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# International Investment Law and Taxation: From Coexistence to Cooperation

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**Think Piece**

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# ABSTRACT

Tax treaty law and international investment law prima facie appear to be two different worlds and two separate legal regimes. However, they largely overlap, as evidenced by the rising number of cases brought before investment tribunals related to tax disputes. This paper demonstrates that there is a need for better designed international rules and policies on tax and investment that would make these areas of the law complementary.

In addition to providing an overview of the current international tax regime, the paper identifies the major areas of interaction and overlap, examines tax as a potential barrier to investment and cross-border trade, and addresses a number of practical questions related to this risk. It offers a number of recommendations to help address the future challenges to tax and investment policy.

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# LIST OF ABBREVIATIONS AND ACRONYMS

| | |
|---|---|
| BEPS | Base Erosion and Profit Shifting |
| BIT | Bilateral investment treaty |
| BRICS | Brazil, Russia, India, China, and South Africa |
| CFCs | Controlled foreign companies |
| EU | European Union |
| FDI | Foreign direct investment |
| FET | Fair and equitable treatment |
| FPS | Full protection and security |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| GST | Goods and services tax |
| ICSID | International Centre for Settlement of Investment Disputes |
| IIAs | International investment agreements (IIAs) |
| IMF | International Monetary Fund |
| LDC | Least-developed country |
| MAPs | Mutual agreement procedures |
| MFN | Most-favoured nation |
| MNE | Multinational enterprise |
| NT | National treatment |
| OECD | Organisation for Economic Co-operation and Development (OECD) |
| OEEC | Organisation for European Economic Co-operation |
| PCA | Permanent Court of Arbitration |
| SCM | Agreement on Subsidies and Countervailing Measures |
| TPP | Trans-Pacific Partnership |
| TRIMs | Trade-Related Investment Measures |
| TTIP | Transatlantic Trade and Investment Partnership |
| UAE | United Arab Emirates |
| UK | United Kingdom |
| UN | United Nations |
| UNCITRA: | United Nations Commission on International Trade Law (UNCITRAL) |
| US | United States |
| VAT | Value-added tax |
| WCO | World Customs Organization |
| WTO | World Trade Organization |

# LIST OF BOXES

# INTRODUCTION

There are more than 3,600 tax treaties, which are a primary source of rights and obligations both for governments and taxpayers, with the main objective of avoiding double taxation and double non-taxation of cross-border income and capital.[1] The tax treaties produce mechanisms to share the tax base between countries, to promote cooperation in the application of the treaties, and to resolve disputes. In parallel, there are an increasing number of non-tax agreements that have the potential to be used to challenge taxation measures, and investment treaties[2] are increasingly causing tensions.[3] Traditionally, cross-border tax issues have been dealt with in specifically designed tax treaties, which are generally bilateral agreements based on the Organisation for Economic Co-operation and Development (OECD) and United Nations (UN) Model Tax Convention.[4]

Tax treaty law and international investment law *prima facie* appear to be two different worlds and two separate legal regimes. However, they largely overlap. It is not a theoretical statement but clearly a practical observation. Current trends in international disputes provide a very good indicator of this overlap, as a number of cases have been brought before investment tribunals related to tax disputes.[5] A number of claimants, instead of using tax treaties, have effectively made their claims through investment law treaties.[6] This trend shows that the tax and investment worlds do not coexist in clinical isolation. On the contrary, they interact and overlap to such an extent that this paper demonstrates that there is a need for better designed international rules and policies on tax and investment, which would allow the tax and investment worlds to move from mere coexistence to cooperation.

To do so, this paper first provides an overview of the current international tax regime. Then, it identifies three major types of interaction and overlap. Section 3 looks at tax as a potential barrier to investment (and cross-border trade) and addresses a number of practical questions related to making tax a barrier to investment and, generally, whether there are real risks that tax could become the last trade and investment barrier. More specifically, what are the most likely forms this could take, and are these risks limited to corporate income taxes or are they also present under personal income taxes; value-added taxes (VATs); excises; and tariffs? Is there a risk that countries will use their tax administrative practices, either explicitly or implicitly, to discourage or encourage imports or exports, or foreign direct investment (FDI)? What is the best way countries can respond? Section 4 explains the linkages between tax incentives, state aid, subsidies, and harmful tax practices and identifies the benefits and risks of using tax incentives to attract increasingly mobile activities. In particular, it discusses whether there is a risk of a "race to the bottom," particularly for highly mobile activities and the next steps for the European Union (EU) Code of Conduct Group and the OECD Harmful Tax. Section 5 discusses the key issue of dispute resolution mechanisms in tax and non-tax agreements. In doing so, this paper also focuses on the comparative analysis of arbitration in tax treaties and investment arbitration, i.e., apart from tax treaty law, how international investment treaties can interact with international tax disputes. In particular, Section 5 addresses why mandatory arbitration seems more acceptable under non-tax agreements than under tax agreements. It also discusses whether the sovereignty and constitutional constraints put forward against tax arbitration are real or political smokescreens and what tax policymakers should learn from the experience of tax arbitration in non-tax agreements. Section 6 summarises the key findings and offers a number of recommendations that should help address the future challenges of tax measures in the context of investment policy. Finally, conclusions are drawn in Section 7.

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1 A significant number of developing countries lack an extensive network of tax treaties, and even a large country like the US has fewer than 70 tax treaties. China, France, and the UK each are parties to more than 100 tax treaties.

2 For investment policy regime, *see* Karl P. Sauvant, The International Investment Law and Policy Regime: Challenges and Options, the E15 initiative, July 2015 at http://e15initiative.org/publications/the-international-investment-law-and-policy-regime-challenges-and-options/

3 Taxation's potentially important effects on international trade and investment flows are recognised in several WTO agreements, including the General Agreement on Tariffs and Trade (GATT) 1994 and its associated Agreement on Subsidies and Countervailing Measures (SCM) and Trade-Related Investment Measures (TRIMs), all of which concern goods as well as the General Agreement on Trade in Services (GATS).

4 Both the OECD and the UN Model Tax Conventions are frequently updated to reflect changing economic patterns, new business models, and emerging technologies. Tax treaties have a long history that dates back to the second half of the 19th century. But, it was only when the predecessor to the OECD, the Organisation for European Economic Co-operation (OEEC), took up this issue in the 1950s that the network began to grow significantly. There is also a series of multilateral agreements (e.g., the OECD Multilateral Convention on Administrative Assistance in Tax Matters, the EU Mutual Assistance Convention, and the Nordic Agreement) but these tend to focus on implementation and administrative issues.

5 In this respect, a great diversity of tax measures has been scrutinised by investment tribunals, including excise taxes, licences to operate in a free economic zone, VATs, import taxes, tax evasion investigations, corporate income tax, tax assessments, and tax audits.

6 One example is *Tza Yap Shum v. Peru*, in which a number of tax measures (namely tax assessment, tax audits and interim measures) resulted in a breach of the investment treaty (see Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, July 7, 2011.). A different tax (namely a new tax on soft drinks) as examined in the *Archer Daniels v. Mexico* case (see Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB (AF)/04/5, November 21, 2007). See further commentaries such as Gildemeister, A. E. (2014). "Burlington Resources, Inc v Republic of Ecuador - How Much is Too Much: When is Taxation Tantamount to Expropriation?" ICSID REVIEW 29(2): 6 and Waelde, T. and A. Kolo (2007) "Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty." INTERTAX 35(8/9).

# THE INTERNATIONAL TAX REGIME

International tax law is governed mainly by international tax treaties, which are "agreements that play a key role in the context of international cooperation in tax matters. On the one hand, they encourage international investment and, consequently, global economic growth, by reducing or eliminating international double taxation over cross-border income. On the other hand, they enhance cooperation among tax administrations, especially in tackling international tax evasion."[7] International tax treaties are agreements between states, and they serve several purposes, including anti-double taxation over cross-border investment, prevention of excessive taxation, avoidance of tax evasion, and cooperation in tax administrations and exchange of information.[8]

## STRUCTURE OF BILATERAL TAX TREATIES

The OECD Model Convention is usually followed by countries, particularly the EU member states, when formulating international tax treaties, while the United States (US) has followed a model that is very similar to the OCED Model Convention, i.e., the UN Model Double Tax Conventions on Income and Capital.[9] Both models are aimed at allocating the fiscal jurisdiction to tax as between the source and residence states and to establish a system of allocation rules in which either the host or the home country will be assigned a primary right to tax.[10] The taxpayers can be relieved from double taxation by claiming the tax credits or tax exemption from the home or the host country's tax authorities.[11]

The structure of the bilateral tax treaties follows the OECD Model Convention and the UN Model Double Tax Conventions on Income and Capital. In summary, Article 1 and Article 2 cover the scope of the convention, including tax and persons covered.[12] Articles 3 to 5 cover the definitions of general terms, resident and permanent establishment.[13] Articles 6 to 21 cover the taxation of income, such as business profits, directors' fees, capital gains, etc.[14] Article 22 is about the taxation of capital. Article 23 is about the methods, i.e., exemption and credit method, for the elimination of double taxation.[15] Articles 24 to 29 cover special provisions, including non-discrimination (Art. 24), the mutual agreement procedure (Art. 25), the exchange of information (Art. 26), etc.[16] Articles 30 and 31 are the final provisions, such as entry in force and termination.[17]

## SUBSTANTIVE RULES IN TAX TREATIES

Nationality and territoriality are two bases for the jurisdiction to tax and they develop into nationality jurisdiction and source jurisdiction.[18] For nationality jurisdiction, a country has the right to tax its residents on their worldwide income. One example of this tax approach is that of the US. The source jurisdiction refers to the fact that a country has the right to tax income that arises from sources within its territory, and many countries tax their residents based only on the source rule. However, when a resident is involved in both nationality and source jurisdiction to tax, this creates a double taxation issue. For example, when a resident is operating a subsidiary in the host country, the income it has earned within the territory is subject to tax by the host country based on the source jurisdiction and the income it has earned within the home country based on the nationality jurisdiction. Also, this example has brought out the transfer pricing problem if the corporation tries to shift the income from a high-tax region to a low-tax region. Bilateral tax treaties usually have terms to solve both double taxation and transfer pricing issues "by reconciling differences in the concepts of various types of income and their geographical source, establishing a common method of determining how certain items of income shall be classified and taxed, and either assigning exclusive tax jurisdiction over certain items of income to one of the treaty countries or dividing the tax revenue between

7 Alexander Trepelkov, Harry Tonino, and Dominika Halka (2013) *United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries*, p.3 at http://www.un.org/esa/ffd/wp-content/uploads/2014/08/UN_Handbook_DTT_Admin.pdf

8 Ruth Mason (2005) US Tax Treaty Policy and the European Court of Justice 59 *Tax L. Rev*. 69.

9 *Ibid.*, 70

10 *Ibid.*; Asif H. Qureshi, Coherence in the Public International Law of Taxation: Developments in International Taxation and Trade and Investment Related Taxation (2015) *10 Asian J. WTO & Int'l Health L. & Pol'y 193.*

11 *See* OECD (2014) *Model Convention with respect to Taxes on Income and on Capital* at http://www.oecd.org/ctp/treaties/oecd-model-tax-convention-available-products.htm

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

18 Avi-Yonah, Reuven S (2015) *Advanced Introduction to International Tax Law,* Hong Kong, Edward Elgar Publishing, 8.

the two countries when neither is willing to relinquish its claim entirely."[19]

Different from the definition of nationality in international investment treaties, the nationality jurisdiction in international tax treaties refers to residence, including individuals and legal entities, which is not based only on nationality, but also on the physical presence, fiscal domicile, habitual abode, location of management and control, etc. It is a wider scope of definition than the one in international investment treaties.

The non-discrimination clause is usually incorporated in the bilateral tax treaties. This clause is provided in Article 24 of both the OCED Model Convention and the UN Model Double Tax Conventions on Income and Capital. Article 24 states that "the taxation of an individual or corporations, i.e., permanent establishment, shall not be less favourably levied in the source country than the taxation levied on enterprises of that state carrying on the same activities. Similar individuals or businesses conducted by local residents and non-residents should, therefore, be treated similarly." The source country is not allowed to discriminate against individuals or corporations who are non-residents in terms of the tax approach and tax administration, including reporting and accounting, if compared with domestic residents. The key test is "whether the differential treatment results in more burdensome taxation for the non-residents."[20] Although it is similar to the concept of the most-favoured nation (MFN) and national treatment (NT) clauses of bilateral investment treaties (BITs), they are different, and they will be discussed later.

Another aspect of bilateral tax treaties is to enhance cooperation in the tax administration and the exchange of information to avoid tax evasion. The OECD launched the Base Erosion and Profit Shifting (BEPS) Project in 2013.[21] The main purpose of the BEPS Project is to effectively prevent double non-taxation and no- or low- taxation cases associated with artificially segregated taxable income from its revenue-generating activities.[22] Apart from the BEPS Project, state parties also signed the Convention on Mutual Administrative Assistance in Tax Matters based on the OECD Model Convention to exchange information on tax matters[23] and to improve the transparency of tax administration.[24]

## BASIC ASPECTS OF INTERNATIONAL TAX DISPUTES RESOLUTION

International tax treaties generally do not provide direct access to arbitration as the dispute-resolution mechanism. Instead, the main instrument of resolving disputes provided in international tax treaties is the mutual agreement procedures (MAPs).[25]

Article 25 of the OECD Model Convention or the UN Model Double Tax Conventions on Income and Capital defines the MAPs, which are followed by many international tax treaties.[26] In essence, this important provision explains that a taxpayer can submit a request to the competent authority in his resident state if he considers that the actions of the contracting states have resulted in taxation not in accordance with the provisions of the Convention. This is the first step of the MAPs, and it is exclusively between the taxpayer and the requested competent authority. The competent authority is obliged to take the objection into consideration if it appears to be justified as stated in Article 25(2).[27]

If a satisfactory solution cannot be reached, it must then initiate the second stage of the proceedings, i.e., any unresolved issues arising from the case shall be submitted to arbitration if the person so requests.[28] However, the arbitration clause is not binding and if the domestic resolving

19 United Nations (2003) *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries,* UN Doc ST/ESA/PAD/SER.E/37 p.4. Available at http://www.un.org/esa/ffd/wp-content/uploads/2014/09/UNPAN008579.pdf

20 *Ibid.*

21 BEPS refers to making use of "tax planning strategies to exploit gaps and mismatches of tax rules to artificially shift income to low or zero tax locations where there is little or no economic activity, resulting little or no overall tax being paid."

22 OECD (2013) *Action Plan on Base Erosion and Profit Shifting,* OECD Publishing. p.13. Available at http://dx.doi.org/10.1787/9789264202719-en

23 *See* OECD (2015) *Exchange of Tax Information Agreements. Available* at http://www.oecd.org/tax/transparency/exchangeoftaxinformationagreements.htm

24 *See* OECD (2015) *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Review.* Available at http://www.oecd-ilibrary.org/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews-czech-republic-2015_9789264233706-en

25 IFA Congress (2014) *Theory of Dispute Resolution in International Tax Law*, p.7. In terms of practice, most of the MAP cases focus on factual assessments. The most prominent examples are transfer pricing disputes. Transfer pricing is one of the most challenging and debated topics in the International tax environment. The number of disputes between taxpayers and tax authorities on this topic has been increasing rapidly in recent years. In addition, the frequent disagreement between different tax authorities on the arm's length nature of cross-border transactions has generated an urgent need to improve the MAP procedures. See generally Sidhu, P. K. (2014) "Is the Mutual Agreement Procedure Past Its "Best-Before Date" and Does the Future of Tax Dispute Resolution Lie in Mediation and Arbitration?" Bulletin for International Taxation 11: 16. See also Lennard, M. (2014). "Transfer Pricing Arbitration as an Option for Developing Countries." INTERTAX 42(3): 10.

26 Article 25 of the OECD Model Convention states that "[w]here a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may … present his case to the competent authority of the Contracting State of which he is a resident … to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention."

27 Art 25.

28 Art. 25(4).

measure is still available, the taxpayer should resort to it first before submitting the case to the arbitration tribunals. Also, the MAPs do not require the competent authorities to reach a final decision; instead, they impose on the parties only the obligation to negotiate with the intention of finding a solution.[29]

In essence, there is not much flexibility in international tax treaties as compared with international investment treaties, because they are restricted by the decisions of the competent authority, which is the local tax authority. In addition, it is widely anticipated that there will be an increasing number of tax disputes in the post-BEPS scenario.[30] As a result, the current MAPs are largely unsatisfactory, and drafting practical solutions for dispute settlements, therefore, is a priority on the international agenda. The issues are extensively discussed by the OECD, the UN, and the EU.[31]

# TAX AS THE LAST BARRIER TO INVESTMENT

Over the past three decades there has been a significant removal of many of the non-tax barriers to cross-border trade and investment. This movement has been led by international organisations, such as the World Trade Organization (WTO), the International Monetary Fund (IMF), the World Bank, and the OECD, pushing trade liberalisation policies and the removal of exchange controls and controls on inward and outward investments. The movement to remove non-tax barriers has been accelerated by the rapid expansion of free trade agreements; these have removed or reduced the customs duties and tariffs on inward and outward transactions, reduced non-tax barriers, and put in place trade facilitation mechanisms. This objective is now almost achieved within the 34 OECD countries and some other major economies, although the issue of capital controls has come back onto the agenda since the global financial crisis.

In this new environment, there is a real risk that tax could become “the last trade and investment barrier,” either by design or default. Tax policymakers need to take this into account when they consider how to respond to the pressures of globalisation.

## FISCAL SOVEREIGNTY AS THE DRIVER OF TAX LAW AND POLICY

Tax systems have always been national, and they are likely to remain so for the foreseeable future, even in regional groupings like the EU. Governments jealously guard their fiscal sovereignty, especially in the area of income taxation, which they see as being at the core of their democratic systems.[32] Yet, these national tax systems have to operate in an increasingly global environment where cross-border activities are growing in importance, financial markets are highly integrated, and large companies increasingly see themselves as truly global corporations. At the same time, technology enables firms and individuals to exploit to the maximum this increasingly borderless world.

Some commentators have advocated that the appropriate response to these pressures is to create a “World Tax Organisation” that would take over responsibility for the taxation of transnational corporations’ profits. Others have argued for a move toward tax harmonisation within regional blocks, such as the EU. Neither of these approaches has gathered much political support, because it would impinge significantly on the fiscal sovereignty of individual countries, although, in practice, small to medium-sized countries may have little effective sovereignty on the design of their tax systems, since they must continually benchmark their tax systems against those of their competitors. This can be seen from the way that other countries reacted to the cuts in corporate income taxes made by the United Kingdom (UK) and the US in the mid-1980s or from the spread of low tax regimes for income from intangible property today.

29 Tutun, Paul D. (1994) Arbitration Procedures in the United States – German Income Tax Treaty: The Need for Procedural Safeguards in International Tax Disputes *12 B.U. Int'l L.J. 186*.

30 “All measures proposed as a result of the BEPS project have a substantial impact on the application of tax treaties, leading to changes in the wording of the articles of the OECD Model Convention and their interpretation. Taxpayers and tax administrations will need time to adjust to the profound changes envisioned. In the interim, there will be a period of very high uncertainty with tax administrations applying a very strict approach and taxpayers challenging this, leading to numerous disputes. The problem will only be compounded by the differences in interpretation between the individual countries.” See Owens, Jeffrey, Jasmin Kollmann, and Laura Turcan (2014) Dispute Resolution in International Tax Law, Working paper series of the Institute for Austrian and International Tax Law, October 17. Available at www.wu.ac.at/taxlaw

31 *See* OECD (2015) Public Discussion Draft BEPS Action 14: Make Dispute Resolution Mechanisms More Effective, 16 January. Available at : http://www.oecd.org/ctp/dispute/discussion-draft-action-14-make-dispute-resolution-mechanisms-more-effective.pdf ]

32 *See* generally Cruz, N.Q. (2008). “International Tax Arbitration and the Sovereignty Objection: The South American Perspective.” Tax Notes International: 10.

## IDENTIFYING THE NATIONAL TAX BARRIERS TO INVESTMENT FLOWS

This section focuses on ways in which tax systems may create intentional or unintentional barriers to cross-border trade and investment. A non-exclusive list of such potential barriers would include at least five major types of tax measures that affect cross-border investment.

First, a major problem is the unrelieved double taxation on cross-border income and capital that occurs if the same income is taxed both in the residence state and the source state. This may influence decisions by multinational enterprises (MNEs) as to where to invest. The OECD's BEPS Project will increase this risk, at least in the short term, because it will trigger a number of domestic tax reforms across the world.[33] Even before the final recommendations were endorsed by the G20 Heads of Government in November 2015,[34] more than 30 countries had already introduced BEPS-related measures. Also, there is no mechanism currently foreseen to monitor the consistent implementation of many of the recommendations and, as can be seen from the reports already issued, in many areas countries were unable to agree on one set of recommendations.

Second, there remain inconsistencies in the way in which customs, VAT, and direct tax authorities apply transfer pricing rules to cross-border transactions between related parties within multinational groups and this may lead to significant compliance costs for companies.

Third, there is a risk of creating a climate of tax uncertainty. The emergence of new players, the rapid development of new technologies, the more aggressive approach to tax planning on the part of some MNEs, and the lack of a global consensus on what should be the international tax rules will lead to more tax uncertainty. It now appears unlikely that BEPS will lead to any fundamental review of the core features of the current international tax framework, with the positions of the OECD countries; Brazil, Russia, China, and South Africa (BRICS);[35] other emerging economies; and developing countries diverging. This lack of agreement will, at least in the short term, lead to a period of uncertainty, a lack of coherence, and disputes between countries. These disputes may be fuelled by tax authorities having unprecedented access to information on the global operations of MNEs (Country-by-Country Reporting; Transfer Pricing Master, and Local Files). This global access to information should, in the long term, lead to fewer disputes, but in the short term it could lead some tax authorities to adopt a more aggressive approach, and some may be tempted to use this information to move toward a more global formula apportionment approach to transfer pricing. Unlike in the trade and investments world, mandatory arbitration in the tax world is the exception rather than the rule.

Fourth, some countries are putting in "exit" taxes under both personal and corporate income taxes, and these taxes may decrease the mobility of capital and labour.

Finally, under the leadership of the WTO and the World Customs Organization (WCO), many tariffs and specific excise barriers to cross-border trade in goods and services have been removed, but friction continues, owing to the inconsistent way in which these rules are sometimes applied.

## THE NEW HORIZON: PROMOTING COOPERATION BETWEEN TAX AUTHORITIES

The OECD has concluded that the appropriate response to the pressures of globalisation is better cooperation between governments. This is the approach the OECD has followed for many years in the direct tax area and with some success. The OECD Model Tax Convention forms the basis for the 3,600 bilateral tax treaties around the world, which minimise frictions between national tax systems.

It has also been at the forefront of promoting cooperation between tax authorities to counter both double taxation and double non-taxation of cross-border income. Similarly, the OECD has been very successful in promoting its transfer pricing guidelines, which are now used as the basis for national legislation both in OECD countries and many non-OECD countries. The OECD, the IMF, and other international organisations have also been active in identifying the best tax policy options in the design of tax systems, both in emerging and developed countries, and in providing the analytical framework and statistics that enable countries to make informed policy decisions.

The OECD in close cooperation with the EU has also done pioneering work on VATs; this started just over a decade ago, and in the long term it should lead to more effective cooperation between the 160 countries that currently operate VAT/goods and services tax (GST) systems.

The Forum on Tax Administration provides a platform for Commissioners from more than 40 countries to come together on a regular basis, and this grouping has now

33 *See* e.g., PricewaterhouseCoopers (PWC) (2015) More than a tax issue: why BEPS will change the way you operate. Available at: http://www.pwc.com/us/en/10minutes/assets/pwc-10minutes-oecd-beps-global-tax-reform.pdf .

34 G20 finance ministers endorsed the final package of measures for a reform of the international tax rules during a meeting on 8 October, in Lima, Peru. See Jaitley, Arun (2015) G20 finance ministers meet: Final action plan for BEPS gets approval, The Economic Times, 10 Oct. Available at: http://economictimes.indiatimes.com/news/economy/policy/g20-finance-ministers-meet-final-action-plan-for-beps-gets-approval/articleshow/49295339.cms.

35 BRICS is the acronym for an association of five major emerging national economies: Brazil, Russia, India, China, and South Africa.

become a powerful voice both in shaping the debate on tax administrations across the world and in helping the Commissioners to work together to cope with the challenges of globalisation.

There is no better example of how international cooperation helps countries respond to the pressures of globalisation than the OECD's pioneering work on removing bank secrecy as a barrier to the effective exchange of information between tax administrations. The success of that project shows that the OECD can not only deliver high technical standards, but also, when it has political support, it can get these implemented even in countries that were extremely reluctant to change. Of course, the OECD's BEPS Project will take this cooperation to a new level. But, the question remains as to whether these forms of non-binding cooperation will be sufficient to avoid tax being used to protect domestic markets, to discriminate in favour of, or against, non-residents, or to give a competitive advantage to a country's enterprises.

# TAX INCENTIVES, STATE AID, SUBSIDIES AND HARMFUL TAX PRACTICES: MAKING THE LINKAGE

Increasingly, governments are using taxation (including how their domestic taxation interacts in a global environment) to attract investment and high-income earners. This paper looks at these features, including the way in which they are administered and implemented in practice. It looks at how tax incentives are designed and how greater transparency and accountability can be achieved in their operation to make them consistent with any new rules emerging from the G20 and EU initiatives. The paper examines the OECD 1998 Report on Harmful Tax Competition and Action 5 of the current BEPS initiative. The paper also examines the ways in which tax incentives (subsidies) are defined by the EU (state aid).[36] Particular attention will be paid to the way in which the actions of the tax administrations can encourage FDI and may override a country's obligations under the international agreements.

## HARMFUL TAX COMPETITION

The traditional view of economists has been that taxation is not a major determinant of location decisions; these are considered to be driven more by potential long-term profitability, which in turn depends on factors, such as costs, access to qualified labour, infrastructure, access to markets, and political and legal stability. The prevailing view is that tax incentives cost more in terms of lost tax revenue than the new investments generated, and in some cases the type of investment attracted lacks "staying power." In contrast, it is acknowledged that tax could be important in decisions on how to structure an investment (subsidiary, branch, joint venture) and how to finance it (local, international, from headquarters, or from another subsidiary), since these decisions can be important for the repatriation of profits.

In the 1990s, the debate broadened to focus on how to counter harmful tax competition and the OECD's 1998 report attempted to distinguish between acceptable and unacceptable tax competition (see Box 1 below).

The premise underlying the report was that, in order to get the full benefits of tax competition, governments need to distinguish between what is acceptable and what is not (exactly as the WTO has done in the trade area). In 2000, the US Bush Administration encouraged the OECD to refocus the project on tax transparency and the exchange of information, but many elements of the 1998 report, particularly the ring-fencing criteria and the subsidiary criteria, remain relevant for the current BEPS discussion.

In the 2000s, the debate shifted again to the challenge posed by intangible assets; this is because an increasing number of MNEs were moving these into low tax jurisdictions. This led the OECD to relaunch work on how the OECD transfer pricing guidelines should treat such intangibles.

## BEPS ACTION 5

In 2013, there was another shift of focus with the launch of the BEPS Action Plan and especially Action 5, which states: "Revamp the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on

36 The role of the WTO is not reviewed here. To date, the WTO, excluding a few high-profile cases (*e.g.*, the US Foreign Sales Corporation - United States - Tax Treatment for "Foreign Sales Corporations" - AB-1999-9 - Report of the Appellate Body, WT/DS108/AB/R, 24/02/2000), has not been seen to actively participate in the harmful tax debate. Yet, the WTO does have a mandate to examine subsidies that result in "revenue foregone," which have "specific" and "arbitrary" effects on cross-border activities.

BOX 1:
**Key factors in identifying and assessing harmful preferential tax regimes for the purpose of the 1998 OECD report**

**1. No or low effective tax rates**

A low or zero effective tax rate on the relevant income is a necessary starting point for an examination of whether a preferential tax regime is harmful. A zero or low effective tax rate may arise because the schedule rate itself is very low or because of the way in which a country defines the tax base to which the rate is applied. A harmful preferential tax regime will be characterised by a combination of a low or zero effective tax rate and one or more other factors set out in this Box and, where relevant, in this section.

**2. "Ring-fencing" of regimes**

Some preferential tax regimes are partly or fully insulated from the domestic markets of the country providing the regime. The fact that a country feels the need to protect its own economy from the providing regime by ring-fencing gives a strong indication that a regime has the potential to create harmful spillover effects. Ring-fencing may take a number of forms, including:

(i). a regime may explicitly or implicitly exclude resident taxpayers from taking advantage of its benefits; and

(ii). enterprises that benefit from the regime may be explicitly or implicitly prohibited from operating in the domestic market.

**3. Lack of transparency**

Lack of transparency in the operation of a regime will make it harder for the home country to take defensive measures. Non-transparency may arise from the way in which a regime is designed and administered. Non-transparency is a broad concept that includes, among other things, favourable application of laws and regulations, negotiable tax provisions, and a failure to make widely available administrative practices.

**4. Lack of effective exchange of information**

Lack of effective exchange of information in relation to taxpayers benefiting from the operation of a preferential tax regime is a strong indication that a country is engaging in harmful tax competition.

BOX 2:
**The Code of Conduct concludes that, when assessing whether such measures are harmful, account should be taken of, *inter alia*:**

1. Whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or

2. Whether advantages are ring-fenced from the domestic market, so that they do not affect the national tax base, or

3. Whether advantages are granted even without any real economic activity and substantial economic presence within the member state offering such tax advantages, or

4. Whether the rules for profit determination in respect of activities within a multinational group of companies depart from internationally accepted principles, notably the rules agreed upon within the OECD, or

5. Whether the tax measures lack transparency, including where legal provisions are relaxed in a non-transparent way at the administrative level.

requiring substantial activity for any preferential regime. It will take a holistic approach to evaluate preferential tax regimes in the BEPS context. It will engage with non-OECD members on the basis of the existing framework and consider revisions or additions to the existing framework."

Action 5 emphasises the need for more transparency by having the spontaneous/automatic exchange of information on rulings between treaty partners. It also focuses on the role of intangible property boxes, which are now found in an increasing number of countries. The draft report issued in 2014 develops a nexus approach to determine which of these regimes would be acceptable and which ones would be unacceptable.

### THE EUROPEAN UNION CODE OF CONDUCT

Throughout the past two decades, the EU Code of Conduct Group has played a parallel role to the OECD's Harmful Tax Practices Forum in curbing harmful tax practices. The criteria used by both groups are broadly consistent (*see* Box 2 below). While the OECD and EU groups have been relatively successful in rolling back harmful regimes, both are now examining whether these criteria need to be updated.

The G20 Finance Ministers' meeting in September 2014 gave a new mandate to international organisations to review the use of tax incentives in least-developed countries (LDCs), a notable omission from the BEPS Project. Although the report has not yet been issued, it is likely to acknowledge that there may be circumstances when tax incentives can improve the competitive position of the LDCs, but it emphasises that such incentives need to be transparent, designed to minimise opportunities for tax planning, and be subject to regular evaluation and oversight by Ministers of Finance. It is currently unclear how this report will feed into BEPS Action 5, which so far has focused mainly on the outcomes rather than the causes of harmful tax competition.

## DISPUTE-RESOLUTION MECHANISMS IN TAX AND NON-TAX AGREEMENTS

The tax community has to answer a key question in the months to come: whether we can achieve mandatory binding arbitration under the OECD BEPS Action 14 or whether an entirely new framework is needed. The statistics tracking the use of the MAP (which is the most common approach to resolving cross-border tax disputes) are already showing significant strain. At the end of 2013, there were 4,566 cases in the OECD's ending MAP inventory. That represents a 12 percent increase over 2012 and a 94.1 percent increase compared with the 2006 reporting period, according to the most recent OECD statistics. OECD member countries experienced a 14 percent increase in new MAP cases initiated in 2013, rising to 1,910 cases from 1,678 in 2012.

While 1,910 new MAP cases were initiated in 2013, only 197 cases (including those with OECD partner countries) were reported to have been completed in 2013. Expectations are that MAP will see even more pressure as a result of the outcomes of the BEPS Project. This is due to the complexity between the BEPS actions, a lack of clarity in the BEPS actions, inconsistent implementation and measurement, and unilateral actions. In addition, the MAP suffer from a number of challenges, including, but not limited to, few constraints in terms of the timeliness of MAP, little involvement on the part of taxpayers, and no ability to track those tax disputes that are not bought to MAP simply because there is a lack of confidence in the system.

The paper discusses how the potential to use arbitration could create political conflict – not only between emerging market nations, but also between OECD member countries. Developing countries in particular do not like the institutional framework under which the MAP-based arbitration would operate. Finally, this paper will examine the different mechanisms that are built into trade, investment and tax agreements to resolve cross-border disputes between governments themselves and between governments and businesses. It will look at the merits of excluding tax disputes from non-tax agreements and the related issue of the need to introduce mandatory arbitration into tax treaties, drawing on the experience of the WTO and the mechanisms available in BITs.

In this section, the explanation of how international investment law and international tax law interact with tax disputes and why there are increasing tax disputes eventually being resolved based on international investment treaties instead of international tax treaties will be discussed. It will be analysed in terms of access to international arbitration and substantive clauses protection by comparing the two regimes.

### ACCESS TO INTERNATIONAL ARBITRATION

The right of direct access to international arbitration provided by international investment agreements (IIAs) is one of the reasons foreign investors have brought claims based on these treaties instead of the international tax treaties.

International arbitration is a right given in the BITs. However, the dispute-resolution mechanism of international tax treaties is usually the MAPs, which are based only a mutual agreement (not a guaranteed right), that an investor can bring a case to international arbitration, because it is only supplementary to the MAPs and has to go through a lengthy process.

For MAPs, Article 25(1) and (2) of the OECD Model Convention are the regulations on how taxpayers/investors should proceed with tax disputes.[37] The MAPs start with: "the taxpayer may present his matter to the competent authority of the contracting state of which he is a resident … [i]f the case is justified, the competent authority has to endeavour to settle the controversy."[38] This procedure is not likely to protect the taxpayer or investor when making an impartial claim, because it grants the competent authority, i.e., the local tax authority, an absolute power whether to accept or reject the case.[39] One drawback is that the way in which the tax authority makes the decision to reject the case lacks transparency – the tax authority may reject the case for political or diplomatic reasons. The competent authority in some countries may not accept a case for MAPs if the case involves particular issues, such as penalties or tax avoidance.[40] Also, the condition imposes a lax responsibility on the competent authority, which merely needs to "endeavour" to settle the controversy, but is not "obliged" it to settle the dispute. The competent authority just needs to make its "best effort" to negotiate and find a settlement or solution, but it is under no obligation to reach a conclusion. These do not give a right to the taxpayer/investor to be treated fairly and bring claims to an impartial institution.

When the parties cannot reach a final conclusion on the tax dispute, the validity of the international tax treaties or double tax treaties is in doubt. The taxpayer/investor has to suffer the double taxation, and the inability of the competent authority to resolve the tax dispute may mean a limited application of the international tax treaties, and the investor's legal rights as a national of the contracting state are not protected. Also, the signed international tax treaties cannot achieve their objective of resolving the issues of double taxation, transfer pricing, etc., because they fail to determine the allocation of tax that each contracting country should receive. It is an adverse effect. Therefore, it lacks predictability and consistency in the legal sense; thus, the foreign investor can easily lose faith in the MAPs. This can be a reason more and more international investors bring claims before international tribunals through the IIAs.

The second important element of the dispute-resolution mechanism within international tax treaties or the OECD Model Convention is arbitration. However, different from the arbitration provision in the MAPs, a taxpayer/investor cannot directly access arbitration; he or she should first go through Article 25 (1) and (2) of the OECD Model Convention. Also, the arbitration clause is available only to particular matters, such as transfer pricing; thus, the application is limited.

Although there is a trend toward extending the scope of the issues that can be referred to arbitration under recent international tax treaties, the arbitration clause serves as only an extension of the MAPs and only for the issues that cannot be solved in the MAPs but not for the whole dispute as stated in Article 25(5) of OECD Model Convention.[41] The arbitration clause is a supplement to the MAPs and it cannot replace them. The OECD has commented that the arbitration clause is an "additional dispute resolution technique which can help to ensure that international tax disputes will to the greatest extent possible be resolved in a final, principled, fair and objective manner for both the countries and the taxpayers concerned."[42] The MAPs should still be the main dispute-resolution mechanism for tax disputes and the arbitration is to increase the effectiveness of the MAPs. Therefore, before an investor will be able to go to arbitration, there are several complex and time-consuming requirements to be fulfilled before he can put the claims before international arbitration.

Furthermore, Article 25(5) of the OECD Model Convention states that "[t]hese unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State."[43] This means that if the local court has resolved the tax disputes, the taxpayer/investor cannot refer the case to international arbitration. This is because the OECD Model Convention may prevent the parallel authorities (domestic court and international tribunal) from dealing with the matter owing to political or diplomatic concerns. Furthermore, states do not want the determination of their taxation powers to be submitted to independent and international arbitration; this would compromise both their national sovereignty and discretion on tax policy within their borders. Also, if the competent authority has reached an agreement on the tax dispute, the taxpayer/investor may not take the case to arbitration, even if he or she is not satisfied with the solution reached by the competent authorities.[44] In this way, so long as the competent authority or domestic court has reached the decision, the taxpayer/investor will be blocked from the further process, even if he or she may have suffered from unfair or not transparent proceedings. Moreover, even if the taxpayer/investor can eventually proceed to international arbitration, he or she must have already waited for a lengthy

37 Art. 25.

38 *Ibid.*

39 Riza, Limor. Taxpayers' Lack of Standing in International Tax Dispute Resolutions: An Analysis based on the Hybrid Norms of International Taxation *34 Pace L. Rev. 1068.*

40 Ault, Hugh J. Improving the Resolution of International Tax Disputes *7 Fla. Tax Rev. 140.*

41 Art. 25(5).

42 *Ibid.*

43 Art. 25(5).

44 Art. 25(5).

period, owing to the waiting period stated in Article 25(2) of the OECD Model Convention — two years.[45] Another angle for interpreting this arbitration clause is that the taxpayer/investor has to waive the right to have access to the domestic courts in order to request that the tax dispute be submitted to arbitration under the OECD Model Convention or international tax treaties in order to avoid the parallel authority. All these make the MAPs a costly exercise both for the investor and the contracting state.

Another point to note is that the OECD Model Convention and most of the international tax treaties exclude the taxpayer/investor as a claimant in the arbitration and the standing is given to the contacting state's competent authority, i.e., the tax authority. This means that the arbitration provided under the OECD Model Convention and the international tax treaties can only be a state v. state case, and the taxpayer/investor can never have the *locus standi* to present the case by himself or herself to the arbitration. This being so, the arbitration clause within the international tax law regime does not really protect taxpayers/investors by avoiding direct access to arbitration, and the case may be dropped, owing to the political or diplomatic relations between the two contracting states.

In addition, regarding the enforcement of the decision of the arbitration within the international tax law regime, Article 25(5) of the OECD Model Convention mentions that "[u]nless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States."[46] The decision binds only the two contracting states, and if the losing contracting state does not comply with the arbitral decision, the winning contracting state or the taxpayer/investor can do nothing, because there is no enforcement mechanism under the international tax treaties and because no sanction or confiscating measures can be imposed to the losing contracting state for any non-compliance of the arbitral decision.

In contrast, direct access to arbitration is available under international investment law depending on which arbitration platform the investor chooses. There is a trend of more tax disputes cases ending up in international arbitration through the international investment treaties. The area of tax disputes with claims through the BITs or the FTAs include the VAT,[47] tax evasion investigations,[48] tax assessment and tax audits,[49] excise tax on cigarettes, stamp tax and import taxes,[50] and cancellation of licences to operate in a free economic zone.[51]

Unlike the arbitration supplement to the MAPs, under the international tax law regime, international investment treaties provide a right of direct access to arbitration to the investors. There are three categories of the drafting whether the investment dispute can be referred to the domestic court and/or international arbitration: either the national court or the international tribunal is the dispute-resolution platform, the third one is either go to the national court first and, if the investor is not satisfied with the decision, then he or she can put the case before international arbitration.[52] This has been illustrated by the Egypt–Netherlands BIT and the US–Mongolia BIT in Part 4, the overview of the dispute-resolution mechanism within international investment treaties and international tax treaties.

The most recent BITs and international investment treaties include dispute-resolution mechanisms and adopt the third approach, which provides both options. As mentioned in Part 4, the International Centre for Settlement of Investment Disputes (ICSID), the Stockholm Chamber of Commerce (SCC) and the Permanent Court of Arbitration (PCA) are the three institutions that provide independent platforms and have their own rules for arbitration.[53] This investor v. state dispute is determined by the independent arbitral tribunals instead of the competent authorities, thus the taxpayers can be more influential than when the proceedings go under the MAPs. Compared with the arbitration clause within the international tax law regime, the arbitration clause under the international investment treaties allows flexibility and provides a direct platform for foreign investors to have access to international arbitration, because they do not have to "obtain an agreement" from any of the competent authorities in their home state or host country to refer the disputes to international arbitration. They do not have any MAPs and do not have to respect a cooling-off period before they can put their case before independent and international tribunals. The arbitration clause within the BITs constitutes a true guarantee that the foreign investors can bring their cases to international arbitration with the protection of the BITs' provisions, and the foreign investors do not have to be affected by any political or diplomatic concerns for not putting their case to international arbitration by the state. This means that the taxpayer is

45 Art. 25(2).

46 Art. 25(2).

47 *See Occidental Exploration and Production Company v. The Republic of Ecuador,* LCIA Case No. UN 3467, Award (1 July, 2004)

48 *See Hulley Enterprises Limited (Cyprus) v. The Russian Federation,* PCA Case No. AA 226, Award (18 July, 2014)

49 *See Tza Yap Shum v Republic of Peru,* ICSID Case No. ARB/07/6, Award (7 July, 2011)

50 *See Enron Corporation & Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award (22 May, 2007)

51 *See Antoine Goetz et consorts c. République du Burundi,* ICSID Case No. ARB/95/3, Award (29 January, 1999)

52 A number of pre-conditions and waiver models exist – e.g. no U-turn, fork in the road, etc. — and there have been an increasing number of these hurdles in new agreements, so a valid question is whether future access to arbitration in IIAs is progressively being reduced.

53 Non-UNCITRAL is ad hoc rules with no institution attached, while intuitional arbitration is used in the context of ICSID, the PCA, the SCC, and others with ICSID (70 percent of cases) and the SCC as the two most popular forums for investment disputes.

better protected by BITs, because he or she can initiate and be present at the proceedings himself or herself; this constitutes a guaranteed right to independent and fair treatment.

On the other hand, according to Article 25(5) of the OECD Model Convention, the taxpayer/investor can only bring the tax dispute to the arbitration on the part that cannot be agreed through the MAPs process.[54] The arbitration within the international investment law regime does not work in the same way. It allows the foreign investors to refer the whole dispute, including all the elements to be presented, to international arbitration. Although some old BITs may have carved out some subject matters, or only allowed subject matter, such as expropriation, to be presented in a national court or international arbitration,[55] most of the recent BITs would not specially make such restrictions. This point will be discussed and analysed fully in the next section.

Another reason recently more foreign investors are bringing their claims under the arbitration clauses of international investment treaties is because they are not satisfied with the results coming from national courts; investors can, therefore, also refer their claims to international arbitration. One of these case awards is in *Deutsche Bank v. Sri Lanka*; the claimant could not get a fair hearing in the Supreme Court of Sri Lanka, so it brought the proceedings to the international tribunal, which held that Sri Lanka had breached the fair and equitable treatment (FET) requirement. Arbitration under the international investment law regime is more preferable than the one under the international tax law regime in this sense, because there is a chance for the investors to avoid an unfair hearing and to put their case before independent arbitration. This can better protect the investors' investments in the host country, and this is why more and more tax dispute parties are using IIAs as the foundation of their claims. Especially in cases for the competent authorities of developing countries for MAP, they lack experience or are often not independent, and therefore the international arbitration used in accordance with the BITs may be of substantial advantage for the taxpayer. Another advantage is that the taxpayer may take action himself or herself to defend his or her rights accruing from the BIT by bringing the claim himself or herself; it is not of the contracting state (this shifts the cost of prosecution to the taxpayer and off of the government).

Enforcement under the international tax law regime through MAPs is not guaranteed. There is no enforcement mechanism available in the arbitration of the bilateral tax treaties and they are bound by the contracting states only. There is no consequence even if the losing contracting state does not follow the arbitral decision. However, under international investment treaties, the enforcement of the arbitral awards is in accordance with the chosen arbitration institution's own rules. For example, the enforcement of the ICSID's arbitral awards is governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and the respective BITs in the matter. For the awards determined by the United Nations Commission on International Trade Law (UNCITRAL), enforcement is governed by the Arbitration Rules and the respective BITs in the matter. Article 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, states: "[e]ach Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[56] This is in effect a command that the state parties must enforce the awards.[57]

The awards do not just bind the contracting parties, but also the other members who have signed the ICSID's Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which is a multilateral agreement signed by 151 states.[58] Also, because the ICSID is an agency of the World Bank Group, there is also a voluntary enforcement of ICSID awards by the World Bank's member states.[59] Therefore, most of the losing states would comply with the awards to avoid an adverse consequence brought by their non-compliance with the ICSID awards, such as having economic sanctions imposed on them. The effect of this can be catastrophic. Therefore, compared to MAPs with an arbitration clause under the IIAs, the IIAs and BITs offer better protection for investors and a probability of enforcement.

In brief, it is agreed that arbitration under the international investment treaties is more effective than under the international tax law. Thus, the right of direct access to international arbitration provided by the international investment treaties and BITs is important, and this is one of the reasons foreign investors have brought claims based on the BITs instead of international tax treaties.

## SUBSTANTIVE CLAUSES PROTECTION

The substantive clauses within international investment treaties and international tax treaties are different, although

54 Art. 25(5).

55 The *Agreement Between the Government of The Republic of Korea and the Government of The People's Republic of Bangladesh For the Promotion and Protection of Investments,* 1986 BITREAT BDKR (6 October, 1988), states: "The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph." Therefore, only the expropriation case can be presented in the domestic courts of the contracting party; see also Note 44 above.

56 This is unique to ICSID as for non-ICSID, including UNCITRAL, the prevailing party must pursue recognition and enforcement of award in domestic court.

57 Mayer Brown LLP (2011) *Enforcement of Awards in ICSID Arbitration*. Available at: https://www.mayerbrown.com/publications/Enforcement-of-Awards-in-ICSID-Arbitration-12-19-2011/

58 *Ibid.*

59 *Ibid.*

they share one common feature, namely, non-discrimination. This is because the purpose of international tax treaties and international investment treaties is not the same. The main purpose of international tax treaties is "to deal with issues arising out of the allocation of revenue between countries" while the purpose of international investment treaties, particularly BITs, is to "protect the investments that generate those revenues" and to prevent them from being abused by the host country. Therefore, the international investment regime offers a larger scope of protection for investment. The better protection of taxpayer/investor rights from the substantive clauses provided by the international investment treaties and the BITs is one of the reasons foreign investors have brought claims based on BITs instead of international tax treaties.[60]

The main purpose of international tax treaties is "to deal with issues arising out of the allocation of revenue between countries."[61] It is understood that international tax treaties are agreements between states; they serve several goals, including anti-double taxation of cross-border investment, prevention of excessive taxation, avoidance of tax evasion, cooperation in tax administration, and the exchange of information.

The structure of bilateral tax treaties follows the OECD Model Convention, and the UN Model Double Tax Conventions on Income and Capital has been briefly discussed. The substantive clauses mainly incorporated in Articles 1 and 2, which cover the scope of the convention, include residence in the matter; Article 22 on taxation of capital; Article 23 on the double tax elimination methods, i.e., exemption and credit method; and Articles 24 and 25 on special provisions, including non-discrimination (Art. 24) and the mutual agreement procedure (Art. 25). The substantive clauses, which protect taxpayers/ investors, are only Articles 1 and 4 on the extended meaning of residence, Articles 22 and 23 on the elimination of double taxation, and Article 24 on non-discrimination. Other provisions in the bilateral tax treaties or the OECD Model Convention are drafted for the purpose of allocating revenues between states, not the protection of the taxpayers/investors. Article 25 has been discussed, and it was concluded that the effectiveness of MAPs to protect the investors is restricted compared with the arbitration clause provided under the international investment law regime.

The meaning of residence is an extended meaning of nationals. For an explanation of this concept, the UK–China Bilateral Tax Treaty[62] (UK–China BTT) will be used as an example. Article 4 of the UK–China BTT, explains the meaning of resident: this is "any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of incorporation, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof … " From this, it is found that residence refers not only to the nationals (irrespective of whether they stay within or outside the territory), but also companies incorporated within the borders or for which permanent establishment exists or central management within the borders. This is an extended concept of nationality, which normally just refers to the citizenship or companies incorporated within the country, i.e., either China or the UK. On the one hand, this residence concept seems good, because the coverage of affected persons or companies is larger, which means that more persons and companies are being protected under this BTT. However, on the other hand, some have commented that when all countries apply this extended concept, it exposes a person or company to two or more countries' taxation in the absence of tie breaker or foreign tax credit rules.[63] In this respect, it is doubtful whether it is a protection to taxpayers/investors and whether actually it is helping the contracting states to manipulate the bilateral tax treaties in favour of the tax policy and the government's revenue.

Also, the non-discrimination rule in Article 24 of the UK–China BTT, states: "[n]ationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected."[64] this means "non-residents from a treaty country must not be treated worse than residents of that same country with respect to the subject matters within the scope of the treaty (as for legal entities, it is usually expressly applicable to permanent establishments of foreign firms and to corporations that are wholly or partly owned or controlled by one or more foreign residents)." This concept is deemed to be the NT provision under the BITs. However, it does not relate to the MFN clause, so either China or the UK can offer even better treatment to the nationals of another country while in no way can the other contracting party of the UK–China BTT claim better treatment than another country. It will be discussed in detail in the next section, but the protection offered to the taxpayers or investors in this sense is limited if it is compared with BITs.

One very important reason international investment treaties are continuing to replace international tax treaties for tax

60 *See* generally Ortino, Federico (2015) Substantive Provisions in IIAs and Future Treaty-Making: Addressing Three Challenges, E15 Task Force on Investment Policy.

61 *Ibid.*

62 *Agreement Between The Government of The United Kingdom of Great Britain and Northern Ireland and The Government of The People's Republic of China For the Avoidance of Double Taxation and The Prevention on Fiscal Evasion with respect to Taxes on Income and on Capital Gains* (2011). Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411443/china-dta-2011.pdf, (Accessed 13 December, 2013).

63 For instance, the controlled foreign companies (CFCs) by nations refers to domestic shareholders who have a "substantial influence" on the foreign corporation – they have to be taxed – but each country has a different concept of "substantial influence." Also, the tax credit rule does not mean the tax is eliminated but that it can be deducted to a certain extent if the same income has been taxed by another contracting state; it is simply to avoid extensive taxation only.

64 Art. 24(1).

disputes is because they offer more substantive clauses to better protect taxpayers/investors' rights of investment.

The substantive clauses include the MFN, NT, FET, guarantees, and compensation with respect to expropriation, full protection and security (FPS), and dispute settlement provisions through recourse to international arbitration, subject to exceptions. Compared to the non-discrimination provisions under the international tax law regime, which can come under NT, the MFN, FET, compensation in respect of expropriation, transfer provisions, and FPS have been missed.

Some have commented that the number of BITs that have been carved out the taxation measures or given priority in international tax treaties is *lex specialis.* BITs apply only under certain exceptions, such as expropriation. For example, Article 3 of the Korea–Uruguay BIT mentions that MFN and NT do not apply to tax measures. However, the exclusion is not absolute, because these tax measures have not been defined as to whether they include only direct tax or also the stamp duty, import tax, tax on capital gains, etc. Also, taxation may be a matter of investment law (see Annex 1 for an overview of tax exceptions diversity).

The carve-out clause does not mean carving out everything related to tax measures, and the purpose of the carving-out clause is to ensure that the host state retains its sovereignty to determine tax policy. This would not exclude the administration of taxation e.g., lack of due process. This is affirmed in *Hulley v. Russia*, where the tribunal ruled that "the "taxation measures" carve-out should not be broad and that the expropriatory "taxes" claw-back was narrow under the 1994 Energy Charter Treaty: assuming the taxation measures carve-out applied, the tribunal concluded that any measures carved out would be within the scope of the expropriation claw-back."[65] Therefore, this case has decided that the carving-out provision should be narrowly construed; if it is a matter affecting policy setting as a sovereign right, it should be carved out. However, if the tax measures are outside that scope, they should not be carved out. Also, one vital point of carving-out is that it should be done in *bona fide* taxation actions, i.e., actions that are motivated by the purpose of raising general revenue for the state.[66] If the actions taken are only under the guise of taxation, it should not be carved out.[67]

Therefore, unless it is under bona fide taxation actions or unless it affects tax policy formation, the substantive clauses, namely, MFN, NT, FET, FPS, and compensation to expropriation, are generally not able to be carved out just by stating it in the BITs or international investment treaties.

The research on cases related to tax disputes lost by states shows that taxpayers/ investors make their tax measure claims through the BITs or international investment treaties for two reasons: either BITs or international investment treaties provide better protection, or they are the only available options, because no bilateral tax treaties or international tax treaties have been concluded between the two parties. One notable recent case pending before ICSID relates to a dispute filed by a United Arab Emirates company against the Republic of Korea National Tax Service, which according to a bilateral tax treaty, has the discretion to withhold a 10 percent sales tax from the UAE's company. However, the bilateral tax treaty may not apply, because the sales tax is not seen as a double tax issue. Therefore, the case is being considered on the basis of a BIT.[68]

Other cases have been filed on the basis of international investment treaties, even where there are bilateral tax treaties. In *Feldman v. Mexico*, the US–Mexico Income Tax Convention is in place, but the claimant filed the case before ICSID, and the tribunal ruled that Mexico violated NT when it imposed an excise tax on cigarettes and customs when exporting cigarettes. Another example is *RosInvestCo v. Russia*, where the UK–USSR Bilateral Tax Treaty[69] is place; however, the claimant used the UK–USSR BIT as the foundation and was awarded for the expropriation on tax evasion investigations and privatisation in the oil industry.[70] This is the same as in *Mobil v. Venezuela*, where a bilateral tax treaty is in place, but the claim was based on the BITs on indirect expropriation for the increase of the income tax rate.[71] All these cases (*see* full list in Annex 2 - Tax-Related Investment Disputes) show that tax measures can be brought under BITs or under international investment treaties, and because BITs offer better protection for investors these claims are brought to international tribunals on the basis of the BITs or international investment treaties. These issues are not really related to double taxation or evasion; rather, the claims allege the host states abuse of foreign investors/taxpayers through tax policies. Therefore, it is more appropriate to file claims based on BITs or international investment treaties instead of the international tax treaties.

Another set of cases are those where there are no international tax treaties between the two countries. Thus, BITs or international investment treaties are the only available option to put before the international tribunal. One example is *Enron Corporation v. The Argentine Republic* where no international

65 *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No. AA 226, Award (18 July, 2014).

66 *Ibid.*

67 *Ibid.*

68 Sejko, Dini (2015) *IPIC, The First SWF To File An ICSID Claim. Available* at: http://statecontrolledentities.com/2015/05/25/ipic-the-first-swf-to-file-an-icsid-claim/

69 *Convention Between The Government of The United Kingdom of Great Britain and Northern Ireland and The Government of The Union of Soviet Socialist Republics For the Avoidance of Double Taxation with respect to Taxes on Income and Capital Gains,* (1985). Available at: https://www.gov.uk/government/publications/ussr-tax-treaties-in-force (31 July, 1985).

70 *RosInvestCo UK Ltd. V. Russian Federation*, SCC Case No. V 079/2005, Award (22 December, 2010).

71 *Mobil Cerro Negro, Ltd., Mobil Cerro Negro Holding, Ltd., Mobil Corporation, Mobil Venezolana de Petróleos Holdings, Inc., Mobil Venezolana de Petróleos, Inc., Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Award (9 October9, 2014).

tax treaty between the US and Argentina exists. Therefore, a claim of breaching FET and umbrella clauses on excess stamp duty can only be claimed under the Argentina–US BIT. Other examples are *Occidental Exploration v. Ecuador* and *El Paso Energy Company International v. Argentina, where* international tax treaties are in place between Argentina and Ecuador, BITs and international investment treaties are used as the claims' treaties.[72]

Therefore, it is agreed that because of the limitation in scope and difference in the treaty purpose, substantive clauses under international investment treaties or BITs can offer better protection for the investors/taxpayers' rights when it involves tax disputes. Also, one point to note is that there are many cases that are not related to double taxation or evasion, but it is the host state that abuses foreign investors/taxpayers through taxing policies. This explains why taxpayers/investors have recently filed increased claims through BITs or international investment treaties instead of the international tax treaties.

# POLICY OPTIONS AND RECOMMENDATIONS

This Section draws the lessons of three previous sections and offers proposals for reform or enhancement of the regimes on tax and investment.

First, there are real risks that taxes could become the last trade and investment barrier. In the future, taxes of different types, such as corporate income taxes, personal income taxes, VATs, excises, and tariffs could create barriers to investment. There is a real risk that countries will use their tax administrative practices, either explicitly or implicitly, to discourage or encourage imports or exports, or (FDIs, owing to the simultaneous reduction of non-tax-barriers and increasing pressures of globalisation, which might leave countries only the resort of tax measures to control trade and investment flows. Four specific recommendations can be made to address these risks:

- The BEPS creates a risk of unrelieved double taxation on cross-border income and capital, which in turn influences decisions by MNEs on where to invest. This issue requires the BEPS to be enhanced with the establishment of a mechanism to monitor the consistent implementation of many of its recommendations.
- Governments and national administrations (customs, VAT, and direct tax authorities) should work toward the harmonisation of transfer pricing rules for cross-border transactions between related parties within multinational groups. This is important to reduce the significant costs suffered by MNEs that impact investment decisions.
- The world of international tax law and policy has entered an era of heavy turbulence, and a key issue will be how international tax disputes are settled. The emergence of new players, the rapid development of new technologies, the more aggressive approach to tax planning on the part of some MNEs, and the lack of a global consensus on what should constitute international tax rules will lead to more tax uncertainty, which can be addressed only by establishing appropriate dispute settlement mechanisms, such as arbitration of tax disputes (on the model of investment arbitration, i.e. allowing foreign taxpayers to sue host states before tax tribunals) or modernising the MAPs.
- The practice of some countries to put "exit" taxes under both personal and corporate income taxes should be regulated, as such taxes may decrease the mobility of capital and labour. This too calls for a greater cooperation among governments and action taken by international organisations.

Second, the use, misuse, and risk of abuse of tax incentives, state aid, subsidies, and harmful tax practices calls for further work at the intersection of tax, investment, and trade policies. Three reforms are suggested:

- The benefits and risks of using tax incentives to attract increasingly mobile activities are better know today and indicate that tax law and policy can play a role in decisions on how to structure an investment (subsidiary, branch, joint venture) and how to finance it (local, international, from headquarters, or from another subsidiary), because these decisions relate to the problem of the repatriation of profits. However, tax incentives cost more in terms of lost tax revenue than new investments generate. As a result, tax incentives should not be used to attract investment, as there is a risk of a "race to the bottom," particularly for highly mobile activities.
- Further steps should be taken by the EU Code of Conduct Group and the OECD Harmful Tax Forum. There should be more transparency, in particular through the spontaneous/automatic exchange of information on rulings between treaty partners.
- The EU Code of Conduct Group has played an important role in curbing harmful tax practices, but in the coming years, there will a need to review the criteria to distinguish between what are acceptable and unacceptable forms of tax competition.

72 *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15 Award (31 October, 2011)

Third, there is a fundamental difference between tax and non-tax agreements with respect to dispute settlement: mandatory arbitration seems more acceptable under non-tax agreements than under tax agreements. In previous years, the sovereignty and constitutional constraints against tax arbitration have been real, but in the future they might only look like political smokescreens. So, there is a need to redesign international tax dispute mechanisms for the years to come. This is further exacerbated by the fact that, in the absence of effective tax dispute mechanisms, foreign investors are increasingly resorting to investment treaties and arbitration to settle tax disputes. This regulation of tax measures by the back door is not satisfactory. In this respect, there are a number of elements that tax policymakers can learn from the experience of tax arbitration in non-tax agreements in terms of the institutional framework, procedures, transparency and engagement with investors, and dealing with costs. In this respect, four specific recommendations are formulated:

- The experiences of investor-state arbitration could serve as a benchmark to assess the needs of the tax community and design a modern system of international tax dispute resolution. Current treaties, such as the Trans-Pacific Partnership (TPP) or the Transatlantic Trade and Investment Partnership (TTIP) should start considering the adoption of modern tax dispute mechanisms that would allow foreign taxpayers to complain against a host state fiscal authority.

- The taxation rights and obligations are subject to a number of non-tax treaties such as WTO, PTAs and BITs. The latter have had a strong impact on foreign taxpayers' rights and host states obligations. In this regard, the proper relationship between these non-tax agreements and tax treaties can be characterised as a regulatory overlap which, to some extent, undermines tax treaties.

- A strong policy option should be to carve out tax from all these other agreements to insulate tax policy from investment and trade disciplines. However, this should be done in parallel with refining of tax treaties and tax arbitration.

- Practically, as non-tax agreements will continue to affect taxes, the tax community should get more effectively involved, since non-tax agreements typically lie within the competence of the Ministry of Trade/Commence/Investment boards and tax agreements within the Ministry of Finance. There should be greater efforts among governments (and within) to identify best practices for facilitating the dialogue between these different communities.

# CONCLUSION

Over the last 30 years, governments and international organisations have concentrated their efforts on reducing and removing a number of non-tax barriers, such as customs duties and tariffs on inward and outward transactions, harmonised or reduced non-tax barriers, and put in place mechanisms to speed up custom controls and procedures. These deep transformations of the international trade and investment regimes have mechanically rendered tax policies more important, because, in this new global economic environment and for the years to come, there is a real risk that tax becomes "the last trade and investment barrier," either by design or default. In this respect, it is crucial for governments to consider two different (but complementary) types of enhancements for the tax and investment regime.

With regard to pure tax measures, it will be important to control tax barriers to investment by promoting cooperation between tax authorities with regard to a number of important issues, such as transfer pricing guidelines, VAT, double taxation and double non-taxation, and identifying the best tax policy options in the design of tax systems. In this respect, the OECD and the IMF should build on recent successes to further facilitate governmental cooperation on tax matters. In addition, governments are increasingly inclined to use taxation (including a number of measures that are at the intersection of tax and investment, namely tax incentives, state aid, subsidies, and harmful tax practices) to attract investment. Over the years, many attempts were made to better discipline these practices (OECD Report on Harmful Tax Competition, Action 5 of the current BEPS initiative, EU Code of Conduct) and it is important to further expand these efforts in the coming years. In particular, there is a need for more transparency, which will require the spontaneous/automatic exchange of information on rulings between treaty partners.

With regard to the evolution of these tax measures and its interaction with the regime on foreign investment, it is crucial to understand that the new phenomenon of investment arbitration has brought about a number of decisions from different arbitral forums in the tax sector, contributing to the formation of a jurisprudence that is elucidating the meaning of key provisions and contributing to the emergence of global economic regulation of tax matters. This has occurred primarily because substantive clauses under international investment treaties can offer better protection of investors/taxpayers' rights than double taxation treaties when it involves tax disputes. Also, tax treaties do not provide attractive dispute resolution mechanisms for foreign taxpayers/investors. This is a warning and a call for a more holistic approach of tax and investment rule-making, which would either clearly distinguish the two regimes (or avoid overlaps or gaps) or encourage the convergence of two regimes that are probably artificially distinguished.

# ANNEX 1: TYPOLOGY OF TAX EXCEPTION IN INVESTMENT TREATIES

Source: compiled by the author

| Type of exclusion | Examples | Legal effect |
|---|---|---|
| General exclusion | Agreement between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments (1995): Article 8:2 "The provisions of this Agreement shall not apply to matters of taxation in the area of either Contracting Party. Such matters shall be governed by the domestic laws of each Contracting Party and the terms of any agreement relating to taxation concluded between the Contracting Parties." | Such a provision excludes tax matters from the treaty scope of application without any reservation. It is impossible to bring a tax-related disputes before an investment tribunal on the ground of such a treaty. |
| Conflict clauses in favour of tax treaties application | Agreement between the Government of the United Mexican States and the Government of the Republic of Korea for the Promotion and Reciprocal Protection of Investments (2000) Article 3:3 "Nothing in this Agreement shall affect the rights and obligations of either Contracting Party derived from any tax convention. In the event of any inconsistency between the provisions of this Agreement and any tax convention, the provisions of the latter shall prevail." | A clause providing priority of taxation treaties over the investment treaty can clarify that investment treaties still applies to taxation, but to the extent that is covered by taxation treaties, the latter shall prevail. |
| Specific and explicit exclusion based on the distinction between the type of taxes (direct and indirect taxes) | Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (2005) Article 21: Taxation "2. Subject to paragraph 7, Article 3 and Article 4 shall apply to all taxation measures, other than taxation measures relating to direct taxes (which, for purposes of this paragraph, are taxation measures on income, capital gains, or on the taxable capital of corporations or individuals, taxes on estates, inheritances, gifts, and generation-skipping transfers), except that nothing in those Articles shall apply: (a) any most-favoured-nation obligation with respect to an advantage accorded by a Party pursuant to a tax convention; (b) to a non-conforming provision of any existing taxation measure; (c) to the continuation or prompt renewal of a non-conforming provision of any existing taxation measure; (d) to an amendment to a non-conforming provision of any existing taxation measure to the extent that the amendment does not decrease its conformity, at the time of the amendment, with those Articles [...]" | This type of provision restricts treaty application to limited types of taxes. It is also noteworthy to mention that few investment treaties introduce such a distinction which indirectly clarifies the meaning of taxation measure. |
| Tax veto to expropriation case | Agreement Between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (2009) Article VII:4: "Article VIII (Expropriation) may be applied to a taxation measure unless the taxation authorities of the Contracting Parties, no later than six months after being notified by an investor that he disputes a taxation measure, jointly determine that the measure is not an expropriation." | Investment treaties can grant the national tax authorities the competence to 'veto' a complaint by an investor alleging expropriation arising from a taxation measure by the host state. |

| Type of exclusion | Examples | Legal effect |
|---|---|---|
| Specific and explicit exclusion to the non-discrimination standards (NT and/or MFN standards) | Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments (2006): Article 5: "Article 4 of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from: [...] (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation. Nothing in this Agreement shall affect the rights and obligations of either Contracting Party derived from any international agreement or arrangement relating wholly or mainly to taxation to which either Contracting Party is a party. In the event of any inconsistency between the provisions of this Agreement and any such agreement or arrangement, the provisions of the latter shall prevail." | Such a provision excludes the application of both NT and MFN from treatments resulting from 'any matter' related to taxation |
| Specific and explicit exclusion to fair and equitable treatment | NAFTA (1995) Article 2103(1) stipulates that '[e]xcept as set out in this Article, nothing in this Agreement shall apply to taxation measures'. [...] 'Articles 1102 and 1103 [i.e. NT and MFN] [...] shall apply to all taxation measures,' and 'Article 1106(3), (4) and (5) [i.e. Performance Requirements] shall apply to taxation measures.' | In this connection, since there is no explicit reference to FET, the tax measures are excluded from consideration in the context of Article 1105. Treaties can also exclude the application of the obligation of fair and equitable treatment on taxation measures. |
| Combination of diverse exceptions within exclusion | Agreement Between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (2009) Article VII (Taxation Measures) "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures. Nothing in this Agreement shall affect the rights and obligations of the Contracting Parties under any tax convention. In the event of any inconsistency between the provisions of this Agreement and any such convention, the provisions of that convention shall apply to the extent of the inconsistency. Subject to paragraph 2, a claim by an investor that a tax measure of a Contracting Party is in breach of an agreement between the central government authorities of a Contracting Party and the investor concerning an investment shall be considered a claim for breach of this Agreement unless the taxation authorities of the Contracting Parties, no later than six months after being notified of the claim by the investor, jointly determine that the measure does not contravene such agreement. Article VIII (Expropriation) may be applied to a taxation measure unless the taxation authorities of the Contracting Parties, no later than six months after being notified by an investor that he disputes a taxation measure, jointly determine that the measure is not an expropriation. If the taxation authorities of the Contracting Parties fail to reach the joint determinations specified in paragraphs 3 and 4 within six months after being notified, the investor may submit its claim for resolution under Article XIII (Settlement of Disputes between an Investor and the Host Contracting Party)." | All types of exclusion do not preclude each other. In fact, some IIAs combine several exceptions within the exclusion, resulting in a complex structure, which requires careful scrutiny to identify the scope of application. |

# ANNEX 2: TAX-RELATED INVESTMENT DISPUTES

| Case Name | Treaty | Award Date | Arbitration Rules |
|---|---|---|---|
| Feldman v. Mexico | NAFTA | December 16, 2002 | ICSID AF |
| Goetz v. Burundi | Belgium–Luxemburg–Burundi BIT | February 10, 1999 | ICSID |
| Enron Corporation & Ponderosa Assets LP v. The Argentine Republic | Argentine-USA BIT | May 22, 2007 | ICSID |
| Occidental Exploration and Production Company v. Ecuador | USA–Ecuador BIT | July 1, 2004 | UNCITRAL |
| Archer Daniels Midland Co. & Tate Lyle Ingredients Americas, Inc. v. United Mexican States | NAFTA | November 21,2007 | ICSID AF |
| El Paso Energy International Company v. Argentina | Argentina–USA BIT | October 31, 2011 | ICSID |
| Duke Energy v. Ecuador | USA–Ecuador BIT | August 18, 2008 | ICSID |
| Hulley v. Russia | ECT | July 18, 2014 | UNCITRAL |
| RosInvestCo v. Russia | UK–USSR BIT | September 12, 2010 | SCC |
| Yukos Universal v. Russia | ECT | July 18, 2014 | UNCITRAL |
| Mobil v. Venezuela | Netherlands–Venezuela BIT | October 9, 2014 | ICSID |
| Quasar de Valores Sicav SA v. The Russian Federation | Spain–USSR BIT | July 20, 2012 | SCC |
| Renta 4 v. Russia | Spain–USSR BIT | March 30, 2009 | SCC |
| Tza Yap Shum v. Republic of Peru | China–Peru BIT | July 7, 2011 | ICSID |
| Veteran Petroleum v. Russia | ECT | July 18, 2014 | UNCITRAL |
| Corn Products International Inc. v. Mexican States | NAFTA | August 18, 2009 | ICSID AF |
| Paushok v. Mongolia | Russia–Mongolia BIT | April 28, 2011 | UNCITRAL |
| Burlington Resources v. Ecuador | USA–ECUADOR | December 14, 2012 | ICSID |
| Phoenix Action v. Czech Republic | Israel–Czech Rep BIT | April 15, 2009 | ICSID |
| Noble Energy v. Ecuador | USA–Ecuador BIT | Settled | ICSID |
| Gottlieb v. Canada | NAFTA | | UNCITRAL |
| TCW v. Dominican Republic | CAFTA | Consent Award/July 16, 2009 | UNCITRAL |
| Lacich v. Canada | NAFTA | Withdrawn | N.A. |
| Link-Trading v. Moldova | USA–Moldova BIT | April 18, 2002 | UNCITRAL |
| Tokios Tokeles v. Ukraine | Lithuania–Ukraine BIT | July 26, 2007 | ICSID |
| EnCana v. Ecuador | Canada–Ecuador BIT | February 3, 2006 | UNCITRAL |
| Plama Consortium Limited v. Republic of Bulgaria | ECT | August 27, 2008 | ICSID |
| Grand River v. USA | NAFTA | January 12, 2011 | UNCITRAL |
| Amto LLC. v. Ukraine | ECT | March 26, 2008 | SCC |
| EDF v. Romania | UK–Romania BIT | October 8, 2009 | ICSID |
| The Rompetrol Group N.V. v. Romania | Netherlands–Romania BIT | May 6, 2013 | ICSID |
| Jan Oostergetel and Theodora Laurentius v. The Slovak Republic | Netherlands–Slovak Republic BIT | April 23, 2012 | UNCITRAL |

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