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Baseball Arbitration to Resolve International Law Disputes: Hit or Miss?

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Baseball Arbitration to Resolve International Law Disputes: Hit or Miss?

by

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Abstract

This Article assesses a concrete proposal that may address some of the current backlash against international courts and tribunals: baseball arbitration, also known as final offer arbitration (FOA), where disputing parties each offer an answer to the dispute (their "final offer") and the adjudicator's task is strictly limited to picking one or the other answer ("hit or miss"). FOA preserves a crucial role for neutral, third-party adjudication but puts more responsibility on states to work out positive solutions themselves. When carefully calibrated, FOA can, at least for some types of disputes (especially numerical ones between two parties), enhance both efficiency (speed, reduced cost, and complexity) and accuracy (reasonable party offers versus tribunals splitting the difference between extreme demands). In addition, FOA should facilitate, rather than chill, settlement and long-term cooperation, and it puts states rather than tribunals in the driver's seat. FOA can also reduce certain sovereignty costs (no giving reasons or setting precedential value for awards) and may unlock state consent to arbitration where traditionally it is

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lacking or heavily contested. Although FOA would seem to be particularly suited to settling international law disputes (where sovereignty costs and suspicion toward tribunals run high), surprisingly, FOA is virtually unknown to international lawyers. Ironically, it is also exactly where FOA is now being confirmed in treaty practice—to settle international tax disputes—that FOA shows its limits. In other settings where FOA is not currently practiced, such as certain trade or investment disputes, FOA has great potential. Neither "hit" nor "miss," the choice should, in most cases, not be between opting into either reasoned arbitration or baseball arbitration. An optimal dispute resolution mechanism is likely a combination of both reasoned arbitration (on threshold issues) and FOA (on numerical questions).

I. Introduction

States and international tribunals are in a love-hate relationship. States routinely agree to third-party adjudication to settle at least some of their disputes or monitor increasingly vague treaty commitments. At the same time, when international tribunals make decisions, they often upset the losing party or are blamed for overreach ("making law"), with little opportunity for states to engage in "legislative correction" as this normally requires consensus of all state parties involved (including the winning party). The existence of compulsory dispute settlement, with a black or white outcome on what states *cannot* do, may also have a chilling effect on states positively settling their differences, or updating or negotiating new rules (if rules are enforceable, states think twice before committing).

Fixes to this tension traditionally involve proposals either to (i) exit from international tribunals altogether[1] or increase state control over tribunals (with the risk of undermining tribunal independence),[2] or (ii) make international tribunals more like domestic courts with public law type guarantees in respect of appointment, transparency, and consistency (with the risk of making tribunals even more powerful).[3]

This Article assesses a concrete proposal that goes in a different direction. It preserves a crucial role for neutral, third-party adjudication

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1. See Joost Pauwelyn & Rebecca Hamilton, *Exit from International Tribunals*, 9 J. Int'l Disp. Settlement 679 (2018), https://academic.oup.com/jids/article/9/4/679/5076138.

2. See, for example, the debate on U.S. proposals to strengthen member control over WTO dispute settlement. *Compare* Terence Stewart, *US Is Correct in Blocking WTO Appellate Body Appointment*, Law360 (May 27, 2016, 4:29 PM), https://www.law360.com/articles/801553/us-is-correct-in-blocking-wto-appellate-body-appointment, *with* Gregory Shaffer, *Will the US Undermine the World Trade Organization?*, Huffington Post (May 23, 2016, 3:04 PM), https://www.huffingtonpost.com/gregory-shaffer/will-the-us-undermine-the_b_10108970.html.

3. See the EU proposal for a new "Investment Court System" to settle investor-state disputes, as introduced in the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU. European Commission Press Release IP/16/399, CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement (Feb. 29, 2016); *The Multilateral Investment Court Project*, European Comm'n, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 (last updated Oct. 10, 2018).

but puts more responsibility on states to work out positive solutions themselves: baseball arbitration, also known as final offer arbitration (FOA), where disputing parties each offer an answer to the dispute (their "final offer") and the adjudicator's task is strictly limited to picking *one or the other* answer ("hit or miss").

When carefully calibrated, FOA can, at least for some types of disputes (especially numerical ones between two parties), enhance both efficiency (speed, reduced cost, and complexity) and accuracy (reasonable party offers versus tribunals splitting the difference between extreme demands). In addition, FOA should facilitate, rather than chill, settlement and long-term cooperation, and it puts states rather than tribunals in the driver's seat. FOA can also reduce certain sovereignty costs (no giving reasons or setting precedential value for awards) and may unlock state consent to arbitration where traditionally it is lacking or heavily contested.

FOA is not new. Long before it was introduced to settle salary disputes between players and their teams in Major League Baseball (MLB) in the 1970s, FOA was practiced in ancient Greece, including during the trial of Socrates. Although FOA would seem to be particularly suited to settling international disputes (where sovereignty costs and suspicion toward tribunals run high), surprisingly, FOA is virtually unknown to international lawyers. Equally unnoticed, however, outside the confines of the tax community, is that, since 2006, U.S. double taxation treaties set out baseball arbitration to settle certain cross-border tax disputes. Shortly after that, both the U.N. and OECD Model Tax Conventions have included the option of baseball arbitration. The recently concluded OECD Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting (2016 OECD Multilateral Tax Convention) confirms baseball arbitration as the default arbitration option.

Ironically, it is also exactly where FOA is now being confirmed in treaty practice that FOA shows its limits. FOA works best in bilateral disputes over a number (e.g., salary figure or intra-company transfer price). FOA struggles in multilateral disputes over threshold questions (e.g., whether there is liability, discrimination, or a permanent establishment in the first place). FOA also raises fundamental questions of equal treatment and practical questions of enforcement.

This Article proceeds as follows. Part II elaborates on the current tensions between states and international tribunals and describes today's paradox of international adjudication. Part III introduces the concept of baseball arbitration and describes it especially in the context of

the recently concluded OECD Multilateral Tax Convention. Part IV discusses the reasons why baseball arbitration may be particularly appropriate to resolve at least some international law disputes. Part V warns about important caveats, including reservations that may make baseball arbitration inappropriate to solve certain modern tax treaty disputes. Part VI illustrates where and how baseball arbitration could be successfully used to resolve disputes where FOA is currently not in use, especially certain trade and investor-state dispute questions. While this Article focuses on international economic law, FOA could also be considered to settle other types of international law disputes that are numerical and between two parties. Damage calculation, including before the International Court of Justice (ICJ), is one example. A recent ICJ case involving environmental damage caused by Nicaragua on Costa Rican territory highlights the challenges involved in reasoned arbitration.[4] FOA could also be used for water or fish stock sharing disputes between two countries or even disputes on how to divide inflows of refugees between two nations. Part VII concludes.

Neither "hit" nor "miss," the choice should, in most cases, not be between opting into either reasoned arbitration or baseball arbitration, the way the OECD Multilateral Tax Convention currently presents it. An optimal dispute resolution mechanism is likely a combination of both reasoned arbitration (on threshold issues) and FOA (on numerical questions).

II. The Paradox of International Adjudication

The relationship between international courts and tribunals and the states that created them is going through a rough patch. If the 1990s was the golden age,[5] today, the pendulum has swung. China refused to participate in the South China Sea Arbitration and called the 2016 award, issued under the U.N. Convention on the Law of the Sea, a "political

4. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgment, 2018 I.C.J. 150 (Feb. 2) (concluding, rather summarily in ¶ 86, that U.S. $120,000 is a "reasonable" amount).

5. *See* Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. Int'l L. & Pol. 709, 709–711, 728–729 (1999).

farce."[6] For the first time in the history of the 23-years old World Trade Organization (WTO), the United States has blocked the reappointment of a member of the WTO Appellate Body[7] and, more recently, refused to even start the selection process for new Appellate Body members which, according to some commentators, "risks killing the WTO from inside."[8] African nations have orchestrated a backlash against both the International Criminal Court[9] and a number of regional economic courts.[10] Investor-state dispute settlement (ISDS) has been attacked from many corners, prompting some countries to exit from it and others, like the EU, to propose major reforms.[11] Countries, as diverse as the UK (in respect of voting rights for prisoners) and Russia (relating to conflicts with Georgia and the Ukraine), have threatened to leave the European Court of Human Rights system.[12]

That relations between tribunals and the states challenged before these tribunals are tense is nothing new, or surprising. Still, a paradox

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6. *See* Liu Xiaoming, *South China Sea Arbitration Is a Political Farce*, Telegraph (July 23, 2016, 1:57 PM), http://www.telegraph.co.uk/news/2016/07/23/south-china-sea-arbitration-is-a-political-farce/.

7. *Statement by the United States at the Meeting of the WTO Dispute Settlement Body*, WTO 1 (May 23, 2016), https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf.

8. Jim Brunsden & Alan Beattie, *EU's Top Trade Official Warns on Trump Impact on Trade*, Fin. Times (Oct. 16, 2017), https://www.ft.com/content/f6a7768c-b029-11e7-aab9-abaa44b1e130.

9. *See African Union Summit on ICC Pullout over Ruto Trial*, BBC News (Sept. 20, 2013), http://www.bbc.co.uk/news/world-africa-24173557; Monica Mark, *African Leaders Vote Themselves Immunity from New Human Rights Court*, Guardian (July 3, 2014), https://www.theguardian.com/global-development/2014/jul/03/african-leaders-vote-immunity-human-rights-court.

10. *See* Karen J. Alter et al., *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 Eur. J. Int'l L. 293, 293–294 (2016).

11. *See* Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed*, 29 ICSID Rev. 372, 407 (2014).

12. *See* Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 L. & Contemp. Probs., no. 1, 2016, at 141, 174–75.

has emerged. On the one hand, in a multi-polar world, with more interactions and diversity between states, treaties or other commitments are more difficult to conclude or to update.[13] The resulting vagueness of treaties (requiring constructive ambiguity to find agreement in the first place) and outdatedness of treaties (adaptation to changing developments requires consensus) has *increased* the scope for disagreements and likelihood of disputes. On the other hand, as treaties address ever more sensitive issues (yesterday, trade; today, tax), third-party adjudication, as between more diverse states (with less chance to engage in "legislative correction" of "wrongly" decided tribunal decisions), has become more controversial. States hesitate to delegate power to international tribunals. Tribunals, in turn, may shy away from making controversial decisions. In sum, in this "paradox of international adjudication,"[14] the *increased* scope for disputes is met with a *reduced* supply in third-party adjudication.

The response or remedy proposed to deal with these tribunal-state tensions often goes in two diametrically opposed directions. One calls for *more state control*, urging tribunals to be strict "agents" of the principals-states or to reject third-party adjudication altogether and reclaim state sovereignty.[15] Another calls for *more power to tribunals* as the only way to meet adjudication demand, with professional, public law–type judges, uncontrolled by states and de facto bound by precedent (to enhance consistency), acting as "trustees" of the system.[16]

This Article explores a different path, one where tribunals and states are not pitted against each other in a zero-sum game, but complement each other; an approach where unconventional forms of third-party adjudication promote the disclosure of information and preferences, and

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13. *See* Joost Pauwelyn et al., *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 Eur. J. Int'l L. 733, 733–34 (2014).

14. A term coined in Joost Pauwelyn & Manfred Elsig, *The Politics of Treaty Interpretation: Variation and Explanations Across International Tribunals*, *in* Interdisciplinary Perspectives on International Law and International Relations 445, 447 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

15. *See supra* note 2 (referencing U.S. proposals to strengthen member control over WTO dispute settlement).

16. *See supra* note 3 (referencing the EU proposal for a new "Investment Court System").

facilitate (rather than chill) agreement and settlement. If the paradox of international adjudication is to be resolved, alternative dispute resolution mechanisms will need to be examined. Baseball arbitration can, in at least certain settings, be one such creative, tailor-made approach.

III. Baseball Arbitration and the 2016 OECD Multilateral Tax Convention

A. The Trial of Socrates

The Athenian trial system, as practiced in 399 B.C. during the trial of Socrates, offers an ancient example of final offer arbitration (FOA).[17] 500 male citizens, drawn by lot, composed the jury who had to decide on the charges of corrupting the youth and impiety leveled against Socrates.[18] The trial was bifurcated into (i) a liability/guilt phase and (ii) a penalty phase, both of which had to be decided within a single day.[19] First, the accusers delivered a speech arguing for the conviction of Socrates. In response, Socrates offered his famous "apology."[20] The jury found Socrates guilty by 280 votes against 220.[21] Notwithstanding this jury ambivalence, the prosecutor then proposed the penalty of death. In response, Socrates first joked that he be "punished" with free meals at the public dining hall for the rest of his life (an honor usually reserved for a benefactor of Athens) but then proposed, as his final offer, a monetary fine.[22] The jury, which could only choose between execution or the fine, perhaps insulted by Socrates's original proposal, voted for execution (360 votes against 140).[23]

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17. *See* Mark J. Sundahl, *Baseball Arbitration, Game Theory and the Execution of Socrates* (Cleveland-Marshall Coll. Law Research Paper No. 10-202, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723176.

18. *See* Plato, Euthyphro, Apology, Crito 42 (F.J. Church trans., Macmillan Publ'g Co., 1948).

19. *Id.*at 42–45; *see also* Sundahl, *supra* note 17, at 8.

20. *See* Plato, *supra* note 18, at 21–49.

21. *Id.* at 42.

22. *Id.* at 43–44.

23. Plato, The Last Days of Socrates 72, 192 n.39 (Hugh Tredennick trans., Penguin Books 1969).

B. Baseball Salary Arbitration

A more recent, less dramatic, and more successful example of FOA is baseball salary arbitration. In 1973, MLB club owners agreed to FOA as a concession to the newly established player's union in order to avert strikes and avoid the, in their eyes, greater evil of free agency (which nonetheless came in 1976).[24] In the 2012–2016 agreement, eligibility for FOA is generally limited to players that have more than three, but less than six, years of Major League service time.[25] Up to three years, owners set the salary at any amount at or above the (collectively bargained) league minimum. After six years, players can leave the club and become free agents. In between, however, club and player are to negotiate a salary, knowing that the player is tied to the club, but in the shadow of FOA. An eligible player may submit the issue of his salary to "final and binding arbitration without the consent of the Club."[26] He must do so by a specific, pre-season "filing date" (for 2016: January 12). Within three days (for 2016: January 15), club and player must then exchange single salary figures for the coming season.[27] These figures may be different from those offered during prior negotiations and are submitted to a three-arbitrator panel. A list of arbitrators is drawn up annually by agreement of representatives of both clubs and players.[28] The arbitration panel holds a single hearing (for 2016: scheduled between February 1 and 20), conducted "on a private and confidential basis."[29] The parties get one hour and a half each to make their presentations.[30] The arbitration panel must consider a closed list of six criteria (e.g., the player's contribution to the club during the past season and comparative baseball salaries) to which the panel is given access on a confidential basis and

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24. *History*, Major League Baseball Players, http://www.mlbplayers.com/ViewArticle.dbml?DB_OEM_ID=34000&ATCLID=211157624 (last visited Oct. 27, 2018).

25. 2012–2016 Basic Agreement Between 30 Major League Clubs & the Major League Baseball Players Association, art. VI(E)(1)(a); *see also id.* art. VI(E)(1)(b) (providing an exception for so-called "Super Two" players.).

26. *Id.* art. VI(E)(1)(a).

27. *Id.* art. IV(E)(2).

28. *Id.* art. VI(E)(5) (Where no agreement can be found, the American Arbitration Association is tasked to provide lists of arbitrators, which are then selected "by alternately striking names from the lists.").

29. *Id.* art. VI(E)(7), (13).

30. *Id.* art. VI (E)(7).

is precluded from considering certain other factors (e.g., the financial position of the player and the club).[31] The arbitration panel must normally make its decision within 24 hours following the close of the hearing.[32] Crucially, the arbitration panel is "limited to awarding only one or the other of the two figures submitted" and "[t]here shall be no opinion."[33] Although the arbitration panel cannot make its award public,[34] salary offers exchanged and arbitration decisions are widely reported in the press. An arbitration decision is automatically implemented as a contractual agreement because, at the hearing, the player and club must submit to the arbitration panel a signed "Uniform Player's Contract, complete except for the salary figure," which the panel must then insert upon making its decision.[35] The parties can settle any time before the arbitration panel reaches a decision. Such settlement can be based on any factor including those precluded in arbitration and may also include features other than salary, such as incentive or bonus clauses or a multi-year contract (contracts that result from binding arbitration cannot include these options).[36]

Not surprisingly, FOA in baseball has contributed to significant increases in player compensation (beforehand, players were largely at the mercy of the club they were tied to).[37] More interestingly, the percentage of cases eligible for FOA that are actually *decided* by an arbitration panel is very small: in the first 20 years (1974–1993) only 9% of all eligible cases (26% of cases *actually filed*);[38] more recently, this number is even lower: in 2011, 2% of eligible cases (2.5% of cases filed); in 2012, 4% of eligible cases (5% of cases filed).[39] Most cases, by far, are settled by mutual agreement, rather than third-party adjudication. At the same time, the percentage of eligible cases *actually filed* to arbitration remains relatively high and has considerably increased over time: 46%

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31. *Id*. art. VI(E)(10).
32. *Id*. art. VI(E)(13).
33. *Id*.
34. *Id*.
35. *Id*. art. VI(E)(4).
36. *Id*. art. VI(E)(3).
37. Jeff Monhait, *Baseball Arbitration: An ADR Success*, 4 Harv. J. Sports & Ent. L. 105, 121 (2013).
38. John L. Fizel, *Play Ball: Baseball Arbitration After 20 Years*, Disp. Resol. J., June 1994, at 42, 44.
39. Monhait, *supra* note 37, at 138–39.

in the 1974–1993 period;[40] more recently, more than 80% of eligible cases (87% in 2011; 83% in 2012).[41] This implies that FOA assists parties in reaching a settlement: it forces both sides to disclose information and submit a reasonable number, after which settlement on a midpoint within the "contract zone" can be reached (in 2015, only 8% of cases filed proceeded to an arbitration award[42]), knowing that failure to settle (i.e., the cost of disagreement) means that the arbitration panel itself will pick *one or the other* of the numbers submitted; the arbitration panel does not have the power to compromise, or split the difference.

C. Baseball Arbitration in Tax Treaties

Since FOA was introduced to settle salary disputes in baseball, it has been copied in a variety of settings, ranging from damages in medical malpractice and rent adjustment disputes[43] to public sector labor contract issues and disputes over disability rates.[44] FOA is also increasingly used in commercial arbitration[45] and has been proposed to set royalty

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40. Fizel, *supra* note 38, at 44.

41. Monhait, *supra* note 37, at 138–39.

42. Maury Brown, *Who's Winning the MLB Salary Arbitration Game?*, Forbes (Feb. 23, 2015, 8:10 AM), http://www.forbes.com/sites/maurybrown/2015/02/23/whos-winning-the-mlb-salary-arbitration-game-heres-data-from-1974-to-2015/#334c09c35fa6 (noting that in 2015, 14 cases were actually decided by an arbitration panel); Eric Stephen, *2015 MLB Salary Arbitration Scoreboard*, SBNation, http://www.sbnation.com/mlb/2015/1/16/7562075/salary-arbitration-tracker-mlb-2015 (last updated Feb. 22, 2015, 10:52 AM) (noting that 175 players filed for arbitration in 2015).

43. *See, e.g.*, Walt Burton, *Baseball Arbitration to Settle Valuation Disputes—Don't Get Caught in Left Field*, Thompson Burton PLLC (Oct. 12, 2012), http://thompsonburton.com/commercial-real-estate/2012/10/12/baseball-arbitration-to-settle-valuation-disputes-dont-get-caught-in-left-field/.

44. *See* Cal. Comm'n on Health & Safety & Workers' Comp., Preliminary Evidence on the Implementation of "Baseball Arbitration" in Workers' Compensation (1999), https://www.dir.ca.gov/chswc/Baseballarb-final'rptcover.htm; Mike Carrell & Richard Bales, *Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining*, 28 Ohio St. J. on Disp. Resol. 1 (2013).

45. *See* Am. Arbitration Soc'y, Drafting Dispute Resolution Clauses: A Practical Guide 30 (2013); *Final Offer Arbitration Supplementary Rules*, Int'l Ctr. for Dispute Resolution (Jan. 1, 2015), https://www.icdr.org

rates for licenses of standard-essential patents on so-called FRAND (fair, reasonable, and nondiscriminatory) terms.[46]

At the international law level, FOA was first introduced in the double taxation treaty between the United States and Canada and, as of 2006,[47] has been included in several other U.S. tax treaties, e.g., with Germany, Belgium, France, and Switzerland.[48] Traditionally, tax treaty disputes have been resolved under a so-called Mutual Agreement Procedure (MAP) that involves, and requires the agreement of, the competent tax authorities of both contracting states. Mandatory binding arbitration is, to this date, included only in a minority of tax treaties.[49] Where it is included, it can take the "independent opinion" or "conventional" arbitration approach (where the arbitrator issues a reasoned opinion, as in the 1990 EU Arbitration Convention[50] or the 2008 OECD Model Tax Convention[51]) or be in the form of FOA. FOA is included in

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/sites/default/files/document_repository/Final_Offer_Supplementary_Arbitration_Procedures.pdf.

46. Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents*, 28 Berkeley Tech. L.J. 1135, 1135 (2013). For a critique of this proposal, see Pierre Larouche et al., *Settling FRAND Disputes: Is Mandatory Arbitration a Reasonable and Non-discriminatory Alternative?*, 10 J. Competition L. & Econ. 581 (2014).

47. *See* Patricia A. Brown, *Development of the "North American Model" for Arbitration of Tax Treaty Disputes* 1 n.3, https://www.wu.ac.at/fileadmin/wu/d/i/taxlaw/institute/WU_Global_Tax_Policy_Center/Arbitration/arb_2/DEVELOPMENT_OF_THE.docx ("The U.S.-Canada protocol in which [FOA first] appeared was not signed until 2007, but the arbitration provision therein was completed several years earlier."). The first public appearance of FOA was in the U.S. tax treaty with Germany, then Belgium, concluded in 2006. Jasmin Kollman & Laura Turcan, *Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges, in* International Arbitration in Tax Matters ch. 2 ¶ 2.3.2.6.1 (Michael Lang & Jeffrey Owens eds., 2015).

48. *See* Kollman & Turcan, *supra* note 47, ¶ 2.3.2.1.

49. *See* Comm. of Experts on Int'l Cooperation in Tax Matters on Its Tenth Session, *Secretariat Paper on Alternative Dispute Resolution in Taxation*, ¶ 26, U.N. Doc. E/C.18/2015/CRP.8 (Oct. 8, 2015).

50. The Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, Aug. 20, 1990, 1990 O.J. (L 225) 10, provides for conventional arbitration between EU member states in respect of transfer pricing disputes.

51. The 2008 OECD Model Tax Convention (as well as the 2010 and 2014 updates) also prefers longer form arbitration. *See* OECD Commentaries

a number of U.S. tax treaties as well as in the 2011 U.N. Model Tax Convention as the default binding arbitration option.[52] Highlighting the increasing popularity of FOA, the 2016 OECD Multilateral Tax Convention also provides for baseball arbitration as the default option.

The 2016 OECD Multilateral Tax Convention was concluded to implement tax reforms agreed at the OECD/G20 level under the so-called BEPS (base erosion and profit shifting) project aimed at tackling "aggressive international tax planning."[53] Rather than amending hundreds of bilateral tax treaties, states decided to conclude a single multilateral treaty under which countries can then notify those "covered tax agreements" to which they want the changes to apply.[54] One of the core BEPS reforms is aimed at "making dispute resolution mechanisms more effective."[55] There are increasing inventories of unresolved MAP cases from the past.[56] Moreover, substantive BEPS reforms have changed income allocation principles for the first time in almost a century and are expected to cause "a tsunami of new [tax] disputes between countries."[57] One option in the new OECD Convention, triggered only

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on the Articles of the Model Tax Convention, Annex Sample Mutual Agreement on Arbitration 381–96 (2010). FOA is also provided for but only when explicitly agreed on in special terms of reference. *See id.* at 383, ¶ 6.

52. U.N. Model Double Taxation Convention between Developed and Developing Countries, Annex to the Commentary on Paragraph 5 of Article 25 (Alternative B) 414 (2011).

53. OECD Multilateral Tax Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Sharing 1 (Nov. 24, 2016), http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf; *see also* Itai Grinberg & Joost Pauwelyn, *The Emergence of a New International Tax Regime: The OECD's Package on Base Erosion and Profit Shifting (BEPS)*, Am. Soc'y of Int'l law: Insights (Oct. 28, 2015), https://www.asil.org/insights/volume/19/issue/24/emergence-new-international-tax-regime-oecd's-package-base-erosion-and.

54. OECD Multilateral Tax Convention, *supra* note 53, art. 2.1(a).

55. OECD, *Making Dispute Resolution Mechanisms More Effective, Action 14—2015 Final Report* (Oct. 5, 2015), https://read.oecd-ilibrary.org/taxation/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report_9789264241633-en#page1.

56. *See* Comm. of Experts on Int'l Cooperation in Tax Matters, *supra* note 49, ¶ 1.

57. Michael Lang & Jeffrey Owens, *Preface* to International Arbitration in Tax Matters, *supra* note 47, at xxiii.

if both states to a tax treaty opt into it, is mandatory binding FOA once two years of MAP has not resolved the case.[58]

Although it is the taxpayer ("a person directly affected by the case") who initiates the MAP and can subsequently request binding arbitration, it is the competent authorities of the contracting states (in the United States, the Secretary of the Treasury) that negotiate in a MAP and are parties to the arbitration.[59] Arbitration proceedings are strictly confidential.[60] Arbitration panels consist of three members: each competent authority appoints one panel member; the two party-appointed members jointly appoint the panel chair.[61] After a dispute is submitted to arbitration, each competent authority must submit a "proposed resolution" that "addresses all unresolved issue(s) in the case," to which it may add a "supporting position paper."[62]

Two types of issues are distinguished: (i) purely numerical questions, such as specific monetary amounts of income or expense, or the rate of tax to be charged for an adjustment; (ii) threshold questions, such as whether an individual is a resident or whether a permanent establishment exists. Where only numerical questions are at issue, the proposal "shall be limited" to a number.[63] Where threshold questions are also contested, "alternative proposed resolutions" may be submitted (e.g., country *x* proposes that no permanent establishment exists; in the alternative, if it exists, the income to be attributed to it is $1,000,000).[64]

Crucially, as in all FOA, the arbitration panel must "select as its decision one of the proposed resolutions for the case submitted by the competent authorities with respect to each issue and any threshold questions.[65] The arbitration decision "shall not include a rationale or any other explanation" and "shall have no precedential value."[66] Implementation of an arbitration decision is quasi-automatic: the arbitration panel does not itself formally dispose of the issue; instead, as in baseball salary arbitration (where the salary number picked gets automatically

58. OECD Multilateral Tax Convention, *supra* note 53, art. 19.
59. *Id*.
60. *Id*. arts. 21, 23.5.
61. *Id*. art. 20.
62. *Id*. art. 23.1(a), (b).
63. *Id*. art. 23.1(a).
64. *Id*.
65. *Id*. art. 23.1(c).
66. *Id*. art. 23.1(c).

included in a standard contract), the decision must "be implemented through the mutual agreement" procedure.[67]

The parties can settle any time before the arbitration panel reaches a decision.[68] Even after a decision has been made, the competent authorities may, within three months, "agree on a different resolution of all unresolved issues," in which case the arbitration decision shall "not be binding" and "not be implemented."[69] Also, the taxpayer who initiated the case may, at any time before the arbitration panel decides, withdraw his request for arbitration or a MAP, in which case the proceeding terminates.[70] Even after an arbitration decision has been made, the taxpayer may reject the mutual agreement that implements the arbitration decision and proceed, for example, before the domestic courts of either party.[71] The arbitration decision shall also not be binding if "a final decision of the courts of one of the Contracting Jurisdictions holds that the arbitration decision is invalid."[72]

Further procedural details need to be worked out by mutual agreement[73] (states can also move away from the default of FOA and opt for independent opinion or reasoned arbitration).[74] If U.S. practice is any guide—and it may well be since most arbitration provisions in the OECD Multilateral Tax Convention were taken from U.S. tax treaties—FOA will move swiftly and efficiently. The time for each, counting from the date of appointment of the chair, is as follows: 90 days to submit a "proposed resolution" (not to exceed five pages) and "supporting position paper" (not to exceed 30 pages); 180 days to submit a "reply submission" (not to exceed 10 pages); nine months for the "arbitration board" to decide.[75] All communication between the arbitration board and the competent authorities "must be in writing" (no hearing with the parties).[76]

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67. *Id*. art. 19.4.
68. *Id*. art. 22.
69. *Id*. art. 24.2.
70. *Id*. art. 22(b).
71. *Id*. art. 19.4(b)(i), (iii).
72. *Id*. art. 19.4(b)(ii).
73. *Id*. art. 19.10.
74. *Id*. art. 23.2. Note that even for reasoned arbitration, arbitral decisions "shall have no precedential value." *Id.* art. 23.2(c).
75. IRS Announcement 2009–44, 2009–24 I.R.B. 1079, 1079–1081.
76. *Id*. at 1080.

The arbitration board is "encourage[d] . . . to use teleconferencing and videoconferencing."[77] If a face-to-face meeting is necessary, only "economy class travel" is reimbursed.[78] Arbitrators will be compensated "for no more than three days of preparation" and "two meeting days" (plus travel days)[79] at $2,000 per day.[80]

As with baseball salary arbitration, the number of cases actually decided by an arbitration board, under any of the seven U.S. tax treaties that now provide for FOA since 2006, is very small.[81] Data is not publicly available, but insider reports refer to "three to eight" arbitrations, all under the U.S.-Canada tax treaty.[82] At the same time, the

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77. *Id*.

78. *Id*.

79. *Id*. at 1080–81.

80. Protocol to Convention for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income, Belg.-U.S., ¶ 6, Nov. 27, 2006, T.I.A.S. No. 07-1228.2 (in reference to paragraphs 7 and 8 of Article 24). Expenses must be set in accordance with the ICSID Schedule of Fees for arbitrators. *Id.*

81. Note, however, that an equally small number of arbitration cases have actually been filed where the treaty provides for conventional arbitration (not FOA), as under the 1990 EU Arbitration Convention, *supra* note 50 and the accompanying text. *See* Sven-Olof Lodin, *The Arbitration Convention in Practice*, 42 Intertax 173, 175 (2014). Few cases filed may indicate success (e.g., because cases settle in the shadow of mandatory binding arbitration). It may also be that certain bottlenecks persist, preventing cases from proceeding to arbitration (e.g., cases that a competent authority has not accepted for MAP consideration and cannot therefore proceed to arbitration, or cases that have been labeled as involving "improper use of the Convention"). *See* Memorandum of Understanding Between Belgium and the United States Under the 2006 Belgium-U.S. Tax Treaty, Belg.-U.S., ¶ 2, May 5, 2009, https://www.irs.gov/businesses/international-businesses/memorandum-of-understanding-between-the-competent-authorities-of-the-kingdom-of-belgium-and-the-united-states-of-america.

82. H. David Rosenbloom, *Mandatory Arbitration of Disputes Pursuant to Tax Treaties: The Experience of the United States*, *in* International Arbitration in Tax Matters, *supra* note 47, at 159, 162–63. Lieb contrasts this small number of FOA tax arbitration cases to "at least, 30 BIT [conventional] arbitration cases . . . that deal with tax matters." Jean-Pierre Lieb, *Introduction: Taking the Debate Forward*, *in* International Arbitration in Tax Matters, *supra* note 47, at 6.

shadow of FOA is credited with hastening settlement,[83] and the experience to date with FOA has been described as "exceptionally positive."[84]

IV. Why Baseball Arbitration May Be Particularly Appropriate to Resolve (at Least Some) International Law Disputes

If for baseball salary disputes or commercial arbitration, the speed, low cost, and simplicity of FOA are attractive, at the international law level, three additional features can make FOA particularly appropriate: (i) reduced sovereignty costs, (ii) a preference for negotiated solutions, and (iii) less chilling effect on rulemaking and broader relationships. Rather than a zero-sum game between states and international tribunals, FOA provides a key role to third-party adjudicators while leaving states in the driver's seat. FOA may thereby enable compulsory dispute settlement where otherwise states could not agree to it.

A. Reduced Sovereignty Costs

Mandatory binding arbitration remains the exception, rather than the rule, as states hesitate to tie their fate to third-party adjudication. The more sensitive the issue, the higher the sovereignty cost. States also fear to lose control over tribunals or may have a hard time trusting "foreign" judges. In this light, it is no surprise that FOA was first used to settle international tax disputes, as tax is often perceived as one of the last bastions of Westphalian sovereignty.[85] FOA reduces certain sovereignty costs as it limits the adjudicator to picking one of the parties' own proposals. Under FOA, tribunals cannot develop their own solution. They

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83. Rosenbloom, *supra* note 82, at 162–63 ("[S]ome complicated Mutual Agreement Procedure cases, which had resisted resolution for years, were concluded once it became clear that there would be a mandatory arbitration provision in a particular treaty.").

84. *Id*. at 159; *see also* Brown, supra note 47, at 1 (describing FOA in U.S. tax treaties as "an overall approach that has been remarkably effective in practice").

85. *See* Brown, supra note 47, at 3 ("[S]ome had expressed concerns that the introduction of mandatory binding arbitration would somehow impinge on U.S. sovereignty. For that reason, the provision was carefully crafted as a continuation of the mutual agreement process in order to minimize such concerns.").

are not even allowed to provide reasons for why they picked one over the other party proposal. As a result, under FOA, tribunals cannot develop their own jurisprudence. In most cases of FOA, precedential value of decisions is even explicitly precluded. This prevents the risk of runaway tribunals creating their own rules. The OECD Multilateral Tax Convention takes this a step further and explicitly provides for legislative correction, even ex post: once the arbitration panel has made its determination, the competent authorities may, within three months, "agree on a different resolution of all unresolved issues," in which case the arbitration decision shall "not be binding" and "not be implemented."[86] Also, the taxpayer can opt-out of an arbitration decision ex post.[87]

B. Preference for Negotiated Solutions

One key objective of FOA is to stimulate negotiations and push the parties to a mutually agreed solution. Modern FOA was first discussed in the context of collective bargaining in industrial relations, more specifically as a "strike-like" institution in situations where strike and lockout are precluded (e.g., in the police force or hospitals).[88] Like strike or lockout, compulsory FOA is meant to increase the cost of disagreement and push the parties to make concessions and settle. In conventional arbitration, arbitral decisions are often a compromise (splitting the difference), providing parties an incentive to exaggerate their claims (a practice that, in turn, chills settlement). Under FOA, in contrast, adjudicators must pick one of the parties' proposals so that parties have an interest in making reasonable offers (if not, arbitrators will choose the other side's proposal). Such reasonable offers should bring parties closer and facilitate settlement as parties "seek security in agreement," rather than risk an uncertain, unpredictable arbitration outcome.[89] As one

86. OECD Multilateral Tax Convention, *supra* note 53, art. 24.2.

87. *Id*. art. 19.4(b)(i), (iii).

88. Carl Stevens, *Is Compulsory Arbitration Compatible with Bargaining?* 5 Indus. Rel., no. 2, 1966, at 38, 38–44 (1966).

89. As Stevens put it originally:

> [FOA] generates just the kind of uncertainty about the location of the arbitration award that is well calculated to recommend maximin notions of prudence to the parties and, hence, compel them to seek security in agreement . . . unlike the case

baseball observer put it: "Winning means being more reasonable, which is the key that unlocks the door to settlement."[90] Much the way the threat of strike pushes parties to settle, in most cases, the threat of FOA leads to agreement, as confirmed in both baseball salary and U.S. tax treaty FOA where very few cases are actually decided by the arbitrator.

In domestic legal systems, one can legitimately question the preference for settlement over an adjudicated outcome.[91] At the international level, however, almost all dispute settlement mechanisms explicitly provide for mutually agreed settlement as a first and preferred option.[92] In a domestic context, with division of powers and constitutional checks and balances, certain decisions are no doubt best taken by a judge, not the legislator. In international law disputes, however, the presumption remains (at least in state-to-state settings) that (democratically elected) state representatives are better equipped to express peoples' interests and preferences than international tribunals.

Since the enforcement of decisions by international tribunals remains a challenge (in the absence of an international police force), settlement also facilitates implementation as both parties agreed with the result. Indeed, many conventional (reasoned) tribunal decisions are not implemented as such (in most cases they clarify what a state *cannot* do)

> under the compromise criterion [conventional arbitration]—there is no reason to suppose that big claims may be rewarded and concessions penalized. Indeed, expectations may tend to be the other way around, as each party may assume that the arbitrator will reject an 'exaggerated' position in favor of an opponent's more moderate claim.

*Id.*at 46.

90. Roger I. Abrams, The Money Pitch: Baseball Free Agency and Salary Arbitration 149 (2000).

91. *See* Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1073–90 (1984) (arguing against settlement based on imbalances of power, absence of authoritative consent, and, most importantly, the crucial public role and social function of courts and adjudication).

92. *See, e.g.*, Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred." *Id.*

and require a subsequent, negotiated settlement on a positive way forward.[93] FOA facilitates early settlement, and even where it leads to an arbitration decision, such decision, as it takes the form of one of the party's concrete proposals set out in a contract, can be implemented immediately (e.g., the salary figure or transfer price is simply inserted into the baseball player's contract or the MAP agreement).

Importantly, that settlement is the preferred option in most international law disputes does not imply that *any* settlement is acceptable. Settlement must, for example, be consistent with mandatory rules[94] and cannot affect third-party rights.[95] There may also be an obligation to make settlements publicly available.[96]

C. Less Chilling Effect on Rulemaking and Broader Relationships

As compared to FOA, compulsory adjudication of the conventional type tends to chill not only settlement (parties take extreme, legal/technical positions, entrench, and simply await the arbitration outcome), it may also dampen negotiated rule adaptation or new rulemaking (states shift responsibility to the judiciary or are afraid to agree on new rules for fear that they will "bite" or could be misinterpreted).

Compulsory dispute settlement in the WTO, for example, is said to have "sharply curtailed" trade diplomacy and triggered retaliation cases that may otherwise not have been filed: "Because litigation is readily available, meaningful consultations do not take place. After all, to have a full, substantive discussion of differences might well reveal

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93. *See* Abhijit Das et al., *Introduction* to WTO Dispute Settlement at Twenty: Insiders' Reflections on India's Participation 1, 1–19 (Abhijit Das & James J. Nedumpara eds., 2016) (describing India's experience in the WTO).

94. *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 18232 (in respect of jus cogens); *see also, e.g.*, DSU, *supra* note 92, art. 3.5 ("All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements. . . .").

95. *See* Vienna Convention on the Law of Treaties, *supra* note 94, art. 34.

96. *See, e.g.*, DSU, *supra* note 92, art. 3.6: "Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto."

litigation strategy. Consequently, exchanges between governments have become largely sterile."[97] In the WTO, 43% of consultation requests filed have led to the circulation of a panel decision.[98] As noted earlier, in baseball salary arbitration, the percentage of cases filed and actually *decided* by an arbitration panel has in recent years been below 10%;[99] in FOA under U.S. tax treaties since 2006, only "three to eight" cases have been decided in arbitration.[100] The formal settlement rate in the WTO is, indeed, relatively low: only 16% of cases filed are formally settled. Formal settlement has, interestingly enough, also *decreased* over time: between 1995–1999, 20% of WTO cases filed were settled during consultations; between 2010–2014, only 1%.[101] Cases may of course settle *before* they are formally filed to the WTO, in the shadow of WTO rules and WTO jurisprudence. However, once such formal filing occurs, the WTO dispute settlement system seems to stymie, rather than facilitate, settlement.

Mandatory dispute settlement in the WTO of the conventional type has also made new rulemaking in the WTO, even when it comes to non-binding guidelines, more difficult.[102] The risk of chilling negotiated rule adaption in, for example, protocols to bilateral tax treaties or

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97. Alan Wm. Wolff, *Problems with WTO Dispute Settlement*, 2 Chi. J. Int'l L. 417, 420 (2001).

98. Data collected by the author, based on all disputes initiated before July 1, 2016 (507 in total) and status update up to September 30, 2016. Of the remaining cases where no panel report was circulated (57% of total), only a fraction was formally settled (16% of total); the rest have either been (i) inactive for more than six months (36% of total, which could include some settlements, but which have not been notified) or (ii) are still pending (5% of total).

99. *See supra* text accompanying note 38.

100. *See supra* text accompanying note 82.

101. Joost Pauwelyn and Weiwei Zhang, *Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload*, 21 J. Int'l Econ. L. 461, 469 (2018).

102. Consider China's concerns that the non-binding guidelines on good regulatory practice (GRP) adopted by the Technical Barriers to Trade (TBT) Committee would nonetheless be referred to in WTO dispute settlement. *See* Petros C. Mavroidis, The Regulation of International Trade: The WTO Agreements on Trade in Goods 405 (2016); Erik Wijkström & Devin McDaniels, *Improving Regulatory Governance: International Standards and the WTO TBT Agreement*, 47 J. World Trade 1013, 1020, 1029 (2013).

regularly updated OECD commentaries to the OECD Model Tax Convention (which, in most countries, filter through into domestic law without formal ratifications) is one of the core reasons why parties have opted for FOA in tax treaties.[103]

In addition, and quite appropriate for international law disputes, FOA may avoid "poisoning the atmosphere." As the focus is on settlement, not "winning the legal argument," protracted back-and-forth criticism of each other's position is avoided. As Tulis put it in the context of baseball salary arbitration, FOA offers the "invaluable incentive of maintaining a congenial relationship between the player and management. In an arbitration proceeding, the player would have to witness his team's management questioning his value to the team. As the player likely will remain on the team, preserving a good relationship is of great importance."[104] Brown describes the broader relationship effect of FOA in the tax treaty context as follows:

> "The success of the [MAP] critically depends on strong, collegial relationships, grounded in mutual trust, between and among competent authorities around the world." . . . [F]or a competent authority that may have several dozen . . . cases with the same country, the risk of "poisoning the atmosphere" with that country's competent authority through an overly litigious approach to dispute resolution is a very real concern.[105]

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103. *See* Patricia A. Brown, *Enhancing the Mutual Agreement Procedure by Adopting Appropriate Arbitration Provisions*, *in* International Arbitration in Tax Matters, *supra* note 47, at 85, 106 ("It is . . . unclear why governments would be interested in the development of a 'legalistic dispute settlement' system that calls for the issuance of independent opinions. Such a system could give rise to yet another set of potentially inconsistent interpretations [on top of potentially diverging domestic court decisions in different countries and OECD interpretations] that could reduce the ability of governments, collectively, to control the development of international tax norms.").

104. Benjamin A. Tulis, *Final-Offer "Baseball" Arbitration: Contexts, Mechanics & Applications*, 20 Seton Hall J. Sports & Ent. L. 85, 92 (2010).

105. Brown, *supra* note 103, at 107 (quoting MAP Strategic Plan ¶ 15).

States involved in other (non-tax) international law disputes are engaged in similar long-term, repeat-game relationships. "Poisoning the atmosphere" in, for example, one trade dispute, may endanger cooperation on another trade (or non-trade) issue or trigger a retaliatory dispute filing in return. Similarly, a foreign investor and a host state involved in an investor-state dispute often have a vested relationship that goes beyond the particular case. Contentious litigation of the conventional type may endanger or even sink this relationship. FOA, in contrast, may leave it relatively unaffected and even bolster cooperation and mutual trust.

D. Speed, Low Cost, and Simplicity

Lest it be forgotten, speed, low cost, and simplicity remain the most-cited advantages of FOA. Although they may be less important for international law disputes (where the number of cases remains relatively low), these features—especially low cost and simplicity—can make FOA particularly attractive to small or developing countries with scarce financial and/or human resources. WTO dispute settlement, for example, is not only relatively slow (on average four years and three months, including consultations, panel and appeal procedures, implementation period and compliance panel and appeal,[106] compared to a month in baseball salary arbitration or two years and nine months for a MAP, including FOA under U.S. tax treaties). It is also expensive (most countries still hire U.S.-based international law firms, although there is the subsidized Advisory Centre on WTO Law for developing countries) and is increasingly so as the complexity of WTO cases and case law increases. The WTO's de facto rule of precedent (explicitly precluded in FOA) shifts power from states to WTO panels and the Appellate Body, and, for most developing countries, it also has two additional drawbacks. First, precedent (as important as it may be to clarify the rules) is built and grows based on cases and arguments submitted by *other*, mostly developed countries; second, where less active countries do file a case, over time this becomes more difficult as they must catch up with an increasingly complex jurisprudence in which they played no or little

106. WorldTradeLaw.net, http://worldtradelaw.net/static.php?type=dsc&page=stats (last visited Nov. 2, 2018).

part.[107] FOA avoids precedent and lengthy rounds of complex legal submissions. Participation in a FOA case is limited to submitting a party's last best offer and, in most cases, settlement negotiations. These considerations most likely explain why the U.N. Model Tax Convention (which generally better reflects developing country interests as compared to the OECD Model Tax Convention) sets out FOA, rather than conventional arbitration, as the default arbitration option.

V. The Limits of Baseball Arbitration

Limiting an adjudicator's role to merely picking one of the parties' proposals—the hallmark of FOA—may be counterintuitive to any law-trained professional. It also offends a longstanding judicial (and emerging arbitral) tradition of reason giving, which is said to limit arbitrariness, enhance the quality of the process, make results more palatable (to both parties and the broader public), and allow for review and precedent to operate.[108] The previous section presented arguments why, in some cases, the advantages of FOA may outweigh, or at least counterbalance, these reasons for reasons (speed, low cost, and simplicity; reduced sovereignty costs; preference for negotiated solutions; and less chilling effect on rulemaking and broader relationships). In addition, there are other important caveats cautioning against the use of FOA in certain international law settings: (i) FOA works best for numerical questions between two parties, (ii) concerns about fairness and equal treatment, (iii) power asymmetries and secrecy, and (iv) practical enforcement matters.

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107. *See* Joost Pauwelyn, *Minority Rules: Precedent and Participation Before the WTO Appellate Body*, *in* Establishing Judicial Authority in International Economic Law 141, 167–68 (Joanna Jemielniak et al. eds., 2016).

108. *See generally* La Motivation des Décisions des Juridictions Internationales (Hélène Ruiz Fabri & Jean-Marc Sorel eds., 2008); The Reasons Requirement in International Investment Arbitration: Critical Case Studies (Guillermo Aguilar Alvarez & W. Michael Reisman eds., 2008); Justice Bingham, *Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award*, 4 Arb. Int'l 141 (1988); Toby T. Landau QC, *Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration*, *in* ICCA Congress Series No. 14, at 187 (2009); S.I. Strong, *Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy*, 37 Mich. J. Int'l L. 1 (2015).

A. Baseball Arbitration Works Best for Numerical Questions Between Two Parties

FOA was devised to mimic a market price where, for whatever reason, negotiations reach an impasse or ordinary market forces do not play (e.g., the baseball example, where the player must stay with his club for the next year). The parties themselves—more so than the arbitrator—know best what the "true price" is, but withhold information. The threat of an uncertain offer by the other side and an uncertain arbitration decision, nudges the parties to make concessions on the negotiating spectrum. This, in turn, creates a contract zone, or more accurate arbitration decision (a choice between two reasonable offers, rather than a compromise between two extremes).

This works if the disputed question is a numerical one, say, on a range between 1 and 100. Assume, for example, that Apple, incorporated in the United States, imports phone batteries from its subsidiary in China. Assume further that a dispute arises between the United States and China as to what arm's length transfer price Apple should pay its Chinese subsidiary for each battery: a higher price leads to more taxable income in China; a lower price means more profits shift to Apple U.S. and the U.S. Treasury. In conventional arbitration, expecting a compromise outcome, both the United States and China may argue extremes (say, $1.00 vs. $20.00, expecting an outcome of around $10.00). FOA drives the parties to make more reasonable offers (say, $4.00 and $6.00, bringing the price closer to the "true price" of around $5.00).

If, in contrast, the question is a principled yes/no threshold issue (e.g., a dispute over whether Apple's Chinese leg is a permanent establishment, triggering certain Chinese tax obligations), FOA cannot fulfill its role of nudging the parties toward a more reasonable offer.[109] The United States will simply stick to its answer that there is no permanent establishment (hence, no tax in China); China will argue that there is; and the arbitrator will need to pick yes or no, without reason giving. Although the other benefits of FOA remain, for threshold questions, FOA

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109. *See* Stevens, *supra* note 88, at 48; *see also* Raffaele Petruzzi et al., *Baseball Arbitration in Comparison to Other Types of Arbitration*, *in* International Arbitration in Tax Matters, *supra* note 47, at 139, 144–45 (FOA "is not suited to cases where the exact monetary value is not the primary issue.").

loses its core functions of stimulating settlement or disclosing more information to reach a more accurate arbitral outcome.

Where the dispute involves, first, a threshold question (e.g., is there a permanent establishment?) and, second, a numeral question (assuming there is a permanent establishment, what amount of taxable income must be attributed to it?), FOA works best issue-by-issue; that is, the arbitrator first picks its answer to the threshold question (be it based on final offers by the parties or reasoned decision), then proceeds to the numerical one, with a new round of final offers by the parties. If, in a multi-question dispute, single-package offers must be submitted and selected, parties may be tempted to slip a few unreasonable elements into their package, knowing that the arbitrator must pick one or the other package.[110] Arbitration could also be reasoned on some issues (threshold questions) and FOA on others (number debates).

In addition, if a dispute involves more than two parties, FOA may not work. Following Apple's state aid condemnation by the EU Commission, for example, a multitude of states may now claim the same Apple income wrongly attributed to Ireland.[111] It may be possible to render bilateral a triangular dispute between A, B and C, by first deciding the A-B dispute, and then the A-C dispute.[112] But if the A-C dispute depends on the outcome in the A-B dispute, it may be unfair not to involve C in the A-B solution. Having several bilateral arbitrations rather than one multilateral may also increase cost and delays and be more complex (thereby neutralizing some of the core advantages of FOA). A, B, and C could be asked to each make their final offer in a single, three-party FOA. Yet, here the risk is that none of the three final offers treat

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110. At the same time, the risk with issue-by-issue decisions is that the arbitrator may be tempted again to compromise or split the difference, not within an issue, but across issues. This could be addressed by appointing a different arbitrator for each issue.

111. James Kanter, *E.U., Citing Amazon and Apple, Tells Nations to Collect Tax*, N.Y. Times (Oct. 4, 2017), https://www.nytimes.com/2017/10/04/business/eu-tax-amazon-apple.html.

112. *See* U.S. Treas. Dep't, Technical Explanation of the U.S.-Belgium Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of 2006, at 97 ("As long as there is a complete network of treaties among the three countries, it should be possible, under the full combination of bilateral authorities, for the competent authorities of the three States to work together on a three-sided solution.").

all three parties reasonably. FOA for modern international tax cases that involve more than two taxing jurisdictions (e.g., where the same income is contested between five countries) and that are income- rather than transaction-based may, therefore, be sub-optimal. Reasoned arbitration may be more advisable in such scenario.

B. Concerns about Fairness and Equal Treatment

Where an arbitrator can only pick between *one or the other* party proposal, will the outcome be fair and accurate? Remember that the underlying idea of FOA is that in conventional arbitration the parties do not disclose all information and take extreme positions; the arbitrator, in turn, makes an educated guess or finds a compromise. From this perspective, FOA can *improve* accuracy: knowing that reasonableness will be rewarded, parties disclose more information so that the outcome (be it settlement or an arbitral determination) better reflects market value.

That said, what a party is willing to offer (and therefore arbitral outcomes) will "depend on uncertainty about the arbitrator's preferences, expectations about the other party's preferences, and the relative risk-aversion of each party."[113] Where there is asymmetry between the parties (e.g., one party is a repeat player and thus knows more about arbitral preferences or can take more risk because the repeat player can spread risk over many cases), outcomes can be skewed.[114] In baseball salary arbitration, for example, club owners win slightly more cases than players (58% v. 42%).[115] This also means that for similar cases, or even for exactly the same question but between different parties (say, in FRAND royalty disputes, the same patent holder and two different licensees[116]), outcomes may be quite different, raising concerns of equal treatment and substantive justice.

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113. *See* Preliminary Evidence on the Implementation of "Baseball Arbitration" in Workers' Compensation, *supra* note 44, at 5.

114. Arbitrator uncertainty can be reduced by publicizing arbitral decisions (see below) and, in any event, persists also in conventional arbitration (in ISDS, for example, outcomes may depend more on who is selected as arbitrator than on the applicable law).

115. *See* Brown, *supra* note 42.

116. *See generally* Larouche et al., *supra* note 46. Indeed, a criticism levelled against FOA to settle standard-essential patent disputes is that two disputes over the same patent with two different licensees can lead to very different

For example, a more risk averse party (think of a developing country, new to FOA in a tax dispute, or a worker in a one-time compensation dispute with a repeat-player insurer) may inflate its offer, beyond true value, to avoid losing. More risk averse parties may then win more often but win less than they should in each instance. The takeaway is that FOA works better where party information and appetite for risk are symmetrical (e.g., to settle collective bargaining over wages between management and equally informed worker unions rather than individual disputes to determine the wage of a single employee). FOA is better adapted also to decide unique disputes between two parties (say, deciding the retaliation amount permitted in a bilateral dispute between two WTO members) rather than the same question between one party and several other parties (e.g., the patent holder and a multitude of licensees).

C. Power Asymmetries and Secrecy

As noted earlier, FOA can be attractive to weaker parties as it is cheaper and less complicated, both in terms of procedural simplicity (a party just has to present its final offer) and because there is no precedent (hence, no sophisticated jurisprudence to follow-up on). At the same time, there is the risk that uninformed parties (think of a developing country new to FOA under a tax treaty) do not fully grasp the operation of FOA, stick to their extreme demand, and lose cases. Training and capacity building could alleviate this concern.

In addition, where FOA is conducted in full secrecy—as is currently the case under U.S. tax treaties, where the taxpayer must agree to any disclosure of information to third parties—competent authorities, taxpayers, and tax advisors/law firms with prior FOA experience are at a clear advantage: they know how the system works and what arguments

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outcomes even where arbitral preferences differ only minimally so that FOA may not comply with the non-discrimination requirement in FRAND. The patent holder may offer 5% in both cases; the two licensees 1%. If the first arbitrator believes the right outcome is 2.9%, it will select the closest offer of 1%; if the second arbitrator believes the right outcome is 3.1%, it will select the closest offer of 5%. Hence, a small arbitral difference of 0.2% results in an outcome differential of 4%. *See* Edward F. Sherry et al., *FRAND Commitments in Theory and Practice: A Response to Lemley and Shapiro's "A Simple Approach"* 12 (Tusher Ctr. for the Mgmt. of Intellectual Capital, Working Paper Series No. 3, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764615.

have convinced arbitrators in past cases. As Brown points out, there is a clear risk that the FOA process "will become the province of a relatively small group of practitioners who are 'in the know'. . . . It is the nature of confidential proceedings that only those who are involved know what has happened."[117] This concern can be addressed by making arbitral decisions public (as happens in baseball salary arbitration), albeit in a way that blanks out taxpayer names or does not disclose core confidential information. Even if decisions would not be reasoned, making them public could also clarify certain rules and procedures and thereby prevent future disputes. As global tax policy is high on the political agenda and controversial in many countries, publication of awards would also meet popular demands for more transparency. As a recent U.N. study notes, "The general citizenry needs to be confident that tax systems are fair and efficient."[118]

D. Enforcement

In some settings FOA facilitates enforcement. In baseball salary disputes, the number picked is automatically included in a standard contract that the parties signed when entering into arbitration. In FOA tax disputes, the outcome is included in a MAP settlement. In other settings, an arbitral award without reasons may be problematic. Under the ICSID Convention, for example, the absence of reasons is a ground for annulment of the award.[119] Under the New York Convention, reason giving is not explicitly mentioned, but some domestic courts have refused to enforce a foreign arbitral award on the basis that failure to provide reasons is contrary to public policy, a ground that is mentioned in the New York Convention.[120] A solution may be for the parties to explicitly

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117. Brown, *supra* note 47, at 7.

118. Comm. of Experts on Int'l Cooperation in Tax Matters, *supra* note 49, ¶ 16.

119. *See* ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52(1)(e) ("Either party may request annulment of the award" on the ground that "the award has failed to state the reasons on which it is based.").

120. *See* Landau, *supra* note 108, at 193 (referring to a 2008 decision of the Quebec Court of Appeal). There is also the risk that, for example, FOA over patent disputes is not enforceable since not a subject matter over which arbitration is allowed under domestic law. *See* Larouche et al., *supra* note 46, at 607. However, this is a problem common to all arbitration options, not just FOA.

waive the need to provide reasons. However, under the ICSID Convention, the parties cannot contract out of the obligation to give reasons.[121] Here, the solution may be for the arbitrator to include in its award not just the final offer of one party, but also the reasons (under U.S. tax treaties, the "supporting position paper") submitted by that party in support of its offer. By making that party's reasoning its own, the award could then be expected to meet the providing of reasons requirement. In disputes where the disagreement is over a contract or treaty provision or term (e.g., the appropriate tariff under a water concession agreement, or equivalent suspension under a trade agreement, rather than damages that need to be collected), the FOA outcome could also be automatically included in a new contract or agreement, rather than take the form of a self-standing award that needs to be enforced as such.

VI. Concrete Proposals for Baseball Arbitration in WTO and Investor-State Dispute Settlement

Before proposing specific instances where FOA could be introduced, the following generic recommendations can be made based on the above analysis.

- To stimulate bargaining and avoid parties sticking to original, extreme positions, parties should be required to make several rounds of offers, with between each a grace period to negotiate and reflect, culminating only at the end in final offers between which the arbitrator must then choose.
- Final offers should be made simultaneously and without the possibility to amend them. Sequential offers present the risk that the plaintiff exaggerates its claim so as to solicit an inflated response by the defendant. In a FOA criminal trial, for example, the accuser may ask for capital punishment, expecting that in response the accused will inflate his punishment offer if only to avoid even the slightest chance of capital punishment.
- Where several questions are involved, offers should be made, and arbitrators ought to decide, issue-by-issue, not as a package. If one issue is a threshold question, another a numerical

121. Guillermo Aguilar Alvarez & W. Michael Reisman, *How Well Are Investment Awards Reasoned?*, *in* The Reasons Requirement in International Investment Arbitration, *supra* note 108, at 1, 3.

question, parties should agree to settle the former through conventional, reasoned arbitration, the latter through FOA.

- To level the playing field for everyone, arbitral decisions (with the exception of confidential information) should be made public.
- To alleviate concerns that parties would for strategic or other reasons not submit reasonable offers—and the arbitrator would thus be forced to make an unreasonable ruling—a safety valve could be included whereby the arbitrator can ask for new offers in case neither offer falls within the range of a reasonable outcome.
- Arbitrators could be agreed upon by both parties (as in baseball salary arbitration) or be appointed by the parties, one each with the chair to be appointed by the "wing arbitrators" (as under U.S. tax treaties). There is a clear risk that party-appointed arbitrators consistently pick the final offer of the party that appointed them. In practice, this could mean that in most cases, the chair decides. A better approach is, therefore, to appoint arbitrators by agreement of both parties or based on rosters previously agreed upon. Where no agreement can be reached, a neutral appointing authority could be designated. A radical alternative would be to revert to the practice in ancient Greece—that is, have a much larger group of arbitrators or jury members decide. One could think of all state parties to the treaty (e.g., all WTO members) or even a randomly selected number of citizens and/or representatives from different stakeholders casting votes on the final offer of the claimant versus that of the defendant.

A. Baseball Arbitration in WTO Dispute Settlement

FOA could be used to settle a range of numerical questions in the WTO. Firstly, it could set the permitted level of retaliation in the event a WTO member has not implemented an adverse ruling, e.g., the annual U.S. dollar amount of claimant's beef that is kept out of the defendant's market because of a WTO inconsistent trade restriction imposed by the defendant.[122] This permitted level of retaliation now requires protracted

122. *See generally* Reto Malacrida, *Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules*

proceedings with complex party submissions and arbitral assessments on especially the trade harm caused by WTO violations.[123] For an arbitrator to decide on exactly how much more trade would have occurred in the hypothetical counterfactual where the WTO violation would not have taken place is a difficult task for which large amounts of economic data and information is required. In most cases, data is missing and plenty of assumptions must be made.[124] Parties tend to claim extreme amounts, and arbitrators are likely to compromise. The result is far from exact. Instead, each party could present its final offer and the arbitrator could simply pick one, closest to the criterion set in the WTO treaty of "equivalent to the level of the nullification or impairment" caused by the original violation.[125] FOA would simplify procedures, level the playing field for developing countries (who may not have the required econometric expertise), and force both parties to be reasonable and disclose more information.

Secondly, FOA could be used to determine the "reasonable period of time" given to a defendant to implement an adverse ruling.[126] Where no agreement can be found between the parties, this is now decided in a separate, reasoned arbitration procedure.[127] It tends to lead to compromise between exaggerated party demands, following dense and often speculative assessments of what is required under domestic rules within the defendant country. Indeed, reasoned arbitration experience in the WTO on this matter confirms exactly the risk of arbitrators splitting the difference. Between 1995 and 2016, 30 awards on "reasonable period of time" under DSU Article 21.3(c) have been issued where both the number of months claimed by the claimant and the number of months

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Governing Members' Preparation and Adoption of Retaliatory Measures, 42 J. World Trade 3, 3 (2008); Jaime Tijmes, *Who Wants What?—Final Offer Arbitration in the World Trade Organization*, 26 Eur. J. Int'l L. 587, 600 (2015).

123. *See* DSU, *supra* note 92, art. 22.6; *see also* The Law, Economics and Politics of Retaliation in WTO Dispute Settlement 95–97 (Chad P. Bown & Joost Pauwelyn eds., 2010).

124. In one case, the arbitrator famously described its approach as being built on "shaky grounds solidly laid by the parties." Nicolas Lockhart, *Comment on Chapter 4*, *in* The Law, Economics and Politics of Retaliation in WTO Dispute Settlement, *supra* note 123, at 128, 133.

125. DSU, *supra* note 92, art. 22.4.

126. *Id.* art. 21.3.

127. *Id.* art. 21.3(c).

claimed by the defendant are stated.[128] Splitting the difference in this context would mean that when adding up the number of months claimed by both parties (say, the claimant argues five months, the defendant asks for nine months), the arbitrator picks 50% of the total amount (in our example, 50% of 14, that is, seven months). Assessing the arbitrator's pick across the 30 cases, the median outcome is surprisingly close to this 50% split: 49.65% (the mean is 46.82%, which if anything, hints at a slight bias toward claimants).[129]

Thirdly, FOA could be used to settle tariff or services re-negotiation disputes where, for example, a customs union adds (or, as under Brexit, subtracts) a member[130] or where a WTO member wants to modify its goods or services schedule and needs to make compensatory adjustments to affected members.[131] GATS Article XXI already provides for arbitration on this question, without specifying the type. Parties could agree to use FOA. In the context of Brexit negotiations, the EU and the UK could, for example, agree to settle debates on how to split current tariff rate quotas (TRQs) between them using baseball arbitration. If, for example, the current TRQ in the EU schedule before the WTO allows for 200 units of lamb meat to be imported into the EU, the question is how many units the UK needs to take over after Brexit: the EU may say 30, whereas the UK, in order to protect its own lamb producers, may argue 10. FOA would force both sides to make a reasonable offer (say, respectively, 15 and 13); an arbitrator would then have to pick one of the two (15 or 13); and protracted arbitration proceedings between the EU and the UK could be avoided. That said, any outcome in such EU-UK dispute could still be contested by third countries, say, New Zealand which wants the TRQ into the UK to be higher or wants a higher amount within the allotted UK TRQ. This would require conventional arbitration and highlights that, when more than two parties are involved, FOA has its limits.

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128. *Id.*

129. For a summary of these 30 cases, see *World Trade Law*, http://www.worldtradelaw.net/static.php?type=dsc&page=arbdscpage.

130. General Agreement on Tariffs and Trade 1994, art. XXIV.6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187.

131. *Id.* art. XXVIII; General Agreement on Trade in Services art. XXI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.

More generally, Article 25 of the DSU allows parties to deviate from standard DSU procedures and instead opt for arbitration.[132] WTO members willing to test FOA could use Article 25 to conduct FOA to decide clearly defined numerical questions as between two parties, without the need to amend the DSU. The only requirements under Article 25 are that both parties agree and that other WTO members are notified, including of the final award.[133]

B. Baseball Arbitration in Investor-State Disputes

Many ISDS cases are brought because of a failure of the parties to adjust the investment or state contract to changed circumstances that occur after the investment is made. The fact that the investment is sunk may tempt the state to hold out in negotiations. The availability of compulsory arbitration may, in turn, limit the incentive of the investor to compromise. FOA could, first of all, be used to redefine contractual elements such as adjusting tariffs for gas or electricity following an economic crisis. FOA is less attractive to decide threshold questions of violation of a bilateral investment treaty (e.g., was there lack of "fair and equitable treatment").

Where FOA could, again, be of use, however, is to set damages once conventional arbitration has found a breach.[134] In the damages phase of ISDS cases, parties tend to exaggerate their claims, knowing that arbitrators may split the difference. In the *Santa Elena* case, for example, the investor claimed U.S. $6,400,000, but Costa Rica, the host state, valued the expropriated land at only U.S. $1,900,000.[135] In response, the arbitrator stated: "It can safely be assumed that the actual and true

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132. DSU, *supra* note 92, art. 25.1 ("Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.").

133. *Id.* arts. 25.2, 25.3.

134. Remember, however, that depending on the applicable arbitration rules, FOA may not be possible because reason giving is an obligation the parties cannot contract out of (as under Article 52 of the ICSID Convention). As discussed earlier, a solution may be for the award to include the reasons for the party offer selected. *See supra* text accompanying note 121.

135. In the Matter of the Arbitration between Compañía del Desarrollo de Santa Elena, S.A. and the Republic of Costa Rica, No. ARB/96/1, Final Award ¶ 93 (Feb. 17, 2000), 15 ICSID Rev.—Foreign Inv. L.J. 169, 199 (2000).

fair market value of the Property was not higher than the price asked by the owners and not lower than the sum offered by the Government, i.e., that it was somewhere between these two figures."[136] Without much further analysis, the tribunal then awarded U.S. $4,150,000, that is, *exactly half way* between the parties' estimates, thereby splitting the difference.[137] FOA, in contrast, would push parties to make reasonable offers, which is likely to lead to a settlement, and, where an arbitration award is needed, would come much faster and without expensive, protracted procedures where parties are forced to engage in rounds of legal and financial expert submissions.

Finally, FOA could also play a useful role in setting the interest rate to be added to damages between the date of breach and the date of the award, and, where payment is delayed, between the award and eventual payment. Here, as well, practice indicates that arbitrators tend to compromise both between the interest rates submitted by the parties and across issues, e.g., a lower damages award may be offset by a more generous interest rate, or arbitrators may agree on breach on condition that the damages are set at a conservative level. FOA avoids splitting the difference on a specific issue. Unless different arbitrators were to be appointed for each issue, cross-issue compromises are more difficult to avoid. Arbitrators who were, for example, ambivalent when finding a breach may be tempted to compensate by picking the lower, host state's final offer on damages; this, in turn, may lead the host state to lowball its damages offer. To avoid such undercutting, one could force the parties to submit their final offer on eventual damages together with their last submission during the liability phase and allow the arbitrators to open the damages offers only after they have decided on breach. In any event, in ISDS as in the WTO, a combination between reasoned arbitration on threshold issues and FOA on numerical disputes could be devised. The choice is not necessarily between either reasoned arbitration or baseball arbitration. An optimal dispute resolution mechanism is likely a combination of both.

VII. Conclusion

If today's paradox of international adjudication—an *increased scope* for disputes combined with a *reduced supply* in third-party adjudication—is

136. *Id.* ¶ 94.
137. *Id.* ¶ 95.

to be resolved, solutions are needed that are different from those ready-made in domestic legal systems or traditionally known in public international law. Alternative dispute resolution mechanisms need to be examined. Baseball or FOA—where disputing parties each submit their final offer and the adjudicator's task is strictly limited to picking *one or the other* answer—can, in at least certain settings, be one such creative, tailor-made approach. Rather than a zero-sum game between states and international tribunals, FOA provides a key role to neutral, third party adjudicators while leaving states in the driver's seat.

Arbitrators and law firms are not likely to be enthusiastic proponents of FOA. It leads to fewer cases that take less time and allows for fewer billable hours. In addition, under FOA, the arbitrator is not allowed to provide reasons, denying him or her the opportunity to display his or her wisdom and knowledge to the parties and broader world. Yet, FOA has clear advantages for the parties, especially in international law disputes: lower sovereignty costs; higher chances of a settlement; less chilling effect on rulemaking and broader relationships; and faster, cheaper, and simpler proceedings. Above all, in FOA, states and not adjudicators are in the driver's seat. FOA may thereby enable compulsory dispute settlement where so far states could not agree to it.

That said, FOA works best for numerical disputes between two parties and where party information and appetite for risk are symmetrical. FOA is better adapted also to decide unique disputes between two parties rather than the same question between one party and several other parties. Parties must be fully informed about the process and to avoid knowledge asymmetries, awards (or summaries thereof) should be made public. To address the risk of non-enforcement before domestic courts for lack of reasons in the award, foreign arbitral awards of the FOA type could make the reasons provided in the winning party's offer their own. A FOA outcome could also be automatically incorporated into a pre-existing contract or treaty with immediate effect (rather than take the form of an award that needs additional implementation).

This assessment means that where FOA is currently included, i.e., in tax treaties, it faces serious limitations. Modern tax disputes are increasingly about threshold questions and multilateral, income-based rather than bilateral, transaction-based. The practice of keeping procedures and awards secret also creates asymmetries of information, hampers clarification of increasingly ambiguous tax rules, and is not likely acceptable to the broader public. In other settings where FOA is not currently practiced, such as certain trade or investment disputes, FOA has great potential: it can make dispute settlement (e.g., over

retaliation, damages or interest amounts, the length of implementation periods, or how to split a tariff rate quota or "divorce bill" between the EU and the UK following Brexit[138]) more efficient and accurate while boosting settlement and reducing the chilling effect on negotiations and broader relationships that comes with conventional arbitration. Moreover, where no binding dispute settlement currently exists (think of sharing disputes regarding water or fish stock between two countries or even disputes on how to divide inflows of refugees between two nations), FOA, with its reduced sovereignty costs, may enable third-party adjudication where so far states could not agree to it.

In any event, in all of these international law settings, be it tax treaties, WTO dispute settlement, or investor-state arbitration, a combination between reasoned arbitration on threshold issues and FOA on numerical disputes could be devised. Neither hit nor miss, the choice should, in most cases, not be between opting into either reasoned arbitration or baseball arbitration, the way the OECD Multilateral Tax Convention currently presents it. An optimal dispute resolution mechanism is likely a combination of both.

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138. In traditional fashion, in "divorce bill" negotiations so far, the UK has offered €20bn, whereas the EU is claiming €60bn. *See* Rowena Mason & Daniel Boffey, *Theresa May Says UK Examining Brexit Divorce Bill "Line By Line*," Guardian (Oct. 20, 2017), https://www.theguardian.com/politics/2017/oct/20/theresa-may-says-uk-examining-brexit-divorce-bill-line-by-line. In the shadow of compulsory FOA, both parties would be forced to submit a more reasonable amount and most likely settle on, say, €50bn even before an arbitrator would have to intervene.