

## Table of Contents

<b>Preface</b>	xxiii
<b>Chapter 1: General Report</b> <i>Pasquale Pistone</i>	1
1.0. Introduction	1
1.1. General framework	2
1.1.1. Policy rationale of bilateral investment and tax treaties	2
1.1.2. A common dilemma: Concluding bilateral treaties or doing without them?	4
1.1.3. Policy trends, models and developments in BITs and tax treaties	8
1.2. Relationship to other tax and non-tax treaties	13
1.2.1. Existence of conflicts and order of priority	13
1.2.2. The relationship of BITs to tax treaties	13
1.2.3. The relationship of BITs to non-tax treaties	16
1.3. Coverage of taxes and carve-out clauses	17
1.3.1. The meaning of taxation in tax carve-out clauses	17
1.3.2. The types of tax carve-out clauses	20
1.3.3. Impact of umbrella clauses on the coverage of BITs and their implication for tax matters	22
1.4. Fair and equitable treatment and transparency	23
1.4.1. The interpretation and application of FET in tax matters and constitutional principles	23
1.4.2. The protection of FET and access to justice in tax matters	24
1.4.3. Common points and differences with the non- discrimination principle	25
1.4.4. Transparency	25
1.5. National treatment and most-favoured-nation treatment	26
1.5.1. Their common policy rationale	26

## Table of Contents

---

1.5.2.	Their application in taxation matters in the absence of a tax carve-out	27
1.5.3.	REIO clauses	29
1.6.	Taxation as expropriation	30
1.6.1.	Expropriation and its application to taxation matters	30
1.6.2.	Tax expropriation and the <i>Yukos</i> case	32
1.6.3.	Expropriation and confiscatory taxation	36
1.7.	Taxation and free transfer of capital	38
1.7.1.	The application of provisions on free transfer of capital to taxation	38
1.7.2.	Protection of returns from investment under BITs and EU law	39
1.8.	Dispute settlement and awards	40
1.8.1.	Types of arbitration and their institutional framework in BITs	40
1.8.2.	Arbitrating tax disputes under the different legal frameworks of bilateral investment and tax treaties	41
<b>Chapter 2:</b>	<b>Australia</b>	<b>45</b>
	<i>Jeff Waincymer</i>	
2.1.	General framework – Policy considerations	45
2.1.1.	Introduction	45
2.1.2.	Australia's tax and investment treaty policy	47
2.2.	Relation to other tax and non-tax treaties	51
2.3.	Coverage of taxes and carve-out clause	53
2.4.	Fair and equitable treatment (FET) and transparency	55
2.5.	National treatment (NT) and most-favoured nation (MFN) treatment	57
2.6.	Taxation as expropriation	58
2.7.	Taxation and free transfer of capital	59
2.8.	Dispute settlement and awards	60

<b>Chapter 3:</b>	<b>Austria</b>	71
	<i>Lars Gläser and August Reinisch</i>	
3.1.	General framework	71
3.2.	Relationship to other tax and non-tax treaties	74
3.3.	Coverage of taxes and carve-out clause	75
3.4.	Fair and equitable treatment and transparency	78
3.5.	National treatment and most-favoured-nation treatment	82
3.6.	Taxation as expropriation	87
3.7.	Taxation and free transfer of capital	90
3.8.	Dispute settlement and awards	91
<b>Chapter 4:</b>	<b>Belgium</b>	99
	<i>Edoardo Traversa and Isabelle Richelle</i>	
4.1.	General framework	99
4.2.	Relation to other tax and non-tax treaties	106
4.3.	Coverage of taxes and carve-out clause	108
4.4.	Fair and equitable treatment and transparency	109
4.5.	National treatment and most-favoured-nation clause	111
4.6.	Taxation as expropriation	113
4.7.	Taxation and free transfer of capital	115
4.8.	Dispute settlement and awards	117



<b>Chapter 5:</b>	<b>Bosnia and Herzegovina</b>	123
	<i>Samira Sulejmanovic and Azra Becirovic</i>	
5.1.	General framework	123
5.2.	Relationship to other tax and non-tax treaties	132
5.3.	Coverage of taxes and carve-out clause	133
5.4.	Fair and equitable treatment and transparency	135
5.5.	National treatment and most-favoured-nation treatment	139
5.6.	Taxation as expropriation	141
5.7.	Taxation and free transfer of capital	143
5.8.	Dispute settlement and awards	144
<b>Chapter 6:</b>	<b>Brazil</b>	149
	<i>Luís Eduardo Schoueri and Ricardo André Galendi Júnior</i>	
6.1.	General framework	149
6.1.1.	General overview of Brazilian DTCs and the non-ratified BITs	150
6.1.2.	Reasons for not entering into BITs	152
6.1.2.1.	Economic argument	152
6.1.2.2.	Incompatibilities with constitutional and other domestic provisions	154
6.1.3.	Brazil as a capital exporter	157
6.1.4.	Brazil's New Investment Treaty Model: The CFIA	159
6.2.	Relation to other tax and non-tax treaties	163
6.2.1.	Investment treaty shopping	163
6.2.2.	Conflict between a DTC and an investment treaty	165
6.3.	Coverage of taxes and carve-out clause	165
6.4.	Fair and equitable treatment and transparency	166

6.5.	National treatment and most-favoured-nation treatment	167
6.6.	Taxation as expropriation	167
6.7.	Taxation and free transfer of capital	170
6.8.	Dispute settlement and awards	171
6.8.1.	Investor-state arbitration	171
6.8.2.	Arbitration in tax issues	174
6.8.3.	Concluding remarks	175
<b>Chapter 7:</b>	<b>Canada</b>	177
	<i>Martha O'Brien</i>	
7.1.	General framework	177
7.1.1.	Three generations of BITs	177
7.1.2.	Canada's double tax treaties	178
7.1.3.	General standards and principles	180
7.1.4.	Pre-establishment control of investment in Canada	181
7.2.	Relation to other tax and non-tax treaties	183
7.3.	Coverage of taxes and carve-out clauses	186
7.3.1.	Tax carve-outs in Canada's BITs	186
7.3.2.	The NAFTA tax carve-out	187
7.3.3.	The CETA tax carve-out	188
7.4.	Fair and equitable treatment and transparency	191
7.4.1.	Substantive standards	191
7.4.2.	Tax administration and FET	194
7.5.	NT and MFN	194
7.5.1.	General	194
7.5.2.	MFN in Canada's DTTs and BITs	195
7.6.	Taxation as expropriation	195
7.7.	Taxation and free transfer of capital	197
7.7.1.	General obligations	197
7.7.2.	Free movement of capital, CETA and tax provisions	197

7.8.	Dispute settlement and awards	199
7.8.1.	General	199
7.8.2.	Public debate on investment agreements	201
7.8.3.	Denial of benefits under BITs and DTTs	202
<b>Chapter 8:</b>	<b>Chile</b>	203
	<i>Rodrigo Polanco Lazo and Felipe Yáñez</i>	
8.1.	General framework	203
8.1.1.	Chilean policy on double taxation treaties and international investment agreements	203
8.1.2.	Is there a Chilean model for IIAs or DTTs?	204
8.1.3.	The role of investment contracts in Chile	205
8.2.	Relationship to other tax and non-tax treaties	207
8.2.1.	Are there overlaps between IIAs and DTTs?	207
8.2.2.	Are there conflicts between IIAs and DTTs concluded by Chile?	207
8.2.2.1.	Treaty provisions dealing with cases of conflict between IIAs and DTTs	208
8.2.2.2.	Conflicts between IIAs and DTTs in the absence of a dispute settlement provision	209
8.2.3.	Conflicts between IIAs and other treaties or agreements containing tax clauses	210
8.2.4.	Conflicts between DTTs and other international treaties protecting foreign investment	210
8.3.	Coverage of taxes and carve-out clauses	210
8.3.1.	Carve-outs	211
8.3.1.1.	Domestic tax autonomy	211
8.3.1.2.	International tax autonomy	212
8.3.2.	Umbrella clauses	212
8.4.	Fair and equitable treatment and transparency	213
8.4.1.	Impact of fair and equitable treatment provisions on Chilean tax rules or administrative practice: Relevant case law	213
8.4.2.	Impact of the constitutional principle of equality on the interpretation of FET clauses	215
8.4.3.	Governmental practices or procedures contravening the FET principle	216
8.4.4.	Transparency obligations in Chilean BITs and FTAs	217



8.5.	National treatment and most-favoured-nation treatment	218
8.5.1.	Non-discrimination clauses in DTTs	218
8.5.2.	Case law on NT and MFN clauses of Chilean IIAs	221
8.5.3.	Non-discrimination clauses in Chilean DTTs vs. Chilean IIAs	222
8.5.4.	MFN clauses in Chilean IIAs vs. MFN rules in WTO rules or FTAs	222
8.5.5.	Comparing MFN clauses in Chilean DTTs with Chilean IIAs	224
8.5.6.	Selective application of MFN clauses in Chilean IIAs	224
8.5.7.	Tax-related cases or awards related to NT or MFN clauses in Chilean IIAs	224
8.5.8.	Regional economic integration organization (REIO) clauses in Chilean BITs	225
8.6.	Taxation as expropriation	225
8.6.1.	Expropriation provisions in Chilean IIAs	225
8.6.2.	Case law related to expropriation	226
8.6.3.	Legitimacy of taxes vs. “acquired rights” of taxpayers	226
8.6.4.	Jurisprudence on confiscatory taxes	227
8.7.	Taxation and free transfer of capital	227
8.7.1.	Capital transfer provisions in Chilean IIAs	227
8.7.2.	Effect of capital transfer clauses on tax provisions	228
8.8.	Dispute settlement and awards	229
8.8.1.	Investor-state arbitration	229
8.8.2.	Relevant cases and political debate	229
8.8.3.	Dispute resolution provisions in IIAs and DTTs	230
8.8.4.	Impact of BEPS on ISDS	230
<b>Chapter 9:</b>	<b>China</b>	233
	<i>Yansheng Zhu</i>	
9.1.	General framework	233
9.2.	Relationship to tax and non-tax treaties	237
9.3.	Coverage of taxes and carve-out clause	239

## Table of Contents

---

9.4.	Fair and equitable treatment	241
9.5.	National treatment and most-favoured-nation treatment	243
9.6.	Taxation as expropriation	246
9.7.	Taxation and free transfer of capital	250
9.8.	Dispute settlement and awards	253
<b>Chapter 10:</b>	<b>Czech Republic</b>	<b>257</b>
	<i>Michal Radvan and Martin Švec</i>	
10.1.	General framework	257
10.2.	Relationship to other tax and non-tax treaties	261
10.3.	Coverage of taxes and carve-out clause	262
10.4.	Fair and equitable treatment (FET) and transparency	265
10.5.	National treatment and most-favoured-nation treatment	269
10.6.	Taxation as expropriation	271
10.7.	Taxation and the free transfer of capital	274
10.8.	Dispute settlement and awards	277
<b>Chapter 11:</b>	<b>France</b>	<b>283</b>
	<i>Thomas Dubut and Tovony Randriamanalina</i>	
11.1.	General framework	283
11.1.1.	The French BIT network	283
11.1.2.	The French free trade agreements network	287
11.1.3.	The French BIT model	288
11.1.4.	Investment contracts and investment authorizations	289
11.1.5.	BITs and the BEPS Project	290



11.2.	Relation to other tax and non-tax treaties	290
11.2.1.	Relation to DTTs concluded by France	290
11.2.2.	Relation to other international agreements concluded by (or binding on) France	292
11.3.	Coverage of taxes and carve-out clause	292
11.4.	Fair and equitable treatment (FET) and transparency	294
11.4.1.	FET and taxation	294
11.4.2.	Judicial review of investment agreements with regard to FET	296
11.4.3.	BITs and transparency	297
11.5.	NT and MFN treatment	297
11.5.1.	Restrictions to the scope of NT and MFN clauses in French BITs	297
11.5.2.	Taxation and NT and MFN clauses in French BITs	299
11.6.	Taxation as expropriation	299
11.7.	Taxation and free transfer of capital	300
11.7.1.	General remarks	300
11.7.2.	BIT free transfer provision and exit tax	301
11.8.	Dispute settlement and awards	301
11.8.1.	Investor-state arbitration in French BITs	302
11.8.2.	Arbitration between the contracting states in French BITs	304
11.8.3.	Arbitration clauses in French DTTs	304
11.8.4.	Treaty shopping	306
11.9.	Conclusion	307
<b>Chapter 12:</b>	<b>Germany</b>	309
	<i>Arno E. Gildemeister</i>	
12.1.	General framework	309
12.1.1.	Treaty practice	309
12.1.2.	Tax stabilization guarantees and the <i>Vattenfall</i> case	311
12.2.	Relationship between investment and tax treaties	312
12.3.	Coverage of taxes and carve-out clauses	316

## Table of Contents

---

12.4.	Fair and equitable treatment and transparency	318
12.5.	National treatment and most-favoured-nation treatment	319
12.6.	Taxation as expropriation	321
12.7.	Taxation and free transfer of capital	323
12.8.	Dispute settlement and awards	324
<b>Chapter 13:</b>	<b>Greece</b>	<b>327</b>
	<i>Panayotis Glavinis and Georgios Matsos</i>	
13.1.	General framework	327
13.1.1.	Greek investment and tax treaty policy	327
13.1.2.	Greek BIT Model	328
13.1.3.	DTTs: Compliance with the OECD Model Tax Convention	329
13.1.4.	Investment authorizations	330
13.1.5.	Greece's national investment code (Law Decree 2687/1953)	331
13.1.6.	Law Decree 3894/2010 on strategic investments	332
13.1.7.	Investment agreements	333
13.1.8.	Influence of the BEPS Project	337
13.2.	Relationship to other tax and non-tax treaties	337
13.3.	Coverage of taxes and carve-out clause	338
13.4.	Fair and equitable treatment and transparency	339
13.5.	National treatment and most-favoured-nation treatment	342
13.5.1.	Interaction with tax law	342
13.5.2.	Compatibility with EU treaties and EU law	345
13.6.	Taxation as expropriation	345
13.7.	Taxation and free transfer of capital	348
13.8.	Dispute settlement and awards	350

<b>Chapter 14:</b>	<b>India</b>	353
	<i>Poonam Khaira Sidhu</i>	
14.1.	General framework: Policy considerations	353
14.1.1.	Treaty-making powers under the Constitution of India	353
14.1.2.	Indian bilateral or multilateral free trade agreements	354
14.1.3.	Indian bilateral investment treaties	354
14.1.4.	Review of the Model BIPA and the new Model BIT	355
14.1.5.	Other IIAs and investment-related instruments (IRIs)	355
14.2.	Relation to other tax and non-tax treaties	356
14.2.1.	Indian double tax treaties	357
14.2.2.	Disputes under Indian BITs	358
14.3.	Coverage of taxes and carve-out clause	358
14.3.1.	Investment contracts, concessions and tax stabilization clauses	359
14.3.2.	Umbrella clauses	360
14.3.3.	Increasing number of tax disputes	361
14.4.	Fair and equitable treatment and transparency	363
14.4.1.	Transparency clauses in the Model BIT	364
14.5.	National treatment and most-favoured-nation treatment	365
14.5.1.	Invoking MFN to import favourable clauses in other BITs	365
14.6.	Taxation as expropriation	366
14.7.	Taxation and free transfer of capital	368
14.8.	Dispute settlement and awards	369
14.8.1.	Conclusion	371
14.8.2.	Epilogue	373
<b>Chapter 15:</b>	<b>Luxembourg</b>	375
	<i>Anne Selbert and Katharina Schiffmann</i>	
15.1.	General framework	375
15.1.1.	Double tax treaties	375



## Table of Contents

---

15.1.2.	Bilateral investment treaties	377
15.1.3.	Bilateral or multilateral free trade agreements	378
15.2.	Relationship to other tax and non-tax treaties	379
15.2.1.	Relationship to tax treaties	379
15.2.2.	Relationship to other international treaties	380
15.3.	Coverage of taxes and carve-out clause	380
15.4.	Fair and equitable treatment and transparency	381
15.5.	National treatment and most-favoured-nation treatment	383
15.6.	Taxation as expropriation	384
15.7.	Taxation and free transfer of capital	385
15.7.1.	Belgium-Luxembourg Model BIT	385
15.7.2.	Existing BITs	385
15.8.	Dispute settlement and awards	386
15.8.1.	Dispute resolution under the Belgium-Luxembourg Model BIT	386
15.8.2.	Disputes and transparency	387
15.8.3.	DTTs and arbitration	388
15.8.4.	BEPS Action 14 Plan	388
15.8.5.	BEPS Action 6	389
15.8.6.	EU Arbitration Convention	389
<b>Chapter 16:</b>	<b>The Netherlands</b>	<b>391</b>
	<i>Daniël Smit</i>	
16.1.	General framework	391
16.1.1.	Introduction	391
16.1.2.	The Dutch Model BIT	393
16.2.	Relationship to tax and non-tax treaties	395
16.3.	Coverage of taxes and carve-out clause	397
16.4.	Fair and equitable treatment and transparency	398

16.5.	National treatment and most-favoured-nation treatment	400
16.6.	Taxation as expropriation	402
16.7.	Taxation and free transfer of capital	404
16.8.	Dispute settlement and awards	405
16.8.1.	Dispute settlement awards under Dutch BITs	405
16.8.2.	Recent trends in dispute settlement: A growing number of dispute settlements and growing scepticism about the current dispute settlement system	406
16.8.3.	Treaty shopping: Anti-BEPS legislation through the backdoor?	409
<b>Chapter 17:</b>	<b>Poland</b>	415
	<i>Karolina Tetlak</i>	
17.1.	General framework	415
17.2.	Relationship to other tax and non-tax treaties	419
17.3.	Coverage of taxes and carve-out clause	421
17.4.	Fair and equitable treatment and transparency	424
17.5.	National treatment and most-favoured-nation treatment	428
17.6.	Taxation as expropriation	430
17.7.	Taxation and free transfer of capital	434
17.8.	Dispute settlement and awards	435
<b>Chapter 18:</b>	<b>Portugal</b>	441
	<i>Tiago Duarte and Pedro Ribeiro de Sousa</i>	
18.1.	General framework	441
18.2.	Relationship to other tax and non-tax treaties	445

## Table of Contents

---

18.3.	Coverage of taxes and carve-out clause	448
18.4.	Fair and equitable treatment and transparency	448
18.5.	National treatment and most-favoured-nation treatment	450
18.6.	Taxation as expropriation	452
18.7.	Taxation and free transfer of capital	456
18.8.	Dispute settlement and awards	459
<b>Chapter 19:</b>	<b>Russia</b>	461
	<i>Danil V. Vinnitskiy</i>	
19.1.	General framework	461
19.2.	Relationship to other tax and non-tax treaties	466
19.3.	Coverage of taxes and carve-out clause	468
19.4.	Fair and equitable treatment and transparency	470
19.5.	National treatment and most-favoured-nation treatment	474
19.6.	Taxation as expropriation	478
19.7.	Taxation and free transfer of capital	479
19.8.	Dispute settlement and awards	480
<b>Chapter 20:</b>	<b>Serbia</b>	483
	<i>Svetislav V. Kostić, Marko Jovanović and Gordana Ilić-Popov</i>	
20.1.	General framework	483
20.2.	Relationship to other tax and non-tax treaties	486
20.3.	Coverage of taxes and carve-out clause	487



20.4.	Fair and equitable treatment and transparency	488
20.5.	National treatment and most-favoured-nation treatment	492
20.6.	Taxation as expropriation	497
20.7.	Taxation and free transfer of capital	500
20.8.	Dispute settlement and awards	501
<b>Chapter 21:</b>	<b>South Africa</b>	<b>505</b>
	<i>Annet Wanyana Oguttu and Rafia de Gama</i>	
21.1.	General framework	505
21.1.1.	How DTTs become part of domestic law	506
21.1.1.1.	Use of Model DTTs	506
21.1.1.2.	Criteria for selecting treaty partners	507
21.1.2.	How BITs become part of domestic law	508
21.1.2.1.	Use of Model BITs	509
21.1.2.2.	Criteria for selecting BIT contracting states	510
21.2.	Relationship to other tax and non-tax treaties	511
21.3.	Coverage of taxes and carve-out clauses	513
21.4.	Fair and equitable treatment and transparency	514
21.4.1.	The impact of the principle of equality on the interpretation of FET clauses	514
21.4.2.	Practices or procedures by tax authorities or tax courts contrary to FET as well as tax laws, and unsatisfactory rules for due process	515
21.4.3.	Transparency in FET provisions in the RSA's BITs	516
21.5.	National treatment and most-favoured-nation treatment	516
21.5.1.	Comparison of non-discrimination clauses in DTTs and NT and MFN clauses in BITs	518
21.5.2.	Similarities between MFN clauses in BITs and MFN rules in WTO rules or free trade agreements	518
21.5.3.	Comparison of MFN clauses in RSA's DTTs with those in BITs	519

## Table of Contents

---

21.6.	Taxation as expropriation	520
21.6.1.	Provisions on expropriation in BITs	520
21.6.2.	Circumstances under which taxation may amount to expropriation under a BIT and the criteria to distinguish indirect expropriation from legitimate regulation	520
21.6.3.	The legitimacy of taxes: Are taxes considered punitive or “normal governmental conduct”?	524
21.7.	Taxation and free transfer of capital	524
21.7.1.	Does any withholding tax on dividends, interest or profits in RSA come under the scope of capital transfer provisions?	524
21.8.	Dispute resolution and awards	525
21.8.1.	Legal barriers to arbitration clauses in BITs	528
21.8.2.	The appropriateness of investor-state arbitration as a dispute settlement mechanism for arbitration of tax disputes – BEPS Action 14	528
<b>Chapter 22:</b>	<b>United States</b>	<b>531</b>
	<i>Yariv Brauner</i>	
22.1.	General framework	531
22.1.1.	Introduction	531
22.1.2.	Current situation	532
22.1.3.	Negotiation policies	533
22.1.4.	Models	534
22.1.5.	Investment contracts and authorizations	536
22.1.6.	BEPS	536
22.2.	Relationship to other tax and non-tax treaties	536
22.2.1.	Conflicts between BITs and DTTs	536
22.2.2.	Conflicts with other treaties	537
22.3.	Coverage of taxes and carve-out clause	538
22.4.	Fair and equitable treatment and transparency	540
22.4.1.	General	540
22.4.2.	Constitutional law aspects	541
22.4.3.	Due process	541

22.4.4.	FET clauses and tax non-discrimination	541
22.4.5.	Transparency obligations	541
22.5.	National treatment and most-favoured-nation treatment	542
22.6.	Taxation as expropriation	543
22.7.	Taxation and free transfer of capital	544
22.7.1.	General	544
22.7.2.	Withholding taxes	544
22.7.3.	Exit provisions	544
22.8.	Dispute settlement and awards	544
22.8.1.	Investor-state arbitration	544
22.8.2.	Disputes	545
22.8.3.	Arbitration in DTTs	545
22.8.4.	Investor-state arbitration and the mutual agreement procedure in DTTs	549
22.8.5.	BEPS	549
<b>List of Contributors</b>		<b>551</b>