Virtual Workshop Series: "Globalization and Digitalization – Interconnections between taxation, trade and investment"

-Summary-

Reporters: Juliana Cubillos and Marius von Frankenhorst[1]

From June 3rd to July 1st, a series of 5 virtual Workshops on "Globalization and Digitalization – Interconnections between taxation, trade, and investment" took place, bringing together participants from academia as well as the public and private sector. The program for all 5 virtual workshops is available here. The workshop series was jointly organized by the ERC Project GLOBTAXGOV Leiden University in cooperation with the Council on Economic Policies, the Asia Pacific FDI Network, and the School of Law of the City University of Hong Kong. It aimed to explore the interconnections between taxation, trade, and investment in terms of the respective governance regimes, but also for instance concerning the different dispute resolution mechanisms and their implications for domestic legal provisions.

Session 1: Importance of Domestic Law for the Interpretation of Tax, Trade, and Investment Treaties (03.06.2021)

Considering the overarching of the workshop series, the participants of the first session, held on June 3rd, discussed the importance of Domestic Law for interpreting tax, trade, and investment treaties. This workshop's session comprised of six presentations, each followed by a short round of discussion open to all participants.

Following an introduction by the session's moderator Irma Mosquera Valderrama (GLOBTAXGOV), Pedro Schoueri (Tax Lawyer Brazil) started the presentations with a foray into the Implications of trade and investment treaties for the application of domestic tax provisions. Drawing on the real-world examples of the Argentinian Financial Services vs. Panama[2] and the Micula[3] cases, he outlined how GATS and investment treaties impact domestic tax provisions, and how different (legal) frameworks and standards pose challenges in this regard. Some of the challenges identified during the presentation concerned the need to align the terminology used for national and international tax standards while considering the standards and commitments made through the GATS and investment treaties. In doing so particular attention must be paid to the exceptions available and the existence of non-uniform terminology (i.e. leveling the playing field as justification for tax presumptions).

He was followed by Wolfgang Alschner (University of Ottawa), who proposed the specific conceptual frame through which the international tax, trade, and investment regimes view multilateralism as a tool to navigate their respective reform analogies. He argued that all three regimes remain stuck in their respective framing of multilateralism, thereby constituting a challenge for area-bridging dialog and/or reform. In his view, this challenge could be overcome if the three areas are conscious about the different frames through which their counterpart(s) view(s) multilateralism. In the third presentation, Anna Marhold (Leiden University) analyzed the Successes and Drawbacks of the WTO Dispute Settlement System. While acknowledging that the WTO system constitutes one of the most successful dispute settlement systems in public international law, she also brought the currently dysfunctional appellate body to attention; the following discussion showcased that this challenge to the WTO system could both be understood as being of systemic and/or of political nature.

After a short break, the second round of presentations began with Paula Baldini (Leiden University) discussing the lessons learned from the Investment Dispute Settlement System (ISDS), and their implications for possible reform ideas. She concluded that none of the currently discussed reform options were perfect and that States should think about how taxes affect their own economic autonomy, and how this relates to the ISDS. She was followed by Toni Marzal (Faculty of Law, University of Glasgow) and Ricardo García (Faculty of Law, Tilburg University), who discussed their ongoing research into the legal Proportionality Principle in EU Tax, WTO, and Investment Law. A key takeaway was that the two diverse characteristics (functionalism/instrumentalism vs. universality) of proportionality render the principle awkward in the context of taxation, but also that there is nothing inevitable about proportionality as a legal practice/concept, or form of reasoning. The final presentation was held by Javier Garcia Olmedo (Queen Mary University of London), who asked whether fragmentation is necessary in the context of the Investment and Tax Dispute Settlement Reforms. Citing the risk of fragmentation between these two systems potentially leading to "forum-shopping", he concluded that Policymakers should be striving to arrive at a more comprehensive approach to dispute resolution through the ongoing reforms.

Session 2: Digital Taxes and Trade in Services (10.06.2021)

On June 10th, the participants convened for the second session of the virtual seminar series. Moderated by Hildegunn Kyvik Nordås (Council on Economic Policies), the workshop focused on the topic of how classic principles of income taxation need to be updated in the face of ever-increasing digital economic activities, a development that has only picked up speed in light of the still ongoing COVID-19 pandemic. The workshop is comprised of 2 sections, the first one is made up of three presentations and a keynote, before moving to a panel discussion with all participants.

David Bradbury from the OECD[4] started out the session with a keynote on the tax challenges arising from the digitalization of the economy, specifically in regard to the taxation of digital services. While projecting that the BEPS project held the potential for significantly increasing global income tax revenue especially considering its further developments through pillars one and two. Although, he warned that the current lack of a comprehensive agreement on digital taxation within the Inclusive

Framework could have several negative consequences, such as an increased risk of double-taxation for MNE's and a subsequently deteriorating investment climate. In his opinion, the current stalemate had already led to increased dissatisfaction and the appearance of unilateral actions in the form of digital service taxes, underlining the importance of reaching an agreement soon.

As first speaker Wei Cui (University of British Columbia) outlined three puzzles in international tax cooperation from a trade and services perspective. Throughout his analysis, he states that the often-cited claim that Mode 1 (Cross-Border-Supply) services increasingly being substituted by their Mode 3 (Commercial Presence) is currently not backed up by real-world evidence from the 5 biggest service economies. Furthermore, he stressed that persisting warnings about a surge in global "trade-wars" were puzzling since all current trade wars were initiated by the same country. Finally, he questioned the reasons to view as negative to raise taxes unilaterally targeting specific MNE's, whereas countries raising taxes on all foreign MNE's did not meet such criticism.

The next presentation was held by Weiwei Zhang (Sidley Austin LLP), who discussed Digital Services Tax and Trade in Services from an international trade law perspective. She found that unilateral DST's as a measure affecting trades in services were often perceived to be inconsistent with international taxation norms, as exemplified by unilateral countermeasures such as the US's Section 301 investigation. To mitigate similar further disputes, she argued that there is a need for a multilateral agreement under the inclusive framework of BEPS which should clarify and update the relevant exemptions under the GATS.

Following this presentation, Mattias Bauer (European Centre for International Political Economy) contemplated the existing myths & misconceptions about Pillars 1 and 2. He argued that there should be no special tax on digital companies or business models, as this would deflect capital from companies and thereby infringe upon their capability of innovation and subsequently stimulating the overall economy. Furthermore, he argued that effective corporate tax rate US-American MNE's indicated that digital companies were in fact not undertaxed, as is often claimed. Likewise, he disputed that not introducing a digital services tax in the EU would erode the social capital in the region due to an increased feeling of inequality, stating that corporate income tax in Europe has instead been continuously on the rise since the 1990s.

Session 3: The Settlement of Tax and Tax Treaty Disputes by the International Courts and Tribunals (17.06.2021)

On June 17th, the participants gathered to discuss the settlement of Tax and Tax Treaty disputes by international courts and tribunals. Julien Chaisse (School of Law, City University of Hong Kong & President, Asia Pacific FDI Forum) moderated the session. In this opportunity, the session was divided into four sub-sessions each concerning one main speaker and two discussants. The first of which covered tax matters being challenged at Investor-State Dispute Settlement Tribunals (ISDS).

To give an overview of this matter Prabhash Ranjan (South Asian University, New Delhi) selected the cases Vodafone vs India and Cairn Energy vs India as examples[5]. In both cases, investors departed from the conception that tax measures are like any other regulatory measure adopted by states. Therefore their adoption could derive from a breach of BITs and consequently be challenged at ISDS[6]. Contrastingly Ranjan explained that it was equally impossible to exclude tax measures from being addressed in Investor-State dispute settlements. Thus tax matters concern the policy powers of a State and as such an unsupervised exercise of that power might derive into non-compensation in cases of deprivation of foreign investment. Based on Cairn's decision the speaker noted that by addressing the application and implementation of a tax measure, instead of its sole existence, the tribunal endorsed the possibility to challenge the conduct of the State as a breach of BIT substantive obligations. He questioned as well whether the absence of tax excluding measures within a BIT, would still refrain an arbitral tribunal from adjudicating over a taxation measure if it has been applied or implemented in a proportionate manner.

Following up the discussion, Blazej Kuzniacki (PwC Poland) questioned the possibility to use the proportionality argument made by the Court of Justice of the European Union (CJEU) when assessing the suitability of anti-tax avoidance measures with the principle of legal certainty. The former, since for the Court had pointed out that the proportionality of a measure should be assessed in regards to its content, which had to be clear, precise, and predictable enough to determine the rule's scope in advance with sufficient accuracy. Hence, respecting the principle of legal certainty.

As second discussant Noam Zamir (Catholic University of Lyon) questioned whether for investment and trade purposes there is a difference between a case of nationalization of a given industry and another in which a tax nominal rate is applied over income, regardless of the outcome in both contexts amounts to the same result. Also, whether proportionality should be considered as a condition for the lawful exercise of the policy power doctrine.

The second speaker of the session was Luca Rubini (School of Law, Birmingham University) discussing the settlement of tax disputes by the World Trade Organization (WTO). He highlighted that there are topics, which concern both tax aspects and other economic and non-economic challenges of our time[7], which make the intersection between trade and taxes greater than expected. In his opinion broad statements on the fact that governments are sovereign to define their tax policies disregard that the design and enactment of those policies can surely overlap on trade obligations. Moreover, the inherent instability and complexity of tax measures potentially increase the uncertainty of the legal tests used, which in turn provides for detailed scrutiny in regards to the motivation and application of those rules vis-à-vis trade law commitments[8]. Equally contestable can be the legal formality attributed to the tests with which the measures are being observed since they are supposed to elucidate the substantive element of economic sciences through their formal prescription. However, it is acknowledged that trade laws interfere with domestic tax regulations mostly in a negative way, as they suppose restrictions on the motivation or articulation of those measures.

Peter Van den Bossche (World Trade Institute) supported the speaker's views and supplemented them by mentioning there are gaps in the trade law regulations that could contribute to close the mismatches present between trade and tax common subjects. Specifically referring to border taxation he highlights the absence of clear rules to define the origin of a product subject to border taxes. As well, identifies that the moratorium on the application of customs duties upon digitally transmitted services might be finding its end in the near future, by virtue of the lack of support to be given by developing nations.

James Nedumpara (Centre for International Trade and Investment Law, Indian Institute of Foreign Trade, New Delhi) noticed that trade agreements lack provisions concerning direct taxation. He questions whether nations are not willing to touch base on direct tax matters in connection with trade legislation. Also considers that there is room for developing more detailed rules regarding direct taxation, specifically in those matters that relate to trade agreements, for instance when related to border transactions involving products categorized by virtue of their origin or intrinsic qualities (i.e. embedded products).

Continuing the session Advocate General Julianne Kokott (Court of Justice of the European Union) provided guidance on how to identify the powers and limits of the authority of the Court of Justice of the European Union (CJEU) based on the type of legislation being referred to. Kokott identifies that although the Court has no jurisdiction under article 234 of the Treaty establishing the European Community (EC) to rule on possible infringements of the provisions of bilateral conventions designed to mitigate or eliminate double taxation, it can interpret those agreements while acting as a court of arbitration.[9] Yet arriving at this result requires two-member states' acquiescence to submitting a request before the Court. In contrast, the basic freedoms are not a remedy against double taxation, since the member states remain autonomous to determine their own tax systems. Moreover, the court does not lay down criteria for the attribution of competence between the member states regarding the elimination of double taxation. If the court wanted to fix double taxation in the name of protecting the freedoms then the way to do so would be to eliminate the power of member states to establish taxes and allocate taxing powers to one state or the other. Alternatively, divide taxing powers between the member states. However, such an outcome would not take place as states around the world consider that the determination of their tax system is part of their sovereign power. Aligned with this consideration, in Kokott's opinion, the CJEU is aware that the meaning to be given to legal texts depends greatly on the meaning given to those by international organizations and other courts[10]. And with this awareness, it is possible to address tax, trade, and investment matters from a multidisciplinary perspective.

Regarding the presentation Matteo Vaccaro-Incisa (European University Institute) commented on the ability shown by the CJEU to fulfill its role as arbitral tribunal by funding its decisions on international public law, when dealing with issues that, although concerning member states, were connected with the interpretation of international conventions or bilateral treaties. Also, praises the caution shown by the Court when interpreting those international provisions through the general principles of public international law instead of adopting an upfront attitude in their interpretation. The second commentator, Vasyl Chorny (Deloitte Netherlands), noted there is a difference between the way in which the Court deals with double taxation on the basis of indirect and direct taxes. He questions whether pleading to single taxation more often could align these differences.

To conclude the session Céline Braumann (Faculty of Law, University of Vienna) talked about the settlement of tax treaty disputes by the International Court of Justice (ICJ). It must be mentioned that as of today the ICJ has never heard of any double tax treaty disputes, therefore the consideration provided departed from the hypothetical existence of such a case. First, when dealing with the jurisdiction of the ICJ to decide on tax treaty disputes it is mentioned that only states have the prerogative to be parties in the cases decided by the Court, a feature that might be overcome by invoking diplomatic protection on nationals, yet considering that the access to double tax treaties is provided based on residence, it might be troublesome for taxpayers to make that fits these initial requirements. However, on the side of the scope of disputes that could be addressed by the ICJ, there is no specific limitation hindering the Court from knowing about international tax matters, as long as they concern the interpretation of a treaty or refer to questions of international law. Regarding the effects of the ICJ involvement in double tax treaty disputes, it was acknowledged that it could be desirable in order to attain a level of harmonization or clarification of the interpretation to be given to these treaties. The former will perhaps increase the consistency between international law and the domestic application of double tax treaties. To conclude Céline Braumann identifies that despite the possibility of accessing the ICJ to decide upon double tax treaty disputes it is unlikely that states would choose this option claiming the protection of their tax sovereignty. Moreover, there is a general stagnation on the number of compromissory clauses for the ICJ jurisdiction on matters that do not relate to taxes, which signals a reticence of states to disclose international matters before the ICJ.

Reflecting on the presentation Leila Choukroune (School of Law, Portsmouth University) identifies that beyond sovereignty there is a question of justiciability, which implies deciding upon the functions and rules to be used in discerning about international law matters in general and towards each discipline in particular. The commentator quotes Sir Hersch Lauterpacht[11] to argue that international dispute settlement is an odd figure when concerning matters representing a vital interest for the state or imply issues of honor. Therefore, in the commentator's opinion, it is unlikely for the ICJ to be involved in discussing international tax issues. As second commentator Michael F. Motala (University of Toronto) follows up on the desirability of the ICJ knowing about international tax issues calling for a clear rationale for the Court to get involved in deciding about international tax matters. For this commentator, the idea of involving the ICJ should be guided into the desirability to cover a specific topic, which might be protecting investors' rights or providing them with certainty, alternatively solving a persisting issue such as tax avoidance by multinationals. Motala reflects on another level of complexity that might arise if the ICJ decided on international tax matters, as the interpretation given to the tax rules might collide with that of other courts.

Session 4: Tax Incentives for Investment. Old and New Challenges for International Trade – June 24 (24.06.2021)

On June 24th, the participants joined the fourth session of the workshop, guided by Agustin Redonda (Council on Economic Policies) as moderator. In this opportunity, four speakers gave their insights on the effects of tax incentives on investment. The session opened with the presentation of Pasquale Pistone (International Bureau of Fiscal Documentation) providing the legal constraints and the context in which tax incentives operate. In this regard, it was clarified that the introduction of tax incentives reduces the tax burden and contributes to the recognition of certain economic behaviors as more desirable than others. Normally these incentives endorse regulatory purposes, however distort equality at a national level. Thus, constitutional justifications are argued for their introduction. However, even if the impact at a national level can be seen as proportional, this is not the case when entering the cross-border scenario. At this level, the introduction of tax incentives might result in both intended and un-intended non-taxation. Moving forwards with this framework Pistone talked about the real aim of GloBE proposals questioning whether their reach was intended to counter abusive/harmful practices or to provide a framework for international tax coordination. And in so doing, whether coordination could be achieved despite the introduction of carve-outs funded on retaining tax sovereignty.

Following this, Hania Kronfol (World Bank Group) discussed corporate tax incentives to attract foreign direct investment (FDI) in developing economies. In her role as a policy specialist, Hania Kronfol provided an overview of the key concerns that policymakers have when introducing corporate tax incentives. During the presentation, it was stressed that incentives implementation follows a life cycle that begins with an FDI strategy placed by the host government and ends with the recognition of the linkages and spillovers left by such a policy. Also, it was stressed that a tendency to adopt tax incentives or provide tax holidays is observable in more than half of the countries around the world in the past decade. The main conclusion regarding this feature is that tax incentives are being adopted as a way to compete with other countries for FDI attraction. However, the impact that can be achieved by the adoption of incentives over the investor's behavior is quite limited. For the expositor, the main takeaway in this regard is that incentives can strengthen the investment location (country's value proposition) but cannot compensate for an unattractive FDI environment. The presentation highlighted as well that a correct estimation of costs to be incurred for developing an incentive campaign was needed in order to properly assess its adequacy. On the final slides, the public found a detailed step plan that could be reflected upon when constructing a tax incentive campaign.

Continuing with the agenda, Lise Johnson (Columbia Center on Sustainable Investment) addressed the topic of investment treaties and tax incentives offering two perspectives on the matter, first considering the treaties as an incentive for investors and secondly as frameworks offering regulations that might contribute to other investment incentives. During the presentation, she questioned the rationale used to allocate the incentives and the problematic aspects of such allocation based on the location of the incentive and its outcome. Remarks were given about the modifications of incentives created by new commitments made after issuing an investment treaty and the requirements of proportionality and respect on the legitimate expectations of the investor. To conclude, Johnson calls for attention to the fact that most claimants are shareholders which interests might differ from those of the companies developing the projects, which can contribute to issues of tax avoidance and distortions of the original aims pursued with the creation of the incentive.

The fourth speaker, Simon J. Evenett (University of St. Gallen) discussed the trade outlook of tax breaks and their effect upon the cross-border movement of goods. The expositor identified three categories of tax breaks that might result controversial from a trade perspective: a) those affecting cross-border commerce (e.g. movement of assets or persons)[12]; b) those that discriminate between domestic and foreign commercial interest[13]; and c) selective tax breaks[14]. All three categories might introduce caveats or be presented as exemptions on trade rules connected with tax matters, which are not always assessed from a trade perspective. The result of the introduction of these tax incentives is a reduction in the certainty that investment regulations in the country. Also, the selectivity of the tax breaks increases the distortion rate on commerce. Evenett endorses the work done by the Council on Economic Policies (CEP) in composing the Global Tax Expenditures Database (GTED) and recommends steering the efforts into finding cross-border data regarding commerce distortions created by the introduction of tax incentives.

Closing the session Alexandra Redhead (Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development) provided an overview on the impact of tax incentives upon the mining sector. The presentation started with a reminder about the absence of data supporting a positive influence of tax incentives over attracting mining investment. Especially when it is considered that the mining sector is worried about structural issues that have to do with the extraction of natural resources rather than reduction of costs in the initial phases[15]. For this reason, Redhead points out that normally cost-based incentives[16] are more material for mining investors, as they will determine how quickly they will recover their investment. Despite the former, the outcome of the comparison between tax incentives available for the mining sector and those which are actually included in the concession contract differ greatly for Asia and Latin America, which signals that the effectiveness of those incentives is low. The region where the Intergovernmental Forum on Mining, Minerals, Metals, and Sustainable Development (IGF) has identified a more positive consideration on tax incentives is Africa, where the difference between the number of incentives available and that of incentives included in the extractive contracts differs only in 1.1 points. This result raises concerns about transparency, discretion, political corruption in regard to the adoption of those incentives. Other issues are being tested with the IGF database, such as the type of incentives available and their inclusion in mining contracts. In this regard, the difference that is most notorious resides in the availability of incentives for corporate income tax and the reduced number of contracts including those incentives in particular. To conclude, Alexandra considers that to align with Pillar 2 the removal of tax incentives should take place, however, this process needs to be carefully assessed to avoid facing arbitral procedures.

Session 5: Discussion Panel (01.07.2021)

For the last session of the workshop, the forum received participants engaged with a discussion about key connecting issues of tax, trade, and investment that were laid down in the previous four sessions. In this opportunity, the moderator was Nana Ama Sarfo (Tax Notes International, Forbes). The first speaker was Marion Jansen (Director Trade and Agriculture Directorate – OECD) providing a political overview on the key elements that make the disciplines merge. During the presentation, three key ideas were expressed, namely that tax policy can affect the level playing field in trade. As well, tax policy has the power to affect investment decisions, and consecutively tax policy is capable of affecting the perceived distributional impact of globalization. With this mindset, the call for the audience and specifically for tax policymakers is to avoid treating trade, investment, and tax law as if they were not related areas. In Marion Jansen's opinion, the losses and distortions caused in one of these disciplines might pervasively affect the other. She expects that the work conducted at the OECD with Pillar 1 and Pillar 2 work as tools for taxing the winners of globalization and restraining the race to the bottom in taxation.

As second speaker Cory Hillier (International Monetary Fund) recapped the work done by the International Monetary Fund (IMF) regarding tax incentives[17] for investment, particularly for low-income countries. Among the reflections made, the expositor pointed out that the BEPS project does not focus on tax incentives, although they represent a major concern for developing countries. Yet guidance has been provided to developing countries instructing them on how to develop their tax incentives policy. An example of this is the toolkit developed by the Platform for Collaboration on Tax (PCT) issued in 2015 and led by the IMF.[18] Considering the results of investor surveys carried on developing countries it is possible to conclude that investments would have been made even if no tax incentives were present.[19] Likewise, as it was mentioned in a previous session of the workshop, it was reinstated that tax incentives that lower the cost of investment are preferred over profit-based tax incentives. The expositor looks forward to the adoption of rules over minimum taxation, as those would restrain global tax competition, which has contributed to the proliferation of tax incentives, regardless of their effectiveness in attracting FDI.

Following the session, Suranjali Tandon (National Institute of Public Finance and Policy) explained that in her opinion tax and investment have a bi-causal relationship, inasmuch taxes affect the return of investments and influence future investors decisions, while investors needs can influence tax policy. Tandon suggests looking at the counterfactual to identify whether the investment would also been made without the existence of the tax incentive, in order to test upon the investment climate of the country. Equally, it is suggested to review the impact that the investment has on stepping up the rates of economic growth in a jurisdiction in order to identify whether the costs for the tax incentives policy are being recuperated in the future. As an example of incentives operating in a domestic situation, she refers to three periods in India, where tax incentives were incorporated.[20] Reflecting on the incentives granted and their metrics it is concluded that although economic activity seems to have grown within the incentive regime, there is no evidence to support that such growth would not have taken place without the incentive. It was mentioned that India's government change its mind in 2020 where a considerable percentage of these incentives were replaced by sunset clauses. The reduction of the incentives available has cause controversies, however, this signals that the country is more aware of its economic goals.

The final speaker of this session was Howard Mann (Investment Law and Arbitration) with a presentation on the dispute settlement proposals in the OECD Pillar 1 and Pillar 2 blueprints. He started by providing remarks over the current state of dispute settlement in international tax law, where it was mentioned that despite increasing cooperation between governments regarding information sharing and controversies resolution the intentions to move towards arbitration were still not as successful as expected. The former is confirmed considering that only 30 countries have signed positively to the option for tax arbitration in the Multilateral Instrument. Some of the reasons for this reluctance are the limited binding impact on taxpayers (reduction of certainty for the governments) and limited to no transparency of the award.[21] Regarding Amount A he calls attention to the fact that expanded MAP processes would be binding for states but not for taxpayers, who can reject either the review panel or the determination panel. This suggests that taxpayers would have a more relevant role than the one played under MAP.[22] He considers that the proposal should expand on key points such as: Which individuals can be appointed as arbitrators? And how to deal with decisions that touch base on the same issues faced in consecutive years? This second question can be raised since the arbitral award is applicable only to the tax period of the controversy, which theoretically will exclude further tax periods in which the same issue is being faced if any.

For further information, a recording of the workshop can be found here. The presentations of each speaker can be found under the events section of the GLOBTAXGOV-website.

---

[1] This report was co-written by Juliana Cubillos (PhD Candidate) and Marius von Frankenhorst (Intern) at the European Research Council funded project GLOBTAXGOV at Leiden University. If you have questions or need additional information please contact us at GLOBTAXGOV@LAW.leidenuniv.nl

[2] The case concerned the establishment of an irrebuttable tax presumption on loan repayments being considered as a net gain of 100% for jurisdictions that had no basis for the exchange of information (EoI) with Argentina and had not entered into negotiations to that end; opposing to the 43% available for jurisdictions having EoI with Argentina. Panama debated over this presumption being outside of the GATS most favored nation exemptions and as a limit to the national treatment obligations.

[3] Micula case concerned the breach of the fair and equitable treatment clause (protection of investors against arbitrariness) included in the Bilateral Investment Treaty (BIT) signed by Romania

and Sweden. In this case, Swedish investors relied on tax incentives granted for making investments in developing regions, which had to be canceled by Romania by virtue of its accession to the EU. The main question revolved around identifying whether the investors had or not a legitimate expectation in regard to the tax incentives.

[4] Head of Tax Policy and Statistics Division at the Centre for Tax Policy and Administration at the OECD.

[5] These cases concerned claims being raised against India for the imposition of retrospective taxes, being observed as a breach of the BITs India-Netherlands and India- United Kingdome.

[6] Supporting this view Ranjan indicated that such argument had already been voiced at cases EnCana vs Ecuador and Burlington vs Ecuador, where it was recognized that extraordinary, punitive, or arbitrary tax measures could lead to indirect expropriation claims.

[7] As examples, he mentions tax avoidance, competitiveness, establishing a level playing field, and carbon leakage.

[8] Uncertainty on the legal tests applied to determine the breaches of trade law is also present, this can be linked to non-discrimination tests, “otherwise due” and "derogation tests” for subsidy laws.

[9]This case that has happened once in the past in C-648 /15 of 12.09.2017 Austria vs. Germany

[10] An example of this awareness is the considerations regarded in the ruling about the “Danish Cases” where the term “beneficial owner” was looked at from diverse perspectives including the one given by the OECD commentaries to the model convention of 2017.

[11] Referring specifically to the book “The Function of law in the International Community” published in 1933.

[12] In this regard, the expositor mentioned the case of Brazil, where tax exemptions on key domestic taxes are being granted to exporters.

[13] The example, in this case, is China, with the introduction of partial VAT rebates on imported inputs used in exported goods.

[14] Evenett remembers the audience about the case of Boing receiving tax breaks from the State of Washington.

[15] It is explained that profits will come along after incurring in several years of expending, and therefore tax incentives are not as relevant in the initial phases of the projects as normally no revenue is being obtained by the investor, hence most of the tax incentives are not applicable as there is little tax (presumptive) or alternatively no tax at all.

[16] Examples of these are: accelerated depreciation, longer lost carryforwards, immediate recovery of exploration expenses.

[17] Defined by the expositor as: "…any special tax provisions granted to qualified investment projects or firms that provide a favorable deviation from the general tax code"

[18] https://www.imf.org/external/np/g20/pdf/101515.pdf

[19] The expositor mentioned the cases of Rwanda, Uganda, and Guinea as examples of this trend, as per shown by the "Effectiveness of tax and non-tax incentives and investments: evidence and policy implications" Investor Survey conducted by Sebastian James, Washington, D.C. World Bank Group – September 2013

[20] Namely 1963-1964, 1990-1991, and 2019-2020

[21] These issues are however lessen in the intra EU context.

[22] Which was limited to requests for a MAP.