

Series Editor: Michael Lang

Editors: Michael Lang / Jeffrey Owens / Pasquale Pistone /  
Alexander Rust / Josef Schuch / Claus Staringer

# The Impact of Bilateral Investment Treaties on Taxation

8

European and International  
Tax Law and Policy Series



# 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

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## 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 Ville-neuve, 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

The editors

Michael Lang  
Jeffrey Owens  
Pasquale Pistone  
Alexander Rust  
Josef Schuch  
Claus Staringer



## 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<sup>1</sup> and 3,000 DTTs<sup>2</sup> 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<sup>3</sup> different countries, based on

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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,<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

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,<sup>7</sup> or disputes regarding the Suez Canal.<sup>8</sup>

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

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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.<sup>9</sup> In general, some European countries<sup>10</sup> have a more complete BIT network than non-European countries with similar economies.<sup>11</sup>

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

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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<sup>14</sup> and are seldom concluded with low-tax jurisdictions.<sup>15</sup>

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<sup>16</sup> 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<sup>17</sup> until after the end of the Second World War,<sup>18</sup> 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. Randriamanelina, 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.<sup>19</sup> Such treaties are the precursors of the modern BITs with generally less extensive protection for investors than that currently offered by BITs.<sup>20</sup>

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.<sup>21</sup>

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.<sup>22</sup>

From their early days, BITs have operated as legal instruments for capital-exporting countries to achieve a stable legal framework in respect of out-bound 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<sup>23</sup> 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,<sup>24</sup> 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.<sup>25</sup>

Although BITs reflect the aspiration to secure legal stability, sometimes even specifically reflected in “stabilization” clauses,<sup>26</sup> practice shows that national policies do change over time<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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

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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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## List of Contributors

### Editors

#### Michael Lang

Michael Lang is Head of the Institute for Austrian and International Tax Law. He is Academic Director of the LLM Program in International Tax Law and Speaker of the Doctoral Program in International Business Taxation (DIBT) at WU (Vienna University of Economics and Business).

#### Jeffrey Owens

Jeffrey Owens is Director of the WU Global Tax Policy Center of the Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business), and former Head of the OECD Centre for Tax Policy and Administration.

#### Pasquale Pistone

Pasquale Pistone holds the Ad Personam Jean Monnet Chair in European Tax Law and Policy at WU (Vienna University of Economics and Business). He is also an associate professor of tax law at the University of Salerno, Italy, and the Academic Chairman of IBFD.

#### Alexander Rust

Alexander Rust is a professor at WU (Vienna University of Economics and Business).

#### Josef Schuch

Josef Schuch is a professor at WU (Vienna University of Economics and Business), and a partner at Deloitte Austria.

#### Claus Staringer

Claus Staringer is a professor at WU (Vienna University of Economics and Business), and a principal consultant with the law firm Freshfields Bruckhaus Deringer.

## Assistant Editors

Ege Berber Villeneuve is currently a PhD candidate in the Doctoral Program in International Business Taxation (DIBT) at WU (Vienna University of Economics and Business). She holds a law degree from Koç University (Istanbul), a master's degree in public law from Istanbul University and an LL.M. finance degree from Goethe University (Frankfurt). During the preparation of this publication, Ege was a recipient of DOC Fellowship from the Austrian Academy of Sciences at the Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business).

Laura Turcan is a PhD candidate in the Doctoral Program in Business Law at WU (Vienna University of Economics and Business). She holds a master's degree from the same university.

## Authors

### **Azra Becirovic**

Azra Becirovic is senior advisor for fiscal affairs at the Ministry of Finance and Treasury of Bosnia and Herzegovina and a PhD candidate in economics at Sarajevo School of Science and Technology, Bosnia and Herzegovina, and the University of Buckingham, United Kingdom. She is also President of the Fiscal Association in Bosnia and Herzegovina, a branch of the International Fiscal Association.

### **Yariv Brauner**

Yariv Brauner is a professor of law at the Levin College of Law at the University of Florida. He joined the Florida faculty in 2006, after teaching at New York University, Northwestern University and Arizona State University. He has been a Visiting Professor and a guest speaker at various universities in the United States and abroad. He is the author of several articles published in professional journals and law reviews, and a co-author of *US International Taxation – Cases and Materials* (with Reuven S. Avi-Yonah and Diane M. Ring), now in its third edition.

### **Rafia de Gama**

Rafia de Gama LL.B., LL.M. (University of Pretoria) is currently pursuing a PhD in international law at Leiden University. Rafia de Gama has an interest in international investment law and international aviation law.

**Tiago Duarte**

Tiago Duarte holds a PhD in Public Law and is a professor of constitutional law, administrative law and international investment arbitration at Nova University Law School in Lisbon. He is also a partner at the PLMJ – Law Firm, where he works in the public law and arbitration departments. He is the chairman of the Investment Arbitration Council of the Portuguese Arbitration Association and has been assisting the Portuguese Government in drafting a new model BIT. Tiago Duarte is a former Visiting Fellow of the Cambridge University, where he did post-doc research regarding ICSID Arbitration at the Lauterpacht Centre for International Law. He has published several articles on public law and investment arbitration, and is regularly invited as speaker at conferences and postgraduate courses in Portugal and abroad.

**Thomas Dubut**

Thomas Dubut holds an LLM in tax law from the Sorbonne Law School (France). He has taught tax law at French universities (currently at the Sorbonne Law School and at Paris Dauphine University) for more than ten years and has been a visiting research fellow at WU (Vienna University of Economics and Business) and at the National University of Athens (Greece). He is currently advisor for the International Monetary Fund, Washington DC (LEG).

**Arno Gildemeister**

Arno Gildemeister (Dr iur (University Münster)/Docteur en droit (Paris-Est), 2011) is a lecturer at the Ecole de droit, Sciences Po, Paris (since 2014) and an academic advisor at the International Investment Law Center Cologne (IILCC), University of Cologne (since 2012). Arno is also an independent mediator and arbitrator and dispute resolution lawyer and has founded ACCORD GbR, an institution specializing in the conciliation of technical and construction disputes. He is Counsel and Head of Dispute Resolution at TÜV Rheinland Group (since 2014). Previously, he worked as Rechtsanwalt/Avocat at Heuking Kühn Lüer Wojtek, Düsseldorf, Arbitration and Litigation (2012-2014), as Rechtsanwalt/Avocat at Shearman & Sterling LLP, Paris, International Arbitration (2009-2012) and as Rechtsanwalt at Epp & Kühn, Strasbourg, French and Cross-Border Business Law (2006-2008). Arno is the author of *L'arbitrage des différends fiscaux en droit international des investissements* (LGDJ 2013) and other publications dealing with the interfaces between taxation and arbitration.

**Ricardo André Galendi Jr.**

Ricardo André Galendi Júnior holds an LLB from the University of São Paulo. He is currently a Master's candidate at the University of São Paulo

and an associate at Lacaz Martins, Pereira Neto, Gurevich & Schoueri Advogados.

### **Lars Gläser**

Dr Lars Gläser is an attorney-at-law with Schindler Attorneys in Vienna. He specializes in Austrian and international tax law, in particular tax litigation, including cross-border mutual agreement and arbitration procedures. After his graduation in law and business administration, Lars worked for more than four years as research associate at the University of Linz and the International Fiscal Association (IFA) at the International Bureau of Fiscal Documentation (IBFD) in Amsterdam.

### **Panayotis Glavinis**

Prof. Dr Panayotis Glavinis is an associate professor of international economic law and vice-dean of the Faculty of Law at Aristotle University of Thessaloniki. He teaches international trade law, international investment law and energy law. He is the director of the MSc in Law and Engineering for Energy jointly organized by the Faculty of Law and the Polytechnical School of Aristotle University. He is attorney-at-law in Greece, arbitrator and mediator, as well as a member of the ICC Commission on Arbitration and ADR.

### **Gordana Ilić-Popov**

Gordana Ilić-Popov is a full professor of tax law and international tax treaty law at the Faculty of Law of the University of Belgrade, Serbia. She is a member of the International Institute of Public Finance (IIPF), International Fiscal Association (IFA) and the European Association of Tax Law Professors (EATLP), as well as of the national non-government organizations: Serbian Fiscal Society (member of its Management Board), Association of Jurists of Serbia, Association of Business Lawyers of Serbia and Serbian Association of the Economic Analysis of Law. She was a legal team coordinator of the Policy and Legal Advice Center, European Agency for Restructuring, member of the investment country team for the FR Yugoslavia within the OECD and Director of the Centre for the European Law at the Institute for Law and Social Sciences at the Faculty of Law, University of Belgrade. Professor Ilić-Popov has been a member of the editorial board of several domestic scientific journals, and is at present a member of the editorial board of the Journal of Economics and Public Finance (USA). She is author or co-author of 9 books and more than 200 articles on tax law, EU tax law and public finance issues, published in international and local scientific and professional journals and in collected papers.

**Marko Jovanović**

Marko Jovanović is an assistant professor at the Faculty of Law of the University of Belgrade, Serbia, from which he also holds a PhD. His teaching activities include lectures and tutorials in international trade law, arbitration law, foreign direct investment law and EU private international law. Dr Jovanović is a member of the Serbian Association of Business Lawyers and the Serbian Arbitration Association. In addition to his academic activities, he has acted as the secretary to arbitral tribunals and as arbitrator in ad hoc arbitrations and arbitrations organized by the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce. He is the vice-president of the Serbian Domain Names Dispute Resolution Committee and the deputy chief legal advisor at the Ministry of Foreign Affairs of the Republic of Serbia. His research focuses on foreign direct investments, WTO law, the international sale of goods, alternative dispute resolution and private international law aspects of business transactions.

**Svetislav V. Kostić**

Svetislav V. Kostić is a docent at the Faculty of Law of the University of Belgrade, Serbia, where he teaches general tax law, international tax law and EU tax law to both undergraduate and graduate students. He holds an LLB, LLM and a PhD from the University of Belgrade Faculty of Law and an LLM from the New York University School of Law. In addition to his academic activities, Dr Kostić is a director of Deloitte Tax and Legal Services in Serbia and a treasurer of the Serbian IFA Branch. He is member of the practice counsel of the ITP at the New York University School of Law and has published approximately 40 articles in both Serbian and international publications.

**Georgios Matsos**

Dr Georgios Matsos lectures on domestic and international tax law at the Aristotle University of Thessaloniki and at the International Hellenic University. He is also head of Matsos & Associates Law Office. He is author of many publications on tax law, accounting law and on public finance and has been invited to speak at many international and domestic conferences.

**Martha O'Brien**

Martha O'Brien is a professor of law at the Faculty of Law, University of Victoria, Canada. She holds an LLM in Law of the European Union from the Université libre de Bruxelles (1992). She practised Canadian and international tax law in Vancouver with leading Canadian national firms from 1992 to 2000. She has published widely on taxation, investment and trade and EU law subjects in Canadian and European books and journals. Of particular

relevance are the following: “Direct taxation, tax treaties and international investment agreements: Mixed objectives, mixed results”, (with Kim Brooks, Schulich School of Law, Dalhousie University) in De Mestral and Levesque (eds.) *Improving International Investment Agreements: Negotiations, Substantive Obligations and Dispute Resolution* (Routledge, New York, 2012).

### **Annet Wanyana Oguttu**

Annet Wanyana Oguttu is a professor of tax law at the University of South Africa. She holds a doctorate in tax law, a master’s in tax law, an LLB degree, HDip International Tax Law and a diploma in legal practice. She has published many articles on international tax law topics in internationally accredited journals and is a rated researcher under South Africa’s National Research Foundation. She authored the book *International Tax Law: Off-shore Tax Avoidance in South Africa* (Juta, 2015) and is a co-author of *Tax Law: An Introduction* (Juta, 2013). In 2014, the President of South Africa appointed her as one of the Commissioners of the South African Law Reform Commission. In 2013, South Africa’s Minister of Finance appointed her as a member of the Davis Tax Committee to assess South Africa’s tax policy framework – she chairs the BEPS Subcommittee. In 2012, the UN/DESA enlisted her as a member of the “Expert Group to Developed a UN Course on Double Tax Treaties” and in 2015, the UNECA also enlisted her to write the South African report on “Domestic Revenue Mobilisation in Africa”. She has been a visiting professor, lecturing international tax law and tax treaties at the University of Pretoria, the University of Johannesburg, the African Tax Institute and the Academy of Public Finance (Vienna University of Economic and Business in Austria). She is the Board President of the South African Institute of Tax Practitioners, and a Board member of the South African Fiscal Association and of the African Tax Research Network – based at the African Tax Administration Forum.

### **Pasquale Pistone**

Pasquale Pistone holds the Ad Personam Jean Monnet Chair in European Tax Law and Policy at WU (Vienna University of Economics and Business) and is the Academic Chairman of IBFD, Amsterdam. He is also an associate professor of tax law at the University of Salerno (Italy). He is editor-in-chief of the *World Tax Journal* and a member of the editorial board of *Intertax*.

### **Rodrigo Polanco Lazo**

Rodrigo Polanco Lazo is an assistant professor of international economic law at the Universidad de Chile and a senior researcher/lecturer, at the World Trade Institute of the University of Bern. He holds a bachelor’s and

a master of laws from Universidad de Chile School of Law, an LLM in international legal studies from New York University (NYU) School of Law, and a PhD from the University of Bern, Graduate School of Economic Globalisation and Integration, specializing in international investment law.

### **Michal Radvan**

Michal Radvan is vice-dean for foreign and external affairs at the Faculty of Law, Masaryk University, Czech Republic, and an associate professor of financial law at the Department of Financial Law and Economics. He specializes in tax law, especially local taxes and income taxation. He is the author of 5 books and the co-author of almost 45 books. He has presented his scientific research in approximately 80 peer-reviewed articles in prestigious journals and conference proceedings. He is a member of the European Association of Tax Law Professors and the Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe. E-mail: [michal.radvan@law.muni.cz](mailto:michal.radvan@law.muni.cz).

### **Tovony Randriamanalina**

Tovony Randriamanalina is qualified in both telecommunications engineering and in taxation. She worked as a project manager for a telecom company in Madagascar (TELMA), and since 2012 has been a tax inspector at the Madagascar Revenue Authority (Direction Générale des Impôts). Since 2014, she has been studying for a doctorate in law at the University of Paris-Dauphine, focusing on the control of transfer pricing in developing countries; her paper on this topic won the prize for the best student paper at the inaugural conference of the Africa Tax Research Network, September 2015.

### **August Reinisch**

August Reinisch is a professor of international and European law at the University of Vienna, Austria. He has served as a legal expert and arbitrator in investment tribunals and is listed in the ICSID Panels of Conciliators and of Arbitrators.

### **Pedro Ribeiro de Sousa**

Pedro Ribeiro de Sousa is currently in-house tax lawyer at Banco BPI, after 10 years in private practice at Ricardo da Palma Borges & Associados – Sociedade de Advogados, R.L. and at Deloitte & Associados, SROC, S.A. He holds an LLM in international tax law from the Vienna University of Economics and Business Administration (WU Wien) and an advanced postgraduate degree in tax law from the Institute for Economic, Financial

and Tax Law of the Lisbon University School of Law. He has published several articles on Portuguese and international tax law.

### **Isabelle Richelle**

Isabelle Richelle is a professor at the University of Liege where she is also co-chairing the Tax Institute. She holds a PhD from the University of Brussels. Her research and practice focuses on European and international tax law in relation to companies and individuals. She is regularly invited as speaker at conferences and seminars and is the author of numerous publications. She is also a member of the ECJ Task Force of the Confédération fiscale européenne, Of Counsel at the Brussels Bar and deputy judge.

### **Katharina Schiffmann**

Katharina Schiffmann is a tax lawyer (associate in the tax department) with GSK Luxembourg SA in Luxembourg.

### **Luis Eduardo Schoueri**

Luís Eduardo Schoueri is a professor of tax law at the University of São Paulo and partner at Lacaz Martins, Pereira Neto, Gurevich & Schoueri Advogados. He is also vice-president of the Brazilian Tax Law Institute and has been visiting professor at a number of foreign universities.

### **Anne Selbert**

Anne Selbert is a tax lawyer (Senior Associate) with Bonn & Schmitt Avocats in Luxembourg.

### **Poonam Khaira Sidhu**

Poonam Khaira Sidhu is a career civil servant from the Indian Revenue Service, currently serving as Commissioner of Income Tax, and Member of the Dispute Resolution Panel. She holds an LLM from the University of Michigan, Ann Arbor, and has trained at Maxwell School of Public Policy at the University of Syracuse. She had a sabbatical attachment with the UK IRS in 1996-97 and has served as Director of International Taxation, managing a cross-functional team responsible for auditing cases in cross-border transactions, advocated cases before the Tax Tribunal and Authority for Advanced Rulings, and assisted the Indian Competent Authority on the resolution of cases under the MAP. Her academic articles have been published in the Bulletin for International Taxation, the International Tax Review and the Economic Times.



**Daniël Smit**

Daniël Smit is a professor in taxation at the Fiscal Institute Tilburg, Tilburg University. He is the author of more than 100 national and international publications in the field of European and international tax law. In June 2012, his PhD thesis was awarded the prestigious European Academic Tax Thesis Award 2012. Furthermore, he has appeared as a speaker at various national and international seminars and conferences and as a guest lecturer at various universities in the Netherlands and abroad. In addition, Daniël Smit has been employed at EY since 2002, and is currently part of the EU Tax Services team in Amsterdam.

**Samira Sulejmanovic**

Samira Sulejmanovic has headed the Unit for Bilateral Trade Relations in the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina since 2010. Her responsibilities cover overall bilateral trade and economic relations of the country, including negotiation and implementation of investment protection treaties, preferential trade agreements and economic cooperation agreements. She has published a number of professional articles related to the most recent developments in investment and trade policies in the world, reflecting the position of Bosnia and Herzegovina, co-authored studies/commentaries, and delivered lectures to post-graduate students on trade negotiations from the perspective of Bosnia and Herzegovina. She graduated in economics from the School of Economics and Business, University of Sarajevo.

**Martin Švec**

Martin Švec is a PhD candidate at the Masaryk University, Faculty of Law, Czech Republic. His dissertation *Dimensions of International and European Energy Law: State Sovereignty in Ensuring Energy Security* focuses on the limits of energy security and international law instruments at the disposal of states. His expertise covers international energy law, investment law, international environmental law, and international humanitarian law. His research also focuses on the relationship between EU law and investment treaty law. In 2015, Martin Švec worked as a legal intern at the Energy Charter Secretariat in Brussels.

**Karolina Tetlak**

Dr Karolina Tetlak is an assistant professor in tax law at Warsaw University, Poland and academic associate of the Centre for International Sports Law at Staffordshire University, UK and Thompson Rivers University, Canada. An LLM graduate of Harvard Law School, she is an expert in sports fiscal law, the taxation of athletes and tax treatment of sports events. Her PhD

thesis on the taxation of international sportspersons has been published in IBFD's Doctoral Series. She teaches international tax law at numerous universities worldwide and has broad practical expertise on income tax, international taxation, VAT and tax procedure. She has been involved as an expert in tax-related arbitration proceedings under bilateral investment treaties signed by Poland.

### **Edoardo Traversa**

Edoardo Traversa is a professor at the Université Catholique de Louvain (UCL) and a visiting professor at the KU Leuven and WU Vienna, where he spent the academic year 2013-2014. He has taught at other European universities (Münster, Valencia and Bologna). His research areas mainly cover constitutional tax law, fiscal and financial federalism, the interaction between taxation and public policies, the development of European tax integration, and international aspects of the taxation of companies and individuals. He has also been consulted on taxation and public finance issues by public authorities at the EU, Belgian federal and regional level. Further, he is a lawyer Of Counsel at the Brussels Bar (Liedekerke).

### **Danil V. Vinnitskiy**

Prof. Dr Danil V. Vinnitskiy is head of the department of tax and financial law, Ural State Law University; head of the Research Centre for Comparative and International Tax Law (Ekaterinburg, Russia); and member of the Academic Committee of the European Association of Tax Law Professors (EATLP) and of the Presidium of the International Association of Financial Law (which unites scholars from CIS countries). He has authored more than 200 publications, including eleven monographs and seven textbooks on tax and financial law (including those prepared with co-authors). He is also the editor of collections of articles on topical issues of financial and tax law, general editor of the Russian Yearbook of International Tax Law, member of the scientific councils of a number of the Russian Federation state bodies, and has acted as an expert for the RF Constitutional Court.

### **Jeff Waincymer**

Jeff Waincymer is a professor at the Faculty of Law, Monash University. He is also an arbitrator and mediator, practicing solely in the fields of arbitration, international trade and investment, customs law and trade remedies and mediation. Jeff Waincymer has been an Australian Government Nominee as a panelist for the WTO and ICSID and is on the HKIAC, SIAC, KLRCA and ICDR arbitration panels. He is the author of *Procedure and Evidence in International Arbitration* (Kluwer); *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May); and *Austra-*

*lian Income Tax: Principles and Policy* (2nd edn., Butterworths); as well as a joint author of *A Guide to the New UNCITRAL Arbitration Rules* (Cambridge University Press), *A Practical Guide to International Commercial Arbitration* (Oceana) and *International Trade Law: Commentary and Materials* (2nd edn., Law Book Company).

### **Felipe Yañez V.**

Felipe Yañez V. graduated from the Universidad de Chile and holds a master in tax law from the Universität zu Köln in Germany. He is a lecturer in tax law and in the Master in Enterprise Law Programme at the Universidad de los Andes, Santiago, Chile, a lecturer in the Master and Management Programme at the Universidad Católica de Valparaíso and in the Tax Programme at the Faculty of Economics and Business, Universidad de Chile. He is Member of the Board of the International Fiscal Association (IFA) Chilean Branch, and has been an attorney since 2000, and tax partner at Mazars.

### **Zhu Yansheng**

Zhu Yansheng is a professor and vice dean at the Law School, Xiamen University. He works in the field of international economic law, tax law and commercial law (specializing in international tax law) and teaches tax law, international tax law, international economic law, company law, contract law and trust law. He is the author of the *Principle of Permanent Establishment in Tax Treaties* (Law Press, China, 2006) and *Company Law* (5th edition, Xiamen University Press, China, 2015), and the co-author and co-editor of *International Tax Law* (a textbook for undergraduate students, High Education Press, China, 2008). Currently, he is vice-chairman of the Society of Fiscal Law in Fujian Province, and a member of the Standing Council of China's Society of Fiscal Law. He was a visiting scholar at Boston University Law School in the academic year 2003-2004, a visiting professor at the National Taiwan University Law School from April to June in 2009, and a Fulbright Scholar hosted at Georgetown University Law Center in the academic year 2011-2012. He received his LLB, LLM, and JSD from Xiamen University.

## Contact

IBFD Head Office  
Rietlandpark 301  
1019 DW Amsterdam  
P.O. Box 20237  
1000 HE Amsterdam  
The Netherlands

**Tel.:** +31-20-554 0100 (GMT+1)

**Email:** [info@ibfd.org](mailto:info@ibfd.org)

**Web:** [www.ibfd.org](http://www.ibfd.org)



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