

Investment Treaty Arbitration: Lessons for Tax Treaty Arbitration

Alternative Dispute Resolution in International Taxation

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ISDS and Investment Treaties

- A decentralised network of over 3,000 investment treaties with procedural and substantive protections
- Investor-State arbitration: flexible and facilitates party autonomy (you get to choose your decision-maker!!)
- Investment protection standards: expansive and broadly drafted
- Losing party has limited rights to challenge the award



Concerns with investment treaty arbitration

- Inconsistent interpretations
- Regulatory chill
- Excessive costs and duration of proceedings
- Lack of independence and impartiality (Double-hating/reappointments)



Matching concerns with solutions

- Bilateral reforms: sustainable investment provisions, alternatives to ISDS, ensuring the right to regulate
- Multilateral reform: UNCITRAL Working Group III, (discussions on a multilateral instrument)
- Institutional reform: investment court system promoted by the EU (discussions on multilateral investment court)



Investment Court System

- Two-level judicial structure: first instance and appeal mechanism
- Courts' members would be appointed in advance by a joint committee of the States party to the treaty
- Implemented in EU trade and investment agreements (CETA, EU-Singapore, EU- Mexico, EU Vietnam)



Solutions resolving concerns?

- Bilateral reforms: good start but long way to go
- Multilateral reforms: implementation? highly political and convoluted negotiation process
- Investment Court: it could resolve inconsistency and impartiality concerns ... but intra-EU investments?



Do we need more fragmentation?

- ISDS in investment treaties (ICSID, UNCITRAL, PCA)
- ISDS in the form of a multilateral instrument
- EU's Investment court in EU investment/trade treaties
- Multilateral investment court
- Domestic courts for EU investors as a result of *Achmea*, which foments treaty shopping



and in the tax treaty system?

- Opt-in arbitration in the MIL
- MAP/Arbitration in tax treaties
- Intra-EU tax treaties (MIL arbitration system v EU Dispute Resolution system)



Lessons for tax treaty arbitration?

