the limitations of arbitration under existing MAP clauses should be changed. For example, the ICC suggests "either state may initiate arbitration" and "the affected taxpayers should have the right of initiative in all cases, whether or not the competent authorities have agreed."109 Furthermore, "arbitration should be compulsory, whether initiated at the instance of a contracting state or a taxpayer."110

21; U.S.-Belgium Tax Convention, art. 24; U.S.-Germany Tax Convention, art. 25, supra note 23.
106. See e.g., U.S.-German Tax Convention, supra note 23, at art. XVI, paragraph 22.
107. See VÁRADY ET AL., supra note 72, at 97.
108. N.Y. Convention, supra note 79, at art. II (3).
110. Id.
Unfortunately, all four United States examples with arbitration clauses include exceptions to the mandatory initiation of arbitration proceedings. The U.S.-Belgium and the U.S.-France Tax Convention mandate binding arbitration for “any case where the competent authorities have endeavored but are unable to reach an agreement.” Once the issue is submitted to arbitration, “neither competent authority [may] cease unilaterally to consider a case;” however, before arbitration, “the competent authorities [may] agree that the particular case is not suitable for determination by arbitration.” The U.S.-Germany and U.S.-Canada Tax Conventions provide for mandatory binding arbitration for issues involving the “enumerated articles of the Convention” and issues the “competent authorities agree is suitable for determination by arbitration.” Like the first two, however, these conventions include the exception allowing “competent authorities [to] agree before the date on which arbitration proceedings would otherwise have begun, [that the issue] is not suitable for determination by arbitration.”

The ability of the competent authority to decide that a tax issue is not arbitrable is similar to the unilateral power of ICA arbitrators’ to decide their own ability to arbitrate. This Kompetenz-Kompetenz principle in ICA makes it “clear that arbitrators have competence to decide upon their own competence.” Similarly, competent authorities in ITA have the power to decide whether mandatory arbitration is really mandatory. Unlike in ICA, where the “final word on the issue of arbitral competence belongs to the courts,” there is no appeal process when competent authorities decide that an issue is not suitable for arbitration. In order to hold competent authorities accountable, ITA should give courts the final decision to arbitrate, as courts have the power to decide the existence and validity of an arbitration agreement in ICA.

111. Schlaman & Trauman, supra note 37, at 2.
112. U.S.-Belgium Memorandum, supra note 39, at 1; see also U.S.-France Memorandum, supra note 71 (same language).
113. Id. (emphasis added).
114. U.S.-German Technical Explanation, supra note 64, at 38; see also, U.S.-Canada Tax Convention, supra note 23, at art. 21 paragraph 6(b).
115. VÁRADIY ET AL., supra note 72, at 99.
116. Id.
117. See infra pp. 211–213.
4. Choice of Law

In ICA, parties should include a choice of law clause specifying what law arbitrators should apply to the dispute. There is a distinction, however, between substantive law governing the overall contract, substantive law governing the arbitration agreement, and procedural law governing the arbitration process. The choice of forum, or seat of arbitration, is equally important because *lex arbitri* provides default procedural internal rules according to the seat of arbitration. Most issues arise in ICA when parties do not fully understand how their choices of law and seat of arbitration work together or against each other.

ITA does not have a *lex arbitri* problem because the procedure is agreed upon by the two contracting countries, which are the only countries that will ever be involved in a tax dispute under their convention. Where pre-planned procedure falls short, the competent authorities “may modify or supplement the . . . rules and procedures as necessary to more effectively implement the intent of paragraph 5 of Article 25 [mandatory binding arbitration in MAP] to eliminate double taxation.” Even without these issues, however, the substantive law chosen by countries and applied by arbitrators on the merits of the case is not always clear since ITA arbitrators are not allowed to report how they reached their decision.

In MAP, competent authorities never disclose how or why they reached an agreement. Since mandatory binding arbitration is an extension of MAP, the arbitrators are also protected by this rule. Only two U.S. conventions with mandatory binding arbitration provisions specify applicable substantive law. Both the U.S. - Germany and U.S. - Canada Tax Conventions include a hierarchy of law the arbitrators shall apply. In descending order of priority, the applicable law is: (1) the Tax Convention itself; (2) any agreement

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118. See VÁRADY ET AL., supra note 72, at 480 (“In addition to institutional rules, procedural norms of the municipal law governing arbitration (the *lex arbitri*) are relevant.”).

119. See e.g. U.S.-German Tax Convention, supra note 23, at art. XVI paragraph 22(q).

120. See U.S.-France Tax Convention, art. 26; U.S.-Canada Tax Convention, art. 21; U.S.-Belgium Tax Convention, art. 24; U.S.-Germany Tax Convention, art. 25, supra note 23.

121. Id.

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between the two Contracting States about the Convention, like a Memorandum of Understanding, a Diplomatic Note, or a Technical Explanation; (3) the laws of the two Contracting States that are not inconsistent; and (4) the OECD commentary on its model tax convention. Neither the U.S. - Belgium nor the U.S. - France Tax Convention tell the arbitrators what law to apply.

Inclusion of the choice of substantive law may be superfluous since MAP arbitration decisions are never published, but inclusion would help ITA transparency and improve taxpayer use and trust of the system. The secrecy of MAP proceedings is justified by its non-precedential status. When compared to ICA, however, with its history of established and adjudicated choice of law rules, it is evident that a different harm than possible precedent might occur. The lack of transparency may result in taxpayers being unwilling to submit their issue to MAP arbitration. Taxpayers need to trust that the decision about their tax liability was based on applicable and equitable law. To this end, the ICC suggests that the tax “arbitration decision should be based on law, including the domestic laws of the state parties to the arbitration, treaties, and international law.” Even if all MAP arbitration clauses begin to include references to substantive law, there will be even more transparency and use of ITA if taxpayers are involved in the proceedings.

5. Formation of the Arbitration Board

Parties to ICA can agree on procedural rules that fit their needs. They can decide to “arbitrate under the rules of an Arbitral Institution or to use an ad hoc procedure.” While ad hoc arbitration tends to be “less expensive and more flexible,” institutional arbitration “provides an independent, neutral set of rules that already exist.” Regardless, procedural rules must satisfy due process. Both parties must be subject to “equal treatment during the arbitral proceedings,” and “given equal

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123. U.S.-Germany Tax Convention, supra note 23, at art. XVI paragraph 22(i); see also U.S.-Canada Technical Explanation, supra note 66, at p. 45.
124. See U.S.-France Tax Convention art. 26; U.S.-Canada Tax Convention, art. 21; U.S.-Belgium Tax Convention, art. 24; U.S.-Germany Tax Convention, art. 25, supra note 23.
125. ICC, supra note 20, at 4.
126. VARADY ET AL., supra note 72, at 28.
127. Miccoli, supra note 74.
opportunity to appear at hearings.” Arbitration institutions are often incorporated into ICA agreements because they have developed procedures to satisfy these needs.

ITA procedure in the four example tax conventions is based on agreements between the two contracting states. Procedure follows MAP until arbitration is initiated. At that point, the conduct of the arbitration proceedings depends on the agreement of the two contracting states, as outlined in the Memorandum of Understanding (U.S.-Belgium, and U.S.-France), the Protocol (U.S.-Germany), or the Diplomatic Note (U.S.-Canada).

First, the arbitration board must be formed. All four example conventions provide for ad hoc formation of the board, with a few restrictions. Generally, competent authorities will choose one person from each of their countries to serve on the arbitration board, and then those two board members will appoint a chairperson who is from a third, different country. The U.S. conventions with Belgium, Germany, and Canada reference the OECD, which provides arbitrators if the competent authorities fail to appoint a member or if the members cannot agree on a chair. The “ad hoc arbitration tribunals [will probably be] composed of private sector professionals (tax lawyers, accountants, perhaps economists, who will be chose by internal and likely undisclosed processes).”

A major concern in ICA is the neutrality and impartiality of the arbitrators, which are “prerequisites to independence.” Independent arbitrators are “one of the crucial comparative advantages of international commercial arbitration” because they preserve due process by being “a forum which is essentially equidistant from both parties.” Ad hoc tribunal formation in ITA is capable of appointing independent arbitrators, but it would be easier if an arbitration institution were involved because

128. VÁRADY ET AL., supra note 72, at 498-99.
129. See section 4 above.
130. See U.S.-France Tax Convention, art. 26; U.S.-Canada Tax Convention, art. 21; U.S.-Belgium Tax Convention, art. 24; U.S.-Germany Tax Convention, art. 25, supra note 23.
131. See e.g. U.S.-Belgium Memorandum, supra note 39, at 2.
132. Id.
133. Christians, supra note 3, at 181.
134. VÁRADY ET AL., supra note 72, at 290.
135. Id. at 282.
institutions' knowledge and experience would likely make formation of the board quicker, and would help the parties avoid confusion.\textsuperscript{136} Also, an institution's carefully curated list of potential arbitrators can settle these disputes; "since many commercial transactions have tax implications, experienced international commercial arbitrators or recognized scholars in the arbitration field could be asked to expand their knowledge of tax issues and serve on the arbitration panel."\textsuperscript{137}

In fact, the competent authority for the United States (the IRS), has "entered into an agreement with the International Centre for Dispute Resolution (ICDR) to provide administrative services in support of arbitration under the Mutual Agreement Procedure."\textsuperscript{138} The ICDR "carries out the international operations of the American Arbitration Association (AAA)," and is active in ICA.\textsuperscript{139} This overlap of institutional support shows how the United States realizes that ITA should incorporate ICA methods. In providing services like selecting arbitrators, the ICDR "draws on its institutional experience, international expertise, multilingual case management staff, flexibility and a commitment to service along with cultural sensitivity."\textsuperscript{140} The attributes were developed through the ICDR's ICA experience, and will be passed on to help improve and develop ITA procedure.

6. Conduct of Arbitration Proceedings

Fees are an important consideration in ICA. These include the arbitrator's fees, facilities and logistical fees, and arbitration board expenses. Control over procedure comes at a price, and the "primary deterrent to the development of international commercial arbitration is the cost of the proceedings."\textsuperscript{141} The cost comes from institutional fees, the price of the arbitrator's time, getting to and carrying out the arbitration meetings, and other expenses. In ITA, the fees are shared equally between the contracting states, and the

\textsuperscript{137} Covington, \textit{supra} note 8, at 386.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Covington, \textit{supra} note 8, at 384.
U.S. conventions with Belgium, Germany, and France cap the arbitrator's fees at $2,000 U.S. dollars per day.142 The U.S.-Belgium convention limits the days a board member can be compensated to "no more than three days of preparation, for two meeting days . . . and for travel days,"143 providing an incentive to reach a timely conclusion. In all four conventions, the arbitration board's expenses are "set in accordance with the International Centre for Settlement of Investment Disputes (ICSID) Schedule of Fees."144 Notably, the taxpayer is exempt from all expenses in this process,145 which should encourage him to bring issues to MAP. Overall, "no additional cost should be incurred in arbitrating a tax case... since it should be no more complicated than arbitrating complex commercial matters."146

A major difference between ICA and ITA procedure is the concerned party's ability to contribute to the arbitration. In ICA, one of the parties initiates arbitration, and then both parties present their case to the board. In ITA, however, a taxpayer brings an issue to his competent authority, and the authority then engages in MAP with the other country's competent authority.147 If two years pass and the issue was submitted to arbitration under a mandatory binding arbitration clause, only the competent authorities are allowed input.148 Under the U.S.-France Tax Convention a taxpayer may consult with his advisors and provide input that may influence the arbitrators' ultimate decision."149 The problem, as discussed below, is the arbitration board is limited to choosing one of the competent authority's proposed resolutions. What use is the taxpayer's input if it is different than that of his competent authority? Should the taxpayer be able to submit his own proposed resolutions?

142. See U.S.-France Memorandum, supra note 71; U.S.-Canada Diplomatic Note, supra note 66; U.S.-Belgium Memorandum, supra note 39; U.S.-Germany Tax Convention, supra note 23.
143. U.S.-Belgium Memorandum, supra note 39, at 5.
144. See U.S.-France Memorandum, supra note 71; U.S.-Canada Diplomatic Note, supra note 66; U.S.-Belgium Memorandum, supra note 39; U.S.-Germany Tax Convention, supra note 23.
145. Id.
146. Covington, supra note 8, at 384.
147. See U.S.-France Memorandum, supra note 71; U.S.-Canada Diplomatic Note, supra note 66; U.S.-Belgium Memorandum, supra note 39; U.S.-Germany Tax Convention, supra note 23.
148. Id.
149. Schlaman & Trauman, supra note 37, at 2.
If ITA develops more along the lines of ICA, as this paper suggests, taxpayer input will become more important. Once again, the ICC suggests that ITA be modified to reflect the ICA position that taxpayers “should be provided an opportunity to present their views, including the right to submit all relevant information and documentation, to present oral and written arguments... and to respond to arguments or evidence submitted by the states involved.”150

Discovery in ICA is a contested issue because of the tension between avoiding complicated procedures and establishing critical facts.151 Sometimes parties submit to arbitration to avoid the broad, time consuming “American-style discovery.”152 On the other hand, discovery could be necessary for fact-finding, and arbitrators “lack coercive power” the courts have.153 In ICA there are conflicting court decisions about whether district courts have the power to compel discovery in arbitration tribunals under 28 U.S.C. § 1782.154 In ITA, however, the arbitrators choose between two submitted proposed resolutions and consider “additional information... only at its request.”155 The tax conventions with Belgium, Germany, Canada, and France do not include procedures for discovery because all the information either side thinks is necessary will be included in their proposed resolutions.156 Discovery seems to be one issue that does not parallel ICA, but this might change if the method of decision making changes. In that event, the ICC proposes that the “production of evidence should be subject to the limitations on production available under the governing domestic law,”157 which goes back to the choice of law and seat of arbitration issues.

150. ICC, supra note 20, at 4.
151. VÁRADY ET AL., supra note 72, at 522.
152. See Id. (“parties often choose arbitration over court litigation in order to avoid complicated procedures, such as those involved in broad discovery”).
153. Id.
154. See Id. at 523; 28 U.S.C. § 1782 (“The district court of the district in which a person resides or is found may order him to give testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal...”).
155. See U.S.-France Memorandum, supra note 71; U.S.-Canada Diplomatic Note, supra note 66; U.S.-Belgium Memorandum, supra note 39; U.S.-Germany Tax Convention, supra note 23.
156. Id.
Termination of the arbitration proceeding is easier in ITA. Many ICA institutions, including UNCITRAL and AAA allow termination if the parties settle before the arbitration award is made.158 The tribunal may also be terminated by claimant withdrawal, "unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute."159 This goes back to the "mandatory" nature of arbitration in ICA if the parties' original contract included an arbitration clause. In ITA, there are more allowances for termination. Under the U.S. - Belgium Tax Convention, the arbitration may be terminated by the arbitral board itself, by the competent authorities reaching an agreement independently of the arbitration, or by the taxpayer who brought the case in the first place.160 The other three U.S. conventions limit termination to competent authorities reaching an agreement, and taxpayer termination (with the exception of the U.S. - Canada Tax Convention).161 In order to mirror ICA, ITA proceedings should only be terminated upon competent authority agreement (like settlement in ICA), and upon request of the taxpayer. The ICC goes a step further, and recommends that only the taxpayer should have the "right to discontinue [because] the arbitration was begun at their behest."162

7. Decision-Making and Appeal

Another major difference exists between ICA and ITA when it comes to arbitral decisions. In ICA, the arbitration board hears from both sides, applies an objective standard within the applicable law, and reaches a decision on the merits that can incorporate either sides' position, or choose a different course of action. In ITA, however, the arbitral board is "not free to create its own conclusion."163 The board must choose one of the proposed

158. See VÁRÁDY ET AL., supra note 72, at 615-16.
160. See U.S.-Belgium Memorandum, supra note 39.
162. ICC, supra note 20, at 4.
resolution papers each competent authority submits. This type of decision making is called “baseball arbitration” because it is similar to the process used in the United States by major league baseball and uses an approach whereby an arbitration board (made up of three arbitrators) may choose only the proposal of one side to the dispute. Also, the arbitration board must decide the case within the time allowed by the tax convention. The U.S.-Belgium Tax Convention requires the board to decide “within 9 months of the appointment of the chair.” The U.S. conventions with Germany, Canada, and France limit the time to reach a decision to only 6 months.

The baseball approach and time limits to arbitral decisions stem from the perspective that the ITA will improve MAP by providing yet another mechanism for forcing the competent authorities to come to a decision. Since one of the competent authority’s proposed resolutions will be chosen, there is pressure on each competent authority to offer a reasonable resolution and therefore increases the likelihood that a compromise between the competent authorities will occur before an arbitral decision. In this way, baseball arbitration is clearly meant to “fix” MAP by encouraging the competent authorities to reach an agreement, at which case the arbitration is terminated. This emphasis on reaching a settlement is mostly likely the reason the ITA procedures do not mention discovery, and why compensation is limited to only a few days.

ITA should be developed such that issues will be fully arbitrated if they get past MAP. It does not make sense to create a process that works best by not being used at all. Part of the success of ICA is based on the independent arbitration board’s decision that can be a compromise between party positions. The nature of ITA disputes in MAP clauses is different than a negotiable private deal

164. See all U.S. mandatory binding arbitration provisions (with the peculiarity of Belgium: The U.S.-Belgium Tax Convention allows the board to decide more than one issue, but “for each issue, [the board must] include only one of the two proposed resolutions” (Arb. Board Operating Guidelines, paragraph 16, p. 5).
165. Schlaman & Trauman, supra note 37, at 2.
166. Dispute Resolution, supra note 163, at 2.
169. Harrington, supra note 7, at 755.
because ultimately just one country will have the right to tax; however, if it were as easy as "choosing" one country, the arbitration process would not be the correct forum. Based on all the differences between ICA and ITA discussed above and the confidentiality and enforcement issues discussed below, it would seem like mediation would be more appropriate if the goal were to get the arbitrators to agree.\textsuperscript{170} The decision to include mandatory, binding arbitration clauses in MAP is an explicit rejection of less compulsory mediation proceedings. As mandatory binding arbitration moves ITA in the direction of ICA, baseball arbitration will probably be replaced with discretionary decisions by the arbitral board. At this point, taxpayer involvement, discovery, and enforcement issues will become more significant.

There is no appeal process in mandatory binding arbitration under MAP. The contracting states cannot appeal since they could have reached a different agreement at any time and cancelled the arbitration proceeding. The taxpayer cannot appeal, but he can reject the arbitration decision.\textsuperscript{171} If an arbitration decision is rejected, the issue cannot be re-submitted to MAP.\textsuperscript{172} Likewise, a party cannot appeal an ICA decision, but can challenge the award in the place of arbitration or in the country where enforcement is being sought.\textsuperscript{173} This is an area where the development of ITA should borrow from another area of law like ICA or ICSID.\textsuperscript{174}

8. Confidentiality

Some may perceive ICA and ITA's emphasis on confidentiality as contradictory to establishing a trusted, transparent, respected area of law. In reality, confidentiality hinders none of those objectives. In ICA, confidentiality of the arbitration proceedings is "one of the fundamental principles - and one of the most definite advantages"

\textsuperscript{170} Mediation is "a non-binding procedure" where the "parties remain always in control." The mediator's role is to assist the parties in reaching their own decision and is a "confidential procedure." Mediation is "an interest-based procedure, whereas arbitration is a rights-based procedure." \textsc{Várady et al.}, supra note 72, at 2-3.

\textsuperscript{171} See U.S.-France Memorandum, supra note 71; U.S.-Canada Diplomatic Note, supra note 66; U.S. - Belgium Memorandum, supra note 39; U.S.-Germany Tax Convention, supra note 23.

\textsuperscript{172} Id.

\textsuperscript{173} See N.Y. Convention, supra note 79, at art. V (2).

\textsuperscript{174} See infra, pp. 217-219.
when compared to courtroom proceedings. Confidentiality allows businesses to keep their dealings, trade secrets, or indiscretions hidden. In ICA, confidentiality applies to both the arbitration proceedings and the eventual award or decision if the parties expressly agree to confidentiality.

Similarly, confidentiality of the arbitration is expressly provided for in all four U.S. mandatory binding arbitration provisions. Neither the procedures, materials used, nor decision of the arbitration board may be disclosed "except as permitted by the Convention and the domestic laws of the Contracting States." The U.S. conventions with Germany, Canada, and France even provide for confidentiality over a person who the taxpayer "has the legal authority to bind," such as a parent company and its subsidiary. This convergence with ICA methods is a good indication that taxpayers will submit their tax issues to arbitration. The only improvement for ITA would be to include taxpayers in the arbitration process. Emphasizing the importance of confidentiality in both ICA and ITA, the ICC states "an essential characteristic" of an arbitration clause is that "the highest applicable standard [of confidentiality] should apply."

9. Enforcement of Arbitral Decisions

In ICA, "arbitral awards are usually final and binding, which avoids a drawn-out appeals process." Administrators of ICA realized it would be a waste of time and resources if arbitral decisions were easily overturned or disobeyed in the country where the award is supposed to be enforced. To proactively address this problem, almost all countries that are engaged in significant international commerce signed on to the Convention on the

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175. VÁRADY ET AL., supra note 72, at 340.
176. See Bulgarian Foreign Trade Bank v. A.I. Trade Finance Inc., Supreme Court of Sweden, October 27, 2000, as reproduced in VÁRADY, supra note 72, at 584 et. seq. ("the Supreme Court considers that a party in arbitration proceedings cannot be deemed to be bound by a duty of confidentiality, unless the parties have concluded an agreement concerning this").
177. See U.S.-France Memorandum, supra note 71; U.S.-Canada Diplomatic Note, supra note 66; U.S.-Belgium Memorandum, supra note 39; U.S.-Germany Tax Convention, supra note 23.
178. U.S.-Germany Tax Convention, supra note 23, at art. XVI, paragraph 22(n).
180. ICC, supra note 20, at 4.
181. Miccioli, supra note 74.
Recognition and Enforcement of Foreign Arbitral Awards (the N.Y. Convention). The N.Y. Convention contains procedures for setting aside an award: (1) in the country where the arbitration award was made; and (2) in the country where enforcement of the award is sought.\textsuperscript{182}

The first procedure has been the subject of debate and litigation in ICA. Article 5(e) of the N.Y. Convention allows a country to refuse to enforce an award if the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."\textsuperscript{183} The language "in which" is the seat of arbitration, but the language "under the law of which" could mean procedural or substantive law.\textsuperscript{184} This goes back to potential choice of law problems that don't yet exist in ITA.

Article 5 of the N.Y. Convention contains exclusive reasons why an award may be unenforceable "in the country where recognition and enforcement is sought."\textsuperscript{185} These reasons are limited to a subject matter "not capable of settlement by arbitration under the law of that country," or where recognition "would be contrary to the public policy of that country."\textsuperscript{186} Courts have interpreted these exceptions narrowly, preserving the "binding" nature of arbitration in ICA, and suggesting ITA decisions be binding as well.

In our four U.S. examples, arbitration decisions are "binding" on the two contracting states, and thus represent a resolution of MAP.\textsuperscript{187} The problem, however, is that each concerned party (the taxpayer who brought the issue before his competent authority in the first place) is free to accept or decline the resolution.\textsuperscript{188} Since the taxpayer is generally not involved in the arbitration proceedings, it seems unlikely that he will accept the resolution without question, especially if the resolution is to his detriment. If the taxpayer does not accept the resolution, the case cannot be resubmitted to MAP\textsuperscript{189}

\textsuperscript{182.} See N.Y. Convention, \textit{supra} note 79, at art. V.
\textsuperscript{183.} Id.
\textsuperscript{185.} N.Y. Convention, \textit{supra} note 79, at art. V(2).
\textsuperscript{186.} Id. at V (2)(a-b).
\textsuperscript{188.} Id.
\textsuperscript{189.} Id.
and remains unresolved, and the time and resources of all parties who were involved are wasted.

The general attitude toward mandatory binding arbitration in MAP is that it will never be used. But what happens if an issue does go to arbitration? The law and procedure to enforce an ITA decision is underdeveloped as a direct result of the view that arbitration solves MAP. Examining ITA through the lens of ICA demonstrates the importance of a decision being “binding” and “enforceable” in accomplishing ITA’s goals. Once again, the ICC recognizes this error from its experience in ICA, and suggests that “arbitration should be binding [on] the affected states as well as the affected taxpayers.”

C. On Balance, Will the ICA Model Work for ITA?

Yes. The more established ICA process can provide useful guidance for the development of ITA. ICA is popular because it gives businesses flexibility and control when operating on a multinational level. These companies are more likely to invest and expand abroad if they know how potential disputes will be dealt with. Instead of being subject to unfamiliar foreign courts, the companies will submit to arbitration standards they themselves have agreed upon. Similarly, “tax treaty arbitration meets the needs of multinational corporate groups seeking symmetrical treatment of income inclusions and deductions in different countries.” Taxpayers are likely to submit to arbitration when “litigation under the court system or in administrative tribunals remains an available but uncertain path,” because they will want a neutral and familiar forum to determine their tax liability.

In fact, the need for familiarity and neutrality is heightened in the international tax environment. In ICA, the parties are generally private companies engaged in business. In ITA, the parties are nations, represented by their competent authorities. In an ITA situation, these national representatives meet to discuss one of the countries’ taxpayers, who had been subject to possible economic double taxation as a result of his multinational activities. The “multinational’s position would be that of a stakeholder, willing to

190. ICC, supra note 20, at 4. (emphasis added).
191. PARK, supra note 86, at 182.
192. Dispute Resolution, supra note 163, at 4.
pay tax to either [country], but not to both countries." There is no right or wrong way to reduce that taxpayer's double taxation, but only more and less effective ways. Arbitration based on the following ICA model is the most effective because of its development and success in the areas discussed above. Since ICA via the "private sector was evidently influential in bringing arbitration to tax treaties," it follows that we should look to ICA "if we want to understand what arbitration is really about" and to learn how to improve it.

This view has support in both the tax and arbitration fields. Manal Corwin, the Treasury Department Assistant Secretary of International Tax Affairs told the Senate Committee on Foreign Relations that "based on our review of the U.S. experience with arbitration in other areas of the law . . . and overwhelming support of the business community, we concluded that mandatory binding arbitration as the final step in the CA [competent authority] process can be an effective and appropriate tool to facilitate mutual agreement under U.S. treaties." The ICC issued a statement "encouraging governments to accept compulsory arbitration in international tax conflicts . . . based upon the broad experience of ICC in commercial arbitration." The ICC believes that mandatory binding arbitration accomplishes corresponding goals of the tax system and ICA, including "not only the cost-effective and equitable resolution of tax controversies, but also the enhancement of global economic growth and development through elimination of unintended instances of double taxation." The ICC "recommend[s] that compulsory and binding arbitration in international tax matters should be adopted in bilateral or multilateral tax conventions."

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193. PARK, supra note 86, at 182.
194. Harrington, supra note 7, at 761.
196. See Opening Statement of Manal Corwin, Treasury Deputy Assistant Secretary (International Tax Affairs), Senate Committee on Foreign Relations, June 7, 2011 at p. 7.
197. ICC, supra note 20, at 1.
198. Id.
199. Id.
VI. Solution: Arbitration of Double Taxation Issues Should be Modeled After the International Commercial Arbitration System

A. The Success of the ICSID Arbitration Model Shows This is Possible

The International Centre for Settlement of Investment Disputes (ICSID) arbitrates disputes between a state and a foreign investor (usually a private party). ICSID is an “autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.” The primary purpose of this multilateral international treaty is to “provide facilities for conciliation and arbitration of international investment disputes.” ICSID arbitration plays “an important role in the field of international investment and economic development,” as demonstrated by its “large membership, considerable caseload, and by the numerous references to its arbitration facilities in investment treaties and laws.”

As a form of state - party arbitration, ICSID falls in the middle of the continuum of private party - private party arbitration (ICA) to state - state arbitrations (ITA). ICSID’s popularity and success as a dispute resolution institution shows the possibility of state - state arbitration development independent of MAP, with input from the private party taxpayer.

In many cases, ICSID arbitration is effectively mandatory and binding. Arbitration under ICSID is technically voluntary, but if both the investor and the country where he invests consent, then arbitration “cannot be withdrawn unilaterally and it becomes a binding undertaking.” “Consent” in many ICSID cases is more mandatory than it seems. The basis of consent is usually found in bilateral or multilateral treaties between governments, or in

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202. Id.
204 Background Information, supra note 201, at 1.
investment contracts between the investor and the host state, all of which are agreed upon in advance of disputes. These agreements play a similar role to tax conventions; they both provide a basis for mandatory binding arbitration in ICSID and ITA. ICSID decisions are binding unless a party requests annulment and a new arbitral panel annuls all or part of the award based on limited grounds.

ICSID arbitration mirrors the success of ICA in the categories discussed above, which is why independent investors and states trust its process. ICSID is an "independent international institution" that provides a "neutral facility" and "independent arbitrators." Parties to ICSID "allow the investor to select the applicable procedural rules," which can come from ICSID or "other arbitration rules" like UNCITRAL. ICSID cases are decided "on the basis of facts and law presented by each of the parties." As ITA develops as its own field, it can use ICSID standards as gap-fillers when ICA principles are not well suited to the public sphere.

B. The U.S. Tax Conventions Should Be Updated

The U.S. Model Tax Convention, as it stands, does not have an arbitration provision under MAP. Although U.S. tax conventions generally conform to the U.S. Model Tax Convention, "each tax treaty is negotiated separately in order to address issues that arise from specific interaction of the two countries." The United States should follow the lead of the OECD, which "frequently updates the OECD Model Treaty in response to the evolution of the global economy and the effect on taxation."

How can the U.S. conventions incorporate mandatory binding arbitration provisions? One proposed solution is for the "U.S. treaties [to contain] a provision that automatically updates the treaty when the OECD makes changes to the OECD Model Treaty" since the "U.S. Model Treaty incorporates many aspects of the OECD

205. See id. at 2 (Bilateral Investment Treaties contain the basis of consent in 63% of ICSID cases).
206. See ICSID Convention, Regulations, and Rules, April 2006, art. 52.
207. See Background Information, supra note 201 at 1, 2.
208. Id.
209. Id. at 3.
211. Bertolini & Weaver, supra note 6, at 17.
Model Treaty” already.212 The United States wouldn’t be giving up all control because “as a member of the OECD, the United States participates in the development of the OECD model.”213 Nevertheless, “given the political and economic importance of tax policy, it is highly unlikely that the United States would agree that future modifications to the OECD Model Treaty would be binding with respect to existing U.S. bilateral tax treaties.”214 If this raises a sovereignty concern, the treaties could automatically update only when the U.S. Model Tax Convention is amended, since that would let the U.S. government retain power.

The decision to “update,” however, would have to be agreed upon in advance in each treaty, resulting in renegotiations of every treaty. To “update the entire U.S. treaty network in this manner, the Treasury Department would have to renegotiate more than sixty separate treaties - a daunting and time-consuming task.”215 Alternatively, Congress could enact “legislation overriding particular provisions of tax treaties, a step that constitutes a violation of the United States’ obligations under the treaties and, accordingly, is generally discouraged by [the] Treasury Department.”216

Does the development of ITA have to be in the context of MAP? What if the mandatory binding arbitration provision existed in an independent provision? MAP is already an obscure process, so “when arbitration is added in to [sic] this context . . . the picture of decision-making and clarity of tax law becomes ever murkier.”217 Instead, taxpayers could choose between going to their competent authorities (and therefore MAP) or going straight to arbitration. This might also raise sovereignty issues because “a country should not delegate inherently governmental functions, or cannot do so under its domestic legal rules.”218 However, “nations may enter into mutual alliances without experiencing a loss of sovereignty, especially when the signatories have equivalent rights under the

212. Id. at 18.
213. Christians, supra note 3, at 175.
214. Kirsch, supra note 5, at 1067.
215. Id.
216. Id.
218. DURST & CULBERTSON, supra note 12, at 3.
Another concern nations may have is that this would move taxation, an integral source of government revenue, into the private sector because arbitration would no longer go through competent authorities. This is a policy debate where governments are probably unwilling to be flexible.

VII. Conclusion

Instead of looking at ITA in the context of "fixing" MAP, it is more useful to consider how the progress of ICA can be used as a template. In the many successful arbitrations under ICA and ICSID, "arbitrators routinely address problems of taxation in the context of ordinary commercial contracts as well as claims by foreign investors brought against host states." It follows that arbitration of taxation issues is feasible and efficient, and will be as commonly utilized as arbitration in commercial and investment matters.

The four U.S. tax conventions that include mandatory binding arbitration provisions demonstrate how ITA already incorporates ICA standards, and where it has room for improvement. Specifically, there is a need for more taxpayer involvement in the ITA process. The United States is moving towards including mandatory binding arbitration clauses in future tax conventions, but should also include clauses allowing taxpayers to be the "third party" in arbitrations.

For the reasons discussed above, ITA would be more effective at resolving double taxation disputes in a three-party system with input from both contracting states and the dissatisfied taxpayer.

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219. Covington, supra note 8, at 370.
220. PARK, supra note 86, at 180.
221. "A proposed Swiss protocol, which has been approved by the U.S. Senate Foreign Relations Committee but must now be voted on by the full Senate, also contains this clause. In addition, the United States is in the process of negotiating amendments to its income tax treaty with Japan and there has been speculation that a mandatory binding arbitration procedure will be included." Dispute Resolution, supra note 163.
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