

# Investment and Tax Dispute Settlement Reforms: Do we need Fragmentation?



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Workshop Series June/July 2021 GlobalTaxGov– (Session 1: Importance of Domestic Law for the Interpretation of Tax, Trade and Investment Treaties)

# Concerns with investment treaty arbitration

- Lack of consistency, coherence and predictability of arbitral decisions
- Constraints on host states' ability to regulate public policy matters (Regulatory chill)
- Lack of independence and impartiality of arbitrators (Double-hating/reappointments)
- Excessive costs and duration of proceedings



# Different mechanisms

## Investment court system (EU)

- Two-level judicial structure (first instance and appeal mechanism)
- Courts' members will be appointed by Member States
- Implemented in EU trade and investment agreements

## Interstate arbitration

USMCA 2018

South Africa's Investment Act 2015

Brazil's CFIAAs 2015

## Exhaustion of local remedies

Morocco-Nigeria BIT 2016

India-Belarus BIT 2018



# Intra-EU investment disputes

## Domestic Courts

- Intra-EU BITs terminated
- Member States and the EU to provide alternatives for intra-EU investment disputes

## Contract-based ISDS (?)

*Case C-109/20 Poland v. PL Holdings, Opinion, AG Kokott (22 April 2021)*

Investor-state arbitration agreements are possible only if courts of the Member States can 'comprehensively review' the arbitration award for its compatibility with EU law and refer the matter to the CJEU when necessary



# Solutions resolving concerns?

- Interstate arbitration: greater respect for state sovereignty but does not resolve concerns about lack of consistency
- Local remedies: gives more control to host states but can potentially lengthen proceedings and increase costs
- Investment court system: consistency may be enhanced but independence and impartiality can be threatened
- Fragmentation can trigger corporate restructuring by investors to bypass dispute settlement reforms



# Concerns in the tax treaty regime

- The MAP does not always ensure a satisfactory and timely resolution to prevent double taxation
- The duration of MAP cases has increased over the years to an average of about thirty months to completion
- Taxpayers have no rights of participation besides the initiation of the procedure



# Different mechanisms

- Instruments containing different mechanisms:
  - OECD Model Convention
  - MLI (as part of the OECD's BEPS project – Action 14)
  - EU Arbitration Convention
  - EU Dispute Resolution Directive



# MLI (opt-in Convention)

Mandatory arbitration if MAP fails

**Last best offer (default)**

Baseball arbitration

Tribunal chooses one the parties' proposed resolution to the issues in dispute.

Taxpayer excluded

**Independent opinion**

Tribunal renders a reasoned decision based on the parties' arguments and evidence.

Taxpayer excluded





# MLI (opt-in Convention)

As of March 2021, out of the 95 signatories to the MLI, 30 jurisdictions have opted for mandatory arbitration

Final offer ("baseball")	Independent opinion
Australia, Austria, Barbados, Belgium, Canada, Curacao, Denmark, Fiji, Finland, France, Germany, Ireland, Italy, Liechtenstein, Luxembourg, Mauritius, Netherlands, New Zealand, Singapore, Spain, Switzerland and the UK	Andorra, Greece, Japan, Malta, Papa New Guinea, Portugal, Slovenia and Sweden



# EU Dispute Resolution Directive

If MAP fails

## Advisory Commission

Mandatory arbitration  
based on independent  
opinion procedure

Taxpayer may  
send documentation/give  
evidence/be heard

## Alternative Dispute Resolution Commission (also 'Standing Committee')

Flexibility in the choice of  
dispute resolution methods (e.g.  
baseball arbitration)

Taxpayer may  
send documentation/give  
evidence/be heard



# Solutions raising other concerns?

- Baseball arbitration: risk to challenge the decision (Article 31(2) UNCITRAL Model Law)
- Reasoned opinion/baseball arbitration: does not promote consistency and predictability
- Taxpayer's rights still uncertain (MIL v EU Directive)
- Fragmentation can trigger forum shopping

