

Domestic Tax Policies and IIAs Issues and Options

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Modernizing IIAs: best practices and challenges in the Asia-Pacific region

In a nutshell



**Can tax disputes be shifted
to investor-state
arbitration?**

Does the ongoing
international tax reform
increase the risk of
triggering more tax
disputes in the context of
investment treaties?

Yes

Facts: trend in investor-state
arbitration

- Why? No systematic tax
exception in investment
treaties
- Prospects and policy lessons:
tax an “old new-issue”

Tax disputes under IIAs are not accidents

Since 1999, at least 32 tax-related cases have been brought to international investment arbitration

Foreign investors considered using investment treaties to complain against a number of countries and tax measures.

Typology of the tax disputes shows the diversity of tax measures reviewed by ISA.

CASE NAME	TREATY	AWARD DATE	ARBITRATION RULES
Feldman v. Mexico	NAFTA	December 16, 2002	ICSID AF
Goetz v. Burundi	Belgium–Luxemburg–Burundi BIT	January 29, 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	December 22, 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	Croatia–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Lacich v. Canada	NAFTA	Withdrawn	DU
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. Bulgaria	ECT & Bulgaria–Cyprus BIT	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

Tax Disputes Lost by the Host States

Out of the 32 disputes dealing with tax matters, 15 have been lost by the host states.

- These disputes are the most interesting because they show what can go wrong in terms of designing tax policy in accord with investment treaties.

The majority of cases (exactly nine awards) concluded with a finding of expropriation.

- However, two claims were consolidated into a single case for *Renta 4* and *Quasar de Valores v. Russia*.
- Also, as part of the *Yukos* case, three separate lawsuits by former Yukos shareholders were filed by Hulley Enterprises Limited (Cyprus), Yukos Universal Limited (Isle of Man) and Veteran Petroleum Limited (Cyprus).
- As a result, there are only six truly different tax disputes that resulted in a finding of expropriation.

However 6 other cases resulted in a breach of FET or NT

Typology

Great diversity of tax measures that are at the origin of the dispute:

- windfall profits tax,
- tax investigations,
- value-added tax,
- taxation of income trusts,
- import taxes,
- corporate income tax,
- tax stamps on cigarettes,
- duty-free regime, etc.

Unsurprisingly, the broad scope of application of investment treaties allows tribunals to look at a wide variety of tax measures.

Complex regime of Taxation Exclusion from IIAs

If taxation isn't excluded, taxation is covered by investment treaties

- Host States' conduct to address tax erosion by investors can be restricted by substantive obligations derived from IIAs.
- Exceptions regime is (very) complex

They can be categorized into 7 main types:

- General exclusion (1),
- Limited exclusion (2)(3)(4),
- Tax veto to expropriation case (5),
- Priority of taxation treaties over IIAs (6).
- Sometimes types of exclusion and/or exceptions can be complexly combined in one investment treaty (7).

Tax and investment do not co-exist in clinical isolation

Several IIAs exclude taxation issues from their scope of regulation, though the extent of exclusion may vary from one treaty to another.

Some investment treaties still cover taxation.

Issue: Host states' sovereign power to taxation can be subjected to the scrutiny of investment arbitration.

International Taxation rapid evolution

Significant losses of national tax revenues

Sophisticated tax planning by MNES aimed at shifting profits in ways that erode the taxable base.

Most tax planning schemes legal: 'outdated' international taxation system.

Reaction is 'BEPS'

OECD originated the Action Plan on tax base erosion and profit shifting

Main instrument: Mutual Agreement Procedures (MAPs).

Few constraints in terms of timeliness of MAP,

Little involvement on the part of taxpayers...

International Taxation

Tax among last bastions of Westphalian sovereignty.

Little progress had been made towards a multilateral tax regime, until recently.

International tax law is centered on a network of more than 3,800 bilateral tax treaties.

Panama papers HSBC, LuxLeaks...

New Deal for the International Tax Regime

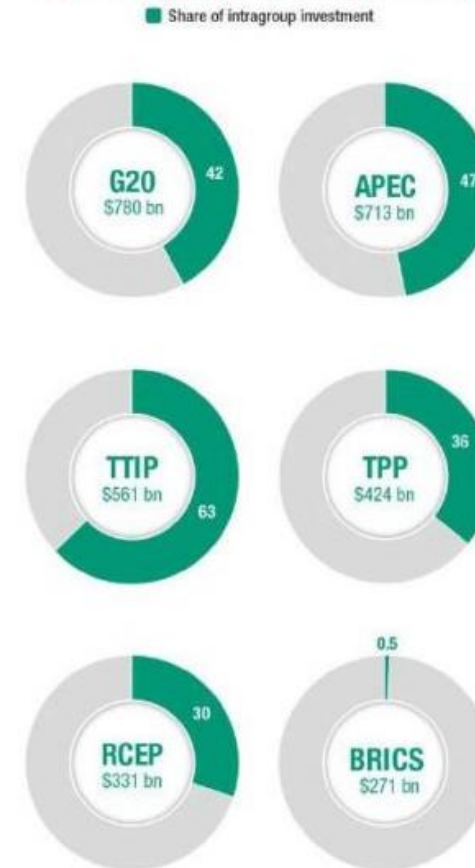
The OECD's Package on Base Erosion and Profit Shifting (BEPS) (October 2015).

15 "actions": countering harmful tax practices, treaty shopping, transfer pricing, interest deductibility, and transparency to exploring the tax implications of the digital economy

Implementation going fast
(OECD report to G20, Shanghai, 26-27 February 2016).

Is BEPS tax transfer pricing relevant to invest treaties?

Figure 3. Major groups: total and intragroup FDI flows, annual average, 2010–2014
(Billions of dollars and per cent)



Look at size of intra-group flows...

Climate of tax uncertainty

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,

However, BEPS on short term could lead some tax authorities to adopt a more aggressive approach

- Some may be tempted to use this information to move towards a more global formula apportionment approach to transfer pricing.
- Investors will react by increasingly relying on ISA (Back-door)