The Growing Importance Of Investment Arbitration In Relation To Tax Measures In The Energy And Natural Resources Sectors

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ABSTRACT
Taxation is an important tool in the hands of States to shape their policies. It affects foreign investors, who – in case of a tax-related dispute – may attempt to pursue remedies available to them under international investment law. Looking at the growing number of tax-related investment disputes, in particular in the energy and natural resources sectors, investors appear to be more conscious of this potential recourse. Given that taxation is addressed in investment treaties in varying manners, there is no single answer as to whether and to what extent disputes arising from tax measures may be addressed in investment arbitration. Investors are well advised to review investment protection available to them. To avail themselves of treaties that may be more favourable in terms of protection against tax measures investors should also potentially consider restructuring their investments.

I. INTRODUCTION
Tax considerations are important in any investor’s decision-making process. The tax treatment expected in a host State-including types and rates of applicable taxes as well as any tax incentives—may weigh on whether an investment will be economically viable and what return on investment may be anticipated. Therefore, any changes to the expected tax regime may affect foreign investments. Changes to tax policies may include introduction of new taxes, modification of (the rates and modes of calculation of) existing taxes, or cancellation of tax incentives. Decisions of tax authorities may also have a significant impact on investments. All these measures may lead to tax-related disputes. In such cases, there appears to be a growing number of investors seeking recourse under investment treaties, and, as a consequence, a growing docket of tax-related investment arbitrations.

To date, there have been around 40 known concluded cases involving tax-related investment claims.1 Several new cases have been reported in the past few months.

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alone (e.g. against Ethiopia, India, Papua New Guinea, and Tanzania). Many of these cases pertain to the energy and natural resources sectors and arose out of tax measures taken against international (or foreign) mining companies by minerals producing States in what has been dubbed a resurgence of ‘resource nationalism.’ In addition, over 30 further claims have been brought against Spain and several against the Czech Republic under the Energy Charter Treaty (ECT) for changes to their solar power sectors, where some of the contended measures are tax-related. Tribunals have been and are faced with questions as to whether tax-related claims are covered in the ambit of an investment treaty and whether tax measures amount to a violation thereof.

Although investment claims may be based on investment treaties, host States’ domestic laws, or investment agreements, the authors focus in this piece on the first of these bases and in particular on arbitrations under bilateral investment treaties (BITs) and multilateral treaties such as the ECT and the North America Free Trade Agreement (NAFTA) as the most commonly relied upon investment instruments.

This article first considers definitions and a typology of tax measures (II). It then considers the extent to which tax-related matters are covered by investment treaties (III). It then discusses potential bases of claims under investment treaties in tax-related disputes (IV), before concluding (V). These issues are considered mainly through the prism of cases arising from tax measures in the energy and natural resources sectors, where investment arbitration appears to be of growing importance.

II. TAX MEASURES: DEFINITIONS AND TYPOLOGY

A State’s tax policy is at the core of its sovereign power. In principle, a State has the right to enact the tax measures it deems appropriate at any particular time. As noted by the tribunal in *El Paso v Argentina*, there is ‘a presumption of validity in favour of legislative measures adopted by a State’ and as noted by the tribunal in, the power to tax is ‘a core sovereign power that should not be questioned lightly.’ However, as noted by one scholar, in an investment dispute occasionally ‘the very legitimacy of [a] tax is

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4 Particularly in the energy and natural resources sectors, investment arbitrations may often be based on contracts (such as production sharing contracts) rather than investment treaties.


6 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 270.
put into question.\textsuperscript{7} There appears to be an increasing number of investors who attempt to challenge tax measures in the light of protections afforded to them by investment treaties. It has been argued that a regulatory and in particular fiscal risk is gradually replacing the classic ‘expropriation’ dimension of political risk and that it has become more challenging to detect the abuse of government powers against foreign investors.\textsuperscript{8}

Typically, even where BITs refer to ‘taxes’, ‘taxation’, or ‘taxation measures’, these terms remain undefined, which leads to uncertainty as to what types of measures are covered. One exception is the ECT, which defines ‘taxes on income or on capital’ as:

all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.\textsuperscript{9}

However, ‘taxes’ as such are not defined apart from denoting that ‘taxes’ do not include customs duties.\textsuperscript{10} Similarly, although NAFTA includes a positive definition of ‘taxes’ and ‘taxation measures’, it specifies to which taxation measures certain standards of treatment do not apply.\textsuperscript{11} As under the ECT, NAFTA denotes that ‘taxes’ and ‘taxation measures’ do not include customs duties.\textsuperscript{12}

In the absence of a (clear) definition of taxes and taxation, it will be up to a tribunal to determine the scope of these terms.\textsuperscript{13} While there is no single definition of what constitutes ‘tax’, there appears to be agreement that the term covers a sum that is due for something other than a particular benefit (service, right, or performance) to a public body for the general purpose of raising revenue based on a generally defined liability in law or regulations.\textsuperscript{14} As put in a lapidary manner, tax is ‘the payment of a debt established by law in favour of the public treasury (“the price we pay for civilization.”)’.\textsuperscript{15} However, as observed by the tribunal in \textit{Murphy v Ecuador}, not every mandatory payment made by


\textsuperscript{9} ECT, Article 21(7)(b).

\textsuperscript{10} ECT, Article 21(7)(d).

\textsuperscript{11} Article 2103(4)(b) of the NAFTA: ‘Articles 1102 and 1103 (Investment - National Treatment and Most-Favored Nation Treatment), Articles 1202 and 1203 (Cross-Border Trade in Services - National Treatment and Most-Favored Nation Treatment) and Articles 1405 and 1406 (Financial Services - National Treatment and Most-Favored Nation Treatment) shall apply to all taxation measures, other than those on income, capital gains or on the taxable capital of corporations, taxes on estates, inheritances, gifts and generation-skipping transfers and those taxes listed in paragraph 1 of Annex 2103.4.’

\textsuperscript{12} NAFTA, Article 2107.

\textsuperscript{13} Walde & Kolo, \textit{Investor-State Disputes}, 429.


a class of persons to the State for public purposes without direct benefit is necessarily a tax.16

Applying this general understanding, a tribunal may need to assess whether particular measures (which may or may not be denominated as ‘taxes’), such as fees (construed as payments for public service), contributions, or penalties will constitute tax measures for the purposes of a specific investment instrument.

For example, in EnCana v Ecuador, in the absence of a definition of ‘taxation measures’ in the underlying BIT, the tribunal held that there was no reason to limit the term to only those provisions of the law which impose a tax. Instead, it found that all aspects of a tax regime which go to determine how much tax is payable or refundable (whether by means of a tax deduction, allowance, rebate or otherwise) are part of the notion of ‘taxation measures’.17

Any determination of the term should be based on the ‘effect of the measure on the investment rather than the name given to it by the host government’18 and in particular taking into account whether it neutralises the investment or renders it unviable.

In the energy and natural resources sectors, a crucial consideration will be whether royalties, understood as special levies imposed in return for access to a State’s natural resources, constitute ‘taxes’. Royalties can be structured in various manners, for example they can be calculated according to the volume of resources extracted or they can take the form of a profit-based tax.19 Another question is that of windfall taxes, which are applied—at times retroactively—to claw back ‘excessive profits’ made by international companies.20

When considering the term ‘taxes’, it is important to determine whether the term will cover, for the purposes of a particular treaty, both direct and indirect taxes. Some investment treaties differentiate between these two groups. Such appears to be the situation under the ECT and NAFTA given that both carve out from their scope a number of direct taxes (e.g. taxes on total income or capital or elements thereof, taxes on estates, inheritances, gifts and generation-skipping transfers, or substantially similar

16 Murphy Exploration & Production Company – International v The Republic of Ecuador, UNCITRAL, Partial Final Award, 6 May 2016, para. 197.
17 EnCana Corporation v Republic of Ecuador, LCIA Case No. UN 3481, Award, 3 February 2006, para. 142.
19 Walde & Kolo, Investor-State Disputes, 429. See the recent case Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, and JSW Solar (zweif) GmbH & Co.KG v Czech Republic, UNCITRAL, Award, 11 October 2017 (unpublished; see Global Arbitration Review, ‘Czech Republic wins first solar case’, 13 October 2017, referring to a levy on solar producers revenue at the rate of 26%).
20 Noury, Bruton & Pan, Resource Nationalism, 1; Kolo, Fat Cats, 99; see also Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Government of Mongolia, UNCITRAL Award on Jurisdiction and Liability, 28 April 2011 (referring to a windfall tax of 68%), and cases against Ecuador brought by Perenco Ecuador Limited, Murphy Exploration & Production Company – International, Occidental Petroleum Corporation and Occidental Exploration and Production Company, and Burlington Resources Inc. (referring to a windfall tax of 99%).
taxes (excluding customs duty). As no indirect taxes are explicitly excluded, it may be
that these are covered in the ambit of the ECT and NAFTA.\textsuperscript{21} In \textit{EnCana v Ecuador}, in
the absence of a definition of ‘taxation measures’ in the underlying BIT, the tribunal held
that there was no reason to limit the term to direct taxation, and so indirect taxes (such
as value added tax (VAT)) were included.\textsuperscript{22}

Over the years, claimants have advanced claims in relation to various tax measures.
Tribunals have been asked to consider, among others, (the effects of) the following: export
duties,\textsuperscript{23} import taxes,\textsuperscript{24} rebates of excise duties,\textsuperscript{25} VAT refunds,\textsuperscript{26} changes to customs
duties and VAT exemptions,\textsuperscript{27} sales tax,\textsuperscript{28} tax on the value of production of electric
energy,\textsuperscript{29} extraction tax,\textsuperscript{30} windfall levies,\textsuperscript{31} royalties,\textsuperscript{32} tax reassessment in a corporate
restructuring,\textsuperscript{33} tax collection,\textsuperscript{34} arbitrary and unreasonable tax audits,\textsuperscript{35} exemption of

\textsuperscript{21} Walde & Kolo, \textit{Investor-State Disputes}, 430; see Article 21(3) of the ECT; Article 2103(4)(b) in
conjunction with Article 2103(1) of the NAFTA.

\textsuperscript{22} \textit{EnCana v Ecuador}, para. 142.

\textsuperscript{23} \textit{El Paso v Argentina}.

\textsuperscript{24} Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. \textit{v Republic of Albania}, ICSID Case No.
ARB/11/24, Award, 30 March 2015.

\textsuperscript{25} \textit{Marvin Roy Feldman Karpa \textit{v United Mexican States}}, ICSID Case No. ARB (AF)/99/1, Award, 16
December 2002.

\textsuperscript{26} \textit{EnCana v Ecuador; Occidental Exploration and Production Company v Republic of Ecuador}, LCIA Case No.
UN 3467.

\textsuperscript{27} \textit{Link-Trading Joint Stock Company v Republic of Moldova}, UNCITRAL, Final Award, 18 April 2002.

\textsuperscript{28} \textit{Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v Argentine
Republic}, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 and Award, 22 May 2007.

\textsuperscript{29} \textit{RREEF Infrastructure (G.P.) Limited and RREEF Fun-European Infrastructure Two Lux Sà r.l. v Kingdom of
Spain}, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016; \textit{Eiser v Spain; JSW Solar v Czech
Republic}.

\textsuperscript{30} \textit{Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v Bolivarian Republic
of Venezuela}, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010.

\textsuperscript{31} \textit{Perenco Ecuador Limited v Republic of Ecuador (Petroecuador)}, ICSID Case No. ARB/08/6, Decision on
Jurisdiction, 30 June 2011 and Decision on Remaining Issues of Jurisdiction and on Liability, 12 September
2014; \textit{Burlington Resources Inc. v Republic of Ecuador}, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June
2010 and Decision on Liability, 14 December 2012; \textit{Paushok v Mongolia}.

\textsuperscript{32} \textit{Conocophillips Petrozuata B.V, Conocophillips Hamaca B.V and Conocophillips Gulf of Paria B.V v Bolivarian
Republic of Venezuela}, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013.

\textsuperscript{33} \textit{Duke Energy Electroquil Partners and Electroquil S.A. v Republic of Ecuador}, ICSID Case No. ARB/04/19,
Award, 18 August 2008; \textit{Vodafone International Holdings BV v India}, UNCITRAL, PCA Case No. 2016-35
(pending).

\textsuperscript{34} \textit{Tza Tap Shum v Republic of Peru}, ICSID Case No. ARB/07/6, Award, 7 July 2011.

\textsuperscript{35} \textit{Feldman v Mexico; Spyridon Roussalis v Romania}, ICSID Case No. ARB/06/1, Award, 1 December 2011.
taxation,\textsuperscript{36} and the withdrawal of tax concessions or incentives.\textsuperscript{37}

One frequent issue before arbitral tribunals is the effect of a retroactive application of taxes. Such retroactive application can at times be seen, for example, with respect to windfall taxes on profits in the energy and natural resources sectors.\textsuperscript{38} It has been suggested that mere retroactivity may not be sufficient to establish a breach of an investment treaty. Rather, other factors should be taken into account, such as a host State’s constitutional principles regarding retroactivity, whether the retroactive legislation was merely a clarification, whether the change was arbitrary or illegal, whether due process was followed, and whether there was transparency in the decision-making process.\textsuperscript{39}

III. APPLICATION OF INVESTMENT TREATIES TO TAX MEASURES

It appears undisputed that States and foreign investors may agree to arbitrate tax issues.\textsuperscript{40} It has been remarked that ‘arbitrability, as such, does not exist’ in international investment arbitration, and accordingly any limitation as to what types of dispute may be submitted to arbitration will be governed by the treaty itself.\textsuperscript{41} However, a State may not necessarily be inclined to allow for comprehensive scrutiny of its tax policies, even if it is open to permitting a similar examination of other types of regulatory measures. On the grounds that fiscal policy is perceived as one of a State’s key prerogatives, many investment treaties (if they address tax-related matters in the first place, which is not always the case) contain some type of a tax carve-out or an exception regarding taxation matters.\textsuperscript{42}

Therefore, for an investor to bring a tax-related claim against a host State under an investment treaty, the treaty must be carefully analysed to assess whether an arbitral tribunal would have jurisdiction over the dispute and whether the standards of protection encompass tax treatment.

Some investment treaties do not refer to taxes or taxation at all,\textsuperscript{43} while some address whether and to what extent the treaty applies to such matters. In the absence

\textsuperscript{36} JSW Solar \textit{v} Czech Republic; Ampal-American Israel Corporation and others \textit{v} Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017; \textit{Autopista Concesionada de Venezuela, C.A. v Bolivarian Republic of Venezuela}, ICSID Case no. ARB/00/5, Award, 23 September 2003.

\textsuperscript{37} \textit{Antoine Goetz and others v Republic of Burundi (I)}, ICSID Case No. ARB/95/3, Award, 10 February 1999; Ioan Micula, Viorel Micula and others \textit{v} Romania (I), ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008 and Final Award, 11 December 2013.

\textsuperscript{38} Noury, Bruton, & Pan, \textit{Resource Nationalism}, 1.


\textsuperscript{41} Lazem & Bantekas, \textit{Treatment of Taxation}, 5.

\textsuperscript{42} Chaisse, \textit{Investor-State Arbitration}, 158.

\textsuperscript{43} See, for example, the Germany-Turkey BIT and the Switzerland-Turkey BIT. See M. de Melo Vieira, ‘The Regulation of Tax Matters in Investment Treaties: A Dispute Resolution Perspective’, in \textit{Dispute Resolution International} 8(1) (2014): 81-2 for arguments to exclude tax matters from the scope of investment treaties so that they would be regulated exclusively in tax treaties.
of any exclusions to the contrary, investment treaties in principle apply to tax-related matters, which in turn should be within a tribunal’s jurisdiction.

Investment treaties that explicitly refer to taxes or taxation more often than not do so either by excluding these from their scope of application or by limiting their application thereto; some treaties contain a combination of various constructs as summarised below.

a) General Exception (Tax Carve-out)

An exception may be of a general character stipulating that the provisions of an investment treaty shall not apply to tax matters. The tribunal in Quasar de Valores v Russia found that to interpret such a blanket exception as to ‘provide a loophole to escape the central undertakings of investment protection would be absurd. Complaints about types and levels of taxation are one thing. Complaints about abuse of the power to tax are something else.’ Similarly, the tribunal in RosInvest v Russia, when faced with arguments pertaining to a general exception, proceeded on the basis that it would ‘not consider an expropriation by way of taxation, but rather an expropriation by a cumulative combination of measures (…) of which taxation is only one.’

An argument based on that reasoning (that the imposition of tax itself is not the measure from which the dispute arose, but merely one of the actions that resulted in a breach of an investor’s rights under the treaty or that the host State’s actions were merely under the guise of taxation rather than bona fide taxation), has been raised by claimants in a number of cases. Several recent solar ECT cases against Spain provide good examples. In RREEF v Spain, the claimants did not deny that the 7% tax on the value of production of electric energy qualified as tax, but they claimed that it was not a bona fide tax and therefore the carve-out in Article 21 of the ECT did not apply (the claimants described the tax as a ‘sham that targets specifically renewable energy installations’ and ‘a tariff cut under the cloak of Taxation’). A similar argument was raised in Isolux v Spain and Eiser v Spain. In the latter case, the claimants contended that they did not challenge the tax in isolation, but rather as part of a pattern of measures that deprived them of the rights...


45 Amco Asia Corporation and others v Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding, 10 May 1988, para. 124.

46 Article 28(1) of the Norway Model BIT: ‘Nothing in this Agreement shall affect the imposition, enforcement or collection of direct or indirect taxes imposed by a Party’; see also Article 11(3) of the Denmark-Russia BIT and Article 8(2) of the Hong Kong-New Zealand BIT.


49 RREEF v Spain, paras 189-94.

50 Isolux Netherlands, BV v Kingdom of Spain, SCC Case V2013/153, Final Award, 17 July 2016, paras 311, 314.

51 Eiser v Spain, para. 258; see also recent Resolute Forest Products Inc. v Government of Canada, PCA Case No. 2016-13, Claimant’s Rejoinder Memorial on Jurisdiction, 3 May 2017, para. 141; Yukos Universal Limited (Isle of Man) v The Russian Federation, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014, para. 1379.
to which their solar plants were entitled under Spanish legislation.\(^5^2\)

Potentially to avoid any arguments regarding the taxation carve-out in the ECT, the claimants in *JSW v Czech Republic* complaining of, among others, tax on the electricity output of solar power plants, decided to rely solely on the Germany-Czech BIT (which does not appear to include any exceptions regarding taxes) and did not invoke the ECT (which was invoked in all other six solar cases against the Czech Republic). The claims were recently dismissed.\(^5^3\)

b) **Standard-specific Exceptions**

Some treaties limit their application to tax measures with respect to particular standards of protection.

1. **Non-discrimination Standards**

Most commonly, the exception regarding tax measures pertains to non-discrimination standards of protection. For example, the Turkish Model BIT contains an exclusion with respect to the application of a most favoured nation clause to taxation.\(^5^4\) Many treaties contain exclusions with respect to both national treatment and most favoured nation treatment clauses.\(^5^5\)

The reasoning behind a carve-out pertaining to non-discrimination standards is to enable the State to enter into new treaties or adopt new legislation providing better tax treatment for third State or domestic investors than the one afforded to foreign investors of the other Contracting State, and to uphold the status quo of its pre-existing investment agreements with investors.\(^5^6\)

2. **Fair and Equitable Treatment**

Some treaties contain exclusions with respect to fair and equitable treatment and full protection and security.\(^5^7\)

Other treaties indicate that the contracting parties ‘should strive to accord fairness and equity with respect to their tax policies.’\(^5^8\) Tribunals differ in their interpretation

\(^5^2\) *Eiser v Spain*, para. 264.

\(^5^3\) *JSW v Czech Republic* (Award of 11 October 2017 is unpublished, but reported in Global Arbitration Review, ‘Czech Republic wins first solar case’, 13 October 2017).

\(^5^4\) Article 3(4)(a) of the Turkish Model BIT (2009): ‘The Provisions of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege which may be extended by the former Contracting Party by virtue of any international agreement or arrangement relating wholly or mainly to taxation.’

\(^5^5\) Article II(4)(b) of the Turkey-Bulgaria BIT: ‘The provisions of this Article shall not apply to any advantage accorded to investors of any third Country by the other Contracting Party based on (...) agreements relating mainly or wholly to taxation.’; see also Article 3(4) of the Bulgaria-Turkey BIT; Article 7(b) of the Poland-Turkey BIT; Article 7(b) of the Turkey-UK BIT; and Article 3(4) of the Serbia-Turkey BIT, as well as Article 4(4) of the Model Belgium/Luxembourg BIT and Article 4 of the Model France BIT.


\(^5^7\) See Article 3(3)(b) of the Netherlands-Turkey BIT and Article 3(3)(b) of the Denmark-Turkey BIT.

\(^5^8\) Article X of the China-Turkey BIT: ‘With respect to its tax policies, each Contracting Party should
of such non-mandatory language, in particular whether it results in legally binding obligations to provide fair and equitable treatment with respect to tax matters. International arbitral practice is split on this matter with some tribunals holding that such language merely includes a best-efforts commitment, while others indicating that such wording results in an obligation that is no different from the obligation to accord to investments fair and equitable treatment.

c) Claw-backs

Some treaties stipulate that while the treaty does not apply to taxes, certain specific standards of protection shall apply to such matters. Presumably, e contrario, standards of protection other than the ones expressly singled out (‘clawed back’) do not apply to taxes.

One example of such an approach is contained in Article 21 of the ECT, which includes a carve-out for ‘Taxation Matters’ and a claw-back for most favoured nation and national treatment clauses, which ‘shall apply to Taxation Measures’ (again, with specified further exceptions), as well as for protection from expropriation, which ‘shall apply to taxes’. This combination of a carve-out, claw-backs, and further exceptions to claw-backs was compared by one author to a Russian nested doll (matryoshka). Similar constructions are used in Article 2103 of NAFTA and Article 3(4)(a) of the Association of South-East Asian Nations Comprehensive Investment Agreement.

d) Joint Tax Consultation or ‘Tax Veto’

Some treaties envision joint consultation on tax measures of the relevant tax authorities. With respect to protection from expropriation, Article 2103(6) of NAFTA includes a provision referred to as a ‘tax veto’. As far as protection from expropriation applies to taxation measures, before submitting a claim to arbitration, an investor shall refer the issue of whether the measure is an expropriation for determination to the tax authorities of its home and host State for joint determination. If the competent authorities do not agree to consider the issue or fail to agree that the measure is not an expropriation, the investor may submit its claim to arbitration.

It follows that if the tax authorities of an investor’s home and host State jointly determine that the taxation measure complained of does not constitute expropriation,
the investor is deprived of recourse to arbitration.\textsuperscript{65} The mechanism has been criticised as depriving investors of the opportunity to have disputes resolved in a neutral forum – which is the primary reason investors seek to rely on investment treaties.\textsuperscript{66}

However, it appears that to date this mechanism has rarely been used to preclude jurisdiction over tax-related (aspects of) disputes.\textsuperscript{67} In a decision on bifurcation, the tribunal in \textit{Resolute Forest Products v Canada} decided to hear Canada's objection as to the claimant's non-compliance with the procedure under Article 2103(6) of NAFTA as one of the preliminary questions.\textsuperscript{68} The claimant argued that the procedure would not apply since it was not arguing that Canada used taxes to expropriate, but rather that tax measures were one element of many measures effecting a constructive expropriation of the claimant's investment, in which scenario the claimant was not required to refer the issue to the tax authorities prior to arbitration.\textsuperscript{69}

Article 21(5) of the ECT includes a similar mechanism. However, unlike a NAFTA tribunal, an ECT tribunal 'may take into account any conclusions' of the competent tax authorities as to whether the measure is expropriatory, although it is not bound by these under Article 21(5)(b)(iii) of the ECT. A determination as to whether the measure is discriminatory, on the other hand, 'shall' be taken into account.\textsuperscript{70}

Reference was made to this mechanism of 'joint tax consultation' by competent tax authorities in both \textit{Plama v Bulgaria} and \textit{Yukos v Russia}. Although it may be considered a subject of debate as to whether the procedure forms a prerequisite to submitting the claim to arbitration, in both cases the tribunals held that the claimants' non-compliance with the procedure should not deprive them of the tribunals' jurisdiction.\textsuperscript{71}

Again, recent solar ECT cases against Spain provide good examples. While in \textit{RREEF v Spain}\textsuperscript{72} the tribunal decided to join Spain's objection based on Article 21 of the ECT to the merits of the case, both \textit{Isolux v Spain} and \textit{Eiser v Spain} included a discussion


\textsuperscript{66} Walde & Kolo, \textit{Coverage of Taxation}, 351; Kolo, \textit{Tax Veto}, 481-3.

\textsuperscript{67} In \textit{Feldman v Mexico}, one out of three measures complained about was deemed expropriatory by the tax authorities and the tribunal declined jurisdiction over that measure (\textit{Feldman v Mexico}, para. 116). In \textit{Archer Daniels Midland}, \textit{Cargill}, and \textit{Corn Products}, three cases against Mexico relating to the same tax, the competent authorities of the United States and Mexico failed to agree that the measure was not an expropriation (\textit{Cargill, Inc. v United Mexican States} (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009, paras 16-7).

\textsuperscript{68} \textit{Resolute Forest Products v Canada}, Procedural Order No. 4 re Decision on Bifurcation, 18 November 2016, para. 5.1.

\textsuperscript{69} \textit{Resolute Forest Products v Canada}, Claimant's Rejoinder Memorial on Jurisdiction, 3 May 2017, para. 141. At the time of writing this contribution, the tribunal has not issued its decision on jurisdiction.

\textsuperscript{70} Ozgur, \textit{Taxation of Foreign Investments}, 58.

\textsuperscript{71} \textit{Plama Consortium Limited v Republic of Bulgaria}, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 266 (the tribunal pointed out that the claimant did not follow the procedure to refer the issue to competent taxation authorities, but still shortly dealt with the question before it); \textit{Yukos v Russia} paras 1406, 1429 (the tribunal held that any referral to the competent taxation authorities 'would clearly have been futile' and was therefore not required).

\textsuperscript{72} \textit{RREEF v Spain} (case is pending at the time of writing this contribution).
of Article 21(5) of the ECT and seemingly the tribunals came to divergent conclusions.

In *Isolux v Spain*, the parties disagreed whether the procedure is mandatory and whether it must be undertaken prior to commencing arbitration, as well as whether the conclusions of the competent tax authorities are binding on the tribunal.73 The tribunal found that while Article 21(5) of the ECT does not allow a tribunal to find a claim of expropriation inadmissible simply by reason of the claimants’ non-compliance with the joint tax consultation procedure, the tribunal cannot examine such claims without providing the competent tax authorities time to reach conclusions on the matter.74

Conversely, in *Eiser v Spain*, the tribunal found that the expropriation claim was inadmissible because the claimants did not refer their claim to the competent tax authority as required under Article 21(5) of the ECT and rejected the claimants’ argument that such a referral would be futile and that their non-compliance could thus be disregarded.75 The tribunal analysed two communications made by the claimants and considered that neither fulfilled the requirements of a referral. The first note, although addressed to the competent tax authority (the Minister of Finance), did not refer to the ECT, let alone to Article 21(5) of the ECT. The second note was addressed to the President of the Government, which the tribunal deemed unlikely to constitute a competent tax authority within the meaning of Article 21 of the ECT, and the note itself (requesting consultation under Article 26 of the ECT) was deemed insufficient to inform the reader that the investor was requesting a joint tax consultation in line with the procedure under Article 21(5) of the ECT.76

The question regarding the character of the procedure under Article 21(5) of the ECT is important enough that in the course of the recent *Yukos* recognition and enforcement proceedings, the Paris Court of Appeal invited the parties to opine on the possibility of requesting a preliminary ruling from the Court of Justice of the European Union (CJEU) in accordance with Article 267 of the Treaty on the Functioning of the European Union as to whether the procedure in Article 21 of the ECT pertains to jurisdiction or admissibility; whether it is mandatory; and whether it can be discarded if the aim of the tax measure is another one than to raise taxes.77 However, the *Yukos* shareholders recently decided to withdraw from enforcement proceedings in France.78 As a result, the Paris Court of Appeal will not request a preliminary ruling from the CJEU and the latter will not have an opportunity to pronounce on this issue (which

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73 *Isolux v Spain*, para. 326. Ultimately, when the arbitration was already pending, the claimant referred the dispute to the General Tax Directorate, which concluded that the disputed tax was neither expropriatory nor discriminatory.

74 *Isolux v Spain*, para. 758.

75 *Eiser v Spain*, para. 295.


77 *Yukos v Russia*, Judgment of Paris Court of Appeal, 27 June 2017, para. 71: ‘La procédure de saisine des autorités fiscales prévue par l’article 21 du TCE est-elle une règle concernant la compétence du tribunal arbitral ou une condition de recevabilité de la requête d’arbitrage? Est-elle obligatoire ou facultative? Peut-elle être écartée lorsqu’il est allégué que les mesures fiscales litigieuses poursuivent un but étranger au recouvrement de l’impôt?’.

would be of importance to any future case brought under the ECT with respect to tax measures).

e) Conflicts Rules

There are a few treaties which introduce a conflicts rule by stating that as far as an investment treaty applies to tax matters, any tax convention will take precedence over the provisions of the investment treaty.79

IV. TAX MEASURES AND INVESTMENT PROTECTION STANDARDS

Given the character of taxation as a set of measures of general application, the question as to whether and to what extent these can amount to a violation of an investment treaty goes hand in hand with issues encountered more generally with respect to other regulatory measures taken by a host State.

Tax measures affecting investors and their investments are likely to be enacted by a State’s parliament, implemented by tax ministers or tax authorities, as well as reviewed and approved of or struck down by courts. Legislative measures and decisions issued by tax ministers and the courts are attributable to a State under international law. With respect to tax authorities, in Oostergetel v Slovak Republic, the tribunal held that the Slovak tax authorities were State organs and as such their conduct was attributable to the Slovak Republic under Article 4 of the ILC Articles on State Responsibility.80

Based on international arbitral practice, the standard of protection most commonly invoked by investors as potentially violated by a host State’s tax measures is protection from expropriation. One reason for this may be that, as seen in section III above, it often is the only standard of protection which will apply to tax measures.81 Other relevant standards are the fair and equitable treatment82 and non-discriminatory standards of protection (national treatment and most favoured nation clauses).83 In this contribution, we focus on tax measures and protection from expropriation.

79 Article 21(4) of the US Model BIT: ‘Nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Treaty and any such convention, that convention shall prevail to the extent of the inconsistency’; see also Article 3(3) Mexico-South Korea BIT. Many States concluded treaties whose primary goal is to address taxes (for example double taxation or fiscal evasion treaties) rather than promote and protect investments as is the case with investment treaties – see in more detail in R. Cordara & L. Nowak, ‘Taxation and Investor State Disputes’, in Plucking the Goose: A Century of Taxation from the Great War to the Digital Age, (ed.s) R. Cordara et al., (Tolley Publishing Co. Ltd, 2016) 115-8.

80 Jan Oostergetel and Theodora Laurentius v Slovak Republic, UNCITRAL, Final Award, 23 April 2012, para. 152.

81 Walde and Kolo, Investor-State Disputes, 424, 441.

82 For a successful claim under fair and equitable treatment due to tax measures see e.g. Oxus Gold plc v Republic of Uzbekistan, UNCITRAL, Final Award, 17 December 2015, para. 827; Occidental v Ecuador (I), paras 184-7.

83 For successful claims under non-discriminatory standards due to tax measures see e.g. Feldman v Mexico, paras 165, 188; Occidental v Ecuador (I), paras 173-4; Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v Mexico, ICSID Case No. ARB (AF)/04/5, Award, 21 November 2007, para. 304.
Although there is consensus that taxation in principle does not constitute expropriation,\(^{84}\) it has been acknowledged that taxation may amount to expropriation in certain circumstances.\(^{85}\) In *Quasar de Valores v Russia*, the tribunal noted that if the ostensible collection of taxes is determined to be part of a set of measures designed to effect a dispossession outside the normative constraints and practices of the taxing powers, those measures are expropriatory.\(^{86}\) Similarly, in *Ryan v Poland*, the tribunal noted that the guise of taxation will not save the host State from liability for actions based on an abuse of tax laws if they result in the total loss or substantial impairment of an investment and, as such, are tantamount to expropriation.\(^{87}\)

Typically, investors complain about ‘confiscatory taxation’ (‘fiscal expropriation’ or ‘expropriatory taxation’), whereby tax measures, including penalties and interest accrued on unpaid amounts allegedly due by investors, some of which are retroactively assessed, are put in place and cumulatively amount to confiscation or appropriation of an investor’s property.\(^{88}\)

Tax measures are most often considered in the framework of indirect expropriation.\(^{89}\) In particular, it has been claimed that certain tax measures, such as windfall taxes or revocation of contractually conceded investment incentives, can be escalated to the level of what is the economic equivalence of expropriation.\(^{90}\)

However, the threshold required to convince a tribunal that finding expropriation has occurred appears to be high. As noted in *Encana v Ecuador*, only if a tax law is extraordinary, punitive in amount or arbitrary in its incidence would issues of indirect expropriation be raised.\(^{91}\) In *Burlington Resources v Ecuador*, the tribunal found (by a majority) that a windfall tax of 99% of oil revenues above a reference price, while considerably diminishing the claimant’s profits, did not amount to a substantial deprivation of the value of the claimant’s investment.\(^{92}\) The tribunal in *Link Trading v Moldova* noted that fiscal measures become expropriatory only when they are found to be an ‘abusive taking’, which the tribunal explained as the State acting unfairly or inequitably towards the investment, adopting measures that are arbitrary or discriminatory in character or in their manner of implementation, or where the measures violate an obligation undertaken

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85 Feldman v Mexico, Award, 16 December 2002, para. 103, where ‘confiscatory taxation’...is listed among a number of ‘expropriatory actions.’
86 Quasar de Valores v Russia, para. 48.
87 Vincent J. Ryan, Schooner Capital LLC and Atlantic Investment Partners LLC v Republic of Poland, ICSID Case No. ARB(AF)/11/3, Award, 24 November 2015, para. 472.
89 Feldman v Mexico, para. 101.
90 Walde & Kolo, *Coverage of Taxation*, 309.
91 Encana v Ecuador, para. 177; see also Tea Tap Shum v Peru, para. 181.
by the State in regard to the investment.93

Frequently, expropriation tax claims are unsuccessful, i.e. a tribunal finds it has no jurisdiction to hear a claim, the claim is deemed inadmissible, or the case is dismissed on its merits.94 However, there have been several cases, often pertaining to the energy and natural resources sectors, where tribunals found there to be expropriation by means of tax measures:

In Revere v OPIC, a contract-based dispute over the imposition of a bauxite tax, the tribunal found that the tax was contrary to the applicable stabilisation clause, and held that the claimant’s property was expropriated.

In Goetz v Burundi, a dispute under the Belgium/Luxembourg-Burundi BIT over withdrawal of tax and customs exemptions relating to production of precious metals, the tribunal held that the measure resulted in indirect expropriation.95

In both Quasar de Valores v Russia and Yukos v Russia, two disputes under the Russia-Spain BIT and the ECT, respectively, over arrests, tax reassessments, fines and other measures relating to the claimant’s interest in an oil company (Yukos), the tribunals held that Yukos’ tax delinquency was a pretext for seizing its assets and that the State’s real goal was to expropriate Yukos and not to collect taxes legitimately.96

In Ampal-American v Egypt, a dispute under both the Egypt-US BIT and the Egypt-Germany BIT over revocation of tax exemptions relating to the claimants’ investments in a consortium that held a long-term gas supply contract, the tribunal held that Egypt’s decision to remove the consortium’s tax-free status constituted a direct and total taking of a discrete investment protected by the treaty and was tantamount to expropriation.97

V. CONCLUSION

Taxation is an important tool in the hands of States to shape their policies. In recent years, various tax measures (such as windfall taxes or capital gains taxes) have affected foreign investors in particular in the energy and natural resources sectors. In case of tax-related disputes foreign investors may attempt to pursue remedies through investment arbitration. Such claims may be brought under investment treaties, foreign investment laws, or investment agreements. Investors appear to be more conscious of this potential recourse, in particular in the energy and natural resources sectors.

However, such claims may not be straightforward. Taxation is addressed in investment treaties in varying manners and there is no single answer as to whether and to what extent disputes arising from tax measures may be addressed in investment arbitration. Although some claimants have been successful in tax-related investment claims, to date, the rate of success for such cases is not very high. It remains to be seen

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93 Link- Trading v Moldova, para. 64.
94 Ibid.; Paushok v Mongolia.
95 Goetz v Burundi (I), para. 124.
96 Quasar de Valores v Russia, para. 177; Yukos v Russia, paras 756, 1406.
97 Ampal-American v Egypt, paras 179, 183.
whether claimants in numerous pending solar ECT claims against Spain and the Czech Republic will convince the tribunals not only that tax-related claims are within their jurisdiction and are admissible, but also that the underlying tax measures constitute a violation of the ECT. Similarly, adverse tax measures which have been imposed recently by various States (in particular, but not exclusively, in Africa)\(^9\) and which have begun to yield investment disputes are, for the most part, yet to reach their conclusions.

Investors are well advised to review investment protection available to them and potentially consider timely restructuring of their investments to avail themselves of treaties that may be more favourable in terms of protection against tax measures.

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\(^9\) See for example Tanzania’s recent amendment to its mining laws increasing royalties tax on gold and other minerals (Reuters, ‘Tanzania’s president signs new mining bills into law’, 10 July 2017).