Mandatory Arbitration Provisions within the Modern Tax Treaty Structure - Policy Implications of Confidentiality and the Rights of the Public to Arbitration Outcomes

Michelle S Bertolini, University of Hartford
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Mandatory Arbitration Provisions within the Modern Tax Treaty Structure – Policy Implications of Confidentiality and the Rights of the Public to Arbitration Outcomes

Introduction: The status of tax treaty issue resolution and the evolution of arbitration as the preferred means.

With the increase in international trade between all the countries of the world, taxes have become a larger issue to both countries and taxpayers, from the large multi-national corporation to the individual who seeks to invest, trade or work in another country. Based upon the devastating potential for double taxation, i.e., getting taxed twice on the same income from two separate countries without relief from either country, and the ever expanding potential for tax evasion, most countries have been willing to negotiate bilateral tax treaties, which seek to alleviate the aforementioned issues of double taxation and tax fraud. However, for the taxpayer or the countries involved, a tax treaty is not of much value unless there are provisions that allow some type of resolution for potential double taxation issues when there are conflicting interpretations of the treaty.

First, this article seeks to explore the current status of tax treaties and the dispute resolutions provisions, known as mutual agreement provisions (MAP), and the evolution of MAP from a non-binding, non-compulsory agreement between two countries to a mandatory process where an arbitration panel establishes a binding agreement. This change from a gentleman’s agreement between countries to a mandatory process will allow taxpayers to escape from the potential of double taxation, which does not exists under the current non-binding regime.

Second, the article explores the confidentiality provisions contained within many of the treaties and explores why these provisions are detrimental for the countries involved, the taxpayers, third parties as well as the international community because of the lack in developing a body of international law surrounding tax disputes. An open system allows taxpayers to plan their investments and operations in an acceptable manner based upon a review of prior tax dispute settlements. In addition, an open system allows the governments, their legislators, and the international community as a whole to review the outcomes of the proceedings to see if these are in-line with expected international norms.

The policy considerations surrounding the transparency of the mandatory arbitration proceedings are far reaching. First, both countries involved must consider the proceedings as fair. Second, taxpayers are the ultimate party affected. The two competent authorities seeking to resolve the issue are parties of interest in as much as their particular government coffers are affected by the outcome of the proceedings. However, the taxpayer is ultimately the one paying the tax to one or both governments. Although the taxpayer is the one paying the tax, other taxpayers in similar factual or treaty interpretation situations can use the arbitration outcome to better plan their particular business transactions.

This article is broken down into seven parts. Part I presents a general overview of the history surrounding tax treaty developments and their usefulness in international trade. In addition, Part I also discusses the evolution of the MAP. Part II explores the current MAP provisions of the Organisation for Economic Cooperation and Development (OECD) Model Tax Convention, United States (US) Model Tax Convention, the European Union (EU) and United Nations (UN) MAP provisions as well as the committee discussions and current treaties, which use the mandatory arbitration provisions. Part III explores the reasons for MAP and presents cases, settlements and qualitative data that show the current voluntary MAP system is ineffective and can cost businesses billions in additional taxes. Section IV discusses the current confidentiality provisions within the four major treaty organizations or governments. Section V presents the policy considerations behind mandatory arbitrations and taxpayer involvements,
both the positive and negative aspects of both. Section VI deals with taxpayer involvement and the
disparity between the OECD model versus the US position. Last, Part VII discusses potential solutions to
the confidentiality issues behind mandatory arbitration, as well as, how an open system could benefit all
parties involved, taxpayers, governments and the body of international tax law.

I. Treaty History

A. Purpose of Tax Treaties

There are two main purposes for tax treaties, removal of double taxation and the sharing of information
between governments. Very little work, either academic or theoretical has been done to prove that tax
 treaties have accomplished either goal, though antidotal evidence appears to confirm some success.¹

The concept of taxation and the potential for conflicting tax issues regarding cross-border trading might
be as old as trading itself. However, the formalistic treaties we think of today in the tax area began in the
1880s between Austria and Prussia.² Both empires saw the benefits of deciding which jurisdiction
retained the taxing power related to a set piece of income.³ As quoted from the unofficial translation of
Art. 7 of the 1899 treaty:

Concerning the potentially required special provisions for the appropriate elimination of double
taxation of such persons who are Austrian as well as Prussian nationals and, at the same time,
have their residence in both territories, the Contracting Parties, if such a case happens, will enter
into an understanding and will take appropriate measures in accordance with this understanding.⁴

As can be seen from the above quote, the first formalistic treaty included a provision seeking some type
of MAP in order to resolve issues not covered within the treaty.

Not until the period right before and after World War I was there a vast expansion in the number of tax
treaties. The League of Nations was a strong supporter of these treaties, which included several
additional European tax treaties that occurred in a similar time frame.⁵ In addition to this expansion,
more and more tax treaties included the MAP provisions, which used various authorities, i.e. competent
authorities, to negotiate unresolved tax issues after the treaty was ratified.⁶

In the area of tax information sharing, the main issue was one of stopping tax evasion. This concept was
not one of the original historical reasons for tax treaties but became much more prevalent once taxpayers

¹ See Blonigen, Bruce A. and Davies, Ronald B., Do Bilateral Tax Treaties Promote Foreign Direct Investment?,
2010). Agreeing with the proposition that tax treaties seek to limit double taxation and tax evasion but taking a contrary position
on whether tax treaties really accomplish such goals.
² Treaty of 21 June 1899 Between Austria-Hungary and Prussia for the Avoidance of Double Taxation which Can
Result From the Application of the Tax Laws in Force in the Kingdoms and Lands Represented in the Imperial Council and in
the Kingdom of Prussia, League of Nations Document E.F.S. 40 F. 15, RGBI 158/1900 (Austria – unofficial translation) [hereinafter
Austria-Hungary]; see also Zvi D. Altman, Dispute Resolution under Tax Treaties, Doctoral Series, at 13-22 (IBFD Academic
Council, Doctoral Series No. 11, 2005).
³ Treaty of 21 June 1899 Between Austria-Hungary and Prussia for the Avoidance of Double Taxation which Can
Result From the Application of the Tax Laws in Force in the Kingdoms and Lands Represented in the Imperial Council and in
⁴ Id. at art. 7.
⁵ See Mitchell B. Carroll, Double Taxation Relief, Discussion of Conventions Drafted at International Conference of
Experts, 1927 and Other Measures, Trade Information Bulletin 523, II (1927).
⁶ The following tax treaties each used different competent authorities ranging from revenue authorities to the highest
financial authorities. E.g. Belgium-France (1931), Canada-United Kingdom (1935), Netherland-Sweden (1935) and other tax
treaties of the period.
started to seek ways to obtain income, tax-free. Countries started to note that information sharing between the different revenue authorities could stem the flow of non-taxed income and increase the government coffers. In one economics study, the authors found the main purpose of tax treaties was to lessen tax evasion in international transactions. Whether this is the overriding reason is one of conjecture, however, it is a major concern for governments.

B. Evolution of Dispute Settlement Provisions in Tax Treaties

The evolution of the tax treaty from the early provisions, as those contained in the 1899 Austria-Prussia treaty, to the newer concept of mandatory arbitration requires one to look at the various organizations and governments involved in treaty creation and commentary, specifically the OECD, US and EU. However, in order to comprehend the issue, one must understand what is a dispute settlement provision and how it affects governments and taxpayers.

The first MAP provisions were merely understandings between the governments to try to come to an understanding between the parties, i.e. the revenue authorities of each country and how the governments should take a piece of income or define a term in the treaty. These were voluntary in nature and neither side was required to attend or come to an understanding.

The first treaty to enhance the MAP provisions over and above the standard agreement was a multilateral treaty between Italy, Hungary, Poland, Romania and Yugoslavia in 1922. Although the countries never implemented the treaty, the break through related to the attempt comes from the fact that this is the first treaty to allow the taxpayer a right to petition the government for a resolution of an issue dealing with double taxation or a treaty definition. This inclusion still exists in a majority, if not all of the current tax treaties. The taxpayer is required to appeal to “the state in which he belongs”. At this point, the government establishes whether the appeal is justified, and if the appeal is, then the government can contact the other country to notify them of the pending issue and try to reach an equitable agreement. However, the other country is not bound to respond nor must they even seek an equitable agreement.

The next major evolutionary step comes from a double taxation treaty dealing with duties between Czechoslovakia and Romania. This particular treaty was not an income tax treaty, but a duties treaty; however, the MAP provisions were unique. First, the treaty seeks to use an international arbitrator, the Fiscal Committee of the League of Nations, to arbitrate any issues related to treaty interpretations or

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7 See generally, Convention Between the Government of the United States of America and the Government of ___ for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes in Income [hereinafter U.S. Model Tax Convention] (as adopted November 15, 2006) 1708 UNTS 3, Reg. No. 29534; Treaty Doc. 101-10; Tax Analyst, Model Conventions 90 TNI 26-48; Doc 93-31206. As the name of the treaty implies fiscal evasion is one of the key aspects to the U.S. Model Tax Treaty.
9 Blonigen, supra note 1.
10 Zvi D. Altman, Dispute Resolution under Tax Treaties, in Doctoral Series, at 13-22 (IBFD Academic Council, Doctoral Series No. 11, 2005) [hereinafter Dispute Resolution].
11 Convention for the Purpose of Avoiding Double Taxation between Austria, Hungary, Italy, Poland, Romania and the Kingdom of the Serbs, Croats and Slovenes (6 April 1922); see also Dispute Resolution, supra note 10 at 15.
12 Dispute Resolution, supra note 10 at 15.
13 Articles of the Model Convention with Respect to Taxes on Income and on Capital [hereinafter OECD Model Tax Convention], art. 25, OECD (as amended in the 2008 Update to the OECD Model Tax Treaty as of July 18, 2008), Tax Analyst, Model Conventions [hereinafter OECD Model Tax Convention].
14 Id. at art. 25; see supra note 7, art. 25.
15 Id.
16 Convention between the Kingdom of Romania and the Czechoslovak Republic Concerning Double Taxation in Connection With Succession Duties [translated by the Secretariat of the League of Nations], 94 TNI 252-125 (20 June 1934).
double taxation issues in which the two countries could not agree.\footnote{Id.} Second, both countries would be bound by the outcome of the arbitration.\footnote{Id.} This was a radical departure from the equitable understanding, non-binding, non-compulsory provisions of MAP up to this point. In addition, this was one of the first treaties to lay out a roadmap on how each side was to proceed in the arbitration.\footnote{Id. at art. 6.} No other successive treaty of the time had a similar arbitration provision.\footnote{Dispute Resolution, supra note 10 at 16-17.}

The earliest binding provisions contained within an income tax treaty were contained in the 1926 United Kingdom-Irish Free State income tax treaty.\footnote{Agreement between the British Government and the Government of the Irish Free State in Respect of Double Taxation Tax, art. 7, (14, April 1926).} Article 7 of the treaty provides:

Any question that may arise between the Parties to this Agreement as to 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.\footnote{Id. at art. 7.}

The importance of this treaty is the addition of binding the outcome on the States. Before this treaty, there were no binding provisions and thus any State could walk away from an agreement, even if the parties agreed to the equitable solution.

In addition to the above bilateral treaties, another important development in the area of tax treaties is the formation of the OECD. The OECD is an organization committed to creating jobs, social equity and effective governance. To this extent, the thirty OECD members\footnote{Ratification of the Convention on the Organisation for Economic Co-Operation and Development, Paris 14 December 1960; available at http://www.oecd.org/document/7/0,3343,en_2649_34483_1915847_1_1_1_1,00.html (last visited January 2010).} use the organization to share ideas, address economic, social and governance issues, and represent potential solutions through the issuance of model treaties, best practice guides or special committee reports to its members and all countries.\footnote{Convention on the Organization for Economic Co-Operation and Development, Paris 14 December 1960; available at http://www.oecd.org/document/7/0,3343,en_2649_34483_1915847_1_1_1_1,00.html (last visited January 2010).} The
OECD Model Tax Convention\textsuperscript{25} is used as a basic outline treaty for all of the thirty members as well as other non-member countries.\textsuperscript{26}


A. OECD Position

The current position of the OECD on MAP and arbitration is under constant revision. The OECD approved its current Model Tax Convention in July of 2005, however in July of 2008 an amendment to the OECD Model Tax Treaty included for the first time a mandatory arbitration provision.\textsuperscript{27} The MAP procedures are contained within Article 25 and state:

\begin{quote}
MUTUAL AGREEMENT PROCEDURE
1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a Resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.
2. The competent authority shall endeavor, 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.
3. The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.
4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.
5. Where,
   a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this convention, and
   b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State,

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

\textsuperscript{25} OECD Model Tax Convention, \textit{supra} note 13.
\textsuperscript{27} OECD Model Tax Convention, \textit{supra} note 13, art. 25(5).
competent authorities of the Contracting States shall be mutual agreement settle the mode of application of this paragraph. 28

The MAP procedures as currently written in the model treaty are very similar to the 1899 Austria-Prussia treaty 29 which required the two countries to attempt to reach an understanding. However, the model treaty also contains some of the newer elements contained in predecessor tax treaties, such as, allowing the taxpayer to request a review and a mandatory time limit for review. 30 In addition, Article 25 includes the new paragraph 5, which includes a binding mandatory arbitration provision. Until the update in July 18, 2008, only the first four paragraphs existed, thus it was a non-binding, non-compulsory treaty. 31

The OECD is a non-governmental organization 32 thus it has some freedom to review procedures, their effectiveness and offer potential solutions. In the area of MAP and its use in tax treaties, the OECD reviewed the current procedures and found them insufficient in light of the current increase in international trade. 33 The OECD instituted two major initiatives. The first initiative was the creation of the Manual on Effective Mutual Agreement Procedures 34 and the second initiative was a report regarding improving the resolution in tax treaty disputes. 35 Both reports were OECD’s beginning discussion on using the current model treaty provisions effectively and amending the current Model Tax Convention MAP provisions. 36

The Manual on Effective Mutual Agreement Procedures (MEMAP) is basically a best practices manual. 37 The manual guides countries through how an effective MAP program should work, first explaining what is MAP, second, the general format of MAP, i.e. procedures to follow, explains what a competent authority is, presents time lines for resolution of disputes and last the benefits to both countries to reaching an agreement. 38 Included in the manual is a discussion on how domestic law interacts with MAP and the issues of tax collections, interest, penalties and other domestic tax issues. 39 All countries have access to the manual 40 , and this benefits both member and non-member countries in dealing with tax treaty disputes.

The second initiative, and one more along the lines of this article, deals with the OECD’s review of the current MAP procedures and the inclusion of arbitration in the model treaty. Mary Bennett, a former

28 OECD Model Tax Convention, supra note 13, art. 25.
29 See Austria-Hungary, supra note 2.
30 OECD Model Tax Convention, supra note 13, art. 25(5).
31 Id. at art. 25(1)-(4)
36 Henry J. Birnkrant, Fixing the Black Box: The OECD Proposals to Amend the Model Treaty to Improve the Mutual Agreement Procedures, 35 Tax Mgmt Int’l J. 12 at 615, 615-617.
37 See generally, MEMAP, supra note 34.
38 Id. at 17-31.
39 Id. at 33-38.
40 Through the OECD website at www.oecd.org.
partner with the Washington D.C. firm of Baker & McKenzie joined the OECD’s Centre for Tax Policy & Administration in 2005 as the head of the tax treaty, transfer pricing and financial transaction division.\textsuperscript{41} As was shown in Section II, the need for taxpayers to have a resolution to tax treaty issues is paramount to remove the threat of double taxation as well as allow taxpayers some type of planning format.\textsuperscript{42} Mary Bennett noted that the need for change after the GlaxoSmithKline case\textsuperscript{43} brought about a two-day meeting of the OECD’s Committee on Fiscal Affairs in January of 2007.\textsuperscript{44} After the meeting, the Committee adopted the Improving the Resolution of Tax Treaty Disputes report.\textsuperscript{45}

Based upon these initiatives, the Committee added paragraph 5, which effectively creates a mandatory arbitration provision for cases where the countries could not arrive at a resolution under the voluntary MAP provisions of paragraphs 1 through 4.\textsuperscript{46} Although paragraph 5 is rather vague, the comments related to paragraph 5 present the technical aspects necessary to effectuate the principals of the paragraph.

The commentary to Article 25 paragraph 5 offers the Contracting Parties as well as the taxpayers a framework to use the mandatory arbitration provisions. Comment 5 notes that although the non-binding MAP procedures are effective and efficient, there are a number of cases in which the voluntary MAP provisions do not succeed and the mandatory arbitration provisions are included in the MAP arsenal in order to avoid double taxation.\textsuperscript{47} A majority of the comments deal with how the Contracting Parties can effectuate paragraph 5.\textsuperscript{48} A short recap of the comments offers some insight into the flexibility the OECD put into the amendment as well as some affirmative steps in an attempt to eliminate double taxation.

- The mandatory arbitration provisions must be used if there is no resolution under the voluntary MAP procedures.\textsuperscript{49}
- If the competent authorities reach an agreement on all issues through the voluntary MAP procedures, then paragraph 5 does not apply and the taxpayer cannot request arbitration.\textsuperscript{50}
- Recognition that certain countries’ laws do not allow for arbitration, thus paragraph 5 would not be included in those treaties.\textsuperscript{51}
- A right for the Contracting Parties to limit the applicability of the mandatory arbitration provisions to specific issues or specific cases.\textsuperscript{52}
- The need for coordination with other arbitration treaties, such as the European Arbitration Convention.\textsuperscript{53}
- If the voluntary MAP is not available to the tax issues, then nor is the mandatory arbitration provisions of paragraph 5.\textsuperscript{54}
- An allowance for a period longer than 2 years if agreed upon by the two Contracting States or the taxpayer before the mandatory arbitration provisions are invoked.\textsuperscript{55}

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\textsuperscript{42} Id.
\textsuperscript{43} Sed Crest, \emph{US to Arbitrate Tax Disputes}, Int’l Tax Rev., March 2007, at 1; see also infra pp 21-23.
\textsuperscript{44} Id.
\textsuperscript{45} Id.; see also Centre for Tax Policy and Administration, \emph{Improving the Process for Resolving International Tax Disputes, OECD}, (version released for public comment on 27 July 2004) at : available at http://www.oecd.org/dataoecd/44/6/33629447.pdf (last viewed January 2010).
\textsuperscript{46} OECD Model Tax Convention, \emph{supra} note 13, art. 25(5).
\textsuperscript{47} OECD Model Tax Convention, \emph{supra} note 13, art. 25(5), comment 5.
\textsuperscript{48} See generally OECD Model Tax Convention \emph{supra}, note 13. art. 25(5), comments.
\textsuperscript{49} OECD Model Tax Convention, \emph{supra} note 13, art. 25(5), comment 63
\textsuperscript{50} Id. at comment 64
\textsuperscript{51} Id. at comment 65
\textsuperscript{52} Id. at comments 66 and 69
\textsuperscript{53} Id. at comment 67
\textsuperscript{54} Id. at comment 68
\textsuperscript{55} Id. at comment 70
• Recognition that the competent authorities cannot close a case or treaty dispute unless all the issues are resolved.\textsuperscript{56}

• The issue presented must actually result from the actions of the Contracting States. A potential for an issue to present itself is insufficient to invoke the mandatory arbitration provisions.\textsuperscript{57}

• The beginning of the two year time limit begins when the competent authority of State A or the taxpayer contacts State B regarding the request for MAP.\textsuperscript{58}

• Recognition of potential conflict with domestic remedies; therefore, the taxpayer should not be allowed to seek both remedies simultaneously. The taxpayer must suspend domestic remedies during the MAP process, including mandatory arbitration. If the taxpayer then rejects the final outcome, the taxpayer can seek domestic redress. In addition, a State may require the taxpayer to forego domestic remedies before the mandatory arbitration.\textsuperscript{59}

• The mandatory arbitration outcome is binding on both Contracting States.\textsuperscript{60}

• The mandatory arbitration decision is only applicable to that particular case. The outcome shall not be binding on any future MAP outcomes with similar facts or issues.\textsuperscript{61}

• Allowance of alternative solutions to the arbitration outcome if the two competent authorities can reach agreement on the issue. This option requires additional language to be added to paragraph 5.\textsuperscript{62}

• Allowance of other methods of dispute resolution outside the voluntary MAP or mandatory arbitration of an ad hoc nature or as part of the MAP procedures.\textsuperscript{63}

• The arbitration panel should use experts in seeking to resolve the issue.\textsuperscript{64}

As can be seen by the comments, the OECD left in flexibility to deal with the myriad of different State issues, such as conflicts of law, potential differing approaches to MAP, and the issue of domestic remedies. In addition, the comments limit the ability of the taxpayer to bring cases simultaneously into a domestic and mandatory arbitration resolution scenario.

B. United States Position

The OECD is the most important international authoritative organizations in dealing with the matters of model treaties and treaty formation, however, the U.S. Model Tax Treaty\textsuperscript{65} and the U.S. position regarding MAP and arbitration still play an important part in international trade because of the relative amount of trade with the U.S.. Many articles contained within the U.S. Model Treaty mirror those of the OECD Model, with some slight modifications.\textsuperscript{66} However, Article 25 of the U.S. Model is much more specific than the OECD Model Article 25, in that the U.S. Model specifically states what issues MAP covers and does not contain the new OECD mandatory arbitration language of Article 25(5).\textsuperscript{67}

\textsuperscript{56} Id. at comment 71
\textsuperscript{57} Id. at comment 72
\textsuperscript{58} Id. at comment 75
\textsuperscript{59} Id. at comments 77, 78, 79, 80 and 82.
\textsuperscript{60} Id. at comment 81.
\textsuperscript{61} Id. at comment 83.
\textsuperscript{62} Id. at comment 84.
\textsuperscript{63} Id. at comment 86.
\textsuperscript{64} Id. at comment 87.
\textsuperscript{65} Convention Between the Government of the United States of America and the Government of ___ for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes in Income [hereinafter U.S. Model Tax Convention] (as adopted November 15, 2006) 1708 UNTS 3, Reg. No. 29534; Treaty Doc. 101-10; Tax Analyst, Model Conventions 90 TNI 26-48; Doe 93-31206. As the name of the treaty implies fiscal evasion is one of the key aspects to the U.S. Model Tax Treaty.
\textsuperscript{66} Id. at art. 25. Many of the articles are similar down to the numbering of the articles. An example is in both the OECD Model and the U.S. Model, article 25 is the mutual agreement procedures section.
\textsuperscript{67} Article 25 of the U.S. Model states:
In similar fashion to the OECD Model, the competent authorities again endeavor to seek a solution but no solution is required. However, unlike the OECD Model, the U.S. Model under section 3 enumerates what the MAP procedures apply to, specific characterization of income, residency issues, and advance pricing issues. Paragraph 5 is very similar to paragraph 4 of the OECD Model Tax Convention in that both seek to set up a joint commission with the purpose of resolving the issue in question through negotiation.

The U.S. position is shifting to one of arbitration. In an interview with Benedetta Kissel, she stated the U.S. is firmly committed to shifting from the current MAP system to one of arbitration. As further proof of this commitment, the current Canada-U.S.A. Income and Capital Tax Treaty (Canada-US Treaty), Convention between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes (U.S.-German Tax Treaty) and Convention between the United States of America and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention

1. Where a person considers that the actions of one or both of the Contracting States result or will result for such person in taxation not in accordance with the provisions of this Convention, it may, irrespective of the remedies provided by the domestic law of those States, and the time limits prescribed in such laws for presenting claims for refund, present its case to the competent authority of either Contracting State.

2. The competent authority shall endeavor, 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 or other procedural limitations in the domestic law of the Contracting States. Assessment and collection procedures shall be suspended during the period that any mutual agreement proceeding is pending.

3. The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They also may consult together for the elimination of double taxation in cases not provided for in the Convention. In particular the competent authorities of the Contracting States may agree:
   a) to the same attribution of income, deductions, credits, or allowances of an enterprise of a Contracting State to its permanent establishment situated in the other Contracting State;
   b) to the same allocation of income, deductions, credits, or allowances between persons;
   c) to the settlement of conflicting application of the Convention, including conflicts regarding:
      i) the characterization of particular items of income;
      ii) the characterization of persons;
      iii) the application of source rules with respect to particular items of income;
      iv) the meaning of any term used in the Convention;
      v) the timing of particular items of income;
   d) to advance pricing arrangements; and
   e) to the application of the provisions of domestic law regarding penalties, fines, and interest in a manner consistent with the purposes of the Convention.

4. The competent authorities also may agree to increases in any specific dollar amounts referred to in the Convention to reflect economic or monetary developments.

5. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

U.S. Model Tax Convention, supra note 10, art. 25.

68 Id. at art. 25(3).

69 Id. at art. 25(5).

70 Deputy international tax counsel for strategic programs at the U.S. Treasury.

71 Sed Crest, supra note 41.
of Fiscal Evasion with Respect to Taxes on Income (U.S. – Belgium Tax Treaty) contain a type of mandatory arbitration.\textsuperscript{72}

All three treaties contain the arbitration language, but the U.S.-German Tax Treaty, through the exchange of notes on August 17, 2006\textsuperscript{73} and the U.S.-Belgium Tax Treaty\textsuperscript{74}, effectuate the technical aspects of the arbitration procedures. The new Article 25, paragraph 5 of the U.S.-German Tax Treaty adds the additional language necessary to establish the outline of mandatory arbitration, along with the addition of paragraph 6, which is definitional in nature.\textsuperscript{75}

5. Where, pursuant to a mutual agreement procedure under this Article, the competent authorities have endeavored but are unable to reach a complete agreement in a case, the case shall be resolved through arbitration conducted in the manner prescribed by, and subject to, the requirements of paragraph 6 and any rules or procedures agreed upon by the Contracting States, if:

a) tax returns have been filed with at least one of the Contracting States with respect to the taxable years at issue in the case;

b) the case

aa) is a case that

A) involves the application of one or more Articles that the Contracting States have agreed shall be the subject of arbitration, and

B) is not a particular case that the competent authorities agree, before the date on which arbitration proceedings would otherwise have begun, is not suitable for determination by arbitration, or

\textsuperscript{72} Within the Canada-U.S.A. Income and Capital Treaty, Article 25, Section 6 states:

If any difficulty or doubt arises as to the interpretation or application of the Convention cannot be resolved by the competent authorities pursuant to the preceding paragraphs of this Article, the case may, if both competent authorities and the taxpayer agree, be submitted for arbitration, provided that the taxpayer agrees in writing to be bound by the decision of the arbitration board. The decision of the arbitration board in a particular case shall be binding on both States with respect to that case. The procedures shall be established in an exchange of notes between the Contracting States. The provisions of this paragraph shall have effect after the Contracting States have so agreed through the exchange of notes.

\textsuperscript{73} Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital (1980), as amended by the 1997 Protocol, 29 July 1997, Treaty Doc. 105-29, art 25; see also The 1989 Income and Capital Tax Convention, Final Protocol and Notes, specifically the additions by the 2006 Protocol before exchange of notes, Article 25, Section 5 states: Disagreements between the Contracting States regarding the interpretation or application of this Convention shall, as far as possible, be settled by the competent authorities. If a disagreement cannot be resolved by the competent authorities it may, if both competent authorities agree, be submitted for arbitration. The procedures shall be agreed upon and shall be established between the Contracting States by notes to be exchanged through diplomatic channels.


\textsuperscript{74} Convention between the United States of America and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Nov. 27, 2006, Doc 2006-23900, art. 24.

\textsuperscript{75} U.S.-German Tax Treaty, supra at note 73, Art. XIII of the Protocol to the 1989 Treaty as amended by the exchange of Notes signed on August 17, 2006.
bb) is a particular case that the competent authorities agree is suitable for determination by arbitration; and

c) all concerned persons agree according to the provisions of subparagraph d) of paragraph 6.

6. For the purposes of paragraph 5 and this paragraph, the following rules and definitions shall apply:

a) The term “concerned person” means the presenter of a case to a competent authority for consideration under this Article and all other persons, if any, whose tax liability to either Contracting State may be directly affected by a mutual agreement arising from that consideration;

b) The “commencement date” for a case is the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities;

c) Arbitration proceedings in a case shall begin on the later of:

aa) Two years after the commencement date of that case, unless both competent authorities have previously agreed to a different date, and

bb) The earliest date upon which the agreement required by subparagraph d) has been received by both competent authorities;

d) The concerned person(s), and their authorized representatives or agents, must agree prior to the beginning of arbitration proceedings not to disclose to any other person any information received during the course of the arbitration proceeding from either Contracting State or the arbitration board, other than the determination of such board;

e) Unless any concerned person does not accept the determination of an arbitration board, the determination shall constitute a resolution by mutual agreement under this Article and shall be binding on both Contracting States with respect to that case; and

f) For purposes of an arbitration proceeding under paragraph 5 and this paragraph, the members of the arbitration board and their staffs shall be considered “persons or authorities” to whom information may be disclosed under Article 26 (Exchange of Information and Administrative Assistance) of the Convention.  

One must look to the Technical Explanation to the 2006 Protocol to understand the procedural aspects of the mandatory arbitration provision created under the protocol. Under Article XIII, of the 2006 Protocol, the U.S. and Germany have agreed to mandatory arbitration of certain cases, where 1) tax returns were filed in one of the contracting states, 2) the case involves interpretation of one of the articles of the Convention, 3) both contracting states have agreed to the arbitration, 4) the competent authorities of both contracting states agree that the issue is suitable for arbitration and 5) that all interested parties agree not to disclose any material received by the contracting states or the arbitration board except for the determination.

The technical aspects of the method are important in the context of policy and the future of U.S. tax treaty arbitration provisions. Pursuant to the literature, the US terminology for arbitration is the “baseball method”. In an arbitration type scenario, each Contracting State’s competent authority would select one arbitrator, and then those two arbitrators would select a chair. The chair cannot be a citizen or resident
of either contracting state. Unlike the OECD Model, the U.S.–German Tax Treaty does not allow taxpayer participation in the arbitration proceedings; however, it appears the taxpayer may be allowed to present their case. The arbitration board has nine months to select one of the proposed resolutions, without modification, as the final holding. Both the OECD Model and the current U.S.-German Tax Treaty bind the Contracting States to the outcome of the arbitration panel.

As can be seen by the technical aspects, both parties must present reasonable proposed resolutions to the arbitration board or potentially not have their proposal considered. The reason for such a conclusion is each competent authority is selecting an arbitrator, supposedly with a country bias, leaving the neutral third arbitrator as the decider of which proposed resolution is closer to the correct interpretation of the law or treaty based upon the facts presented.

C. European Union Position

Much of Europe follows the lead of the OECD since so many of the members are also members of the European Union. Therefore, a majority of the interrelated treaties between EU countries have the previous OECD Model of MAP before the amendments of July 18, 2008 which included mandatory arbitration. However, there are some items unique to Europe, the first is the mandatory and binding arbitration procedures involving transfer pricing and permanent establishment issues among EU members. The arbitration procedures are based upon the EU Arbitration Convention. The procedures only apply to fifteen of the current EU members, but the process is underway to include all EU members.

In addition to the European Arbitration Convention, the European Court of Justice (ECJ) has increased its jurisdiction to include direct taxation cases. Although the ECJ has not heard an international tax treaty case, the court has announced its position on tax treaties and how those are to be viewed in the EU. The court in Denkavit International BV, Denkavit France SARL v. Ministre de l’Economie, des Finances et de l’Industrie noted that the freedom of establishment outweighs tax conventions, i.e. tax treaties, between EU members. In addition, the court specifically deals with the OECD model treaty by stating “the fact that the rules are consistent with the provisions of the OECD model convention does not also

82 Id.
83 Id.
84 U.S.-German Tax Treaty, supra note 73, art. 25(5), Exchange of Notes III, para. 4. However this was not contained in the final 2006 Protocol.
85 U.S.-German Tax Treaty, supra note 73, art. 25(5), Protocol to the 1989 Treaty (2006) as Amended by the Exchange of Notes signed on 17, August 2006, art. 25(5), comment 22(g)-(h).
87 The following is based upon the U.S.-German Tax Treaty, supra note 73, Protocol to the 1989 Treaty (2006) as Amended by the Exchange of Notes signed on 17, August 2006, art. 25(5), comment 22(i). The hierarchy of interpretation is as follows; first, provisions of the convention, second, commentaries or explanations agreed upon between the contracting states, third, the Contracting States law as long as not inconsistent, and last, OECD commentary, guidelines or reports.
88 See OECD membership list at note 23.
90 Id. at art. 2.
91 See Explanation of Proposed Income Tax Treaty Between the United States and Belgium: Hearing before the S. Committee on Foreign Relations, prepared by Joint Comm. on Taxation for Hearing Scheduled on July 17, 2007.
93 ECJ, C-270-83, 28 January 1986 (Avoir fiscal).
94 ECJ, C-170-05, 49
mean that they comply with Article 43 EC. Neither the provisions nor the objectives of the OECD model convention, on the one hand, or the EC Treaty, on the other hand, are in fact the same." As noted, the ECJ views tax treaties as important but the treaties cannot violate the four freedoms of the EU, nor does following with OECD positions exempt countries from following EU law. Thus, the ECJ may become more important in the area of tax treaty interpretation, specifically MAP in the future.

One EU member treaty of note in the area of arbitration is the Austria-German Tax Treaty. In particular, this treaty under Article 25, paragraph 5 gives a firm mandatory arbitration provision.

(5) In the event that any difficulties or doubts arising as to the interpretation or application of this Convention can not be resolved by the competent authorities by mutual agreement as set forth in the preceding paragraphs of this Article within a period of three years from the date of commencement of the proceedings, at the request of the person identified in paragraph 1, the States shall be under obligation to submit the case to arbitration as defined by Article 239 of the EC Convention with the Court of the European Communities.

Unlike many other EU member treaties, this particular treaty requires arbitration three years after the commencement of the MAP. This is one of the most forceful mandatory arbitration provisions in an active treaty.

D. United Nations Position

Within the United Nations (UN), there is a consensus to follow the lead of the OECD and EU. In both sessions, the UN looked to the OECD and EU models and discussions, in particular the OECD’s proposed revision to Article 25 of the OECD Model Tax Convention along with the EU’s work on the EU Arbitration Convention in the area of transfer pricing. Currently the UN Model Tax Convention’s Article 25 is very similar to the original, pre-July 2008, OECD Model Tax Convention Article 25.

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95 A.G. Micho, ECJ. C-324-00, 79
97 Id. at art. 25(5)
99 Id.
100 Model taxation convention between developed and developing countries (Adopted by the United Nations Group of Experts on January 11, 2001). Article 25 states:

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

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

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application
However, unlike the OECD or the EU, the UN works with developing countries and their relationships with developed countries, specifically in trade and taxation.\footnote{\textit{E/C. 18/2007/CRP.7 Dispute Resolution, Economic and Social Council, Committee of Experts on International Cooperation in Tax Matters, Third Session, 29-October-2 November 2007.}} Therefore, the review of the arbitration procedures is a bit different.

The UN addressed this conflict in its latest communiqué from a meeting of the Economic and Social Council, Committee of Experts on International Cooperation in Tax Matters.\footnote{\textit{Id.}} Within the text of the discussion, the experts “raise questions of specific interest to developing countries and countries in transition . . . [with an] emphasis . . . on possible deviation form the OECD Report and its recommendations”\footnote{\textit{Id. at 3.}} The UN notes that the OECD Model Tax Convention applies a bilateral approach to revising the current treaty structure, i.e. that each country should review its tax treaties and revise them appropriately in discussion with the other Contracting State.\footnote{\textit{Id.}} However, the UN noted that this would be near impossible for developing countries to initiate, so the UN seeks to consult with the OECD Secretariat and the EU Commission to seek a multilateral approach for developing countries.\footnote{\textit{Id. at 5.}} As was shown, the UN is much more reactive in the area of arbitration and will likely follow the lead of the OECD and EU.

### III. The Reason for MAP and a Case for Arbitration

One of the big questions in the area of arbitration is why MAP is not sufficient to resolve tax treaty issues. There is both empirical research and current examples that the MAP processes as it exists today in the previous OECD Model Treaty, before the inclusion of the mandatory arbitration amendment, many EU Treaties as well as the US Model Treaty are insufficient, especially considering the ever-increasing amount of international trade and the additional funds needed by governments for domestic purposes.\footnote{See generally \textit{Dispute Resolution, supra note 10.}} The following section will be broken down into three parts, the first part will present types of tax treaty disputes, the second part will present empirical data that MAP is not succeeding and the last part will present a current example where MAP failed, which cost the taxpayer billions of dollars because income was taxed twice by different countries.

#### A. Types of Tax Treaty Disputes

First, one must understand how an issue can arise between two countries. There are two separate types of double taxation issues, allocation\footnote{Allocation cases are defined as transfer pricing or sourcing of income. \textit{Dispute Resolution, supra note 10 at 111-12.}} and non-allocation.\footnote{\textit{Id.}} An example of both an allocation and non-
allocation case follows in order for the reader to understand the importance of MAP and arbitration procedures in tax treaty issue resolution.

In allocation issues, transfer pricing disputes account for the vast majority of allocation issues.\textsuperscript{109} Transfer pricing issues occur when two States claim the right to the same income. This normally occurs between parent-subsidiary relationships or home office-branch situation where services, marketing or products are shipped between the two States.\textsuperscript{110} In this case, the competent or revenue authority in Country A determines that the corporation or other entity (Z) has shifted profits from Country A to an “associated enterprise”,\textsuperscript{111} another corporation or branch, in another country (Country B) and Country A determines the transaction was not at “arm’s length”\textsuperscript{112} In this case, the competent authority in Country A increases Z’s taxable income in Country A, while Country B’s competent authority does not allow a corresponding deduction for the reallocation in Country B.\textsuperscript{113} The ending result is entity Z is taxed twice on the income associated with the reallocation of income.\textsuperscript{114}

In the area of non-allocation, the majority of cases deal with permanent establishment issues.\textsuperscript{115} In these particular cases, two countries competent authorities both treat the entity as having a permanent establishment\textsuperscript{116} within their country. This particular issue is of great importance particularly in the area

\footnotesize
\begin{itemize}
\item \textsuperscript{108} Non-allocation cases deal with residency and permanent establishment cases. \textit{Dispute Resolution, supra} note 10 at 288-89.
\item \textsuperscript{109} \textit{Id.}
\item \textsuperscript{111} The German-US Tax Treaty defines an associated enterprise relationship as; Where an enterprise of a Contracting State participates directly or indirectly in the management, control, or capital of an enterprise of the other Contracting State; or the same person participates directly or indirectly in the management, control, or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State.
\item \textsuperscript{112} U.S.-German Tax Treaty, \textit{supra} note 73, art. 9, para. A-b, 39,029.
\item \textsuperscript{113} D.A. van Waardenburg, \textit{Transfer Pricing Arbitration Procedure}, 18 Eur. Tax’n 144, 145 (1978); \textit{see also} Rev. Proc. 70-18 that directs the Internal Revenue Service or other U.S. competent authority to “adhere to the standards of arm’s length dealings.” In addition, Rev. Proc. 70-18 regulates the allocation of income and deductions between U.S. taxpayers and related individuals or entities in foreign treaty countries.
\item \textsuperscript{114} \textit{See Dispute Resolution, supra} note 10, at 287-288; \textit{see generally} I.R.C. §482 for methodology of how Contracting State statutes can lead to such a result.
\item \textsuperscript{115} \textit{See U.S. v. Goodyear Tire & Rubber}, 493 U.S. 132 (1989); \textit{see also infra} note 156 and 157 referring to the Glaxo transfer pricing issue.
\item \textsuperscript{116} \textit{Dispute Resolution, supra} note 10 at 288-89.
\end{itemize}
of E-Commerce. The dispute arises where Country A’s competent authorities state entity Z has a permanent establishment in Country A, thus entity Z must allocate income to Country A. However, the dispute arises when Country B does not recognize the permanent establishment status of Country A, and does not allow entity Z to offset Country B’s taxes for the tax paid to Country A through a credit, or allow an income adjustment in Country B by the amount allocated to Country A. In this case, entity Z is double taxed on the income allocated to Country A. In addition, a number of cases deal with withholding cases related to whether an individual or company is a permanent resident or non-resident alien subject to general withholding.

B. Empirical Data

Since a majority of MAP cases are confidential in nature, the empirical data is based upon a number of sources but specifically a doctoral text written by Zvi D. Altman. The following part is a recap of Dr. Zvi D. Altman’s research and conclusions, plus updates from the OECD. The reason for presenting this information is to show that MAP is untimely in some cases and merely unsuccessful in others. The empirical data will show the U.S., EU and the recently released OECD statistics regarding open cases, actual settlements and some information on arbitration, although arbitration is a relevantly new concept in treaty dispute settlement.

One of the issues in tax treaty disputes is the timeliness of the resolution. Under MAP, as presented by the current U.S. Model Treaty and the OECD Model Treaty, before the July 18, 2008 amendments, there was no specific required settlement date. Based upon statistics gathered at the 1981 IFA Congress for the years 1971 through 1980, the average MAP duration was approximately 15 months in 1971 to around 2 years in 1980, with some taking up to 5 years. The IRS data for the period from 1995 through 2004 shows an increase from 20 months in 1995 to over 30 months in 2004. The 30-month time limit is very close to the U.S. statute of limitation for return review. The European data for the period 1995 through 1999 show an average of 18 months with the longest taking 5 years. As can be seen from the following data, the MAP procedures are taking considerably longer than the current U.S.-German Tax

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118 Id.
119 Id.
120 See generally, Report on the Application and Administration of Section 482, Publication 3218, April 22, 1999.
121 Dispute Resolution, supra note 10 at 107-10.
122 Id. at chapter 2.
123 See U.S. Model Tax Convention, supra note 65, art. 25; see also OECD Model Tax Convention before the inclusion of Art. 25(5), supra note 13, art. 25.
124 The information contained data from Australia, Federal Republic of Germany, the Netherlands and Sweden.
127 I.R.C. §6501. The statute of limitation for a review and assessment of additional tax on a return without extending the time limit is 36 months within the U.S.
Treaty and the amended OECD Model Treaty arbitration provisions would take because there is a definitive time line.\textsuperscript{129}

A second area of concern and perhaps more important is the number of cases which are either partially or not resolved, thus leading to double taxation. The first report to present some type of analysis regarding MAP success and relief from double taxation was by Joseph G. McGowan in 1977 at the International Institute on Tax and Business Planning.\textsuperscript{130} Mr. McGowan\textsuperscript{131} noted in the report that “there was a wide gap between the number of competent authority issues and taxpayers’ actually requesting competent authority assistance.”\textsuperscript{132} The following statistics were provided:\textsuperscript{133}

Table 2: Total MAP cases

<table>
<thead>
<tr>
<th></th>
<th>Full relief (%)</th>
<th>Partial relief (%)</th>
<th>No relief (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allocation</td>
<td>67</td>
<td>8</td>
<td>25</td>
</tr>
<tr>
<td>Non-allocation</td>
<td>54</td>
<td>7</td>
<td>39</td>
</tr>
</tbody>
</table>

The report based the analysis upon dollar values presented for resolution.\textsuperscript{134}

Dr. Altman applied values to the following percentages, based upon information provided by the IRS, and found the value of total cases presented for resolution were between $359 million\textsuperscript{135} and $909 million.\textsuperscript{136} Since MAP is confidential, the actual dollar value of partial or no relief that was double taxed is not available, but even if we use 25% as the number that means between $90 and $229 million dollars of income was double taxed based upon the data used in the 1977 report and remember these are pre-1977 dollar values.

The U.S. Treasury issued the next large scale report dealing with the number of cases presented to arbitration and the success rate, i.e. those taxpayers receiving total relief from double taxation in Publication 3218.\textsuperscript{137} The 1999 report provided the statistics through 1998; the Internal Revenue Service provided the statistics to Dr. Altman for the years 2000 through 2004.\textsuperscript{138}

\begin{itemize}
\item \textsuperscript{129} U.S.-German Tax Treaty, supra note 73 at art. 25(5)-(6). The mandatory arbitration proceedings can start after two years of MAP if unsuccessful at the taxpayer’s request. The arbitration panel must then issue a ruling nine months after the presented potential resolutions from each competent authority. \textit{See also} OECD Model Tax Convention, supra note 13, art. 25(5).
\item \textsuperscript{131} Director of International Operations at the IRS in 1977.
\item \textsuperscript{132} McGowan, supra note 130.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Id.
\item \textsuperscript{135} Phillip E. Coates and Diane K. Kanakis, \textit{International Taxation: Competent Authorities Share their Concerns: The United States}, 32 Tax Notes 597, 601-602 (1986); \textit{see also} Dispute Resolution supra note 10 at 120.
\item \textsuperscript{136} Id. The larger number was the preliminary report based upon all §482 adjustments for the year in question, however, the lower number was based upon removing certain potential allocation cases. \textit{Dispute Resolution}, supra note 10 at 120.
\item \textsuperscript{138} The following table is a recap of information presented in Zvi D. Altman, \textit{Dispute Resolution under Tax Treaties}, IBFD Doctorate Services, 2005, pgs 121-22.\end{itemize}
The publication along with the data collected by Dr. Altman show that the number of U.S. and foreign initiated requests for competent authority resolution has stayed relatively constant for allocation cases over the period of 1995 to 2004, with a maximum of 124 in 1997 to a low of 83 in 1998. However, the Internal Revenue Service noted a general shift from U.S. taxpayer or U.S. competent authority initiated cases to more foreign initiated cases. This particular shift is unexplained, however, one reason for the shift might be the increase in U.S. §482 transfer pricing audits.

For non-allocation cases, the Internal Revenue Services reports a general increase in U.S. initiated cases from a low of 10 to a peak of 29. The foreign initiated cases have stayed relatively stable at around 45 per year. As can be seen between the two types of cases, allocation cases are the majority of initiated cases, most likely because of the large number of transfer pricing issues based on the increase in international trade and complex corporate structures.

Although the number of cases presented is valuable information in the context of MAP, the more interesting question is the number of cases, or percentage in terms of dollars, of taxpayer income that received little or no relief from double taxation. The following chart was created based upon data from Publication 3218 and the updated Internal Revenue Service data shows a wide range of taxpayer income that received partial or no relief. The percentages show a significant number of taxpayers received little or no relief.

<table>
<thead>
<tr>
<th>Year</th>
<th>Correlative Adjustment (%)</th>
<th>Adjustment Withdrawn (%)</th>
<th>Partial Relief (%)</th>
<th>No relief (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>49.12</td>
<td>41.90</td>
<td>0.41</td>
<td>8.58</td>
</tr>
<tr>
<td>1996</td>
<td>50.30</td>
<td>38.22</td>
<td>0.00</td>
<td>11.48</td>
</tr>
<tr>
<td>1997</td>
<td>52.87</td>
<td>46.17</td>
<td>0.19</td>
<td>0.78</td>
</tr>
<tr>
<td>1998</td>
<td>41.09</td>
<td>45.96</td>
<td>8.20</td>
<td>4.45</td>
</tr>
<tr>
<td>1999</td>
<td>28.40</td>
<td>39.47</td>
<td>3.12</td>
<td>29.01</td>
</tr>
<tr>
<td>2000</td>
<td>26.55</td>
<td>71.87</td>
<td>0.38</td>
<td>1.20</td>
</tr>
<tr>
<td>2001</td>
<td>25.48</td>
<td>48.23</td>
<td>2.52</td>
<td>23.77</td>
</tr>
<tr>
<td>2002</td>
<td>37.59</td>
<td>26.9</td>
<td>26.84</td>
<td>8.67</td>
</tr>
</tbody>
</table>

The most current analysis of how effective MAP procedures are comes from the OECD in its Dispute Resolution: Country Mutual Agreement Procedure Statistics for the years 2006 and 2007. The statistics

<table>
<thead>
<tr>
<th>Year</th>
<th>Correlative Adjustment (%)</th>
<th>Adjustment Withdrawn (%)</th>
<th>Partial Relief (%)</th>
<th>No relief (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>89</td>
<td>35</td>
<td>14</td>
<td>41</td>
</tr>
<tr>
<td>1998</td>
<td>47</td>
<td>36</td>
<td>10</td>
<td>52</td>
</tr>
<tr>
<td>1999</td>
<td>61</td>
<td>32</td>
<td>22</td>
<td>45</td>
</tr>
<tr>
<td>2000</td>
<td>48</td>
<td>44</td>
<td>29</td>
<td>49</td>
</tr>
<tr>
<td>2001</td>
<td>35</td>
<td>78</td>
<td>14</td>
<td>42</td>
</tr>
<tr>
<td>2002</td>
<td>31</td>
<td>63</td>
<td>15</td>
<td>42</td>
</tr>
<tr>
<td>2003</td>
<td>28</td>
<td>68</td>
<td>24</td>
<td>50</td>
</tr>
<tr>
<td>2004</td>
<td>23</td>
<td>63</td>
<td>22</td>
<td>42</td>
</tr>
</tbody>
</table>

In 1995 and 1996, the Internal Revenue Service did not break the data down between U.S. or foreign initiated requests for competent authority relief under the applicable MAP sections of a tax treaty.

140. *Id.*
141. Publication 3218, *supra* note 137 at 8-1 and Appendix A.
142. *Dispute Resolution, supra* note 10 at 113.
143. *Id.*
144. *Dispute Resolution, supra* note 10 at 124.
145. OECD Dispute Resolution: Country Mutual Agreement Procedures Statistics
http://www.oecd.org/document/7/0,3343,en_2649_37989739_43754119_1_1_1_1,00.html (last viewed January 2010)
show an increase in the total number of MAP cases from 2,344 in 2006 to 2,655 in 2007, or a 13.5% increase.\textsuperscript{146} In addition, the total number of new cases increased from 1,097 in 2006 to 1,159 in 2007.\textsuperscript{147} Another interesting part of the study was the average time for settling the cases was 18.91 months in 2007, an increase of 14.4% over 2006.\textsuperscript{148} This shows that MAP is increasingly used and the potential for double taxation is growing.

The empirical evidence shows that the current MAP procedures are not accomplishing their goal, the remove of double taxation based upon tax treaty provisions. In addition, the total number of cases is increasing and the time taken for the competent authorities to potentially settle the issues is increasing. The conclusion by many in the business and the academic community is there needs to be a more forceful and definitive solution to tax treaty disputes, such as true mandatory arbitration.\textsuperscript{149} As one law professor put it “[t]he inadequacy and dysfunction of the Manual Arbitration Procedures is not surprising when one remembers that the process is entirely permissive and non-binding.”\textsuperscript{150}

C. Practical Example of Failed MAP

Although the empirical data shows a need for some improvement in MAP, specifically in the area of requiring countries to arrive at a solution in tax treaty disputes, a real life example of the failure of voluntary MAP brings to life the problem. In addition, to the general failure of MAP, the need for further dissemination of information regarding the actual arbitration proceedings to the general public, i.e. businesses, taxpayers, and other governments, would be one way to create some common principals amongst the countries in dealing with tax treaty disputes.

The showcase example of MAP gone wrong is an allocation case dealing with transfer pricing. The GlaxoSmithKline PLC (Glaxo) MAP case is one of the most addressed cases in both transfer pricing and MAP.\textsuperscript{151} The case was between the U.S. and U.K. competent authorities and dealt with transfer pricing related to a market intangible and patent royalty payments.\textsuperscript{152} Glaxo is a pharmaceutical company that operates throughout the world and is headquartered in the U.K., where all the patents related to various drugs are established and held.\textsuperscript{153} A dispute arose between the company and the U.S. competent authorities, the Internal Revenue Service, as the result of a transfer-pricing audit in 2000. During the audit, the Internal Revenue Service noted seventy-five percent of Glaxo’s U.S. sales resulted from a high profit drug named Zantac.\textsuperscript{154} Glaxo had allocated a majority of the profits related to the drug to the U.K. because headquarters owned the patent related to the drug.\textsuperscript{155} Glaxo’s position was the U.S. subsidiary

\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{150} Id. at 809.
\textsuperscript{153} The company is headquartered in the U.K. with 84 principal subsidiaries throughout the world.
was merely a distribution company and was not fully integrated into the pharmaceutical branch of the business.\textsuperscript{156}

The U.K. revenue authorities agreed with Glaxo’s position; however, the Internal Revenue Service argued that the marketing efforts made by the U.S. subsidiary were the reason for the drug’s success.\textsuperscript{157} The marketing efforts are what made the drug so valuable and profitable, thus Glaxo should have allocated additional profits to the U.S. based upon this "marketing intangible".\textsuperscript{158} The Internal Revenue Services demanded over $8.0 billion in back taxes, interest and penalties.\textsuperscript{159}

Glaxo referred the tax treaty dispute, i.e. the transfer pricing issue to the U.S. and U.K. competent authorities pursuant to the U.S.-U.K. Tax Treaty.\textsuperscript{160} Article 26 is like many of the other MAP tax treaties:

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of this Convention or, if later, within six years from the end of the taxable year or chargeable period in respect of which that taxation is imposed or proposed.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with this Convention. Any agreement reached shall be implemented notwithstanding any time limits or other procedural limitations in the domestic law of the Contracting States, except such limitations as apply for the purposes of giving effect to such an agreement.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Convention. In particular the competent authorities of the Contracting States may agree:

   a) to the same attribution of income, deductions, credits, or allowances of an enterprise of a Contracting State to its permanent establishment situated in the other Contracting State;

   b) to the same allocation of income, deductions, credits, or allowances between persons;

\textsuperscript{156} Glaxo sought to raise other issues during its defense against the I.R.C. §482 transfer pricing adjustment. One such issue was to present the fact that SmithKline Beecham, a competitor, had received an advance pricing agreement (APA) with the U.S. for a similar drug, and the company sought to use this fact to try to present a case for discrimination in the APA process; \textit{see also} Bob Ackerman et al., \textit{Global Transfer Pricing Update}, 37 Tax Notes Int'l 469, 470 (2005).

\textsuperscript{157} Zantac was a leading ulcer drug in the U.S. \textit{See} Molly Moses, \textit{U.S. Marketing Intangible Stance in Glaxo: Wave of the Future?}, 12 BNA Tax Mgmt. Transfer Pricing Rep. 995 (2004); \textit{see generally} Marc M. Levey, \textit{The Quest for Marketing Intangibles}, 16 J. Int'l Tax. 28 (Nov. 2005) for a general overview of the marketing intangible by country and region.


\textsuperscript{159} Andrew Jack, \textit{GSK Tax Bill Raised to Dollars 7.8 Bn.}, Financial Times (London), Jan. 27, 2005, at 21.

c) to the same characterization of particular items of income, including the same characterization of income that is assimilated to income from shares by the taxation law of one of the Contracting States and that is treated as a different class of income in the other Contracting State;

d) to the same characterization of persons;

e) to the same application of source rules with respect to particular items of income;

f) to a common meaning of a term;

g) that the conditions for the application of the second sentence of paragraph 5 of Article 7 (Business Profits), paragraph 9 of Article 10 (Dividends), paragraph 7 of Article 11 (Interest), paragraph 5 of Article 12 (Royalties), or paragraph 4 of Article 22 (Other Income) of this Convention are met; and

h) to the application of the provisions of domestic law regarding penalties, fines, and interest in a manner consistent with the purposes of this Convention.

They may also consult together for the elimination of double taxation in cases not provided for in this Convention.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. 161

Article 26 is very similar to a majority of the active tax treaties in that both sides shall endeavor to seek a resolution. The U.K. competent authorities agreed with Glaxo and the U.S. held its position regarding the marketing intangible, so MAP broke down with neither competent authority willing to deviate from their original position. 162 After the two competent authorities could not come to agreement and in 2004, the U.S. took Glaxo to court within the U.S. to protect the evidence, i.e. the U.S. sought discovery to establish the transfer pricing related to the U.S. operations. 163 Although the case ultimately settled in September of 2006, the ultimate cost to Glaxo was a settlement with the U.S. for $3.6 billion, the largest transfer price settlement in history. 164 The U.K. also taxed the income related to the settlement without any relief, thus double taxation. 165

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161 Id.
162 Molly Moses, supra note 158 at 995.
163 Both the Internal Revenue Service and Glaxo sought information from the other regarding marketing and APAs. Glaxo argued that the company tried to work with the Internal Revenue Service to obtain an APA, but Internal Revenue Service rebuffed their efforts. The Internal Revenue Service wanted Glaxo’s marketing materials to further bolster their case of active involvement in the United States market. See GlaxoSmithKline Holdings v. Comm'r, 117 T.C. 1 (2001); Tamu N. Wright, IRS Seeks Access to Glaxo Computer System, Worldwide Records to Close Discovery ‘Gaps,’ 15 BNA Tax Mgmt. Transfer Pricing Rep. 11 (2006); see also Tamu N. Wright, IRS Refuses to Turn Over Documents, Answers Questions on APAs in Glaxo Case, 14 BNA Tax Mgmt. Transfer Pricing Rep. 947 (2006).
164 Press Release, GlaxoSmithKline, GSK Settles Transfer Pricing Issue with IRS (September 11, 2006) (on file with the author); see Int’l Tax Rev., February 1, 2008 showing that the IRS is again dealing with Glaxo on an international allocation issue, this one dealing with interest expense allocated to the U.S. related to debts between the U.S. subsidiary and the parent company. The IRS is seeking $680 million in back-taxes and interest. In addition to the U.S., Glaxo currently has pending transfer pricing cases with Japan and Canada, see also Glenn S. Simpson, Glaxo in Major Battle with IRS Over taxes on Years of U.S. Sales, Wall Street Journal, June 11, 2002, pg. 1.
As can be seen from the Glaxo example, the downside to the current MAP system is the voluntary and non-binding nature of the procedure. In addition, the nature of the dispute, the value of patents and marketing intangibles, are not something courts regularly address, as Glaxo noted in its decision to settle. With the increase in international trade, these types of confusion and income allocation issues are going to become more prevalent and without a mandatory binding arbitration provision within tax treaties, these types of outcomes will increase. In addition, under the current confidentiality provisions of MAP and mandatory arbitration, other taxpayers, courts and the international tax community will not even be able to learn from these mistakes.

IV. Confidentiality in MAP

In the previous three sections, the article has discussed the current status of MAP, the trend in the OECD, U.S. and E.U. towards a mandatory arbitration procedures; however, in both the current OECD Model Tax Convention and the U.S. Model Tax Treaty along with the E.U. Transfer Pricing Arbitration Convention, the treaties contain confidentiality agreements related to mandatory arbitration. Since the OECD is a non-governmental agency, in order for its model confidentiality agreements to become part of a treaty, the treaty negotiators need to include the language. However, in the U.S., the language is part of the model treaty but is also protected through legislation. This section will explore the current status of confidentiality within the MAP system, including the OECD, which includes the EU and UN since a majority of their treaties follow the OECD lead and the US positions. In Section V, the article will discuss the policy reasons against such confidentiality provisions and Section VII will cover some potential solutions to the issues presented in Sections IV through VI.

A. OECD Confidentiality Provisions

The OECD seems to have taken two different courses when dealing with confidentiality in the realm of international business treaties, which include both tax and investment treaties. In the OECD Model Tax Convention, the OECD calls for confidentiality of all information exchanged between the parties. However, just the opposite is true in the dealings between investors and States. In these particular disputes, the OECD recommends complete disclosure and transparency. The goal of the OECD is one of cooperation and transparency, but it seems in the area of taxation, the member countries seek to keep any information regarding mandatory dispute resolution as opaque.

The confidentiality provision of the current OECD Model Tax Convention is located in Article 26. The applicable three sentences state:

Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in the first sentence. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial proceedings.


OECD Model Tax Convention, supra note 13, art. 26.


OECD Model Tax Convention, supra note 13, art. 26 in annex A to the 2008 Update to the OECD Model Tax Convention.
As can be seen from the following sentences, the OECD believes that in tax situations it is best to keep information private. When dealing with the revised MAP, with the inclusion of the mandatory arbitration, Article 26 still stands. In addition, the OECD in the annex to the 2008 Update to the OECD Model Tax Convention, created a sample mutual agreement on arbitration, and within this example, under paragraph 8, Communication of information and confidentiality, the confidentiality aspects of Article 26 are re-emphasized.170 However, in an interesting update, the OECD in the same update and contained within the annex related to the revised Article 25, paragraph 15 brings about a permissive method for disclosure of the arbitration provision.171 This is a first step towards disclosure; however, it still requires permission and is not contained within the main comments to Article 25.

A majority of the EU and OECD members follow the Model Tax Convention before the July 18, 2008 amendments as a basis for tax treaty negotiations, the verbiage of Article 26 is relatively consistent among the member.172 In addition, the UN also follows this approach, and contained within its Model Tax Convention, the confidentiality section reads

Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State. However, if the information is originally regarded as secret in the transmitting State it shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes which are the subject of the Convention. Such persons or authorities shall use the information only for such purposes but may disclose the information in public court proceedings or in judicial decisions.173

The U.N.’s Model Tax Convention is almost identical, and in some case uses identical language as the OECD Model Tax Convention before the 2008 update. The same holds true for many EU member states.174

In contrast to the Model Tax Convention, the OECD’s position on investor-State disputes is one of pro-transparency. Currently, the OECD position is one of limited transparency.175 However, the OECD also notes that there is a general shift towards more transparency, such as those written into the North American Free Trade Agreement (NAFTA) and the U.S. Federal Trade Agreements (FTA) with Chile and other countries.176 All of these provisions seek to allow third party’s with a vested interest in the outcome

171 OECD Model Tax Convention, supra note 13, art. 25(5), annex to the 2008 Update to the OECD Model Tax Convention, para. 15 states: Where more than one arbitrator has been appointed . . . [W]ith the permission of the person who made the request for arbitration and both competent authorities, the decision of the arbitral panel will be made public in redacted form without mentioning the names of the parties involved or any details that might disclose their identity and with the understanding that the decision has no formal precedential value.
174 See generally EU State Treaties supra note 172 for examples.
175 Transparency, supra note 168, pgs 2-4.
of tribunal decisions to participate in the proceedings. The hearings are public and must be open to the public, but sensitive data, such as trade secrets, etc., are protected. There has been a multitude of cases dealing with these provisions within NAFTA and other U.S. trade agreements. In 2004, the Investment Centre for the Settlement of Investment Disputes (ICSID), proposed a framework, which followed along the lines of NAFTA. The draft sought to allow third party participation in trade disputes as well as increasing the transparency of the negotiations. The OECD accepted this position and believes this is the correct course for investor-State disputes; however, this seems to conflict with the tax treaty position of confidentiality. In both cases, third parties have an interest and are vested in the outcome, be it a trade issue or an unfair valuation of a transfer pricing issue.

B. U.S. Confidentiality Provisions

In no country are there more avenues available to the citizenry for obtaining information regarding governmental decisions than in the U.S. Even with the general openness of information, the U.S. also seeks to keep tax treaty disputes confidential. The U.S. has two separate methods, both work in combination; the first, the actual tax treaty provisions and second the statutory language of I.R.C. §6105.

In the U.S. Model Tax Treaty, much like the OECD Model Tax Convention contains language of a general confidentiality position, which is contained in Article 26, paragraph 2. Again much like the OECD Model the language states:

Any information received under this Article by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to above, or the oversight of such functions. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial proceedings.

The only major difference in the U.S. Model Tax Convention is the inclusion of use of the information for oversight purposes. Thus from a model standpoint, the OECD and U.S. models are very similar.

The similarities end in the new U.S.-German Tax Treaty in dealing with the binding arbitration provisions. Although the language in Article 26 is very similar to the U.S. and OECD Model Tax

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178 Id.
179 See generally, Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332 (1st Cir. 2000); Dept. of Trans. v. Public Citizen, 541 U.S. 752 (2004); see also Robert A. Green, Article: Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes, 23 Yale J. Int’l L. 79 (Winter, 1998) (discussing the differences and similarities between tax and trade dispute resolution).
181 Id.
183 U.S. Model Tax Convention, supra note 65, art. 26(2).
184 Compare U.S. Model Tax Convention, supra note 65, art. 26; with OECD Model Tax Convention, supra note 13, art. 26.
185 U.S.-German Tax Treaty, supra note 73, Art. XIII of the Exchange of Notes dated 17 August 2006, replacing the original paragraph 5 of Article 25, with new paragraphs 5 and 6.
186 See U.S. German Tax Treaty, supra note 73, art. 26(1).
Conventions, the real difference comes during the binding arbitration provisions of Article 25, paragraph 5 and 6. In particular, Article 25, paragraph 6, subsection d, states:

The concerned person(s) and their authorized representatives or agents, must agree prior to the beginning of the arbitration proceedings not to disclose to any other person any information received during the course of the arbitration proceeding from either Contracting State or the arbitration board, other than the determination of such board.\textsuperscript{187}

This particular subsection raises the confidentiality level when the tax treaty dispute invokes the arbitration provisions. All parties concerned must agree not to disclose any information. In addition, contained within the technical explanation of the mandatory arbitration provisions, Article XIII requires all parties to sign onto a confidentiality agreement.\textsuperscript{188}

Although the U.S. has the similar OECD Article 26, the new binding arbitration provisions appear to expand confidentiality. In addition to the treaty language, the U.S. Congress furthered confidentiality by passing I.R.C. §6105.\textsuperscript{189} This particular code section gives statutory power to the current tax treaty confidentiality provisions. The statute states:

(a) In general.
   Tax convention information shall not be disclosed.

(b) Exceptions.
   Subsection (a) shall not apply—
   
   (1) to the disclosure of tax convention information to persons or authorities (including courts and administrative bodies) which are entitled to such disclosure pursuant to a tax convention,
   
   (2) to any generally applicable procedural rules regarding applications for relief under a tax convention,
   
   (3) to the disclosure of tax convention information on the same terms as return information may be disclosed under paragraph (3)(C) or (7) of section 6103(i), except that in the case of tax convention information provided by a foreign government, no disclosure may be made under this paragraph without the written consent of the foreign government,
   
   (4) in any case not described in paragraph (1), (2), or (3), to the disclosure of any tax convention information not relating to a particular taxpayer if the Secretary determines, after consultation with each other party to the tax convention, that such disclosure would not impair tax administration.

(c) Definitions.
   For purposes of this section—
   
   (1) Tax convention information.
       The term “tax convention information” means any—
       
       (A) agreement entered into with the competent authority of one or more foreign governments pursuant to a tax convention,
       
       (B) application for relief under a tax convention,
       
       (C) background information related to such agreement or application,
       
       (D) document implementing such agreement, and

\textsuperscript{187} Id. at art. 26(6).
\textsuperscript{188} Department of the Treasury, Technical Explanation of the Protocol signed at Berlin on June 1, 2006 amending the Convention between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to taxes on income and Capital and to Certain Other taxes signed on 29th August 1989, art. XIII [hereinafter U.S. - German Protocol].
\textsuperscript{189} I.R.C. §6105.
(E) other information exchanged pursuant to a tax convention which is treated as confidential or secret under the tax convention.

(2) Tax convention.
   The term “tax convention” means—
   (A) any income tax or gift and estate tax convention, or
   (B) any other convention or bilateral agreement (including multilateral conventions and agreements and any agreement with a possession of the United States) providing for the avoidance of double taxation, the prevention of fiscal evasion, nondiscrimination with respect to taxes, the exchange of tax relevant information with the United States, or mutual assistance in tax matters.

In addition, the IRS in the Internal Revenue Manual Part 11, Chapter 3, Section 25 further discusses how and when they will distribute information. The manual reinforces the applicability of IRC §6103 regarding tax return information and the limitations created by Congress in IRC §6105 regarding treaty information. In addition, any information received by the IRS from a foreign government or their competent authority is subjected to the same confidentiality provisions of §6105. Thus, any information obtained by the IRS in a tax treaty situation, whether collected domestically or from the other Contracting State is confidential.

Although no cases deal directly with the U.S.-German Tax Treaty, specifically the binding arbitration provisions, one case Tax Analyst v. I.R.S. deals with §6105. In the case, Tax Analyst sought to obtain data related to a meeting of the Pacific Assn. of Tax Administrators (PATA) and the “G-4”. During the various meetings, the parties discussed tax administration issues, such as, transfer pricing, tax evasion, etc. Tax Analyst under the Freedom of Information Act (FOIA) requested copies of the proceedings, which the IRS stated amounted to over 57,000 pages of documentation. The I.R.S. sought summary judgment against Tax Analyst under I.R.C. §6105 and the exemptions under 5 U.S.C. §552(b)(3), (5) and (6).

The plaintiff, Tax Analyst, argued against the imposition of §6105 because under §6103 only return information is confidential and protection does not “protect legal analysis and legal conclusions.” The court did not believe that §6103 was applicable to the case. In the court’s analysis of §6105, the court noted that the intent of Congress was clear and the reason for the statute was to protect information related to discussions or reports created within the international tax treaty arena. Thus, the court held

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190 Id.
191 IRM 11.3.25
192 IRM 11.3.25.1
193 IRM 11.3.25.2
194 217 F. Supp 2d. 23 (DDC 2002).
195 Id. at 23-25. The Pacific Assn. consists of the United States, Japan, Canada and Australia. The G-4 consists of the United States, United Kingdom, France and Germany.
196 Id. The meeting dates were November 19, 1996, May 5, 1998 and December 1, 1998.
197 Id.
198 Id.
199 Id. at 25.
200 I.R.C. §6103 states only information related to “return information” is subject to confidentiality.
201 Id.; see also Tax Analyst v. I.R.S., 117 F.3d 607, 611-12 (80 AFTR 2d 975-52) (D.C. Cir. 1997).
203 Id.
for the I.R.S. because Congress codified the secrecy provisions in §6105 and the information created during the PATA and G-4 meeting were exempt from disclosure.\textsuperscript{204}

The U.S. has a comprehensive confidentiality position concerning the dissemination of information during tax treaty disputes, as well as tax treaty discussions. With the common language of Article 26 and the statutory language of §6105, obtaining information related to tax issues is very difficult, if not impossible. However, there are some holes in the U.S. confidentiality provisions as can been seen in the Congressional records and regarding the FOIA and its relationship to laws or discussions regarding determining the liability of a taxpayer.

V. Policy Considerations of Arbitration and Secrecy

Within this section, the article will address the various policy implication regarding confidentiality and mandatory arbitration. Because this article deals exclusively with the new mandatory arbitration, the article will not discuss the overall confidentiality provisions of Article 26 in the OECD and U.S. Model Tax Conventions. This article does not attempt to argue that all tax information transferred between competent authorities is available for disclosure, but any information or proceedings revolving around the arbitration clauses should be available to the public. In addition, this article does not attempt to state that the voluntary MAP of the current OECD and US Model Tax Conventions should be subject to disclosure. However, the article will show that the new OECD and U.S. mandatory arbitration provisions are in fact not part of MAP, and thus should not be subject to the same secrecy applicable to these voluntary proceedings.

A. Mandatory Arbitration: Really Part of MAP?

The first issue one must determine on deciding whether the mandatory arbitration proceedings should be made public is whether mandatory arbitration even part of MAP. This section is broken down into three separate sub-parts, the first dealing with the reasons for MAP, the second dealing with the reasons for the move towards mandatory arbitration, the last deals with why mandatory arbitration should not be a part of MAP.

1. MAP

The reasons for MAP go back to before the League of Nations as noted in the history section; however, the League of Nations Draft Model Treaty from 1928\textsuperscript{205} and associated comments outlined the first in depth look at dispute resolution. Article 14 was a precursor to the OECD and UN models; however, it was also voluntary.\textsuperscript{206} Although a bit different that the current models, the League of Nations would

\begin{itemize}
  \item \textsuperscript{204} \textit{Id.}
  \item \textsuperscript{205} Report Double Taxation and Tax Evasion, League of Nation Doc. 1928. II. 49. (1928).
  \item \textsuperscript{206} Article 14 states:

  Should a dispute arise between the Contracting States as to the interpretation or application of the provisions of the present Convention, and should such dispute not be settled either directly between the States or by the employment of any other means of reaching agreement, the dispute may be submitted, with a view to an amicable settlement, to such technical body as the Council of the League of Nations may appoint for this purpose. This body will give an advisory opinion after hearing the parties and arranging a meeting between them if necessary.

  The Contracting States may agree, prior to the opening of such procedure, to regard the advisory opinion given by the said body as final. In the absence of such an agreement, the opinion shall not be binding upon the Contracting States unless it is accepted by both, and they shall be free, after resort to such procedure or in lieu thereof, to have recourse to any
present an advisory opinion if the two sides could not agree on a solution. In addition, both countries could agree to make the advisory opinion binding, but as stated in the 1927 League of Nations Report on Double Taxation and Tax Evasion and in the 1928 commentary, Article 14 was a voluntary and non-binding approach to dispute resolution.

During the development of the OECD and UN Model Tax Conventions, as shown in Section III, the same requirements exist, one of voluntary participation in the process and a non-binding outcome. As stated by the OECD committee, MAP is in place to allow governments the right to reach an equitable solution through negotiations and compromise. In addition to establishing the format for negotiations, the OECD realized the importance of secrecy during the proceedings since the two governments are actually negotiating under their rights as countries to resolve a diplomatic issue, i.e. a tax treaty dispute. However, in the OECD and UN Articles, the governments’ obligation to participate is voluntary and the resulting outcome, if any, is non-binding.

Under all three model tax conventions, the OECD, U.S. and U.N., MAP is relatively the same. The two governments can come together, if both sides agree and endeavor to reach an understanding. Thus, it is possible that both sides will come to a resolution, and even if a resolution is reached, the outcome is non-binding. Thus, MAP is as the title suggests a mutual agreement type procedure that is voluntary and non-binding on the treaty members. As was shown in the Glaxo case, competent authorities can disagree and not come to a resolution. In this case, either country can then bring the issue before a

arbitral or judicial procedure which they may select, including reference to the Permanent Court of International Justice as regards any matters which are within the competence of that Court under its Statute.

Neither the opening of the procedure before the body referred to above nor the opinion which it delivers shall in any case involve the suspension of the measures complained of; the same rule shall apply in the event of proceedings being taken before the Permanent Court of International Justice, unless the Court decides otherwise under Article 41 of its Statute.

Id. note 205, art. 14.

Id.

Id.; see also Mexico Draft (1943), Article XVI and London Draft (1946) Article XVII, both created by the League of Nations.

OECD Model Tax Convention, supra note 13, art. 25; U.N. Model Tax Convention, supra note 100, art. 25. The one notable exception in the current OECD and UN models is the lack of an advisory opinion.


Id.

Id.; OECD Model Tax Convention, supra note 13, art 25; U.N. Model Tax Convention, supra note 100, art. 25.; U.S. Model Tax Convention, supra note 65, art. 25; OECD Model Tax Convention, supra note 13, art. 25.; U.N. Model Tax Convention, supra note 100, art. 25.

Id.

Id. See Section VI.

As states by the OECD in its 2004 report;

The existing MAP process provides a generally effective method of resolving international tax disputes, although as discussed in Sections I and II, a number of improvements need to be made. However, even once the improvements to the MAP discussed in this note have been made, there will still inevitably be cases in which the MAP is not able to reach a satisfactory result. These cases will typically arise when the countries involved cannot agree on the proper interpretation or application of the treaty in a particular situation. Since the MAP process as currently structured does not require the countries to agree, but only that they endeavour to agree, the result can be unrelied double taxation or “taxation not in accordance with the Convention” in a case where the CAs are not able to reach agreement.

2004 Report, supra note 181.
domestic court, whose decision would be the final holding in the dispute. This means there is a potential for double taxation and shows that MAP is of a voluntary and non-binding nature.

2. Mandatory Arbitration

Whether looking at the OECD mandatory arbitration model or the U.S. position on mandatory arbitration contained within the U.S.-German Protocol, both require a definitive, binding outcome to a treaty dispute.\textsuperscript{217} The two methods to achieve such a goal are different, but the outcome is similar; the main question is what prompted the movement towards arbitration, and is it the same as MAP.

Within the OECD’s 2004 report,\textsuperscript{218} the first mention comes in regarding supplemental dispute resolution (SDR) techniques.\textsuperscript{219} The OECD discussed a variety of SDR methods including mediation and arbitration.\textsuperscript{220} In addition to the various SDRs, there was a discussion regarding whether the SDR would be optional or mandatory, with a bias towards mandatory arbitration since MAP is voluntary and a voluntary SDR would merely be one of the same.\textsuperscript{221} Because of the bias towards a mandatory position, the OECD noted that they would have to amend the Model Tax Convention for the inclusion of a mandatory arbitration model since MAP was voluntary in nature.\textsuperscript{222}

The second issue the OECD addressed is the binding nature of the SDR.\textsuperscript{223} In order to satisfy the nature of the SDR process, i.e. a definitive and definite solution, the SDR would have to be binding on the participants.\textsuperscript{224} The OECD’s initial position was all parties; governments and taxpayers would be bound by the outcome of the arbitration.\textsuperscript{225} In the 2006 proposal,\textsuperscript{226} the OECD comments bifurcated the two dispute resolution methods, MAP versus the arbitration technique.\textsuperscript{227}

These additional techniques can make the MAP process itself more effective even in cases where resort to the techniques is not necessary. The very existence of these techniques can encourage greater use of the MAP process since both governments and taxpayers will know at the outset that the time and effort put into the MAP process will be likely to produce a satisfactory result. Further, governments will have an incentive to ensure that the MAP process is conducted efficiently in order to avoid the necessity of subsequent supplemental procedures.

The statement clearly denotes that the SDR procedures will supplement and benefit MAP because governments are more likely to come to a resolution knowing there is another procedure out there that will come to a resolution outside of their direct control.\textsuperscript{228} This bifurcation is important in the analysis on whether the OECD should consider mandatory arbitration as a part of MAP versus a separate resolution procedure.

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\textsuperscript{217} See Section IV; OECD Model Tax Convention, supra note 13, annex to the 2008 Protocol; U.S.-German Tax Treaty, supra note 73, art 25(5)-(6); see also, EU Tax Convention, supra note 89.


\textsuperscript{219} Id. at 28-31.

\textsuperscript{220} Id.

\textsuperscript{221} Id.

\textsuperscript{222} Id.

\textsuperscript{223} Id.

\textsuperscript{224} Id.

\textsuperscript{225} Id.

\textsuperscript{226} Id.


\textsuperscript{228} Id.
The next issue the OECD considered is where to place the SDR under the current model tax convention. A Joint Working Group selected Article 25, through the insertion of a new paragraph; however, nowhere in the committee report does it specifically state that this new SDR is part of MAP other than placing the language under Article 25.

The U.S. movement towards mandatory arbitration is similar to the OECD. The drive towards mandatory arbitration began in earnest with the issuance of the proposed regulations related to §482. On July 28, 1992, the Tax Executive Institute (TEI) sent comments to the Treasury regarding the potential for increased §482, transfer pricing, international tax treaty disputes and the need for alternative dispute resolution versus the voluntary MAP system. The TEI suggested following the European model of the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits Associated Enterprises. However, the U.S. government deferred further work until the current inclusion of the mandatory arbitration provisions in the U.S.-German Protocol and the U.S.-Belgium Tax Treaty.

Business groups welcomed both the OECD amendments to the Model Tax Convention and the U.S. movement towards the mandatory arbitration model. A majority of the praise has been from business or pro-business groups, with a general push to place these provisions under MAP to provide the benefits of secrecy during the proceedings.

3. Is Mandatory Arbitration Really a MAP Issue

In order to determine whether mandatory arbitration should be part of MAP, one must review the purpose and language of the methods; MAP versus mandatory arbitration. Within this section, the article will breakdown the language of the OECD MAP and U.S. Model Tax Conventions along with the OECD mandatory arbitration and the U.S. – German Protocol provisions.

The OECD and U.S. models have very similar MAP conventions. The major elements are:

1) A taxpayer must consider that one or both countries to the convention are not in accordance with the convention.

2) The taxpayer must present their case to the competent authority of their Contracting State.
3) The competent authority shall endeavor to arrive at a solution.\textsuperscript{242}
4) If the competent authority cannot resolve the issue alone, the competent authority shall seek to reach a mutual agreement with the other Contracting State’s competent authority.\textsuperscript{243}
5) The two competent authorities shall endeavor to resolve the issue.\textsuperscript{244}

In all the above elements, the competent authorities are under no obligation to find a solution.\textsuperscript{245} In fact, the Contracting State does not even need to proceed if they believe there is no conflict.\textsuperscript{246} In addition, since the entire process is voluntary, the outcome is also non-binding on either Contracting State.\textsuperscript{247}

The mandatory arbitration provisions are completely opposite to this procedural approach to dispute resolution. If the Contracting State, through their competent authority, agrees to initiate MAP and the other Contracting State agrees to seek a resolution, and the two competent authorities cannot reach a resolution, then mandatory arbitration is required.\textsuperscript{248} The major elements of the OECD and U.S. mandatory arbitration provisions are:

1) The two competent authorities were not able to resolve the dispute under MAP.\textsuperscript{249}
2) Requires the taxpayer to request arbitration.\textsuperscript{250}
3) The outcome of the arbitration is binding on the two Contracting States.\textsuperscript{251}

Although the second requirement is the same as in MAP, the first requirement requires the mutual agreement procedures to fail before the dispute resolution process of mandatory arbitration is available to the taxpayer.\textsuperscript{252} This failure requirement surely means that mandatory arbitration is outside of MAP, because in order to get to mandatory arbitration, one process, MAP, failed.

Second, unlike MAP, the Contracting States are bound by the outcome of arbitration.\textsuperscript{253} This is completely different from MAP, the arbitration procedure arrives at the final, binding dispute resolution and neither Contracting State can elect out of the decision.

Third, unlike MAP, the two Contracting States do not control the outcome. Under the U.S. and OECD model contained in the 2008 update annex, each competent authority selects one arbitrator, and then those two arbitrators select a neutral third arbitrator.\textsuperscript{254} The competent authorities do not control the outcome from that point forward. Both Contracting authorities must present their case to the arbitration panel.\textsuperscript{255} Unlike MAP, where the two competent authorities negotiate, under mandatory arbitration, there are no

\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Id. However, if both competent authorities arrived at a resolution to the dispute, it is very unlikely that one of the Contracting States would walk away from the outcome.
\textsuperscript{248} OECD Model Tax Convention, supra note 13, art. 25(5), note 13; U.S.-German Tax Treaty, supra note 73, art 25(5)-(6).
\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} Id.
\textsuperscript{253} Id: see also EU Tax Convention, supra note 89. (The taxpayer is not bound in the OECD or US version, but in the EU, the taxpayer is bound by the outcome.)
\textsuperscript{254} U.S.-German Tax Treaty, supra note 73, art. 25(5), Protocol to the 1989 Treaty (2006) as Amended by the Exchange of Notes signed on 17, August 2006, art. 25(5), comment 22(e); OECD Model Tax Convention, supra note 13, annex to the 2008 Protocol.
\textsuperscript{255} Id.
negotiations, merely a presentation of one’s case to the panel. Thus, this is nothing like MAP but more like a true arbitration or court case.

Last, the procedures in both the OECD and to an extent the U.S. model are similar to a court proceeding. Both sides, and in the case of the OECD, the taxpayer, now present the applicable law, facts and potential resolution to the arbitration panel. Both Contracting States get to present the information in a light favorable to their position, just like a court of law. Why then is mandatory arbitration part of MAP, when there is no mutual agreement, and the results are binding. The answer may be that the proponents of mandatory arbitration sought to keep the proceedings secret, much like MAP.

B. Confidentiality and Mandatory Arbitration

Since mandatory arbitration really does not relate to MAP because of the fact is it binding, is not controlled by the Contracting Parties and is not negotiated, the next issue is why are the proceedings secret. The issue of secrecy is one, which appears to be pro-business, pro-government and anti-public policy. Within this section, the article will explore why secrecy is pro-business and pro-government as well as give numerous reasons why secrecy is against public policy and places limits on the development of international tax treaty body of law.

1. Pro-Business Aspect

First, the secrecy provisions of mandatory arbitration are pro-business. No one argues that MAP should not be confidential since the governments are negotiating a settlement, however, mandatory arbitration does not include any negotiations. There are multiple examples of businesses seeking secrecy when dealing with governmental agencies or with other governments. Businesses have benefited from secrecy in the settlement process, through keeping negative exposure to a minimum and not exposing potentially dangerous products, secrecy in governmental processes, specifically the development of broadband statistics by the FCC, and last, how country bank secrecy laws can benefit both businesses and taxpayers. In the tax area, businesses benefit because they may be able to settle for an amount less than the true tax due, or governments may settle for less simply to close the case. This leaves the taxpaying public in the dark.

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256 U.S.-German Tax Treaty, supra note 73, art. 25(5)-(6), Protocol to the 1989 Treaty (2006) as Amended by the Exchange of Notes signed on 17, August 2006, art. 25(5)-(6), comments.
257 Id.
259 Id.
260 See Bureau of Nat’l Affairs, Inc. v. Comm’r, 24 F. Supp. 2d 90, 93 (D.D.C. 1998) in which the IRS lost against BNA for the disclosure of information related to Advanced Pricing Agreements. Shortly after the case was won, multinational business aggressively lobbied Congress is reverse this ruling. Congress passed §6103(b)(2)(C), which effective overturned the court’s decision and now APAs are confidential.
263 Carrick Mollenkamp, Laura Saunders and Evan Perez, USB to Give 4,450 Names to U.S., Tax-Evasion Pact May Disclose 10,000 Clients; Swiss Government Selling Stake, Wall St. J., Aug. 20, 2009. showing how businesses, including certain taxpayers, benefited from the bank secrecy laws of Switzerland.
A second pro-business aspect of the current mandatory arbitration proceedings is the issue that taxpayers can use the system to bypass the domestic court system. Unlike the Contracting Parties, the taxpayer is not bound by the decision of the arbitration panel. Thus, if the taxpayer does not like the arbitration panel decision, the business can seek redress in domestic courts.

From a pro-business standpoint, the current arbitration provisions are a win-win for the business taxpayer. First, the business gets relief from double taxation. Second, the entire proceedings are confidential. Last, if the business/taxpayer does not like the outcome, they can simply opt out and seek domestic resolution.

2. Pro-Government Aspects

Although the government has an interest in the proceedings, the most at stake is the potential for lost revenue. Unlike MAP, which negotiates a settlement, mandatory arbitration requires the government to forward legal principals and facts to substantiate their position for a resolution. Governments seek confidentiality in the mandatory arbitration cases because of a perception issue.

First, governments seek confidentiality because the governments may not want their positions being released to the public. Since a majority of the cases will likely involve transfer pricing, i.e. allocation cases, the government may not want the public to know they treat taxpayers with similar facts and issues differently. In addition, the governments may not want to be bound or allow the taxpayers to give any precedence to a position taken in a specific arbitration.

The second reason for not wanting public disclosure deals with later settlement if the taxpayer does not accept the outcome of the arbitration panel. The argument here is two-fold. First, the government may not want the public to know that they potentially settled a strong case for less than the appropriate amount because of internal negotiations with the taxpayer. Second, the government may not want the court to know its position before trial. This gives the government the chance to reformulate its position. However, the courts should have access to such information once the case is presented.

3. Public Policy Aspect

One aspect of arbitration is whether the actual arbitration proceedings are public or private. It is an important hurdle in deciding the confidentiality of the provisions. Once this aspect is overcome, then the other public policy ramifications of an open system come into full light; such as, benefits to other taxpayers and future arbitration panels as well as the courts regarding government positions and potential solutions, the neutrality of the system, safeguarding against bribery and corruption and last to allow the general public to hold their governments accountable for actions taken in arbitration.

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264 Nick Baker, *U.S.-German Tax Treaty Deserves Senate Passage*, Heartland Perspectives, December 12, 2007 (noting a letter sent from Sen. Feingold (D-CA.), Sen. Dorgan (D-ND) and Sen. Levin (D-MI) to then U.S. Treasury Secretary John Snowe opposing and questioning whether mandatory arbitration is merely a secret tax court and a way for companies to get around the domestic court system).

265 *U.S.-German Tax Treaty, supra* note 73, art. 25(5), Protocol to the 1989 Treaty (2006) as Amended by the Exchange of Notes signed on 17, August 2006, art. 25(5), comment 22(a)-(q); OECD Model Tax Convention, *supra* note 13, art. 25, comments and annex to the 2008 Protocol.

266 Id.

267 See generally, *supra* text accompanying notes 151-165. The IRS settled for 3.2 billion when the initial request was for over $8.0 billion. If this type of issue made it to arbitration and the public saw the government’s case against Glaxo was strong, there is a potential of public outrage at settling for less than half of the true amount owed.
a. Public or Private Arbitration

One of the overriding issues in dealing with arbitration is whether ordinary arbitration is public or private. Black’s Law Dictionary defines arbitration as “[a] method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.” 270 Many argue mandatory arbitration falls within the realm of private arbitration, meaning the proceedings and issues are confidential. 271

Some of the issues in deciding whether arbitration should be public, i.e. not confidential, or private are:

1) Whether the issue presented is of public interest 272

2) Affect on society 273

3) “Transparency would assist other[s] . . . in understanding the issues involved and would permit more widespread and effective participation in the system” 274

4) Whether transparency would increase confidence in the system 275

The U.S. and E.U. applied these standards in the World Trade Organization (WTO) treaty and these same issues present themselves in tax treaties. The public has an interest in the proceedings, one to keep their governments accountable and two to assist in future tax planning. The arbitration decision affects society, i.e. one nation may not collect the appropriate taxes, etc. In addition, other taxpayers would benefit from the increased transparency. Last, a transparent system leads to confidence in the system because academics, practitioners and the pubic could review the proceedings for fairness and application of the rule of law. Mandatory arbitration in tax treaty disputes should require transparency because of these reasons.

b. Precedence of Arbitration Dispute Resolution

Although the OECD, US and EU mandatory arbitration conventions specifically state that the outcomes have no precedence value, analysis of the arbitration decision is still useful to the general public and other businesses. One of the largest issues in transfer pricing today is in the area of E-Commerce. 276 Since E-Commerce is a growing area of concern for governments, specifically in the area of transfer pricing and

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272 See generally, International Council for Commercial Arbitration, Yearbook Commercial Arbitration Volume XXIX v (2004 ed.) (emphasizing that since arbitral institutions have increasingly publicized awards through print and online access, the International Council for Commercial Arbitration (“ICCA”) has begun publishing awards in its Yearbook that are usually unavailable in print or via the Internet). The first volume in the Yearbook series was printed in 1976.
274 Id.; See also, Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency, TN/DS/W/13 (22 Aug. 2002); Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement, TN/DS/W/1 (Mar. 13, 2002). This conclusion is particularly true in the context of the WTO dispute settlement process because Congress must approve the implementation of any WTO decision requiring a change in U.S. law or practice. See Uruguay Round Agreements Act, 19 U.S.C. § 3538.
275 Id.
permanent establishment, any arbitration proceedings would offer potential guidelines for profit allocations.  

There is almost universal agreement that many courts do not have the knowledge, experience or time to deal with transfer pricing disputes. Because courts are unprepared for dealing with these cases, arbitration panels can become useful to the general public, as well as, courts and other arbitration panels in deciding these very complex issues. Arbitration panels are likely to have greater experience because each Contracting Party, in a U.S. style arbitration, gets to select one arbitrator, and then those arbitrators select a third arbitrator. Since the Contracting Parties are selecting the first two, the countries are more likely going to select individuals knowledgeable in the area of the disputed issue. In addition, the OECD comments to art. 25 related to mandatory arbitration notes the importance of the use of experts in deciding these complex issues. Thus, the outcome from an arbitration panel would have some expertise behind its decision.

Since the arbitration panel likely has greater knowledge and experience in the selected dispute area, the outcome and analysis could assist others by giving some guidelines related to the issue in question. This public information, although not precedence, could begin the process of creating a body of information available to agencies, such as the OECD, academics and practitioners, who could analyze and begin to offer additional suggestions in dealing with international tax issues. The information would also offer insight and guidance for future arbitration panels and courts deciding similar issues.

c. Neutrality

Another aspect of transparency is to allow both Contracting States and the taxpayer to be assured that the outcome was from a neutral arbitration panel. One of the issues in secret arbitration is the taxpayer does not know the arbitrators, their histories or experience. This unknown could lead to an arbitrator being biased or having ulterior motives in deciding an outcome. Transparency would allow the Contracting State and taxpayer to review the arbitrators and decide whether there was potential for bias or a conflict of interest on behalf of one of the arbitrators. In either case, if there was bias or a conflict of interest, the taxpayer could potentially contest the outcome or seek domestic relief.

d. Protection from Corruption

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277 Id.
278 Id.; See also EU Tax Convention, supra note 73.
279 U.S.-German Tax Treaty, supra note 73, art. 25(5), Protocol to the 1989 Treaty (2006) as Amended by the Exchange of Notes signed on 17, August 2006, art. 25(5), comment 22(e); OECD Model Tax Convention, supra note 13, annex to the 2008 Protocol.
280 OECD Model Tax Convention, supra note 13, art. 25, comment 87.
281 See also Technical Explanation to the Protocol Signed at Berlin on June 1, 2006 Amending the Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes Signed on 29th August 1989, U.S. Department of Treasury, 1 June 2006 at art. XIII.
282 In the Arabian American Oil Company (ARAMCO) Arbitration case, the arbitration panel held for ARAMCO and then the neutral third arbitrator went to work for ARAMCO. Saudi Arabia questioned whether the arbitration panel was really neutral when the chief arbitrator, the “neutral” arbitrator, went to work for ARAMCO right after the arbitration panel finished its work. Saudi Arabia v. Arabian American Oil Company, 27 Int’l L. Rep. 117, 179 (ad hoc arbitration Aug. 23, 1958); see also Charles N. Brower and Jeremy K. Sharpe, International Arbitration and the Islamic World: The Third Phase, American Journal of International Law, Vol. 97, No. 3 (Jul., 2003), pp. 643-656.
Because the arbitration panel’s deliberations are secret, neither the Contracting States nor the taxpayer will even know why one particular resolution was selected over the other. This unknown factor leaves open the possibility of corruption in the deliberation process, from bribery to coercion.

Many of current tax treaties are between members of the U.S., E.U. and other industrialized countries; however, there are still number treaties between less developed countries where corruption is still part of government. Mandatory arbitration is in its infancy, with the new amended OECD Model Treaty, the E.U. Transfer-Pricing Arbitration Convention and the U.S.’s limited use, but once the U.N. adopts the OECD position, the number of mandatory arbitration provisions in tax treaties is likely to increase. With this increase, comes an increase in the likelihood of corruption. Without transparency, the public nor the taxpayer will know about potential corrupt outcomes, thus unable to hold their governments responsible.

e. Holding Government’s Accountable

The last area where secrecy leads to potential issues is holding one’s government to some type of accountability in dealing with other countries or taxpayers. If a Contracting States acts on its own self-interest against the will or benefit of its own citizens within an arbitration proceeding, the secrecy provisions of the current mandatory arbitration provisions would hide this issue. The citizenry of a country should have the right to decide whether a position taken by their government is correct and if they disagree, take steps necessary to notify the government of their dissatisfaction with the position taken.

4. What Information Is Available

Based upon the public policy issues, the arbitration panel should fully disclosure the Contracting Parties participation, the taxpayer participation if applicable, proposed resolutions, minutes of the arbitration panels deliberations and the final resolution to the general public. This position does not advocate releasing any negotiations that occurred during MAP, nor the trade secrets or other aspects of a company’s competitive advantage, unless such competitive advantage was merely from tax savings. The arbitration panel should release:

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285 Id.
286 Within the third world, the mandatory arbitration process might allow a more powerful trading partner to bribe or coerce a smaller country’s representative into voting for their proposed resolution to the tax dispute. See Agreement Between the Government of Canada and the Government of the Federal Republic of Nigeria for the Avoidance of Double Taxation and the Preservation of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, Aug. 4, 1992, 1999 WTD 248-31 (as an example of a developed/developing country tax treaty); Nigeria: Corruption and Misuse Rob Nigerians of Rights: Rivers State Local Governments Squander Oil Revenues Instead of Funding Health, Education, Human Rights News, Jan. 31, 2007, (available at http://www.hrw.org/english/docs/2007/01/28/nigeri15204.htm)(last viewed January 2010) (for the proposition that corruption still exists and in mandatory arbitration corruption could go unnoticed because of secrecy).
288 The solutions available to the citizenry vary by country, but some examples would be voting out the current government, seeking legislation to avoid the same mistake, or seek a re-visitation of the dispute at hand.
1) The taxpayer involved, unless the release of such information would cause immediate and irreparable harm. However, the taxpayer should have to present evidence to the arbitration panel to prove just cause similar to an unnamed defendant or plaintiff in a court case.290

2) The facts and applicable law the arbitration panel used in its decision, as well as the two proposed resolutions presented by the Contracting Authorities and the taxpayer if applicable.291 However, this does not mean trade secrets, copyrights, customer lists, etc., similar to information redacted from a private letter ruling.292

3) The minutes of the arbitration panel deliberations and any oral testimony or depositions taken by the panel, with any information related to one and two above redacted.293

4) The final arbitration resolution.294

The above information would allow the Contracting Parties, the taxpayer and the general public to understand the proceedings and how the arbitration panel reached its final resolution. In the alternative, information provided could be akin to the Private Letter Ruling process, where information is redacted; such as, names of the taxpayers, trade secrets, marketing intangibles, etc.

5. Benefits of Publication

Beyond the immediate concerns of public policy, the benefits of releasing the information to governments, academics, practitioners and other involved in treaty dispute resolution would be an increase in the materials dealing with international dispute resolution. Governments would now understand if the changes to tax treaties really accomplished its goals, to first, increase the pressure on competent authorities to reach a negotiated settlement through MAP and second, decrease the incidents of double taxation. In addition, taxpayers could use the information in planning their international transactions, thus lowering overall tax treaty disputes. Last, the information at one point could be the basis for beginning to put in place some international law dealing with transfer pricing and other tax treaty disputes, to the benefit of international commerce.

VI. Taxpayer Involvement in Arbitration Proceedings

One of the major differences between the OECD and U.S. arbitration provisions is whether the taxpayer can be involved in the arbitration process. This is a key philosophical difference between the two and the question becomes, since the taxpayer is the ultimate responsible party, i.e. the one paying the taxes, shouldn’t they also be allowed to participate in the proceedings. Again, since the EU and UN follow the OECD Model, any discussion regarding their position will be included under the OECD section.

A. OECD, EU and UN Taxpayer Involvement in Arbitration

The OECD in its report, Improving the Resolution for Tax Treaty Disputes, wrote into the sample mutual agreement of arbitration a specific section dealing with the taxpayer’s input in the arbitration process, which is now included in the annex of the OECD Model Treaty amendments dated July 18, 2008.295

290 See Methodist University Association v. Wynne & Jaffe, 599 F.2d 707, 712-713 (5th Cir. 1979) (Holding that only plaintiffs with special circumstances, such as matters of sensitive and highly personal nature, can proceed under a fictitious name).

291 U.S. German Tax Treaty. supra note 73, art. 25.

292 See I.R.C. §6110(c) for list of deleted items, however, unlike a private letter ruling, since mandatory arbitration is similar to a court case, the arbitration panel should identify the taxpayer involved.


294 Id.

295 OECD Model Tax Convention, supra note 13, annex to the 2008 Protocol, para. 11.
The persona who made the request for arbitration may, either directly or through his representatives, present his position to the arbitrators in writing to the same extent that he can do so during the mutual agreement procedures. In addition, with the permission of the arbitrators, the person may present his position orally during the arbitration proceedings.\textsuperscript{296}

The arbitrators in this case will be able to see the position of the taxpayer.\textsuperscript{297} The importance of the inclusion of the taxpayer is two-fold. First, the taxpayer will have a chance to present their legal theory regarding the correct tax treatment, along with facts and other items, which the governments might not include in their presentations to the arbitration panel.\textsuperscript{298} Second, the taxpayer is able to obtain a glimpse into the arbitration proceedings. Based upon Article 26 of the OECD Model Tax Convention, the taxpayer might not be able to access any of the information presented to the arbitration panel other than the final decision.\textsuperscript{299} Thus, the taxpayer would have no idea what information the governments presented to the arbitration panel. Based upon these two concerns, taxpayer participation is a positive in relation to the OECD proposed mandatory arbitration position.

B. U.S. Position

The U.S. position, in particular how it interacts with the current binding arbitration provisions, appears to be one of strict confidentiality and no taxpayer involvement. The current U.S.-German Tax Treaty takes an opposite position from the OECD proposed mandatory arbitration provisions.\textsuperscript{300} The U.S. position is the taxpayer has no place in the arbitration process because the true reason for the arbitration is for the two governments to present data and law defending their position and for the arbitration panel to decide among the two choices.\textsuperscript{301} The U.S., through Treasury, still would like to consult with the taxpayer, but the taxpayer will have no direct opportunity to present their position to the arbitration panel, nor will the taxpayer know the position the U.S. is taking in the arbitration.\textsuperscript{302}

There are both negatives and positives to the U.S. position regarding taxpayer involvement in the arbitration process. Many practitioner and academics have written articles criticizing the U.S. position for a number of reasons:

1) The taxpayer is a party to the dispute, thus the taxpayer should be able to represent their position to the arbitration board.\textsuperscript{303}

2) The taxpayer may present facts to the panel not presented in the governments’ representations in front of the tribunal.\textsuperscript{304}

3) The arbitration panel should be able to hear the taxpayer’s position on the applicable legal theory and treaty interpretation.\textsuperscript{305}

\textsuperscript{296} Id.
\textsuperscript{297} Id.
\textsuperscript{298} James P. Fuller & Barton W.S. Bassett, \textit{The United States Introduces Mandatory Arbitration for Resolving Certain Treaty Disputes}, Int’l Tax J, Jan/Feb 2008, 15, 16. Though the article was on the U.S. and its position on taxpayer involvement, the thought process also applies to the OECD position.
\textsuperscript{300} U.S.-German Tax Treaty, supra note 73, art. 25-26.
\textsuperscript{301} Id. at art. 25(5)-(6); see also David R. Tillinghast, Esq., \textit{Taxpayer Participation in Mandatory Arbitration Under the New German and Canadian Protocols and Belgian Treaty}, Tax Man. Int’l J., 581, 581-82, Nov. 9, 2007.
\textsuperscript{304} Id.
4) The arbitration panel should be able to seek additional facts directly from the taxpayer, not through the two governments.\textsuperscript{306}

On the side of the U.S., various commentators have defended the exclusion of the taxpayer for a number of reasons.

1) The taxpayer is not a true participant in the dispute. The dispute is between the two governments and interpretation of the tax treaty, thus they are the only participants.\textsuperscript{307}

2) Taxpayer participation might allow the taxpayer a back door “to obtain a secret and quasi-judicial hearing of their tax dispute outside the control of the tax departments of the taxing state.”\textsuperscript{308}

3) Potential for the taxpayer to bypass the participant countries court system using a secret forum, i.e. the arbitration panel.\textsuperscript{309}

The OECD and the US have distinctly different approaches to taxpayer involvement. However, a review of the pro-exclusion issues related to the proceedings, most deal with the confidentiality of the proceedings, i.e. the taxpayer is seeking to use the arbitration panel as a short-run around the standard domestic court system or tax review. In a confidential and secret proceeding, there is a potential for taxpayer involvement to potential by-pass the domestic authorities; however, if these proceedings were open to the public, the concerns would abate. Since the arbitration proceedings, or at least a transcript or dissemination of the two government positions and the deliberations of the panel, the public and domestic governments could assess whether the taxpayer was in fact using the proceedings to bypass local jurisdiction.

VII. Potential Resolution to Tax Treaty Disputes; Mandatory Arbitration and Release of Secret Information

The free flow of goods, capital, services and people is one of the laudable goals of the EU.\textsuperscript{310} However, the EU is finding out that in order to accomplish these goals, there must also be a free flow of information.\textsuperscript{311} The OECD, EU, US and UN have all placed limits on the availability of information regarding tax dispute resolution under MAP. However, since MAP is based upon secrecy, this limitation is also justified; however, justification ends when the treaty dispute moves from MAP to mandatory arbitration. Only the OECD, EU and US have mandatory arbitration provisions currently, but all follow the same course of secrecy regarding the deliberations and analysis related to the resolution. This section will explore potential avenues in changing the position from one of secrecy to one of openness.

A. The OECD

Since the OECD is a non-governmental agency, there is no direct legal or legislative way to gain the necessary changes to make mandatory arbitration more transparent. However, based upon member discussions; such as, from Hal Hicks\textsuperscript{312} on June 6, 2006 at the International Taxation Conference.\textsuperscript{313} “A

\textsuperscript{305} Id.
\textsuperscript{306} Id.
\textsuperscript{307} Michael J. McIntyre, Commentary: Comments on the OECD Proposal for Secret and Mandatory Arbitration of International Tax Disputes, 7 Fla. Tax. Rev. 622, 639 (2006). Although the arguments are against the taxpayer inclusion aspects of the OECD proposed mandatory arbitration, the same analysis is applicable as positives for the U.S. based taxpayer exclusion from the proceedings.
\textsuperscript{308} Id.
\textsuperscript{309} Id.
\textsuperscript{312} International Tax Counsel for the U.S. Treasury from 2004 through February 6, 2007.
component of the OECD treaty program and a matter of critical and fundamental importance to the U.S.
is the OECD’s leadership in the area of exchange of information and transparency.” Within this
case, it would appear the U.S. wants the OECD to expand transparency.

A second avenue available is to petition the OECD and its members to change its position on mandatory
arbitration and information release more in-line with its position on other international business model
treaties. In addition, the OECD should move mandatory arbitration from Article 25 and place it within its
own Article along with information disclosure requirements based upon the public policy issues stated in
Section V. The OECD in its 2005 report, Transparency and Third Party Participation in Investor-State
Dispute Settlement Procedures, advocates this articles exact position in the foreword stating “... that
additional transparency, in particular in relation to the publication of arbitral awards, subject to necessary
safeguards for the protection of confidential business and governmental information, is desirable to
enhance the effectiveness and public acceptance of international investment arbitration, as well as
contributing to the further development of a public body of jurisprudence.” This standard should also
apply to mandatory arbitration in the tax treaty dispute scenario.

The OECD needs to see the public policy benefits of releasing information from mandatory arbitration
proceedings. In addition, within its own E-Commerce report, it notes the up coming issues regarding
defining E-Commerce transactions as well as the transfer pricing issues associated with internet
commerce and income allocation. A body of jurisprudence related to E-Commerce would benefit not
only tax treaty members but also the entire E-Commerce community.

B. The EU

The EU with its Arbitration Convention takes a position very similar to the OECD and US regarding
confidentiality. The European Economic Community (EEC) and the EU are based upon the four
freedoms. These freedoms are the basis for EU legislation, including taxation. The European Court
of Justice (ECJ) is in place to guarantee these freedoms to all EU citizens and companies. As part of this
jurisdiction, the ECJ began to hear direct taxation cases in dealing with taxes between different member
states. The importance of this move is the ECJ proceedings are public and deal with unfair taxation,
which violate one of the four freedoms.

In order to gain access to the mandatory arbitration deliberations, the taxpayer may have to seek a ruling
through the ECJ. This would allow the dissemination of the proceedings as well as the government
positions in dealing with the transfer pricing issue. Although this is an indirect method to seek
information, the EU does not have any direct method outside of a similar argument presented in the
OECD section.

C. The US

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313 Hal Hicks, International Tax Counsel for the U.S. Treasury, Lunch Speech at the International Taxation
Conference (June 6, 2006).
314 Id.
315 Transparency, supra note 142 at 1.
318 Id.
319 ECJ, C-270-83, 28 January 1986 (Avoir fiscal).
The U.S. potentially has the highest level of confidentiality, in not allowing the taxpayer to participate in the mandatory arbitration proceedings through the legislative confidentiality provisions of §6103 and §6105. However, the U.S. also has a long history of disclosure. This disclosure even includes items one might consider secret government communications; such as, private letter rulings, technical advise memorandums, general counsel advise, and field service advise prepared by the Chief Counsel’s office. In addition, the U.S. has the Freedom of Information Act (FOIA).

In order to obtain the information sought within this article, a two-fold approach is necessary; the first is a legislative approach, while the second seeks the information through the FOIA. In the area of legislation, within the committee reports dealing with the passage of §6105, the committee was under the impression that competent authority agreements “generally do not contain an explanation of the law or application of law to facts. Instead, such agreements are negotiated arrangements to resolve double taxation issues.” However, under the mandatory arbitration provisions, the arbitration panel will select a proposed solution, which will either interpret a law or apply a law to a set of facts. In either case, the mandatory arbitration provisions appears to be outside the committee’s scope, thus it appears that §6105 might have a weakness or requires adjustment.

The second available method based upon the weakness of §6105, is the availability of I.R.C. §6110 and the FOIA. I.R.C. §6110 is the information disclosure code section contained within the Internal Revenue Code. The IRS is required to supply the public materials related to any “written determination”; such as, a “ruling, determination letter, advice memorandum or Chief Counsel Advise.” Written determination is not specifically defined within the Internal Revenue Code, but the courts have defined the term as establishing the liability of the taxpayer. It would appear that a proposed resolution, prepared by the U.S. competent authority and presented in a mandatory arbitration proceeding, would classify as a written determination. The IRS, through the proposed resolution, is presenting the law and facts to substantiate the liability of the taxpayer. Thus, it would appear the public could access the mandatory arbitration proposed resolution at the very least.

The second available method is through the FOIA. The FOIA requires the government to disclose any information that is not specifically exempted within the statute or else where in the legislative code. However, under 5 U.S.C.A. §552(b)(1)-(9) there are certain exemptions in which the FOIA does not apply, and the government does not need to disclose the information. The two exemptions which could stymie the public are section 1, an Executive order related to foreign policy and section 4 dealing with trade secrets and financial information. However, in both cases, if I.R.C. §6105 is viewed as incompatible with mandatory arbitration, any governmental argument would require the government to

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322 Taxation with Representation Fund v. IRS, 646 F2d 666 (DC Cir. 1981).
323 Tax Analyst v. IRS, 117 F3d 607 (DC Cir. 1997).
326 U.S.-German Tax Treaty, supra note 73, art. 25(5)-(6).
327 I.R.C. §6110.
331 Id.
332 Id.
prove that one of the exceptions apply, not the public. Therefore, Congress should, based upon the committee report related to I.R.C. §6105, public policy and the underpinnings of the FOIA, allow disclosure of the arbitration proceedings.

VIII. Conclusion

The history of tax treaties and specifically the mutual agreement procedures worked well for many years. However, as international trade grows, and complexity of such trade grows, the potential for double taxation increases. The move towards mandatory arbitration as a last resort after MAP fails is a step in the area of relieving taxpayers from the potential of double taxation; however, there are still problems of secrecy in these proceedings.

Mandatory arbitration is not part of MAP as it is binding and does allow the two competent authorities MAP secrecy is understandable as two governments try to negotiate a settlement, which likely involves some compromise on both sides. However, mandatory arbitration does not require such secrecy. First, the governments are not negotiating, but seeking a resolution in their favor. Second, the taxpayer, not the governments initiate mandatory arbitration. Third, secrecy is against the goal of mandatory arbitration because secrecy leaves open the potential for fraud, governmental bias against the country’s best interest and the opportunity for the information and analysis of the arbitration board to benefit future third parties.

The OECD is normally the leader in treaty issues. The organization has in past reports related to business issues, i.e. state-investor disputes, espoused the reasons for openness as a benefit to international trade and fairness to all parties. However, in the tax area, the opposite is true, and secrecy seems to be the preferred method, although this goes against the very arguments made for openness in state-investor disputes.

In the U.S., Congress established the confidentiality protection of I.R.C. §6105 on the false premise that MAP does not include analysis of law and fact. Although this may hold true for MAP, it does not hold true for mandatory arbitration. Congress should amend I.R.C. §6105 to exempt mandatory arbitration from confidentiality and specifically require disclosure, or allow the public to present an argument to a court under I.R.C. §6110 or the FOIA.

Last, the EU, in its Arbitration Convention should require disclosure. The benefits of all three of these parties requiring disclosure are numerous, but some major ones include the ability for taxpayers to plan transactions based upon previous arbitrations, allow the public to see the fairness of the decisions and last allow the governments to analyze whether mandatory arbitration is really succeeding. Academics and practitioners could assist governments in analyzing the data, as well as, offering additional support and improvements to benefit international trade.

The disclosure of mandatory arbitration provisions is a win-win scenario, the governments benefit from the lower number of disputes are a result of prior arbitration, taxpayer’s benefit because of the fairness of the proceedings and the removal of double taxation and the public benefits from being able to keep their governments accountable and assurances that all taxpayers are treated equally.