1-2016

Implementation of Arbitration Decisions in Domestic Law

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Source Publication:

Lang, Michael et al. International Arbitration in Tax Matters. Amsterdam, The Netherlands: IBFD Publications, 2015.

Part Five: Implementation and Publication of Arbitration Decisions

Chapter 14: Implementation of Arbitration Decisions in Domestic Law

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14.1. Arbitration and "applicable" domestic law

Arbitration, even if it seems simply providing for the possibility of arbitration, is increasingly attracting attention as a possible means to discipline the resolution of otherwise potentially intractable international tax controversies concerning the allocation of taxing rights under tax treaties.[2] While perceived, though not without reservation, to be a potential welcome *addition* to a typical mutual agreement procedure (MAP) patterned on article 25 ("the MAP article") of the OECD Model Tax Convention on Income and Capital[3] ("the OECD Model") in the form of article 25(5), other provisions of article 25, notably its "interpretive" and "application,"[4] and "legislative",[5] aspects and contemplated recourse to a "joint commission"[6] reflect a long-standing awareness, even possibly a latent expectation, that objective interveners and alternative or supplementary means or other extensions of the MAP beyond the typical limits of a "specific case"[7] may help the MAP to achieve its full potential.[8] In fact, one author, in a

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1. I am grateful for helpful comments and observations from my partner and colleague Janice McCart concerning a draft of this paper, although of course any errors or oversights are my responsibility. This chapter was prepared with the other chapters in mind and accordingly is deliberately limited to the subject it addresses. It is meant to align without significant overlap with and complement, and therefore takes into account, the other chapters in this book in so far as they bear on the subject of this chapter. It is also meant to be a survey of issues as a contribution to the larger discussion captured in this book, in short a taxonomic inquiry, rather than a comprehensive research inquiry, and should be read subject to this qualification. References are not meant to be comprehensive, but have been selected to accord with aspects of this paper on which they specifically relay or from which the paper draws support, or as examples of other commentaries in this area (without meaning to suggest that these references are exhaustive) that may be of interest in relation to the comments in this chapter. I would like to acknowledge the contributions of the other authors in this book and my discussions with them, from which my thinking and this chapter no doubt have benefited.
2. *See* OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD 2013) ("BEPS") and OECD, *Public Discussion Draft BEPS Action 14: Make Dispute Resolution More Effective* (OECD 18 Dec. 2014) (the "Action 14 Discussion Draft"), notably sec. 4 "Ensuring that Cases Are Resolved Once They Are in the Mutual Agreement Procedure" subsec. T. It is noted that on the eve of the publication of this book, the OECD published on October 5, 2015 the final BEPS reports on the BEPS Actions. For the purposes of this Chapter, the final reports are substantially consistent with the draft reports to which this Chapter refers; accordingly this Chapter's references to BEPS reports have not, for the most part, been updated or restated. This qualification applies generally to this Chapter. There are recurring references in professional discussions about arbitration; e.g. *see* K.A. Parillo, *Competent Authorities Debate Sovereignty Argument Against Arbitration* , Worldwide Tax Daily (WTD), pp. 239-6 (12 Dec. 2014) and 76 Tax Notes Int'l, p. 996 (15 Dec. 2014); M. Herzfeld, *News Analysis: A Way Forward on Dispute Resolution?* , WTD (2 Mar. 2015) 40-1; and M. van Herksen, *Can International Tax Dispute Resolution Be Resuscitated? An Analysis of Comments to the OECD on BEPS Action 14* , Tax Management Transfer Pricing Report (TMTPR): News Archive 2015 Latest Developments in Practice (http://taxandaccounting.bna.com). And, judging by public comments made to the OECD concerning the Action 14 Discussion Draft, there is a perceived need for arbitration (*see* http://www.oecd.org/tax/public-comments-action-14-make-dispute-resolution-mechanisms-more-effective.htm) and in this regard, highlighting the perceived importance of arbitration to resolve substantive matters that arise because of developments arising from other Actions, e.g. *see* http://www.oecd.org/tax/transfer-pricing/public-comments-actions-8-9-10-chapter-1-tp-guidelines-risk-recharacterisation-special-measures.htm . *See also* K.A. Parillo & A. Gupta, *Business Sector Decries OECD's Lack of Support for Arbitration* , WTD (26 Jan. 2015) 16-2 and 77 Tax Notes Int'l, p. 411 (2 Feb. 2015); M. Herzfeld, *News Analysis: BEPS – Phase II* , WTD 2-1 (5 Jan. 2015) and 77 Tax Notes Int'l, p. 14 (5 Jan. 2015); K.A. Parillo, *OECD Will Add "Muscle" to Next BEPS Dispute Resolution Draft* , WTD 30-1 (13 Feb. 2015), 77 Tax Notes Int'l, p. 481 (16 Feb. 2015); and D.W. Gregory, *U.S. Exploring Multilateral Instrument To Expand Arbitration Network, Official Says* , 23 TMTPR 1443 (News Archive, 19 Mar. 2015). The international debate concerning arbitration continues in the BEPS context; to indicate the interest and intensity of this debate, recent, but by no means comprehensive, references include e.g. K.A. Bell & L Davison, *OECD Twenty-Five Countries Seeking Consensus on Mandatory Arbitration, OECD Official Says* , TMTPR (News Archive, 23 Mar. 2015); J. Kollmann et al., *Arbitration in International Tax Matters* , WTD (31 Mar. 2015), 77 Tax Notes Int'l, p. 1189 (30 Mar. 2015); D.D. Stewart, *ABA Meeting: Mandatory Arbitration To Be in Next U.S. Model Treaty* , WTD (11 May 2015); and K.A. Parillo, *OECD Report Will Include Optional Treaty Arbitration Commitment* , 78 Tax Notes Int'l, p. 1002 (15 June 2015). Notably, the OECD's Forum on Tax Administration has established a specific MAP Forum "to meet regularly to deliberate on general matters affecting all participants' programs for conducting mutual agreement procedures"; the strategic plan document can be found at: http://www.oecd.org/site/ctpfta/map-strategic-plan.pdf .
3. OECD, *Model Convention on Income and Capital* (July 2014), together with its Commentary. This work continues an inquiry begun and reported on earlier, in 2007, by the OECD; *see infra* n. 15 . Regarding art. 25 generally, as a frequent direct or implied reference in this paper, *see* J.S. Wilkie, *Article 25: Mutual Agreement Procedure – Global Tax Treaty Commentaries* , Global Tax Treaty Commentaries IBFD, and in particular especially useful references concerning art. 25 in note 7 of that chapter.
4. OECD Model, art. 25(3) and (4).
5. Id.
6. Id., art. 25(4), notably in relation to all aspects of art. 25.
7. Id., art. 25(1), (2) and (4).
8. Art. 25 of the OECD Model is sufficiently similar textually and conceptually to its analogue in art. 25B of the UN *Model Double Tax Convention between Developed and Developing Countries* (United Nations 2011) (the "UN Model") together with its Commentary, as well as the equivalent regime in the *EU Arbitration Convention* that this short note will speak mostly in terms of art. 25 of the OECD Model. Conceptually, for the scope of this discussion, the notion and nature of arbitration as a means to facilitate the resolution of otherwise deadlocked non-tax controversies is also similarly framed in e.g. the Arbitration Rules Mediation Rules of the International Chamber of Commerce (ICC) (International Chamber of Commerce 2011, 2013), the Model Law on International Commercial Conciliation (2002) of the UN Commission on International Trade Law (UNCITRAL); United Nations Commission on International Trade Law, 2004, other regimes to address commercial and investment controversies, and article XXII of the World Trade Organization (WTO) General Agreement on Trade in Services (GATS) (WTO: https://www.wto.org/English/docs_e/legal_e/26-gats_01_e.htm , in Part V, particularly arts. XXII and XXIII) notably to

thoughtful and wide-ranging analysis of arbitration in the tax context, has essentially presumed its usefulness but, in a fashion to which these comments are sensitive, has referred to "mandatory arbitration" as "a solution in search of a problem".[9]

These comments express a point of view as a contribution to the discussions framed by this book. They proceed on the assumption, for the most part, that an otherwise legally effective arbitration decision can be reached and that what remains is to give it fair effect in relation to states' assessments of taxpayers under their laws. No assumptions are made about the specific features or peculiarities of particular states' laws. Ultimately, of course these matter.

14.1.1. What is the question?

It is axiomatic that an arbitration decision is only as useful as it is effective. "Effective" can mean many things. It can in fact mean capable of achieving an objective. It can mean being sound conceptually or suitably targeted. It can also mean enforceable in a legal sense, i.e. indicating that its outcome has legal effect and can be compelled. This paper is oriented to enforceability; accordingly, it considers whether the law, a state's domestic law, necessarily presents or should be allowed to present barriers to the "effective", with the other connotations, use of arbitration to enrich, supplement and still before with ultimately propel MAP settlements. The OECD recognizes this necessary compatibility (or possible friction) in paragraph 65 of the Commentary on article 25, concerning article 25(5). The effectiveness and influence of an arbitration decision (and presumably also more generally a MAP settlement for which the decision would be critical) will be impaired if it has not been reached within the boundaries of and is incapable of being given effect (implemented) according to a state's applicable domestic law. Ultimately, not even "guidance" on international tax matters can be fully effective, even if as such it would be recognized under a state's law to have some probative value, unless enlivened by state's laws.[10]

There seems to be generalized concern, which percolates in the discussions in various chapters of this book, that arbitration may, or at least in some respects could, collide with, or possibly not fully accord with, competing legal considerations associated with "domestic" or "local" – in international law terms "municipal" – law. This concern may be traced to the implication, even fact, that the course of tax disputes conceivably would be affected significantly by the intervention of third parties, persons who are not members or instrumentalities of the tax authorities and states whose interests are at stake (apart from their selection by them), even if they are invested with official status by being selected by those states to act as arbitrators. Hence, it may be thought that the adoption of arbitration as a device to assist the resolution of disagreements about the allocation of taxing rights respecting particular taxpayers and their income may require unique authority, e.g. through the adaptation of the MAP article of a tax treaty to accommodate arbitration by engrafting article 25(5) or its equivalent, the adoption of some sort of unique or specific process in the nature of an international tax tribunal or by making changes to domestic law to allow for arbitration in this context.

Are these concerns necessarily justified or compelling? Possibly not. Is there another way to think about the intersection of MAP-based arbitration and a state's domestic law that, on a principled basis, can avoid, rationalize or possibly if necessary mitigate this *legal* tension and illuminate a constructive track forward unimpeded and undeterred by *legal* barriers? Possibly yes.

But answering these questions requires looking beyond, or "outside the box" of, typical perceptions of the MAP and tax treaties generally by focusing on their rudiments in an international legal context that anticipates and has long conceded the need to harmonize, as objectively as possible, the application of disparate tax systems together – to allow each "its due" relative to the "source" of income and a taxpayer's engagement with and connections in a source state, while mitigating trade distortions induced by unwarranted taxation, including the ulterior means by which the incidence of that taxation is shifted through business input and output prices.

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determine the priority of the GATS and tax treaties to resolve disputes with a tax element. In the last regard, *see* Part III of the Commentary on art. 25 of the OECD Model, paras. 88-94 and Wilkie, *supra* n. 3, sec. 1.2.5.1.; *see also* the decision of the arbitrators in the *Yukos* case concerning the application of the *Energy Charter Treaty* (2080 UNTS 95) in which the meaning and significance of taxation was considered as an important factor in determining whether certain tax-related carve-outs affecting the jurisdiction of the arbitrators applied: PCA Case AA 227, *In the matter of an arbitration before a tribunal constituted in accordance with article 26 of the Energy Charter Treaty and the 1976 UNCITRAL arbitration rules, between Yukos Universal Limited (Isle of Man and the Russian Federation), Final Award* , 18 July 2014. The author acknowledges the benefit gained from reading M. Lennard's contribution to this volume (*see* ch. 19) as well as an earlier draft of Mr Lennard's comments in a paper being published by Fordham University in the *Fordham University Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2014).

9. E. Farah, *Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem* , 9 Fla. Tax Rev. 8, 703 at pp. 709 and 710 (2009). As an example of recent commentary, *see also* K.A. Parillo, *Competent Authorities Debate Sovereignty Argument against Arbitration* , WTD (12 Dec. 2014). For various commentaries concerning arbitration (which are offered as examples of commentaries in this area consulted during the preparation of this paper but which compilation does not purport to be exhaustive or comprehensive) *see infra* n. 19 .

10. E.g. *see* two Supreme Court of Canada cases addressing the probative value of the OECD Model in interpreting tax treaties but also possible limitations on the significance of OECD guidance (the OECD Transfer Pricing Guidelines) if that guidance is not adequately reflected in applicable law: respectively, CA: SCC, *Crown Forest Industries Ltd. v. Canada* [1995] 2 SCR 802 and CA: SCC, *Canada v. GlaxoSmithKline Inc* . 2012 SCC 52, [2012] 3 SCR 3. For related general commentary, *see* A. Christians, *Hard Law & Soft Law in International Taxation* , University of Wisconsin Law School Legal Studies Research Paper Series Paper No. 1049 (May 2007) (http://ssrn.com/abstract=988782); 25 Wisc. J. Int'l L. 325 (2007); *Tax Laws: Global Perspectives* (A. Usha ed., Icfai Univ. Press 2008).

We tend to take for granted the architectural elegance of tax treaties. Through the OECD and UN Models, they are familiar – they are fixtures of tax policy and planning. They reflect principled responses to the reality, before their time, of uncoordinated tax systems of various kinds as well as the exigencies and features of trade between states. But they are also, for the same reasons, very practical – they offer solutions that can only ever "work" if they reflect the reality of how commercial and other relations actually take place and accept the inevitable other reality that treaty partner states have to be prepared to work with as well as within them in the service of the over-arching treaty objectives. In other words, they are not self-executing even though their distributive articles have this appearance. To a certain extent they are both organic and dynamic.[11]

As with any other relationships, the parties have to be prepared to talk to each other, to listen to each other and, often like it or not, accommodate each other. And sometimes, again like any other relationship, they may need a little help to identify and understand each other's interests, positions and reasonable scope for mutual accommodation. That's where arbitration, in the contemporary context, comes in. Our effort could be directed to explaining all the reasons why it cannot or should not be effective, why, for example, there are "sovereign" legal considerations that must be overcome, if they must, or perhaps mask other less visible non-legal concerns. Another tack is to work within the possibilities offered by existing law to expand the reach of foundational tools foreshadowed in the earliest days of tax treaties, and which intuitively "make sense", to extend the utility of treaties and the MAP in their otherwise familiar setting. These comments take this tack, to offer observations and arguments that might facilitate the more ready adoption of arbitration in a MAP context by confronting a variety of factors more or less attributable to domestic law that could be perceived as drawbacks, and by offering a comparison to analogues in domestic and other legal contexts that reinforce this possible adoption and adaptation of arbitration.

There is as yet little practical experience with arbitration as a tool to resolve tax disputes and few tax treaties that specifically envisage its use. In fact, as comments by other contributors to this book also reflect, it may be the case that the paucity of actual arbitration decisions is an indication that arbitration is effective and, where available, is working. In other words, the possibility of arbitral proceedings if a MAP is otherwise inconclusive may be enough in itself to encourage a sharpening of positions sufficient to result in the resolution of tax controversies that otherwise would be destined for an actual arbitration, without requiring recourse to that procedure. This is difficult to confirm, however, because arbitration decisions, even their mere existence, typically are not "public", a situation giving rise to other questions separately considered in other chapters of this book.

Despite foreseeable reservations, developing international guidance on treaty-related dispute resolution seems prepared to acknowledge the contribution that arbitration could make to accelerate the principled resolution of tax disputes so as to ensure, as much as possible, "taxation in accordance with" a tax treaty. An important point of departure for these comments is the possibility that article 25, even without the specific addition of a provision to deal with ("mandatory" and "binding") arbitration, could and should be seen as accommodating this extension or aspect of article 25 taking account of public international law considerations and consequently under the states' domestic laws. There is reason to think, as these comments offer as a point of view, that there may be a much greater ad hoc opportunity than is commonly thought for states willing to engage this or like processes within or as directed by the scheme of tax treaties.

14.1.2. Reconsidering the accepted order – A process

This chapter is and is meant to be understood as part of a larger inquiry framed by this book. It is meant to spark discussion and contribute to the progress of a continuing debate about the feasibility of arbitration assisting in the resolution of treaty-based tax disputes.

These comments survey issues regarding the legal context in which an arbitration decision would be implemented. However, they take an unconventional and possibly provocative course. The use of arbitration in international tax matters is perhaps novel, but that alone is not enough to conclude that legal considerations of various kinds are or should be allowed to impair its effective use, particularly where "natural" jurisdictional associations of income and taxpayers' connections to taxing states are harder to discern and may not even exist or matter very much.

This paper raises the possibility that, unconstrained by the traditional bounds within which arbitration issues and, more generally, the MAP commonly seem to be considered, there may be fewer institutional or legal barriers to this use of arbitration to deal with international tax uncertainty or disagreement, at least in so far as they would be attributed to domestic legal considerations.

14.1.3. Why does it matter?

The practical significance of developing a ready and reliable means to eliminate inevitable tax friction resulting from "globalization" without derogating from the legitimate exercise by states of their tax jurisdiction and interfering with their fiscal and financial well-being cannot be underestimated, as reactions to the OECD's ongoing work concerning Action 14 of its and the G20's BEPS

11. E.g. *see* J.F. Avery Jones, *Problems of Categorizing Income and Gains for Tax Treaty Purposes* , 5 British Tax Rev. 382 (2001); for commentary that reaches back to the earliest stages of the development of "modern" tax treaties, *see* E.R.A. Seligman, *Double Taxation and International Fiscal Cooperation* (a series of lectures delivered at the Académie de Droit International de La Haye in 1927, subsequently published in 1928) (The MacMillan Company 1928).

Project illustrate.[12] There are fewer and fewer reliable or possibly even relevant "bright lines" in the law to establish the "source" of income in relation to particular states or the requisite taxpayer connections that "naturally" justify and sustain states' taxing rights.[13] There is continuing resistance to adopting formulaic ways to apportion income, considered by many to be antithetical to transfer pricing's "arm's length standard". And yet taxpayers crave predictability and certainty about the sustainability of their tax planning and reporting, a validation of sorts of the correctness of their positions and some sort of assurance that whether motivated by their own interests in relation to each other or the relationships of taxpayers to them, states will not challenge their reported tax positions.

These are formidable challenges. An ideal response would conceivably be that existing and familiar tools of dispute resolution can accommodate a variety of approaches, including arbitration, to assist the goal treaties serve – a harmonious allocation among states of taxing rights without inducing trade distortions or imperilling the pubic financial viability of those states. Is this a possible response, even if not incontrovertible?

This paper suggests that the answer is, and indeed needs to be, "yes", even if there are bumps along the way requiring attention, as long as there is a will among states, apart from legal considerations, to follow this path. It further suggests that domestic legal considerations should and need not frustrate the effective implementation of MAP determinations to which arbitration contributes.

14.1.4. "Barriers versus barriers"

Along the way, the perspective given voice in these comments confronts shibboleths about the MAP and in turn challenges the MAP to achieve its full and possibly latent potential in circumstances where tax disputes of the sort that normally would concern the MAP – competing national tax claims based on cross border business activities – may become much less exceptional in the light of global business practices and greater deference in tax law and guidance to the economic qualities of income, albeit still within the limits of legal systems. Accordingly, this paper asks questions more than it presumes to offer conclusions. It tries to frame an inquiry about whether, necessarily, support for positions critical of arbitration on a legal footing is too easily taken for granted as a basis for concluding that arbitration in international tax matters is a more difficult objective to attain than might in fact or law be the case.

Possibly, the law is not a barrier to the effective adoption of arbitration as a tool, maybe an increasingly necessary tool as a matter of ordinary course in tax administration, to parse countries' taxing rights according to the expectations set by tax treaties. Equally, there is a possibility, albeit of greater though less evident concern, that there is a willingness of states to risk possibly unfavourable outcomes informed by objective scrutiny conducted by disinterested observers. That of course is a different kind of objection to arbitration; its legal basis needs to be tested. In evaluating the possible utility of arbitration, it is important to identify and characterize pertinent issues for what they are; objections and hurdles may still remain, but in order to make progress it is important to determine accurately the essential nature, legal or otherwise, of those objections and hurdles and to address them accordingly without conflating them.

Recognizing that "applicable domestic law" is not amorphous among inherent disciplines or universal among states, these comments focus primarily on principles and concepts distilled or that may be inferred from applicable public law, namely tax treaties that are patterned on the OECD Model, taking account of key articles of the Vienna Convention on the Law of Treaties (VCLT).[14] It would be convenient and desirable if directly, or by implication, existing legal arrangements already agreed by many states could be considered the adoptive host of arbitration as a dispute resolution tool, without the need for material reforms of states' laws or a new international tax institution or order. This approach might well even be superior to establishing a unique, self-standing international tax forum to determine questions that are essentially the product of bespoke quasi-contractual, quasi-diplomatic "bargains" framed by tax treaties (even allowing for common models) between states acting in relation to each other (through their taxpayers) as independent "economic actors". Arguments are raised to illustrate how this possibility may exist. Even though this way of looking at the MAP is not indisputable, it may offer directional insight into how to "make arbitration work" without being deterred by concerns about its legal viability or procedural effect.

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12. OECD, *supra* n. 2 .
13. E.g. *see* the emphasis placed on detecting observable contributions to how income is earned in the OECD's continuing work on Actions 8, 9 and 10 as well as the revision of chap. VI of the OECD Transfer Pricing Guidelines. Most recently, this is evident in the OECD's *Public Discussion Draft BEPS Actions 8, 9 and 10: Discussion Draft on Revisions to Chapter I of the Transfer Pricing Guidelines (Including Risk, Recharacterization, and Special Measures* (19 Dec. 2014), notably D.2, and *OECD/G20 Base Erosion and Profit Shifting Project Guidance on Transfer Pricing Aspects of Intangibles Action 8: 2014 Deliverable* (2014), notably ch. VI B. The final BEPS reports (as noted, published by the OECD after this chapter was written) are consistent with this and other commentary in this Chapter.
14. *Vienna Convention on the Law of Treaties* (1969), United Nations 2005 (Status, 16 Mar. 2015; *see* https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en); *see also* I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984), notably ch. 4, *The Observance, Application, Amendment and Modification of Treaties* . For an interesting discussion of the relationship between international law and international tax law, *see* R.S. Avi-Yonah, *Essay: International Tax as International Law* , 57 N.Y.U Tax Law Review 483 (2004).

14.2. Arbitration and MAP

The study by the OECD and G20 in the context of BEPS and the recently released Public Discussion Draft and indeed Final Reports for BEPS Action 14: Make Dispute Resolution Mechanisms More Effective, generally reflect the reality that states' legal regimes – tax and otherwise – cannot be presumed to be universal or effect the same national policy objectives; neither can they necessarily be expected to accommodate arbitration as a feature of the MAP.[15] Another way of saying this is that states' tax, private and public law regimes may be different or at least cannot be assumed to be the same even if similarly directed. Implicitly, this subsumes awareness that states may have good reasons, each in its exclusive view, for preserving these differences or certain of them. It should not be surprising that "tax competition" is real, likely enduring and not intrinsically or necessarily "bad", even if new approaches to inter-nation fiscal equity and comity are thought to be necessary or at least desirable.[16] This highlights another factor affecting the implementation of arbitration decisions possibly relevant to a number of BEPS initiatives. Independent of prevailing legal considerations, the willingness of states to do what the law may otherwise permit to be done, including if the MAP is infused with arbitration, is important and possibly the essential determinant of measures to improve or refine international tax collaboration.

Rather than try to mix and match particular legal regimes, this note takes substantial account of states' obligations under article 25 of the OECD Model-based MAP article (which for the present purpose should be understood to include version B of its UN analogue) as a fair reflection that their commitments to each other are otherwise "legal" however they are to be measured. There is perhaps more to this way of thinking than first appears, relevant not only to "implementation" but foundationally to explain how and why article 25 of the OECD and UN Models, and for that matter the European Union Arbitration Convention,[17] all similar in important respects from the present perspective, bridge various issues[18] associated with the implementation of arbitration decisions without derogating from states' sovereignty or taxpayers' rights.

Arbitration is examined here primarily as an aspect of the MAP, despite fundamental similarities among tax and non-tax versions of arbitration.[19] It is a separate, and possibly more difficult, question whether institutionally a separate body, like the World Trade Organization (WTO) or the European Court of Justice (ECJ), should be constituted with parallel or even supervening authority

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15. *See* OECD, *supra* n. 2 , Action 14 Discussion Draft, where certain potential limitations and restrictions are acknowledged in paras. 42 and 43; the need to address the relationship between "MAP arbitration and domestic legal remedies" is specifically noted, though without elaboration, in Option 25, para 46. This Chapter also takes the Final Report on Action 14 into account. *See also* earlier work by the OECD on tax treaty dispute resolution, OECD, *Improving the Resolution of Tax Treaty Disputes* (Report adopted by the Committee on Fiscal Affairs on 30 January 2007) and OECD, *Manual on Effective Mutual Agreement Procedures* (MEMAP) (February 2007 version), notably Best Practices No. 2 (Robust use of Article 25(3) power to relieve double taxation), No. 12 (Countries eliminate or minimize "exceptions" to MAP), No. 13 (Taxpayer presentations to competent authorities), No. 18 (Recommendation for MAP cases beyond two years), ch. 4 (MAP and Domestic Law), sec. 6.3 (Other Types of MAP Proceedings) and, more generally, the sense of the MEMAP that the MAP should result in timely settlements by competent authorities, a point that is relevant to other discussion in this paper about the significance of "endeavour" in relation to what competent authorities may be obliged or obligated to do to ensure "taxation in accordance with" a convention where some kind of measure of specific assistance by interveners, i.e. typically the competent authorities, is required.
16. *See* J.S. Wilkie, *An International Fiscal Revolution in the Making? Some Musings on Tax Policy and Its Economic Foundations* , University of Calgary School of Public Policy Blog (26 Sept. 2013); *see* http://policyschool.ucalgary.ca/?q=content/international-fiscal-revolution-making-some-musings-tax-policy-and-its-economic-foundations , and *Reflections on "BEPS": Tax, Law and "Law and Economics"* , University of Calgary School of Public Policy (July 31, 2014); *see* http://policyschool.ucalgary.ca/?q=content/reflections-%E2%80%9Cbeps%E2%80%9D-tax-law-and-%E2%80%9Claw-and-economics%E2%80%9D .
17. European Commission, 41990A0436, 90/436/EEC: *Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises – Final Act – Joint Declarations – Unilateral Declarations* , OJ L225, 20/008/1990, pp. 0010-0024. *See* Wilkie, *supra* n. 3 , sec. 1.2.5.2.
18. The editors of this book helpfully suggested various issues that could be considered in a discussion of "implementation". Their outline is attached as Schedule A, to indicate the kinds of issues arising to be considered in this context (*see* sec. 14.13.).
19. *See* references mentioned, *supra* nn. 3 and 8 (including references in Wilkie at note 7). *See also* various commentaries pertaining to the use of arbitration to resolve tax controversies in addition to Farah, *supra* n. 9 : C. Burnett, *International Tax Arbitration* , The University of Sydney, Sydney Law School, Legal Studies Research paper No. 08/31, Apr. 2008; J-P. Chetcuti, *Tax Dispute Resolution: Arbitration in International Tax Dispute Resolution* , Inter-Lawyer Law Firs Directories, Lex Scripta, 2001 (http://www.ilnter-lawyer.com/lex-e-scripta/articles/tax-arbityraton.htm); N.Q. Cruz, *International Tax Arbitration and the Sovereignty Objection: The South American Perspective* , Special Reports, Tax Notes Int'l (11 Aug. 2008) 533; M.S. Bertolini, *Mandatory Arbitration Provisions within the Modern Tax Treaty Structure: Policy Implications of Confidentiality and the Right of the Public to Arbitration Outcomes* (http://works.bepress.com/michelle_bertolini/1); M.S. Bertolini & P.Q. Weaver, *Mandatory Arbitration within Tax Treaties: A Need for a Coherent International Standard* (http://ssrn.com/abstract=2003897); C.R. Irish, *Private and Public Dispute Resolution in International Taxation* , 4(2) Contemp. Asia Arb. J. 121 (http://ssrn.com/abstract+19664525); M.J. McIntyre, *Comments on the OECD Proposal for Secret and Mandatory Arbitration of International Tax Disputes* , Wayne State University Law School Legal Studies Research Paper Series No. 07-05, Apr. 2006; T. Jain, *Mutual Agreement Procedure under DTAAS: Time To Embrace Arbitration?* , 354 Income Tax Reports, 69 (2013); L. Grandfond, *Arbitration in the International Tax Area: Can Arbitrators Run with the Hare and Hunt with the Hounds?* (2012, prepared as a student at Paris I Panthéon Sorbonne University in the course of the Master 2 Opérations et Fiscalité des Sociétés (OFIS). Also, for a thoughtful discussion on how sovereignty issues may affect international considerations and institutions in a variety of ways, *see* A. Christians, *Sovereignty, Taxation, and Social Contract* , University of Wisconsin Law School Legal Studies Research Paper Series Paper No. 1063 (May 1063) (http://ssrn.com/abstract=1259975) and A. Christians, *Networks, Norms and National Tax Policy* , University of Wisconsin Law School Legal Studies Research Paper Series Paper No. 1078, 9 Wash. U. Global Stud. L. Rev. 1 (2010) (http://openscholarship.wustl.edu/law_globalstudies/vol9/iss1/2). *See also* a compilation of the United States' explanation of arbitration with certain countries in Internal Revenue Service, *Mandatory Treaty Arbitration With Germany, Belgium, Canada and France* (http://www.irs.gov/Businesses/International-Businesses/Mandatory-Tax-Treaty-Arbitraton) (2 Nov. 2014).

to decide tax disputes regardless of or in addition to states' domestic processes. This question is addressed briefly at the end of these comments, although it is not clear that such a profound development would be necessary to facilitate the expeditious resolution of tax controversies using arbitration or a like process.

14.3. The relevant legal environment and the effectiveness of arbitration

A state's pertinent legal environment includes its constitutional, public international, administrative and private law in addition to its domestic tax law. Together, these determine the legitimate application of tax law by establishing not only "subjects", "objects" and "realization events" within the immediate statutory compass of the tax law, but also the necessary means by which intentional governmental actions are imbued with legal authority and, to collateral effect, governmental officials may interpret, apply, administer and enforce the law within its reasonable scope according to discretion reasonably exercised by them.

Said less grandly, an arbitration decision will be ineffective even if it might have some probative value as extrinsic information for resolving uncertain tax treaty provisions as permitted by articles 31 and 32 of the VCLT,[20] if the process by which it is reached lacks suitable legal authority or in any event the laws of the affected states are inadequate to allow its implementation. In as much as the legality and administrative effectiveness of a decision are inextricably linked to its underlying legal authority concerning how and by whom it is made, it is necessary to adopt a perspective on fundamental legal questions relating to arbitration in tax matters.

14.4. Effective implementation

An effective arbitration decision presumably must be made according to a process that is within the law applicable to the affected parties, including the states themselves. Equally, it must reflect an outcome, substantively and procedurally, that the applicable tax and supporting private law of a state contemplates. In other words, the capacity to make and implement an arbitration decision that grounds reliable tax outcomes under states' domestic laws must be part of each state's sovereign law, whether "naturally" or by adoption according to supervening treaty or other public law obligations.

The decision must be given effect according to practices and procedures that are "legal"; if licence is required with respect to interpretation, application or ultimate enforcement, this elasticity must be found within applicable law taking into account supervening obligations as they may be framed and expressed under a tax treaty.

Even if arbitration is "mandatory" and "binding" – understood to refer to the obligations of states *in relation to each* other but not as a constraint that would deny taxpayers their "rights" to challenge a decision that enshrines those interstate obligations – taxpayers may nevertheless need to have a "way out" of having their fortunes determined by a "foreign" (to their legal systems) or other kind of authority or influence. This may be by a direct review or appeal of the arbitration decision or a less direct displacement of that decision in its guise as an element of a larger MAP settlement, at least by exercising applicable domestic law appeal rights concerning the tax adjustments giving rise to issues referred to arbitration.

14.5. A question concerning the limits of article 25 and criticisms of arbitration

Perspectives on arbitration may be changing even though a range of views about its perceived incursions on state sovereignty persist. On close examination, however, is it possible that arbitration is more novel in terms of the way in which it is presently viewed, rather than new in fact as a tool to fully achieve the objectives of inter-nation tax fiscal comity framed by tax treaties and protected by the MAP?

Article 25 of the OECD Model, even without article 25(5), coupled with an approach to the interpretation and application of tax treaties that is fully consistent with the legal principles set out in the VCLT, may already supply the requisite public law authority to permit tax treaty partners to implement effective arbitration decisions within the boundaries of their domestic laws. It may even carry a "soft" obligation to do so if it is by this means that the weight of their obligation to "endeavour" to apply treaties purposively in principle may best be carried. This, it seems, is possible without depriving taxpayers of remedies that still effectively permit them to displace arbitration decisions made as part of a MAP settlement, while nevertheless offering firm, final and binding commitments by states *in their tax relations with each other* that permit each state to effectuate the resolution of tax controversies under its law to result in taxation in accordance with the over-arching objectives of a tax treaty in a way that is reliable for taxpayers.

14.6. Criticisms of arbitration affecting implementation

One of the challenges to arbitration is that a state's sovereignty, notably its entitlement to devise and apply tax policy according to its exclusive decisions, would be compromised by an impermissible delegation of interpretive and legislative

20. E.g. *see* the analysis of the Supreme Court of Canada in the *Crown Forest* case, *supra* n. 10 . The precedential value, if any, of an arbitration decision or even that arbitration was initiated is debatable and may vary among states that nevertheless would adopt arbitration in the case of a MAP. E.g. Annex A to the Fifth Protocol to the *Canada-United States Tax Convention* (*see infra* nn. 33 and 42) which deals with the procedure for conducting arbitration in the "baseball" style, i.e. each state presents a position and the arbitration board chooses between them, as part of a MAP under that Convention, explicitly provides that "the board shall not state a rationale" for its decision and the "determination … shall have no precedential value".

authority to "third parties" who are not legislators or duly appointed government officials. Embedded in this are two potential concerns.[21] First, arbitration by its nature as a legal *process* would trench substantively on national "sovereignty". Second, an arbitration determination would be made by unauthorized persons – "delegates" who, no matter how "expert" or "judicious" in ability, outlook or experience, would not be official exponents of, i.e. appointed and or authorized under applicable law to be the manifestation of, the affected tax systems.

Made according to a vulnerable legal process, the implementation of an arbitration decision directly or indirectly in itself might then be considered to offend the "sovereignty principle" as an impermissible subjugation of law to administrative fiat.

Subsumed within these concerns is the possibility that taxpayers' "rights" – to test a fair and reasonable application of law, not just the tax law but the law generally – would be adversely affected by an unjustifiable assertion of official "force". This would be compounded by not allowing for a suitable appeal and potential displacement of the arbitration "decision", except possibly by way of a "last resort" administrative law challenge to "prohibit" tax authorities from acting beyond their reasonable authority.

14.7. Is arbitration novel but not new? Learning about MAP by remembering its beginning

14.7.1. Article 25

Action 14 of the OECD/G20 Action Plan on Base Erosion and Profit Shifting anticipates the salutary possibilities of arbitration to bring order to the tax world without a "world tax order". Given the scope of the Action Plan's aspirations, orderly dispute resolution may take on primary significance. Interestingly, however, the Action Plan implicitly seems to question whether arbitration can be adequately hosted by MAP articles drawn without article 25(5) of the OECD Model. This is despite the "interpretive", "application" and "legislative" aspects in article 25(3) and (4), which may give rise to a separate MAP proceeding as well as infuse a more familiar "specific case" MAP framed by article 25(1) and (2) incorporating additional possibilities to accommodate more expansive dispute resolution (sometimes inaccurately referred to as "alternate") than is typically thought.[22]

These "other" provisions of article 25, respectively, retain vestigial references to competent authorities "consult[ing] together for the elimination of double taxation in cases not provided for in the Convention" and "communicating with each other … through a *joint commission* consisting of themselves *or their representatives* , for the purpose of reaching an agreement in the sense of *the preceding paragraphs* " (emphasis added). There are no restrictions on how such communications would take place or how a "joint commission" would be struck, operate and be populated. In so far as objection would be taken to third parties acting as "arbitrators," the specific acknowledgement that the members of a "joint commission" do not necessarily have to be the competent authorities themselves but may be their "representatives," a term that is also used without qualification or reservation, is at least interesting directionally for the present discussion.

A version of arbitration or mediation was conceived originally as a principal feature of MAP. The potential need was recognized from the outset of "modern" tax treaties. The original antecedents to article 25 were articles 13 and 14 of the first model tax treaties, the 1927 and 1928 League of Nations Models.[23]

Article 13, though much more general than article 25(1), (2) and (3), may fairly be said to encompass what are now considered to be "specific case", "interpretive", "application" and "legislative" MAPs. In other words, just as its modern, more particular successors, article 13 recognized that the overarching essence of a MAP or MAP-like proceeding is to give effect to a tax treaty "bargain" or "scheme" so as to result in taxation consistent with both its distributive "rules" and the inter-nation fiscal comity that, more broadly, exist to enable and sustain it.

Article 14 is more interesting for the present discussion. Article 14 provided:

> 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

21. E.g. *see* references mentioned *supra* in n. 19 .
22. *See supra* nn. 4 -7.
23. *See* Wilkie, *supra* n. 3 , sec. 1.2.1.

> accepted by both, and they shall be free, after resort to such procedure or in lieu thereof, to have recourse to any arbitration or judicial procedure which they may select …[24]

What is new, seemingly is old. Article 14 did not carry through to the League's Mexico (1943) and London (1946) Models, but the notion of referring unresolved questions to a "commission" re-emerged in the first OECD Model in 1963 and has continued in successive models.[25]

Broadly, this admittedly truncated telescoping of treaty history is meant to illustrate that from the earliest stages of contemporary tax treaty development, the possible benefit from, and even need for, recourse to objective advice or direction of one kind or another (even arbitration by name, not only by description) was recognized, including in relation to how advisory bodies might be constituted.[26]It also shows a primary concern with the abiding objective of tax treaties and particularly the MAP to bridge any impediments – foreseen, foreseeable or otherwise – to an orderly sharing and allocation of taxing rights between states. It further shows an awareness, like the self-standing nature of article 25, that distributive rules of tax treaties may not be self-executing; judgments may need to be made and treaty states may need to be guided to fully appreciate the soundness (or not) of their positions in relation to their treaty commitments. The focus originally was less with technique and process than outcome within the tenets of applicable law and, as the original history of tax treaties shows with respect for taxpayers, through a procedure that was "intended not to replace but to supplement the procedures of tax appeal established by the tax legislation of the contracting States".[27]

It appears that article 25, even without article 25(5), conceivably could host virtually any "alternative" supplementary or other means of "issue" resolution that would culminate in the determination of MAP cases, states willing. It is not important for these comments that article 25(3) and (4) may not be commonly seen this way or that the OECD may not recognize the intrinsic richness and far-sightedness of article 25 even without a tailored or specific arbitration procedure among its existing tools. It is noted that comments in the recently released OECD Public Discussion Draft BEPS Action 14: Make Resolution Mechanisms More Effective (referred to earlier in section 14.2.) in section 2(12) and (F) (insufficient use of article 25(3)), (18) and Option 6, reflect a realization that those existing tools may have latent untapped potential with, it is posited, extant legal effect. What matters, it is suggested, is that a state that makes treaty commitments unreservedly in the form of article 25 can fairly be taken to have concluded, as a legal matter, that those commitments are compatible with *its* constitutional and private law and also with public international law principles applicable to it, effectively merging the article and other treaty commitments with the rest of a state's pertinent law, including as it bears on the "implementation" of any treaty-based outcome.

It is acknowledged that some countries have historically balked at including aspects of article 25(3) purporting to allow the competent authorities to exercise what might amount to legislative authority; states have also hedged on including the notion of "commission" for reasons that presumably are closely associated with concerns about "sovereignty".[28]However, few "observations" or "reservations" have actually been expressed about article 25 despite vestiges of these concerns expressed elsewhere.[29]Moreover, it is suggested that the OECD and UN Models are sufficiently similar to permit a fair inference that what is contemplated in those articles, without any particular qualifications or limitations, not only is expected more or less universally to be "legal" according to treaty states' laws, but also may be given effect through implementation by states that have concluded treaties reflective of these Models taking account of customary international law. It seems not an unfair inference that at least directionally in the context of article 25, arbitration can be subsumed by "consultation", "communication" and "commission" whether via "representatives", i.e. representatives of the competent authorities, or otherwise; the colour and effect of article 25 would then seem to illuminate arbitration as a viable feature not only of MAP as such but also of treaty states' laws.

14.7.2. Vienna Convention on the Law of Treaties

States that have ratified or acceded to the VCLT, or that otherwise acknowledge it to be customary pubic international law, have legal obligations transcending any other conflicting (domestic) law. These legal obligations are important to consider in evaluating whether a state's adoption of arbitration to resolve tax controversies under tax treaties and the "implementation" of arbitration decisions are "legal", i.e. are compatible with a state's other relevant law.

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24. Id., sec. 1.2.1.1.1.
25. Id., sec. 1.2.2.1.
26. E.g. the selection of an OECD representative to fill an unfilled arbitration panel chair as contemplated for purposes of art. XXVI(6) and (7) and Annex A of the *Canada-United States Income Tax Convention* compares favourably though not perfectly with appointments that were envisaged to be made by the Council of the League of Nations.
27. Commentary on Article XVI/XVII of the League of Nations Mexico Model (1943)/London Model (1946); *see* Wilkie, *supra* n. 3 , sec. 1.2.1.2.
28. *See* Wilkie, id., in particular commentaries mentioned in note 7 may be helpful in reflecting on this point.
29. *See* Commentary to art. 25, OECD Model; however, despite the absence of many observations and reservations on the article, note 1 to art. 25(5) acknowledges that for various reasons, including the interaction of arbitration and states' "national law, policy or administrative considerations", there could be more widespread resistance to the adoption of arbitration in MAP notably for "sovereignty" reasons; *see* art. 14 Discussion Draft, para. 42, *supra* n. 6 . *See generally* , Wilkie, *supra* n. 3 , particularly sec. 4.2.3. concerning "delegation".

We are mostly familiar with articles 31 and 32 of the VCLT, which require treaties to be interpreted in good faith according to their terms while permitting recourse to various materials in order to inform the interpretation of otherwise unclear treaty terms. Commonly, the good faith principle that informs the application of any treaty is attributed only to article 31, which states the "General rule of interpretation" of treaties. The good faith reference in article 31 applies to "interpretation" that accords with giving treaty terms their contextual meaning "in light of … [a treaty's] object and purpose."

Less attention tends to be paid to articles 26 and 27, which affect the fundamental compatibility of treaty obligations and treaty states' laws. They directly affect a state's obligations to implement treaty commitments without allowing domestic law to impede or intercede. As such, these articles contribute to the other grounds found in or underlying article 25 itself for considering arbitration to be an effective device to resolve *and implement* the resolution of tax treaty controversies in a manner that may be presumed to reconcile with a state's applicable domestic law, including public law principles and treaty obligations.

Article 26 expresses the "*pacta sunt servanda*" principle: "Every treaty in force is *binding* upon the parties to it and *must be performed* by them *in good faith*" (emphasis added).

If a treaty exists and has been given legal force, it applies regardless of other limitations in the law. It is binding on a party. Parties generally should not be considered to purport to undertake commitments they cannot perform or implement under their laws. Its terms and provisions are not to be applied selectively on an ad hoc basis. Furthermore, the reference here to "good faith" is not merely to "interpretation" according to a treaty's "object and purpose" as article 31 provides; it is to overall *performance*. In other words, a treaty partner must find a way to give effect to – i.e. implement – its commitment.

It is worth a brief digression at this point to reflect on another aspect of article 25 (MAP) as comprising an "obligation" to which articles 26 and 27 of the VCLT would apply.

A treaty partner's only obligation is to "endeavour" to reach a MAP resolution, even if ultimately unsuccessful.[30] With respect to all commentaries that offer a more tepid or narrow view including the OECD's own, it is suggested that contextually "endeavour" means quite a bit more than "best efforts", according to the scheme of tax treaties; it imports an expectation that states will and should usually resolve their differences through the MAP. In many respects, article 25 – MAP – is the essence of a tax treaty. It applies to a treaty in its entirety, independently of any other treaty provisions. It is not a distributive rule; it is not confined to any particular provisions of a treaty. Rather, its objective is to ensure taxation in accordance with the treaty, possibly even in spite of other features of the treaty itself, to achieve the overarching objectives of international fiscal comity and harmony that are the foundational objectives served by an instrument bridging two tax, and implicitly more general legal, regimes that otherwise have no other reason to be compatible or to accommodate each other.

Article 25 accordingly enshrines a very serious – perhaps the most serious – inter-national obligation within a tax treaty. While failure to agree is possible, it should be an aberration: "endeavour" is not an excuse for failure nor, it is suggested, is it a justification for treating the practical and customary contextual meaning of that word as other than equivalent to "obliged absent compelling reasons to the contrary"; in other words, comporting with at least a "soft" obligation.[31] It should also not be a covert or ulterior means by which treaty partners would simply deny a MAP proceeding or settlement gratuitously or, within the scheme of a treaty, selfishly or selectively, or an ad hoc basis, i.e. as a means to assert control that effectively would extend its sovereign entitlement to make law serving particular social and economic choices without the intervention of persons not fully invested in those choices. Given the inevitability, indeed the premise, that treaty states' laws and practices and how they are expressed will differ, those differences and factual inferences drawn in relation to them cannot be a justification for failing to bridge those differences. With differences of this nature being presumed, giving effect to a treaty bargain would already be imperilled and at risk of being episodic. The "implementation" of the law, with which MAP is mostly concerned, should not be the means by which states selectively "repair" imperfect law or alter the tax policy choices to which the law gives effect.

While article 26 is not infrequently mentioned when applying the VCLT to the interpretation of a tax treaty, references to article 27 are much less common. If article 26 sets a principal grounding the actual or presumed compatibility of treaty obligations and domestic law (including the basis and means of implementing arbitration decisions), article 27 cuts to the quick of this issue. Article 27 provides that domestic law must not get in the way of the *performance* of treaty obligations: "A party [a state] may not invoke the provisions of its internal [the entire spectrum of its domestic law including constitutional law, administrative law and public international law that it has adopted or otherwise applies conventionally or customarily to it] as justification for its failure to perform a treaty." There are no qualifications (even allowing for the reference in article 26 to article 46 of the VCLT relating to the

30. *See* Wilkie, id. and, generally, the OECD Commentary to art. 25 of the OECD Model. *See also* the Action 14 Discussion Draft, *supra* n. 6, sec. 1(A)(10) and in that connection the proposed, for discussion, para. 5.1 that would be added to the Commentary to art. 25, which, as this paper posits in relation to the existing art. 25 and its Commentary, already frames an expectation that treaty-based controversies should be resolved, "obliging" if not "obligating" competent authorities to achieve this outcome.

31. States are encouraged in the MEMAP to adopt 25 "best practices" for the MAP to resolve tax disputes in an enlightened and flexible manner; these "best practices" and their overall direction and force accord with this view of "endeavor" as an "obligation", i.e. an expectation, in the context of a treaty, that treaty-affected tax controversies should and will be resolved. *See* Wilkie, *supra* n. 3, sec. 2.7.3. and particularly sec. 2.7.3.2.

capacity ("competence") to conclude treaties), no licence to make ad hoc determinations, no latitude (despite what some of the Commentary to article 25 says) not to apply treaties purposively as they have been agreed, somehow to give effect from time to time to selective policy or other administrative inclinations despite the essence of treaty states' obligations to avoid discordance in the alignment of their tax laws, essentially by whatever means within the law that may be possible.

Together, articles 26 and 27 of the VCLT reflect an expectation of the necessary compatibility and effectiveness of treaty obligations with treaty states' law, provided that a treaty is in force. This, together with the interpretation of article 25 offered earlier, would seem to alleviate pressure on whether arbitration as a manifestation of MAP, with or without article 25(5), is compatible with and should be effective (able to be implemented) under states' relevant domestic law, or even whether a particular domestic law recognition of these principles is required or would in any event add clarity.[32]

14.7.3. Summing up so far: The legality of MAP-based arbitration decisions and their implementation

In principle, article 25 of the OECD Model and articles 26 and 27 of the VCLT offer considerable justification for being satisfied, in principle, that an arbitration decision made as a complement or supplement to or part of the MAP or a like treaty-based dispute resolution mechanism, and its implementation, should be expected not to collide with a state's constitutional, public international, administrative or private law – not because in theory they could not, but because through the legal significance and force of treaty commitments they should not.

In this light, the next questions concern more specifically how an arbitration decision would be given practical effect while protecting taxpayers' (and possibly states') interests through an appeal or similar review process.

14.8. Giving practical effect to an arbitration decision

14.8.1. The "national legal order": MAP with arbitration is still MAP

The main premise of the following comments is that arbitration is in some manner an extension of and even latent in MAP under a tax treaty or some other international agreement that has the legal significance and effect of a treaty.

It may be debated whether arbitration (i) complements or supplements the MAP, (ii) is limited to addressing unresolved "issues" within a MAP case rather than determining the case itself or (iii) in some sense is a proceeding that takes place apart from a typical MAP but parallel to it. However, given the objective of tax treaties generally, and of article 25 and its UN and EU cousins in particular, to rationalize competing but presumptively different tax and legal systems fairly and predictably so as to avoid a variety of tax and non-tax distortions in states and their economic citizens' dealings, the utility of such a debate seems muted. What seems to matter more is whether, by adopting a "glass half full" outlook, arbitration supplies the equivalent of a human joint replacement when, for one reason or another, the cartilage between the basic legal bones is insufficient to prevent troublesome friction (that seems to get worse with age!).

Seen in that light, it is suggested that a MAP outcome achieved with the benefit of arbitration is still a MAP outcome. If a MAP determination unaided by arbitration can and would be (and would be required to be) implemented according to the further requirements, expectations and possibly compromises of or inherent in states' tax and other law and practice, then there would not seem to be any compelling reason why arbitration, whether by resolving a problematic "issue" as contemplated by article 25(5) or the "case" itself as, for example, the applicable provisions of the Canada-United States Tax Convention contemplate,[33] should fundamentally change things. The admittedly liberal telescoping of article 25(3) and (4) earlier is thought-provoking.[34] The evolution of article 25 as well as its present terms assist in explaining this point of view.

The competent authorities are expected to interact and solve treaty problems even if not formally obligated to do so. There are no specific limitations on how they can or should interact. As long as states act to further the effective implementation of a treaty to achieve its objectives, i.e. to avoid "taxation not in accordance with the Convention" according to article 25 so as to "perform" their treaty obligations selflessly and in good faith, including by way of "interpretations" that give effect to a treaty's "object and purpose", they seemingly should be on solid legal ground.

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32. E.g. sec. 115.1 of the Income Tax Act (Canada) provides: "Notwithstanding any other provision of this Act, where the Minister and another person have, under a provision contained in a tax convention or agreement with another country that has the force of law in Canada, entered into an agreement with respect to the taxation of the other person, all determinations made in accordance with the terms and conditions of the agreement shall be deemed to be in accordance with this Act." *See also* Wilkie, *supra* n. 3 , sec. 2.4.2.
33. *Canada-United States Tax Convention* (1980), S.C. 1984, c. 20, as amended by S.C. 1995, c. 34, S.C. 1997, c. 38, and S.C. 2007, c. 32; *see* art. XXVI(6) and (7) and 2007 Protocol Annex A (as well as related IRS and Canada Revenue Agency understandings and Canada Revenue Agency operating procedures).
34. Art. 25 effectively offers states the opportunity to consider arbitration as a part of a MAP conducted directly by the competent authorities or via their "representatives" (art. 25(4)), "consulting" (art. 25(3)) with each other, even to address circumstances that might "not be provided for in the Convention" (art. 25(3)) to achieve an outcome faithful to a treaty's reason for being in the first place.

14.8.2. The preparation and presentation of the "case" provides (the) "control"

A criticism of arbitration under the MAP is that it requires competent authorities to possibly abandon or moderate *control* over their positions and their entitlement somehow to *insist* on them, and possibly to accept an outcome that is not only not preferable, but which, other things considered, they would choose to reject. Is this more a theoretical than practical concern, particularly given the nature of the MAP as always binding disparate tax systems and the viewpoint concerning article 25 offered earlier?[35] In any event, arbitration comes at the end of what should be a thorough engagement between the competent authorities in which the relevant law and circumstances should have been thoroughly considered so as to establish the parameters of a disagreement. Does this not frame – in effect control – the parameters of arbitration? Would states and their competent authorities not already have exerted their influence, sensitive to each other's tax and general legal systems, developing and stating their positions?

The OECD's approach to arbitration envisages the competent authorities appointing the arbitrators directly or vicariously through the arbitrators' selection of another arbitrator. In effect, the arbitrators have a role within the context of a MAP that is in the nature of that of, and some of the responsibilities of, the competent authorities even though the arbitrators are delegates.

Ultimately, the competent authorities control the course of arbitration, most clearly if it is "baseball arbitration", but even in so far as it would be reasonable to expect the outcome of an arbitration to reflect the materials and positions of the treaty states submitted by their competent authorities to the arbitrators.[36] These will necessarily comprise not only the competent authorities' views of their own and of their counterparties' positions, but also, underlying the MAP process of which arbitration is a part, the influence and contributions of affected taxpayers concerning the positions put by the competent authorities to each other and the arbitrators. In this connection, the proposition is advanced here – in light of the seriousness of treaty obligations – that whatever the sought-after outcome of each state might be, neither would advance a position known to be fundamentally impossible taking account of each other's law, of which they should in any event be aware.

14.8.3. "Issues" and "cases"

In practice, whether an "issue" or a MAP "case" is resolved through arbitration seems possibly to be a distinction without a difference, despite other points of view. If the only impediment to a MAP outcome is an unresolved "issue", a resolution of the issue determines the case, though possibly the retained authority (control) of the competent authorities is clearer by adopting the OECD's tack (and tact).[37] If arbitrators are not "deciding" a case but effectively contributing objective expertise to break an "issue" roadblock, the connection between an otherwise typical MAP and arbitration which arises only for an incomplete MAP is even more seamless and the inherent compatibility of such an outcome with states' laws clearer.

14.8.4. Arbitration and administrative "notifications" or decisions of tax authorities and court decisions

Focusing on arbitration as a "process" draws attention to whether it has or requires its own "position" in a "national legal order" in relation to a state's administrative and adjudicative processes for dealing with tax assessments and appeals.

This question would be more acute, but possibly answered differently, if arbitration were to be entrusted institutionally to an independent decision-making body with acknowledged legal authority, such as the WTO, or took place "privately" or through another process according to the arbitration or mediation regimes framed, for example, by the ICC or UNCITRAL.

It may be a distraction, however, to overly focus on the process aspect of arbitration, i.e. the participants and how they organize their engagement, rather than the substantive determination arising from successful arbitration. As long as arbitration is and is seen as a tool or device to advance MAP, it seems that an arbitration decision should have the same role and significance as any MAP decision (including any of its elements) regardless of how relatively important arbitration's contribution to the MAP outcome is. In keeping with the role of treaties to relieve excessive taxation (and possibly to avoid gratuitous tax avoidance) by assigning taxing rights to competing state parties but not to create, i.e. "charge" tax liability, a MAP decision must always be implemented by treaty states through their domestic tax assessment regimes. The MAP decision establishes the outcome meant to be framed and enforced by those systems; it feeds into but does not supplant them.[38]

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35. *See* Cruz, *supra* n. 19 , particularly at 538 (column 2) and 540 (column 2). *See also* the OECD Commentary on art. 25, e.g. in relation to arbitration, para. 78.
36. Accordingly, to the extent that arbitration fuels but does not replace a MAP proceeding, it seems reasonable to expect that the same legal and practical conditions apply with respect to the application and enforcement of an arbitration decision in so far as states' own laws are concerned. It may be that confining arbitration to the determination of difficult "issues" rather than the case itself reinforces the residual authority of the competent authorities and accordingly mutes the embedded sovereignty issue or at least reinforces the compatibility of arbitration with applicable states' law. The competent authorities will nevertheless have completed the rest of the case, taking account in any event, given the nature of MAP, of the unavoidable and sometimes seemingly irreconcilable differences in their tax and general legal regimes.
37. *See* Farah, *supra* n. 9 ; OECD Commentary to art. 25, paras. 63-64. *See also* possible limitations on the use of arbitration for "issues" that may be compounded by art. 25(5)'s specific reference to art. 25(1), mentioned in OECD Commentary on art. 25, para. 73.
38. *See supra* n. 32 regarding sec. 115.1 of the Canadian Income Tax Act. *See also supra* n. 37 .

On this basis, an arbitration decision may be seen as being on the same level as any MAP outcome. A MAP determination generally exists independently of any domestic process, although its scope and effectiveness may be affected by parallel domestic administrative and judicial proceedings, in spite of which the MAP may still be undertaken. It is well understood, for efficiency and possibly other reasons, that although not deprived of recourse to domestic remedies and MAP, taxpayers are at the same time effectively required to prioritize their remedies. Specifically, taxpayers wishing to secure the maximum potential benefit from MAP are encouraged to put domestic appeal proceedings in abeyance (assuming they needed to be started to avoid time bars or other possible limitations), to avoid a "prejudgment" of the MAP issues that according to common practice and possibly states' laws might limit the authority or practical ability of states to reach a MAP outcome. While it is debatable whether a MAP proceeding is or should be limited by pre-existing administrative or judicial decisions on the issues otherwise to be considered in a MAP, the common view and that advised by the OECD is that competent authorities are or may be constrained by decisions reached via states' domestic appeal processes.[39]

It is interesting and possibly significant for the present discussion to consider why the commonly held view about the intersection of domestic proceedings and a MAP may be debatable, but the preservation of domestic appeal rights would nevertheless conceivably have important implications for arbitration in relation to a MAP. There are at least two possible reasons. First, the latitude of a MAP, with or without arbitration, may be less constrained than the common view holds. Second, while a desirable arbitration may result in a decision that is "final" and "binding," this finality generally applies only to the states themselves unless the affected taxpayers accept the outcome. MAP determinations with or without the infusion of arbitration should seemingly have equivalent effect.

Fundamentally, the parties to a MAP are not the same parties to a domestic law proceeding and the interests requiring to be considered are also not the same even if they intersect.[40] A domestic appeal engages a taxpayer and *its* tax authority; it is their relative interests that are determined within a particular domestic law context even if the same domestic law of that state, including its constitutional and other public law, are also engaged in a MAP proceeding. The other state's interests would not usually be represented even though its law may influence how the relevant contested domestic law should be applied; generally, a determination under the "foreign" law, proved as a fact in the domestic proceedings, may or could be relevant for decisions under a particular domestic tax law provision such as whether a creditable foreign tax exists. Such a determination is made, however, with the taxpayer's law and its state's interests in mind, not necessarily balanced by those of any other tax regime.

On the other hand, a MAP, just like the tax treaty of which it is a part, engages states as economic actors in relation to each other, each with its own interests to be realized via its taxpayers. This is so even though taxpayers may initiate a MAP and as a practical matter are also directly affected parties and, on the invitation of the competent authorities, may contribute in a supporting way to the advancement by the competent authorities of their position. Taxpayers are not the parties to a treaty. In a manner of speaking, they are manifestations of the states of which they are "tax citizens" or to which they are otherwise connected. In effect, they are the "playing ground" on which states, in relation to their relative "personal" interests, satisfy those relative interests in relation to each other. To use a natural resources law metaphor, a state has a "carried interest" in its taxpayers' circumstances and their financial outcomes, as a state-to-state matter.

A MAP under article 25 is generally understood to be or to be in the nature of a quasi-diplomatic process; it is an encounter between nations without the need for diplomatic formalities to be observed with each encounter. It is suggested, for the reasons further noted in this brief digression, that there is at least a reasonable question as to whether the tax authorities or courts of one of the states that is a party to a *diplomatic contract* can, as a legal matter, effectively determine unilaterally and without participation or representation of the other state party the relative scope or legitimacy, as between the states, of that other party's tax interest or of the relative interests of the two states between them.[41]

Arbitration decisions presumably would be "notified" to the affected parties, namely the concerned states and taxpayers, in the same manner as MAP determinations, and ultimately reflected in an assessment or similar notice. It is of course possible that in devising bespoke features of arbitration, states could provide for staged notifications of arbitration progress as well as detailed protocols for the submission of materials to be considered and the possible participation of the affected parties, including taxpayers and, directly, the competent authorities. If the main contributions of arbitration are discipline, objectivity and finality, there seemingly is no need, within reasonable temporal limits, to restrict what arbitrators consider even in a "baseball"-style arbitration.

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39. The OECD Commentary on art. 25 deals with this matter in a number of places; *see* that Commentary and Wilkie, *supra* n. 3, secs. 2.4.1.2.1. and 2.4.2. In the context of arbitration and MAP, *see particularly* OECD Commentary on art. 25, paras. 76-82.
40. *See* Wilkie, id., particularly secs. 2.4.2. and 2.6.2.
41. In this regard, the guidance of arts. 26 and 27 of the VCLT seems profoundly important. These comments acknowledge that this is at least a debatable view, one that the OECD and its members seemingly would not adopt (as put in this note), at least in the Commentary on art. 25. However, considering this view helps to inform why a MAP process with or without arbitration, which is not institutionally separate or independent, should not (be expected to) give rise to status, notification or conflict issues relative to a state's domestic law proceedings that are different in kind or practice from those encountered in a typical MAP. *See* Wilkie, *supra* n. 3.

Indeed, there is no particular reason why arbitration would not take on the features of a traditional adjudication under states' domestic laws if those states were willing.[42] This could include opportunities for taxpayers to participate directly in a MAP as parties with standing.[43] In these ways, an arbitration proceeding could take on characteristics of an audit or domestic administrative or adjudicative appeal.

But again, like the primary question concerning the basic status of arbitration as part of a MAP, the relationship between it and a state's domestic administrative and formal process should seemingly not be different for a MAP infused by arbitration. In effect, an arbitration decision is by its nature, via MAP, incorporated by reference and effect in a state's domestic tax assessment process and outcome.

14.8.5. Publication

The publication and precedential value of arbitration decisions has been addressed separately in this book. However, it is useful in comparing domestic processes and the conduct for an arbitration to note similarities or differences. Within the context of earlier comments concerning the status of arbitration as part of a MAP, there are three points of comparison: domestic administrative appeals, domestic judicial appeals and agreements with or rulings by the tax authorities in the nature of an advance pricing arrangement/agreement (APA) in transfer pricing matters or an advance ruling on the application of the tax law to a particular transaction. It is to be noted that the publication of an arbitration decision is part of a larger issue of whether MAP determinations themselves should be published. It is uncommon for MAP determinations to be published. Some of the reasons for this are reflected in the specific comments below.

14.8.6. Domestic administrative appeals

These are appeals that take place extrajudicially, essentially as a review by the appeals branch of a tax authority of a primary audit determination made by the audit branch. In that sense, it is a part of a total or complete administrative review of a taxpayer's affairs by the tax authorities. Taking account of taxpayer confidentiality constraints, it would probably be uncommon for the outcome of that kind of review by a tax authority of a taxpayer's affairs – essentially an adjustment to its tax filing – to be published any more than the original "as filed" presentation by a taxpayer's affairs would be published. An arbitrated determination affecting a taxpayer's affairs that would be implemented as an assessment of the taxpayer seems to bear considerable similarity to an extended administrative review of this nature that takes place outside a formal adjudication process. Leaving aside other considerations about the precedential value of determinations that may be highly specific factually and therefore unique, an arbitration decision when evaluated according to this analogue should arguably not be more public than the MAP proceeding of which it is a part or the tax reporting and assessment determination that would give effect to the MAP (and implicitly arbitration) outcome.

14.8.7. Domestic judicial appeals

Typically, the underlying record and decisions of judicial appeals in tax matters are public and, in the case of the decisions, actually published. This is presumably for at least two reasons. First, the process by which taxpayers are subjected to the authority of a state is meant to be open, transparent and observable. Second, even in cases that are highly factual, the interpretation and application of the law by legal authorities and institutions inform the meaning, scope and continuing force and texture of the law and how it may be expected to apply. To that extent, knowing the outcome of arbitration for an "issue" could be said to be comparable.

The comparability of a MAP, being the manifestation of a quasi-contractual quasi-diplomatic arrangement between states acting in their relative interests, to domestic law adjudication is not clear. It is also unclear why an arbitral aspect to a MAP decision with respect to a particular relevant point of contention should make a MAP determination any more public than it otherwise would be. That of course raises a larger question as to whether a MAP determination should be public, but this question is beyond the scope of these comments.

Moreover, judicial proceedings impose a host of limitations and checks that test the propriety and, in the circumstances, legitimacy of factual and legal assertions comprising a complete record of proceedings, as well as instilling in the adjudication process an objective systemic discipline that typically may be lacking in a MAP with or without arbitration. Given its quasi-diplomatic provenance, however, such an extended process or system may not be necessary or necessarily expected for the MAP. In important respects, a decision – whether judicial or arbitration – is not informative without knowing its entire context and being assured that relevant elements have been subjected to disciplined scrutiny, testing them for accuracy and relevance.

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42. E.g. the guidance for arbitration under the *Canada-United States Income Tax Convention, supra* n. 33 , contemplates evidentiary, timing and other process features in the nature of processes commonly associated with the discipline and formality of adjudication. There would not seem to be any reason why taxpayers could not, as they may in the EU case, be invited to contribute directly. *See* e.g. OECD MEMAP, Best Practice No. 13, as well as the OECD Commentary on art. 25, Annex, Sample Mutual Agreement on Arbitration.
43. *See EU Arbitration Convention, supra* n. 17 , art. 10.

14.8.8. Administrative agreements and rulings

In some respects, an arbitration decision, like any MAP determination of which the decision would form a part, is similar to a ruling or agreement between a taxpayer and its tax authority reached outside the context of any formal or other controversy, including in entirely domestic circumstances. Taxpayers and tax authorities commonly reach agreements on the interpretation and application of tax law, e.g. through APAs in transfer pricing and tax rulings regarding specific transactions undertaken by taxpayers.

APAs are not commonly published; this is possibly because they are particular manifestations of the MAP and, in any event, frequently contain sensitive commercial and business information of a taxpayer that would be difficult to redact without rendering the result difficult to read or understand. That said, there may be different practices and standards that could apply to such a determination, as the recent publication by the European Commission of certain provisional State aid decisions reflects.[44] A consistent application of transparency standards developed as part of the work by the OECD and the G20 on BEPS conceivably invites a review about whether it is justifiable not to publish or at least allow public access to any agreements between tax authorities and taxpayers, even if highly redacted, for no other reason than simply to know they exist within certain parameters.

It is more common for redacted tax rulings on particular transactions to be published. While their factual underpinnings are undeniably important, a tax ruling tends to focus on the interpretation of particular provisions of the law applied in a limited and often quite sterile factual context. Typically, they are not themselves factual determinations and do not directly address the characteristics of taxpayers and their dealings other than as may be relevant to the very immediate but limited concerns associated with the particular statutory interpretation addressed by the ruling. Accordingly, they lend themselves to very stylized and relatively brief legal determinations in relation to which all that needs to be known to understand them may be stated or assumed within the ruling itself, unlike the record of judicial proceedings or, usually, the underlying materials prepared to support an APA. It is not clear than an arbitration decision or its MAP list would fit this model easily, again taking account of the significance of circumstances and the state-to-state nature of the MAP and tax treaties.

14.8.9. Costs

The OECD observes in the Commentary on article 25 on how the costs of arbitration should essentially be shared ratably by states engaged in a MAP. A further question of whether those costs should be "pushed down" to affected taxpayers as costs akin to tax ruling or APA costs that may be charged to taxpayer is not clear that a MAP is sufficiently similar. It is understandable why the costs of a taxpayer-initiated APA or tax ruling would be borne by the affected taxpayer(s). In effect, taxpayers appropriate tax authority resources for their particular benefit.

It is not clear, however, that the MAP or its costs are on the same plane. While it is the case that taxpayers may initiate a MAP, they do so only because, in the first instance, a state's tax authority will have adjusted a taxpayer's reported tax position so as to invoke another state's interest in whether resulting taxation is "in accordance with" the two states' expectations *of each other* as set out in a tax treaty and, consequently, whether what amounts to a transfer from the non-adjusting state to the other could be required via a foreign tax credit or refund. Therefore, unlike any other encounters that a taxpayer may have with tax authorities, a taxpayer is something of a bystander in as much as a tax treaty codifies an agreement involving "other persons" – states – acting in their own interests. In these circumstances, it is unclear why the taxpayer would or should bear the costs (including arguably arrears or other deficiency interest and penalties, as well as "transaction costs") of the states' process in relation to each other, a process over which the taxpayer is able to exert little influence or any control.

14.9. Reviewing an arbitration decision

14.9.1. Some basic considerations

Affected states and taxpayers may not (notably an issue if arbitration is not mandatory, in so far as states are concerned) agree with the outcome of arbitration proceedings; indeed, taxpayers may not agree with a MAP determination. But arbitration may not be invoked for this reason; it is not an appeal device to challenge MAP decisions.[45]

The question naturally arises whether there should be some supervening process by which states or taxpayers can test and displace an arbitration decision, in as much as it is a "decision" and that a related MAP outcome may have been reached through a more or less stylized process because of arbitration which reflects quasi-judicial characteristics or may be likened to the process of a "tribunal". By way of context, MAP determinations, of which an arbitration decision would be a part, would not normally be

44. E.g. European Commission, State aid SA. 38374 (2014/C) (ex 2014/NN) (ex 2014/CP) – Netherlands *Alleged aid to Starbucks* , Brussels 11.06.2014 C(2014) 3626 final Public Version; European Commission, State aid, SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) – Ireland *Alleged aid to Apple* , Brussels, 11l06.2014 C(2014) 3606 final Public Version; and State aid S.A.38944 (2014/C) – Luxembourg *Alleged aid to Amazon by way of a tax ruling* , Brussels, 07.10.2014 C(2014) 7156 final Public Version. It is interesting to note how much information is still presented about the affected enterprises even in the redacted versions of these decisions to initiate proceedings it is noted that the publication of these and successor decisions, so far generally to like effect, continues. The references here are indicative. Decisions continue to be published after this Chapter was prepared to be included in this book.
45. OECD Commentary on art. 25, para. 64.

subject or subjected to review by way of appeal or other adjudication. A MAP determination arises from a quasi-contractual, quasi-diplomatic process that allows states to rationalize and provide relief concerning the application of their tax systems to avoid unwarranted taxation (and also possibly increasingly unwarranted "non-taxation") without supplementing their separate systems, including appeal rights of taxpayers.

Under article 25(3), taxpayers, and indeed states themselves, may generally avail themselves of the MAP as an alternative (it is commonly thought) to a determination of relevant issues exclusively or conclusively under the domestic legal process of a relevant state, without taxpayers forfeiting any domestic appeal rights if they have otherwise been preserved. In keeping with the *relieving* nature of tax treaties and the particular, separate and independent role of the MAP to bridge, *by states' agreement* , differences between tax authorities concerning the relative primacy of otherwise legally sustainable tax claims, it is unclear why or how a MAP determination would be appealable. The comparability of a MAP, being the manifestation of a quasi-contractual quasi-diplomatic arrangement between states acting in their relative interests, to domestic law adjudication, as already mentioned, is also not clear. Furthermore, it is not clear why being affected by an arbitration decision on a particular relevant point of contention should make a MAP determination any more reviewable than it would otherwise be. That of course arises without addressing a larger question, i.e. the issue of whether MAP determinations should or could be appealable via judicial channels.

A possible exception might be the pursuit of administrative law remedies under the law of the state the competent authority of which was considered not to be acting according to the applicable principles of "natural justice" in administering its law in relation to a treaty. There is some precedent for claims of this nature, although it is thought it would be possible that neither the complaint as such nor the remedy involved in proceedings of this nature would directly or covertly be allowed to be the relevant substantive tax issue.[46]

14.9.2. States' interests

A perceived benefit of arbitration is that its result may be "mandatory", "final" and "binding". Typically, these terms are understood to address limitations imposed on states themselves, to limit the perpetuation of disagreements between them at the taxpayers' expense about the application of a tax treaty to force the states' taxing rights. In light of the fundamental nature of the MAP, it is appropriate that arbitration be other than "voluntary" and its outcome, as the states are affected, be indisputable, although, possibly, as provided in the EU Arbitration Convention, still subject to a limited opportunity to reach a different agreement taking account of an arbitration decision.[47]Otherwise, there is presently no other forum to resolve states' disagreements about how to apply a tax treaty on the assumption that states are otherwise not exposed to some sort of action or sanction concerning their conduct, in for example, the International Court of Justice.

14.9.3. Taxpayers' interests

That arbitration would be "mandatory" and its outcome "final" and "binding" for states does not mean that that outcome necessarily must apply. Taxpayers may have an interest in appealing or annulling an arbitration decision or testing the conduct of tax authorities and the arbitrators in reaching it.

As affected parties, taxpayers are generally entitled not to accept a MAP determination, with or without an inherent arbitration component, at least unless states specify otherwise in a fashion compatible with both their international and domestic law, particularly as taxpayers' rights would be affected. That, coupled with the preservation of a taxpayer's domestic appeal rights assuming that it has reserved them, may be seen as effectively supplying a taxpayer with an avenue for appeal, though perhaps not of a direct or conventional kind and not of the arbitration decision per se albeit with an effect that in some respects may be constructively similar.[48]On the assumption that arbitration is required to address an "issue" that otherwise frustrates the successful completion of a MAP case and the decision by the arbitrators, operating as extensions of the competent authorities that

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46. For examples of how Canadian courts conceive the intersection of administrative law and substantive tax law proceedings in tax matters, *see* n. 49 . The availability of a process to inquire into the exercise of discretion by tax authorities seems to be attracting attention in the United States also; *see* M. Sapirie & A. Velarde, *News Analysis: Can U.S. Courts Review Competent Authority's Discretionary Actions?* , WTD (16 Mar. 2015) and 77 Tax Notes Int'l 934 (16 Mar. 2015) – the report includes a link to proceedings initiated in *Starr International Co. v. United States of America* .
47. *See EU Arbitration Convention, supra* n. 17 , art. 12.
48. Reference has been made earlier and generally throughout this paper as to how the parallel pursuit of domestic law and treaty-based remedies would take place, taking account of the fact that the processes are fundamentally different and involve different parties despite appearances in some respects to the contrary. The OECD recognizes the importance of ensuring that taxpayers affected by a MAP (involving an arbitration decision) have some recourse to protect their interests if they think those interests are not well served by the MAP determination, whether or not states decide to require a waiver of domestic remedies (including judicial process) as a condition of undertaking arbitration. This approach is consistent with the OECD's broader views on the parallel nature of states' domestic processes and the MAP even though it does not appear to be the OECD's preferred position in any event that taxpayers domestic law remedies be compromised or limited by invoking the MAP with or without arbitration. *See* OECD Commentary on art. 25(5), paras. 77, 79 and 80. However, even if a taxpayer would be required to forego domestic process rather than simply put it in abeyance if arbitration was invoked to complete a MAP, the OECD anticipates without specifying or prejudging what they would be that some means be provided "to ensure that sufficient legal safeguards are granted to the taxpayer as regards his participation in the arbitration process to meet the requirements that may exist under domestic law for such a renunciation to be acceptable under applicable legal systems" and in that regard the OECD further refers to a taxpayer's possible "right to be heard" under domestic law (OECD Commentary on art. 25(5), para. 80).

appointed them, is not acceptable to a taxpayer as it is captured by a MAP settlement, the taxpayer may (re)activate its domestic appeal rights, provided it has taken steps under its domestic law to preserve them and would not have already exhausted them before pursuing a MAP remedy.

Additionally, to the extent that there may be doubt about how a MAP conclusion was reached and particularly how the arbitrators conducted arbitration proceedings, there might be scope for considering an administrative law challenge of a state's actions according to principles of "natural justice". Options to consider would be to "prohibit" the affected authorities from conducting themselves in a particular way that may be considered to have compromised the integrity of the MAP or the arbitration itself, inquire (ascertain by way of certiorari) about pertinent matters affecting how a decision was reached, or requiring a particular course of official conduct (mandamus). The possible relevance of administrative law to question how MAP determinations are made is not a new issue either even if not commonly considered. However, challenges of this nature are and it is suggested ought to be uncommon, particularly in light of the nature of tax treaties and the latitude afforded tax authorities under article 25 to conduct proceedings concerning the interpretation and application of a tax treaty.[49]

14.10. Arbitration decisions outside traditional sources of laws of tax jurisdictions

These comments so far have proceeded on the assumption that arbitration would take place in the context of a MAP framed by article 25 of the OECD Model or its UN or EU analogues.

This is not the only conceivable approach to arbitration. Regulatory and commercial arbitration may be organized under other private or institutional regimes, including the ICC and UNCITRAL protocols and trade law disputes contested by states through the WTO or, indeed, the parallel jurisdiction of the ECJ in tax matters justifiable according to EU members' judicial systems. Arbitration is a technique to bridge parties' differences in a disciplined and conclusive manner without otherwise affecting the object of the disagreement. Accordingly, there is resurgent interest in the possible utility of a "world tax forum" or the like to which unresolved or contested international tax determinations, including under treaties, could be referred institutionally. This last section and the concluding comments in this note comment briefly on both these avenues for resolving tax controversies, particularly to ensure taxation consistent with existing treaty understandings between states while preserving taxpayers' rights under domestic law.

14.10.1. "Other supplementary dispute resolution" – Doing what needs to be done

Tax authorities and taxpayers would seemingly not be prevented from voluntarily seeking the intervention of third parties to offer objective guidance concerning the viability and likely outcome of contested tax positions.[50] In fact, recourse to objective interventions of this sort may be salutary and have much the same effect as typical arbitration in so far as parties' opposing positions would be exposed to objective critical scrutiny. This assumes that typical legal constraints regarding the confidentiality of taxpayers' affairs would be respected. In some cases, this already happens domestically, e.g. by way of judicial conferences in advance of a trial where the parties' positions may be tested by the reactions of a judge. The goal of such a procedure is to define and refine genuinely contestable issues and winnow out from the proceedings points of unreasonable, unnecessary or irrelevant disagreement.

There are at least two key differences between proceedings of this nature, which regardless of their name broadly have the flavour if not the effect of "mediation" and arbitration according to the OECD, UN and EU approaches. First, undertaking them would essentially be voluntary unless legally enshrined, though as noted earlier concerning the meaning of "endeavour" possibly no less influential. Second, their outcomes would not be institutionally enforceable unless adopted other than for their persuasive effects by the tax authorities. To be otherwise would presumably require the kind of authority directly or indirectly invested in arbitration by article 25 and as an intrinsic feature of tax treaties governed by paramount public international law.

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49. E.g. *see* a recent important decision of Canada's Federal Court of Appeal explaining how administrative law challenges concerning how tax authorities administer the tax law relate to the determination of substantive issues, making administrative remedies consistent with their general effect (at least under Canadian law) "last resort" remedies despite some possible procedural (time limitation) shoals that have to be carefully navigated to preserve taxpayers' rights: CA: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc* ., 2013 FCA 250. *See also* the Canadian Federal Court decision in which administrative proceedings were invoked unsuccessfully in a situation presenting limitation period and assessment timing issues related to the viability of MAP, in CA: Federal Court, *Teletech Canada, Inc. v. Minister of National Revenue* , 2013 FC 572. Interestingly, a recent decision of the Court of Queen's Bench of Alberta, Canada was called upon to consider questions of precedent and decided issues (stare decisis and res judicata) in relation to arbitration proceedings: CA: Can. ABQB, *ENMAX Energy Corporation v. TransAlta Generation Partnership* , 2015 ABQB 185. The Court viewed questions concerning the precedential and binding nature of prior arbitration decision on future decisions to be questions of law within its authority and competence to address. That said, it also concluded as matter of law that a prior arbitration decision concerning the same parties was not binding in a subsequent arbitration proceeding concerning the same parties, but could be introduced as evidence in the subsequent proceeding subject to the subsequent arbitration panel's determinations on questions of admissibility, relevance and weight. The Court also considered the question whether other arbitration decisions affecting the parties, including those adverse to those parties, could be introduced as evidence; the Court concluded that this question was one of confidentiality, subject in the first instance to the agreement of the parties to the arbitration decision and then as to whether any confidentiality limitations should be over-ridden in the circumstances a review and determination by the arbitration panel seized of the new case. In this context, the Court was concerned with overriding considerations of law and fairness.

50. *See* Commentary on art. 25, para. 86 (under the heading "Use of other supplementary dispute resolution mechanisms").

All of that said, these and other conceivable differences between a MAP-based arbitration and what the OECD refers to as "supplementary dispute resolution" in paragraphs 86 and 87 of the Commentary on article 25 may be less important than their labels and associated process might otherwise suggest. In particular, as a practical matter these differences do not necessarily deprive the less formal "legal" or institutional methods of dispute resolution of their possible probative value to achieve tax treaty objectives or, it is suggested, the possible acceptance by affected parties of outcomes, if not by compulsion, by good judgment.

A forward-thinking outlook on how to avoid or at least bridge tax controversies might consider any disciplined approach offering parties an opportunity to test each other's, and, perhaps more importantly, their own, positions as a disinterested but informed observer would see them. This is particularly the case as conflicting perceptions or possibly inconsistent characterizations of events impinging on fair and appropriate interstate allocations of taxing rights in accordance with applicable law are encountered more frequently.

14.10.2. A "world tax organization"

From time to time, the possible utility of a separately constituted unique global institution charged with resolving international tax disputes is considered. In the absence of a "world tax order" and given the vast web of bilateral income tax treaties governing how states' tax systems are meant to interact in relation to the law and process of each, the introduction of a new tax "institution" would seemingly mark a profound public law development. It would not be surprising that such an institution would require bespoke legal validation as a "decider of record" and that this would need to be woven into the existing adjudicative fabric and general law of any affected states on more or less on common, or at least predictable and comparable terms. A fair concern would be its actual utility, given predicable complexity.

But, with an enlightened outlook on the MAP and arbitration as a part of the MAP, as developed in this paper, is a "world tax organization" necessary or even desirable? Are the domestic law complications to integrate such an instruction into domestic law adjudication regimes, even if surmountable, worth the benefit expected of them? Are most of the practical benefits thought to be provided by such a forum already available in practice even without a single adjudicator? Supervening legal authority – domestic legal authority on a state-by-state basis and public law authority – would seemingly be required for a new institution. As a precursor, there might also need to be an agreed substantive jurisdiction served by overarching authority. For example, the ECJ decides tax cases affecting the domestic law of Member States because there is a substantive union of those states that creates a parallel legal regime to which all members and their judicial systems are subject. It would seem that to aspire to a world tax adjudicator first requires more fundamental legal and political steps that would need to be carefully considered and, even with goodwill would, it is suggested, involve protracted and possibly difficult debate.

14.11. Observations and propositions: Contributing to guidance about "taking the debate forward"

These comments are meant to enliven an increasingly timely discussion of arbitration in relation to a business (and consequently tax) world that, contrary to the expansive connotation of "globalization", has revealed itself, ironically perhaps, to be economically quite compact. Accordingly, it is thought that there is a need for expeditious ways, i.e. time limited final decisions, to resolve inevitable disagreements and uncertainty about how tax systems engage with each other to achieve the ongoing rebalancing of international tax claims for which BEPS, by way of example, is both a lightning rod and a roadmap.

Much of the BEPS inquiry, for which transfer pricing inevitably is so important, is concerned with establishing the "source" of income and the nature of taxpayers' connections to relevant states. This is to be achieved without formulaic, prescriptive or necessarily even common standards or "rules; that degree of regulatory homogenization is either not practically attainable or, as in the case of formulaic approaches, has been generally disavowed because of economic imperfections but also, it is imagined, sovereignty concerns attributable to any renunciation of control over process. The markers of "source" and "connection" on which international tax "rules" and conventions have relied and the ways in which taxpayers have organized their affairs with the same reliance, are revealed not to be necessary, or in any event necessarily the pertinent indicators of where economic events take place and how taxing rights should be allocated even within the distributive framework of tax treaties.

An approach to international taxation that focuses even more deliberately on where events actually take place and parties' actual, functional contributions to them are made – the approach that pervades BEPS and can be expected to persist as an influence even if the BEPS proposals somehow are diluted or not legislatively adopted – may need to be supplemented by decision processes that assure a shared, predictable and ultimately final view among taxpayers and tax authorities about where and how income is earned. Disputes, spawned by disagreement and uncertainty, which formerly might have arisen as the exception rather than the rule, could become endemic in the ordinary course of compliance simply because evolving practices and guidance are not likely to be prescriptive nor their application "natural" or self-revealing of clear outcomes.

As reflected in comments received by the OECD concerning Action 14 of the OECD and G20 BEPS Action Plan and the related December 2014 Discussion Draft,[51] it is possible that to balance inevitable uncertainty attributable to a more "economic" evaluation of how income is earned within the framework of prevailing legal conventions, recourse is needed to a process with features of rulings or adjudicative proceedings as a matter of course and not just when exceptional altercations arise from time to time between taxpayers and tax authorities. The question then arises whether (alternative) dispute resolution techniques short of typical appeal proceedings under domestic laws need to be adopted effectively as systemic parts of the ordinary course of tax administration.

Arbitration is not in that sense, or as contemplated in the Commentary on article 25 of the OECD Model, an "alternative". Rather, it is perhaps more accurately appreciated, it is suggested, as an outgrowth or, possibly a particular manifestation, of resolving tax disputes according to the precepts of and within the MAP. It is argued here that arbitration is either now embedded in or is a natural extension of the MAP.

With these observations and the specific limits of the present discussion in mind, the following comments are offered with a view to categorizing issues that could usefully be explored further. These comments also suggest or imply directions by which both this inquiry would continue and, fundamentally, arbitration would be more widely accepted and even adopted as a means to facilitate the resolution of tax disputes without necessarily diluting states' sovereignty or taxpayers' recourses and remedies.

- It is unclear that arbitration, in itself, necessarily creates any "new" questions about contesting MAP settlements or how they are implemented under domestic laws or otherwise.
- In principle, absent particular terms of tax treaties in force, arbitration is or can be a legally effective means that should be available in the MAP to resolve open "issues" and directly or by effect to also resolve "cases", with or without the addition to article 25 of a specific reference to arbitration in the nature of article 25(5).
- The laws in force in states that have given effect to a tax treaty incorporating the MAP in a typical form should accommodate legally effective recourse to arbitration and give effect to, i.e. allow for the implementation of, a decision arising from arbitration as an element of a MAP settlement that states are otherwise legally obliged, if not strictly legally obligated, to reach absent unusual extenuating circumstances.
- Legal impediments that could arise under states' laws to limit the effective implementation of the full force and effect of arbitration or a MAP should be legally capable of being overcome because of overarching tax treaty obligations that states are obliged to "perform" in good faith free of domestic law limitations.
- In the face of the existence of a legally effective arbitration decision that could, other things considered, be implemented as part of a MAP settlement according to a state's law, a taxpayer's (or possibly the other state's) recourse and remedy are unclear if for some reason a state fails to give effect to the decision or for other reasons an affected taxpayer is dissatisfied with the arbitral element and its effect is, on a MAP outcome, discernible, although there may be several avenues of possible review.
- Taxpayers would not generally expect to have a separate means to challenge an arbitration decision reached in the course of a MAP any more than a MAP settlement itself would be open to challenge by a separate and independent legal process. Indirectly, however, taxpayers retain the ability to contest tax adjustments that could be but have not been resolved under a MAP. Even in the case of "mandatory" (for states) and "binding" (on states) arbitration, taxpayers may effectively challenge a tax assessment that would incorporate an arbitration decision and therefore implicitly the arbitration decision itself by declining to accept a MAP settlement and activating or reactivating domestic law administrative and judicial avenues of review and appeal.
- Taxpayers (and possibly treaty states that take issue with an unwillingness of another state to undertake arbitration if voluntary or implement an arbitration decision as part of a MAP or who wish to contest a state's unwillingness to complete a MAP despite "endeavouring" to do so) may, in appropriate legal environments, consider recourse to domestic administrative law remedies regarding a state and its tax authorities' failure to administer relevant law that affects or is affected by the MAP fairly, reasonably and more generally in accordance with principles of "natural justice". However given the absence of a strict legal obligation to reach MAP settlements, pursuit of this remedy may be difficult and for the most part novel.
- States, and possibly taxpayers although it is unclear whether and how they would have standing, might consider challenging a MAP outcome that incorporates an arbitration decision by resorting to supervening public international law to the extent that directly or implicitly such law forms part of the states' law, in a forum constituted to adjudicate differences between states about whether they have breached their obligations to each other, such as perhaps the International Court of Justice. However, it

51. *See* the references *supra* in nn. 2 and 15 . *See also* public comments posted by the OECD concerning Action 14 and the December 2014 Discussion Draft (http://www.oecd.org/tax/public-comments-action-14-make-dispute-resolution-mechanisms-more-effective.htm) and in this regard, highlighting the perceived importance of arbitration to resolve substantive matters that arise because of developments arising from other Actions; e.g. *see* http://www.oecd.org/tax/transfer-pricing/public-comments-actions-8-9-10-chapter-1-tp-guidelines-risk-recharacterisation-special-measures.htm .

is unclear whether states would be inclined, even with grounds, to invoke such a process or what its prospects in any event would be in the absence of "endeavour" more clearly comporting with a "legal obligation" rather than a good faith commitment even with features of a "soft" obligation.

- It is unclear, taking account of the following considerations no doubt among others, how a separate review process of MAP (and arbitration) decisions could or constructively would be supplemented or supplanted by a system modelled on the institutional authority of the ECJ or the WTO to make decisions that bind states in the design and application of their laws or the performance of their commitments under them. It is equally unclear, however, whether such a system necessarily would be better or fundamentally different compared to opportunities possibly afforded by the MAP, particularly with arbitration as an acknowledged or prescribed element. Considering such alternatives does suggest, however, that none of (i) arbitration as a dispute resolution device, (ii) the implementation of arbitration decisions in accordance with domestic as well as public law or (iii) the means by which those decisions would be challenged can be evaluated as if only questions of process and administration were involved. Perhaps, however, the existing MAP regime may in fact offer greater latitude for decisions to be reached that bind states while preserving some measure of appeal for taxpayers without needing to adopt new institutions or develop universally agreed new legal standards.

    - First, it is unclear whether or how a taxpayer could acquire standing in a WTO or ECJ proceeding to pursue its own interests as such. Though imperfect, however, taxpayers do have a degree of vicarious standing in the MAP and arbitration conducted within a MAP. If only states had standing, they would have to be willing (and taxpayers would have to count on their willingness) regardless of extant legal authority to actually challenge each other unless taxpayers as part of a substantially novel regime acquired standing in a supervening proceeding or somehow could compel states to act. It is not clear how the law alone, whether the public international law governing states' relations or domestic law that would be relevant to the implementation of MAP (including arbitration) decisions could deal with how unwilling states would be compelled to formally contest each other's tax interests. Compared to WTO or ECJ proceedings, in which it is understood standing is restricted, the MAP is also fundamentally an engagement between states; a difference, however, attributable possibly to the genesis of the MAP and in any event how it is that involved taxpayers are "involved" even if only partly in framing and prosecuting the disagreements considered in the MAP (including arbitration).
    - Second, in the case of the WTO, it is understood that despite an internal review procedure under the WTO's *Dispute Settlement Understanding* ("Rules and Procedures Governing the Settlement of Disputes") for panel reports, that one state contests to the WTO Dispute Settlement Body or that that body refuses on its own to accept and which are then reviewed by the Appellate Body under those rules, WTO decisions are considered to be "final" without recourse to review by other adjudicative bodies. While MAP settlements (and "mandatory" "binding" arbitration decisions) are generally "final" for states, they are not necessarily final for taxpayers who may effectively challenge them by pursuing the issues giving rise to them by conventional domestic law means. This may be a feature of the MAP that would be difficult to replicate according to other international dispute settlement models, which nevertheless offers taxpayers a unique if somewhat imperfect residual control over their fortunes regardless of how affected states treat each other. A question worth considering is possibly whether any aspect of the MAP that has failed or is not accepted, other than possibly the fact of either, should be known to a domestic adjudicator and furthermore what probative value that awareness in itself would be expected to have other than to possibly reinforce the residual possibility of double taxation absent a suitably sensitive domestic law determination. That said, however, a MAP outcome is not necessarily or prescriptively final as would be a WTO determination.
    - Third, in order for a forum such as the WTO or ECJ to engage, there would seemingly need to be a supporting legal system by which affected states would have bound themselves to observe substantive legal standards in relation to each other. However, in a manner of speaking, does such a regime already exist in a tax treaty context given the substantial web of tax treaties with generally comparable MAP articles under either the OECD or UN Models? One of the reasons for digressing in this note about the latent implications and possibilities of article 25 was to offer a way of interpreting article 25 as supplying at least "soft" obligations to reach MAP settlements even using untypical means. If that is correct or even conceivable as an evolution in how MAP is understood, then there already is an "obligatory" regime of sorts according to standards that are reasonably well understood and have an existing legal pedigree including in relation to states' laws; a virtue of this "system" is its comparable application in "developed" and "developing" country treaties, even without "harder" obligations among states, which conceivably would be very difficult to agree sufficiently well and quickly, anew, to make a "world tax forum" viable or integrated properly with states' own adjudicative forums.
    - In short, an issue to consider further is whether many of what could be anticipated to be the features of a "different" dispute resolution regime in the nature of a "world" body are already present, *as a legal matter* , in the MAP and whether adopting a different system would in fact offer fewer opportunities and less latitude to taxpayers than arbitration within the MAP to bind states while preserving some albeit possibly still "fiscally leaky" avenues for taxpayers to appeal what they consider

to be unacceptable decisions by states via the MAP (and arbitration) under well-understood domestic law processes and procedures.

- A further question is whether the OECD would adopt a remedial process for evaluating and auditing the performance by states of their MAP "obligations" through the sort of peer review process that has been adopted to evaluate preferential or non-transparent tax regimes.[52] The purpose of such an arrangement would be to supply a means by which taxpayers could be assured some measure of oversight concerning whether states' MAP positions are consistently reasonable in light of a treaty and the MAP's purposes to assure frictionless assignments of taxing rights. The results of such reviews would be an invitation to states to continually reconsider and re-evaluate their approaches to the MAP.

14.12. A closing comment

A wide-ranging reconsideration of international tax principles, practices and "rules" is underway. These comments are deliberately taxonomic – a survey of pertinent issues relating to the intersection of arbitration as an extension of the MAP and states' domestic laws. The debate has been joined by the OECD, the UN, the International Monetary Fund, various non-governmental organizations, taxpayers and their advisors, and even the Papacy.[53] Despite many layers and textures, the core issues concern how to reliably ascertain the "source" of income and who "earned" it. Complexity does not arise from these questions alone; they are not new questions; rather, it emanates from circumstances that supply fewer and fewer observable or controlling points of reference for answering them in a "globalized" world.

A possibly profound implication of present developments, however, is that disputes, disagreements and misunderstandings among states and between states and their "tax citizens" are inevitable. They are likely to be more common if not even routine systemically because these questions concerning the "source" of entitlement to income are enduringly hard and it may be overly optimistic to expect that generally applicable prescriptive standards for answering them are likely or maybe even possible. In effect, controversies and their expeditious resolution may become mainstays of tax system administration, not unlike rulings or APAs, and not merely collateral to those systems to deal with occasional and in any event exceptional disagreements. Accordingly, measures that are faithful to the objectives meant to be served by tax treaties, that reflect the MAP's fundamental undercurrents and that are effective as a legal matter according to states' prevailing domestic laws, and furthermore that allow for taxpayer's rights to be protected by familiar processes should be welcome. Arbitration offers a procedural avenue to get the most out of the MAP; with these considerations in mind, though, coming to this realization may also result in a better understanding of the potential force and effect of the MAP even without stipulating a specific arbitration tool.[54]

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52. This observation comes from a discussion with a colleague that prompted a reflection, by comparison, on ways in which the OECD encourages the development and application of best practices by states concerning various substantive and procedural features of their tax systems and administration. In this connection, *see* R. Mitchell, *OECD: BEPS Should Include Peer Review Mechanism To Push Arbitration for Disputes* , TMTPR (30 Mar. 2015).

53. *See* commentary in J.S. Wilkie, *Policy Forum: "BEPS" One Year In: Taking Stock, One Canadian's View* , 62:2 Canadian Tax J. 455 (2014).

54. It is important to note and reinforce a point made through this paper that there is a difference between *process* in the service of reaching a substantive outcome and *the outcome itself* and the "international tax" principles and dynamics affecting it. Possibly because of the intensity and scope of the BEPS efforts, there is a tendency, it is suggested and was mentioned earlier, to perceive much of the present review of "international taxation" as both novel and new. However, in many respects it is neither. Perhaps the context in which principles and practices associated with "international taxation" are presently being challenged awaken our awareness of the textures of what we have grown accustomed to taking for granted, often in effect starting our analysis of international tax principles and practices somewhere seemingly distant from what should be the beginning point. To allow the appearance of novelty and "newness" to overtake our reconsideration of "international taxation" risks distracting us and distorting our analyses. The BEPS and related inquiries are frequently attributed to the effects of "globalization" – all too frequently a rather woolly term that, for example, economic geographers concerned with economic flows and concentrations of economic activity think about possibly more aptly, analytically and descriptively in terms of events and circumstances that "compress time and space". E.g. *see* the reference to D. Harvey's scholarship (nn. 15 and 21) and the discussion in the related text in J.S. Wilkie, *Reflecting on the "Arm's Length Principle": What Is the "Principle"? Where Next?* , in *Fundamentals of International Transfer Pricing in Law and Economics* , p. 137 (W. Schön & K.A. Konrad eds., Springer 2012) and the reference in note 45 to M. Storper and the related discussion in sec. 7. of J.S. Wilkie, *Intangibles and Location Benefits (Customer Base)* , 68 Bull. Intl. Taxn. 6/7, p. 35, at 358 (IBFD June/July 2014). This is one way of thinking about what happens when political borders, physical "transfers" and forms and modes of business organization less reliably reflect where economic events take place and who their contributors are. There is almost a tendency to think that "globalization" is occurring for the first time. It is not. And neither should arbitration be seen either as a new idea or panacea. It is a technique among others to help affected parties sort out the effects of behaviour and economic relations shaped by contextual factors of various kinds and ultimately manifested in economic and financial effects that feed but may also test the reasonable limits of the parameters of taxation. It needs to be kept in its proper place and expectations about its utility, particularly in times of flux and even instability, kept in perspective. Coincidentally, and possibly a little eerily, while completing the initial draft of this paper, the author was reading the distinguished Canadian historian Margaret MacMillan's recent acclaimed examination of the lead up to World War I, entitled *The War That Ended Peace – The Road to 1914* (Penguin 2013, at xxxii), and found the following passage in the Introduction arresting (emphasis added): "The nineteenth century was an extraordinary time of progress, in science, industry and education, much of it centered on an increasingly prosperous and powerful Europe. Its peoples were *linked to each other and to the world through speedier communications, trade, investment, migration, and the spread of official and unofficial empires* . The *globalization of the world* before 1914 has been matched only by our own times since the end of the Cold War. *Surely, it was widely believed, this new interdependent world would build new international institutions and see the growing acceptance of universal standards of behavior for nations* . International relations were no longer seen, as they had been in the eighteenth century, as a game where if someone won someone else had to lose. Instead, all could win when peace was maintained. *The increasing use of arbitration to settle disputes among nations, the frequent occasions when the great powers in Europe worked together to deal with, for example, crises in the decaying Ottoman Empire, the establishment of an international court of arbitration, all seemed to show that, step by step, the foundations were being laid for a new and more efficient way of managing the world's affairs* ." The balance of her book deals with the complex

14.13. Annex: Schedule A – Contributor's Guide Topic 14 [55]

Schedule A

Contributor's Guide Topic 14: Implementation of arbitration decisions in domestic law

Please provide a short overview of the following issues. This is not an exhaustive list so please feel free to add other issues.

- Tax law as part of public law is subject to many requirements of constitutional law, therefore, an arbitration decision has to be in line with the requirements of constitutional law on an effective legal protection and on the equality of taxation.
- To fulfil these requirements, the arbitration decision has to be implemented in an appropriate position in the national legal order.
- Review of the arbitration decision on its merits possible?
- Review of the arbitration decision on its conformity with constitutional guarantees possible?
- Possibility to lodge an appeal only for the taxpayer or also for the tax administration?
- Annulment of the arbitration decision and reference to the arbitration tribunal or new decision on the merits?
- Costs of arbitration decision fixed?
- Arbitration decision on the same level as a notification of the tax administration?
    - All subsequent stages of legal proceedings for tax notifications also applicable for arbitration decisions?
    - Comparability of a notification of the tax administration with an arbitration decision?
    - Decision publicly available?
- Arbitration decision on the same level as a decision of a court?
    - All subsequent stages of legal proceedings for the decision also applicable for the arbitration decision?
    - Comparability of a decision of a domestic court with an arbitration decision?
    - Decision publicly available?
- Arbitration decision on the same level as a decision of the highest national court?
- Arbitration decisions outside the traditional sources of law of the tax jurisdictions?

behavioural, political, personal and other circumstances that must have fuelled or been subsumed in the "globalization" of the day and, correspondingly, not ultimately contained by "arbitration" or any other means or mechanics meant somehow to perfect collaboration in manifestations of unity or cohesion.

55. *See supra* n. 18 .