



**The 5<sup>th</sup> BRITACOF**

Deepening Tax Administration Cooperation for  
High-Quality Belt and Road Development

Hong Kong, China 24-26/9/2024



# Taxation and Investment Treaties!

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# Introduction

- International tax law and international investment law have common themes and goals, but otherwise seem to be in different legal worlds.
- Keynote intends to increase awareness of investment treaties with tax policy makers and tax administrators
- Why: because Investment Treaties can be invoked to challenge taxation measures, even if these have been excluded from investment treaty protection
- Focus is on Bilateral Investment Treaties (BITs), but scope is wider (including Energy Charter Treaty)







# What are BITs?

- BITs are treaties that establish the terms and conditions for private investment by nationals and companies of one state in another state
- BITs set actionable standards of conduct that apply to governments in their treatment of investors from other states, including:
  - fair and equitable treatment
  - national treatment and/or most favored nation treatment
  - protection from expropriation
  - free transfer of means and full protection and security
- ‘Umbrella clause’: also contractual obligations covered by the BIT





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# What are BITs?

- BITs allow for an alternative dispute resolution mechanism, whereby an investor whose rights under the BIT have been violated could have recourse to International arbitration, often under the auspices of the ICSID (International Center for the Settlement of Investment Disputes), rather than suing the host State in its own courts.
- An Award can be enforced in many countries as per multilateral agreements







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## 2001 China-Netherlands BIT - Preamble

Agreement on encouragement and reciprocal protection of investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands.

The Government of the People's Republic of China and the Government of the Kingdom of the Netherlands, hereinafter referred to as the Contracting Parties,

- Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relations between them, particularly with respect to investments by the investors of one Contracting Party in the territory of the other Contracting Party,
- Recognising that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable,
- Have agreed as follows,
- [and then follow the standards]





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# Taxation Measures

## 2012 Canada-China BIT

### ARTICLE 14 Taxation

1. Except as provided in this Article nothing in this Agreement shall apply to taxation measures.
2. Nothing in this Agreement shall affect the rights and obligations of the Contracting Parties under any tax convention. In the event of any inconsistency between the provisions of this Agreement and any such convention, the provisions of that convention shall apply to the extent of the inconsistency.
3. (...)
4. The provisions of Article 10 shall apply to taxation measures





# Taxation Measures

- So, tax carved out, DTA takes precedence; that's it?
- Not exactly, some BITs have no tax carve out and no reference to tax treaties
- Query: can tax measures be tested against BIT protection?
- But even if there is a tax carve out, is a taxation measure a covert expropriation?  
(Yukos)





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## Other Cases

- Expropriation/Fair and equitable treatment:
  - Archer Daniels Midland v Mexico
  - Feldman v Mexico
  - EnCana v Ecuador
  - Occidental Exploration and Petroleum Company v Ecuador
  - Sergei Paushok v Mongolia
  - Waste Management v Mexico
  - Vodafone v India
  - Cairn v India
  - Lonestar v Rep of Korea





# Some notable differences – Treaty shopping

## Tax:

- Evolution of OECD Commentary (sham; abuse)
- Evolution of case law
- MLI with PPT/LOB

## BIT:

- Strict textual interpretation of BITs; *pacta sunt servanda*
- No examples of denial of benefits/lack of jurisdiction based on sham (Cf. Yukos)
- Only denial if interposition of entity after dispute has arisen
- DOB clause – rudimentary, only focuses on substantial presence in the other state, but not on a connection between that presence and the investment





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# Dispute Resolution

## Tax:

- State to state with very little taxpayer involvement
  - MAP and Arbitration
  - Limited costs

## BIT:

- Investor to state
- Consiliation or arbitration (ICSID/UNICITRAL)
- Use of expert witness
- Significant costs







## Concluding remarks

- BITs are underexplored in taxation, but this will change (think of the Pillar 2 discussion)
- Potential ramifications are significant
- Tax policy makers and tax administrators should be aware of BITs!
- No BIT should be negotiated without taxation measures in mind
- BIT negotiators should always talk with tax treaty negotiators and coordinate!
- Tax expertise in BIT arbitration – the use of Experts
- What can the tax world learn from the BIT world?
- What can the BIT world learn from the tax world?





# The 5<sup>th</sup> Belt and Road Initiative Tax Administration Cooperation Forum



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# Thank you

