The Interaction Between IIAs and DTCs: Potential for Overlap and Reform Proposals

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1 Introduction

International tax law and international investment law are two of the fastest growing areas of international economic law. The international tax law regime is governed by more than 3600 double taxation conventions (DTCs or tax treaties), most of which are based on the Organisation for Economic Cooperation and Development (OECD) Model Tax Convention (Kobetsky 2011 and Model Tax Convention 2019). These treaties 'serve several goals, including anti-double taxation of cross-border investment, prevention of excessive taxation, avoidance of tax evasion, cooperation in tax administration, and the exchange of information' (Chaisse ICTSD 2016a). DTCs do not provide taxpayers with direct access to dispute resolution. Instead, tax treaty disputes are predominantly resolved through the (purely intergovernmental) Mutual Agreement Procedure (MAP). The MAP is administered by the competent tax authorities of the Contracting Parties to the applicable DTC with the aim of avoiding or mitigating double taxation for taxpayers. Despite being of vital importance for taxpayers since it guarantees the proper application and interpretation of DTCs, the MAP has suffered from well-known criticism over the last few years. It has been criticised for not always ensuring a satisfactory and timely resolution of the dispute and for failing to grant taxpayers participation rights (Chaisse 2016b; Dourado 2019; Perrou 2019).

For its part, the international investment law regime is governed by over 3000 international investment agreements (IIAs or investment treaties), including bilateral investment treaties (BITs), free trade agreements (FTAs), and multilateral investment agreements, which aim to promote foreign direct investment (Salacuse

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2021). These treaties provide investors with an unprecedented level of substantive and procedural protections but offer no reciprocal rights for states wishing to preserve regulatory space (Dumberry 2016). Unlike DTCs, IIAs contain investor-state dispute settlement (ISDS) clauses, which allow investors to directly challenge policy measures that may affect their investments before arbitral tribunals and claim for high compensation amounts. This regime is also 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 (Dietz et al. 2019; Waibel et al. 2010). Critics argue that the regime unduly restricts host states' regulatory policy space, cannot guarantee arbitrators' independence and impartiality, fails to ensure consistency between decisions, lacks transparency and leads to overly long and expensive proceedings (Giorgetti et al. 2020; Arato et al. 2020; Henckels 2016).

Concerns have also been raised with respect to the interplay between DTCs and IIAs. Investment treaties do not generally exclude taxation from their scope of application, meaning that they can cover tax measures aimed to raise revenue, eliminate double taxation or limit opportunities to engage in tax avoidance or evasion. Investors have brought tax-based ISDS claims in an increasing number of cases given the limits and shortcomings of the MAP. These claims can overlap with the subject matter covered by DTCs, creating uncertainties for tax and investment policymakers. This chapter examines selected cases in which tribunals have examined the relation between IIAs and DTCs. These cases include *Cairn v India*, *ConocoPhillips v Vietnam*, *Schooner v Poland*, and *Lone Star v Korea.* It will then make suggestions in the form of treaty drafting approaches that states can adopt in their IIAs to regulate possible conflicts between the two regimes.

2 Case Law

As O'Brien and Brooks explain, '[t]ax treaties and IIAs have much in common' (O'Brien and Brooks 2012 at 303). These instruments 'share the same purpose of facilitating FDI, […] provide similar legal protections, such as prohibition of discriminatory treatment of non-nationals [and] are intended to create security and predictability' for investors (O'Brien and Brooks 2012 at 304). IIAs offer, however, a larger scope of protection for investment than DTCs (Ortino 2015). As mentioned in the Introduction, tax treaties do not provide investors/taxpayers with direct access to dispute resolution and only deal with the allocation of taxing rights between Contracting Parties over certain types of income and capital gains. Investment treaties offer expansive substantive protections in respect of investments that generate that income and enable investors/taxpayers to bring direct claims against host states.

Moreover, most IIAs do not exclude taxation from their scope of application and are silent on their relationship with DTCs (UNCTAD 2021). This means that investors can be protected from tax-related measures adopted by host states that violate the IIA's substantive protections, including measures that 'may simultaneously fall within the scope of a DTC as well as an IIA between the relevant countries'

(UNCTAD 2021 at 16). More recent investment treaties contain tax carve-out provisions, which exclude tax measures from all or certain investment protection standards and attempt to prevent inconsistencies relating to a taxation measure between IIAs and DTCs (Davie 2015). However, these treaties do not generally define what is meant by 'taxation measure', nor do they explain who (investment tribunal or domestic tax authorities) should solve potential inconsistencies.

The better protection offered by IIAs has resulted in a multiplication of tax disputes before investment treaty tribunals. According to UNCTAD, between 1987 and 2021, 'investors have challenged tax-related measures in 165 ISDS cases based on IIAs' (UNCTAD 2021 at 5). These cases involve different measures, including regulatory changes to feed-in tariffs for renewable energy production, withdrawal of VAT subsidies, increase in windfall profit taxes and royalties, the initiation of tax investigations or audits, and the imposition of capital gain taxes (Tandon 2022; Ranjan 2022; Rolland 2020). The cases discussed below show how ISDS claims involving domestic tax policies have the potential to overlap with the subject matter covered by DTCs.

2.1 Cairn v India

An illustrative and recent example is the *Cairn v. India* case. This case arose out of India's decision to retrospectively amend its income tax laws and impose a tax liability of USD 1.6 billion on Cairn India Ltd. for its failure to deduct withholding tax on capital gains resulting from a series of restructuring transactions that took place among the Cairn group in 2006. Cairn UK initiated UNCITRAL arbitration proceedings under the UK-India BIT, claiming that India's measures leading to the imposition of the retroactive tax breached, among others, its obligation to accord Cairn UK and its investment fair and equitable treatment (*Cairn v. India*, Award, 2020).

India made several jurisdictional objections, including that challenges to its 'tax legislation and policy are excluded from the scope of the BIT and are not arbitrable':

> tax disputes are not capable of being resolved by arbitration under the BIT in light of an implied exception to the scope of application of the BIT, and of the fact that the Respondent and the United Kingdom have in fact specifically agreed that tax disputes should be settled in accordance with the procedure prescribed in the contemporaneous [double taxation avoidance agreements] (at para 764).

India relied, in this respect, on the UK-India DTC, 'which does not provide for arbitration, but rather for a mutual agreement procedure involving consultations between the taxation authorities of the two States' (at para 771). According to India, 'the advancement of [tax] claims under the BIT is incompatible with the [DTC], in which the Respondent and the UK seek to ensure the "avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains' (at para 773). In other words, since the measures adopted by India are

regulated by the DTC, "the BIT should be read so as to exclude such matters from its scope" (at para 801). The absence of a tax carve-out in the BIT defining the relationship between this treaty and the DTC did not alter this conclusion, India added, 'because at issue here is the existence of general limits to the scope of protection of investment treaties which exist even if they are not made explicit' (at para 767). Cairn UK should have, therefore, resorted to the MAP provided in the DTC, instead of challenging India's tax measures under the BIT.

The Tribunal disagreed with India. It observed that the UK-India DTC and the UK-India BIT 'govern different subject-matters' and that the BIT 'does not expressly specify that [it] should be considered to be incompatible with' the DTC (at paras 803–806). The Tribunal noted, in this respect, that, unlike the ISDS provision in the BIT, the MAP 'does not purport to provide a dispute resolution mechanism for situations in which an investor of one of the Contracting States considers that the host State has violated his rights as an investor' (at para 803). The Tribunal further found that the BIT did not contain a provision preventing the investor from submitting arbitration claims relating to tax measures that can potentially fall within the scope of the DTC. The Tribunal upheld jurisdiction over the dispute and held that India had failed to respect its obligations under the BIT, in particular, the Fair and Equitable (FET) standard (at paras 256–509). India was ordered to pay Cairn UK over USD 1.2 billion in compensation and challenged the award before the courts of the seat of the arbitration, the Hague. In a decision of 31 December 2021, the Hague Court of Appeal decided to set aside the award given that Cairn UK did not appear in the proceedings, presumably in response to India's decision to withdraw its retroactive tax bill (Bohmer 2020).

2.2 ConocoPhillips v Vietnam

The *ConocoPhillips v Vietnam* case is another example of how investment treaty protection can conflict with rights and obligations under DTCs. This case also relates to capital gains tax on restructuring of assets. In 2012, ConocoPhillips UK (a UK subsidiary of the US energy giant ConocoPhillips) sold two of its entities (ConocoPhillips Gama Limited and ConocoPhillips Cuu Long) to UK-based Perenco Overseas Holdings. The only assets held by ConocoPhillips Gama and Cuu Long were ConocoPhillips's oil interests in Vietnam. It was reported that ConocoPhillips sold the companies for USD 1.29 billion, making a profit of USD 896 million (Turner 2018; Alencar and Neck 2020).

Under the terms of the UK-Vietnam DTC, 'capital gains generated from transactions involving shares deriving their value from immovable property situated in one of the contracting states may be taxed in the jurisdiction where the property is located' (Alencar and Neck 2020 at 16). The Vietnamese tax administration interpreted the DTC as granting the state the right to tax capital gains on the transaction since it derived its value exclusively from oil interests located in Vietnam. Based on the current tax rate in Vietnam, ConocoPhillips would have to pay an estimated

USD 179 million to the Vietnamese government for its capital gain. ConocoPhillips refused to pay this tax, arguing that the sale was between two UK entities with no taxable presence in Vietnam.

In 2015, Vietnam signalled its intention to tax the transaction. In a move designed to prevent the Vietnamese government from collecting the capital gains tax, ConocoPhillips and Perenco initiated UNCITRAL arbitration proceedings against Vietnam under the UK-Vietnam BIT. On 20 January 2020, the journal *Finance* Uncovered reported that ConocoPhillips has settled the case with the government, noting that 'the US oil giant, has finally paid tax to Vietnam on a $896m gain from the sale of two oil fields in 2012—marking a significant climbdown amid embarrassing legal action and international critic' (Mathiason 2020). Although the settlement of the dispute has been confirmed, the exact terms of the settlement remain undisclosed.

Had the dispute proceeded, Vietnam would have likely raised a jurisdictional objection on grounds like those invoked in *Cairns v India*, arguing that any disagreement between Vietnam and ConocoPhillips as to the payment of the capital gains tax should have been resolved through the UK-Vietnam DTC. It is also probable that tribunal would have rejected the objection on the basis that the UK-Vietnam BIT does not require that investors resort to the DTC to challenge tax-related measures.

2.3 Schooner v Poland

Another case worth mentioning is *Schooner v. Poland*. This case involved a BIT claim arising out of an investment made by two US companies in the mid-1990s in a newly privatised Polish state enterprise, Kama Foods, an oil and margarine manufacturer. For fiscal years 1994 to 1997, Kama Foods recorded the payment of management fees, training and know-how as tax-deductible for tax assessment purposes. As a result of a series of inspections conducted in 1997, the Polish tax authorities took a series of tax enforcement measures that disallowed certain deductions that had been taken by Kama Foods, leading the company to become insolvent.

On 31 March 2011, the investors instituted arbitration proceedings under the ICSID Additional Facility Rules pursuant to the US-Poland BIT. The investors argued that, through its tax measures, Poland had violated the expropriation, FET and full protection and protection standards (FPS) of the Poland-US BIT as well as its provisions relating to the free transfers of investments. Poland raised several jurisdictional objections. In particular, Poland argued that 'the entire Tax Claim is covered by the tax exception provided in Article VI of the Treaty read in conjunction with Article 22 of the Poland—United States Double Tax Treaty ("DTT") and is, therefore, outside the jurisdiction of this Tribunal' (*Schooner v. Poland*, Award, 2015 at para 179). Article VI of the BIT is a tax carve-out provision which reads as follows:

> 1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of, and commercial activity conducted by, nationals and companies of the other Party.
>
> 2. Nevertheless the provisions of this Treaty, and in particular Article IX and X, shall apply to matters of taxation only with respect to the following:
>
> (a) expropriation, pursuant to Article VII;
>
> (b) transfers, pursuant to Article V; or
>
> (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article IX(1)(a) or (b),
>
> to the extent that they are not subject to the dispute settlement provisions of a convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within reasonable period of time (at para 209).

Poland first argued that 'the phrase "matters of taxation" in Article VI(2) should be defined broadly as referring to all issues related to the process or system of imposing and charging taxes' (at para 211). As such, according to Poland, the Tribunal did not have jurisdiction over the claimants' FET and FPS claims since the tax measures adopted by the state fell within the ambit of that provision. The Tribunal majority agreed, holding that 'matters of taxation' include the 'assessment and collection of taxes', which is the type of measure that triggered the claimants' BIT claims (at para 284).

Second, Poland argued that the Tribunal did not have jurisdiction over the claimants' remaining claims, expropriation and denial of free transfer, 'because the Claimants did not resort to the "dispute settlement provisions of a convention for the avoidance of double taxation" before initiating this arbitration as required under Article VI(2) of the BIT' (at para 290). Article 22 of the Poland-US DTC provides for the MAP. According to the Respondent, 'the central part of the present dispute [was] the application of income tax laws which is covered under the DTC' and thus the claims fell 'within the ambit of the mutual agreement procedure' (at para 294). More concretely, Poland pointed out that the dispute was covered under Articles 8, 11, 13, and 15 of the DTC (at para 314).

The Tribunal noted that 'the central issue in this case relates to deductibility of [management] costs for the purposes of calculating corporate income tax and the DTC is applicable to income tax' (at para 313). Despite this, after examining the DTC provisions relied upon by Poland, the Tribunal found that the dispute was not subject to the MAP. With respect to Articles 8 of the DTC, the Tribunal observed that this provision 'deals with business profits and sub-article (3) provides that in determining the profits of a business, deductions for expenses incurred for the purposes of the business shall be allowed' (at para 315). The Tribunal held that this provision was not relevant in that case at hand since, according to the 'Respondent's own formulation', the dispute was 'not whether Management Services were in fact provided, but whether [the claimants] adequately documented the provision of the Management Services for the purposes of claiming deductions' (at para 315). With respect to Article 13 of the DTC, which relates to royalties, the Tribunal found that 'there is no issue of royalties being paid to or by anyone in this case and therefore,

Article 13 of the DTC has no application to the present dispute' (at para 316). As to the Tribunal's position on Article 15 of the DTC, which deals with the taxation of income derived from the provision of services, such as management services, the Tribunal found the dispute did not concern this issue but rather 'the treatment of the expenses incurred by [the claimants] in paying for the Management Services' (at para 317).

Finally, the Tribunal decided that 'the Claimants' claim that their freedom to transfer funds was violated because they could not freely transfer the Management Fees [was] very different from the taxation of dividends covered under Article 11' and thus that provision was not applicable either (at para 319).

Based on the above analysis, the Tribunal held that it only had jurisdiction to hear the claimants' claims based on expropriation and transfers of funds pursuant to Article VI(2) of the BIT. On the merits, however, the Tribunal decided that both claims had failed, and the claimants were, consequently, not entitled to any damages. The investors have unsuccessfully tried to set aside the award at the seat of the arbitration, Paris (Charlotin 2022).

2.4 Lone Star v Korea

The last case worth discussing is *Lone Star v. Korea*, one of the latest investment awards in tax-related investment treaty disputes. In that case, the relation between the IIA and the DTC between Belgium and Korea was at issue. The issue before the tribunal concerned the application by Korea of its 'substance Over Form Principle' which resulted in the denial of tax treaty benefits under the Korea-Belgium DTC by disregarding companies incorporated and resident of Belgium in relation to capital gains. The tribunal did not consider that, as argued by Korea, the Belgian investment companies—the legal owners—had no standing simply on the basis that they had been disregarded pursuant to the substance over form principle: 'to do so would be to assume in favor of the Respondent an important point in issue, namely whether the Respondent adopted the *correct tax treatment*' (*Lone Star v. Korea*, Award, 2022 at para 366).

Although the tribunal held that it had no jurisdiction under the DTC, this did not prevent it from discussing the interaction between the substance over form principle and Korea's tax treaty obligations from the ambit of the arbitration (at paras 296 and 372). The tribunal examined whether the application of the substance over form principle by Korean tax authorities and courts was in conformity with the substantive standards of the IIA (at para 390). Relying extensively on the OECD Model Commentaries, the tribunal concluded that:

> The Tribunal concludes that Korea's application of the Substance Over Form doctrine did not violate the BIT because, as referenced by Dr.—the doctrine forms 'part of the basic rules for determining the facts that give rise to tax liability'. It is only after the facts have been determined that the tax consequences are assessed, and it is only at the tax consequence stage, not the earlier fact-determination stage, that the Treaty provisions come into

> play. Here the judicial proceedings initiated by the Lone Star companies resulted in a rejection in the relevant cases of Lone Star's ·version of facts. The Korean courts adequately explained why the application of Substance Over Form was not arbitrary but grounded in the evidence. Nor, in the opinion of the Tribunal, as will be discussed, was the application discriminatory (at para 410).

In the same vein:

> In the absence of any claim of denial of justice, the Claimants have not established any violation of the 2011 BIT in respect of the post-27 March 2011 tax treatment of their investments. Their various arguments based on Substance Over Form were properly analysed by the Korean courts to whom the Claimants had remitted the questions and the Claimants' objections were rejected for reasons with which the Tribunal agrees. In other words, in the Tribunal's view, the tax treatment violated neither national nor international standards and as such there is no wrongful act capable of supporting the Claimants' arguments on expropriation, Full Protection and Security, the Umbrella Clause, or the provision for Free Transfers. The Respondent acted well within the legal boundaries of internationally-accepted tax policy (at para 469).

As Danon notes, 'the *Lone Star* award has underscored the relevance of the Model Commentaries, as a matter of principle, for purposes of determining whether a domestic rule affecting the eligibility of an investor to tax treaty benefits is applied in conformity with the substantive standards of protection contained in an IIA' (Danon 2022 at 230).

3 Reform Options

These four cases illustrate how the investment and tax treaty regimes have the potential to interact and overlap. With the support of arbitral jurisprudence, and in the absence of a clear definition regarding the relationship between IIAs and DTCs, disputes arising from tax-related measures can fall within the scope of both treaty regimes. This can lead to the parallel use of the dispute settlement mechanisms offered in each field to resolve disputes arising out of the same measure. As UNCTAD explains:

> Potentially, a taxpayer could request the relevant competent authority for a mutual agreement procedure (MAP) and, concurrently or afterwards, pursue ISDS claims as an investor under an IIA concerning the same matter. A MAP between the competent authorities of the contracting parties or a State-State tax arbitration could be ongoing when an ISDS proceeding is initiated. The outcome of a MAP, tax arbitration or tax litigation could also give rise to ISDS cases (UNCTAD 2021 at 17).

In other words, the proliferation of overlapping and uncoordinated mechanisms to resolve tax disputes in the international plane has resulted in further fragmentation. This demonstrates, as Chaisse aptly observes, that 'there is a need for better designed international rules and policies on tax and investment, which would allow the tax and investment worlds to move from mere coexistence to cooperation' (Chaisse 2016b).

States are responding to the increasing volume of ISDS claims involving tax measures by amending investment treaty provisions. Preserving tax policy autonomy and coordinating investment and tax disputes settlement mechanisms have become an important matter for treaty negotiators. As compared to old-generation IIAs, more recent treaties contain tax carve-out provisions that aim to completely exclude tax measures from their scope of application and to avoid overlap between IIAs and the subject matters covered by DTCs. The 2016 India Model, for instance, states that the treaty shall not apply to 'any law or measure regarding taxation, including measures taken to enforce taxation obligations' (India Model BIT 2016 Art 2.4). This article further provides that a host state's decision that a particular regulatory measure is related to taxation, whether made before or after the commencement of arbitral proceedings, 'shall be non-justiciable and it shall not be open to any arbitration tribunal to review such decision' (India Model BIT 2016 Art 2.4). As Ranjan notes, 'it is evident that India has decided to keep taxation measures outside the purview of the BIT in response to Vodafone and Cairn challenging India's retrospective application of taxation law under different BITs' (Ranjan et al. 2018).

The new 2018 Dutch model BIT mostly aims at avoiding conflicts with DTCs. Article 10(3) provides that '[t]his Agreement does not affect the rights and obligations of a Party under an agreement for the avoidance of double taxation. In the event of inconsistency between such agreement and this Agreement, the agreement for the avoidance of double taxation prevails to the extent of the inconsistency' (Dutch Model BIT 2019 Art 10.3). This clause, however, does not clarify how and by whom (ISDS tribunal or domestic tax authorities) inconsistencies should be settled. This means that, as occurred in *Schooner v. Poland*, it would be for the ISDS tribunal to determine whether there is a conflict between the IIA and the DTC. The position of the tribunal regarding a potential conflict between the two regimes may be different from that adopted under domestic law.

Only a few IIAs, such as Article 14 of the Chile-Hong Kong BIT, contain a provision specifying that any determination as to the existence of an inconsistency between a DTC and an IIA shall be settled by the competent (tax) authorities of the contracting parties. This provision provides that:

> In case an issue arises as to whether any inconsistency exists between this Agreement and a tax convention between the Parties, the issue shall be referred to the designated authorities. If the designated authorities decide to make a determination as to the existence and extent of any inconsistency, they shall do so within six months of the referral of the issue. No procedures concerning the measure giving rise to the issue may be initiated under Section D (Settlement of Disputes between the Parties) or Article 21 (Submission of a Claim to Arbitration) until the expiry of the six-month period. An arbitral panel or tribunal established to consider a dispute related to a taxation measure shall accept as binding a determination of the designated authorities made under this paragraph. If the designated authorities have not determined the issue within six months from the date of the referral, the tribunal or arbitral panel shall decide the issue (Chile-Hong Kong BIT 2019 Art 14.4).

The Chile-Hong Kong BIT indeed gives a greater role to host states on taxation claims. This treaty, however, does not address a possible scenario where the

competent tax authorities do not reach an agreement within the deadline established in the treaty, leaving that decision to the tribunal. That outcome may differ from the one of the competent tax authorities if the same claim is brought under a DTC.

4 Conclusion

This paper has explored the extent to which ISDS claims involving domestic tax policies have the potential to overlap with the subject matter covered by DTCs and MAPs. The cases examined therein illustrate such potential for interaction. The paper has also proposed reforms options that states can adopt in their IIAs to regulate possible conflicts between the two regimes. Investment treaties that contain tax-carve out provisions, however, only represent the minority of the vast IIA universe. Most IIAs do not address tax issues and are silent on the relationship between their scope of protection and the subject matter covered by DTCs and MAPs. In the absence of a consistent and coherent treatment of fiscal matters in tax and investment treaties, investors will continue to challenge tax policies before ISDS tribunals that may potentially fall within the realm of DTCs. States will, in turn, continue to face the consequences of regulatory gaps, such as unintended and expansive interpretations of treaty provisions. It is thus necessary to establish a more effective safeguard for avoiding overlaps between IIAs and tax policymaking. Recent reform efforts taking place mostly at the bilateral level show how states are trying to achieve this goal.

Amending or renegotiating IIAs bilaterally or even regionally may not, however, be the most effective way to advance harmonisation between the regimes. This approach will result in continued fragmentation and will foster treaty shopping by investors that restructure their investments through companies incorporated in states that have signed IIAs that do not contain tax carve-out provisions. It is submitted that any reform efforts designed to improve coherence between IIAs and DTCs will first require the cooperation between investment and tax policymakers. They should avoid the formulation of investment and tax policymaking in vacuums. In this respect, they should seek to minimise the risk of friction between the existing uncoordinated and potentially overlapping dispute resolution mechanisms established in investment and tax treaties.

References

Arato, Julian, et al. 2020. Parsing and managing inconsistency in investor-state dispute settlement. *Journal of World Investment and Trade* 21: 336–373.

Alencar, Henrique and Neck, Judith. 2020. Capital gains taxes and offshore indirect transfers. *Oxfam (Online)* July 22.

Bohmer, Lisa. 2020. The Hague Court sets aside *Cairn v India* award based on Cairn's decision not to object to the set-aside application. *Investment arbitration reporter* (Online) January 10.

Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016-7, Final Award, 21 December 2020.

Chaisse, Julien. 2016a. *International investment law and taxation: From coexistence to cooperation*. E15Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

———. 2016b. Investor-state arbitration in international tax dispute resolution: A cut above dedicated tax dispute resolution. *Virginia Tax Review* 35: 149–222.

Charlotin, Damien. 2022. Claimants once again fail to set aside treaty award in favour of Poland before French courts. *Investment Arbitration Reporter (Online)* May 31.

Danon, Robert. 2022. Relation between dispute resolution under double taxation conventions and investment treaties. In *Alternative dispute resolution and tax disputes*, Elgar tax law and practice series, ed. W. Haslehner et al. Edward Elgar.

Davie, Matthew. 2015. Taxation-based investment treaty claims. *Journal of International Dispute Settlement* 6: 202–227.

Dietz, Thomas, et al. 2019. The legitimacy crisis of investor-state arbitration and the new EU investment court system. *Review of International Political Economy* 26: 749–772.

Dourado, Ana Paula. 2019. Post-BEPS international tax arbitration. *Intertax* 47: 671–677.

Dumberry, Patrick. 2016. Suggestions for incorporating human rights obligations into BITs. In *Rethinking bilateral investment treaties: Critical issues and policy choices*, ed. K. Singh and B. Ilge. ENDS, Madhyam and SOMO.

Giorgetti, Chiara, et al. 2020. Independence and impartiality of adjudicators in investment dispute settlement: Assessing challenges and reform options. *Journal of World Investment and Trade* 21: 441–474.

Henckels, Caroline. 2016. Protecting regulatory autonomy through greater precision in investment treaties: The TPP, CETA, and TTIP. *Journal of International Economic Law* 19: 27–50.

Investment agreement between the government of the Hong Kong Special Administrative Region of the People's Republic of China and the government of the Republic of Chile. Entered into force on 14 July 2019.

Kobetsky, Michael. 2011. *International taxation of permanent establishments, principles and policy*. Cambridge: Cambridge University Press.

LSF-KEB Holdings SCA and others v. Republic of Korea, ICSID Case No ARB/12/37, Final Award, 30 August 2022.

Nick Mathiason, 'Oil major settles huge capital gains tax bill to Vietnam', Finance Uncovered investigation, 20 January 2020.

O'Brien, Marta, and Kim Brooks. 2012. Direct taxation, tax treaties and IIAs: Mixed objectives, mixed results. In *Improving international investment agreements*, Routledge research in international economic law, ed. A. Mestral and C. Lévesque. Routledge.

OECD. 2019. *Model tax convention on income and on capital 2017 (full version)*. Vol. 1. OECD.

Ortino, Federico. 2015. Substantive provisions in IIAs and future treaty-making: Addressing three challenges. E15 task force on investment policy.

Perrou, Katerina. 2019. Taxpayer rights and taxpayer participation in procedures under the dispute resolution directive. *Intertax* 47: 715–724.

Ranjan, Prabhash, et al. 2018. *India's model bilateral investment treaty: Is India too risk averse?* Brookings India IMPACT Series No. 082018. Brookings Institution India Center.

Ranjan, Prabhash. 2022. Investor-state dispute settlement and tax matters: Limitations on state's sovereign right to tax. *Asia Pacific Law Review* 31: 219–234.

Rolland, Sonia. 2020. The impact of trade and investment treaties on fiscal resources and taxation in developing countries. *Chicago Journal of International Law* 21: 63–70.

Salacuse, Jeswald. 2021. *The law of investment treaties*. 3rd ed. Oxford: Oxford University Press.

Tandon, Suranjal. 2022. Issues and challenges with applying investment agreements to tax matters in the context of India's experience. *Asia Pacific Law Review* 31: 235–252.

The 2016 Model Indian Bilateral Investment Treaty.

The 2019 Dutch Model Bilateral Investment Treaty.

Turner, George. 2018. Oil firms use secretive court hearing in bid to stop Vietnam taxing their profits. *The Guardian (Online)* August 15.

UNCTAD. 2021. *International investment agreements and their implications for tax measures: What tax policymakers need to know: A guide based on UNCTAD's investment policy framework for sustainable development*. UN Doc UNCTAD/DIAE/PCB/INF/2021/3.

Vincent J. Ryan. 24 November 2015. *Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland, ICSID Case No. ARB(AF)/11/3, Award*.

Waibel, Michael, et al. 2010. *The backlash against investment arbitration: Perceptions and reality*. Kluwer Law International.