JUSTICE, THIRD-PARTY FUNDING, AND TAX TREATY ARBITRATION

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ABSTRACT

Resolving tax treaty disputes and improving dispute resolution mechanisms for tax treaty disputes have been important topics for international tax for decades, but it has not been an easy journey for the international tax community including policymakers, international bodies, and academics to come up with a clear solution. Similar to other global policies that require a multilateral agreement, a multilateral approach to a global tax policy cannot be easy as relations among the states with different backgrounds need to be coordinated and it involves critical issues relevant to national interests such as tax sovereignty, revenue, conflicts with domestic laws, and financial resources. That being said, the current global approach to resolve unsuccessful Mutual Agreement Procedure ("MAP") cases of a tax treaty seems fairly straightforward under both the Organization for Economic Co-operation and Development and the United Nations' Model Tax Conventions as both simply suggest arbitration to step in to render a final decision for the unsuccessful MAP cases. However, due to the factors mentioned earlier, the vast majority of the bilateral tax treaties do not contain the arbitration clause, and it seems quite clear that an approach needs to be made from both within and outside the boundaries of international tax, tackling sub-issue by sub-issue, in order to improve dispute resolution mechanism for tax treaty disputes. This Article aims to highlight the importance of having the arbitration clause in a tax treaty, and focusing on the financial aspects of tax treaty arbitration, examines whether third-party funding ("TPF"), which has become more mainstream in traditional international arbitration proceedings, could be utilized in tax treaty arbitration to remove certain financial barriers as in other traditional arbitration proceedings by analyzing (i) any legal barriers, (ii) benefits from a justice perspective, and (iii) investment merit from a funder perspective. For the analysis, the Article specifically discusses (a) the current issues and the status quo of the MAP and tax treaty arbitration, (b) how TPF has been utilized in international arbitration and helping parties without or insufficient financial resources, (c) differences and similarities between tax treaty arbitration and other types of international arbitration i.e., international commercial arbitration, investor-state arbitration, and state-state arbitration, and (d) TPF from both the taxpayer claimant and the funder perspective.

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I. INTRODUCTION

Final decision of a legal case is one of the fundamental elements of the judicial system. From a justice point of view, every legal case or dispute needs to be concluded with a final and binding decision. However, resolving tax treaty disputes has been one of the major problems in the modern tax treaty network as some tax treaty disputes at times remain unresolved because the vast majority of tax treaties in force contain an incomplete version of a dispute resolution tool of a tax treaty known as the Mutual Agreement Procedure ("MAP") that omits the

arbitration clause.

Perhaps, bringing a claim before a national court may seem to be the most straightforward and simplest mechanism to resolve tax treaty disputes, but due to the unilateral nature of domestic proceedings, it is generally insufficient and undesired to resolve tax treaty disputes as it involves two or more states with equal sovereignty. For this reason, the MAP article was introduced in the Organization for Economic Co-operation and Development's ("OECD") Model Tax Convention in 2008 to provide a dispute resolution tool within a treaty to resolve tax treaty disputes.[1]

The MAP is an article in a tax treaty that simply requires competent authorities i.e., tax representatives from each state,[2] to meet and put their best efforts into a negotiation to resolve a tax treaty dispute within a set timeframe.[3] A quantitative study conducted in 2017 on MAP (the "Quantitative Study") indicates that the number of MAP cases is increasing while domestic court cases are decreasing for resolving tax treaty disputes,[4] and the success rate of the MAP seems to be high as well according to the OECD MAP statistics.[5]

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1. The MAP, together with the modern form of the arbitration clause, was first introduced in the OECD Model Tax Convention in 2008. However, before the introduction of the MAP article in the OECD Model Tax Convention, the arbitration clause was included in some bilateral tax treaties, and it appears that the earliest income tax treaty containing an arbitration clause is the United Kingdom-Ireland tax treaty of 1926. *See* Article 7 of Agreement between the British Government and the Government of the Irish Free State in respect of Double Income Tax in the Finance Act, 1926 of Ireland. The treaty provides that:

> Any question that may arise between the parties of this Agreement as to the interpretation of this Agreement or as to any matter arising out of or incidental to the Agreement shall be determined by such tribunal as may be agreed between them and the determination of such tribunal shall, as between them, be final.

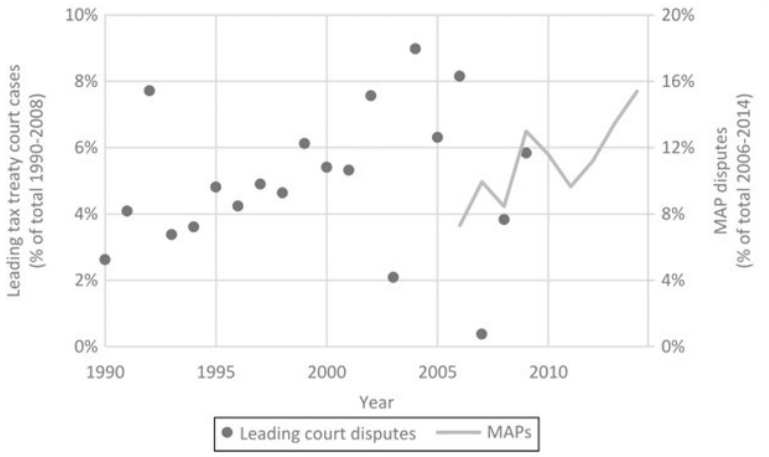
Id.

2. The OECD explains that the competent authority for each country is typically identified in the Definitions article of the tax convention—for example, under Article 3 (General Definitions) of the OECD Model Tax Convention—and a typical designation would be "the Minister of Finance or his authorised representative" or "the Secretary of the Treasury or his delegate." Org. for Econ. Coop. and Dev. [OECD], *Manual on Effective Mutual Agreement Procedures*, at 11 (Feb. 2007), https://www.oecd.org/ctp/38061910.pdf.

3. *Id.* at 8.

4. Eduardo A. Baistrocchi & Martin Hearson, *Tax Treaty Disputes: A Global Quantitative Analysis*, *in* A GLOBAL ANALYSIS OF TAX TREATY DISPUTES 1512, 1535-36 (Eduardo Baistrocchi ed., 2017).

5. According to the OECD's 2020 MAP statistics, MAP inventory as of January 1, 2020 was 6,338 and 6,478 as of December 31, 2020, with 2,508 new cases initiated and 2,378 cases closed in 2020. Transfer pricing cases took 35 months on average and other cases took 18.5 months on average to get to the conclusion. About 52% of MAP cases were fully or partially resolved under the MAP, and about 3% of the cases remained undecided i.e., no agreement was reached including the agreement to disagree. *See* Org. for Econ. Coop. and Dev. [OECD] *2020 Mutual Agreement*



[Figure 1: Share of tax treaty dispute cases][6]

However, it should be noted that the MAP is simply a negotiation process and neither state involved in the MAP process has the authority to compel resolution, and both states do not have an obligation to make a final decision. Thus, if the states fail to reach an agreement within a set timeframe, the case remains unresolved and leaves the taxpayer without any additional legal tools to get the case decided with a final decision. Hence, both the OECD and the United Nations ("UN") Model Tax Conventions (collectively, the "Model Tax Conventions") suggest including the "arbitration clause" for unsuccessful MAP cases which appears to be the most rational way to decide the unresolved MAP cases considering how other treaty-based disputes are being resolved.[7] Surprisingly, however, as of 2017, only 178 out of over 3,000 bilateral tax treaties contained the MAP-arbitration clause.[8]

As noted above, resolving a dispute through arbitration is still a fairly new concept for international tax and there are various factors that make the states skeptical about having the arbitration clause. One of the main factors would be

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Procedure Statistics (2020), https://www.oecd.org/ctp/dispute/mutual-agreement-procedure-statistics.htm [https://perma.cc/8HT5-B4CP].

6. Baistrocchi & Hearson, *supra* note 4, at 1537 fig.17.24.

7. *See* Org. for Econ. Coop. and Dev. [OECD], *Articles of the Model Convention with Respect to Taxes on Income and Capital*, *in* MODEL TAX CONVENTION ON INCOME AND ON CAPITAL art. 25, 21-22 (2017); U.N., *Articles of the United Nations Model Double Taxation Convention Between Developed and Developing Countries, in* Model Double Taxation Convention Between Developed And Developing Countries art. 25, 36-38 (2017).

8. As discussed, the Model Tax Conventions suggest including the arbitration clause, but only 178 out of over 3,000 bilateral tax treaties contained the clause as of 2017. *See* H.M. Pit, *Arbitration Under the OECD Multilateral Instrument: Reservations, Options and Choices*, 71 BULL. INT'L TAX'N 445 (2017).

the cost of arbitration as it requires substantial financial resources due to the scale and complexity of tax treaty cases.

As legal proceedings are costly in general, the modern form of litigation finance, also known as third-party funding ("TPF"), was introduced in the mid-1990s and has been actively utilized in the fields of international arbitration and domestic litigation proceedings.[9] TPF, or litigation finance, generally refers to a financing tool that allows a third-party funder[10] to provide a financial resource to the party to the dispute without or insufficient financial resources for a proceeding in exchange for shares of the case.[11] In the past two decades or so, TPF has been constantly becoming popular, especially after many jurisdictions relaxed the relevant rules around 2006.[12] In the case of international arbitration, not only the private parties have been utilizing TPF but the states in investor-state arbitration as well.[13]

Thus, it would be reasonable to assume at a first glance that TPF could also be utilized in tax treaty arbitration and provide the same or similar benefits to tax treaty arbitration as well. However, tax treaty arbitration's unique characteristics that distinguish it from traditional arbitration proceedings such as international commercial arbitration and investor-state arbitration need to be taken into account before making any conclusions on its applicability. Given that not many studies have been conducted on this topic yet, this Article aims to discuss and analyze in detail the applicability of TPF to tax treaty arbitration to provide a new perspective and a reference on this topic. For the analysis, the following aspects of tax treaty arbitration are considered.

First, unlike in international commercial arbitration where the parties are both private individuals, or investor-state arbitration where both a private party and a state are involved, tax treaty arbitration involves two states as claimant and respondent. One key aspect to note here, however, is that although both parties

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9. *See A Brief History of Litigation Finance: The Cases of Australia and the United Kingdom*, HARV. L. SCH. CTR. ON THE LEGAL PRO.: THE PRAC., (Sept./Oct. 2019), https://thepractice.law.harvard.edu/article/a-brief-history-of-litigation-finance/ [https://perma.cc/6GGH-TM3V].

10. Generally, third-party funders are specialized litigation firms, insurance companies, investment banks, and hedge funds. *See* Catherine Rogers, *Gamblers, Loan Sharks, and Third-Party Funders*, *in* ETHICS IN INTERNATIONAL ARBITRATION 1, 8 (2014).

11. Eric De Brabandere & Julia Lepeltak, *Third Party Funding in International Investment Arbitration* 5 (Grotius Ctr. Working Paper No. 2012/1, 2012).

12. Countries including the United States, the United Kingdom, Australia, Singapore, Hong Kong, China, Latin America, and European countries relaxed their rules on TPF. *See* Chiann Bao, *Third Party Funding in Singapore and Hong Kong: The Next Chapter*, 34 J. INT'L ARB. 387-400 (2017).

13. *See* Sherry Xin Chen & Kirrin Hough, *Researching Third-Party Funding in Investor-State Dispute Settlement*, HAUSER GLOB. L. SCH. PRO. (May 2019), https://www.nyulawglobal.org/globalex/Third-Party_Funding_Investor-State_Dispute_Settlement.html [https://perma.cc/EL3A-9GML].

in tax treaty arbitration are states, one state is simply representing a taxpayer that submitted for the MAP. Thus, tax treaty arbitration appears to have both characteristics of investor-state arbitration and state-state arbitration, but there are several key differences and similarities that need to be considered. These are discussed in detail in the following chapters.

Second, unlike in other treaty-based arbitrations, in tax treaty arbitration, the taxpayer i.e., the claimant needs to go through the lengthy MAP process first before they can submit for arbitration, and only certain unresolved MAP cases could be submitted for arbitration under the MAP article.

Third, as noted above, arbitration is still a new concept in the field of international taxation because arbitration was only introduced in 2008 to the OECD Model Tax Convention with the MAP article. There are no clear procedural rules and institutions or arbitration courts specifically for and that have expertise in international tax and tax treaty arbitration. Therefore, it appears that there still is confusion, for example, as to which type of arbitration would be appropriate for different types of tax treaty disputes. Unlike in general arbitration proceedings where procedural rules are similar to domestic proceedings i.e., a reasoned ruling after the hearings are used, the Model Tax Conventions suggests "baseball" arbitration,[14] also known as "final offer arbitration," to be used in tax treaty arbitration.[15] On the other hand, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument" or "MLI") suggests that a state can choose to adopt either baseball arbitration or ordinary domestic court-type arbitration known as "independent opinion arbitration." This is discussed in more detail in the following chapters.

Factoring in the unique aspects of tax treaty arbitration discussed above, this Article highlights the importance of having the arbitration clause in a tax treaty and examines whether TPF could be utilized in tax treaty arbitration to remove certain financial barriers as in other traditional arbitration proceedings by analyzing (i) any legal barriers, (ii) benefits from a justice perspective, and (iii) investment merit from a funder perspective. For the analysis, the Article specifically focuses on and discusses (a) the current issues and the status quo of the MAP and tax treaty arbitration, (b) how TPF has been utilized in international

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14. The "Sample Mutual Agreement on Arbitration" in the Commentaries of the OECD Model Tax Convention suggests that "each Contracting State shall submit to each arbitrator and to the other competent authority a proposed resolution" and "the arbitration panel shall select as its decision one of the proposed resolutions for the case submitted." This means that the OECD considers "baseball arbitration" as an appropriate type of arbitration for tax treaty disputes. Baseball arbitration requires each party to submit a proposed monetary award to the arbitration panel and the panel chooses one from two without any modifications. This type is often suggested for arbitration proceedings where an amount in dispute is sum certain. *See* Org. for Econ. Coop. and Dev. [OECD], *Commentaries on the Articles of the Model Convention*, *in* MODEL TAX CONVENTION ON INCOME AND ON CAPITAL 43, 387 (2010). This topic is discussed in more detail in Chapter IV of this Article.

15. *Id*.

arbitration and helping parties without or insufficient financial resources, (c) differences and similarities between tax treaty arbitration and other types of international arbitration i.e., international commercial arbitration, investor-state arbitration, and state-state arbitration and (d) TPF from both the taxpayer claimant and the funder perspective.

In the first chapter, *the MAP and tax treaty arbitration*, the chapter discusses the current issues with respect to the MAP and tax treaty arbitration, and explores various bilateral and multilateral tax treaties and the Model Tax Conventions. The chapter first explains the mechanism of the MAP and addresses the core problem of the MAP. Then, the chapter explores the recent developments in tax treaty dispute resolution mechanisms such as Action Items 14 and 15 of the OECD's Base Erosion and Profit Shifting Action Plan ("BEPS Action Plan"), the MLI, and other global discussions on this topic such as various tax committee meetings held by the relevant international bodies.

In the second chapter, *international arbitration and TPF*, the chapter analyzes how TPF has been (i) utilized in different types of international arbitrations and (ii) helping parties in arbitration proceedings without financial resources. The chapter also discusses and explores the status quo, the rationale, and the mechanism of TPF.

In the third chapter, *tax treaty arbitration and TPF*, the chapter conducts a comparative study on tax treaty arbitration and other types of arbitration to fully understand the anatomy of tax treaty arbitration and examines whether TPF could be adopted and utilized in tax treaty arbitration. The chapter then analyzes TPF from the perspective of both a taxpayer claimant and a third-party funder.

II. THE MAP AND TAX TREATY ARBITRATION

A. Overview of the MAP: Article 25 of the Model Tax Conventions

As briefly noted in the introduction, the MAP is an article in a tax treaty that allows a taxpayer to claim and require competent authorities, i.e., tax administrations of each state, to meet and resolve a dispute arising from a tax treaty. Compared to other judicial proceedings, the MAP is a unique way of resolving disputes because (i) a dispute is resolved through a negotiation process between the competent authorities of each state, and (ii) the outcome becomes legally binding but does not become a precedent.[16]

Pursuant to the OECD Model Tax Convention, a taxpayer has the right to present their case to either contracting state if they consider that taxation is not "not in accordance"[17] with a treaty.[18] Typical issues submitted under this

16. Allison Christians, *Take MAP with a Grain of Salt: Sifto and the Legal Nature of Competent Authority Agreements*, 86 TAX NOTES INT'L 81 (2017).

17. The Commentaries on the OECD Model Tax Convention explains that the MAP is applicable, regardless of whether there is a double tax issue, if a taxation in dispute is in direct contravention of a rule in the Convention.. The Commentaries stipulates the following:

provision of the MAP article include disputes arising from economic double taxation, permanent establishment, dual residency, and withholding tax are submitted under this provision of the MAP article.[19] When a case is submitted for the MAP process, the competent authorities of each state are required to "endeavour" to resolve the case within a set timeframe.[20] The MAP can be also submitted in case there are any difficulties or doubts arising as to the interpretation or application of a treaty. In such cases, the competent authorities are required to attempt to clarify the definition of a specific term used in the treaty.[21] The Quantitative Study indicates that the most commonly disputed Articles of the OECD Model Tax Convention are Articles 3 (General Definitions), 4 (Resident), 5 (Permanent Establishment), 7 (Business Profits), 9

> Whilst the mutual agreement procedure has a clear role in dealing with issues arising as to the sorts of adjustments referred to in paragraph 2 of Article 9, it follows that even in the absence of such a provision, States should be seeking to avoid double taxation, including by giving corresponding adjustments in cases of the type contemplated in paragraph 2; and the mutual agreement procedure is also applicable in the absence of any double taxation contrary to the Convention, once the taxation in dispute is in direct contravention of a rule in the Convention.

Org. for Econ. Coop. and Dev. [OECD], *Commentaries on the Articles of the Model Convention*, *in* MODEL TAX CONVENTION ON INCOME AND ON CAPITAL 119, 1183-84 (2017).

18. Article 25(1) of the OECD Model Tax Convention states that:

> Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

Org. for Econ. Coop. and Dev. [OECD], *Articles of the Model Convention with Respect to Taxes on Income and Capital*, *in* MODEL TAX CONVENTION ON INCOME AND ON CAPITAL art. 25(1),21 (2017).

19. *See* U. N., Guide to the Mutual Agreement Procedure Under Tax Treaties 1, 5-9 (Oct. 2010), https://www.un.org/esa/ffd/wp-content/uploads/2014/10/ta-Guide_MAP.pdf [https://perma.cc/R83X-NJ7C].

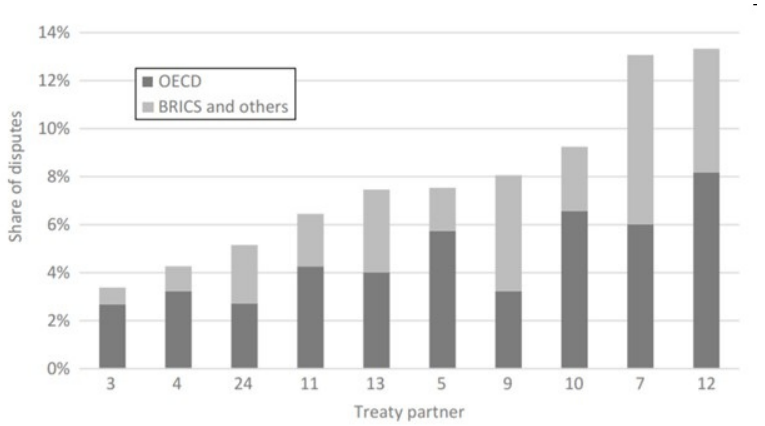
20. Article 25(2) of the OECD Model Tax Convention states that:

> The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

Org. for Econ. Coop. and Dev. [OECD], *supra* note 18, art. 25(2).

21. Article 25(3) of the OECD Model Tax Convention states that "[t]he competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention." *Id.* at art. 25(3).

(Associated Enterprises), 10 (Dividends), 11 (Interest), 12 (Royalties), 13 (Capital Gains), and 24 (Non-discrimination).[22]



[Figure 2: The Most Commonly Disputed Articles][23]

For the administration of the MAP process, the competent authorities are allowed to communicate and negotiate with a communication method they prefer.[24]

In the case of the UN Model Tax Convention's MAP article, it needs to be noted that the MAP article operates in a similar manner to the OECD Model Tax Convention's MAP article but it has two different versions that states can adopt – one with the arbitration clause and one without the arbitration clause.[25] The arbitration clause of the Model Tax Conventions is discussed in more detail in the following chapters.

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22. *See* Baistrocchi & Hearson, *supra* note 4, at 1533.

23. *Id*. at 1533 fig.17.19. OECD members include Australia, Canada, France, Germany, Italy, Japan, Mexico, South Korea, Turkey, the United Kingdom, and the United States. BRICS and others include Argentina, Brazil, China, India, Indonesia, Russia, and South Africa. *Id*.

24. Article 25(4) of the OECD Model Tax Convention states that "[t]he competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs." *Articles of the Model Convention with Respect to Taxes on Income and Capital*, *supra* note 18, art. 25(4).

25. *See* U.N. DEP'T OF ECON. & SOC. AFFAIRS, U.N. MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, art. 25, U.N. Doc. ST/ESA/PAD/SER.E/213 (2017).

B. The Key Issues of the MAP and the Arbitration Clause

All cases	2020 Start inventory	Cases started in 2020	Cases closed in 2020	2020 End inventory
Cases received prior to 1 January 2016 or of the year of joining the BEPS Inclusive Framework	2,449	0	653	1,796
Cases received on or after 1 January 2016 or of the year of joining the BEPS Inclusive Framework	3,889	2,508	1,725	4,682

[Figure 3: 2020 OECD MAP Statistics][26]

According to the OECD's 2020 MAP statistics,[27] MAP inventory as of 1 January 2020 was 6,338, and 6,478 as of 31 December 2020, with 2,508 new cases initiated and 2,378 cases closed in 2020.[28] Transfer pricing cases took 35 months on average, and non-transfer pricing cases took 18.5 months on average to get to the conclusion.[29] About 52% of MAP cases were fully or partially resolved under the MAP, and about 3% of the cases remained undecided, i.e., no agreement was reached, including the agreement to disagree.[30]

The success rate seems high enough to support the conclusion that the MAP is effectively resolving tax treaty disputes, but as noted above, the key issue is that certain taxpayers' cases could remain unresolved after going through the lengthy MAP process. The OECD also acknowledged on this point that, inevitably, there will be cases in which "the MAP is not able to reach a satisfactory result."[31] For this reason, the Model Tax Conventions suggest including Article 25(5),[32] the arbitration clause, which could render a final

26. *See 2020 Mutual Agreement Procedure Statistics*, *supra* note 5.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Org. for Econ. Coop. and Dev. [OECD], *Improving the Resolution of Tax Treaty Disputes*, 1, 4 (Feb. 2007), https://www.oecd.org/ctp/dispute/38055311.pdf [https://perma.cc/WY32-RGHM].

32. Article 25(5) of the OECD Model Tax Convention states the following:

> Where,
>
> a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

decision for the undecided MAP cases. In addition to providing the final tool to access justice to the taxpayers, the arbitration clause could also encourage the competent authorities to reach an agreement within a set timeframe as they would want the case to be finalized when they have the authority to have certainty.

It may appear that changing the language in the MAP article to impose an obligation on the states to render a final decision within the set timeframe would resolve the issue of certain MAP cases being unresolved, but this would likely be more challenging given that the MAP process involves two states with equal sovereignty. From a judicial perspective, therefore, it seems clear that adopting the arbitration clause would be the simplest and most reasonable way to deal with unresolved MAP cases. However, as noted above, as of 2017, only 178 out of over 3,000 bilateral tax treaties contained the arbitration clause, and therefore, unsuccessful MAP cases under the current tax treaty network are likely to remain unresolved.

i. BEPS Action Item 14: Making Dispute Resolution Mechanisms More Effective[33]

In 2013, to address and resolve issues associated with base erosion and profit shifting, or double non-taxation, the OECD and G20 countries selected a "15-point Action Plan" and published the 15 Final Reports in 2015 that address the current issues and make suggestions to improve current policies.[34] Among other Action Items of the BEPS Action Plan, the Action Item 14, *Making Dispute Resolution Mechanisms More Effective*, specifically focuses on addressing the current problems and suggests ways to improve the MAP. The Report states that

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> b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities, any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

OECD, *supra* note 18, art. 25(5).

33. This section is partially adopted from Kun Chol Kim, *The OECD's International Compliance Assurance Programme*, A.B.A. TAX TIMES, May 2020, 19-21.

34. *See* Org. for Econ. Coop. and Dev. [OECD], ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 9-11 (2013); OECD, *OECD/G20 Base Erosion and Profit Shifting Project (2015 Final Reports) Executive Summaries* (2015). https://www.oecd.org/ctp/beps-reports-2015-executive-summaries.pdf [https://perma.cc/WNM7-XMHC].

it aims to "[d]evelop solutions to address obstacles that prevent countries from [re]solving treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases."[35]

The Action Item 14 comprises two parts: (i) the minimum standard and (ii) commitment to mandatory binding MAP arbitration. Pursuant to the Action Item 14, while it is "mandatory" for the member countries to implement the "minimum standard" and be regularly monitored and report it to the Committee on Fiscal Affairs to the G20, the adoption of the "best practices" is optional.[36]

The "minimum standard" comprises three specific standards and require member countries to:

> [(1)] Ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner;
> [(2)] Ensure the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and
> [(3)] Ensure that taxpayers can access the MAP when eligible.[37]

Each specific standard provides several guaranteed measures, and the first standard guarantees seven measures to taxpayers: (i) Inclusion of the modified Article 25(1) through Article 25(3) and granting access to transfer pricing cases; (ii) access for cases involving a domestic or treaty anti-abuse rule; (iii) resolution of MAP cases within an average timeframe of twenty-four months; (iv) mandatory membership of the Forum on Tax Administration MAP Forum; (v) timely and complete MAP statistics following the new prescribed reporting framework; (vi) peer-review of compliance with the minimum standards; and (vii) transparency in respect of positions on MAP arbitration.[38]

The second standard also guarantees seven measures: (i) publication of rules, guidelines, and procedures to access and use the MAP for taxpayers; (ii) publication of country MAP profiles; (iii) certainty of the MAP function that is not dependent on the audit function or state tax policy; (iv) remuneration not based on collections; (v) certainty on adequate resource; (vi) clarification on domestic audit settlements that do not preclude access to a MAP; and (vii) roll-back of advance pricing arrangements in appropriate cases where there are APA programs.[39]

Finally, the third standard guarantees three measures: (i) access to both competent authorities in a MAP either through an amendment of Article 25(1) or

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35. Org. for Econ. Coop. and Dev. [OECD], *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report* 11 (OECD/G20 Base Erosion and Profit Shifting Project, 2015).

36. *Id.*

37. *Id.* at 9.

38. *Id.* at 13-17.

39. *Id.* at 17-21.

through a bilateral notification or consultation process where one competent authority feels a case is not justified for MAP; (ii) identification of the documents required for a MAP request in the MAP guidance; and (iii) inclusion in the treaty of the possibility of a MAP irrespective of domestic time limits.[40]

The three minimum standards are all subject to a two-stage peer review and monitoring process. In stage one, a member state's implementation of the minimum standard based on its legal framework for MAP and the application of this framework in practice are reviewed. In stage two, the measures taken by the member to address any shortcomings identified in the stage one peer review gets reviewed.[41]

While the main objective of the BEPS Action Plan is to address and resolve issues relevant to double non-taxation, Action Item 14 specifically aims to improve the current form of MAP and tax treaty dispute resolution mechanisms in general. This is obviously because a solid dispute resolution tool must be in place within a tax treaty from a tax policy perspective to ensure certainty. As discussed above, however, although Action Item 14 obligates the states to implement the "minimum standards" to speed up the MAP process, it is silent on unresolved MAP cases. As Professor Mindy Herzfeld stated in 2016 regarding the BEPS Action Plan, it is indeed "impossible to address all the criticism."[42] At this stage, however, it would be critical to devise follow-up action plans to deal with the core issues of the MAP that Action Item 14 did not address and/or resolve to make additional and key progress in making tax treaty dispute resolution mechanisms more effective.

ii. BEPS Action Item 15 and the MLI

The Multilateral Instrument, or MLI, is a final product of the BEPS Action Plan and an actual treaty that aims to implement the BEPS Action Plan measures into bilateral tax treaties of signatories.[43] The MLI is a separate product from Action Item 15, but the purposes, obstacles in implementation, and mechanism of the MLI are addressed and discussed in Action Item 15. Action Item 15 specifically explains why the MLI is desirable and feasible, with an analysis of the tax and public international law issues related to the development of the MLI.[44] More than one hundred jurisdictions were involved in the negotiation

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40. *Id.* at 22-28.

41. Org. for Econ. Coop. and Dev. [OECD], *BEPS Action 14 on More Effective Dispute Resolution Mechanisms - Peer Review Documents*, at 5 (Oct. 2016).

42. Mindy Herzfeld, *News Analysis: Coordination or Competition? A BEPS Score Card*, TAX NOTES INT'L (2016).

43. *See* Org. for Econ. Coop. and Dev. [OECD], Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting , *opened for signature* November 24, 2016, https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm [hereinafter MLI] [https://perma.cc/H32G-G9XG].

44. Org. for Econ. Coop. and Dev. [OECD], *Developing a Multilateral Instrument to Modify*

process of the MLI, and it was concluded in November 2016.[45] The MLI is the first multilateral treaty of its kind, and as of 2021, it covers ninety-five jurisdictions, and sixty-four jurisdictions have ratified it.[46]

As an actual treaty, the MLI contains various provisions that are discussed and recommended in the fifteen Action Items of the BEPS Action Plan, namely the good practices and minimum standards to prevent double non-taxation. However, the main objective of the MLI is not to bind each state with the entire provisions of the MLI but to swiftly amend existing bilateral tax treaties with a provision(s) that each state has agreed to implement. For example, if two states that have a bilateral tax treaty between them have agreed to implement a certain provision of the MLI, then the MLI automatically amends or adds that specific provision of the MLI to their bilateral tax treaty when those two states ratify the MLI. Once all signatories ratify the MLI, it is expected that more than 1,700 bilateral tax treaties will be modified.[47]

The MLI comprises seven parts and thirty-nine articles, and Parts V and VI specifically deal with dispute resolution and arbitration respectively.[48] Article 19 of Part VI contains the "Mandatory Binding Arbitration" which grants the right to a taxpayer to submit for arbitration if competent authorities fail to resolve a tax dispute arising from taxation not in accordance with a treaty.[49] However, just as other provisions in the MLI, Part VI remains "optional"[50] by specifically stating that a state may "choose to apply" the Part VI.[51] As of July 2021,[52] only twenty-eight states decided to adopt Part VI in their tax treaties, and only seventeen states among that twenty-eight states have committed to implement the "mandatory and binding" arbitration provision.[53] To summarize, the MLI has slightly increased

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Bilateral Tax Treaties, Action 15 - 2015 Final Report 18-23 (OECD/G20 Base Erosion and Profit Shifting Project, 2015).

45. At time of publication, the MLI covers one-hundred jurisdictions. *See* Org. for Econ. Coop. and Dev.[OECD], *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, (Dec. 16, 2022) https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf [https://perma.cc/WYD5-JLDM].

46. Org. for Econ. Coop. and Dev.[OECD], *Tax Treaties: OECD Publishes 30 Country Profiles Applying Arbitration Under the Multilateral BEPS Convention*, (Mar. 25, 2021), https://www.oecd.org/tax/beps/oecd-publishes-30-country-profiles-applying-arbitration-under-the-multilateral-beps-convention.htm [https://perma.cc/8S3T-9KXZ].

47. *Id.*

48. *See* MLI, *supra* note 43.

49. *See id*. art. 19.

50. In addition to the choice to include Part VI, the MLI also allows states to exclude specific issues, or causes of dispute, from the scope of Part VI, using the reservation.

51. *See* MLI, *supra* note 43, art. 18.

52. *See* Org. for Econ. Coop. and Dev. [OECD], *supra* note 46.

53. Gabriela Capristano Cardoso, *Using Arbitration to Resolve Transfer Pricing Disputes and the Impact of the OECD's Unified Approach Proposal*, TAX NOTES INT'L, March 23, 2020, at 1261; *see also* Simone S. Schiavini*, The MLI's Arbitration Clause: How Many Bilateral Tax Treaties Are*

the number of bilateral tax treaties with the arbitration clause, but it appears that many countries are still unwilling or hesitant to have the arbitration clause in their tax treaties.

iii. The Arbitration Clause and the Factors of Hesitancy

Although the idea and the discussions regarding the arbitration clause started in 1984, it was not introduced in the OECD Model Tax Convention until 2008.[54] Contrary to the international tax community's initial objective, not many bilateral tax treaties have adopted the arbitration clause since its introduction to the OECD Model Tax Convention. There are many different factors that are making each state hesitant in deciding to adopt the arbitration clause, but among many, it appears that there are three main factors.

First, as discussed above, it should be noted that arbitration is still a fairly new concept to international tax, and as arbitration is a "private" procedure, there is not much information and resources that would allow the countries to identify and study good practices to understand the overall effect of having the arbitration clause. Thus, without having such information and resources, it seems that not many countries would be willing to consider implementing the arbitration clause.

Second, there could be a complex conflict of laws and sovereignty issues. The OECD also noted in the Commentaries on the OECD Model Tax Convention (the "Commentaries") that "[i]n some States, national law, policy or administrative considerations may not allow or justify the type of arbitration process provided for in the paragraph. For example, there may be constitutional barriers preventing arbitrators from deciding tax issues."[55] Also, if a country is not a signatory to the New York Convention, an arbitration decision might not be binding.[56]

Third, from a financial resource perspective, it may appear to certain states that a disparity in financial resources between the parties could potentially affect the overall proceeding as arbitration is generally a costly process. This issue is discussed in more detail in the following chapters.[57]

iv. Recent Discussions and Developments in the UN and OECD Tax Meetings

As noted above, both the UN and the OECD have been putting their efforts

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Actually Covered?, TAX NOTES INT'L, Aug. 6, 2018, at 592.

54. *See* Org. for Econ. Coop. and Dev. [OECD], *Transfer Pricing, Corresponding Adjustments and the Mutual Agreement Procedure*, *in* TRANSFER PRICING AND MULTINATIONAL ENTERPRISES: THREE TAXATION ISSUES 8-42 (1984), https://read.oecd-ilibrary.org/taxation/transfer-pricing-and-multinational-enterprises/transfer-pricing-corresponding-adjustments-and-the-mutual-agreement-procedure_9789264167803-1-en#page2 [https://perma.cc/EP64-MGJQ].

55. Org. for Econ. Coop. and Dev. [OECD], *supra* note 14, at 372.

56. *See* discussion *infra* Chapter IV for more information regarding the New York Convention.

57. *Id.*

to improve dispute resolution mechanisms for decades through their annual and project-based meetings. The UN has been specifically discussing this issue in every session of the Committee of Experts on International Cooperation in Tax Matters ("UN Tax Committee") meeting since the first session held in 2005.[58] In their twenty-second session held in 2020, the Committee has completed and published the Handbook on the Avoidance and Resolution of Tax Disputes to provide comprehensive guidance on the pre and post dispute resolution mechanisms, especially for the benefit of the developing countries.[59]

The OECD, after concluding the first BEPS project, i.e., the BEPS Action Plan, has been leading another global tax project called BEPS 2.0, which aims to develop an appropriate global tax policy for the digital economy of the twenty-first century. Broadly, the digital economy concerns digital goods and services that are "less tangible than traditional goods, but more tangible than traditional services" according to Professor Wentong Zheng.[60] Specifically, the BEPS 2.0 proposes the "Two-Pillar Solution" to address the tax challenges arising from the digitalization of the Economy which suggests (i) re-allocation profit of the largest and most profitable multinational enterprises ("MNEs") to other countries i.e., the Pillar One and (ii) subjecting MNEs with annual revenue over 750 million euros to a fifteen percent minimum tax i.e., the Pillar Two.[61]

In October 2021, more than 130 member countries of the OECD/G20 Inclusive Framework on BEPS, representing more than ninety percent of the global GDP, agreed to the Two Pillar Solution.[62] As noted above, it is a significant global tax project, as it aims to modify the tax rules globally to have a suitable tax policy for the twenty-first century's digital economy. From a dispute resolution perspective, there is a meaningful development as well, because tax certainty is one of the key items in the Two-Pillar Solution. Under the Two-Pillar Solution, all participating countries are required to implement the four minimum standards of the first BEPS project, which include the BEPS Action Items 5 (Countering Harmful Tax Practices), 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances), 13 (Transfer Pricing Documentation and Country-by-Country Reporting), and 14 (Dispute Resolution Mechanisms). Specifically, Pillar One requires all participating countries to have a "mandatory

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58. *See* Comm. of Experts on Int'l. Coop. in Tax Matters, Rep. on the Twenty-Third Session., U.N. Doc. E/2022/45-E/C.18/2021/4 (Oct. 19-28, 2021), https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2022-02/N2140002E.pdf [https://perma.cc/CQX7-FXUW].

59. U.N. DEP'T OF ECON. & SOC. AFFAIRS, HANDBOOK ON THE AVOIDANCE AND RESOLUTION OF TAX DISPUTES, at 3, U.N. Sales No. E.21.XVI.5 (2021).

60. Wentong Zheng, *The Digital Challenge to International Trade Law*, 52 N.Y.U. J. INT'L L. & POL. 539, 545 (2020).

61. *See* Org. for Econ. Coop. and Dev. [OECD], *OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors*, at 5 (Oct. 2021) https://www.oecd.org/g20/topics/international-taxation/oecd-secretary-general-tax-report-g20-finance-ministers-indonesia-October-2022.pdf [https://perma.cc/5DLS-3K96].

62. *Id.* at 4.

and binding dispute resolution process" which includes arbitration.[63] Only a few developing countries are permitted to use an "elective process" which makes the dispute resolution process optional.[64]

III. INTERNATIONAL ARBITRATION AND TPF

Before moving on to discuss TPF in detail, it would be helpful to explore and understand why arbitration has been suggested or adopted as a final dispute resolution tool in the Model Tax Conventions and other non-tax treaties such as the World Trade Organization's Dispute Settlement and bilateral investment treaties ("BITs") and has been a standard dispute resolution tool in cross-border commercial disputes as well.

The modern form of arbitration was shaped in 1871 in the famous *The Alabama Claims* case.[65] In *Alabama*, a dispute arose between the United States ("U.S.") and the United Kingdom ("U.K.") on the Confederate cruiser Alabama which was built in the U.K. and used against the Union as a commerce destroyer. The case was later resolved by five members of the High Commission, namely the arbitrators, nominated by the U.S., the U.K., Italy, Switzerland, and Brazil under the Treaty of Washington. The arbitrators awarded 15.5 million U.S. dollars ("USD") in gold to the U.S., which is approximately USD 330 million in today's monetary value.[66] As *Alabama* furthered the use of arbitration to peacefully resolve cross-border disputes by people from different backgrounds, the case is referred to as a "landmark in the evolution of international peace."[67]

As explored, one of the principal reasons that make arbitration to be utilized and adopted to resolve cross-border disputes would be its "neutrality," which distinguishes arbitration from domestic court proceedings. Professor William W. Park explained that "in a world without supranational courts of mandatory jurisdiction, arbitration supplies a relatively neutral and independent adjudicatory process for the vindication of economic rights."[68]

Unlike in domestic court proceedings, parties to the dispute in the arbitration proceedings have equal rights, for example, to select arbitration panels, the governing law, and the venue in arbitration proceedings. However, as arbitration is generally a costly process for all parties involved, including the state party in investor-state arbitration, a disparity in financial resources could possibly affect

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63. *Id.*

64. *Id.*

65. *See* U.N., *Alabama Claims of the United States of America Against Great Britain*, *in* 29 REPS. OF INT'L ARBITRAL AWARDS 125-34 (2011).

66. *Id*. at 133-34. The award was rendered on September 14, 1872, by the tribunal of arbitration established under Article I of the Treaty of Washington. *Id*. at 127. *see also* William W. Park, *Swords into Plowshares: A Pilgrimage for the CSS Alabama*, 37 ARB. INT'L 515-532 (2021).

67. Henry S. Fraser, *Sketch of the History of International Arbitration*, 11 CORNELL L. REV. 179, 200 (1926); *see also* Park, *supra* note 66, at 530-31.

68. William W. Park, *Tax and Arbitration*, 36 ARB. INT'L 157, 205 (2020).

the overall process.[69] Due to this reason, a funding mechanism that is known as TPF, or litigation finance, has been actively utilized in both international arbitration and domestic proceedings. It should be noted that there are no major differences in the funding mechanism for domestic litigations and international arbitration, and the term TPF and litigation finance are used interchangeably.[70]

A. Overview of TPF: Definition, Mechanism, and Law

As briefly noted above, TPF generally refers to financing by a third-party funder for one of the parties to the dispute where the funder, in return, receives shares of the case. It appears to be a simple funding mechanism, but formally defining TPF has not been easy as funding could be provided by a "variety of actors, for a variety of reasons and purposes, and through a variety of tools."[71] To provide guidance on matters relevant to the use of TPF in international arbitration, the International Council for Commercial Arbitration–Queen Mary Task Force ("ICCA-Queen Mary Task Force" or the "Task Force")[72] was formed in 2013, and the Task Force introduced a working definition of TPF on their report, the Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (the "Report"), as below:

> The term "third-party funding" refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,
> a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
> b) such support or financing is either provided in exchange for

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69. *See* Brabandere & Lepeltak, *supra* note 11, at 3.

70. Matthew Amey, *Third Party Litigation Funding in England and Wales: An Overview*, THOMSON REUTERS PRAC. L. UK (2022).

71. *See* Hussein Haeri, Clàudia Baró Huelmo & Giacomo Gasparotti, *Third-Party Funding in International Arbitration*, *in* THE GUIDE TO M&A ARBITRATION (3d ed. 2021).

72. According to the Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, the ICCA-Queen Mary Task Force on Third-Party Funding is a joint task force established by ICCA and Queen Mary, University of London in 2013 which comprises a diverse group of leading experts from a wide range of professional backgrounds, and included arbitrators, attorneys from both in-house and law firms, representatives from arbitral institutions, states, academics, and a range of third-party funders and brokers. *See* Int'l Council for Com. Arb. [ICCA], *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, PUB. NO. 4, ix (Apr. 2018). https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf [https://perma.cc/C3MG-889E]. The initial objective of the Task Force is to identify issues that arise in relation to TPF in international arbitration, and the determination of what outputs, if any, would be appropriate to address those issues. *Id.* at 2-3. The primary work of the Task Force, however, limited its work to those issues that: (i) directly affect international arbitration proceedings; and (ii) are capable of being addressed at an international level. *Id.* at 7.

> remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.[73]

It is similarly defined in investment treaties as well. Article 1(2) of Section 3 of the European Union's proposal for Investment Protection and Resolution of Investment Disputes, Transatlantic Trade and Investment Partnership ("TTIP"), which was developed for discussion with the U.S. defines TPF as below:

> "Third Party funding" means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.[74]

The Comprehensive Economic and Trade Agreement ("CETA") between Canada and the European Union also provides a similar definition. Article 8.1 of the CETA states:

> [T]hird party funding means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute.[75]

Most jurisdictions have their own definition for TPF, or litigation funding, the same funding mechanism used for domestic proceedings. In England and Wales, a relevant code for litigation funding provides:

> [TPF is] where the funds are invested pursuant to a Litigation Funding Agreement ('LFA') to enable a party to a dispute ('the Funded Party') to meet the costs (including pre-action costs) of the resolution of Relevant Disputes. In return, the Funder, Funder's Subsidiary or Associated Entity: . . . receives a share of the proceeds if the claim is successful (as defined in the LFA); and . . . does not seek any payment from the Funded Party in excess of the amount of the proceeds of the dispute that is being funded, unless the Funded Party is in material breach of the provisions of the LFA.[76]

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73. *Id.* at 50.

74. Transatlantic Trade and Investment Partnership, EU-U.S., art. 1(2), § 3, *proposed* Nov. 12, 2015.

75. Comprehensive Economic and Trade Agreement, Can.-EU, art. 8.1, Oct. 30, 2016, 2017 O.J. (L11) 23.

76. *Code of Conduct for Litigation Funders,* ASS'N OF LITIG. FUNDERS OF ENGLAND AND WALES, cls. 2.4-2.6 (Jan. 2018) https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf [https://perma.cc/JC9Q-QTFF].

As explored, a funder generally gets a share of a case in return for funding the case. The percentage of the funder's share is normally calculated based on the amount invested by the funder taking into consideration the expected value of an award, and the funder takes that portion from an award if the invested case is successful.[77] However, if the funded party loses, the funder generally receives no compensation and could also be liable for the legal fees. Thus, akin to any other investment, the funder bears a substantial risk, and the funder and their legal team, therefore, always conduct a thorough investigation and assessment of a case to minimize any risks before making an investment decision. The funder generally considers (i) overall facts and circumstances, (ii) the expected value of compensation, (iii) the time needed to reach a satisfying outcome, and (iv) estimated future costs.[78]

A third-party funder, for the purposes of TPF, ranges from specialized litigation firms to insurance companies, investment banks, and hedge funds.[79] The ICCA-Queen Mary Task Force provided a working definition of a "third-party funder" in its Report as below:

> [A]ny natural or legal person who is not a party to the dispute . . . but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:
> a) in order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
> b) bsuch support or financing is provided through a donation, or grant, or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the dispute[80]

It is defined similarly in domestic legislations as well. For example, in Hong Kong, where the use of third-party funding became legal in 2017, a relevant law provides:

> (1) A third party funder is a person—
> (a) who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person; and
> (b) who does not have an interest recognized by law in the arbitration other than under the finding agreement.
> (2) In subsection (1)(b), the reference to a person who does not have an interest in an arbitration includes—
> (a) a person who does not have an interest in the matter about which an arbitration is yet to commence; and

77. *See* Brabandere & Lepeltak, *supra* note 11, at 5-6.

78. *Id.*

79. *See* Rogers, *supra* note 10, at 8.

80. Haeri, Huelmo, & Gasparotti, *supra* note 71, at 14.

(b) a person who did not have an interest in an arbitration that has ended.[81]

A funder's clients could range from individuals to law firms, corporations, and even sovereign states.[82] Although TPF is typically utilized by the claimants, the respondents would also be able to use TPF if they have grounds to file a counterclaim.[83] As many jurisdictions have now relaxed their restrictions and rules on TPF, it has become an attractive tool for both the party looking to be funded and the funder seeking to invest. When making TPF decisions, however, it would be important to understand how the national courts have been evaluating the funding arrangements as well. Although the national courts generally only have supervisory jurisdiction over arbitration cases, it needs to be noted that the TPF arrangement could still be challenged in the national courts.

In *Drynan v. Bausch Health Companies Inc.,*[84] the Ontario Superior Court of Justice determined whether to approve the TPF agreement by first looking at whether the agreement is "champertous or illegal" and whether it is a "fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants."[85] For the analysis, the court specifically evaluated the following five factors: (1) the plaintiff's right to instruct and control the litigation should not be diminished by the funding agreement; (2) the funding agreement must not compromise or impair the lawyer and client relationship or the lawyer's duties of loyalty and confidentiality; (3) the compensation of the funds must be fair and reasonable; (4) the funder undertakes to keep confidential any confidential or privileged information; and (5) the funding agreement must be necessary to provide access to the plaintiff.[86]

The court also specifically considered the degree of control of the funder by assessing the wording of the "promise clauses," which required the plaintiff to conduct the litigation in a certain manner, with phrases such as "conduct the action in a way that avoids unnecessary costs" or "follow all reasonable legal advice of counsel."[87] Although the Court did not strike or amend the wording in the clause, the Court stated that the agreement for TPF should not bind the

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81. Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, No. 6 (2017) § 98J (H.K.).

82. Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, Cardozo L. Rev. 861, 872 (2015).

83. Rachel Howie & Geoff Moysa, *Financing Disputes: Third-Party Funding in Litigation and Arbitration*, Alberta L. Rev. 465, 474 (2019).

84. Drynan v. Bausch Health Companies Inc., 2020 ONSC 4379 (Can.).

85. *Id*. ¶ 18. It should be also noted that the court further explained that the "test is an exercise of judicial discretion that involves the balancing of various factors to determine what is fair and reasonable in each particular case." *Id.*

86. *See* Arrangement Relatif à 9354-9186 Québec Inc., (Bluberi Gaming Technologies Inc.) -and- Ernst & Young Inc., 2018 QCCS 1040 ¶. 74 (Can.).

87. *See Drynan v. Bausch Health Companies Inc.,* 2020 ONSC at ¶ 59.

plaintiff's hands and undermine the plaintiff's ultimate control of the case.[88] Also, domestic laws generally require funders to demonstrate that they have adequate procedures to manage potential conflicts of interest.

B. Rationale and Policy Reasons

As TPF involves a third party that indirectly becomes a part of the litigation by acquiring the shares of the case, TPF could conflict with many jurisdictions' traditional norms and laws. For that reason, some concerns over the use of TPF have been constantly raised as well.[89] Historically, common law jurisdictions did not allow a third party without a legitimate interest in a case to be part of the case, as the third party could possibly have the power to influence the actual party with a legitimate interest. For example, if it becomes in the funder's interest during the case to agree on a settlement, the funder may express its willingness to do so even if it is not in the funded party's best interest. Also, as long as the funding agreement allows, the funder may be able to simply withdraw from the proceeding if the funder and the funded party are unable to settle these types of issues.

The concept of TPF has actually existed for quite a long time, and in the Roman and Roman-Dutch periods, the concept was known as *pacta de quota litis*, or "champertous agreement." The arrangement was often disfavored by the courts as it was viewed to encourage speculative litigation and consequently abused the legal process. The Privy Council's statement regarding the "champertous agreement" in *Ram Coomar Coondoo v. Chunder Canto Mookerjee* in 1876 appears to illustrate the overall stance of national courts on litigation funding in the past. The Privy Council stated:

> [A]greements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy–effect ought not to be given to them.[90]

Another issue with respect to TPF is also relevant to the funder's status as the third party as this status limits a tribunal or a national court's jurisdiction over the funder. This status could become especially problematic if the funder refuses to

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88. *Id.*

89. *See* U.N. Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS): Third-Party Funding – Possible Solutions, Note by the Secretariat, Comm'n on Int'l Trade Law Working Group III (Investor-State Dispute Settlement Reform), U.N. Doc. A/CN.9/WG.III/WP.172 (Aug. 2, 2019).

90. Ram Coomar Coondoo v. Chunder Canto Mookerjee, (1876) 2 App. Cas. 186, 210 (India).

pay the final award as the funder does not have the direct obligation to pay due to its status as a "third party." Therefore, this often leads to separate litigation over the security-for-costs applications.[91] Generally, mere financial distress alone is insufficient to secure the order, but if an applicant can prove exceptional circumstances such as a history of failing to pay for cost awards by the opposing party, an arbitration tribunal or a court tend to generally grant it.[92]

To summarize the concerns over the use of TPF, it would be worthwhile to note Judge Callinan's and Judge Heydon's joint dissenting judgment in one of the leading cases on TPF, *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd. Campbells* is a domestic litigation case where the third-party funder proposed to the potential claimants to initiate a class action on behalf of them to recover the disputed amount. In return for this arrangement, the funder asked to have principal control of the case and to receive 33.3% of the proceeds.[93] The High Court of Australia upheld the arrangement, but Judge Callinan and Judge Heydon stated that the following factors need to be taken into account:

a) Whether the funder's motive was only to profit from the litigation of others,
b) Whether the funder sought out and encouraged persons to sue who would not otherwise have done so,
c) Compared to the plaintiff's losses, whether the funder's potential gain was much larger,
d) Whether the funder had excessive control of the case,
e) Whether the plaintiff's interest is subservience of the retailers' interests to those of the funders,
f) Whether the plaintiff's lawyers had a limited role, and
g) Whether the funder had a monopoly position.[94]

However, despite the concerns discussed above, the number of TPF-backed arbitration cases has been sharply increasing, especially after many jurisdictions relaxed their rules on TPF around 2006 and since the economic downturn in 2008 when many corporations experienced difficulties in bringing legal actions due to reduced cash flow.[95] As one can imagine, one of the main benefits TPF can

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91. A security-for-costs is a court order to protect the interest of a party by requiring the other party to make a payment first as a security for the other party's costs. *See* Ari MacKinnon, Aaron Gavin & Leila Mgaloblishvili, *'State Of The Rules' on Third-Party Funding in International Arbitration*, ABOVE THE LAW (July 29, 2021, 12:12 PM), https://abovethelaw.com/2021/07/state-of-the-rules-on-third-party-funding-in-international-arbitration/ [https://perma.cc/Q3F4-VKCN].

92. *Id.*

93. Campbells Cash and Carry Pty Limited v Fostif Pty Limited [2006] HCA 41 (Austl.).

94. *Id.* ¶¶ 268-83.

95. Regions including the U.S., the U.K., Australia, Singapore, Hong Kong, China, Latin America, and Europe relaxed the TPF rules. *See* Bao*, supra* note 12. *See* Haeri, Huelmo & Gasparotti*, supra* note 71, at 18.

provide is the opportunity for a party without sufficient financial resources to access justice.[96] The Australian Government's statement below on TPF seems to show the current position of the majority of jurisdictions on the use of TPF in general:

> The Government supports class actions and litigation funders as they can provide access to justice for a large number of consumers who may otherwise have difficulties in resolving disputes. The Government's main objective is therefore to ensure that consumers do not lose this important means of obtaining access to the justice system.[97]

Due to this reason, many jurisdictions have begun to acknowledge the benefits and value of TPF and have started to relax their rules on TPF. In *Campbells*, the High Court of Australia expressed that "access to justice" is "a fundamental human right which ought to be readily available to all,"[98] and in *Arkin v. Borchard Lines, Ltd.*, the Court of Appeal of England & Wales explained that the funders could help those "seeking access to justice which they could not otherwise afford."[99] Further, in *Gulf Azov Shipping Co Ltd & Ors v. Chief Humphery Ikikefe Idisi & Ors,* Lord Phillips, MR stated with respect to TPF that "[p]ublic policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation."[100]

Academics and practitioners in the field of international arbitration and TPF generally share a similar idea on TPF as well:

> Sometimes arbitration is a contest of equals . . . . However, if one of the parties is much smaller than the other, . . . even if the weaker of the two parties has a very strong case on the merits, it would have a difficult time turning down a low settlement offer that would free it of the burdens of ongoing dispute resolution. The ultimate resolution of the case would likely be influenced as much by the bargaining imbalances between the parties as by the underlying merits of the case . . . And indeed arbitration finance, with its ability to allow even the most financially constrained party to pursue a meritorious claim in an appropriate manner, addresses this very important access to justice and due process issue.[101]

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96. Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1276 (2011).

97. Explanatory Statement, Corporations Amendment Regulation 2012 (No 6) (Austl.).

98. *See* Campbells Cash and Carry Pty Limited v Fostif Pty Limited [2006] HCA 41 (Austl.).

99. Arkin v Borchard Lines Ltd [2005] EWCA (Civ) 655 (Eng.).

100. *See* Gulf Azov Shipping Co Ltd & Ors v. Chief Humphery Ikikefe Idisi & Ors, [2004] EWCA (Civ) 292 ¶ 54 (Eng.).

101. Christopher P. Bogart, *Third-Party Financing of International Arbitration*, GLOB. ARB. REV. (August 17, 2016), https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2017/article/third-party-financing-of-international-arbitration [https://perma.cc/9UF3-TMRF].

Lastly, it may first appear that TPF could potentially increase the number of frivolous cases as it provides the chance to file a claim by providing financial resources to the parties. However, although TPF may not decrease the number of frivolous cases, it is unlikely that it would increase the number of frivolous cases. As noted above, TPF is an investment from the funder's perspective, and thus, the funder would always conduct thorough due diligence[102] and investigation to determine the strength and merits of a case before making any investment decisions.[103] The rejection rate by the funders is known to be ninety percent or higher.[104] In *Anglo-Dutch Petroleum v. Haskell*,[105] the Court of Appeals of Texas explained that the funder would consider "the merits of the suit and make a calculated risk assessment on the probability of a return on its investment" and "an investor would be unlikely to invest funds in a frivolous lawsuit, when its only chance of recovery is contingent upon the success of the lawsuit."[106]

Aside from the above, the overall position of national courts in general at present appears to be that the current judicial system has the ability to detect and protect against the risk and concerns around the use of TPF. In *Giles v. Thompson*, Lord Mustill stated regarding TPF and the current judicial system as below, "As the centuries passed the courts became stronger, their mechanisms more consistent and their participants more self-reliant. Abuses could be more easily detected and forestalled, and litigation more easily determined in accordance with the demands of justice, without recourse to separate proceedings against those who trafficked in litigation."[107]

IV. TAX TREATY ARBITRATION AND TPF

As briefly discussed above, broadly, international arbitration could be categorized into three different types: (i) international commercial arbitration, (ii) investor-state arbitration, and (iii) state-state arbitration. Modern international arbitration rules started to shape and were introduced around the 1950s. The rules for international commercial arbitration were furthered by the UN Conference on International Commercial Arbitration in 1958, and similarly, the concept of investor-state arbitration was introduced around the late 1950s when the first BIT was signed and when the World Bank introduced the International Centre for Settlement of Investment Disputes ("ICSID") Convention.[108] The investor-state arbitration clause is now contained in more than two-thousand BITs, and

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102. *See* Int'l Council for Com. Arb. [ICCA], *supra* note 72, at 196; *see also infra* Appendix A – The Due Diligence Checklist.

103. *See* Rogers, *supra* note 10.

104. *See* Int'l Council for Com. Arb. [ICCA], *supra* note 72, at 25.

105. Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 104-05 (Tex. Ct. App. 2006).

106. *Id*.

107. Giles v. Thompson [1994] 1 AC 142 (HL) 153 (appeal taken from Eng.).

108. *See* Int'l Council for Com. Arb. [ICCA], *supra* note 72.

hundreds of investment disputes are resolved under this arbitration clause.[109] State-state arbitration has a slightly longer history than investor-state arbitration as it was the norm in the early Treaties of Friendship, Commerce and Navigation, and it is now included in most BITs with the investor-state arbitration clause.[110]

The modern form of tax treaty arbitration, on the other hand, has the shortest history and is a unique concept that has a distinguishable characteristic compared to the other three types of arbitration discussed above as it appears to be state-state arbitration due to the parties involved but one state is simply representing the taxpayer, the *de facto* claimant. Professor Maarten J. Ellis once said the following while discussing the "issues in the implementation of the arbitration of disputes arising under income tax treaty:"

> When one says "arbitration," it seems so simple. But you have lifted a tip of the veil, and suddenly it no longer seems so simple. I recognize, of course, that it is part of the professional attitude of a lawyer, more specifically a tax lawyer, to make simple things seem complicated. But this is something that is complicated and does not seem simple at all.[111]

A. Arbitration Institutions and Courts, Procedural Rules, and Substantive Law

As the types of disputes and the types of parties involved are all different in international commercial arbitration, investor-state arbitration, and state-state arbitration, the initiation of an arbitration proceeding in each type of proceeding also differs. While investor-state arbitration and state-state arbitration are initiated under the arbitration clause of an investment treaty, a commercial arbitration proceeding is initiated under the arbitration clause in a commercial contract or an agreement between the private parties, and the only relevant treaty to commercial arbitration would be the New York Convention,[112] which essentially applies to any arbitration, regardless of its type.

The New York Convention, also known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is a key multilateral treaty for international arbitration. The New York Convention was adopted by the

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109. *Id.*

110. Treaties of Friendship, Commerce, and Navigation are bilateral treaties that were designed to establish a framework to have a mutually beneficial economic relationship between two states, specifically to facilitate commerce, navigation, and investment between the states and to protect individuals and businesses. *See* Andreas Paulus, *Treaties of Friendship, Commerce and Navigation*, OXFORD PUB. INT'L L. (Mar. 2011); *see also* Nathalie Bernasconi-Osterwalder, *State–State Dispute Settlement in Investment Treaties*, INT'L INST. FOR SUSTAINABLE DEV. 1, (Oct. 2014) https://www.iisd.org/system/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf [https://perma.cc/3H3R-NPY8].

111. Maarten J. Ellis, *Issues in the Implementation of the Arbitration of Disputes Arising Under Income Tax Treaties – Response to David Tillinghast*, 56 BULL. INT'L TAX'N 100 (2002).

112. Karl-Heinz Bockstiegel, *Commercial and Investment Arbitration: How Different are they Today? The Lalive Lecture 2012*, 28 ARB. INT'L 577, 579 (2012).

UN in 1958 and came into force in 1959,[113] and as of 2021, there are 168 contracting states to the treaty.[114] In short, the treaty was developed and signed by the countries to have "common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and nondomestic arbitral awards" and to ensure that arbitral awards are "recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards."[115] For example, in the U.S., foreign arbitral awards are enforced under Chapter 2 of the Federal Arbitration Act, which incorporates the New York Convention.[116]

i. Procedural Rules

From a procedural perspective, the rules could differ depending on the three different formats of arbitration: (i) institutional arbitration, (ii) ad hoc arbitration, or (iii) baseball arbitration, which is also known as final offer arbitration. However, regardless of the format, basic procedural rules similar to domestic court procedural rules generally apply to all arbitration proceedings. For example, an arbitration tribunal would be required to ensure that each party has the proper opportunities to present and defend itself under the principle of due process in any arbitration proceedings.[117]

In institutional arbitration, international arbitration institutions, such as the London Court of International Arbitration and the Singapore International Arbitration Centre, administer the overall arbitration process under their own

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113. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 4739 [hereinafter New York Convention].

114. *Id.*

115. The "New York Convention" provides:

> Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and nondomestic arbitral awards. The term "non-domestic" appears to embrace awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings, e.g., another State's procedural laws are applied.
>
> The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. *Id.*

116. *See* 9 U.S.C. §§ 1-14.

117. *See* Bockstiegel, *supra* note 112, at 579-80.

procedural rules. It should be noted that depending on a legal system of a venue, which is known as a "seat" in an arbitration term, a domestic court could have "supervisory jurisdiction" on the arbitration procedure.[118] In the case of ad hoc arbitration, it is not administered by any institutions, and the parties would need to determine all aspects of the arbitration including the applicable law and the procedural rules for the proceeding. In investor-state arbitration, investment treaties, such as the ICSID Convention, generally provide guidelines and procedural rules.[119]

In contrast to investor-state arbitration, in tax treaty arbitration, a tax treaty itself does not contain procedural rules. Similar to "ad hoc" arbitration, the "Sample Mutual Agreement on Arbitration" contained in the Commentaries simply states that the appointed arbitrators should adopt procedural and evidentiary rules that they deem necessary.[120] However, the Commentaries does provide some additional guidelines regarding the procedure, and the MLI, which has been amending the provisions of bilateral tax treaties of the MLI signatories, contains more detailed procedural rules. There are two main Parts in the MLI for dispute resolution, Part V and Part VI, and Articles 18 to 26 of Part VI specifically provide arbitration-related provisions, including procedural rules.[121]

a. Article 20 – Appointment of Arbitrators

An appointment process of arbitrators in tax treaty arbitration is akin to a selection process of both commercial contracts and investment treaties which usually appoints three arbitrators as an arbitration panel. Article 20 of the MLI requires an arbitration panel to have three individual members that are impartial and independent of the competent authorities, tax administrations, and ministries of finance of the Contracting Jurisdictions, and with expertise or experience in international tax matters.[122] When selecting the panel members, each state has the right to appoint one panel member, and the two panel members appointed by each state then appoint a third panel member that will also serve as the Chair of the

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118. *Id*.

119. *Id*.

120. The Commentaries states:

> Subject to this agreement and the Terms of Reference, the arbitrators shall adopt those procedural and evidentiary rules that they deem necessary to answer the questions set out in the Terms of Reference. They will have access to all information necessary to decide the issues submitted to arbitration, including confidential information. Unless the competent authorities agree otherwise, any information that was not available to both competent authorities before the request for arbitration was received by both of them shall not be taken into account for purposes of the decision.

See Org. for Econ. Coop. and Dev. [OECD], *supra* note 18, at 384.

121. *See* MLI, *supra* note 43, pts. V-VI. *see also infra* Appendix B for the full text of Part V and Part VI of the MLI.

122. *See* MLI, *supra* note 43, art. 20(2).

arbitration panel.[123]

b. Article 21 – Confidentiality of Arbitration Proceedings

In contrast to domestic court proceedings, arbitration is generally a private and confidential process, and this nature of arbitration is one of the main reasons oftentimes arbitration is preferred over a domestic court proceeding. However, compared to commercial arbitration, as issues raised in investor-state arbitration are generally more relevant to the public interest, there have been arguments that cases concerning public interest should be more open and transparent.[124]

In *Vedanta v. India,* an investor-state arbitration that was held in Singapore, India sought a declaration from the Singapore High Court that the case should be confidential.[125] In response, the Court stated that unless the parties otherwise agree, a general obligation of confidentiality arises in common law in all arbitration proceedings.[126] However, the court listed the following exceptions where the general rule of confidentiality may not be applicable:

a) where there is express or implied consent to disclosure;
b) where disclosure is permitted by a tribunal order, or with the leave of the court;
c) where disclosure is reasonably necessary for the protection of the legitimate interests of a party to the arbitration; or
d) where the interest of justice require disclosure.[127]

Similar to the confidentiality rule discussed above, Article 21 of the MLI provides that it needs to be ensured that any information relating to the arbitration proceeding should be confidential.[128] However, given the nature of tax issues that would be highly relevant to the public interest, it seems that the public interest argument may also be deemed valid in certain tax treaty arbitration cases.

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123. *Id*.

124. Mabel I. Egonu, *Investor-State Arbitration Under ICSID: A Case for Presumption Against Confidentiality?*, 24 J. INT'L ARB. 479 (2007).

125. *See* Vedanta Resources PLC v. Republic of India, PCA Case No. 2016-05; *see also* Judgment of the High Court of Singapore, Republic of India v. Vedanta Resources plc [2020] SGHC 208.

126. Republic of India v. Vedanta Resources PLC [2020] SGHC 208 at 70-72.

127. Bhat Rohit & Lingard Nicholas, *Confidentiality in Investment-Treaty Arbitration: The Singapore Position*, FRESHFIELDS BRUCKHAUS DERINGER (Oct. 28, 2020), https://riskandcompliance.freshfields.com/post/102gina/confidentiality-in-investment-treaty-arbitration-the-singapore-position [https://perma.cc/T4UZ-FKQD].

128. *See* MLI, *supra* note 43, art. 21.

c. Article 22 – Resolution of a Case Prior to the Conclusion of the Arbitration

Like in domestic court proceedings, a claimant in an arbitration proceeding can settle or withdraw from the case during the proceeding. Similarly, in tax treaty arbitration under the provisions of the MLI, pursuant to Article 22, an arbitration proceeding can be terminated during the proceeding if (i) the states reach a mutual agreement during the arbitration proceeding, or (ii) the person requested withdraws their case.[129]

d. Article 23 – Type of Arbitration Process

Article 23 of the MLI suggests two types of arbitration that a state can adopt: (i) final offer arbitration, also known as baseball arbitration,[130] or (ii) independent opinion arbitration.[131] As noted above, the OECD Model Tax Convention suggests final offer arbitration, and it appears that many states also have adopted final offer arbitration. Under Article 23(1), for final offer arbitration, each state needs to submit to the arbitration panel a proposed resolution that addresses all unresolved issues in the case.[132] Once they are submitted, the panel reviews both resolutions and selects one of the proposed resolutions as the final decision without any modifications by a vote of a simple majority by the panel.[133] However, it should be noted that as the panel simply picks one from two proposed resolutions, the decision does not include any explanation or rationale as to how the panel reached that decision.[134] Nonetheless, final offer arbitration

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129. *See id.* art. 22.

130. Baseball arbitration, or final offer arbitration, is a type of arbitration that was developed to resolve salary disputes in the Major League Baseball of the United States that arise between a player and a team owner. *See* Josh Chetwynd, *Play Ball? An Analysis of Final-Offer Arbitration, Its Use in Major League Baseball and Its Potential Applicability to European Football Wage and Transfer Disputes*, 20 MARQUETTE SPORTS L. REV. 109, 110-115 (2009). .In baseball arbitration, a panel is selected by both parties i.e., the player and the owner, and just like in other arbitration proceedings, both get an equal opportunity to present their position in the hearing sessions. *Id.* at 123-25. After the hearings, the panel chooses one of the two salaries for the upcoming season without any modification to the selected salary. *Id.* at 110-115. The concept of baseball arbitration has been adopted and used for similar disputes where two sum-certain amounts are disputed. *See* Jaime Tijmes, *Who Wants What? – Final Offer Arbitration in the World Trade Organization*, 26 EUR. J. OF INT'L L. 587 (2015); Mordehai Mironi, *From Mediation to Settlement and from Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation*, 73 INT'L J. OF ARB., MEDIATION, AND DISP. MGMT. 52 (2007).

131. *See* MLI, *supra* note 43, art. 23.

132. The proposed resolution is limited to a disposition of specific monetary amounts or the maximum rate of tax charged pursuant to a tax treaty. *See id.* art 23(1).

133. Final offer arbitration was first introduced to tax treaties by the U.S., but the U.S. Model Tax Convention did not include the arbitration clause until the OECD included the clause in their Model Tax Convention in 2008. *See* MLI, *supra* note 43.

134. *See id.* art. 23(1).

is often preferred due to its simplicity, lower cost, and faster process. Also, it generally works well for sum-certain monetary disputes and tends to have less interference with state sovereignty. However, the legality and fairness of the decision could potentially be called into question, and it is less suitable for other types of disputes where the amount in dispute is not sum-certain or needs adjustments. For example, final offer arbitration may not work well for a transfer pricing case where the states disagree on the amount of the primary adjustment.[135]

In contrast, independent opinion arbitration is akin to domestic proceedings. In tax treaty arbitration under the provisions of the MLI, pursuant to Article 23(2), the states need to provide any information that may be necessary for the arbitration decision to the arbitration panel, and the panel decides the issues submitted in accordance with the applicable provisions of a tax treaty and, subject to these provisions, of those of the domestic laws of the states.[136] When the decision is made by the panel by a simple majority, the decision is delivered to the states in writing, which includes the sources of law relied upon and the reasoning which led to their decision.[137] For this reason, unlike final offer arbitration, independent opinion arbitration would be more appropriate if the amount in dispute is not sum-certain, for example, in cases relevant to transfer pricing and the non-discrimination clause. Also, as the arbitration panel provides an explanation and rationale as to how the panel reached the decision, the parties tend to be more accepting of the decision. However, like in domestic proceedings, it is generally lengthier and could possibly interfere with state sovereignty. Some scholars also raised that it could also potentially result in a chilling effect.[138]

It should be noted that under Article 23 of the MLI, however, a state can only adopt either one of final offer arbitration or independent opinion arbitration, and this could potentially result in a mismatch in the type of arbitration where two states to the dispute need to decide which one to use.[139] Thus, given that independent or final offer arbitration alone is not appropriate for all types of tax disputes, it appears that the relevant rules should provide flexibility to choose based on the type of dispute.

e. Article 24 – Agreement on a Different Resolution

The Commentaries explain that although the parties have six months to

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135. Raffaele Petruzzi, Petra Koch & Laur Turcan, *Chapter 6: The Baseball Arbitration in Comparison to Other Types of Arbitration*, *in* INTERNATIONAL ARBITRATION IN TAX MATTERS 52h-i (Michael Lang & Jeffrey Owens eds., 2015).

136. *See* MLI, *supra* note 43, art. 23(2).

137. *Id.*

138. The chilling effect in arbitration occurs when the parties favor an early decision due to the cost, which makes the parties to rely less on good-faith negotiations to settle disputes. A study on this has shown that about 66% of cases resulted in outright wins or losses. *See* MLI, *supra* note 43.

139. *See* MLI, *supra* note 43, art. 23.

implement the decision by the panel from the date of communication of the decision,[140] under Article 24 of the MLI, parties must inform within three months if both states agree on a different resolution.[141] This provision is similar to the post-award settlement in an ordinary arbitration proceeding where the parties can modify or adjust the award if both agree to settle after the award is rendered.

f. Article 25 – Costs of Arbitration Proceedings

Article 25 of the MLI states that the fees and expenses of the members of the arbitration panel, as well as any costs incurred in connection with arbitration proceedings, are borne by the states.[142] This arrangement is one of the factors that distinguishes tax treaty arbitration from commercial arbitration and investor-state arbitration as the cost of arbitration is borne by the states while one state is merely representing the taxpayer, the *de facto* claimant. When reading this provision, it may appear that the states would bear all the costs of arbitration, but this should not be mistaken. This arrangement is discussed in more detail in the sections below.

ii. Substantive Law

Generally, in international commercial arbitration, besides when a contract specifically excludes any national law or when, for example, refers to UNIDROIT principles,[143] a national substantive law is used as the governing law.[144] Typically, the arbitration clause in commercial contracts or agreements specifically states what jurisdiction's substantive law will be used as the governing law. Similarly, in investor-state arbitration, the law agreed by the parties is generally applied, and in case there is no such agreement in place, the law of the contracting state party to the dispute and such rules of international law are normally applied.[145] However, unlike in commercial arbitration, changes in the domestic law of a state could give rise to another dispute in investor-state arbitration, because, for example, from an investor point of view, there could be a situation where the

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140. *See* Org. for Econ. Coop. and Dev. [OECD], *supra* note 14, at 387.

141. *See* MLI, *supra* note 43, art. 24.

142. *See id.* art. 25.

143. UNIDROIT is the international institute for the unification of private law as self-described below:

> The UNIDROIT is an independent intergovernmental Organisation with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives.

UNIDROIT, https://www.unidroit.org/ [https://perma.cc/S2F3-6UAV].

144. *See* Bockstiegel, *supra* note 112.

145. *See, e.g.*, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 575 U.N.T.S. 159.

changes in the law appear to be intentional to place the state in a better position. If such a situation arises, the investor claimant generally has the ground under the expropriation clause of a BIT to argue that the state has taken its property without just compensation, for example, by changing tax laws.[146]

In the case of tax treaty arbitration, Article 23(2)(b) would be the relevant article to decide the applicable law. Article 23(2)(b) provides that the arbitration panel is required to make a decision in accordance with the applicable provisions of a treaty and, subject to these provisions, of those of the domestic laws of the states.[147] Therefore, in tax treaty arbitration, both the provisions of a treaty and the domestic law of the states to the dispute are always relevant and applied.

The Commentaries also contains paragraphs akin to Article 23(2)(b) that provide more detailed guidelines on the applicable law, specifically for the issues with respect to (i) the interpretation of a treaty and (ii) the application of the arm's length principle.[148] As to the interpretation of a treaty, the Commentaries provides that the panel should decide the issues in the light of the principles of interpretation incorporated in Articles 31 to 33 of the Vienna Convention on the Law of Treaties ("Vienna Convention"),[149] having regard to the Commentaries as periodically amended, as explained in the OECD Model Tax Convention.[150] With respect to the issues related to the application of the arm's length principle, the Commentaries suggests that the penal, when making a decision, should take into account the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD TP Guidelines")[151] and should also consider any other sources which the states may expressly identify in the Terms of Reference.[152]

B. Jurisdiction

As international arbitration involves parties from different states, the determination of the tribunal's jurisdiction over the case could require complex

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146. *See Bockstiegel, supra* note 112.

147. *See* MLI, *supra* note 43, art. 23(2).

148. *See* Org. for Econ. Coop. and Dev. [OECD]*, supra* note 14, at 385.

149. The Vienna Convention, also known as the "treaty on treaties," is a multilateral convention that came into force in January 1980 with an objective to regulate treaties. *See* Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. OF INT'L LAW Of International Law 431, 434-37 (2004). Articles 31 to 32 set out the rules for the interpretation of a treaty. *See* Vienna Convention on the Law of Treaties, May 13, 1969, 1155 U.N.T.S. 331.

150. *See* Org. for Econ. Coop. and Dev. [OECD]*, supra* note 14, at 385.

151. The OECD TP Guidelines are transfer pricing guidelines that focus on the main issues of principle that arise in the transfer pricing area. *See* Org. for Econ. Coop. and Dev. [OECD], TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS *2017* (2017).

152. *See* Org. for Econ. Coop. and Dev. [OECD], *supra* note 14, at 385

legal analysis and may also lead to a separate dispute. In international commercial arbitration, a dispute over jurisdiction is less likely to occur compared to investor-state arbitration as the arbitration clause in a commercial contract or agreement would generally contain a provision that specifically addresses the tribunal's jurisdiction.[153] However, in investor-state arbitration, a dispute over jurisdiction could occur more frequently as the tribunal's jurisdiction over the case is determined under a relevant provision in an investment treaty that is generally interpreted with general principles of treaty contained in the Vienna Convention.[154] Typically, the following factors are considered in determining the tribunal's jurisdiction in investor-state arbitration:

a) Whether an "investment" existed;
b) Whether the Claimant is a national of the alleged home state, often as a company which has been created there by the mother company for the only reason that this new home state has a BIT with the respondent state; or
c) Whether a national of that home state really owns and/or controls the allegedly expropriated company.[155]

Similar to investor-state arbitration, in tax treaty arbitration, jurisdiction is determined pursuant to a tax treaty. However, as explored above, in tax treaty arbitration, the key issue from a jurisdiction point of view would be whether the taxpayer has the ground to initiate the MAP process as the arbitration tribunal will typically have jurisdiction over the case without a separate analysis on jurisdiction provided that the taxpayer has the proper ground for the MAP.

As discussed above, a taxpayer has the ground for the MAP if there is (i) potential taxation "not in accordance" with a tax treaty or (ii) difficulties or doubts arising as to the interpretation or application of a treaty.[156] To initiate the MAP process, a taxpayer does not need to wait until such taxation has been charged against or notified to them[157] and it is generally sufficient if they can establish that actions[158] of one or both of the states are likely[159] to result in such taxation from the perspective of the taxpayer.[160] For example, similar to the claims made under the expropriation clause of a BIT, a taxpayer can make a

153. *See* Bockstiegel, *supra* note 112, at 583.

154. *Id*.

155. *Id*.

156. *See* MLI, *supra* note 43, art. 25..

157. Org. for Econ. Coop. and Dev. [OECD]*, supra* note 14, at 357.

158. According to the Commentaries, the "actions" mean "all acts or decisions, whether of a legislative or a regulatory nature, and whether of general or individual application, having as their direct and necessary consequence the charging of tax against the complainant contrary to the provisions of the Convention." Org. for Econ. Coop. and Dev. [OECD], *supra* note 14, at 357.

159. A taxpayer's belief must be reasonable and must be based on facts that can be established. *See id.*.

160. *Id.*

similar claim under the MAP article and the non-discrimination clause of a tax treaty.[161] Other examples include situations where a self-assessment system or the active examination in the course of an audit resulting in taxation not in accordance with a treaty, and where there is a gap between each state's transfer pricing regulations which would make it difficult for the taxpayer's related party to obtain a corresponding adjustment in the other state without going through the MAP process.[162]

Thus, in summary, if a taxpayer reasonably believes that the taxation at issue is not in accordance with a tax treaty, that reasonable belief would be sufficient to initiate the MAP process, and when the MAP result is unsuccessful, the arbitration tribunal will generally have jurisdiction over the unresolved MAP cases without a separate analysis on jurisdiction. In short, unlike in investor-state arbitration, as tax treaty arbitration takes place after the MAP process, jurisdiction is less likely to be a separate issue in tax treaty arbitration.

C. Tax Treaty Arbitration from Third-party Funder Perspective and TPF from Taxpayer Claimant and State Perspective

As discussed above, TPF generally refers to a funding agreement between a party to the dispute and a third-party funder where, under the agreement, the third-party funder provides funds for part or all of the proceedings, in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute.[163] Consequently, there are two obvious conditions that need to be satisfied for TPF to work: (i) there needs to be a party that seeks a fund from a third party, and (ii) as it is an investment from the funder's perspective, there must be a foreseeable return on investment. Before moving on to discuss these two requirements in detail, it would be helpful to explore one of the landmark investor-state arbitration cases involving taxation, *Yukos v. Russia*.[164]

Established in 1993, Yukos Oil Company ("Yukos") was Russia's largest company in the oil and gas sector and one of the top ten oil and gas companies in the world by market capitalization in the 1990s.[165] At the time, Russia had a low-tax region program, known as "ZATOs," which provided tax benefits such as federal corporate tax exemptions to corporations operating in certain regions

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161. *Id.*

162. *Id.*

163. Int'l Council for Com. Arb. [ICCA], *supra* note 72, at 14.

164. Three parallel arbitrations were submitted by three shareholders (Hulley Enterprises Limited (Cyprus), Yukos Universal Limited (Isle of Man) and Veteran Petroleum Limited (Cyprus)) that hold 70.5% of the Yukos' shares. *See* Hulley Enterprises Limited (Cyprus) v. The Russian Federation (PCA Case No. AA 226); Yukos Universal Limited (Isle of Man) v. The Russian Federation (PCA Case No. AA 227); and Veteran Petroleum Limited (Cyprus) v. The Russian Federation (PCA Case No. AA 228) [hereinafter collectively *Yukos*].

165. Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227, at 13.

to encourage investments in such regions.[166] Yukos was one of the corporations that utilized the program by relocating its trading companies to one of the regions and were fully exempted from federal corporate taxation. Russia argued that Yukos increased the oil price using sham shell companies and fraudulently evaded billions of dollars of profits tax from 1999 to 2004 by abusing the program. While Russia's authorities initiated a series of criminal investigations, Russia's tax authorities conducted several tax audits on Yukos in 2003 and imposed a tax of about USD 24 billion. Yukos contended that it was not abusing the program and Russia took a series of measures such as imposing an excessive and discriminatory tax, which led to the bankruptcy of Yukos in August 2006.[167] The arbitration proceeding was initiated under the provisions of the Energy Charter Treaty ("ECT"),[168] which Russia had not yet ratified but the provisions had been agreed as legally binding as part of the draft framework. The arbitration tribunal stated that it appears Yukos had partially abused the program but Russia "launch[ed] a full assault on Yukos . . . in order to bankrupt Yukos and appropriated its assets while, at the same time, removing Mr. Khodorkovsky[169] from the political arena."[170] The tribunal awarded approximately USD 50 billion to Yukos in July 2014, which was the highest amount in the history of investor-state arbitration. The amount is also equivalent to 13% of Russia's budget revenue for the 2014 fiscal year.[171]

Two key takeaways from *Yukos* from TPF and tax treaty arbitration perspective would be the potential impact of arbitration involving taxation on both (i) a multinational enterprise and (ii) a state. For the analysis below, investor-state arbitration is discussed more than commercial arbitration given the similar characteristics to tax treaty arbitration, which involves a private party and a state(s).

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166. *Id.* at 14-16.

167. *Id.* at 16.

168. The Energy Charter Treaty was signed in December 1994 and entered into legal force in April 1998, and as of March 2022, there are fifty-three Signatories and Contracting Parties to the Treaty. *See The International Energy Charter Consolidated Energy Charter Treaty with Related Documents*, INT'L ENERGY CHARTER (Jan. 15, 2016). The treaty and its related documents, provide a "legal and political basis for the creation of an open international energy market." *Id. See also* The Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95 [hereinafter Energy Charter Treaty].

169. Khodorkovsky is a former CEO of Yukos who was imprisoned in 2003 on charges of fraud and tax evasion. *See* Reuters, *Q+A: Who is Russian jailed tycoon Mikhail Khodorkovsky?*, REUTERS, (Mar. 3, 2009, 8:12 PM), https://www.reuters.com/article/us-russia-khodorkovsky-sb-idUSTRE5222FJ20090303 [https://perma.cc/UT3Q-KYZT]. .

170. *See Yukos, supra* note 163.

171. Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227, at 13.

i. Tax Treaty Arbitration from Third-party Funder Perspective and TPF from Taxpayer Claimant Perspective

As noted above, TPF is utilized by a party to the dispute mainly to finance their legal fees and relevant out-of-pocket expenses such as expert fees, arbitrator fees, and discovery related fees, but also to secure working capital or to finance other financial liabilities.[172] That said, as noted above, because TPF is an investment from a funder's perspective, there must be a foreseeable return on investment. A funder generally takes into consideration the potential value of the outcomes and the legal merits of the case when making their investment decisions. Specifically, when conducting a valuation of a case, a funder normally conducts a simple economics test that evaluates whether a ratio between the sought amount by a borrower and the potential value of a claim is at least 1:10.[173] However, it should be noted that the 1:10 ratio does not mean a ten-fold return but roughly four times the initial investment.[174] For example, if the funder invests USD 1 million, the funder would generally expect the claimant to recover USD 10 million, which will allow the funder to recover its initial investment of USD 1 million plus a three-fold return, that will leave the funder with 40% and the borrower with 60% of the award. Therefore, when it becomes clear to the funder that the case is strong enough and there is a foreseeable return, investing in an arbitration case would be highly attractive from a funder's perspective. In investor-state arbitration, it is known that, on average, while the costs of investment are about USD 5 million, an arbitral award must be five to six times larger than the costs, i.e., approximately, USD 30 million.[175] In one case, a funder made more than a 700% return from investing in an investor-state arbitration proceeding.[176]

Similarly, investing in tax treaty arbitration could be as attractive as investing in investor-state arbitration to the funders given the value of a tax treaty arbitration case i.e., the amount involved in tax dispute is generally as large as the amount involved in investor-state arbitration cases. As discussed in *Yukos* above, the amount in a dispute involving taxation and a multinational enterprise could be as large as billions of dollars in USD. As noted, the *Yukos* case was initiated under the "expropriation clause" of the ECT claiming that tax imposed by Russia constitutes expropriation. In *Yukos*, Russia tried to argue that pursuant to the

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172. Int'l Council for Com. Arb. [ICCA], *supra* note 72, at 20.

173. *Id.* at 25.

174. *Id.*

175. Brooke Guven & Lise Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement* 6 (CCSI Working Paper 2019), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1007&context=sustainable_investment_staffpubs.

176. *Id.*; *see also* BURFORD CAPITAL, *2018 Interim Report* (2018), https://www.burfordcapital.com/media/1525/bur-30307-interim-report-2018-web.pdf [https://perma.cc/JWK4-3BGS]; *see also* Teinver S.A., Transportes de Cercanias S. A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, Award, ICSID Case No. ARB/09/1 (July 29, 2017).

carve-out provision,[177] the tribunal does not have jurisdiction over the issues involving taxation, but the tribunal stated that it has jurisdiction over the issue under the claw-back provision[178] as the taxation at issue appears to be an "expropriation."[179] Russia further argued that the taxation was not "discriminatory,"[180] stating that the same taxation measures have been applied to other offenders in the same manner and the "searches and seizures were taken as part of legitimate taxation measures and conducted in accordance with normal Russian practice and the appropriate procedural protections available under Russian law".[181]

Although the case is an investor-state arbitration case that was initiated under the ECT, a case involving a similar issue i.e., "discriminatory taxation" could also possibly be initiated under the non-discrimination clause[182] of a tax treaty which similarly prevents discriminatory and non-favorable tax treatment and ensures equal treatment.[183] Also, though the details of the MAP and tax treaty arbitration cases are not publicly known, apparently, the amount involved in typical tax treaty disputes involving multinational enterprises, for instance, beneficial ownership disputes concerning capital gains tax and dividend withholding tax, or other cases involving typical tax treaty issues discussed above, including a case involving the "non-discrimination" clause,[184] would normally be at least millions of dollars in USD.

Generally, when a tax dispute occurs with a state, in other words when a state imposes a tax that is excessive or unjust from a taxpayer's perspective, the

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177. *See* The Energy Charter Treaty, *supra* note 168.

178. *See id.* art. 21(5).

179. *See* Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227, at 448-49.

180. *Id.* at 17.

181. *Id*.

182. *Articles of the Model Convention with Respect to Taxes on Income and Capital*, *supra* note 18.

183. Article 24(5) of the OECD Model Tax Convention states that:

> 5. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

Org. for Econ. Coop. and Dev. [OECD], *supra* note 18, art. 24(5).

It should be noted that, for example, if *Yukos* is initiated under the non-discrimination of a tax treaty (assuming that it met the threshold of a tax treaty), it is likely that only the sum-certain tax amount of USD 24 billion would be considered by the tribunal.

184. The most commonly disputed Articles of the OECD Model Tax Convention are Articles 3 (General Definitions), 4 (Resident), 5 (Permanent Establishment), 7 (Business Profits), 9 (Associated Enterprises), 10 (Dividends), 11 (Interest), 12 (Royalties), 13 (Capital Gains), and 24 (Non-discrimination). *See* Baistrocchi & Hearson, *supra* note 4.

taxpayer may choose to either (i) pay the disputed amount first and then demand a refund or (ii) defer the payment until the end of the dispute with the risk of paying a penalty and/or an interest being accrued during the time. Given that the typical monetary scale of tax treaty disputes would be similar to investor-state arbitration cases discussed above, many tax treaty arbitration cases would generally be capable of providing a three-fold or four-fold return to the funders.

From a taxpayer claimant perspective, as noted above, TPF allows them to secure legal fees and relevant out-of-pocket expenses as well as working capital for their business or to finance other financial liabilities. This would be particularly important for the taxpayer claimants as the legal fees are likely to be significant given the expertise required for tax treaty arbitration and the legal advisors' involvement from the MAP submission stage. Generally, the legal advisors would assist and advise the taxpayer throughout the process, which would typically include preparing legal memoranda, and economic models if considered necessary, that justify the taxpayer's MAP application and overall position to initiate the MAP. This means that although the taxpayer is represented by the state, every other step of the MAP process, including arbitration, inevitably requires the heavy involvement of the taxpayer's legal advisors, and this whole process would certainly incur large legal fees. Thus, given the typical legal fees and the monetary amount normally involved in a tax dispute case, it seems clear that TPF could be a valuable tool to many taxpayers.

ii. TPF from State Perspective

In treaty-based arbitration proceedings, the respondent states are in an entirely different position compared to the claimants because the states do not have the right to initiate a claim under almost all treaties except in a limited situation where it has a ground to initiate a counterclaim.[185] However, an insurance type of funding agreement that could protect the state from a higher than anticipated award could be agreed upon between the respondent state and the funder, and as mentioned above, if the state could make a counterclaim against the claimant, the counterclaiming state would be able to utilize TPF.[186] The market for both dispute insurance and financing for respondents has been growing with TPF and becoming more available.[187]

As discussed, although TPF may not offer as much to the respondent states, it should be noted that TPF could still matter to the states from a policy perspective, perhaps, especially for developing countries. Generally, developing countries are more skeptical about tax treaty arbitration as there is an inevitable imbalance in financial resources between developed and developing countries,[188]

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185. *See* Guven & Johnson, *supra* note 175, at 8-9.

186. *Id.*

187. *See* Org. for Econ. Coop. and Dev. [OECD], *supra* note 72, at 23, 43.

188. Zaleha Adam, *ASEAN/International - Mutual Agreement Procedure Arbitration in Developing Countries – The ASEAN Experience*, 70(4) BULL. FOR INT'L TAX'N (Apr. 1, 2016).

and due to the high cost of arbitration, developing countries could be indirectly forced to settle during the MAP negotiation process to avoid costly arbitration.[189] Therefore, although TPF may not directly offer much to the respondent states, it appears that the states could still be indirectly benefited from TPF if their citizens could utilize TPF to level the financial playing field and protect their rights with a lesser financial burden.

V. CONCLUSION

The starting point of this Article was taxpayer rights, trusting that no case should remain unresolved without any legal tools, and the preliminary objectives were (i) to highlight the importance of having the arbitration clause in a tax treaty and (ii) to provide a new perspective and a reference on this topic as tax treaty arbitration has yet been fully analyzed from traditional arbitration and TPF perspective. As explored, the vast majority of bilateral tax treaties do not contain the arbitration clause, which consequently makes certain MAP cases remain unresolved without any alternative tools within a treaty. As noted, there are several reasons for many bilateral tax treaties omitting the arbitration clause, but this Article solely focused on the financial aspects of arbitration and examined whether TPF could be utilized in tax treaty arbitration to remove certain financial barriers as in other traditional arbitration proceedings by analyzing (i) any legal barriers, (ii) benefits from a justice perspective, and (iii) investment merit from a funder perspective.

As it is important to first fully understand the anatomy of tax treaty arbitration to identify any legal barriers and to examine the applicability of TPF to tax treaty arbitration, the Article conducted a comparative study on international commercial arbitration, investor-state arbitration, state-state arbitration, and tax treaty arbitration (the "Study") after exploring and analyzing both the MAP and TPF in the first two chapters of this Article.

In summary, the findings of the Study indicate that there are no major legal barriers in tax treaty arbitration that would potentially prevent the utilization of TPF and the current TPF regulations in force will generally be applicable to tax treaty arbitration in the same manner. However, as tax treaty arbitration can only be initiated after the conclusion of the MAP process by the competent authorities, the number of tax treaty arbitration cases would likely be much smaller compared to non-tax treaty arbitration cases. Nonetheless, financing tax treaty arbitration would still be an attractive investment opportunity for the funders given the scale of the potential awards. Likewise, from the taxpayer claimant's perspective, like in other arbitration proceedings, TPF would be a valuable tool as it provides them with an opportunity to access justice that they could not have or would have been burdensome. However, as tax treaty arbitration was introduced in the Model Tax Conventions only about a decade ago and has not been actively utilized, compared to international commercial and investor-state arbitration, the overall rules and system for administering arbitration have not been firmly defined and

189. *Id.*

settled in yet to international tax, and thus more investments and efforts to have the right system that is optimized for tax treaty arbitration seemed to be needed to increase the comfort level towards tax treaty arbitration.

As expressed throughout the Article, the MAP or a dispute resolution mechanism of a tax treaty will remain incomplete without the arbitration clause from a judicial point of view. Despite its importance, however, there are several factors that make countries hesitant when deciding whether to adopt the arbitration clause such as tax sovereignty, revenue, conflicts with domestic laws, and financial resources. An approach, therefore, needs to be made from both within and outside the boundaries of international tax, tackling sub-issue by sub-issue, and this Article specifically dealt with the financial aspects of tax treaty arbitration with TPF. To conclude, though TPF may not remove and resolve all financial issues relevant to tax treaty arbitration, it seems clear that, as an ancillary tool, TPF is capable of assisting those "seeking access to justice which they could not otherwise afford"[190] in the tax treaty arbitration setting as well, and potentially thereby lessen certain resistance to tax treaty arbitration arising from a possible financial disparity between the parties to the tax treaty arbitration.

190. *See* Arkin v Borchard Lines Ltd [2005] EWCA (Civ) 655 (Eng.).

Appendix A – The Due Diligence Checklist

A due diligence checklist of questions and issues that funders and funded parties should consider before entering into a funding agreement.

1. Concerning the Third-Party Funder's Legal and Financial/Capital Structures
   a. Is it publicly listed?
   b. Is the funder regulated and/or bound to comply with official and/or publicly published guidelines, whether having the force of law or merely by way of recommendations? Is it subject to the control of any regulating authority?
   c. Is it a limited liability company and, if so, what is its:
      (i) paid-up capital;
      (ii) objects clause;
      (iii) indebtedness and leverage level (indebtedness vs. equity capital)?
   d. Is it an investment fund and, if so;
      (i) where is it established?
      (ii) is it regulated and if so, by whom?
      (iii) what is its duration?
      (iv) what is its indebtedness and leverage level (indebtedness vs. equity capital)?
   e. Did the third-party funder take any steps to ensure that there are no actual or potential conflicts of interest between any shareholder/investor and a party, arbitrator(s), and/or opposing parties?
   f. How and when does the third-party funder raise the funds necessary to fund the case? Are these funds kept in segregated accounts? If funds are subject to successive capital calls, have precautions been taken to ensure that the committed equity capital is available for the successive calls?
   g. Is the third-party funder regularly reviewed by an external auditing company?
   h. Does the third-party funder raise funds on a case by case basis ("pledge fund": investors decide which case they are funding)?

2. Concerning the Third-Party Funder's Specific Obligations to a Party
   a. Is the funding agreement intended to provide for the funding of the arbitration proceedings up to the stage of the rendering of an award (lawyers' and expert(s)' fees, arbitrators' and arbitral institution's fees), up to the collection of the proceeds, or up to a different milestone?
   b. Is there a selective budget? Which types of costs are not included? Which precise costs/expenses are funded by the third-party funder?
   c. Which aspect of the arbitration or of the enforcement is possibly not included?
   d. Does the funding agreement provide for funding in respect of a potential annulment proceeding (by the respondent, by the claimant)?
   e. Does the third-party funder intend to bear the costs related to enforcement of the award or related judgment resulting from the funded proceedings?
   f. Does the funding agreement cover fees or costs related to ancillary claims,

including third-party fund against counterclaims?
g. Does the funding agreement address the issue of security for costs?
h. If the decisions of the third-party funder are taken by an investment (or similar) committee, does a professional arbitrator or a legal counsel specialized in arbitration participate in the decisions of the investment committee?
i. If so, how is the risk of an actual or potential conflict of interest between such person, a party, the opposing party and/or any of the arbitrators dealt with?

3. The Third-Party Funder's Professional Responsibilities
a. Does the third-party funder have an internal code of conduct or does it adhere to an external (e.g., industry) one?
b. Is the third-party funder's code of conduct compatible with the party's own ethical principles, and those of the lawyers representing the party?

4. The Funding Agreement
a. Who are the parties to the funding agreement?
b. Has a separate non-disclosure agreement been signed or does the funding agreement deal with confidentiality-related issues?
c. If the funding agreement sets out a pre-established budget for the proceedings, does it also provide a solution in case this budget is exceeded?
d. Does the funding agreement specify the conditions for and degree of control the funder may exercise over case strategy?
e. Does the funding agreement deal with situations of disagreement between the parties with respect to the strategy to be implemented or pursued? In particular, does it address the issue of resolution of disagreements between the third-party funder and a party concerning settlement proposals?
f. What remuneration will the funder be entitled to, and how will it be calculated?
g. Does the funding agreement include provisions regarding a potential adverse costs award against the funded party?
h. Does the funding agreement include provisions regarding who will bear the costs for enforcing the award?
i. Does the funding agreement provide for whether and under what conditions it can be terminated?
j. Does the funding agreement include provisions for modification?
k. Does the funding agreement provide for a dispute resolution mechanism in case disagreements cannot be solved amicably?

Appendix B – Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

Part VI.
Arbitration

Article 18 – Choice to Apply Part VI

A Party may choose to apply this Part with respect to its Covered Tax Agreements and shall notify the Depositary accordingly. This Part shall apply in relation to two Contracting Jurisdictions with respect to a Covered Tax Agreement only where both Contracting Jurisdictions have made such a notification.

Article 19 – Mandatory Binding Arbitration

1. Where:

a) under a provision of a Covered Tax Agreement (as it may be modified by paragraph 1 of Article 16 (Mutual Agreement Procedure)) that provides that a person may present a case to a competent authority of a Contracting Jurisdiction where that person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement (as it may be modified by the Convention), a person has presented a case to the competent authority of a Contracting Jurisdiction on the basis that the actions of one or both of the Contracting Jurisdictions have resulted for that person in taxation not in accordance with the provisions of the Covered Tax Agreement (as it may be modified by the Convention); and

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to a provision of a Covered Tax Agreement (as it may be modified by paragraph 2 of Article 16 (Mutual Agreement Procedure)) that provides that the competent authority shall endeavour to resolve the case by mutual agreement with the competent authority of the other Contracting Jurisdiction, within a period of two years beginning on the start date referred to in paragraph 8 or 9, as the case may be (unless, prior to the expiration of that period the competent authorities of the Contracting Jurisdictions have agreed to a different time period with respect to that case and have notified the person who presented the case of such agreement),

any unresolved issues arising from the case shall, if the person so requests in writing, be submitted to arbitration in the manner described in this Part, according to any rules or procedures agreed upon by the competent authorities of the Contracting Jurisdictions pursuant to the provisions of paragraph 10.

2. Where a competent authority has suspended the mutual agreement procedure referred to in paragraph 1 because a case with respect to one or more of the same issues is pending before court or administrative tribunal, the period provided in subparagraph b) of paragraph 1 will stop running until either a final decision has been rendered by the court or administrative tribunal or the case has been suspended or withdrawn. In addition, where a person who presented a case and a competent authority have agreed to suspend the mutual agreement procedure, the period provided in subparagraph b) of paragraph 1 will stop running until the suspension has been lifted.

3. Where both competent authorities agree that a person directly affected by the case has failed to provide in a timely manner any additional material information requested by either competent authority after the start of the period provided in subparagraph b) of paragraph 1, the period provided in subparagraph b) of paragraph 1 shall be extended for an amount of time equal to the period beginning on the date by which the information was requested and ending on the date on which that information was provided.

4.

a) The arbitration decision with respect to the issues submitted to arbitration shall be implemented through the mutual agreement concerning the case referred to in paragraph 1. The arbitration decision shall be final.
b) The arbitration decision shall be binding on both Contracting Jurisdictions except in the following cases:

i) if a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. In such a case, the case shall not be eligible for any further consideration by the competent authorities. The mutual agreement that implements the arbitration decision on the case shall be considered not to be accepted by a person directly affected by the case if any person directly affected by the case does not, within 60 days after the date on which notification of the mutual agreement is sent to the person, withdraw all issues resolved in the mutual agreement implementing the arbitration decision from consideration by any court or administrative tribunal or otherwise terminate any pending court or administrative proceedings with respect to such issues in a manner consistent with that mutual agreement.

ii) if a final decision of the courts of one of the Contracting Jurisdictions holds that the arbitration decision is invalid. In such a case, the request for arbitration under paragraph 1 shall be considered not to have been made, and the arbitration process shall be considered not to have taken place (except for the purposes of Articles 21 (Confidentiality of Arbitration Proceedings) and 25 (Costs of Arbitration Proceedings)). In such a case, a new request for arbitration may be made unless the competent authorities agree that such a new request should not be

permitted.

iii) if a person directly affected by the case pursues litigation on the issues which were resolved in the mutual agreement implementing the arbitration decision in any court or administrative tribunal.

5. The competent authority that received the initial request for a mutual agreement procedure as described in subparagraph a) of paragraph 1 shall, within two calendar months of receiving the request:

a) send a notification to the person who presented the case that it has received the request; and

b) send a notification of that request, along with a copy of the request, to the competent authority of the other Contracting Jurisdiction.

6. Within three calendar months after a competent authority receives the request for a mutual agreement procedure (or a copy thereof from the competent authority of the other Contracting Jurisdiction) it shall either:

a) notify the person who has presented the case and the other competent authority that it has received the information necessary to undertake substantive consideration of the case; or

b) request additional information from that person for that purpose.

7. Where pursuant to subparagraph b) of paragraph 6, one or both of the competent authorities have requested from the person who presented the case additional information necessary to undertake substantive consideration of the case, the competent authority that requested the additional information shall, within three calendar months of receiving the additional information from that person, notify that person and the other competent authority either:

a) that it has received the requested information; or

b) that some of the requested information is still missing.

8. Where neither competent authority has requested additional information pursuant to subparagraph b) of paragraph 6, the start date referred to in paragraph 1 shall be the earlier of:

a) the date on which both competent authorities have notified the person who presented the case pursuant to subparagraph a) of paragraph 6; and

b) the date that is three calendar months after the notification to the competent authority of the other Contracting Jurisdiction pursuant to subparagraph b) of paragraph 5.

9. Where additional information has been requested pursuant to subparagraph b) of paragraph 6, the start date referred to in paragraph 1 shall be the earlier of:

a) the latest date on which the competent authorities that requested additional information have notified the person who presented the case and the other competent authority pursuant to subparagraph a) of paragraph 7; and

b) the date that is three calendar months after both competent authorities have received all information requested by either competent authority from the person who presented the case.

If, however, one or both of the competent authorities send the notification referred to in subparagraph b) of paragraph 7, such notification shall be treated as a request for additional information under subparagraph b) of paragraph 6.

10. The competent authorities of the Contracting Jurisdictions shall by mutual agreement (pursuant to the article of the relevant Covered Tax Agreement regarding procedures for mutual agreement) settle the mode of application of the provisions contained in this Part, including the minimum information necessary for each competent authority to undertake substantive consideration of the case. Such an agreement shall be concluded before the date on which unresolved issues in a case are first eligible to be submitted to arbitration and may be modified from time to time thereafter.

11. For purposes of applying this Article to its Covered Tax Agreements, a Party may reserve the right to replace the two-year period set forth in subparagraph b) of paragraph 1 with a three-year period.

12. A Party may reserve the right for the following rules to apply with respect to its Covered Tax Agreements notwithstanding the other provisions of this Article:

a) any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for by this Convention shall not be submitted to arbitration, if a decision on this issue has already been rendered by a court or administrative tribunal of either Contracting Jurisdiction;

b) if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting Jurisdictions, a decision concerning the issue is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions, the arbitration process shall terminate.

Article 20 – Appointment of Arbitrators

1. Except to the extent that the competent authorities of the Contracting

Jurisdictions mutually agree on different rules, paragraphs 2 through 4 shall apply for the purposes of this Part.

2. The following rules shall govern the appointment of the members of an arbitration panel:

a) The arbitration panel shall consist of three individual members with expertise or experience in international tax matters.

b) Each competent authority shall appoint one panel member within 60 days of the date of the request for arbitration under paragraph 1 of Article 19 (Mandatory Binding Arbitration). The two panel members so appointed shall, within 60 days of the latter of their appointments, appoint a third member who shall serve as Chair of the arbitration panel. The Chair shall not be a national or resident of either Contracting Jurisdiction.

c) Each member appointed to the arbitration panel must be impartial and independent of the competent authorities, tax administrations, and ministries of finance of the Contracting Jurisdictions and of all persons directly affected by the case (as well as their advisors) at the time of accepting an appointment, maintain his or her impartiality and independence throughout the proceedings, and avoid any conduct for a reasonable period of time thereafter which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings.

3. In the event that the competent authority of a Contracting Jurisdiction fails to appoint a member of the arbitration panel in the manner and within the time periods specified in paragraph 2 or agreed to by the competent authorities of the Contracting Jurisdictions, a member shall be appointed on behalf of that competent authority by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a national of either Contracting Jurisdiction.

4. If the two initial members of the arbitration panel fail to appoint the Chair in the manner and within the time periods specified in paragraph 2 or agreed to by the competent authorities of the Contracting Jurisdictions, the Chair shall be appointed by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a national of either Contracting Jurisdiction.

Article 21 – Confidentiality of Arbitration Proceedings

1. Solely for the purposes of the application of the provisions of this Part and of the provisions of the relevant Covered Tax Agreement and of the domestic laws of the Contracting Jurisdictions related to the exchange of information, confidentiality, and administrative assistance, members of the arbitration panel and a maximum of three staff per member (and prospective arbitrators solely to

the extent necessary to verify their ability to fulfil the requirements of arbitrators) shall be considered to be persons or authorities to whom information may be disclosed. Information received by the arbitration panel or prospective arbitrators and information that the competent authorities receive from the arbitration panel shall be considered information that is exchanged under the provisions of the Covered Tax Agreement related to the exchange of information and administrative assistance.

2. The competent authorities of the Contracting Jurisdictions shall ensure that members of the arbitration panel and their staff agree in writing, prior to their acting in an arbitration proceeding, to treat any information relating to the arbitration proceeding consistently with the confidentiality and nondisclosure obligations described in the provisions of the Covered Tax Agreement related to exchange of information and administrative assistance and under the applicable laws of the Contracting Jurisdictions.

Article 22 – Resolution of a Case Prior to the Conclusion of the Arbitration

For the purposes of this Part and the provisions of the relevant Covered Tax Agreement that provide for resolution of cases through mutual agreement, the mutual agreement procedure, as well as the arbitration proceeding, with respect to a case shall terminate if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting Jurisdictions:

a) the competent authorities of the Contracting Jurisdictions reach a mutual agreement to resolve the case; or

b) the person who presented the case withdraws the request for arbitration or the request for a mutual agreement procedure.

Article 23 – Type of Arbitration Process

1. Except to the extent that the competent authorities of the Contracting Jurisdictions mutually agree on different rules, the following rules shall apply with respect to an arbitration proceeding pursuant to this Part:

a) After a case is submitted to arbitration, the competent authority of each Contracting Jurisdiction shall submit to the arbitration panel, by a date set by agreement, a proposed resolution which addresses all unresolved issue(s) in the case (taking into account all agreements previously reached in that case between the competent authorities of the Contracting Jurisdictions). The proposed resolution shall be limited to a disposition of specific monetary amounts (for example, of income or expense) or, where specified, the maximum rate of tax charged pursuant to the Covered Tax Agreement, for each adjustment or similar issue in the case. In a case in which the competent

authorities of the Contracting Jurisdictions have been unable to reach agreement on an issue regarding the conditions for application of a provision of the relevant Covered Tax Agreement (hereinafter referred to as a "threshold question"), such as whether an individual is a resident or whether a permanent establishment exists, the competent authorities may submit alternative proposed resolutions with respect to issues the determination of which is contingent on resolution of such threshold questions.

b) The competent authority of each Contracting Jurisdiction may also submit a supporting position paper for consideration by the arbitration panel. Each competent authority that submits a proposed resolution or supporting position paper shall provide a copy to the other competent authority by the date on which the proposed resolution and supporting position paper were due. Each competent authority may also submit to the arbitration panel, by a date set by agreement, a reply submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority. A copy of any reply submission shall be provided to the other competent authority by the date on which the reply submission was due.

c) The arbitration panel shall select as its decision one of the proposed resolutions for the case submitted by the competent authorities with respect to each issue and any threshold questions, and shall not include a rationale or any other explanation of the decision. The arbitration decision will be adopted by a simple majority of the panel members. The arbitration panel shall deliver its decision in writing to the competent authorities of the Contracting Jurisdictions. The arbitration decision shall have no precedential value.

2. For the purpose of applying this Article with respect to its Covered Tax Agreements, a Party may reserve the right for paragraph 1 not to apply to its Covered Tax Agreements. In such a case, except to the extent that the competent authorities of the Contracting Jurisdictions mutually agree on different rules, the following rules shall apply with respect to an arbitration proceeding:

a) After a case is submitted to arbitration, the competent authority of each Contracting Jurisdiction shall provide any information that may be necessary for the arbitration decision to all panel members without undue delay. Unless the competent authorities of the Contracting Jurisdictions agree otherwise, any information that was not available to both competent authorities before the request for arbitration was received by both of them shall not be taken into account for purposes of the decision.

b) The arbitration panel shall decide the issues submitted to arbitration in accordance with the applicable provisions of the Covered Tax Agreement and, subject to these provisions, of those of the domestic laws of the Contracting Jurisdictions. The panel members shall also consider any other sources which the competent authorities of the Contracting Jurisdictions may

by mutual agreement expressly identify.

c) The arbitration decision shall be delivered to the competent authorities of the Contracting Jurisdictions in writing and shall indicate the sources of law relied upon and the reasoning which led to its result. The arbitration decision shall be adopted by a simple majority of the panel members. The arbitration decision shall have no precedential value.

3. A Party that has not made the reservation described in paragraph 2 may reserve the right for the preceding paragraphs of this Article not to apply with respect to its Covered Tax Agreements with Parties that have made such a reservation. In such a case, the competent authorities of the Contracting Jurisdictions of each such Covered Tax Agreement shall endeavour to reach agreement on the type of arbitration process that shall apply with respect to that Covered Tax Agreement. Until such an agreement is reached, Article 19 (Mandatory Binding Arbitration) shall not apply with respect to such a Covered Tax Agreement.

4. A Party may also choose to apply paragraph 5 with respect to its Covered Tax Agreements and shall notify the Depositary accordingly. Paragraph 5 shall apply in relation to two Contracting Jurisdictions with respect to a Covered Tax Agreement where either of the Contracting Jurisdictions has made such a notification.

5. Prior to the beginning of arbitration proceedings, the competent authorities of the Contracting Jurisdictions to a Covered Tax Agreement shall ensure that each person that presented the case and their advisors agree in writing not to disclose to any other person any information received during the course of the arbitration proceedings from either competent authority or the arbitration panel. The mutual agreement procedure under the Covered Tax Agreement, as well as the arbitration proceeding under this Part, with respect to the case shall terminate if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting Jurisdictions, a person that presented the case or one of that person's advisors materially breaches that agreement.

6. Notwithstanding paragraph 4, a Party that does not choose to apply paragraph 5 may reserve the right for paragraph 5 not to apply with respect to one or more identified Covered Tax Agreements or with respect to all of its Covered Tax Agreements.

7. A Party that chooses to apply paragraph 5 may reserve the right for this Part not to apply with respect to all Covered Tax Agreements for which the other Contracting Jurisdiction makes a reservation pursuant to paragraph 6.

Article 24 – Agreement on a Different Resolution

1. For purposes of applying this Part with respect to its Covered Tax Agreements, a Party may choose to apply paragraph 2 and shall notify the Depositary accordingly. Paragraph 2 shall apply in relation to two Contracting Jurisdictions with respect to a Covered Tax Agreement only where both Contracting Jurisdictions have made such a notification.

2. Notwithstanding paragraph 4 of Article 19 (Mandatory Binding Arbitration), an arbitration decision pursuant to this Part shall not be binding on the Contracting Jurisdictions to a Covered Tax Agreement and shall not be implemented if the competent authorities of the Contracting Jurisdictions agree on a different resolution of all unresolved issues within three calendar months after the arbitration decision has been delivered to them.

3. A Party that chooses to apply paragraph 2 may reserve the right for paragraph 2 to apply only with respect to its Covered Tax Agreements for which paragraph 2 of Article 23 (Type of Arbitration Process) applies.

Article 25 – Costs of Arbitration Proceedings

In an arbitration proceeding under this Part, the fees and expenses of the members of the arbitration panel, as well as any costs incurred in connection with the arbitration proceedings by the Contracting Jurisdictions, shall be borne by the Contracting Jurisdictions in a manner to be settled by mutual agreement between the competent authorities of the Contracting Jurisdictions. In the absence of such agreement, each Contracting Jurisdiction shall bear its own expenses and those of its appointed panel member. The cost of the chair of the arbitration panel and other expenses associated with the conduct of the arbitration proceedings shall be borne by the Contracting Jurisdictions in equal shares.

Article 26 – Compatibility

1. Subject to Article 18 (Choice to Apply Part VI), the provisions of this Part shall apply in place of or in the absence of provisions of a Covered Tax Agreement that provide for arbitration of unresolved issues arising from a mutual agreement procedure case. Each Party that chooses to apply this Part shall notify the Depositary of whether each of its Covered Tax Agreements, other than those that are within the scope of a reservation under paragraph 4, contains such a provision, and if so, the article and paragraph number of each such provision. Where two Contracting Jurisdictions have made a notification with respect to a provision of a Covered Tax Agreement, that provision shall be replaced by the provisions of this Part as between those Contracting Jurisdictions.

2. Any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for in this Part shall not be submitted to arbitration if the issue falls within the scope of a case with

respect to which an arbitration panel or similar body has previously been set up in accordance with a bilateral or multilateral convention that provides for mandatory binding arbitration of unresolved issues arising from a mutual agreement procedure case.

3. Subject to paragraph 1, nothing in this Part shall affect the fulfilment of wider obligations with respect to the arbitration of unresolved issues arising in the context of a mutual agreement procedure resulting from other conventions to which the Contracting Jurisdictions are or will become parties.

4. A Party may reserve the right for this Part not to apply with respect to one or more identified Covered Tax Agreements (or to all of its Covered Tax Agreements) that already provide for mandatory binding arbitration of unresolved issues arising from a mutual agreement procedure case.