RUCHELMAN

the next generation of tax

INSIGHTS

DIVIDEND INCOME FROM INDIA: TAX TREATY ISSUES FOR NONRESIDENT SHAREHOLDERS

BILATERAL INVESTMENT TREATIES: A POTENTIAL LEGAL REMEDY IN INTERNATIONAL TAX DISPUTE

AND MORE

Insights Vol. 9 No. 3

© Ruchelman P.L.L.C., 2022. All rights reserved.

TABLE OF CONTENTS

Editors' Note

Dividend Income from India: Tax Treaty Issues for Nonresident Shareholders 4

Bilateral Investment Treaties: A Potential Legal Remedy in International Tax Disputes 11

Perenco v. Ecuador and *Achmea B.V. v. The Slovak Republic:* Practical Limitations When Seeking Relief Under a B.I.T. 25

Foreign Tax Credit Regulations: Nexus as the New Credo......... 37

About Us

EDITORS' NOTE

In this month's edition of *Insights*, our articles address the following:

- **Dividend Income from India: Tax Treaty Issues for Nonresident Shareholders.** Effective April 1, 2020, the dividend distribution tax ("D.D.T.") imposed on Indian companies paying dividends was abolished. While Indian politicians may say otherwise, tax advisers outside India viewed the D.D.T. as a workaround allowing India to collect the equivalent of dividend withholding tax without having to take into account a lower rate provided by an income tax treaty. With the demise of the D.D.T., the Indian tax authorities are challenging claims for dividend withholding tax benefits. Sakate Khaitan, the senior partner of Khaitan Legal Associates, Mumbai, and Abbas Jaorawala, a Senior Director and Head-Direct Tax of Khaitan Legal Associates, Mumbai, review issues that have been raised by the Indian tax authorities at the time dividends are declared and paid to residents of several countries that are treaty partners of India. Terms such as G.A.A.R., P.P.T., and M.L.I. are often raised. In addition, treaties that have most-favored-nation ("M.F.N.") provisions are now regularly challenged.

- **Bilateral Investment Treaties: A Potential Legal Remedy in International Tax Disputes.** Traditionally, international tax disputes tend to focus on provisions in treaties for the avoidance of double taxation. Typically, income tax treaties reduce withholding tax on various types of investment income, provide an increased threshold for imposing tax on business profits, and offer procedures to claim relief in the event of double taxation or the imposition of tax that is not in accordance with the terms of the relevant treaty. However, income tax treaties are not the only legal remedy available in an international tax dispute. Countries also conclude bilateral investment treaties ("B.I.T.'s") with the aim of protecting and stimulating cross-border investment. In comparison to an income tax treaty, disputes under B.I.T.'s generally are settled by an independent arbitration panel. While a country may "dig in its heals" during the course of the arbitration process, it cannot follow a strategy of agreeing to disagree with its counterpart in the treaty partner country. Once an arbitration panel renders its decision against a government, the award can be converted into a judgment that is enforceable through seizure of assets owned by the government. Paul Kraan, a tax partner at Van Campen Liem in Amsterdam has authored the quintessential monograph on the use of a B.I.T. to obtain relief from confiscatory taxes or unfair treatment imposed by a signatory to an applicable B.I.T.

- ***Perenco v. Ecuador* and *Achmea B.V. v. The Slovak Republic*: Practical Limitations When Seeking Relief Under a B.I.T.** While resorting to a B.I.T. provides a corporation access to an independent body when seeking to resolve a dispute with a foreign government, success is not always obtained easily or at all. Stanley C. Ruchelman and Marie de Jorna, a member of the Paris Bar learning U.S. tax law during a period of training with Ruchelman P.L.L.C., dive into two cases where relief has either been denied for over a decade (*Perenco v. Ecuador*) or where access to a B.I.T. was eliminated as

© Ruchelman P.L.L.C., 2022. All rights reserved.

a mechanism to resolve disputes for corporations that are resident in an E.U. Member State with the government of another E.U. Member Sate (*Achmea B.V. v. The Slovak Republic*).

- **Foreign Tax Credit Regulations: Nexus as the New Credo.** A U.S. taxpayer that is subject to income tax in both the U.S. and a foreign country can reduce the amount of tax payable to the U.S. by claiming a credit for foreign income taxes paid or accrued to one or more foreign countries. The principle is simple: taxpayers should not pay tax twice with regard to the same item of income. The application of the principle is not so easy, requiring a taxpayer to overcome several hurdles, including a determination of the source of income and whether the tax is a creditable income tax. Faced with Pillar 1 of B.E.P.S. and digital services taxes, both of which look to the location of customers when determining the source of income – and the primary right to impose tax – the I.R.S. adopted a new set of foreign tax credit regulations. They warn U.S. taxpayers that until U.S. tax law is changed, foreign income taxes imposed on the basis of customer location will not be allowed as a credit against U.S. tax when nexus does not exist between the foreign country imposing tax and the place where the income generating activity takes place. Wooyoung Lee explains the new "nexus" requirement for a tax to be considered an income tax under U.S. concepts and provides a real-life illustration of how the tax result may have changed.

We hope you enjoy this issue.

- The Editors

DIVIDEND INCOME FROM INDIA: TAX TREATY ISSUES FOR NONRESIDENT SHAREHOLDERS

Authors
Sakate Khaitan
Abbas Jaorawala

Tags
Dividend Distribution Tax
Income Tax Treaties
India
Most-Favored-Nation

Sakate Khaitan is the senior partner of Khaitan Legal Associates, Mumbai. He heads the corporate M&A, funds, restructuring and insurance practice. He has extensive experience working with Indian and foreign companies, H.N.W. individuals and government authorities.

Abbas Jaorawala is a Senior Director and Head-Direct Tax of Khaitan Legal Associates, Mumbai. He has extensive experience in advising on domestic and cross-border direct tax matters and Indian exchange control regulations.

INTRODUCTION

Prior to April 1, 2020, dividend income of nonresident shareholders of an Indian company was exempt from tax in India. However, Indian companies paid dividend distribution tax (the "D.D.T.") on the payment of a declared dividend. That changed in April 2020, when dividend income of shareholders became taxable in India in the hands of such shareholders. For dividends paid to nonresident shareholders, Indian companies must withhold appropriate withholding tax when paying dividends.

The rate of direct tax and withholding tax on dividend income of nonresidents, as per Indian Income Tax Act 1961 (the "Act") is 20%, plus applicable surcharge and cess. A taxpayer is permitted to apply the provisions of a tax treaty, if such provisions are more beneficial than the provisions of the Act.[1] The nonresident shareholder must furnish a tax residency certificate ("T.R.C.") from the tax authority of its country of residence along with other documentation to claim tax treaty benefits in India.

Prior to the change in law, the issue of claiming tax treaty benefits in India for Indian dividend income was not relevant. Consequently, neither the existence of tax nexus over a shareholder nor the shareholder's residence country were relevant issues. Now, however, nonresident shareholders face several issues when seeking relief from withholding tax under an income tax treaty in effect between India and a particular treaty partner. This article aims to provides insights into typical situations and issues being faced.

TAX TREATY RELIEF FOR DIVIDENDS

India has in effect income tax treaties with over 90 countries. Generally, the withholding tax rate on dividend income is lower under an income tax treaty than that provided under domestic law. In addition, several of India's tax treaties contain a most-favored-nation ("M.F.N") clause. The M.F.N. clause permits a qualifying tax resident of the treaty partner country to apply a lower withholding tax under an income tax treaty between India and another treaty partner country, provided that the other country is a member of the O.E.C.D. The language of the M.F.N. clause varies among the income tax treaties in effect. In particular, some provide that its application is automatic, while others provide that the benefit depends on further agreement between tax authorities of both countries.

Hence, it is in the interest of nonresident shareholders to seek access to the applicable tax treaty and reduce their tax liability in India, if possible. Broadly speaking, the tax rates under some of India's popular tax treaties, without considering the M.F.N. clause, are as follows:

---

[1] Section 90(2) of the Act.

Country	Tax Rate on Dividend Income
United States	15% (25%, depending on facts)
United Kingdom, Singapore	10% (15%, depending on facts)
Belgium *(M.F.N. clause)*	15%
France, Hungary, Netherlands, Switzerland, Sweden *(all with M.F.N. clause)*	10%
Germany	10%
Portugal	10% (15%, depending on facts)
Mauritius	5% (15%, depending on facts)
Slovenia, Lithuania	5% (15%, depending on facts)
Colombia	5%

As the above table indicates, the tax rates on dividend income from India can be reduced under an income tax treaty from 20%, plus applicable surcharge and cess, to as low as 5%. However, Indian tax authorities can invoke the provisions of India's General Anti-Avoidance Rule ("G.A.A.R.") in certain circumstances to deny the tax treaty benefit in India if they find that the main purpose of the arrangement is to obtain an impermissible tax benefit in India considering the principle of substance over form.

TAXATION OF DIVIDEND INCOME UNDER SELECT INCOME TAX TREATIES

Mauritius

Historically, Mauritius has been one of the most popular jurisdictions for routing investments to India. The rate is 5%, if the beneficial owner is a Mauritius company that directly holds at least 10% of the capital of the Indian company paying the dividends. The rate is 15% in all other cases.

The Multilateral Instrument ("M.L.I.") does not yet apply to the India-Mauritius Income Tax Treaty. While ratifying the M.L.I., Mauritius has not covered the treaty with India. Accordingly, the principal purpose test ("P.P.T.") under the M.L.I. does not apply to the India-Mauritius tax treaty.

Coupled with the tax regime in Mauritius, Mauritius continues to be a favored jumping-off point for making a direct investment in shares of an Indian company. Nonetheless, the provisions of India's G.A.A.R. should be analyzed before structuring investments through Mauritius. Also, if the M.L.I. becomes applicable to the India-Mauritius tax treaty in the future, the requirement of economic and commercial substance under the P.P.T. test will be crucial for availing tax treaty benefits in India.

United States

The rate of tax on dividend is 15%, if the beneficial owner is a U.S. corporation that owns at least 10% of the voting stock of the Indian company paying dividends. The rate is 25% in all other cases.

Although the U.S. has not ratified the M.L.I., Article 24 (Limitation on Benefits) of the India-U.S. Income Tax Treaty provides a set of simplified limitation on benefits ("L.O.B.") tests that must be met in order for a corporation to claim the benefit of the treaty.

Under the first test, a U.S. tax resident other than an individual must meet the following ownership and base erosion tests. More than 50% of the beneficial interests in the entity must be owned directly or indirectly by

- one or more individual residents of India or the U.S.;
- one of the Contracting States, including political subdivisions or local authorities;
- other individuals subject to tax in India or the U.S. on worldwide incomes; or
- citizens of the U.S.

Under the base erosion test, the income of the entity must not be used in substantial part, directly or indirectly, to meet liabilities (including liabilities for interest or royalties) to persons who are not

- residents of the U.S. or India;
- residents of one of the Contracting States, including political subdivisions or local authorities; or
- citizens of the U.S.

Under the second test, the income from India must be derived in connection with, or be incidental to, the active conduct by the U.S. corporation of a trade or business in the U.S., other than the business of making or managing investments. Under an exception, activities carried on in the banking or insurance sectors are acceptable.

Under the third test, a U.S. corporation will qualify for treaty benefits if its principal class of shares are publicly traded. This means that there is substantial and regular trading on a recognized stock exchange, including NASDAQ and any stock exchange registered with the Securities and Exchange Commission as a national securities exchange for purposes of the Securities Act of 1934.

If none of the foregoing tests are met, a U.S. corporation may make a request to the Indian competent authority for relief and access to treaty benefits.

Limited liability companies ("L.L.C.'s") may qualify for treaty benefits based on certain judicial precedents even though most are treated as passthrough entities in the U.S. that do not pay U.S. tax and are not tax resident in their own right. This implies that, for treaty benefits to be granted, the owner of an L.L.C. must (i) be a

corporation[2] other than an S-corporation,[3] (ii) be formed under the laws of a state of the U.S., (iii) actually pay tax in the U.S. on global income,[4] and (iv) meet the conditions of the India-U.S. Income Tax Treaty, including the L.O.B. clause. If those facts exist, a *pro rata* portion of the dividend may qualify for the reduced rate of withholding tax. Even then, a challenge from the Indian tax authorities may arise and G.A.A.R. can still be invoked to deny tax treaty benefits.

The U.K. or Singapore

Under the India-U.K. Income Tax Treaty, the rate of withholding tax that is imposed on dividend payments from an Indian company generally is 10%, although it may be 15% certain limited circumstances.

Under the India-Singapore Income Tax Treaty, the rate of tax on dividend payments from an Indian company is 10%, if the beneficial owner is a Singapore company that owns at least 25% of the shares of the Indian company paying the dividends. In all other cases, the rate is 15%.

Entitlement to the reduced tax rate is subject to potential challenge under Indian domestic G.A.A.R. In addition, the M.L.I. has been adopted in both income tax treaties and the treaty P.P.T. must be met as well. Consequently, the benefit of reduced withholding tax rates under each income tax treaty may be lost if the Indian tax authorities conclude that, having regard to all relevant facts and circumstances, it is reasonable to conclude that obtaining that benefit was one of the principal purposes of arranging an investment in India through a Singapore or U.K. corporation, provided that the reduced rate of withholding may be allowed if considered to be in accordance with the object and purpose of the treaty.

"Prudence suggests that the commercial and economic substance of the U.K. or Singapore shareholder should be tested before claiming the treaty benefit of a reduced dividend withholding tax in India."

Prudence suggests that the commercial and economic substance of the U.K. or Singapore shareholder should be tested before claiming the treaty benefit of a reduced dividend withholding tax in India.

The Netherlands

Under the India-Netherlands Income Tax Treaty, the rate of withholding tax on a dividend from an Indian company is 10%. However, a possibility exists to invoke the M.F.N. clause under the income tax treaty in order obtain the benefit of a 5% rate, as was discussed before the Delhi High Court in the case of a Netherlands taxpayer.

In the *Concentrix Services Netherlands B.V.* case,[5] the Indian tax authorities were unsuccessful in defending their action of denying application of the M.F.N. benefit. The taxpayer was a tax resident of Netherlands and a shareholder of an Indian company which was making payment of a dividend at a time when the D.D.T. was no longer in effect. The taxpayer made an application to the Indian tax authorities

[2] If the shareholder in the U.S. is not a corporation that would qualify for the 15% rate of withholding tax, the withholding tax rate under Indian domestic law is lower than the treaty rate.

[3] An S-corporation is a corporation that generally is owned only by U.S. citizens and resident individuals. It elects flow through treatment under Subchapter S of the Internal Revenue Code.

[4] In principle, the dividend may qualify for the dividends received deduction that is provided under Section 245A of the Internal Revenue Code.

[5] W.P.(C) 9051/2020.

seeking the benefit of the M.F.N. under the India-Netherlands Income Tax Treaty signed in 1989. The taxpayer contended that the lower tax rate of 5% for dividend income under the India-Slovenia Income Tax Treaty signed in 2003 was available to it. Further, the 5% withholding tax rate provided for in the India-Lithuania Income Tax Treaty signed in 2011 and the India-Colombia Income Tax Treaty signed in 2011 would be imported into the India-Netherlands tax treaty under the M.F.N. clause, as each of those countries were O.E.C.D. members as of the date the taxpayer sought to apply the M.F.N. clause. Nonetheless, the Indian tax authorities denied the application because none of those countries was a member of the O.E.C.D. when its income tax treaty with India was signed. The tax authorities argued that no intention existed to extend the rate of withholding tax in those income tax treaties to existing treaties with other countries once those other countries became members of the O.E.C.D.

The Delhi High Court disagreed with the position of the Indian tax authorities and held that the benefit of the lower tax rate of 5% for dividend income under the three income tax treaties was available to Concentrix because it was a Dutch resident corporation entitled to treaty benefits and all of the countries were O.E.C.D. members at the time the M.F.N. clause in the treaty applicable to Concentrix was sought to be invoked.

The Delhi High Court also placed reliance on the Decree issued by the Netherlands authorities which stated that the lower tax rate of 5% for dividend income under the India-Slovenia tax treaty would apply to the India-Netherlands tax treaty. Hence, it was held that India could not adopt an inconsistent position in light of applicable treaty interpretation principles.

Nonetheless, the Indian tax authorities have not relinquished the position raised in the *Concentrix* case. A similar Delhi High Court judgment is currently before the Supreme Court.[6] The issue will be settled once the Supreme Court rules. In the interim, the position of the tax authorities is troublesome. A tax circular has been issued disagreeing with the rationale of the Delhi High Court. It contends that the M.F.N. clause cannot be applied automatically irrespective of its language unless an explicit notification is made by India. The circular is not binding on taxpayers. However, it will be followed by the tax authorities. Until the matter is finally settled, only taxpayers that have received a favorable order from any court in India can follow the holding in the *Concentrix* case without risk of assessment. Note that a subsequent decision of the Income Tax Appellate Tribunal ("I.T.A.T.") has held that the Circular may not be in line with the law.

In these circumstances, a corporation that is resident of a country having an income tax treaty with India that includes an M.F.N. provision may wish to explore the option of invoking the Mutual Agreement Procedure ("M.A.P.") of that treaty. Even then, the impact of the Indian G.A.A.R. and the P.P.T. under the India-Netherlands Income Tax Treaty would need to be analyzed. Also, the effect of differences among the three treaties providing a 5% withholding tax rate on direct investment dividends requires analysis. The 5% tax rate under India-Slovenia Income Tax Treaty and India-Lithuania Income Tax Treaty is available only if the beneficial owner directly holds at least 10% of the capital of the Indian company paying the dividends. No similar requirement exists in the India-Netherlands Income Tax Treaty. It is not clear whether the 10% ownership requirement of other treaties must be imported under other treaties along with the 5% withholding tax rate.

[6] The Nestle SA case is discussed below in the text at note 7.

© Ruchelman P.L.L.C., 2022. All rights reserved.

Finally, the conditions under the India-Slovenia Income Tax Treaty to qualify for the 5% withholding tax rate have been modified by Article 8 of the M.L.I., which requires the 10% shareholding to be met throughout a 365-day period that ends on the date of payment of the dividend. Article 8 of the M.L.I. does not apply to the India-Netherlands Income Tax Treaty. In the context of a parent company owning all the shares of an Indian subsidiary, this is not a problem. But it may be a problem for a Dutch company owning less than 10% of an Indian company when invoking the M.F.N. clause under the India-Netherlands Income Tax Treaty.

"The M.L.I. does not apply to the India-Switzerland Income Tax Treaty."

Switzerland

Under the India-Switzerland Income Tax Treaty, the rate of dividend withholding tax is 10% and a possibility exists to invoke an M.F.N. provision in the treaty to claim a reduction in withholding tax to 5%.

As mentioned above, after the judgment in the *Concentrix* case, the Delhi High Court gave similar access to the lower dividend withholding tax rate of 5% for dividend income in the *Nestle SA* case,[7] involving the M.F.N. provision under the India-Switzerland Income Tax Treaty. There, the Delhi High Court referred to the withholding tax rate for dividends under the India-Lithuania Income Tax Treaty and the India-Colombia Income Tax Treaty. Subsequently, the Swiss tax authorities officially notified Swiss taxpayers that the withholding tax rate of 5% is applicable on receipt of dividend income from Indian companies. As a result, the foreign tax credit in Switzerland is capped at 5%. Reciprocity from the Indian tax authorities in this matter is expected by Switzerland.[8] As mentioned previously, the Indian tax authorities do not share this view.

The M.L.I. does not apply to the India-Switzerland Income Tax Treaty. Consequently, the P.P.T. and Article 8 of the M.L.I. have no impact on dividends paid to a Swiss corporation.

Cayman Islands and British Virgin Islands ("B.V.I.")

Income tax treaties are not in effect between India and the Cayman Islands or B.V.I. Accordingly, dividends paid to residents of these jurisdictions are subject to full Indian withholding tax of 20%, plus applicable surcharge and cess. Currently, there is much discussion about a potential redomicile of Cayman Islands and B.V.I. corporations to Mauritius. Mauritius is a business-friendly jurisdiction that has a favored tax regime for corporation and an income tax treaty in effect with India. Ideally, the redomicile of a corporation to Mauritius should not be considered a taxable event for a corporation holding shares of an Indian company. Nonetheless, a question arises whether the redomiciliation will adversely impact the redomiciled company's entitlement to income tax treaty benefits in India based on claims of treaty shopping or avoidance under a P.P.T. standard.

Recently, the Mumbai bench of the I.T.A.T. addressed the issue in the *Asia Today Limited* case.[9] In reaching its decision in a case involving redomiciliation, it acknowledged that various dynamic and constantly evolving business reasons and

---

7 W.P. (C) 3243/2021.

8 Announcement of the Swiss Federal Department of Finance on August 13, 2021.

9 TS – 620-ITAT-2021 (Mum).

© Ruchelman P.L.L.C., 2022. All rights reserved.

justifications may exist for redomiciliation, especially if the existing place of domicile inhibits future business or prospects in some way. In this regard, it reflected a view in the U.S. that entering a transaction for good and valid business purposes will not be tainted under a P.P.T. standard if the good and valid business purpose is merely enhanced by a resulting tax saving.[10]

CONCLUSION

The D.D.T. system was enacted to allow India to collect tax on dividend distributions at the rate it determined without regard to limitations under its network of income tax treaties. Now that the D.D.T. has been repealed, India once again faces limitations on its ability to fully tax dividend distributions to nonresidents. It has taken a position that M.F.N. provisions have only limited application. Whether that position can be maintained at a time of international cooperation is an open question. Interesting times.

[10] See for example Code §7701(o), codifying the economic substance doctrine of U.S. tax law. The provision does not alter the tax treatment of certain basic business transactions that, under longstanding judicial and administrative practice, are respected. Among these basic decisions are (i) the choice between capitalizing a business enterprise with debt or equity, (ii) the choice between foreign corporations and domestic corporations, (ii) the treatment of a transaction or series of transactions as a tax-free corporate organization or reorganization, and (iv) the ability to respect a transaction between related parties provided that the arm's length standard of Code §482 is satisfied.

© Ruchelman P.L.L.C., 2022. All rights reserved.

BILATERAL INVESTMENT TREATIES: A POTENTIAL LEGAL REMEDY IN INTERNATIONAL TAX DISPUTES

Author
Paul Kraan

Tags
Bilateral Investment Treaty
Expropriation
Investment Protection Agreements
I.C.S.I.D.

Paul Kraan is a tax partner at Van Campen Liem in Amsterdam, specializing in international tax planning and structuring, advising corporations, funds, and High Net Worth individuals on Dutch tax aspects of investments. Paul studied law and economics at the University of Amsterdam. He is a member of the board of the Netherlands Association of Tax Attorneys (N.V.A.B).

INTRODUCTION

Traditionally, international tax disputes tend to focus on provisions in treaties for the avoidance of double taxation, including a reduction in tax on various types of investment income, an increased threshold for imposing tax on business profits, as well as procedures to claim relief in the event of double taxation or the imposition of tax that is not in accordance with the terms of the relevant treaty. However, such double taxation agreements ("income tax treaties") may not be the only legal remedy available in an international tax dispute, as countries also conclude bilateral investment treaties ("B.I.T.'s") with the aim to protect and stimulate cross-border investment. Disputes under B.I.T.'s generally are settled by an arbitration panel. This article sets out under which circumstances an international tax dispute may fall within scope of an investment treaty.

SHORTCOMINGS IN LEGAL PROTECTION UNDER TAX TREATIES

Traditionally, income tax treaties are considered the appropriate means of redress for avoiding double taxation arising from a cross-border transaction. The allocation of taxing rights between states under such treaties is generally based on internationally accepted principles and methods. These are laid down in the model treaty (and related commentary) which is established under the auspices of the Organisation for Economic Cooperation and Development ("O.E.C.D.")[1] and in the United Nations ("U.N.") Model Convention.[2]

O.E.C.D. Member States are predominantly prosperous countries with a high income per capita. However, in recent decades, the economic emergence of certain countries that are not O.E.C.D. Member States has resulted in the increased importance of investment in those countries and (economic) self-awareness, as well.

As regards foreign investment in such emerging economies, taxing rights are allocated in ways that strongly emphasize the position of the source state. This may concern source taxes in ways that are not entirely customary in international relations,

---

1. O.E.C.D. Income and Capital Model Convention ("the O.E.C.D. Model Treaty") and Commentary, Paris, November 21, 2017.

2. U.N. Model Double Taxation Convention Between Developed and Developing Countries ("the U.N. Model Treaty"), as updated on May 19, 2017. This model treaty distinguishes itself from the O.E.C.D. Model Treaty by a stronger emphasis on the position of the source state.

© Ruchelman P.L.L.C., 2022. All rights reserved.

such as the indirect levy of tax on capital gains (through a withholding tax that is imposed on the purchase price). Also, the interpretation of recognized international tax concepts differs in many cases from the common international standards, such as those that define a permanent establishment and explain when it may exist.

Initially, a foreign company that is confronted with such unique application of tax concepts will attempt to obtain relief by using legal remedies available in the relevant country. However, local judiciary authorities may not always be completely independent and, even when independent, may endorse the divergent views taken by the local tax administration.

In such circumstances, multinational companies may attempt to obtain relief through remedies outside the local legal system. An applicable income tax treaty may provide relief through a mutual agreement procedure ("M.A.P.") between the competent authorities of the contracting states concerned. However, the M.A.P. in most income tax treaties only requires the contracting states to make an effort to resolve the issue and may not eliminate double taxation where the competent authorities maintain differing views on a particular provision of the income tax treaty In many instances, pursuing this route does not lead to a satisfactory outcome for the taxpayer because, in part, the taxpayer is not even a party to the M.A.P. between the relevant states.

For this reason, an arbitration provision has been developed within the context of the O.E.C.D. Model Convention which makes it possible to proceed to compulsory binding arbitration if the competent authorities do not reach an agreement.[3] The aim is to include binding arbitration in as many income tax treaties as possible. Indeed, the Base Erosion and Profit Shifting ("B.E.P.S.") Action Plan developed by the O.E.C.D. earlier this decade includes Action 14, which calls for effective dispute resolution mechanisms. Meanwhile, within the E.U. this has led to the adoption of a directive which offers a uniform mechanism to address tax treaty disputes among E.U. Member States in accordance with the B.E.P.S. Action 14 minimum standard.[4] Nonetheless, there is little experience with arbitration under a bilateral income tax treaty.

However, international tax disputes are not governed solely by procedures of income tax treaties. With regard to cross-border investment, often states conclude a B.I.T. that is intended to protect those investments from improper state action in the host country. If any disputes should result, the International Centre for the Settlement of Investment Disputes ("I.C.S.I.D.") of the World Bank can be requested to appoint an arbitration panel to resolve the dispute, absolutely. That request can be made directly by the investor concerned. This article examines the extent to which international tax disputes may be resolved under the terms of a B.I.T.

---

[3] See Paragraph 5 of Article 25 of the O.E.C.D. Model Convention.

[4] E.U. Council Directive on Tax Dispute Resolution Mechanisms in the European Union on October 10, 2017.

© Ruchelman P.L.L.C., 2022. All rights reserved.

INVESTMENT PROTECTION AGREEMENTS

Nature and Content

The first B.I.T.[5] was concluded in 1959 between Germany and Pakistan.[6] The current investment protection agreement network includes thousands of B.I.T.'s, as well as a large number of multilateral investment protection agreements. The network of investment treaties, therefore, provides broad coverage. Often, a B.I.T. is concluded prior to consideration of an income tax treaty.

"While income tax treaties are mostly based on the O.E.C.D. Model, there is no generally accepted model B.I.T."

While income tax treaties are mostly based on the O.E.C.D. Model, there is no generally accepted model B.I.T. However, numerous countries have developed unique unofficial model agreements from which a B.I.T. is negotiated. These unofficial model agreements may form the basis of a multilateral agreement. As such, the legal form of investment protection agreements can differ.[7] Despite any differences, investment protection agreements often adopt a similar structure, pursuant to which investments are stimulated and protected by means of guarantees.[8]

This can be explained by the fact that the letter and spirit of every investment protection agreement is ultimately the same: the creation of a favorable investment climate by protecting and stimulating investments.[9] The provisions of nearly all investment protection agreements provide for the protection of investments against expropriation and unreasonable treatment, liberalization through the abolition of legal prohibitions on investment, and the creation of a level playing field in the form of equal treatment.[10]

In general, the letter and spirit of an investment protection agreement is realized through a number of substantive rights:[11]

- Expropriation is prohibited unless the expropriation is nondiscriminatory and in the general interest. In that event, the affected investor is entitled to adequate compensation. (This is the most important substantive right).
- Investments are entitled to be treated in a fair and equitable manner and to complete protection and security.

---

[5] In the following, the term "investment protection agreement" refers to a B.I.T. and a multilateral investment agreement offering similar investment protection.

[6] J.W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 Int'l L. pp. 655-675 (1990).

[7] *E.g.*, A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International 2009).

[8] *Id.*

[9] See S. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, McGeorge Global Bus. and Dev. L. Journal 19, p. 337 (2007).

[10] K.J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010).

[11] See S. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham L. Rev. 4, pp. 152-165 (March 2005).

- Investors are entitled to equal treatment and the right against discrimination based on nationality. (A most-favored-nation ("M.F.N.") clause is often included.)
- Repatriation of income earned from the relevant investments cannot be prevented.
- Provisions of international law that are more favorable than the investment protection agreement are given preference over the provisions in the investment protection agreement, provided a reference to international law is part of the agreement.`
- An umbrella clause may be included in the investment protection agreement under which the contracting states are obligated to fulfil all the undertakings given in respect of an investment.[12] (By means of these substantive rights, contracting states can guarantee investors that their investments will be free of specified sovereign risk.)[13]

Legal Protection

In addition to substantive rights, investment protection treaties contain procedural rights that make the realization of substantive rights possible.[14] The legal structure of the investment protection agreement allows the aggrieved party to enforce its rights directly by means of an arbitration panel specifically appointed for that purpose, without the need to obtain government approval in the host state. This differs considerably from the situation under income tax treaties, where disputes must generally be resolved through a M.A.P., where the taxpayer has little or no influence. Instead, an investment protection agreement allows the taxpayer to maintain control over all facets of the procedure, from commencement of the action to the hearing itself.[15] This can be particularly advantageous if the host country cannot provide fair and balanced legal protection due to corruption, the absence of an independent judiciary, or stonewalling by the taxation agency.[16] In this way, an investment protection agreement guarantees permanent and adequate legal protection.

The investment protection agreement designates the body, or bodies, that are competent to decide investment disputes under the applicable agreement. In most cases, the body will be an arbitration panel appointed by the International Centre for Settlement of Investment Disputes ("I.C.S.I.D."), which is part of the World Bank. More than 140 countries recognize the I.C.S.I.D.[17] As these agreements can differ, case law under other agreements is not controlling. Nonetheless, case law provides guidance for the interpretation of agreements. Investment protection agreements

---

12 R. Dolzer & M. Stevens, *Bilateral Investment Treaties*, pp. 81-82 (Kluwer Law International 1995).

13 See also Franck, *supra* note 11.

14 *Id.*

15 H.L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 Yale Intl. L. J. pp. 219-263 (2001).

16 See also Vandevelde, *supra* note 10.

17 Franck, *supra* note 11.

© Ruchelman P.L.L.C., 2022. All rights reserved.

have similar purposes and provide similar protection in many ways. As a result, decisions under other comparable agreements may be taken into account according to the Vienna Convention on the Law of Treaties.[18]

Accessibility

Three facts must exist to successfully invoke protection offered by an investment protection agreement:

- A qualifying investment is made in the territory of one of the contracting state.
- The qualifying investment is made by a qualified investor from the other contracting state.
- As to the investment and the investor, an obligation contained in the investment protection agreement purportedly has been violated.

Almost all investment treaties define the term "investment."[19] The definition generally is broad, such as "every kind of asset invested in accordance with the national laws and regulations of the Contracting Party in the territory of which the investment is made" or "every kind of asset" – followed by a non-exhaustive list of qualifying investments.[20]

It is not surprising that the broad definition of "investment" has led to broad interpretations in the case law.[21] Arbitration panels are prepared to give broad interpretations to the term "investments" to ensure the scope of protection is extensive.[22]

Investor activities must be assessed on an aggregate basis. Consequently, if the activities consist of separate elements that can only be considered an investment when viewed as a whole, protection under an investment protection agreement is possible even if host country obligations to only one of those elements has been breached.[23]

A territorial factor must also be present for an investment to qualify for protection. The investment must relate to one of the contracting states for an investment protection agreement to be applicable. Hence, there must be a sufficient nexus with the host country. Courts have applied a relatively low threshold when determining whether nexus exists.[24] This is evidenced by the fact that a large number of treaties

---

18 Vienna Convention on the Law of Treaties (May 23, 1969), Treaties IBFD. See Franck, *supra* note 11.

19 Dolzer & Stevens, *supra* note 12, p. 26.

20 *Id.*, p. 27.

21 AR: I.C.S.I.D., January 14, 2004, Case No. ARB/01/3, *Enron v. Argentina*, par. 44, and Vandevelde, *supra* note 10, p. 13.

22 M. Sornarajah, *The International Law on Foreign Investment*, p. 9 (Cambridge University Press 2004).

23 EC: I.C.S.I.D., August 18, 2008, Case No. ARB/04/19, *Duke Energy v. Ecuador*.

24 *E.g.*, in AL: I.C.S.I.D., April 26, 1999, Case No ARB/94/2, *Tradex Hellas v. Albania and CZ*: U.N.C.I.T.R.A.L., March 14, 2003, IIC 62 (2003), *CME v. Czech Republic*, where the court stated that "[it is not required that] the assets or funds be imported from abroad or specifically from [territoriality of the other contracting state] or have been contributed by the investor itself." See also Vandevelde, *supra* note 10, p. 148.

© Ruchelman P.L.L.C., 2022. All rights reserved.

include a provision that makes the agreement applicable to investments that are made through a business resident in a third state.

Once a particular investment has been found to be covered by an investment protection agreement, the next issue is whether the holder of the investment has access to the investment protection agreement. Traditionally, the definition of "investor" included in most investment protection agreements applies to natural persons, legal entities, and partnerships.[25] Natural persons qualify as an investor if they hold the nationality of one of the contracting states. This must be determined according to the domestic law of the investor state.[26] Different criteria are used to determine if a legal entity or partnership qualifies as an investor. Included are the place of incorporation and the place where control is exercised. Other criteria may be used where the facts are unique.

E.U. Situations

Specifically with regard to B.I.T.'s concluded by and between E.U. Member States, the *Achmea* case of the European Court of Justice ("E.C.J.") found an arbitration clause in a B.I.T. to be incompatible with community law, as tribunals essentially remove disputes from the jurisdiction of the Member States' courts and consequently from the E.U.'s judicial system.[27] This ruling has significant consequences for arbitration clauses in B.I.T.'s concluded by the Member States.

Under the E.U. treaties, the Member States' courts and the E.C.J. collaborate in resolving disputes involving aspects of community law. Through the preliminary reference mechanism under Article 267 of the Treaty on the Functioning of the European Union ("T.F.E.U."), domestic courts refer questions on community law to the E.C.J. and are required to follow the answers provided by the E.C.J. This system should ensure that community law is applied effectively and uniformly throughout the E.U. and preserves the essential characteristics of the legal order in a uniform way within the E.U. To ensure the effectiveness of community law, courts in Member States must make preliminary references to the E.C.J. To that end, community law must always prevail over other sources of law, whether international or domestic. A more detailed discussion of the Achmea case appears elsewhere in this edition of *Insights* in a companion article co-authored by Stanley C. Ruchelman and Marie de Jorna.

TAXATION IN INVESTMENT PROTECTION AGREEMENTS

General

Having outlined the general contours of a B.I.T., the next issue is whether a B.I.T. can provide protection in regard to tax measures. As previously described, in certain cases, the legal protection provided by an income tax treaty is inadequate. The additional legal protection provided under an investment protection agreement can be of great significance in these circumstances.

---

[25] United Nations Conference on Trade and Development (U.N.C.T.A.D.), *Bilateral investment treaties 1995-2006: Trends in investment rule making*, p. 12 (U.N. 2007).

[26] *Id.*, p. 13.

[27] Case 284/16 *Slovak Republic v. Achmea*.

In most countries, autonomous tax policy is a sensitive subject. This finds expression in B.I.T.'s. In general, states are wary of third-party actions that may impose undesired limitations on taxation. This concern extends to B.I.T.'s and often is manifested in a number of B.I.T.'s through the inclusion of a carve-out provision.[28] The carve-out removes taxation from the scope of the B.I.T. However, other B.I.T.'s include only a partial exclusion for taxation.[29] The protocol to the Germany-Mexico B.I.T. states that tax measures that violate provisions of a B.I.T. can be subject to arbitration, with the exception of those provisions relating to national or M.F.N. treatment.[30]

". . . international law recognizes that taxation by sovereign states can amount to indirect expropriation in specific circumstances."

Taxation as a Form of Indirect Expropriation Under B.I.T.'s

The right of a state to impose tax is a fundamental attribute of sovereignty. Consequently, international law provides that taxation constitutes an important exception to the rule that expropriation is not allowed without adequate compensation. By its nature, taxation involves the taking of the taxpayer's money, resulting in a form of expropriation. Nonetheless, tax exclusion clauses in B.I.T.'s generally prevent effective actions against the state imposing tax.

Nonetheless, international law recognizes that taxation by sovereign states can amount to indirect expropriation in specific circumstances. In the case of *Yukos*, the court ruled that the tax measures imposed by the host state on a resident of the investor state could amount to expropriation for purposes of the relevant investment protection treaty "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 authorities."[31]

The definition of "expropriation" in investment protection agreements usually follows the definition found under international law.[32] Expropriation[33] can occur both directly and indirectly.[34] Direct expropriation occurs if the investment is nationalised or otherwise directly confiscated by means of a legal transfer of ownership or a direct physical takeover.[35] Indirect expropriation occurs when a state interferes in the

28 U.N.C.T.A.D., *supra* note 25, p. 81.

29 *Id.*, p. 82.

30 *Id.*, p. 83.

31 *Quasar de Valores et al v. The Russian Federation*, Award dated July 20, 2012.

32 A.F. Rodriguez, *International Arbitration Claims against Domestic Tax Measures Deemed Expropriatory or Unfair and Inequitable,* Inter-American Development Bank, Occasional Paper-SITI-11, p. 7 (January 2006).

33 Weston considers "expropriation" to be ambiguous and unsuitable. He proposes using "wealth deprivation." See B. Weston, *"Constructive taking" under International Law: A Modest Foray into the Problem of "Creeping Expropriation,"* Virginia Journal of Intl. L. 16, pp.103-175 (1975).

34 *E.g.*, U.N.C.T.A.D., *supra* note 25, p. 44, and O.E.C.D., *Working Papers on International Investment*, No. 2004/4, *Indirect Expropriation and The Right to Regulate, in International Investment Law* p. 3 (O.E.C.D. 2004).

35 O.E.C.D., *supra* note 34, p. 3.

© Ruchelman P.L.L.C., 2022. All rights reserved.

use of an investment or in the benefits received from that investment, even if the investment has not been physically seized and the legal ownership has not been affected. A governmental measure can also qualify as indirect expropriation if the investment's market value decreased as a result thereof[36] or if the economic benefit that could reasonably be expected was denied.[37] The effect of such government action is equal to that of expropriation. In broad terms, direct expropriations are rarely found, while indirect expropriations are more common.[38]

Taxation represents a partial breach of property rights.[39] As such, most forms of taxation could be contested by invoking an investment protection agreement, although this could not reasonably be expected to be the intention of such an agreement.[40] As a general rule, taxation does not qualify as expropriation under international law.[41] Under international law, a state cannot be held liable for loss of ownership as a result of a *bona fide* tax that is generally accepted as a legal expression of the executive power of a government.[42]

---

[36] MX: I.C.S.I.D., November 21, 2007, Case No. ARB(AF)/04/05, *Archer Daniels Midland v. Mexico.*

[37] MX: I.C.S.I.D., August 30, 2000, Case No. ARB(AF)/97/1, *Metalclad Corporation v. Mexico.*

[38] C.H. Schreuer, Part 1 — Report: The concept of expropriation under the ECT and under investment protection treaties, Investment Arbitration and the Energy Charter Treaty, pp. 108-159 (C. Ribeiro ed., 2006); 2 Transnat'l Dispute Mgmt. 3, p. 108 (June 2005).

[39] For practical reasons, the definition of "tax" as applied in investment treaties, is not discussed. In general, it is accepted that a tax measure will include legal provisions, procedures and their legal implementation.

[40] *E.g.*, T. Walde & A. Kolo, Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty, 35 Intertax 8/9, pp. 440-447 (2007).

[41] *E.g.*, in MX: U.N.C.I.T.R.A.L., February 3, 2006, LCIA Case No. UN3481, *EnCana v. Ecuador*, the court stated that, "a tax law is not a taking of property; if it were, a universal state prerogative would be denied by a guarantee against expropriation, which cannot be the case." In MX: I.C.S.I.D., December 16, 2002, Case No. ARB(AF)/99/1), *Feldman v. Mexico*, 7 I.C.S.I.D. Reports 318 (2003) 42 ILM 625, the tribunal argued that, "governments must be free to act in the broader public interest through protection of the environment, new or modified tax regime, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like."

[42] Sec. 712, *Restatement of the Law Third, the Foreign Relations of the U.S.A.* (American Law Institute 1987); Feldman, para. 105. See also A. Kolo, *Tax "Veto" as a Special Jurisdictional and Substantive Issue in Investor-State Arbitration: Need for Reassessment?,* Symposium, 2009.

Exceptional Circumstances

This does not mean that taxation cannot fall under the scope of the definition of expropriation. In certain circumstances, taxation can constitute expropriation under international law[43] as a result of which a tax dispute between a tax authority and an investor can be resolved by arbitration.[44] In *Link Trading v. Moldova* (2002), the arbitration panel ruled that taxation can be considered an expropriation if the nature of the tax involves "abusive taking."

According to the panel, a tax is considered "abusive taking" if it is unreasonable, arbitrary, discriminatory, or contrary to existing agreements.[45] In *Encana v. Ecuador*, where a refusal to refund Ecuadorian V.A.T. was in dispute, the panel concluded that taxation falls under the scope of the definition of expropriation if it can be qualified as "extraordinary, punitive in amount or arbitrary in its incidence."[46]

As a result of the current paucity of case law in regard to tax disputes, it can be concluded that two types of taxation can be identified under an investment protection agreement. Taxation that results in an indirect expropriation must be distinguished from taxation that, while having a substantial negative impact on the market value of the investment, nevertheless must be regarded as legitimate and, therefore, does not qualify as an indirect expropriation under an investment protection agreement.[47]

Assessment Framework

Certain elements can be extracted from case law and the literature that, taken together, can create an assessment framework for distinguishing *bona fide* tax measures from taxation that qualifies as expropriation:

---

[43] Rodriguez, *supra* note 32, p. 8. See also U.K.: London Court of International Court of Arbitration, July 1, 2004, Administered Case No. UN 3467, *Occidental v. Ecuador*. See also L. B. Sohn & R.R. Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens*, 55 A.J.I.L. 545, art. 10(5) (1961) (herein, the Harvard Draft):

> An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results…from the action of the competent authorities of the State in the maintenance of public order, health, or morality…shall not be considered wrongful, provided…it is not a clear and discriminatory violation of the law of the State concerned,…[and] it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world.

[44] Rodriguez, *supra* note 32, p. 13; see also CA: N.A.F.T.A./U.N.C.I.T.R.A.L., June 26, 2000, *Pope & Talbot Inc. v. the Government of Canada*, Interim Award in which the tribunal concluded that, "a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation."

[45] MD: U.N.C.I.T.R.A.L., April 18, 2002, *Link v. Moldova*, available here.

[46] MX: U.N.C.I.T.R.A.L., February 3, 2006, LCIA Case No. UN3481, *EnCana v. Ecuador.*

[47] Wälde & Kolo, *supra* note 40; R.E. Walck, *Tax and Currency Issues in international Arbitration*, 3 World Arb. & Med. Rev. 2, p. 176 (2009).

© Ruchelman P.L.L.C., 2022. All rights reserved.

- The government measures must lead to a substantial decrease in value.
- The decrease in value interferes with the reasonable expectations underlying the investment.
- The government measure deviates from internationally accepted norms (characteristics test).[48]

This assessment framework was confirmed in *Archer Daniels Midland v. Mexico*, where the panel ruled that factors beyond a substantial decrease in value or paralyzing government interference could be taken into account in determining whether the tax constituted an expropriation:

> * * * including whether the measure was proportionate or necessary for a legitimate purpose; whether it discriminated in law or in practice; whether it was not adopted in accordance with due process of law; or whether it interfered with the investor's legitimate expectations when the investment was made.[49]

In the *Revere Brass and Copper* case, the arbitration panel ruled that mining tax and royalties, imposed in violation of a concluded advance tax ruling, qualified as expropriation.[50] The ruling formed part of a concession given to a subsidiary for the extraction of bauxite in Jamaica. The newly elected government ignored the ruling and increased the tax burden by introducing a new mining tax. Revere considered the negative impact on profitability excessive and ended its subsidiary's activities. The arbitration panel recognized that Revere's subsidiary still had full ownership and could have continued with its activities but regarded the matter as an expropriation under international law nonetheless because Revere could no longer make an economically effective use of the business. The profitability of the investment was severely impaired by the tax.

Substantial Financial Damages

While it is difficult to determine the scope and extent of damage arising from a tax measure for it to qualify as expropriation, general agreement exists that the bar is set very high.[51] The United Nations Conference on Trade and Development ("U.N.C.T.A.D.") concluded that the damage must include "a significant depreciation"

---

[48] *E.g.*, *Archer Daniels*; Wälde & Kolo, *supra* note 40, Harvard Draft Convention, *supra* note 43; O.E.C.D., *supra* note 34; Restatement, *supra* note 42, §712, cmt. (g); Iran-US. Claims tribunal, December 29, 1989, Award No. 460-880-2, *Too v. Greater Modesto Insurance Assocs., et al.;* and R. Moloo & J. Jacinto, *Environmental and Health Regulation: Assessing Liability Under B.I.T.s,* 29 Berkeley J. of Intl. L. 2, pp. 1-66 (2011).

[49] *Archer Daniels*, par. 250.

[50] August 24, 1970, *Revere Copper and Brass Inc and Overseas Private Investment Corporation* (1978), 56 ILR 258, discussed by M. Hunter & A.C. Sinclair, *Ammoil Revisited Reflections on a Story of Changing Circumstances*, in Investment Law and Arbitration: Leading Cases From The ICSID, NAFTA, Bilateral Treaties and Customary International Law p. 360 (T. Weiler ed., Cameron May 2005).

[51] *E.g.*, Kolo, *supra* note 42; *Archer Daniels*; Rodriguez, *supra* note 37; and *Feldman*, para 103.

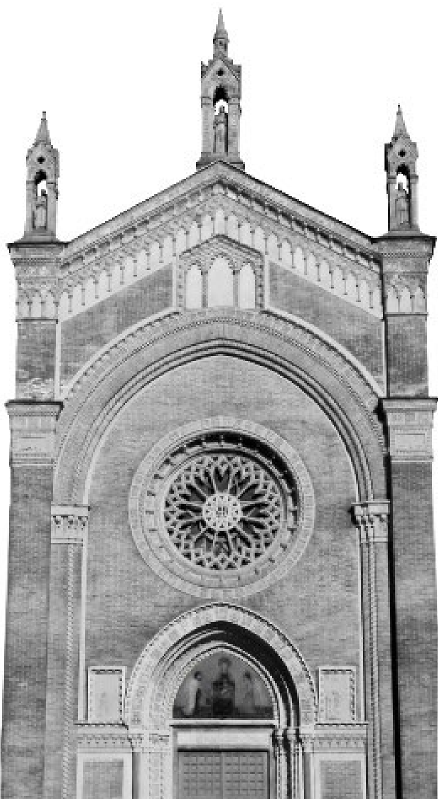
© Ruchelman P.L.L.C., 2022. All rights reserved.

in value.[52] Moreover, if a measure is extremely discriminatory or absurd, the extent of financial damage need not be the same as for a more common measure.[53] In *Occidental v. Ecuador* the panel dealt with a refusal by the Ecuadorian tax authorities to refund V.A.T., contrary to earlier agreements with the taxpayer.[54] The taxpayer invoked the expropriation clause of the relevant B.I.T. According to the panel, the refusal did not qualify as expropriation since it did not deprive the taxpayer of the economic benefits that were reasonably to be expected or inflict substantial damages on the investment. The right to a V.A.T. refund was not a substantial part of the investment.[55] The previously cited *Archer Daniels* case is one of the few rulings that attempts to define the standard to be applied when measuring damages. The panel concluded that the damage criterion is met if the taxpayer is deprived of all or the majority of the benefits generated by the investment. Not only is the scope of the tax relevant but also the duration of the tax. A permanent loss of value will carry more weight than a temporary loss of value.[56]

OTHER PROVISIONS PROVIDING LEGAL PROTECTION AGAINST TAX MEASURES

Equal National Treatment Under Non-Discriminatory Provisions

The *Archer Daniels* case previously discussed involved a 20% tax imposed by Mexico on soft drinks containing a corn syrup sweetener. The tax did not apply to soft drinks sweetened with sugar cane. The reason for this measure appeared to have been the protection of the Mexican sugar cane market. A.D.M. was a U.S. manufacturer of corn syrup. It saw a sharp decline in the value of its Mexican investments as a result of the measure. A.D.M. challenged the tax under the North American Free Trade Agreement ("N.A.F.T.A."), a multilateral investment protection agreement. One of the grounds for its complaint was that the tax qualified as expropriation.[57]



---

[52] U.N.C.T.A.D., *Series on Issues in International Investment Agreements: Taking of Property* 4 (2000). See also R. Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 *Recueil des Cours*, pp. 259-324 (1982).

[53] Wälde & Kolo, *supra* note 40.

[54] *Occidental v. Ecuador.*

[55] *Occidental v. Ecuador*. See also I.C.S.I.D., September 13, 2006, Case No. ARB/04/15, *Pope & Talbot and Telenor v. Hungary.*

[56] *Archer Daniels*, para. 240:

> The test on which other Tribunals and doctrine have agreed – and on which the "Claimants" rely – is the "effects test". Judicial practice indicates that the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place. An expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment. There is a broad consensus in academic writings that the intensity and duration of the economic deprivation is the crucial factor in identifying an indirect expropriation or equivalent measure.

[57] A.D.M. invoked article 1102 of the N.A.F.T.A.

© Ruchelman P.L.L.C., 2022. All rights reserved.

The arbitration panel applied the assessment framework described above and concluded that the impact of the tax on A.D.M.'s investments was not sufficient to constitute expropriation. However, the arbitration panel considered the tax a violation of N.A.F.T.A. because the nondiscrimination provision guarantees the domestic and equal treatment of foreign investments. The arbitration panel ruled that the effect of the tax was such that U.S. manufacturers and distributors of corn syrup in Mexico received less favorable treatment than Mexican manufacturers of sugar cane. As a result, the tax violated the investment protection agreement.

Fair and Equitable Treatment

The *Occidental v. Ecuador* case, in respect of which a decision was given under the U.S.-Ecuador B.I.T. is similar to the *Archer Daniels* case.[58] Initially, the arbitration panel rejected a claim based on the expropriation provision, because revoking a right to a V.A.T. refund did not qualify as expropriation. However, after further consideration, the revocation of the refund was considered to be an unauthorized violation of the investment protection agreement. The arbitration panel considered that the right to fair and equitable treatment had been violated.[59] The right to a V.A.T. refund was part of an agreement with the Ecuadorian tax authorities, which interpreted national legislation (the ruling). The arbitration panel emphasized that a contracting state to a B.I.T. must provide investors from the other contracting state with a stable and predictable legal infrastructure. That obligation is a consequence of the right to fair and equitable treatment that is mandated by the B.I.T. Whether the contracting state acted in bad faith was irrelevant. Based on the underlying facts, the panel concluded that the domestic V.A.T. legislation and the subsequent interpretation in a tax ruling materially contributed to Occidental's decision to invest in Ecuador. The panel concluded that "the tax law was changed without providing any clarity about its meaning and extent, and the practice and regulations were also inconsistent with such changes."[60] As such, the panel ruled that Ecuador failed in its obligation to provide a stable and predictable legal system. The revoked refund resulted in a violation of the existing B.I.T.[61]

Last but not least, the *Vodafone* case offers a more recent and quite spectacular example of the interaction between income tax treaties and B.I.T.'s. In what is commonly regarded as one of the most significant international tax disputes of this era, a Dutch affiliate of the Vodafone Group, Vodafone International Holdings B.V.

---

[58] *Occidental v. Ecuador.*

[59] Art. II(3)(a) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, with Protocol and a Related Exchange of Letters (August 27, 1993): "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."

[60] *Occidental v. Ecuador*, para 184.

[61] It should be noted that the tribunal in *EnCana v. Ecuador*, para. 173 considered that a contractual obligation was indeed more important than an obligation derived from general legislation and, therefore, applied to the underlying issue a more limited interpretation of the right to fair and equitable treatment:

> [I]n the absence of a special commitment from the host state, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage, during the period of the investment.

© Ruchelman P.L.L.C., 2022. All rights reserved.

("V.I.H.") sought to rely on the formal route in the B.I.T. signed between India and the Netherlands rather than the mutual agreement procedure provided for in the income tax treaty between the two countries. More specifically, V.I.H. invoked Clause 9 of the B.I.T. to challenge a retrospective amendment of Indian law to tax capital gains, which had been enacted in the aftermath of the following events.

Back in 2007, V.I.H. had acquired a 67% interest in the Indian telecom company Hutchison Essar Limited ("H.E.L.") for an amount of $11 billion. This transaction entailed a share purchase agreement between V.I.H. and the Hutchison Telecommunications International Limited ("H.T.I.L.") involving a Cayman Island-based company C.G.P. Investments Limited ("C.G.P."), which in turn, directly and indirectly, held a 67% interest in H.E.L. Shortly thereafter, the Indian tax authorities issued a notice demanding payment of $2.2 billion as capital gains tax, which Vodafone contended it was not liable to pay as the transaction between H.T.I.L. and V.I.H. did not involve the transfer of any capital asset situated in India.

"The scope of substantive rights laid down in an investment protection agreement in the context of taxation is difficult to define, partly due to the scarcity of guidance in the case law."

Following verdicts by the Bombay high court and the Indian Supreme Court, eventually the case reached the Permanent Court of Arbitration at the Hague. In a unanimous decision, the court held that the retrospective demand was in breach of the guarantee of fair and equitable treatment.[62] Moreover, the court requested India not to pursue any such tax demand any more against Vodafone Group, so as to end the tax dispute between India and the Vodafone Group that had lasted almost a decade.

CONCLUSIONS

The scope of substantive rights laid down in an investment protection agreement in the context of taxation is difficult to define, partly due to the scarcity of guidance in the case law. Nonetheless, it follows from the above that a B.I.T. can provide legal protection against those forms of taxation that may constitute a violation of its provisions. Particularly, the provisions on expropriation, nondiscrimination, and the right to fair and equitable treatment set limits on a contracting state's right to impose taxation.

Where taxation results in a substantial decrease of the value of an investment, it may be a form of expropriation that can be redressed under a B.I.T. if it detrimentally affects the reasonable expectations of the investor that formed the basis for its investment. However, access to a B.I.T. is allowed only if the imposition of the tax deviates from internationally accepted legal standards. The most obvious example of an internationally accepted legal standard is a tax that violates the principle of non-discrimination. The tendency of arbitration panel decisions is that when the violation of a generally accepted legal principles is flagrant, the disputed government action on the investment need not be as great in order for a claim by an affected investor to be upheld.

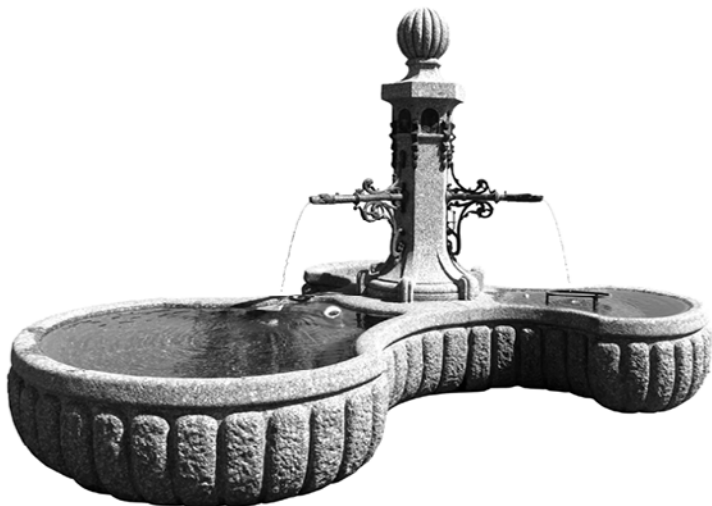
Future cases and arbitration guidance will be required to determine the circumstances in which a violation of specific international tax principles can be considered a deviation from internationally accepted legal standards. In matters relating to taxation, it may be expected that an arbitration panel will apply a high standard before a claim will be upheld under a B.I.T. regarding the imposition of tax. The unanticipated

[62] *Vodafone v. India (I)Vodafone International Holdings BV v. India* (I)(PCA Case No. 2016-35), arbitral award dated September 25, 2020.

imposition of tax by the host country must have a significant impact on the value of the investment and must be at odds with the reasonable expectations of the investor at the time the investment was made. If both these conditions are met, it is conceivable that a panel may conclude that such taxation qualifies as indirect expropriation.

For tax advisers who customarily look for relief under the terms of an income tax treaty, the most interesting aspect of arbitration under a B.I.T. is that the investor is a direct party to the arbitration. Indeed, the investor can instigate arbitration proceedings in addition to participating in the proceedings. The generous legal protection offered by an investment protection agreement stands in stark contrast to arbitration under a tax treaty, but it is still in the formative stages.

Arbitration under a tax treaty or an investment protection agreement does not necessarily have to be mutually exclusive. The competent authority in the state of residence can be requested to start a M.A.P. under the relevant tax treaty, while at the same time commencing proceedings under the existing investment protection agreement. Note that access to a B.I.T. may require that all avenues for domestic legal recourse have been exhausted previously. In this respect, the spectre of arbitration under an investment protection agreement can keep pressure on the mutual consultation procedure under the tax treaty.



© Ruchelman P.L.L.C., 2022. All rights reserved.

PERENCO V. ECUADOR AND *ACHMEA B.V. V. THE SLOVAK REPUBLIC*: PRACTICAL LIMITATIONS WHEN SEEKING RELIEF UNDER A B.I.T.

Authors
Stanley C. Ruchelman
Marie de Jorna

Tags
Achmea
Bilateral Investment Treaty
Perenco

Marie de Jorna is a French lawyer who is admitted to the Paris Bar. She holds a Master 1 Degree in Business from the University Paris 1, Pantheon-Sorbonne and a Master 2 Degree from the University of Poitiers. She is currently training in U.S. tax matters at Ruchelman P.L.L.C.

INTRODUCTION

The immediate reaction of tax advisers in seeking relief for a client faced with a cross-border tax dispute is to seek Competent Authority relief under the Mutual Agreement Procedure of an applicable income tax treaty. As explained in Paul Kraan's article elsewhere in this edition of *Insights*, a Bilateral Investment Treaty ("B.I.T.") can also protect against certain abuses by foreign tax authorities. A B.I.T. is designed to promote foreign investment between two nations. One of the main points of the treaty is to assure an investor from one state that its investment in the other state will be treated fairly. Typically, this means that the foreign investor or its local subsidiary will not be the target of unfair sovereign acts, but it also protects against unfair or confiscatory tax assessments. Approximately 3,000 B.I.T.'s are currently in effect.

Compared to an income tax treaty, which aims to avoid double taxation by allocating taxing rights between its parties and provides a dispute resolution process to be followed by the Competent Authorities of its parties' tax administrations, a B.I.T.is structured to ensure that the foreign investor and its local subsidiary will receive the same treatment as domestic companies, including fair and equitable treatment and protection from expropriation. In addition, the dispute resolution provision under a B.I.T. grants a foreign investor the right to bring an action before an international arbitration panel that is enforceable as a judgment in the event obligations imposed on a party to a B.I.T. are violated. However, the wheels of justice grind slowly, as will be seen below.

An example of a company seeking relief from confiscatory tax assessments under a B.I.T. involves a French oil and gas company, Perenco Ecuador Limited ("Perenco"), which in 2008 filed a petition requesting arbitration by the International Centre for Settlement of Investment Disputes ("I.C.S.I.D.") against the government of Ecuador ("Ecuador").[1] This petition was filed following the enactment of a law in Ecuador that increased the participation of the Ecuadorian government at the expense of Perenco. Five similar petitions were filed with the I.C.S.I.D. in response to these measures.

A B.I.T. between two Member States no longer has a role to play in resolving disputes that arise entirely within the European Union in light of the *Achmea* decision in 2018, which dismissed the competency of the B.I.T. as an avenue for a resident of one Member State to obtain relief against another Member State based on European Union ("E.U.") law.

---

[1] *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador),* I.C.S.I.D. case No. ARB/08/6.

© Ruchelman P.L.L.C., 2022. All rights reserved.

This article will explore two cases where arbitration under a B.I.T. provided ephemeral benefits. They are *Perenco v. Ecuador* and *Achmea v. The Slovak Republic*.[2]

PERENCO V. ECUADOR

Context of the Dispute

Ecuador's Amazonian Region is known for its important oil resources. Perenco is one of several foreign oil companies that have been granted permission to exploit the area's oil reserves.

In 1993, Ecuador put in place Law 44. This law permitted oil contractors to operate through participation contracts. Under those contracts, the private company assumed all the risks and costs of exploration and exploitation in return for the grant of a right to receive a share of the revenue generated from the production of oil.

In 2002, Perenco became a party to two participation contracts related to oil exploration and production activities in Blocks 7 and 21, situated in the Ecuadorian Amazonian Region. Four years later, Perenco and an unrelated company, Burlington, formed a joint venture regarding production in those blocks, with Perenco having the majority interests.

In 2005, international oil prices began to rise. In 2002, the price of Ecuadorian crude oil was approximately U.S.$15 per barrel. By 2005, prices reached U.S.$50 per barrel and generated extraordinary profits for oil companies. As a result, the Ecuadorian government announced that it would renegotiate the participation contracts in order to provide a greater share of the revenue to itself.

In 2006, Law 42 was adopted in Ecuador. It allocated 50% of "extraordinary income" derived from production of oil to the Ecuadorian government. Extraordinary income was defined as any revenue earned per barrel that exceeded a specified reference price. The reference price was set at U.S.$25 per barrel for the Block 7 participation contract and U.S.$15 per barrel for the Block 21 participation. Thus, for example, if in 2006 the reference price was U.S.$25 and the prevailing price of oil was U.S.$45 per barrel, the Ecuadorian government would be entitled to U.S.$10 per barrel ((U.S.$45 - U.S.$25) x 50% = U.S.$10 per barrel).

A second decree issued in October 2007 increased the Ecuadorian government's share of revenue from sales above the reference price from 50% to 99%, effectively freezing Perenco's profits at slightly more than the reference price.

Perenco's Request for Arbitration at the I.C.S.I.D.

The governments of France and Ecuador entered into a B.I.T. (the "F-E B.I.T.") on September 7, 1994. Article 4 of the F-E B.I.T. provides as follows:

> Each Contracting Party shall ensure fair and equitable treatment in accordance with the principles of international law, to investments of nationals and companies of the other Contracting Party and to ensure the enjoyment of the right thus recognized is hampered in either law or in fact.

---

[2] Case C-284/16.

In particular, though not exclusively, shall be regarded as barriers of fact or law in fair and equitable treatment, any restriction to purchase and transport of raw materials and auxiliary materials, energy and fuel and means of production or operation of any kind, interference with the sale and transport of goods within the country and abroad, as well as any other measures having a similar effect.

Investments made by nationals or companies of either Contracting Party shall enjoy full protection and security by the other Contracting Party.

Neither of the Contracting Parties shall impair the management, maintenance, use, enjoyment or disposal of investments of nationals or companies of the other Contracting Party.

Article 6 of the F-E B.I.T. provides as follows:

1. The Contracting Parties shall not take any measures of expropriation or nationalization or any other measures the effect of which is, directly or indirectly dispossessing nationals and companies of the other party (hereinafter referred to as "expropriation") of their investments, except for a public purpose and provided that such measures are not discriminatory nor contrary to a specific commitment undertaken pursuant to the laws of the Contracting Party between those nationals or companies and the host State. The legality will be verifiable by judicial proceedings.

   The expropriation of measures that could be taken shall be subject to the payment of fair and adequate compensation amounting to the real value of the investment and the concerned is assessed in relation to a normal economic situation and prior to any threat of dispossession.

   Such compensation, its amount and has no later than the date of expropriation. The compensation shall be paid without delay, and effectively realisable freely transferable. It produces until the date of payment, shall include interest at the market rate of interest.

2. Nationals or companies of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolution, state of emergency or national revolt in the other Contracting Party benefit, on the part of this latter, from a treatment no less favourable than that accorded to its own investors or to those of the most favoured nation.

   In the event of a declaration of a national state of emergency, these companies or nationals receive fair and adequate compensation for the loss allegedly suffered as a result of the events referred to above.

Article 9 of the F-E B.I.T. provides for relief ultimately through arbitration, as follows:

> 1. The Contracting Parties shall not take any measures of expropriation or nationalization or any other measures the effect of which is, directly or indirectly dispossessing nationals and companies of the other party (hereinafter referred to as "expropriation") of their investments, except for a public purpose and provided that such measures are not discriminatory nor contrary to a specific commitment undertaken pursuant to the laws of the Contracting Party between those nationals or companies and the host State. The legality will be verifiable by judicial proceedings.
>
>   The expropriation of measures that could be taken shall be subject to the payment of fair and adequate compensation amounting to the real value of the investment and the concerned is assessed in relation to a normal economic situation and prior to any threat of dispossession.
>
>   Such compensation, its amount and has no later than the date of expropriation. The compensation shall be paid without delay, and effectively realisable freely transferable. It produces until the date of payment, shall include interest at the market rate of interest.
>
> 2. Nationals or companies of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolution, state of emergency or national revolt in the other Contracting Party benefit, on the part of this latter, from a treatment no less favourable than that accorded to its own investors or to those of the most favoured nation.
>
>   In the event of a declaration of a national state of emergency, these companies or nationals receive fair and adequate compensation for the loss allegedly suffered as a result of the events referred to above.

On April 30, 2008, Perenco petitioned the I.C.S.I.D. to begin arbitration proceedings, contending that its rights under Articles 4 and 6 were violated by the Ecuadorian government.

Perenco submitted that Ecuador breached Article 4 of the of the F-E B.I.T. because it failed to accord Perenco's investment in Blocks 7 and 21 fair and equitable treatment. The participation contracts were written so that Perenco's participation was tied exclusively to the volume of the production and not according to the oil price fluctuations. By enacting the Law 42, Ecuador undermined this expectation.

When the arbitration process under the F-E B.I.T. began, Perenco ceased making payments under Law 42. In response, the Ecuadorian government seized all crude production from Blocks 7 and 21. In response, Perenco submitted that the enactment of the Law 42, the seizure of Perenco's crude production from the Blocks 7 and 21, and the cancellation of the contracts breached Article 6 of the B.I.T. which prohibited expropriation. In total, Perenco claimed damages of U.S.$1.572 billion.

In 2009, the I.C.S.I.D. arbitration panel issued a decision recommending provisional measures restraining Ecuador from demanding Perenco pay any amount.

The Answers From Ecuador

Ecuador challenged the authority of the I.C.S.I.D. arbitration panel to adjudicate the dispute. Ecuador contended that Perenco was not a French company within the meaning of the F-E B.I.T. and that the I.C.S.I.D. arbitration panel lacked jurisdiction over Perenco's Blocks 7 and 21 contract claims because the dispute was not a technical and/or economic dispute.

"In sum, the I.C.S.I.D. arbitration panel considered that the enactment of Law 42 imposing the sharing ratio of 99% for the Ecuadorian government and 1% for Perenco with regard to amounts in excess of the reference price was in breach of fair and equitable treatment under Article 4 of the F-E B.I.T., but did not constitute an expropriation prohibited by Article 6 of the F-E B.I.T."

As to the substantive issue, Ecuador responded that Article 4 of the F-E B.I.T. was not breached because Law 42 did not modify the participation contracts as the contracts did not guarantee Perenco a right to a given revenue stream. In addition, Ecuador argued that Article 6 of the B.I.T. was not breached as the measures taken were all legitimate exercises of Ecuador's police powers and that they were legitimate responses to Perenco's illegal conduct. Finally, Ecuador argued that there was no expropriation as Perenco was not deprived of the contract's benefits.

Decisions of the I.C.S.I.D. Arbitration Panel in 2011 as to Jurisdiction and in 2014 as to Liability

In 2011, the I.C.S.I.D. arbitration panel determined that it had jurisdiction over Perenco's contract claims because Perenco was indirectly owned by French citizens.

In 2014, the I.C.S.I.D. arbitration panel concluded that Ecuador was liable for breaches of the participation contracts and for acting in violation of the fair and equitable treatment standard of Article 4 of the F-E B.I.T. The I.C.S.I.D. arbitration panel went on to conclude that the cancellation of the contract constituted a breach of Article 6 of the B.I.T.

In sum, the I.C.S.I.D. arbitration panel considered that the enactment of Law 42 imposing the sharing ratio of 99% for the Ecuadorian government and 1% for Perenco with regard to amounts in excess of the reference price was in breach of fair and equitable treatment under Article 4 of the F-E B.I.T., but did not constitute an expropriation prohibited by Article 6 of the F-E B.I.T.

Environmental Counterclaim by Ecuador

In 2015, Ecuador presented an environmental counterclaim on the basis of an environmental catastrophe in the two oil blocks situated in the country's Amazonian rainforest that had been worked by the consortium headed by Perenco.

In August 2015, the I.C.S.I.D. arbitration panel issued an interim decision on the environmental counterclaim and recommended that the parties seek to negotiate a resolution. If the parties could not arrive at a settlement, the I.C.S.I.D arbitration panel advised that it would proceed to appoint an independent expert. In the end, no agreement was found, and an independent expert was chosen.

Applications of Perenco to Apply the Conclusions in the Dispute Between Burlington and Ecuador

At the same time that Ecuador was pursuing a counterclaim against Perenco based on environmental damages, it pursued a claim against Burlington, the other

company that joined Perenco in exploiting the oil reserves in Block 7 and Block 21. The claim against Burlington raised all the same issues that had been raised against Perenco. On February 7, 2017, the Burlington I.C.S.I.D. arbitration panel rendered its decision on the counterclaims of Ecuador, finding Burlington liable for environmental damages.

On April 18, 2017, Perenco filed a dismissal application based on concepts of *res judicata*. It argued that Ecuador brought the same dispute against Perenco and Burlington in two separate proceedings and that Ecuador's counterclaims concern the same subject matter and are premised on the same legal basis. It pointed out that Ecuador did not dispute that it sought identical overlapping compensation with regard to the same alleged damage in both proceedings. As all factual and legal issues forming the basis of Ecuador's counterclaims against Perenco have been determined, there was nothing more for the arbitration panel to decide.

In response, Ecuador asserted, among other things, that Perenco's motion was not timely made as the parties in both disputes were arbitrating counterclaims for more than five years. If Perenco wished to prevent parallel litigation of the counterclaims, it should have filed a *lis pendens* application as early as December 2011. In Ecuador's view, Perenco waited until it knew the result of the Burlington arbitration and sought to take advantage once the decision in the Burlington arbitration was reached.

The arbitration panel ruled in favor of Ecuador. According to the decision, Ecuador's counterclaims in the two proceedings progressed in parallel, although the counterclaims were presented in the Burlington matter more than ten months earlier. The parties were fully aware of this fact. While parallel proceedings are generally avoided, neither panel had the power on its own motion to order the consolidation of the parts relating to counterclaims. Moreover, Perenco never challenged the jurisdiction of the arbitration panel to hear Ecuador's counterclaims nor their admissibility.

Perenco filed a second dismissal application on January 30, 2018, contending that that Burlington's payment in full satisfied Perenco's obligations on the counterclaims. This application was dismissed.

Award of Damages on the Perenco Claim and the Ecuadorian Counterclaim

On September 27, 2019, the I.C.S.I.D. arbitration panel issued the final award in the arbitration proceedings. It ruled that Perenco was entitled to damages in the amount of U.S.$448,820,400. This was balanced by an award in favor of Ecuador in the amount of U.S.$54,439,517 for environmental damages to Block 7 and Block 21 and for remedying the damages to infrastructure.

Perenco acted quickly in taking steps to enforce the award. In October 2019, it asked the U.S. Federal Court of the District of Columbia to enter a judgment against Ecuador in the net amount set forth in the Award. According to the I.C.S.I.D. rules, the place of arbitration controls the process for enforcing the award. Here the arbitration was held in the U.S. Under Section1391(f)(4) the Foreign Sovereign Immunities Act ("F.S.I.A.").

At about the same time, Ecuador petitioned the I.C.S.I.D. for an order annulling the award. The circumstances in which annulment is granted are limited. An *ad hoc* committee of three members was appointed to address Ecuador's petition.

© Ruchelman P.L.L.C., 2022. All rights reserved.

In May 2021, the *ad hoc* committee issued a decision concluding the annulment proceeding and largely confirming the award. The committee reduced the damages awarded from U.S.$448.82 million to around U.S.$412 million, finding that there was a lack of reasoning in the original award. Although Ecuador was ordered to pay the reduced award by July 27th, 2021, Ecuador refused to do so. Instead, it petitioned the U.S. District Court for the District Court of Columbia to rule that Perenco *owed* unpaid income tax in the amount of U.S.$40,845,760.13, as finally determined by the courts in Ecuador. In broad terms, a determination is final and binding when no further appeal is available or the time for filing an appeal has run. The District Court was asked to allow a set-off of that amount against the award of the *ad hoc* committee.

On September 20, 2021, Perenco filed its response with the U.S. District Court. Claiming that Ecuador's request for a tax set-off fails under a common law rule known as the "revenue rule." The common law revenue rule is a judicial doctrine that prevents courts in one country from being used by a foreign government as a tool to collect lost tax revenue of any kind. The leading authority in the U.S. is *Moore v. Mitchell*, 30 F.2d 600 (2d Cir. 1929).[3]

Ecuador's reliance on the final determination against Perenco for taxes owed proved to be faulty. On November 8, 2021, the Tax Chamber of the Ecuadorian National Court of Justice issued a decision remanded one of the seven tax judgments for which Ecuador claimed set-off to a lower court for further consideration on the merits. This did not stop the Ecuadorian government from pursuing its claim for a set-off. On February 16, 2022, Ecuador submitted a response brief arguing that the six other judgments should be decided on their own merits and that the remanding of a single judgment should not bar Ecuador from seeking setoff for the six other judgments. On February 22, 2022, Perenco responded, arguing that even if Ecuador could prove that the tax claims are enforceable, those claims still could not be set off against the award because a final determination of the amount due does not yet exist.

No decision has been reached by the U.S. District Court as of the date of publication of this article.

Takeaway

The long history of arbitration and litigation between Perenco and Ecuador brings to mind the Supreme Court case of *Marbury v. Madison*, 5 U.S. 137 (1803). That case involved an individual, William Marbury, who was nominated to a Federal office by John Adams, then President of the U.S., and whose nomination was approved by the Senate. Nonetheless, James Madison, the Secretary of State, refused to issue a commission to Mr. Marbury confirming appointment to the office. A writ of mandamus was sought from the Supreme Court, which refused to order Mr. Madison to issue the commission. The Supreme Court held that Mr. Marbury had a right to the commission but no remedy against the Secretary of State, Mr. Madison, to issue the commission.

[3] See also *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings Inc.,* 268 F.3d 103 (2d Cir. 2001); *European Community v. RJR Nabisco Inc.,* 355 F.3d 123 (2d Cir. 2004). For a full discussion of the revenue rule, see Doobay and Ruchelman, "Adventures in Cross-Border Tax Collection: Revenue Rule vs. Cum-Ex Litigation," Volume 175, Number 3 *Tax Notes Federal* 359, April 18, 2022.

In *Perenco v. Ecuador*, Perenco was found to have been damaged by the acts of the Ecuadorian government which violated the F-E B.I.T. Perenco even had a remedy authorized by the F-E B.I.T. An arbitration procedure before the I.C.S.I.D. was available and access to the U.S. Federal District Court for the District of Columbia to enforce a decision of the I.C.S.I.D. Notwithstanding the right and the remedy, the matter has not been finally resolved after 14 years of litigation before the I.C.S.I.D. and the U.S. Federal District Court for the District of Columbia. Like Mr. Marbury more than 200 years ago, Perenco seems to have a right, but no effective remedy for the violation of that right by the Ecuadorian government. That may change one day when a judgment is issued and assets seized in satisfaction of the judgment, but the cost in terms of legal expense and time-value of money is appalling.

ACHMEA B.V. V. THE SLOVAK REPUBLIC: THE END OF B.I.T.S AT THE INTRA-E.U. LEVEL

Context of the Dispute

Following a reform on its health system in 2004, the Slovak Republic opened its market to foreign private insurance companies. It is in this context that Achmea, member of a group of insurance companies based in the Netherlands, formed a subsidiary in the Slovak Republic to provide sickness insurance.

In 2006 and 2007, the Slovak Republic partly reversed the liberalization of the private health insurance market by enacting a law prohibiting the distribution of profits generated by private health insurance companies operating in the Slovak Republic. Ultimately, the Constitutional Court of the Slovak Republic determined that the prohibition was contrary to the Slovak constitution. Consequently, the Slovak Republic allowed the distribution of profits by a law enacted in 2011.

In 2008, Achmea brought an arbitration proceeding against the Slovak Republic according to the arbitration clause that appears in Article 8 of the B.I.T. between the Netherlands and the Slovak Republic ("the N-S B.I.T."). The arbitration took place in Germany.

The N-S B.I.T. was concluded in 1991 and entered into force on January 1, 1992. In accordance with Article 3(1) of the N-S B.I.T."), the two countries undertook to ensure fair and equitable treatment of the investments of investors from the other country and not to impair by unreasonable or discriminatory measures the operation, management, maintenance, use, enjoyment, or disposal of those investments. In accordance with Article 4 of the N-S B.I.T., each country guaranteed the free transfer of profits in a freely convertible currency without undue restriction or delay of payments relating to an investment, such as profits, interest, and dividends.

Achmea contended that the relevant law enacted by the Slovak Republic was contrary to the Article 4 of the N-S B.I.T. and initiated arbitration proceedings in Germany.

Article 8 of the N-S B.I.T., provides a dispute mechanism to resolve claims under the N-S B.I.T. It provides as follows:

> 1. All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if, possible, be settled amicably.

2. Each Contracting Party hereby consents to submit a dispute referred to in paragraph 1 of this Article to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date on which either party to the dispute requested amicable settlement.

3. The arbitral tribunal referred to in paragraph 2 of this Article will be constituted for each individual case in the following way: each party to the dispute appoints one member of the tribunal and the two members thus appointed shall select a national of a third State as Chairman of the tribunal. Each party to the dispute shall appoint its member of the tribunal within two months, and the Chairman shall be appointed within three months from the date on which the investor has notified the other Contracting Party of his decision to submit the dispute to the arbitral tribunal.

4. If the appointments have not been made in the abovementioned periods, either party to the dispute may invite the President of the Arbitration Institute of the Chamber of Commerce of Stockholm to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the most senior member of the Arbitration Institute who is not a national of either Contracting Party shall be invited to make the necessary appointments.

5. The arbitration tribunal shall determine its own procedure applying the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.

6. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
   - the law in force of the Contracting Party concerned;
   - the provisions of this Agreement, and other relevant agreements between the Contracting Parties;
   - the provisions of special agreements relating to the investment;
   - the general principles of international law.

7. The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute.

"During the arbitration, the Slovak Republic raised an objection to the jurisdiction of the arbitration panel based on European Union law. The arbitration panel dismissed the objection and damages in the principal amount of €22.1 million."

During the arbitration, the Slovak Republic raised an objection to the jurisdiction of the arbitration panel based on European Union law. The arbitration panel dismissed the objection and damages in the principal amount of €22.1 million. The Slovak Republic brought an action before the Higher Regional Court in Frankfurt, Germany to

© Ruchelman P.L.L.C., 2022. All rights reserved.

set aside the award. The Higher Regional Court dismissed the action. The Slovak Republic appealed the dismissal to the German Federal Court of Justice, contending that Article 8 of the N-S B.I.T. was incompatible with Articles 267 and 344 of the Treaty on the Functioning of the European Union ("T.F.E.U.").[4]

Article 344 provides as follows:

> Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

Article 267 provides as follows:

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> a. the interpretation of the Treaties;
>
> b. the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
>
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

The matter was referred to the Court of Justice of the European Union because it had not yet ruled on the question and the matter was of considerable importance to the numerous bilateral investment treaties in force between Member States of the E.U. containing similar arbitration clauses. The C.J.E.U. ruled that the dispute resolution provision of the N-S B.I.T. was incompatible with Articles 267 and 344 of the T.F.E.U.

According to the C.J.E.U., an international agreement cannot affect the allocation of powers fixed by the foundation treaties governing the operations of the E.U. and the autonomy of the E.U. legal system. That principle is enshrined in Article 344 of the T.F.E.U., which provides that Member States cannot submit a dispute concerning the interpretation or application of the foundation treaties to any method of settlement other than those provided for in those treaties. The essential characteristic of E.U. law is that it stems from an independent source of law – the foundation treaties – and reflects the primacy of E.U. law over the laws of the Member States.

---

[4] The T.F.E.U. is one of two treaties forming the constitutional basis of the European Union, the other being the Treaty on European Union.

© Ruchelman P.L.L.C., 2022. All rights reserved.

In order to ensure that the specific characteristics and the autonomy of the E.U. legal order are preserved, the foundation treaties established a judicial system intended to ensure consistency and uniformity in the interpretation of E.U. law. The keystone of the legal system is Article 267 of the T.F.E.U., which, sets up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States. In this way, a system is established securing uniform interpretation of E.U. law.

Applying these principles to the dispute resolution provisions of the N-S B.I.T., a resolution of the dispute between Achmea and the Slovak Republic will involve the application of E.U. law which can only be resolved by the courts of E.U. Member States and the C.J.E.U. The arbitration panel that is used to resolve a dispute under the N-S B.I.T. is not a court established by a Member State and its decision is not reviewable by the C.J.E.U. By entering into the N-S B.I.T., the Slovak Republic established a mechanism for settling disputes between an investor and a Member State which could prevent the disputes from being resolved in a manner that ensures the full effectiveness of E.U. law, even though they might concern the interpretation or application of that law.

As a final point, the C.J.E.U. differentiated use of a dispute resolution system in commercial arbitration from reliance on an arbitration panel to resolve a claim against a Member State of the E.U. The former involves a dispute between private parties. The latter involves a dispute involving a private party and a Member State of the E.U., which can be resolved only by a court of a Member State.

Consequently, Articles 267 and 344 of the T.F.E.U. must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the N-S B.I.T. under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

Consequences of the *Achmea* Decision

In January 2019, 28 Member States of the E.U., including the U.K., adopted a political declaration calling for the termination of all intra-E.U. B.I.T.'s. Included in the declaration were the following three points:

- All arbitration proceedings based on intra-EU B.I.T.'s are incompatible with E.U. law, are invalid from the very beginning, and pending disputes must be terminated.
- Courts are to be notified that intra-E.U. B.I.T. awards cannot be recognized or enforced.
- State-owned companies must withdraw from arbitration proceedings under intra-E.U. B.I.T.'s.

In October 2019, the European Commission announced the agreement of Member States to the termination of approximately 190 intra-E.U. B.I.T.'s. Awards in arbitration proceedings concluded before March 6, 2018, the date of the judgment in the *Achmea* case, will remain in effect.

© Ruchelman P.L.L.C., 2022. All rights reserved.

“While the decision by the C.J.E.U. can be understood at various levels, several commentators view the decision in the Achmea case as a huge step backward in rights of investors.”

In May 2020, 23 Member States signed an agreement to collectively terminate all intra-E.U. B.I.T.’s. Sunset clauses that promised continued coverage by a B.I.T. for a period of time after its termination no longer had effect. Finland, Sweden, Austria, and Ireland abstained from signing the agreement, as did the U.K.

Internal investments by persons resident in the E.U. continue to benefit from the protections conferred by the fundamental freedoms of the single market, the freedom of establishment, and the right to free movement of capital. They also enjoy rights guaranteed by the Charter of Fundamental Rights and the general principles of E.U. law. However, these rights can be enforced only by the courts of Member States, guaranteed by Article 19 of the Treaty of the European Union, under the control of the Court of Justice of the European Union.

In July 2018, the European Commission published a communication on the protection of intra-European investments, and in May 2020, it launched a public consultation on the protection of investments within the European Union, in order to promote investment all over the European Union.

Takeaway

While the decision by the C.J.E.U. can be understood at various levels, several commentators view the decision in the *Achmea* case as a huge step backward in rights of investors. One article summarizes the *Achmea* case and the follow-up steps by the E.U. as extremely troubling:

> We demonstrate that the CJEU’s *Achmea* judgment has resulted in significantly more damage beyond the termination of intra-EU BITs. It made the application of EU law difficult, if not impossible. Indeed, it has opened the floodgate to deficient judicial protection in the face of structural backsliding of the rule of law in some EU Member States. While the motives of the CJEU and by extension the European Commission to safeguard their ultimate control over the internal market by exclusively relying on the preliminary ruling system of integrated European judiciary may be understandable, they cannot serve as a credible justification for the long-term consequences of disempowering investors in the name of an ideological stance regarding EU judiciary, which cannot work in the backsliding Member States, where the ‘integration of the EU’s judiciary’ could stand for the absence of independent adjudication. Consequently, the Achmea judgment and post-*Achmea* developments such as the recently signed Termination Agreement to terminate the intra-EU BITs have been leading to significant—possibly irreparable in the short- to medium-term—lowering of the procedural and substantive protection standards for European investors in times when they are in need of more rather than less protection.[5]

---

[5] Kochenov, D.V., and Lavranos, N., *Achmea versus the Rule of Law: CJEU’s Dogmatic Dismissal of Investors’ Rights in Backsliding Member States of the European Union*, Hague J Rule Law (2021), available here.

© Ruchelman P.L.L.C., 2022. All rights reserved.

FOREIGN TAX CREDIT REGULATIONS: NEXUS AS THE NEW CREDO

Author
Wooyoung Lee

Tags
Activities-Based Nexus
Attribution
Creditable Tax
Foreign Income Tax
Foreign Tax Credit
In-lieu-of Tax
Jurisdictional Nexus
Property-Based Nexus
Source-Based Nexus

INTRODUCTION

A U.S. taxpayer that is subject to income tax in both the U.S. and a foreign country can reduce the amount of tax payable to the U.S. by claiming a credit for foreign income taxes paid or accrued to one or more foreign countries. The principle is simple: taxpayers should not pay tax twice with regard to the same item of income. The application of the principle is not so easy, requiring a taxpayer to overcome several hurdles, including whether the tax is creditable.

The Internal Revenue Code ("Code") provides a credit for two broad classes of tax. First, Code §901 allows a credit for foreign taxes levied on "income, war profits, or excess profits." This is generally understood as the requirement that the foreign tax be an "income tax." Second, Code §903 allows a credit for foreign taxes levied "in-lieu-of" a tax on such items. An example is a gross income tax imposed on nonresidents in connection with income not attributable to a trade or business in the country, where residents with a trade or business are generally taxed on realized net income.[1]

A tax is generally creditable under Code §901 if it meets the net gain requirement. The net gain requirement is met if the foreign tax meets three tests:

- The realization test
- The gross receipts test
- The net income test

The realization test broadly requires that the tax be imposed on income when the income is realized.[2] The gross receipts test generally requires that the tax be imposed on gross receipts or certain equivalents.[3] The net income test requires that the tax be imposed on net income (*i.e.*, after recovery of expenses through deductibility or amortization).[4]

New regulations were adopted at the end of 2021. This article addresses some of the highlights.

---

1. See the I.R.S. website.
2. Treas. Reg. §1.901-2(b)(2)(i).
3. Treas. Reg. §1.901-2(b)(3).
4. Treas. Reg. §1.901-2(b)(4)(i).

© Ruchelman P.L.L.C., 2022. All rights reserved.

NEW REGULATIONS

The new regulations modify the net gain requirement by requiring closer conformity to U.S. tax law, which is a recurring theme of the new regulations, and add another criterion: the attribution requirement.[5] This had been known as the jurisdictional nexus requirement in the proposed regulations but was renamed.

The effect is that some foreign taxes that were previously viewed to be creditable under prior regulations may no longer be creditable under the new regulations. The regulations take particular aim at taxes imposed under destination-based criteria, such as customers' location. An example would be a digital services tax that has become popular outside the U.S.

The components of the requirement differ depending on whether the taxpayer is a resident of the foreign country. Foreign tax paid by nonresidents of the foreign country meets the attribution requirement if there is nexus based on one or more of the following criteria: activities, sourcing rules, or property.

Attribution to Nonresidents

Activities-Based Nexus

Activities-based nexus requires that only gross receipts and costs reasonably attributable to the nonresident's activities in the foreign country are included in the tax base.[6] Such activities can include "functions, assets, and risks located in the foreign country." In general, attribution is reasonable if it follows principles similar to those set out in Code §864(c), which sets rules for determining effectively connected income ("E.C.I."). This means that gross receipts cannot be taken into account as part of the tax base if they are sourced based on the location of customers or users, or of people from whom the nonresident makes purchases. This requirement excludes rules that tax a taxpayer based on the activities of another person, including a trade or business or permanent establishment created by another person, unless that other person is an agent for or a flow-through entity owned by the taxpayer. In essence, this follows the holding in *Miller v. Commr.,*[7] a case that held a foreign corporation did not have U.S.-source income or effectively connected income when it was a subcontractor of a U.S. related party having a contract with a U.S. customer and all activities of the foreign corporation were performed outside the U.S.

Source-Based Nexus

Source-based nexus is twofold.[8] First, income that is included based on source is limited to income sourced to the foreign country. Second, the foreign country's sourcing rules must be similar to U.S. sourcing rules. In response to criticism, the final regulations require reasonable similarity but not complete conformity to U.S. sourcing rules for foreign persons. Specific rules are provided for three types of income:

---

[5] T.D. 9959.

[6] Treas. Reg. §1.901-2(b)(5)(i)(A).

[7] T.C. Memo 1997-134, aff'd without pub. op., 166 F3d 1218 (9th Cir. 1998).

[8] Treas. Reg. §1.901-2(b)(5)(i)(B).

© Ruchelman P.L.L.C., 2022. All rights reserved.

- Income from services must be sourced to the place of performance, which cannot be based on the service recipient's location.
- Royalties must be sourced to the place of use or right to use the intangible property.
- Income from sales of property is completely excluded from eligibility for source-based nexus. If a taxpayer wants a foreign tax credit for such income, the foreign tax rule must fit either activities-based or property-based nexus.

Property-Based Nexus

> ***"Property-based nexus is the only way to meet the attribution requirement for a foreign tax imposed by a foreign country on nonresidents based on the situs of property, including ownership in a corporation or flow-through entity."***

Property-based nexus is the only way to meet the attribution requirement for a foreign tax imposed by a foreign country on nonresidents based on the situs of property, including ownership in a corporation or flow-through entity.[9]

Property-based nexus requires comparison to two provisions of U.S. tax law. First, with regard to real property, creditable foreign tax is limited to sums raised under rules similar to F.I.R.P.T.A., which imposes U.S. tax on foreigners holding U.S. real property. The second concerns tax incurred through disposition of property other than shares in a corporation, but including interests in a partnership, and based on the situs of property other than real property. Creditable foreign tax is limited to sums attributable to property that forms part of the business property maintained by the nonresident in the foreign country, as determined by rules similar to the E.C.I. rules under U.S. tax law.

Attribution to Residents

Wider latitude is provided for a foreign tax imposed on residents of the foreign country imposing the tax. The foreign tax on all of a resident taxpayer's worldwide income will pass the attribution requirement.[10] However, the foreign tax rules must require that income between the resident and affiliated entities (*i.e.*, income subject to transfer pricing rules) be calculated under arm's length principles. As with attribution to nonresidents, the tax cannot take into account destination-based criteria.

Income Tax Treaties

Tax treaties sometimes override domestic law, and the final regulations, to an extent, provide for that. If the article on relief from double taxation in a tax treaty between the U.S. and the foreign country treats a foreign tax as an income tax, that tax will be considered an income tax. However, such relief is limited to U.S. residents. A more limited form of relief is available to C.F.C.'s.

APPLICATION

Mr. A is a U.S. person who, through two tiers of flow-through entities, owns and operates a resort in Spain. He does not reside there. The resort is owned directly by a Spanish flow-through entity, which is owned by a Danish flow-through entity. Mr. A decides to sell the resort by selling all of his interests in the Danish entity. The transaction results in the imposition of Spanish capital gains tax at 19%, the rate for

---

9 Treas. Reg. §1.901-2(b)(5)(i)(C).

10 Treas. Reg. §1.901-2(b)(5)(ii).

© Ruchelman P.L.L.C., 2022. All rights reserved.

nonresidents, based on the underlying real property being located in Spain. There is no Danish tax liability.

Mr. A naturally wants a foreign tax credit to offset his U.S. tax liability. Since Mr. A is a nonresident, the Spanish tax must have nexus with Mr. A based on activities, sourcing rules, or property. A sale of ownership interest in a flow-through entity is a sale of property, so source-based nexus is not a possibility. Furthermore, a tax on a nonresident's gains from the disposition of property based on the situs of the property can only meet the attribution requirement through property-based nexus. Activities-based nexus is therefore also eliminated.

The Spanish tax substantively has a similar effect as F.I.R.P.T.A.: a nonresident is taxed on the disposition of real property in the country. But were the situation reversed, with Mr. A as a Spanish resident holding interests in U.S. real property, Mr. A would not face F.I.R.P.T.A. tax. This is because the entity that Mr. A is disposing of would not be a U.S. corporation, and F.I.R.P.T.A. taxes foreigners who directly own U.S. real property or shares in a U.S. corporation holding real property. To achieve the mirror result (U.S. tax liability, to match Spanish tax liability in the actual scenario), Mr. A would have to make a check-the-box ("C.T.B.") election. He would then be considered a direct owner of the second-tier U.S. entity. But it is arguable that Spanish law effectively reaches the same result of a C.T.B. election for Mr. A by attributing the sale of the Danish entity to the underlying asset. The two countries' laws are mechanically different but achieve the same result. In fact, as one commenter noted, the language of the proposed regulations would have allowed this tax to be creditable, as the proposed regulations did not require the foreign tax to be similar to F.I.R.P.T.A.

The final regulations require reasonable similarity to F.I.R.P.T.A. and specify that the tax must be "attributable to the disposition of real property situated in the foreign country… (or an interest in a *resident* corporation or other entity that owns such real property) [emphasis added]." The Spanish tax therefore does not achieve property-based nexus.

Tax treaties are a backup. The final regulations require examination of the article on relief from double taxation, which allows for a credit to be taken. In the Spain-U.S. Income Tax Treaty, this is Article 24. In comparison to certain other treaties, such as the France-U.S. Income Tax Treaty, Article 24 of the Spain-U.S. treaty does not specify which taxes are considered income taxes. Instead, it simply allows a credit to U.S. citizens and residents for "income tax paid to Spain." But Article 2 (Taxes Covered) clarifies that the treaty (presumably including Article 24) applies to Spain's individual income tax. By allowing the credit against Spanish income tax, Article 24 appears to treat the individual income tax as an "income tax paid to Spain." Additionally, the preamble to the proposed regulations states that the new regulations are not meant to change the effect of existing tax treaties. It is likely that the treaty would have come to Mr. A's rescue.

CONCLUSION

A more circuitous path is now required to reach the correct answer. The more stringent requirements suggest that other U.S. persons in Mr. A's position may no longer be able to claim a foreign tax credit for a tax that is imposed on an indirect real property gain through two layers of corporations. Mr. A would have been among their number were it not for the treaty. Not all taxpayers will have this escape route.

© Ruchelman P.L.L.C., 2022. All rights reserved.

As one commenter to the proposed regulations noted increased reliance on tax treaties could lead to more inequitable imposition of U.S. tax, as the U.S. has many more treaties with developed than developing countries. While this comment reflects current views on social justice, it ignores the fact that, in the past, developing countries abstained from entering an income tax treaty with the U.S. for several reasons. For some countries, a treaty would impair the country's ability to collect full withholding tax on dividends, interest, and royalties. For others wishing to provide low tax rates for certain investments, U.S. tax law did not allow U.S. corporations to claim a "tax-sparing" foreign tax credit. A tax-sparing foreign tax credit would allow a U.S. corporation to claim an indirect foreign tax credit at the time it receives a dividend from a 10%-owned foreign subsidiary as if the general rate of income tax in the developing country were imposed, rather than a lower, incentive rate. Now that the U.S. has moved away from the indirect foreign tax credit and has adopted a foreign dividends received deduction for dividends received from certain foreign subsidiaries, developing countries may have greater interest in opening income tax treaty negotiations with the U.S.

Mr. A is one of the luckier taxpayers as the U.S. has an income tax treaty in effect with Spain.

© Ruchelman P.L.L.C., 2022. All rights reserved.

About Us

Ruchelman P.L.L.C. is a boutique law firm based in New York City. It was founded in 1989 by an alumnus of a legacy firm that is now Deloitte's.

Our firm provides a wide range of tax planning and commercial legal services to clients across the Americas, Asia, Europe, and the Middle East. Clients include global investors, multinational corporations expanding into the U.S., and U.S. businesses with international operations. Our core practice focuses on cross-border transactions.

About Insights

Insights, the tax journal of Ruchelman P.L.L.C., provides in-depth reporting on the evolving landscape of U.S. and international taxation. It offers complex analysis of current issues, legislative updates, and practical introductions to the tax law from leading tax professionals in their respective countries.

Special features include an annual examination of the use of holding companies in European tax planning and a look at the year in review.

Location

Architects and Designers Building | 150 East 58th Street, 22nd Floor | New York, New York 10155

Contacts

If you have any questions regarding this publication, please contact the authors or one of the following members.

Name	Email	Phone
Galia Antebi	antebi@ruchelaw.com	+1 212.755.3333 x 113
Nina Krauthamer	krauthamer@ruchelaw.com	+1 212.755.3333 x 118
Wooyoung Lee	lee@ruchelaw.com	+1 212.755.3333 x 121
Michael Peggs	peggs@ruchelaw.com	+1 212.755.3333 x 232
Simon H. Prisk	prisk@ruchelaw.com	+1 212.755.3333 x 114
Neha Rastogi	rastogi@ruchelaw.com	+1 212.755.3333 x 131
Stanley C. Ruchelman	ruchelman@ruchelaw.com	+1 212.755.3333 x 111

Editorial Staff

Stanley C. Ruchelman .... Editor in Chief

Francesca York .... Graphic Designer, Copyeditor

WITH PHOTOS BY:

Galia Antebi, Jennifer Lapper, Simon Prisk, Stanley C. Ruchelman, and Francesca York.

Disclaimer: *This publication has been prepared for informational purposes only and is not intended to constitute advertising or solicitation and should not be used or taken as legal advice. Those seeking legal advice should contact a member of our law firm or legal counsel licensed in their jurisdiction. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. Confidential information should not be sent to our law firm without first communicating directly with a member of our law firm about establishing an attorney-client relationship.*