The Impact of Bilateral Investment Treaties on Taxation


Publication Review

British Tax Review


Subject
Tax

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This book follows the usual format of the books readers are accustomed to from the superb team of tax academics of the Vienna University of Economics and Business (WU). It encapsulates the proceedings from a conference that took place in Rust, Austria, in the summer of 2015. This conference brought together tax academics and practitioners, as well as investment law academics and practitioners, to examine a very important topic: the relationship between taxation and bilateral investment treaties. This book provides one of the most comprehensive analyses of the topic to date through an illustration of different countries’ perspectives from across the world.

There are 22 chapters in this book. There is a general report authored by Professor Pasquale Pistone and reports of the system in place in 21 countries from across the world: Australia; Austria; Belgium; Bosnia and Herzegovina; Brazil; Canada; Chile; China; Czech Republic; France; Germany; Greece; India; Luxembourg; the Netherlands; Poland; Portugal; Russia; Serbia; South Africa; and the US.

The first chapter, which contains the general report, is very helpful in setting the context in which the country reporters have approached the issue. The general framework of bilateral treaties, their policy rationale and developing trends are reviewed, before the author considers the relationship to other treaties (tax and non-tax treaties). This is essential in order to understand the (lack of) tax coverage of such treaties through the tax carve-out clauses, the application of FET (fair and equitable treatment) and national treatment clauses. In the general report, Pistone questions whether the creeping competences of the EU might have an impact on some of the issues such as protection of investors relating to tax incentives negotiated, arguably having the recent state aid investigations in mind. A brief review of the dispute settlement process is also made questioning its limitations. Of course, this chapter (and the book as a whole) preceded the Slovak Republic v Achmea BV case, and its ground-breaking implications.

The remainder of this book contains the country reports. In the selection of countries, there is good representation of OECD countries, BRICS, EU Member States and other European countries. There is minimal representation of South American countries (only Chile) and no report from any of the least developed countries. This, by itself, is indicative of the fact that bilateral investment treaties were traditionally preferred by capital-exporting countries "to achieve a stable legal framework in respect of outbound investment and to secure the transfer or returns from such investment", though this may no longer be the case, as shown in some of the country reports like that of China.

This book is likely to become a reference point in this area. It highlights important tax aspects of bilateral investment treaties that have been relatively unexplored—at least by mainstream tax academia. This book also reveals global trends and best practices (at the time of writing), showing some of the tensions between the two regimes. The book is highly recommended to scholars working in tax law and international investment law, as well as international organisations and government officials.

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Footnotes

1 Professor in Tax Law, Queen Mary University of London, Centre for Commercial Law Studies.

1 M. Lang, et al. (eds), The Impact of Bilateral Investment Treaties on Taxation (The Netherlands: IBFD, 2017).

2 Slovak Republic v Achmea BV (C-284/16) EU:C:2018:158; [2018] 2 CMLR 40.

3 Lang, et al. (eds), above fn.1, 6.