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LESSONS FROM INVESTMENT TREATY ARBITRATION

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A. INTRODUCTION

12.001 The rise of globalisation has resulted in an unprecedented increase of disputes in the international investment and tax law regimes. Cases under the Mutual Agreement Procedure ('MAP'),[1] which is the predominant mechanism that

1 Typically, MAPs are conducted in accordance with a specific mutual agreement procedure provision set out in the relevant double tax treaty ('DTT') between the two Contracting States. Those DTTs, in turn, typically rely on Art. 25 of the model tax treaty published by the Organisation for Economic Co-operation and Development ('OECD') (that is, the OECD Model Tax Convention on Income and on Capital (Full Version) (OECD Publishing 2017), available at https://doi.org/10.1787/g2g972ee-en ('OECD Model'), last accessed 12 August 2022), which includes, among other things, article-specific commentaries, which for the purposes of this volume are referred to as the 'OECD Model Commentaries' (if not referring to specific articles) or the 'OECD Model Comm. on Article [X] [the relevant article]' together with the relevant paragraphs thereof, if appropriate; or, perhaps, Art. 25 of the model tax treaty published by the United Nations ('UN') (i.e., the UN Model Double Tax Convention between Developed and Developing Countries 2017 Update (UN 2017) ('UN Model'), available at www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf (last accessed 12 August 2022), which includes, among other things, article-specific commentaries, which for the purposes of this volume are referred to as the 'UN Model Commentaries' (if not referring to specific articles) or the 'UN Model Comm. on Article [X] [the relevant article]' together with the relevant paragraphs thereof, if appropriate).

taxpayers use to resolve disputes under double taxation treaties ('DTT'), had almost tripled by the end of 2019.[2] For their part, the number of disputes initiated under investment treaties through investor-state dispute settlement ('ISDS') mechanisms had reached 1,023 as of January 2020.[3] These figures are expected to rise in the coming years, especially in the aftermath of the COVID-19 outbreak. States have taken measures in an attempt to contain the spread of the virus that will likely have a significant negative impact on businesses, including those run by foreign investors and taxpayers.

12.002 The MAP and ISDS mechanisms play a fundamental role to ensure the stability and predictably of the tax and investment treaty networks. Despite this, the functioning of these mechanisms has come under increasing scrutiny and criticism. Stakeholders have identified a number of shortcomings in each field. For the investment treaty regime, critics argue that ISDS, *inter alia*, unduly restricts the host state regulatory policy space, cannot guarantee arbitrators' independence and impartiality and fails to ensure consistency in arbitral decisions.[4] For the tax treaty regime, critics have pointed to a number of weaknesses of the MAP, including that the taxpayer has no right to participate, the procedure is time consuming and it is uncertain whether a satisfactory outcome will be achieved.[5]

12.003 A reform process in both fields has recently emerged in order to mitigate these shortcomings. For investment law, the challenge involves establishing a regime that better accommodates the interests of investors and states and streamlines the arbitration procedure to resolve investment treaty disputes. For tax law, the challenge is to make the resolution of cases under the MAP more timely, efficient and effective through compulsory arbitration and to enhance taxpayer participation in the procedure.

12.004 This chapter examines lessons that tax law policymakers can learn from investment law reforms for the establishment of a more effective and balanced mechanism to resolve tax treaty disputes. In doing, this chapter will first examine

2 See OECD, 2019 MAP statistics ('OECD 2019 MAP Statistics'), available at www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2019.htm (last accessed 12 August 2022).

3 See UN Conference on Trade and Development ('UNCTAD'), World Investment Report: International Production Beyond the Pandemic (UN Publishing 2020) 110, available at https://fbsd.unctad.org/fbsd-document/world-investment-report-2020-international-production-beyond-the-pandemic/ (last accessed 17 August 2022).

4 Malcolm Langford, Michele Potestà, Gabrielle Kaufmann-Kohler & Daniel Behn, 'UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: An Introduction' (2020) 21 JWIT 167.

5 Roland Ismer, 'Compulsory Waiver of Domestic Remedies before Arbitration under a Tax Treaty – A German Perspective' (2003) 57 Bull Int'l Tax'n 18.

the concerns raised in investment law that seem most relevant for the tax treaty regime, such as impartiality and independence of arbitrators, incorrect and inconsistent decisions and the asymmetric nature of investment treaties. This will be followed by an examination of investment law reforms that have been implemented at the bilateral, regional and multilateral levels to address these concerns and how these reforms can be beneficial for the tax treaty regime.

B. CONCERNS IN INTERNATIONAL INVESTMENT LAW

1. Introductory remarks

12.005 The unprecedented rise in ISDS claims against states has put into question the legitimacy of this system of dispute resolution and the treaties from which its jurisdiction and substantive legal principles largely derive.[6] Concerns have been raised about the benefits of investment treaties, including bilateral investment treaties ('BITs') and free trade agreements ('FTAs'), and ISDS from a host state perspective. This chapter will focus on certain weaknesses of the investment treaty regime and ISDS that the tax law regime might want to consider when implementing reforms in tax treaty dispute resolution. Current tax law reforms in dispute settlement are designed to address the shortcomings of the MAP.

12.006 The MAP is a purely intergovernmental procedure administered by the competent tax authorities of the states party to the applicable DTT with the aim of avoiding or mitigating double taxation for taxpayers. It has been argued that the MAP does not always ensure a satisfactory and timely resolution of the dispute to the end of preventing double taxation.[7] As Lang and Owens note, 'a MAP is slow and the number of unresolved cases continues to grow, which has led to an increase in unrelieved double taxation'.[8] In this regard, the OECD's statistics indicate that MAP cases closed in 2019 alone 'lasted for 25 months (31 months for transfer pricing cases, 22 months for other cases)'.[9]

6 Thomas Dietz, Marius Dotzauer & Edward Cohen, 'The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System' (2019) 26 Rev Int'l Pol Econ 749; Michael Waibel, Asha Kaushal, Kwo-Hwa Chung & Claire Balchin, 'The Backlash against Investment Arbitration: Perceptions and Reality' in Waibel et al. (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010); Charles Brower, 'Structure, Legitimacy, and NAFTA's Investment Chapter' (2003) 36 Vand J Transn'l L 37.

7 Ana Paula Dourado, 'Post-BEPS International Tax Arbitration' (2019) 47 Intertax 671; Poonam Khaira Sidhu, 'Is the Mutual Agreement Procedure Past Its "Best-Before Date" and Does the Future of Tax Dispute Resolution Lie in Mediation and Arbitration?' (2014) 68 Bull Int'l Tax'n 11.

8 Lang/Owens (eds), *International Arbitration in Tax Matters* (IBFD Publishing 2016).

9 OECD, 'OECD Releases 2019 MAP Statistics and Calls for Stakeholder Input on the BEPS Action 14 review on Tax Certainty Day', available at www.oecd.org/tax/oecd-releases-2019-map-statistics-and-calls

Another troublesome fact is that taxpayers have no rights of participation other than the ability to initiate the MAP.[10]

12.007 Reform efforts to address these shortcomings have been undertaken under the auspices of the OECD and G20 ('OECD/G20') and by the European Union ('EU'). In 2013, the OECD/G20 launched the Base Erosion and Profit Shifting ('BEPS') Project. The BEPS Project resulted in the so-called BEPS Package, which set out 15 actions designed to tackle tax avoidance, improve the coherence of international tax rules, ensure a more transparent tax environment and address the tax challenges arising from the digitalisation of the economy, which led, in turn, to the creation of the OECD/G20 Inclusive Framework on BEPS ('BEPS Inclusive Framework').[11] The OECD and G20 were mindful that the implementation of the BEPS actions should not lead to unnecessary uncertainty for compliant taxpayers and to unintended double taxation. It was therefore agreed that making dispute resolution mechanisms under tax treaties more effective and efficient should form an integral part of their BEPS Inclusive Framework.

12.008 Accordingly, as part of Action 14, the OECD adopted, in 2016, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (the 'MLI').[12] The MLI aims at strengthening the MAP by introducing an (interstate) mandatory arbitration mechanism for disputes that cannot be resolved through the MAP.[13] The MLI offers two different methods. It provides for a 'final offer' arbitration, or so-called baseball arbitration, which is the default method. Under this method, the arbitral panel

-for-stakeholder-input-on-the-beps-action-14-review-on-tax-certainty-day.htm (last accessed 12 August 2022).

10 Katerina Perrou, 'Taxpayer Rights and Taxpayer Participation in Procedures under the Dispute Resolution Directive' (2019) 47 Intertax 715; Daniele de Carolis, 'European Union – The EU Dispute Resolution Directive (2017/1852) and Fair Trial Protection under Article 47 of the EU Charter of Fundamental Rights' (2018) 58 Eur Tax'n 495; Juliane Kokott, 'European Union – Taxpayers' Rights' (2020) 60 Eur Tax'n 3.

11 OECD, OECD/G20 Base Erosion and Profit Shifting Project ('BEPS Project'), Making Dispute Resolution Mechanisms More Effective – BEPS Action 14: 2015 Final Report ('BEPS Action 14 Final Report') (OECD Publishing 2015), available at www.oecd-ilibrary.org/docserver/9789264241633-en.pdf?expires=1660755609&id=id&accname=guest&checksum=7B212DBAB7EBB9A0DB2E53815A310A08 (last accessed 5 August 2022).

12 OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion And Profit Shifting (OECD Publishing 2016) ('MLI'), available at www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf (last accessed 4 August 2022), together with its Explanatory Statement ('MLI Explanatory Statement'), available at www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf, (last accessed 17 August 2022).

13 For a more comprehensive analysis of the MLI's arbitration mechanism, see Nathalie Bravo, 'Mandatory Binding Arbitration in the BEPS Multilateral Instrument' (2019) 47 Intertax 693; Jeffrey Owens, 'Mandatory Tax Arbitration: The Next Frontier Issue' (2018) 46 Intertax 610.

only has to decide between one of the proposed solutions presented by the competent authorities of the states concerned.

12.009 The other method is the 'Independent Opinion' procedure, whereby the panel is required to submit a reasoned and well-founded decision based on the arguments and evidence presented by the competent authorities. Taxpayers are excluded from the arbitration procedure. Also, for any of these methods to apply, the signatories of the Convention have to expressly agree to import them into their DTTs. As of March 2021, out of the 95 jurisdictions have that signed the MLI, 30 had opted for mandatory binding arbitration.[14]

12.010 In parallel to the conclusion of the MLI, the EU adopted Council Directive (EU) 2017/1852 of 10 October 2017 on tax resolution mechanisms in the European Union ('TDRD'),[15] which applies to the procedural mechanisms provided in DTTs signed between EU Member States. The TDRD similarly attempts to improve the MAP by introducing a mandatory arbitration mechanism (interstate in nature) that takes different forms. For instance, if the competent authorities do not reach a solution, an 'Advisory Commission' will be constituted to decide the dispute, which will issue a final opinion on eliminating double taxation. Unlike the MLI's arbitration mechanism, the TDRD allows Member States to agree to a higher level of taxpayer participation in the proceedings.[16]

12.011 By supplementing the MAP with a mandatory arbitration mechanism, the OECD and the EU certainly strive to establish a more efficient and effective resolution of tax treaty disputes, creating more certainty for taxpayers and avoiding unintended double taxation. The mechanisms implemented through the MLI and the TDRD are, however, in their infancy stage. They also leave a number of important issues unresolved, which may undermine their potential to mitigate the shortcomings of the MAP.

12.012 To name but a few examples, as Mooij aptly notes, '[t]he MLI and the Dispute Resolution Directive are both silent on who shall administer arbitrations,

14 OECD, 'Tax Treaties: OECD Publishes 30 Country Profiles Applying Arbitration under the Multilateral BEPS Convention' (OECD Publishing 2021), available at www.oecd.org/tax/beps/oecd-publishes-30-country-profiles-applying-arbitration-under-the-multilateral-beps-convention.htm (last accessed 12 August 2022).

15 Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union [2017] OJ L 265/1 ('TDRD').

16 See, e.g., Art. 11(2)(f) TDRD. For a more comprehensive analysis of the TDRD's arbitration mechanism, see Chapter 5 in this book. See also Georg Kofler, 'EU Tax Dispute Resolution Directive: the Deathblow to Double Taxation in the European Union' (2019) 28 EC Tax Rev 266.

and so are their official explanations nor, for that matter, are there more than a very small number of existing bilateral tax treaties that address the issue of administration'.[17] This will bring new challenges regarding the support and conduct of the arbitration, such as constituting the arbitral tribunal, ensuring the independence and impartiality of arbitrators and determining the applicable procedural rules (for example, submission of evidence and organisation of hearings).

12.013 A further unresolved issue relates to the fiscal sovereignty states. Hearson and Tucker claim that '[u]nder mandatory binding tax arbitration, states cede sovereignty over the interpretation of international tax agreements to panels of transnational tax adjudicators of states'.[18] Other authors have expressed similar concerns. Sidhu notes that 'states are extremely protective of their fiscal sovereignty and unwilling to subject their taxing powers to adjudication'.[19] Cruz is of the view that if arbitral decisions conflict with domestic sovereignty regulations, competent authorities have no incentive to conclude MAP cases or to avoid treaty interpretations that undermine the other state and the interests of taxpayers.[20]

12.014 Lastly, the arbitration mechanisms implemented through the MLI and the TDRD will still remain under the exclusive control of the competent tax authorities. The TDRD gives Member States room for conferring participation rights upon taxpayers, but it is not clear what those rights might be. As Perrou rightly notes, 'at the current level of development of international (economic) law and human rights law, [the phenomenon of the absent taxpayer] can no longer be justified'.[21] The challenge for tax policymakers therefore involves establishing a dispute resolution regime that accommodates the interests of investors and taxpayers.

12.015 Based on the above considerations, stakeholders involved in tax law reforms have recently begun to consider finding support in other fields of dispute

17 Hans Mooij, 'Arbitration Institutes: An Issue Overlooked' (2019) 47 Intertax 737.

18 Martin Hearson & Todd N. Tucker, '"An Unacceptable Surrender of Fiscal Sovereignty": The Neoliberal Turn to International Tax Arbitration' (2021) Perspectives on Politics, available at www.cambridge.org/core/journals/perspectives-on-politics/article/an-unacceptable-surrender-of-fiscal-sovereignty-the-neoliberal-turn-to-international-tax-arbitration/C3E4CDD17A00C985AEFC782CB3ADC2D0 (last accessed 14 July 2022).

19 Sidhu, supra n. 7, at 604.

20 Natalia Quinones Cruz, 'International Tax Arbitration and the Sovereignty Objection: The South American Perspective' (2008) 51 Tax Notes Int'l 533, 541.

21 Katerina Perrou, Taxpayer Participation in Tax Treaty Dispute Resolution (IBFD Publishing 2014), summary abstract available at www.ibfd.org/shop/book/taxpayer-participation-tax-treaty-dispute-resolution (accessed 12 August 2022).

resolution, such as international investment law. Indeed, the robust and tested investment arbitration framework can arguably offer valuable lessons for tax policymakers wishing to improve the resolution of tax treaty disputes.[22] In this regard, investment law can equally serve to address the unresolved issues left open in the arbitration mechanisms contained in the MLI and the TDRD.

12.016 The basic structure of the investor-state arbitration system can, for instance, provide a useful tool to enhance taxpayers' participation in tax treaty disputes. Further, as a system that has long operated under the rules of specialized arbitral institutions, investment arbitration can serve as a model for the organisation and support of arbitrations under DTTs. However, investment treaty arbitration has its own weaknesses that should be considered before it becomes a reference for tax law reforms in dispute resolution.

2. Weaknesses of investment-treaty arbitration

12.017 As previously mentioned, the investment treaty regime is facing a legitimacy crisis that has spread across the globe, prompting several states to denounce investment treaties or to exclude ISDS provisions from these agreements.[23] Critics of the regime vary in form and type. Given space constraints, this chapter will examine three weaknesses of investment treaty arbitration, namely that the system (a) cannot guarantee arbitrators' independence and impartiality, (b) fails to ensure consistency of arbitral decisions and (c) does not consider other non-investment interests of states, such as human rights, the environment and labour standards.[24]

22 Jeffrey Owens et al., 'What Can the Tax Community Learn from Dispute Resolution Procedures in Non-Tax Agreements?' (2015) 69 Bull Int'l Tax'n 577; Julien Chaisse, 'Making Tax Dispute Resolution Mechanisms More Effective: The Base Erosion and Profit Shifting Project and Beyond' (2017) 10 Contemp. Asia Arb J 1; Sidhu, supra n. 7; Alireza Salehifar, 'Rethinking the Role of Arbitration in International Tax Treaties' (2020) 37 J Int'l Arb 87.

23 See e.g., the 2018 Agreement between the United States of America, the United Mexican States, and Canada, which eliminated ISDS between the United States and Canada, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3841/usmca-2018 (last accessed 14 July 2022), and in response to the holding of the Court of Justice of the European Union in Judgment of 6 March 2018, C-284/16 *Achmea* ECLI:EU:C:2018:158 ('Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States [...] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept'), EU Member States deciding to terminate their intra-EU BITs.

24 Stephan Schill & Vladislav Djanic, 'Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law' (2018) 33 ICSID Rev-Foreign Inv L J 29.

(a) Impartiality and independence of arbitrators

12.018 It is a fundamental and universally accepted principle that adjudicators, whether domestic or international, must be and remain independent and impartial during the course of the proceedings.[25] Although the words are often used together, 'independence' and 'impartiality' are different concepts. 'Independence' means that an arbitrator should be free from any relations with parties, counsel, the other arbitrators and the institutions, and also is perceived to be independent from them in the eyes of a reasonable third party.[26] The concept of 'impartiality' is more subjective. It means that an arbitrator must not be biased or show favour to any party, must approach each issue with an open mind and must make a decision based on the arguments and facts presented by the parties.[27]

12.019 The requirement that arbitrators are and remain independent and impartial plays a fundamental role in investment disputes. This is because, as Giorgetti notes, investment treaty arbitration

> functions as a public governance system, both because the disputes involve assessing the legality of a State's exercise of public authority in relation to private economic actors and because decisions by arbitral tribunals function as persuasive authority in concretizing and further developing the international legal standards that govern investor-State relation.[28]

12.020 The same would hold true for the arbitration of tax treaty disputes, where an arbitral panel will be asked to decide whether legislative or regulatory measures adopted by domestic tax authorities are contrary to the provisions of the applicable DTT. In this spirit, it is difficult to disagree with the view that ISDS and, by implication, tax treaty arbitration 'should apply more lenient standards of independence and impartiality as compared to what is required in public dispute settlement systems in other contexts'.[29] This is all the more so consid-

25 Chiara Giorgetti, 'Between Legitimacy and Control: Challenges and Recusals of Arbitrators and Judges in International Courts and Tribunals' (2014) 49 Geo Wash Int'l L Rev 101.

26 Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2003) 212–13; Doak Bishop & Lucy Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration' (1998) 14 Arb Int'l 395.

27 M. Scott Donahey, 'The Uniform Domain Name Dispute Resolution Process and the Appearance of Partiality: Panelists Impaled on the Horn of a Dilemma' (2002) 19 J Int'l Arb 33.

28 Chiara Giorgetti et al., 'Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options' (2020) 21 JWIT 441, 444. See also Stephan W. Schill, 'International Investment Law and Comparative Public Law: An Introduction' in Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010), at 3.

29 Ibid.

ering that, as opposed to judges acting in domestic judicial settings, arbitrators in investment arbitration are generally appointed by the parties.

12.021 Most international arbitration rules used in ISDS proceedings include requirements for the independence and impartiality or arbitrators. The preferred mechanism for investors, the Convention for the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention'), provides that arbitrators shall be 'persons [...] who may be relied upon to exercise independent judgment'.[30] The English and French version of the ICSID Convention do not mention 'impartiality', as the Spanish version does. However, all language versions are equally authentic so there is general consensus that both requirements apply.[31]

12.022 Other international arbitration rules contain similar provisions. For example, the International Chamber of Commerce ('ICC') Arbitration Rules state that '[e]very arbitrator must be and remain impartial and independent of the parties involved in the arbitration'.[32] Similarly, the London Court of International Arbitration ('LCIA') Arbitration Rules provide that '[a]ll arbitrators shall be and remain at all times impartial and independent of the parties',[33] while the Stockholm Chamber of Commerce ('SCC') Arbitration Rules decree that '[e]very arbitrator must be impartial and independent'.[34]

12.023 To ensure compliance with the requirements of independence and impartiality, these arbitration rules oblige arbitrators to disclose all relevant facts that might cause a party to question an arbitrator's impartiality or independence. The obligation to disclose remains during the entire arbitral process. Arbitration rules also allow disputing parties to challenge arbitrators when they believe a particular arbitrator lacks the capacity to decide in an impartial and independent manner.[35]

30 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 14 October 1966 575 UNTS 159 ('ICSID Convention') Art. 40, available at https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf (last accessed 12 August 2022); together with the 2022 'ICSID Arbitration Rules', available at https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf (last accessed 12 August 2022).

31 Maria Nicole Cleis, 'The Independence and Impartiality of ICSID Arbitrators Current Case Law, Alternative Approaches, and Improvement Suggestions' (2017) 8 Nijhoff Int'l Inv L Series 12.

32 Art. 11(1) ICC Rules of Arbitration, effective as of 1 January 2021 ('ICC Arbitration Rules'), available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (last accessed 12 August 2022).

33 Art. 5.3 LCIA Arbitration Rules, effective as of 1 October 2020 ('LCIA Arbitration Rules'), available at www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx (last accessed 12 August 2022).

34 Art. 18(1) SCC Arbitration Rules, effective as of 1 January 2017 ('SCC Arbitration Rules'), available at https://sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf (last accessed 12 August 2022).

35 Art. 57 ICSID Convention, Art. 10 LCIA Rules, Art. 14 ICC Rules and Art. 19 SCC Rules.

12.024 All such rules establish deadlines for parties to challenge an arbitrator, and who will decide the challenge. The challenge is normally decided by either a third person appointed by the institution or the institution itself. ICSID takes a different approach, though. When the panel is composed of three arbitrators, the unchallenged arbitrators decide. If they cannot agree on the challenge, or if the challenge involves more than one arbitrator or a sole arbitrator, the Chairman of the Administrative Council of ICSID must decide.

12.025 Concerns over how to ensure independence and impartiality are also reflected in other international systems of dispute settlement. This is, for instance, the case with the arbitration mechanism recently established by the MLI, which provides that '[e]ach member appointed to the arbitration panel must be impartial and independent' at the time of accepting the appointment and throughout the proceedings.[36] The MLI further clarifies that arbitrators must be free of any relationship with 'the competent authorities, tax administrations, and ministries of finance of the Contracting Jurisdictions and of all persons directly affected by the case (as well as their advisors)'.[37] The MLI, however, does not contain a provision with disclosure obligations and the possibility for the parties to challenge an arbitrator.

12.026 Developing fair and effective rules to ensure independence and impartiality is fundamental to the legitimacy of both tax and investment treaty arbitration, and that of each member of the arbitral tribunal. Yet in investment treaty arbitration, at least, this legitimacy has been questioned. An increasing number of states and other stakeholders have raised concerns over the lack of independence and impartiality of arbitrators. One of these concerns relates to the challenge procedure itself, which is the ultimate method to control independence and impartiality.

12.027 The main question here is: who should decide the challenge? As just explained, a neutral body normally decides the challenge. ICSID is the exception to this rule, where the remaining members of the tribunal decide. This system has been criticised since it is difficult, not to say unfitting, for the remaining arbitrators to decide on the fate of another arbitrator. This is not however the only concern about the impartiality and independence of arbitrators. As one author has noted, criticism surrounding this issue is also 'directed against the central feature of party appointment, as well as the propriety of connections between

36 Art. 20(2)(c) MLI.

37 Ibid.

arbitrators and parties, the issues of multiple appointments, double-hatting, issue conflict, and implicit pro-investor [or pro-state] bias'.[38]

12.028 Party appointment of arbitrators can at times be perceived as a 'moral hazard' and become problematic,[39] the reason being that an arbitrator appointed by the state, for instance, may have an incentive to decide in its favour with the objective to express loyalty and obtain reappointment. Repeat appointments run the risk of increasing an arbitrator's tendency to decide in favour of the party making such appointments.

12.029 So-called double-hatting is another growing concern. The ICSID itself acknowledges this issue, which the institution defines as 'the practice by which one individual acts in two different roles in ISDS cases simultaneously or within a short time period'.[40] Indeed, some of the arbitrators who decide ISDS claims also periodically serve as counsel in other investment arbitration cases. The fear here is that an arbitrator's decision might be influenced by arguments they wish to make in a case where they are litigants. These situations may create the appearance of conflict.[41]

12.030 These issues, some of which can also arise in tax treaty arbitration, have the potential to derail the system. Therefore, any ISDS reform should aim at addressing both actual and perceived lack of independence and impartiality. Before examining current reform efforts that have been adopted to that end, this chapter examines another weakness of investment treaty arbitration, namely inconsistent decisions.

(b) Inconsistent decisions

12.031 International investment law is composed of a decentralised and uncoordinated network of thousands of, mostly bilateral, investment treaties. Many countries in the world have negotiated these instruments on the basis of treaty models and there is a high degree of similarity in the wordings of treaty provision, such as investment protection provisions requiring host states to provide

38 Giorgetti, supra n. 28, at 452.

39 Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 ICSID Rev – Foreign Inv L J 339.

40 ICSID, Code of Conduct: Background Papers Double-Hatting (2021), available at https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_(final)_2021.02.25.pdf (last accessed 12 August 2022).

41 Empirical studies suggest that almost half of investment arbitration cases may be affected. See e.g., Malcolm Langford, Daniel Behn & Runar Hilleren Lie, 'The Ethics and Empirics of Double Hatting' (2017) 6 ESIL Reflection, 1, 3, available at www.researchgate.net/publication/319562787_The_Ethics_and_Empirics_of_Double_Hatting/link/5bfcf17892851cbcdd746555/download (last accessed 12 August 2022).

fair and equitable treatment ('FET') as well as to treat all foreign investors alike (so-called most-favoured nation treatment ('MFN')).[42]

12.032 Investment treaties also contain similar definitions of what constitutes a protected investor, whether a natural or a legal person. Most treaties define natural persons only by reference to the state of nationality of that person. Article 1 of the Egypt–Finland BIT provides a typical definition: '[t]he term "investor" means, for either Contracting Party, [...] (a) any natural person who is a national of either Contracting Party in accordance with its laws.'[43] For juridical persons, investment treaties generally use the incorporation criterion.[44] A common definition can be found in the UK–El Salvador BIT, which defines protected legal persons as 'corporations, firms and associations incorporated or constituted under the law in force in' a Contracting Party.[45]

12.033 Inconsistency in decision-making occurs when arbitrators adopt different interpretations of provisions contained in the same investment treaty or of identical or similarly worded provisions contained in different investment treaties. The issue of interpretative inconsistency in investment treaty arbitration goes to the very heart of the backlash against the regime. This is 'one of the most salient problems for governments as well as commentators'.[46] It undermines predictability and legal certainty, making it difficult for states, and also for investors, to ascertain the exact scope of treaty commitments.

12.034 Concerns about inconsistency are currently up for discussion at the United Nations Commission on International Trade Law ('UNCITRAL') Working Group III. As will be explained, Working Group III has a broad, open-ended, problem-driven mandate to work on the reform of the procedural aspects of ISDS.[47] Governments involved in this process have expressed their concerns about inconsistency in terms of justice, efficiency and the legitimacy of the

42 Jesse Peters, Florian Huber & Maria Bilwin, Memorandum to SOMO: Comparative Research on Investment Protection Standards and Procedures (SOMO 2021), available at www.somo.nl/wp-content/uploads/2021/03/ALC-Comparative-Research-on-Investment-Protection-Standards-and-Procedures-1-1.pdf (last accessed 12 August 2022).

43 Art. 1(3) Finland–Egypt BIT (2005).

44 Florian Franke, *Der personelle Anwendungsbereich des internationalen Investitionsschutzrechts* (Nomos/Hart Publishing 2013), at 138.

45 Art. 1(c)(i) and (ii) UK–El Salvador BIT (1999).

46 Julian Arato, Chester Brown & Federico Ortino, 'Parsing and Managing Inconsistency in Investor-State Dispute Settlement' (2020) 21 JWIT 337. See also Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L Rev 1521.

47 UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS) of 5 September 2018 UN Doc A/CN.9/WG.III/WP.149, available at https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/064/96/PDF/V1806496.pdf?OpenElement (last accessed 12 August 2022).

system. In its 2018 Report on its Thirty-Sixth Session,[48] Working Group III noted that some participants expressed the view that

> the lack of consistency, coherence, predictability and correctness of arbitral decisions was a material concern and not only one of perception. It was said that such a lack negatively affected the reliability, effectiveness and predictability of the ISDS regime and its overall credibility and legitimacy. The view was expressed that this would run contrary to fostering foreign direct investment … It was further mentioned that the lack of consistency could also have financial and political impact on States as they relied on a coherent and predictable framework when developing their investment policies. Further, investors would also be affected when deciding whether to invest in a State and whether to pursue an ISDS claim.[49]

12.035 Inconsistent interpretations of similar treaty provisions are not uncommon. Space constraints naturally preclude a comprehensive examination of arbitral decisions in which tribunals have interpreted treaty provisions in diverging ways.[50] For illustrative purposes, it suffices to refer to a new area of investment law where inconsistency reigns: requests for arbitration from investors with dual nationality.

12.036 An increasing number of tribunals have been asked to determine claims by dual nationals, that is, investors who hold the nationality of both Contracting States. Respondent states have objected to jurisdiction in these cases, arguing that investors should not be entitled to sue their own state of nationality in an international forum. Two decisions are worth mentioning in this context: *Serafín García Armas et al. v Venezuela* ('*García Armas I*') and *Manuel García Armas and others v Venezuela* ('*García Armas II*').[51]

12.037 Both cases involved claims brought by a family of Venezuelan–Spanish nationals against Venezuela for alleged breaches of the Spain–Venezuela BIT, which contains a standard investment treaty definition of 'investor' and, thus, fails to address the standing of dual nationals. The question before the tribunals in

48 UNCITRAL, 'Report of Working Group III on the Work of Its Thirty-Sixth Session' (Vienna, 29 October–2 November 2018) of 6 November 2018 UN Doc A/CN.9/964, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/075/12/PDF/V1807512.pdf?OpenElement (last accessed 12 August 2022).

49 Ibid., at 6.

50 For a comprehensive analysis on inconsistent interpretations of treaty provisions, see Arato et al., supra n. 46.

51 *Serafín García Armas* and *Karina García Gruber v The Bolivarian Republic of Venezuela* PCA Case No 2013-3, Decision on Jurisdiction of 15 December 2014 ('*Serafín Garcia Armas*'); *Manuel García Armas and others v The Bolivarian Republic of Venezuela* PCA Case No 2016-08, Award on Jurisdiction of 13 December 2019. For a comprehensive analysis on dual nationality in investment law, see Javier García Olmedo, 'Claims by Dual Nationals under Investment Treaties: Are Investors Entitled to Sue Their Own States?' (2017) 8 J Int'l Dispute Settlement 695.

both cases was, therefore, whether, in the absence of express treaty language to the contrary, an investor holding the nationality of both Contracting States is entitled to treaty protection. The tribunals took opposite positions on this question, adding a further layer of uncertainty in international investment law.

12.038 In the first arbitration, *García Armas I*, Venezuela invoked the customary international law rule of 'dominant and effective' nationality, which precludes claims by dual nationals when the national seeking protection has more connections with the respondent state. The tribunal rejected the argument on the premise that investment treaties are 'special law' and should apply in isolation from customary international law.[52] Hence, the fact that the claimants were also Venezuelan nationals and had strong connections with that state mattered little to the tribunal. As Spanish nationals, the tribunal concluded, the claimants qualify as investors.

12.039 After the tribunal rendered its jurisdictional award in *García Armas I*, an increasing number of dual nationals initiated arbitrations against their states of nationality.[53] One such arbitration is the *García Armas II* case. As indicated above, this case was instituted against Venezuela by other members of the same family under the same BIT and for damages caused to the same investment. The investors were also dual Spanish–Venezuelan nationals and Venezuela challenged jurisdiction on the same grounds.

12.040 Despite that background and adopting a position that completely contradicts the award in *García Armas I*, the tribunal in *García Armas II* held that the very same Spain–Venezuela BIT did not apply in isolation from the nationality rules of customary international law. For the tribunal, therefore, the fact that the BIT did not address dual nationality justified the application of the customary rule of dominant and effective nationality. The tribunal declined jurisdiction since, given their connections with Venezuela, the claimants' dominant and effective nationality was Venezuelan.

12.041 The problem of interpretative inconsistency is a systemic one given the *ad hoc* nature of the existing regime, in which different arbitral panels are asked to apply the same investment treaty or different treaties with similar provisions. Moreover, there is no system of precedent in investment arbitration that con-

52 *Serafín García Armas*, supra n. 51, paras 173–4.

53 Javier Garcia Olmedo, 'Recalibrating the International Investment Regime through Narrowed Jurisdiction' (2020) 69 Int'l Comp L Q 308–12.

strains arbitrators to take prior published awards into account or to stabilise international investment law.[54]

12.042 A similar problem could also arise in tax treaty arbitration. Like international investment law, the tax law regime is governed by a decentralised network of thousands of DTTs containing similar language, which can be subject to diverging interpretations by arbitral panels. As one author has noted:

> even if the arbitration were one day to become a regular judicial phenomenon, there is little chance that arbitration on a per treaty basis would ever result in a uniform interpretation of tax treaties. As arbitration commissions are not bound by the laws of the two treaty partner states, their decisions are not automatically taken as a precedent by the courts of these states.[55]

12.043 The lack of uniformity in treaty interpretation undermines the legitimacy in the framework as it exists today. This is among the most pressing issues in need of reform. The aim should be to achieve more predictability for both states and investors. As we shall see, states are currently implementing reforms to tackle this issue.

3. The asymmetric nature of investment treaties

12.044 The final weakness of the regime that I mention here is the asymmetric nature of investment treaties. As presently drafted, most investment treaties provide foreign investors with an unprecedented level of substantive and procedural protections but offer very little to host countries in terms of safeguards. Substantive protection standards are based on extremely broad and vague treaty language and only investors can initiate disputes against host states. Dumberry explains the asymmetry prevalent in the regime as follows:

> In their present form, BITs are asymmetrical insofar as investors are being accorded substantive rights (without being subject to any specific obligations) while countries only have obligations. In other words, an investor simply cannot breach any rights of the host country under these treaties since no such rights exist. Thus, while a limited number of BITs contain provisions dealing with non-investment issues, they do not impose any obligations upon foreign investors.[56]

54 Andrea Menaker, 'Seeking Consistency in Investment Arbitration: The Evolution of ICSID and Alternatives for Reform' in Albert Jan van den Berg (ed.), *International Arbitration: The Coming of a New Age?* (Kluwer Law International 2013) 607 at 621.

55 Wim Wijnen, 'Some Thoughts on Convergence and Tax Treaty Interpretation' (2013) 67 Bull Int'l Tax'n 3.

56 Patrick Dumberry, 'Suggestions for Incorporating Human Rights Obligations into BITs' in Kavaljit/Burghard (eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (Both Ends/Madhyam/Somo 2016) at 211–12.

12.045 The broad language of investment treaties gives 'investment tribunals significant discretion in interpreting states' obligations towards foreign investors' and in determining the regulatory autonomy of host states.[57] Arbitrators do not generally consider arguments by states regarding their policy powers to regulate, nor do they value other non-investment interests of states when deciding investment disputes, such as human rights, the environment and labour standards.[58] States' regulatory autonomy on sensitive subjects has been challenged in high-profile cases.

12.046 A related concern about the asymmetry of the investment treaty regime is its potential to prevent governments from carrying out legitimate policy changes, a situation known as 'regulatory chill'.[59] States may be discouraged from enacting legislation in the public interest due to the risk of increasing their exposure to investment treaty claims and costly litigation.[60] Costs in investment treaty arbitration may easily amount into the millions of dollars. A survey conducted by the OECD reveals that 'legal and arbitration costs for the parties in recent ISDS cases have averaged over USD 8 million with costs exceeding USD 30 million in some cases'.[61]

12.047 There is evidence showing that investment treaty arbitration does in fact dissuade states from adopting regulatory measures. In 2013, for instance, New Zealand announced that it was delaying the introduction of plain tobacco packaging in light of Philip Morris's claim against Australia.[62] Indonesia and Costa Rica, respectively, abandoned environmental measures in light of the

57 Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19 J Int'l Econ L 30.

58 Schill & Djanic, supra n. 24, at 40.

59 Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Brown/Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011), at 606.

60 Jan Wouters & Nicolas Hachez, 'The Institutionalization of Investment Arbitration and Sustainable Development' in Cordonier Segger et al. (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011), at 620.

61 David Gaukrodger & Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' in OECD Working Papers on International Investment (OECD Publishing 2012) No 2012/03 19.

62 Associate Minister of Health Tariana Turia, 'Government Moves Forward with Plain Packaging of Tobacco Products' (20 February 2013), available at www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products (last accessed 12 August 2022) ('There is a risk that tobacco companies will try and mount legal challenges against any legislation, as we have seen in Australia. In making this decision, the Government acknowledges that it will need to manage some legal risks. As we have seen in Australia, there is a possibility of legal proceedings. To manage this, Cabinet has decided that the Government will wait and see what happens with Australia's legal cases, making it a possibility that, if necessary, enactment of New Zealand legislation and/or regulations could be delayed pending those outcomes').

threat of investment treaty arbitration.[63] This may ultimately harm public welfare, which in turn puts into question the benefits of the regime from a host state perspective.[64]

12.048 Tax treaty dispute resolution can also raise asymmetry concerns from the taxpayer perspective. The MAP and arbitration mechanisms under DTTs are purely interstate, as evidenced by the current reforms implemented in the MLI and the TDRD. DTTs do not confer rights upon taxpayers to participate in the procedure, which is under the exclusive control of the competent tax authorities. This is so despite the fact that the interests involved in a DTT dispute are also those of the taxpayer, who will ultimately suffer from double taxation. This absence of the taxpayer can undermine the legitimacy of the system.

12.049 Moreover, and depending on how the system evolves, tax treaty arbitration can potentially affect the regulatory space of states in a similar way to investment treaty arbitration. Through tax treaty arbitration, states leave in the hands of a third person the discretion to decide how tax authorities can regulate and cede their sovereignty over the interpretation of DTTs.

12.050 Though for different reasons, both investment and tax policymaking should attempt to balance the rights of states and investors/taxpayers in the interest of development for all. As further elaborated in the next section, investment law policymakers have already begun implementing reforms with that purpose in mind.

C. MATCHING CONCERNS WITH SOLUTIONS

12.051 We have seen that the investment law regime is undergoing a turbulent transitional phase. Investment treaties and the rapid increase of arbitrations under them have resulted in mounting criticism of the system. The criticisms examined in this chapter include that the regime cannot guarantee arbitrators' independence and impartiality, fails to ensure consistency between decisions and unduly restricts host state regulatory policy space. In response to these criticisms, an increasing number of states have engaged in reviewing and modifying treaty provisions and ISDS mechanisms under investment trea-

63 Stuart G. Gross, 'Inordinate Chill: BITs, non-NAFTA MITS, and Host-State Regulatory Freedom: An Indonesian Case Study' (2003) 24 Mich J Int'l L 916.

64 Thomas Schultz & Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' (2015) 25 EJIL 1160.

ties.[65] The ongoing legitimacy crisis of the investment law regime has also triggered a comprehensive attempt at multilateral reform under the framework of UNCITRAL Working Group III. This section provides a brief overview of the most salient reforms options adopted and proposed by states at each of these two levels.

1. Investment treaty reforms

12.052 Since 2012, more than 150 states have begun to modernise their investment treaties, implementing both substantive and procedural reforms.[66] Substantive reforms include treaty provisions aimed at enhancing the development dimension of investment treaties and maintaining the right of host states to regulate.[67] In this regard, UNCTAD highlights that 19 of the 29 investment treaties signed in 2018 'have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources'.[68] For instance, the Canada–Moldova BIT states: 'A Party may adopt or enforce a measure necessary to: protect human, animal or plant life or health [and] conserve the living and non-living exhaustible natural resources.'[69]

12.053 The EU and its Member States have included sustainable development within the 'European international investment policy', promoting 'investment which is sustainable, respects the environment (particularly in the area of extractive industries) and encourages good quality working conditions in the enterprises targeted by the investment'.[70] The EU has already concluded agreements promoting these goals, including the EU–Singapore FTA.

12.054 Other treaties expressly recognise the right to regulate. The Hungary–Cape Verde BIT, for instance, establishes that

65 Anthea Roberts, 'Investment Treaties: The Reform Matrix' (2018) 112 AJIL Unbound 193.

66 For a comprehensive analysis of reform elements, see UNCTAD, *World Investment Report 2019: Special Economic Zones* ('2019 World Investment Report') (UN Publishing 2019) 105–9.

67 2019 World Investment Report, supra n. 66, at 100–13; J. Anthony VanDuzer, Penelope Simons & Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (Commonwealth Secretariat 2013); Yulia Levashova, 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law' (2018) 14 Utrecht L Rev 40.

68 2019 World Investment Report, supra n. 66, at 105.

69 Art. 17(1)(a) Canada–Moldova BIT (2019).

70 European Parliament, Resolution of 6 April 2011 on the Future European International Investment Policy (2010/2203(INI)).

> the provisions of this Agreement shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.[71]

12.055 Another more innovative approach to establish a more balanced regime is the development of investors' obligations in investment treaties. Some BITs contain norms with explicit duties of investors. An illustrative example is the Morocco–Nigeria BIT.[72] This treaty is considered as the 'first international investment agreement which contains a clause establishing that investors need to respect human rights'.[73] Article 18 states: 'Investors and investments shall uphold human rights in the host state.'[74] This provision also mandates that investors act in accordance with core labour standards and international environmental and labour obligations of the host and/or home state.[75]

12.056 Another treaty adopting a similar approach is the 2019 Model BIT between Belgium and Luxembourg. It requires investors to 'act in accordance with internationally accepted standards applicable to foreign investors to which the Contracting Parties are a party'.[76] We assume that these standards include regimes such as the OECD Guidelines for Multinational Enterprises or the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office.

12.057 A number of BITs show that states are also implementing different procedural reforms that significantly depart from the system's traditional features. These reforms seek to regulate ISDS by limiting treaty provisions subject to ISDS, excluding policy areas from ISDS and limiting the time period to submit claims. The 2012 Cameroon–Turkey BIT, for instance, excludes claims relating to real estate from the scope of arbitral review.[77] With this kind of reform,

71 2019 Hungary–Cape Verde BIT. Other BITs that contain a provision on a state's right to regulate with specific reference to safeguarding public health, the environment and labour include: Japan–Morocco BIT; Burkina Faso–Turkey BIT; Cabo Verde–Hungary BIT; Burundi–Turkey BIT.

72 Morocco–Nigeria BIT (2016), awaiting ratification by Nigeria.

73 Markus Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application' (2020) 5(1) Business and Human Rights Journal 114.

74 Art. 18(1) Morocco–Nigeria BIT (2016).

75 Ibid., Art. 18(3) and (4).

76 Art. 18(1) Belgium–Luxembourg Model BIT (2019). See also Norwegian Model BIT (2015), Indian Model BIT (2016) and Austrian Model BIT (2010).

77 Cameroon–Turkey BIT. See also Burkina Faso–Canada BIT (2015), Canada–Côte d'Ivoire BIT (2014); Canada–Guinea BIT (2015) India–Mozambique BIT (2009).

states can apply restraints with respect to the claims they are willing to pursue against investors and the type of government measures that can be challenged.

12.058 Some BITs also include the requirement of the exhaustion of local remedies. The Egypt–Switzerland BIT, for example, requires foreign investors to exhaust the domestic administrative review procedure specified in the laws and regulations of the host state before it can submit the dispute to arbitration.[78]

12.059 A final noteworthy procedural reform feature found in investment treaties is the possibility for states to bring counterclaims against investors. Some investment treaties now incorporate provisions allowing states to bring claims against investors for a breach of obligations under the treaty. The treaty concluded by regional economic community of the Common Market for Eastern and Southern Africa ('COMESA') is a good example. Article 36.7 of the COMESA Agreement states that a

> Member State against whom a claim is brought by a COMESA investor or its investment under this Article, may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor or its investment bringing the claim has not fulfilled its obligations under this Agreement.[79]

12.060 The aforementioned reforms mainly focus on mitigating the asymmetry prevalent in investment treaties by aligning investment protection with other state interests. These reforms also attempt to strike a better balance between the procedural rights of investors and states. Another reform thrust seeks to address concerns about the inconsistent decisions and independence and impartiality.

12.061 With respect to inconsistent decisions, states have begun to clarify problematic provisions in their treaties. They are doing so by delimiting the scope of investment protection standards. UNCTAD, for instance, indicates that investment treaties concluded in 2018 contain clauses that 'limit or clarify obligations (e.g., by omitting or including more detailed clauses on FET (all 29 IIAs) and/or indirect expropriation (23 IIAs))'.[80] The Rwanda–United Arab Emirates BIT, for instance, provides a list of measures that would constitute a violation of the FET obligation, including denial of justice in criminal, civil or administrative

78 Egypt–Switzerland BIT (2010). See also Morocco–Nigeria BIT (2016); China–Côte d'Ivoire (2002).

79 Common Market for Eastern and Southern Africa, Investment Agreement for the COMESA Common Investment Area of 23 May 2007. It has not been ratified.

80 2019 World Investment Report, supra n. 66, at 105.

proceedings, fundamental breach of due process in juridical proceedings, targeted discrimination on manifestly wrongful grounds and abusive treatment.[81]

12.062 To respond to inconsistent jurisprudence on dual nationals, growing of investment treaties incorporate the rule of dominant and effective nationality. One of these treaties is the Comprehensive Economic and Trade Agreement ('CETA'), concluded between the EU and its Member States and Canada. Article 8(1) provides that '[a] natural person who is a citizen of Canada and has the nationality of one of the Member States of the European Union is deemed to be exclusively a natural person of the Party of his or her dominant and effective nationality'.[82]

12.063 CETA has also introduced a revolutionary reform that takes a different approach to resolving the problem of interpretive inconsistency. It should first be noted that, in Europe, mobilisation against ISDS has been particularly high, to the point that the EU Trade Commissioner dubbed ISDS 'the most toxic acronym in Europe'.[83] In March 2018, the Court of Justice of the European Union ('CJEU') held in the *Achmea* case[84] that the ISDS clause in the Netherlands–Slovakia BIT is incompatible with EU law. Following up on the legal consequences of this ruling, in January 2019, Member States issued declarations in which they agreed to terminate their intra-EU BITs.[85] As a result, potential alternatives for the resolution of intra-EU investment disputes are under discussion.

12.064 At the same time, the EU has developed an investment court system to hear claims under treaties concluded with non-EU states.[86] This system, which was recently 'Europeanised' by the CJEU,[87] replaces the traditional ISDS model found in most investment treaties. The investment court system was included in CETA and other treaties concluded with non-EU states, such as the EU–Singapore FTA and EU–Mexico FTA. The system has two main features.

81 Art. 4 Rwanda–UAE BIT. See also Congo–Morocco BIT (2018), Mali–Turkey BIT (2018); Mauritania–Turkey BIT (2018); Cabo Verde–Hungary BIT (2019).

82 Art. 8 CETA (2017). See also the Dutch Model BIT (2019) and Iran–Slovak Republic BIT (2017).

83 Paul Ames, 'ISDS: The most toxic acronym in Europe' Politico (17 September 2015), available at www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/ (last accessed 12 August 2022).

84 *Achema*, supra n. 23.

85 European Commission (Financial Stability, Financial Services and Capital Markets Union), Declaration of the Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection.

86 Laura Puccio and Roderick Harte, 'From Arbitration to the Investment Court System (ICS), the Evolution of CETA Rules: In-Depth Analysis – Study' (2018) EPRS | European Parliamentary Research Service.

87 Nikos Lavranos, 'Court of Justice of the EU Approves CETA Investment Court System', Practice Law Arbitration Blog (Thomson Reuters 17 June 2019).

12.065 First, the court's members (subject to strict independence and impartiality requirements) would be appointed in advance by a Joint Committee of the States party to the treaty on the basis of a permanent roster of 15 judges. The roster will be made up of five EU nationals, five Canadian nationals and five third party nationals.[88] They are appointed for two five-year terms and one four-year term. The judges are *ex ante* selected by the state parties to the investment agreements.

12.066 Second, the decisions of the court would be subject to appeal before an appellate body. The Appellate Tribunal will review the awards on the basis of (a) errors in the application or interpretation of the law; (b) manifest errors in the appreciation of facts, including the appreciation of relevant domestic law; and, lastly, (c) the grounds set out in Article 52(1)(a)–(e) of the ICSID Convention.[89] The Appellate Tribunal will be made up of three appointed members. The functioning of the Tribunal and the appointment of its members are not determined in the final CETA text but will be defined at a later stage by the CETA Joint Committee.

12.067 The creation of an investment court with an appellate has the potential to address some of the discussed ISDS criticisms. For instance, the establishment of a permanent roster of judges appointed by the CETA Joint Committee can be considered as a step in the right direction in securing the impartiality and independence of the arbitrators. This will alleviate concerns stemming from the role of party autonomy in ISDS, including reappointments and double-hatting. As one author has noted, an appellate mechanism 'could, for example, scrutinize how double-hatting, issue conflicts, or contacts between arbitrators and parties are dealt with in first-instance arbitrations and set aside or annul arbitral awards if inappropriate behaviour is detected'.[90]

12.068 Moreover, an appellate mechanism would also ensure predictability and consistency in arbitral decisions. An appeal mechanism that allows judges to review manifest errors in the interpretation and application of treaty law is expected to improve the quality and consistency of investment arbitration awards by moving towards a precedent-based system.[91]

88 Art. 8.27 CETA.

89 Arts 8.28 and 8.39 CETA.

90 Giorgetti, supra n. 28, at 467.

91 Mark Feldman, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power' (2017) 32/3 ICSID Review – Foreign Investment Law Journal.

12.069 Accordingly, an investment court system might 'increase legitimacy both in substance and through institutional design by strengthening independence, impartiality and predictability'.[92]

12.070 That said, in its current form, the system does not address concerns about the asymmetry of the system, as it still prioritises the rights of foreign investors over the public interest without imposing any obligations upon them. Further, it offers a one-sided dispute resolution mechanism in the sense that states are not allowed to bring claims against investors for their misconduct.

12.071 Investment law reform is also taking place at the multilateral level.

2. Multilateral reform – UNCITRAL Working Group III

12.072 As already explained, multilateral-level reforms are ongoing under the auspices of the UNCITRAL Working Group III, which is in charge of identifying concerns regarding ISDS and developing reforms when desirable.[93] This is a government-led process involving delegations from around one hundred states in collaboration with international organisations, arbitral institutions, NGOs, business associations and learned societies.

12.073 The Group has identified a number of concerns to be addressed by the reform process: (1) excessive legal costs; (2) duration of proceedings; (3) legal consistency; (4) decisional correctness; (5) arbitral diversity; and (6) arbitral independence and impartiality.[94] In April 2019 it agreed that reform was necessary and began to discuss detailed reform options,[95] which are currently being developed through a draft work plan.[96] A variety of reform options have been proposed in this context.[97] For present purposes, this chapter briefly examine two of these options: the development of a Code of Conduct for Adjudicators and a Multilateral Investment Court ('MIC').

92 European Commission, 'Investment in TTIP and beyond – the path for reform, Concept Paper' of May 2015 on enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court, 9.

93 UN, 'Report of the United Nations Commission on International Trade Law Fiftieth Session' of 3 July–21 July 2015, Official Records of the General Assembly Seventy Second Session, Supplement No 17 UN Doc A/72/17, paras 263–4.

94 UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS)' of 5 September 2018 UN Doc A/CN.9/WG.III/ WP.149.

95 UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session' of 1–5 April 2019, published 9 April 2019 UN Doc A/CN.9/970.

96 Lisa Sachs et al., 'The UNCITRAL Working Group III Work Plan: Locking in a Broken System?' (4 May 2021) Columbia Center on Sustainable Investment.

97 Langford, supra n. 41, at 175.

12.074 The creation of a Code of Conduct for Adjudicators could provide a ready and simple solution to target the different concerns that arise with respect to the independence and impartiality of arbitrators.[98] On 1 May 2020, the ICSID and UNCITRAL Secretariats published a 'Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement'. The Code seeks to reflect the joint discussions organised by the UNCITRAL and ICSID Secretariats on the contents of the Code and the deliberations of UNCITRAL Working Group III to date.[99] The Code 'provides applicable principles and detailed provisions addressing matters such as independence and impartiality, and the duty to conduct proceedings with integrity, fairness, efficiency and civility'.[100] The Code also 'draws from a comparative review of standards found in codes of conduct in investment treaties, arbitration rules applicable to investor-State dispute settlement, and of international courts'.[101] On 19 April 2021, the Secretariats of ICSID and UNCITRAL released a new version of the Draft Code.

12.075 If implemented, a Code of Conduct for arbitrators could potentially address independence and impartiality concerns. As Giorgetti notes: 'A clear advantage of such a Code is that it could simultaneously deal with most of the concerns related to adjudicators' independence and impartiality. It could require extensive disclosure, prohibit, or regulate double-hatting and repeat appointments, as well as define and regulate issue conflicts.'[102]

12.076 Indeed, the 2021 version of the Draft provides, for instance, a sample provision to regulate double-hatting. Article 4 states:

> Article 4
>
> Limit on Multiple Roles
>
> Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case [involving the same

98 Jeff Dunoff and Chiara Giorgetti, 'Introduction to the Symposium: A Focus on Ethics in International Courts and Tribunals' (2019) 113 AJIL 279.

99 Secretariats of ICSID & UNCITRAL, 'Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement' (2020), available at https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf (last accessed 16 August 2022).

100 Secretariats of ICSID & UNCITRAL, ' Draft Code of Conduct for Adjudicators in International Investment Disputes Version Two' (2021), available at https://icsid.worldbank.org/sites/default/files/draft_code_of_conduct_v2_en_final.pdf (last accessed 16 August 2022).

101 Ibid.

102 Giorgetti, supra n. 28, at 467.

factual background and at least one of the same parties or their subsidiary, affiliate or parent entity].[103]

12.077 The 2021 version of the Draft Code also contains a detailed provision on 'Disclosure Obligations', including a list of factors that should be disclosed by the appointed arbitrator:

> Adjudicators shall make disclosures in accordance with paragraph (1) and shall include the following information:
>
> (a) Any financial, business, professional, or personal relationship within [the past five years] with:
> (i) the parties, and any subsidiary, affiliate or parent entity identified by the parties;
> (ii) the parties' legal representatives, including all appointments as Arbitrator, [Judge], counsel, or expert witness made by the parties' legal representative in any IID [and non-IID] proceedings;
> (iii) the other Arbitrators, Judges or expert witnesses in the proceeding; and
> (iv) any third-party funder with a financial interest in the outcome of the proceeding and identified by a party;
>
> (b) Any financial or personal interest in:
> (i) the proceeding or its outcome; and
> (ii) any administrative, domestic court or other international proceeding involving substantially the same factual background and involving at least one of the same parties or their subsidiary, affiliate, or parent entity as are involved in the IID proceeding; and
>
> (c) All IID [and non IID] proceedings in which the Adjudicator has been involved in the past [5/10] years or is currently involved in as counsel, expert witness, or Adjudicator.[104]

12.078 An obvious and important question arises as to how to implement the Draft Code. On 7 May 2021, the UNCITRAL Secretariat released a Draft Note on 'the Implementation and Enforcement of the Code of Conduct'.[105] UNCITRAL 'outlines the possible means of implementation of the Code as a binding standard', including incorporation in investment treaties, incorporation on a treaty-by-treaty basis and incorporation in procedural rules of arbitral institutions, such as ICSID. Some commentators consider that 'one of the more straightforward' means of implementation will be 'the possibility of

103 2021 Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, Art. 4.
104 Ibid., Art. 10.
105 UNCITRAL, 'Draft Note on the Implementation and Enforcement of the Code of Conduct' of 7 May 2021, available at https://uncitral.un.org/en/codeofconduct (last accessed 16 August 2022).

ICSID attaching the Draft Code (once finalized) to the declaration signed by individual arbitrators'.[106]

12.079 Another more significant reform is the development of a MIC. The EU has championed this reform in the discussions of the Working Group III. In line with the investment court system implemented in CETA and other treaties, the EU has envisioned a MIC with the following features:

> First instance
>
> A standing mechanism should have two levels of adjudication. A first instance tribunal would hear disputes. It would conduct, as arbitral tribunals do today, fact finding and then apply the applicable law to the facts. It would also deal with cases remanded back to it by the appellate tribunal where the appellate tribunal could not dispose of the case. It would have its own rules of procedure.
>
> Appellate tribunal
>
> An appellate tribunal would hear appeals from the tribunal of first instance. Grounds of appeal should be error of law (including serious procedural shortcomings) or manifest errors in the appreciation of the facts. It should not undertake a de novo review of the facts. Mechanisms for ensuring that the possibility to appeal is not abused should be included. These may include, for example, requiring security for cost to be paid.
>
> Full-time adjudicators
>
> Adjudicators would be employed full-time. They would not have any outside activities. The number of adjudicators should be based on projections of the workload of the permanent body. They would be paid salaries comparable to those paid to adjudicators in other international courts.[107]

12.080 The establishment of a MIC could successfully address some of the concerns related to ISDS. Depending on its design, it could reduce the problems associated with the independence and impartiality of arbitrators. The idea proposed by the EU – also found in its investment court system – to have full-time judges would weaken the link between adjudicators and counsel for investors and states. However, an appointment system controlled by states parties can lead to a court populated by 'pro-state' judges.[108] Proponents of the MIC could

106 Felipe de Marinis et al., 'Draft Code of Conduct for Adjudicators in ISDS Proceedings: Further Practical Considerations' (1 November 2020) Kluwer Arbitration Blog.
107 Submission of the European Union and its Member States to UNCITRAL Working Group III of 18 January 2019 on establishing a standing mechanism for the settlement of international investment disputes, available at https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf (last accessed 16 August 2022).
108 Submission from the Government of Bahrain of 29 August 2019 UN Doc A/CN.9/WG.III/ WP.180, paras 31–2.

therefore consider replacing the system of party appointment with one where judges are appointed by an institution or an international organisation. This option would address not only the core issue of who appoints the adjudicators but also related issues of double-hatting and multiple appointments.

12.081 A MIC with a two-tier mechanism would also ensure predictability and consistency.[109] More importantly, and unlike the EU's investment court system, a MIC would not be tied to one single investment treaty, but would piggyback investment treaties in force among its Member States. This means that the court would be deciding investment disputes arising from different treaties, potentially introducing far more uniformity into the interpretation of similarly worded treaty provisions.

12.082 The different reforms proposed by the UNCITRAL Working Group III a positive development for the investment law regime. Although not yet implemented, they offer valuable guidance for states currently involved in the arduous task for improving the language of their treaties. Having said that, the UNCITRAL reform process suffers from an important deficiency. It only focus on procedural reforms. This means that discussions within the Group do not address concerns with the system that require substantive reform to the underlying rules,[110] such as asymmetries in international investment law. Substantive provisions shape the asymmetric contours of investment protections and play a crucial role on finding a better balance between safeguarding the policy interests of states, on the one hand, and protecting the investment of investors, on the other. The Group should, therefore, consider including discussions on developing reforms to achieve this balance.

D. CONCLUSIONS

12.083 The investment and tax law regimes have faced similar periods of contestation that have led to a legitimacy crisis concerning the functioning of the regimes' dispute settlement mechanisms.

109 Anna De Luca et al., 'Responding to Incorrect ISDS Decision-Making: Policy Options' (2020) 21 JWIT 380.

110 See Anthea Roberts & Taylor St John, 'UNCITRAL and ISDS Reforms: Agenda-Widening and Paradigm-Shifting' (EJIL:Talk! 20 September 2019) available at www.ejiltalk.org/uncitral-and-isds-reforms-agenda-widening-and-paradigm-shifting (last accessed 16 August 2022); see also Submission from South Africa to the United Nations of 17 July 2019 UN Doc A/CN.9/WG.III/WP.176, para 20, available at https://uncitral.un.org/sites/uncitral.un.org/files/176-e_submission_south_africa.pdf (last accessed 16 August 2022).

12.084 These mechanisms are subject to a number of shortcomings that have instigated a reform process. In tax law, a major concern is that the MAP does not always ensure a satisfactory and timely resolution of the dispute to the end of preventing double taxation. Another often voiced concern is the fact is that taxpayers have no rights of participation other than the possibility to initiate the MAP.

12.085 To address the concerns in the tax regime, the OECD and the EU propose to supplement the MAP with mandatory arbitration mechanisms, the design of which has been introduced in the MLI and the TDRD. The introduction of arbitration in the tax regime can certainly help to establish a more efficient and effective resolution of tax treaty disputes. However, leaving aside the fact that the proposed mechanism has yet to be tested, a number of important issues are left unresolved.

12.086 For one, a number of questions arise regarding the administration of the arbitration, including how the parties should ensure the independence and impartiality of arbitrators. This is particularly so with respect to the arbitration system implemented in the MLI. Another issue is that the procedure will still be under the exclusive control of the competent tax authorities, that is, no clear participation rights have been conferred upon taxpayers. Moreover, the arbitration of tax treaty disputes can lead to unintended results if perceived as a tool that restrains the fiscal sovereignty of states.

12.087 The investment law regime suffers from its own shortcomings. Criticisms include that the regime cannot guarantee arbitrators' independence and impartiality, fails to ensure consistency between decisions and unduly restricts host state regulatory policy space. States and other stakeholders are currently implementing procedural and substantive reforms to mitigate these concerns. This reform process, which is taking place at the bilateral, regional and multilateral level, can offer valuable guidance for tax policy makers seeking to reduce the flaws in the resolution of tax disputes. Investment law reform can equally serve to address the unresolved issues left open in the arbitration mechanisms contained in the MLI and the TDRD. This chapter has given a flavour of the different investment law reform options that serve such purpose.

12.088 The tax law regime can for, instance, consider balancing the asymmetry between taxpayers and tax authorities by offering taxpayer–state arbitration in the form of a tax court based on the model implemented in CETA, with a permanent tribunal and an appellate mechanism. This mechanism can also serve to prevent interpretative inconsistency in tax treaty disputes. The regime

can also consider resort to arbitral institutions used in investment treaty arbitration for support and administration of the process. In this regard, the regime can look at institutions that have developed efficient procedures to ensure the independence and impartiality, including those institutions that will soon incorporate a rigorous Code of Conduct for arbitrators. For states that are worried about their fiscal sovereignty, they can combine arbitration with treaty provisions that define the kind of fiscal measures that fall within the scope of application of the treaty.

13

REFLECTIONS ON DISPUTE RESOLUTION UNDER GATT AND THE WTO AND DOUBLE TAX TREATY DISPUTES

Timothy Lyons

A. INTRODUCTION

This chapter is primarily concerned to reflect on the dispute settlement procedures operating in the context of the General Agreement on Tariffs and Trade ('GATT')[1] and the World Trade Organization ('WTO'). In particular, it is intended to consider what lessons these procedures may hold for those concerned with the resolution, and in particular the arbitration, of disputes between states concerning double tax treaties pursuant to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base **13.001**

1 The General Agreement on Tariffs and Trade 1947 came into force on 1 January 1948 ('GATT 1947'). In 1994, it was annexed to the Marrakesh Agreement establishing the WTO ('Marrakesh Agreement'), as part of Annex 1A 'Multilateral Agreements on Trade in Goods'. See WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 24th printing (Cambridge University Press 2016) 354 ('Marrakesh Legal Texts', with the GATT annex to the Marrakesh Agreement referred to as 'GATT 1994' and collectively, GATT 1947 and GATT 1994 are referred to below as 'GATT').