WU Institute for Austrian and International Tax Law

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The Impact of Bilateral Investment Treaties on Taxation

8

European and International Tax Law and Policy Series

IBFD

The Impact of Bilateral Investment Treaties on Taxation

Why this book?
The tax aspects of bilateral investment treaties, which, in most cases, provide the investor with the unique opportunity to directly initiate an international dispute settlement process – also known as investor-state dispute settlement – are often overlooked. The increasing number of tax-related investment disputes is a clear indicator of an urgent need to identify and examine the issues emerging in this area in an academic context. The aim of this book is to provide a comprehensive analysis of the relationship between taxation and bilateral investment treaties. Twenty-one national reports from countries across the globe have been compiled in this volume. The reports, prepared for the conference “The Impact of Bilateral Investment Treaties on Taxation”, which took place in Rust (Austria) from 2-4 July 2015, help bring to light tax aspects of bilateral investment treaties that have significant unexplored aspects. Tax academics and tax practitioners, along with investment law academics and practitioners, provided their input. A major focus is the attitude taken towards tax matters in the bilateral investment treaties of reporting countries, as is the relationship between double tax treaties and bilateral investment treaties. In addition to the national aspects, the book also outlines global trends and best practices, and in doing so it aims to analyse the consistency of existing policies with the international obligations undertaken in bilateral investment treaties. The general report elaborates extensively on issues connected with tax carve-out provisions in bilateral investment treaties and the arbitration of tax matters This book is of relevance to practitioners and academics working in tax law and international investment law, as well as students doing research and all who have an interest in the most current issues in these fields of law.

The title is volume 8 in the WU Institute for Austrian and International Tax Law - Tax Law and Policy Series.

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Preface

Preface

The relationships between taxation and bilateral investment treaties are traditionally the subject of separate studies by scholars. However, the real world bundles them together, thereby often raising intricate technical questions concerning the differently shaped tax carve-out clauses contained in bilateral investment treaties.

We have conceived this book to fill the gap between those two separate lines of studies and provide a comprehensive analysis of the relationships between taxation and bilateral investment treaties. Using the interdisciplinary research methodology that has already characterized various publications coordinated by our institute at WU Vienna, this book is the end result of a research cluster that we initiated several years ago and aims at providing a theoretical and practical approach to its subject. It has been enriched by national reports that were drafted by tax and bilateral investment treaty experts based on a questionnaire, and a general report that highlights the most relevant points contained in the national reports together with our own scientific contribution.

The first drafts of the national reports were presented at our 2015 Summer Conference in Rust, leading to a vivid debate and numerous thought-provoking suggestions, which have prompted the national reporters to improve their own contributions to this book.

The production process of this book, which was supported by the funds of the FESTO Fellowship, has included a critical revision of all national reports by a team from our institute – among others, Ege Berber Villeneuve, who is writing her own interdisciplinary doctoral thesis in parallel with this research project and book, and Laura Turcan. At the time of the production process of this book, both worked under the supervision of the general reporter and made a valuable contribution to ensuring the scientific quality of all national reports. Our warmest thanks to them!

Once more we have been fortunate to have Renée Pestuka coordinating the logistics of book production. Her commitment, efficiency and friendly approach are unique and an example to us all. Finally, we would also like to thank Jules Macrory for her support and Margaret Nettinga for her highly professional linguistic editing.

We trust that our readers will appreciate our efforts and find this book useful for theoretical and practical analyses of the problems concerning the relationships between taxation and bilateral investment treaties.

Ponza-Vienna, 29 July 2016

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General Report

Pasquale Pistone

1.0. Introduction

The bilateral investment treaty (BIT) and double tax treaty (DTT) networks are not only among the most extensive treaty networks in existence, with roughly 2,300 BITs[1] and 3,000 DTTs[2] currently in force, but also the most influential from the perspective of the protection and treatment that they provide to individuals. While BITs aim to protect foreign investors from discrimination, uncompensated expropriation and arbitrariness, and provide them with certainty concerning the legal consequences of their investment, the goal of DTTs is to eliminate the double taxation that might arise due to cross-border economic activities. Lastly, both of the treaty types share the goal of promoting cross-border investment and thus economic growth.

In the new post-economic crisis and post-BEPS environment, taxation is becoming increasingly important both in the public opinion and to countries struggling to recover from the effects of the economic crisis and to balance their budgets by increasing tax levels. Therefore, tax is becoming a crucial factor in foreign investment. Despite the interrelation between investment and taxation, and the extensive number of BITs and DTTs being signed, little research has been undertaken on the potential overlap and interaction between international taxation and BIT law, with its potential consequences for foreign investment.

In order to examine this relationship, the Institute for Austrian and International Tax Law invited academics, practitioners and government officials involved in the negotiation of these treaties to the 2015 Summer Conference in Rust. The conference was based on a series of short input statements prepared by national reporters from 34[3] different countries, based on

1. *See* UNCTAD Database, Investment Policy Hub, available at http://investmentpolicyhub.unctad.org/IIA.
2. *See* IBFD Tax Treaty Database.
3. Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Chile, China, the Czech Republic, France, Germany, Greece, Hungary, India, Italy, Luxembourg, Mex-

a questionnaire devised by the Institute's staff. The questionnaire and conference covered eight different subtopics dealing with the scope of the two types of treaties, as well as several substantial provisions found in BITs, e.g. the fair and equitable treatment (FET), national treatment (NT) and most-favoured-nation (MFN) treatment standards. The input statements consisted of excerpts from the draft national reports prepared by the conference attendees.

Following the conference, where high-level discussions on the finer points of law were held, the national reporters updated their reports by incorporating the feedback received during the conference and the main points raised during the discussions. This general report is based on the final national reports from 21 countries,[4] of which 13 are OECD member countries and 11 are EU Member States, as well as the BRICS, Serbia and Bosnia. While the general report highlights the most important points of the national reports, it also includes the personal views of the reporter and is based on the personal technical knowledge of the author as well as the results of the WU research group. Thus, where relevant, further information was added from additional sources.

The general report follows the outline of the questionnaire and the reports, and therefore is composed of eight different sections, which focus on: (i) the framework for BITs and DTTs; (ii) their relationship with other treaties (tax and non-tax); (iii) whether taxes are in the scope of BITs; (iv) the FET standard and transparency under BITs; (v) the NT and MFN standards in BITs; (vi) the prohibition of expropriation in BITs; (vii) the free transfer of capital provisions in BITs; and (viii) dispute settlement under DTTs and BITs, and investment awards.

1.1. General framework

1.1.1. Policy rationale of bilateral investment and tax treaties

BITs and tax treaties have different policy rationales, which can be described briefly as follows.

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ico, the Netherlands, Peru, Poland, Portugal, the Republic of Serbia, Romania, Russia, the Slovak Republic, Slovenia, Spain, South Africa, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, the United States and Venezuela.

4. Australia, Austria, Belgium, Bosnia and Herzegovina, Canada, Chile, China, the Czech Republic, France, Germany, Greece, India, Italy, Luxembourg, the Netherlands, Poland, Portugal, Russia, Serbia, South Africa and the United States.

The main policy rationale for concluding a BIT is to provide a legal framework that protects non-nationals and encourages them to invest their capital in a given country, often a developing country or an economy in transition.[5]

BITs do not protect nationals, since (at least in a democratic state) their social contract with the state provides them with sufficient legal protection. Instead, they strengthen the rights of foreigners and prevent any expropriation of their investment for reasons that may be connected with policy changes in the government of a country.[6]

Arbitration mechanisms allow for an impartial and depoliticized framework for disputes between the state and the investor, taking into consideration that governments can change legislation, and provide for solutions based on authentic interpretation that in fact override the decisions of national courts. Significant examples are seen in the disputes between the United States and Cuba,[7] or disputes regarding the Suez Canal.[8]

Bilateral tax treaties are concluded for the main purpose of regulating the exercise of tax sovereignty in cross-border situations, which they restrict as compared to the conditions established by domestic law. Entitlement to the protection offered by bilateral tax treaties is determined by residence in either contracting state. They create rights and obligations for both contracting states with a view to preventing, mitigating or providing relief for international double taxation. However, bilateral tax treaties are highly vulnerable to tax arbitrage and for this reason have developed over the past decades mainly around model conventions. This secures consistency in the exercise of tax jurisdiction.

In the absence of an international tax court, for many years disputes over bilateral tax treaties were exclusively adjudicated before the domestic

5. D. Smit, The Netherlands, sec. 16.8.3. indicates that, since nationality is determined by domestic law, the mere fact of setting up a Netherlands company gives entitlement to protection under the BIT, thus, in a way, fostering certain forms of treaty shopping. However, some countries, such as Canada, include in their investment treaties – *see* the Canada-China treaty – specific clauses to prevent this phenomenon. Other national BIT models, such as the Swiss one, include a real economic activity requirement for granting non-nationals treaty protection.

6. For an introductory note on the topic, *see* Stefano Castagna, *ICSID Arbitration: BITs, Buts and Taxation – An Introductory Guide*, 70 Bulletin for International Taxation 7 (2016), pp. 370-378.

7. *See* Walter Fletcher Smith Claim (Cuba, USA), Reports of International Arbitral Awards, Vol. II (1949), pp. 913-918.

8. *See* J. Yackee, *The First Investor-State Arbitration: The Suez Canal Company v Egypt (1864)*, The Journal of World Investment & Trade, Vol. 17 (2016), pp. 401-462.

courts of one of the contracting states or addressed by the two contracting states in the framework of joint administrative procedures, generally known as mutual agreement procedures (MAPs), with no actual rights for taxpayers. Recently, arbitration finally made its way into bilateral tax treaties through the 2010 Update to Article 25(5) of the OECD Model.

A comparison between the rationale of bilateral tax and investment treaties shows the former to be instruments of public international law for regulating conflicts between states and the latter to be instruments of private international law by which states bind themselves to recognizing the protection of rights of investors. However, both affect the legal sphere of persons. Therefore, a modern vision of tax treaties should draw on experience with BITs when addressing potential issues arising in the framework of arbitration. Vice versa, BITs should look to the substance of tax treaties so that the actual implications of tax carve-out clauses can be understood, for instance with a view to deciding whether MAPs can constitute actual dispute settlement mechanisms.

1.1.2. A common dilemma: Concluding bilateral treaties or doing without them?

Bilateral investment and tax treaties are prominent features of the international treaty policies of most countries.

Germany has been a policy forerunner in both bilateral investment and tax treaties.[9] In general, some European countries[10] have a more complete BIT network than non-European countries with similar economies.[11]

Some states have a limited network of BITs and others have no BITs at all.[12] There is hardly any country in the world currently that does not have BITs. Tax treaties are most frequently found among major trading partners,[13]

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9. *See* A. Gildemeister, Germany, sec. 12.1.1.
10. Reports show a trend in founding EU Member States to have a more extensive network of BITs than non-European countries, for instance Canada and the United States.
11. For example, the Netherlands currently has 91 and the United Kingdom has 96 BITs in force, while the United States has 40 and Canada has 30 BITs in force. *See* UNCTAD Database, Investment Policy Hub, available at http://investmentpolicyhub.unctad.org/IIA.
12. Brazil is a good example of this category. *See* L. Schoueri and R. Galendi Jr., Brazil.
13. *See* J. Waincymer, Australia, sec. 2.1.2. and Y. Brauner, United States, sec. 22.1.3.

sometimes have different features in bilateral relations with developing countries[14] and are seldom concluded with low-tax jurisdictions.[15]

The difference in the use of bilateral investment and bilateral tax treaties may find various explanations, three of which are worth mentioning here.

Historically, the first bilateral tax treaties were concluded as early as in the 19th century. The first modern BIT only appeared in 1959[16] as part of a more general worldwide trend to provide international legal protection to investment, a trend that also gave rise to, among other instruments, the United Nations Conference on Trade and Development (UNCTAD) and the International Centre for Settlement of Investment Disputes (ICSID) arbitration systems for disputes on international investment.

Multilateral instruments were developed for the protection of investment and trade liberalization, but hardly any can be found in international taxation, which was essentially driven by bilateralism steered by model conventions drafted under the auspices of the League of Nations, the Organisation for European Economic Co-operation (OEEC) and the Organisation for Economic Co-operation and Development (OECD).

Furthermore, since the late 18th century[17] until after the end of the Second World War,[18] developed countries have concluded friendship and com-

14. Economists are often sceptical about their impact on foreign direct investment, *see* P. Egger, M. Larch, M. Pfaffermayr and H. Winner, *The Impact of Endogenous Tax Treaties on Foreign Direct Investment: Theory and Evidence*, 39 Canadian Journal of Economics 3 (2006), pp. 901-931. However, previous interdisciplinary and legal studies conducted at WU Vienna question whether this outcome may have been partly biased by the absence of a sufficiently specific analysis of the comprehensive set of clauses contained in the tax treaties of each country. *See* further on this in F. Barthel, M. Busse, R. Krever and E. Neumayer, *The Relationship between Double Taxation Treaties and Foreign Direct Investment*, in M. Lang et al. (eds.), *Tax Treaties: Building Bridges between Law and Economics* (IBFD Publications, 2010), pp. 3-18; and P. Pistone, *Tax Treaties with Developing Countries: A Plea for New Allocation Rules and a Combined Legal and Economic Approach*, id., pp. 413-414.

15. For the purpose of our research, the concept of bilateral tax treaty indicates a general tax treaty concluded with a view to countering international double taxation on income and capital. Concluding such treaties with low-tax jurisdictions is, on the one hand, not particularly needed and, on the other hand, exposes high-tax countries to double non-taxation, especially when the exemption method relieves double taxation and prevents the exercise of tax jurisdiction in respect of foreign-sourced income.

16. *See* A. Gildemeister, Germany, sec. 12.1.1.; and T. Dubut and T. Randriamanalina, France, sec. 11.1.1.

17. D. Smit, Netherlands, sec. 16.1.1.; and Y. Brauner, United States, sec. 22.1.1.

18. For instance, the friendship and commerce treaty between the Netherlands and the United States was concluded in 1956, i.e. shortly before the creation of the Euro-

merce treaties.[19] Such treaties are the precursors of the modern BITs with generally less extensive protection for investors than that currently offered by BITs.[20]

Interestingly, numerous friendship and investment treaties include(d) NT and MFN clauses that are also applicable to taxes and, in several cases, exclude the exercise of tax jurisdiction on non-nationals or foreigners. At the same time, such a vision of economic allegiance has lost momentum in the world of international taxation.[21]

Further, we suggest that the technical studies concerning the exercise of tax sovereignty in cross-border situations, prepared with particular intensity for the 1963 OECD Model, have gradually contributed to awareness of the complexity of this domain and facilitated the diffusion of tax carve-out clauses in BITs and the less frequent inclusion of MFN treatment in bilateral tax treaties.[22]

From their early days, BITs have operated as legal instruments for capital-exporting countries to achieve a stable legal framework in respect of outbound investment and to secure the transfer of returns from such investment.

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pean Economic Community (EEC). The existence of this specific treaty (and of that between Ireland and the United States, concluded before the former country joined the EEC) raises interesting issues on the protection of US investment in Europe in respect of the State aid procedures on tax matters.
Furthermore, the United States continued concluding friendship and commerce treaties at a time when other countries, for instance Germany, had already changed their policy with a preference for BITs. An emblematic case in this respect is the German (bilateral investment) and US (friendship and commerce) treaties concluded with Pakistan in 1959 and 1961, respectively.

19. Interestingly, E. Traversa and I. Richelle, Belgium, sec. 4.1. indicate that some Belgian friendship and commerce treaties concluded in the 19th century (with South Africa, Tunisia and Venezuela) are still in force.

20. The difference between the two types of treaties mainly lies in the absence of actionable standards of conduct in respect of foreign investment in friendship and commerce treaties, which *are* included in BITs.

21. As indicated by the IBFD International Tax Glossary on the basis of the 1923 report of the League of Nations, economic allegiance was a doctrine according to which a given jurisdiction's right to tax is determined by reference to the relative proximity of certain economic characteristics to that jurisdiction as compared to another, competing jurisdiction.

22. However, as I. Hofbauer, *Das Prinzip der Meistbegünstigung im grenzüberschreitenden Ertragssteuerrecht* (Linde Verlag, Vienna, 2005), p. 193, rightly indicates, numerous tax treaties include MFN clauses. A comprehensive and updated survey of tax treaties with MFN clauses is currently being conducted by IBFD.

Two examples confirm our view and can be mentioned here. French[23] policy throughout the 1960s promoted BITs with unilateral effects in favour of French investors abroad. German policy prioritized developing countries when it concluded its first BITs, possibly due to fear that legal instability in such countries could pose immediate threats to German outbound investment. This trend can also be noted in other BIT networks.

However, the perception gradually spread throughout the world that the conclusion of a BIT could also be in the interest of countries wishing to attract inbound investment,[24] since the acceptance of limitations to national sovereignty associated with the conclusion of such a treaty would be an effective confirmation of a serious commitment to give investment legal protection along internationally accepted standards, also sheltering it to some extent from possible policy changes.[25]

Although BITs reflect the aspiration to secure legal stability, sometimes even specifically reflected in "stabilization" clauses,[26] practice shows that national policies do change over time[27] and international obligations contracted by a given country cannot be entirely open-ended or completely prevent a country from adapting its own legislation when appropriate.[28] Long-term stability in legislation nevertheless represents an important ele-

23. *See* T. Dubut and T. Randriamanalina, France, sec. 11.1.1.
24. M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010), p. 229, questions this perception in the absence of empirical evidence that confirms it, but more recent econometrical studies conducted in the Netherlands prove the contrary. A. Lejour and M. Salfi, *The Regional Impact of Bilateral Investment Treaties on Foreign Direct Investment*, CPB Discussion Paper from CPB Netherlands Bureau for Economic Policy Analysis (2015), p. 2.
25. *See* Y. Zhu, China, sec. 9.1.
26. Stabilization clauses have become a popular demand of investors seeking to invest in developing countries. They are, however, rarely used in developed countries, since they are largely considered unconstitutional in that they go against the widely accepted principle that one legislature cannot bind a future legislature, and that an executive act of government cannot bind a legislative body.
27. A good example of this kind of issue is the *Vattenfall* case. A change in German nuclear power policy compelled the investor, a Swedish state-owned company, to sue Germany before the ICSID Arbitration Court under the Energy Charter. This case, which was still pending (case ICSID ARB/12/12) at the time this report was drafted, shows that good reasons may cause a country to reconsider its previous decisions, thus leading to the question of whether the protection of the investment in fact represents the source of an absolute legal restriction on the decisions of a country.
28. Sergei Paushok, *CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability of 28 Apr. 2011, para. 302.

ment, on which business decisions rely heavily. Therefore, whether or not secured by the existence of a BIT, this type of policy is particularly important to create favourable inbound investment.

The obligations assumed by a country under a BIT should rather be read within such a framework, as an expression of the binding commitment not to introduce arbitrary changes in national legislation, judicial and administrative practice that could lead to expropriation of the foreign investment.

1.1.3. Policy trends, models and developments in BITs and tax treaties

The emergence of both types of bilateral treaties is largely influenced by the proactive approach of developed countries, pursuing the goals of protecting outbound investment and preventing international double taxation.[29] All other states are usually players on the sideline, left with the sole policy option of whether or not to conclude the bilateral treaty, but with little or no power as to the content of such a treaty.[30] The search for policy consistency should therefore focus on the former, rather than the latter group of countries.

We shall now address the criteria for selecting treaty partners, the convergence among bilateral treaties, including the role of model conventions, and provide some additional information on recent and ongoing developments, including the shift of competence within the European Union in matters of trade and investment, and the impact of the BEPS project on both types of bilateral treaties.

Developed countries seem to prioritize the conclusion of BITs in geographical areas that are more receptive to inbound investment and gradually complete their network with treaties with all (or most) countries in that

29. D. Smit, Netherlands, sec. 16.1.2. indicates that the Netherlands sometimes carries out negotiations of both types of bilateral treaties in the framework of a single package deal.
30. Changes in economic power of countries may alter their role in this field as well. Gradually, Brazil became a significant capital exporter for the region and changed its attitude towards investment treaties. It developed a new investment treaty model. *See also* L. Schoueri and R. Galendi Jr., Brazil, sec. 6.1.3. China underwent similar economic development and subsequent change in BIT policy, *see* Y. Zhu, China, sec. 9.1.

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