EMPIRICAL STUDY:

TAX-RELATED MEASURES IN INVESTOR-STATE ARBITRATION

Danielle Morris, Yarik Kryvoi, Sam Winter-Barker, Tunç Savaş

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I. INTRODUCTION

The right to tax constitutes a core attribute of State sovereignty. As U.S. Supreme Court Justice Oliver Wendell Holmes Jr. said, "Taxes are the price we pay for civilization." However, States may voluntarily limit their taxation powers by concluding investment protection treaties limiting their right to regulate, including their right to tax.

As a result, investors have brought challenges to a variety of taxation measures. Some of these cases have resulted in substantial awards (e.g., the USD 50 billion award in the Yukos cases, the USD 1.25 billion award in *Cairn Energy v. India*). Partly in response, States have increasingly sought to exclude tax measures from the scope of their investment protection treaties.

Tax-related disputes often come hand-in-hand with political controversies and are related to current debates about the legitimacy of arbitration, the limits of tribunals' powers and the efforts to reform the system of investor-State dispute resolution.

As part of this broader discussion, we are pleased to present this report on taxation measures in investment disputes. In contrast to the existing literature, we have taken an empirical approach to assess various aspects of these disputes: the geographic origins of investors and respondent States, the economic sectors involved, the types of measures challenged, and the likelihood of success, among others.

Much of this report presents the findings of our empirical analysis of 70 investor-State treaty disputes and 21 contractual tax-related disputes. In additional to painting a bigger picture of tax-related disputes and identifying patterns in tribunals' decision-making, the report discusses specific treaty provisions that give rise to tax disputes.

We thank Professor Robert Danon and Dr. Claudia Annacker for their comments on earlier drafts of this report.

We hope that this report will help those working in the field of investor-State arbitration to better understand the key statistical trends and patterns of decision-making. At the same time, the report may help those involved in reforming the system of investor-state dispute resolution or investment treaties.

Danielle Morris

Partner at WilmerHale

Professor Yarik Kryvoi

Director of the Investment Treaty Forum, British Institute of International and Comparative Law

Sam Winter-Barker

Senior Associate at WilmerHale

Tunç Savaş

Associate at WilmerHale

II. EXECUTIVE SUMMARY

The number of tax-related disputes is steadily rising. While only 17 tax-related disputes were filed before 2000, 74 such disputes have been filed since then, including a number of cases involving multi-billion-dollar claims. In particular, 43 tax-related disputes were filed between 2000-2010. This period saw a flurry of tax-related cases due to windfall oil profits taxes and the economic crisis in Argentina.

The object of tax-related disputes is not the correctness of domestic law application. The object of an investment arbitration is not to decide the dispute under domestic law, but to establish if the taxation measure in question breaches standards of protection under an investment treaty or provisions of an investment contract (most frequently fair and equitable treatment and indirect expropriation). In other words, tribunals under investment treaties and investment contracts do not operate as courts of appeal to re-hear disputes under domestic tax law.

Most tax-related disputes arise out of treaties. Treaty- and treaty-and-contract-based disputes make up 77% of all tax-related investment disputes. Since 2000, the number of contract-related disputes has been in decline. The decline is possibly due to the increasing prevalence of investment treaties and use of investment arbitration. Contract-based disputes account for nearly a quarter of cases.

Investors in tax disputes tend to come from the "Global North." The vast majority of investors in tax-related treaty cases have come from North America and Western Europe, in line with trends in investment arbitration overall. Over half of respondents have been States in South America, Eastern Europe, and Central Asia. In contrast to treaty-based tax-related disputes, contractual disputes have shown a broader geographic distribution of investors, with nearly half coming from outside of North America and Western Europe.

Most treaties contain no tax carve-outs but States increasingly include them in more recent treaties. States are increasingly including tax carve-outs in investment treaties to exclude taxation measures from some or all of the protections of the treaty. Although treaties with tax carve-outs amount to only 10% of investment treaties overall, over 40% of treaties entered into force since 2010 include tax carve-outs.

Capital-exporting States more frequently include tax carve-outs in their treaties. Canada, the United States, Singapore and Japan all have 20 or more investment treaties with tax carve-outs. The vast majority of States have five or fewer such treaties. Most commonly, States exclude taxation measures entirely in tax carve-outs, but also "claw-back" certain protections, most commonly unlawful expropriation. Tax carve-outs generally exclude FET claims, but assuming such a claim passes jurisdictional muster, an investor's chance of success on an FET claim is much higher (44%) than its chance of success on an expropriation claim (30%).

Tax carve-outs rarely preclude tax-related claims. Tax carve-out provisions barred less than one-fifth of tax-related claims and so do not have an overly significant effect on preventing tax-related claims. Investors were also able to bring claims covered by any tax claw-backs in the relevant treaty.

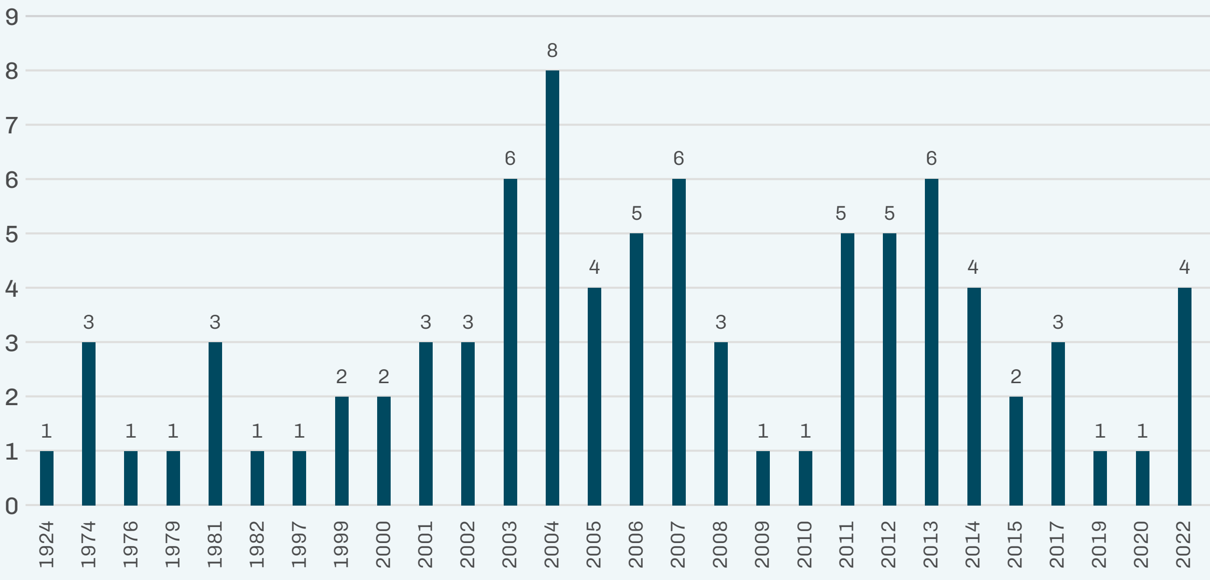
Tax claims arise in a variety of sectors, particularly in energy. Over one-third of treaty-based and treaty-and-contract-based tax-related claims arise in the oil, gas, and mining sector. Investors have challenged a multitude of types of tax measures, including corporate income tax, VAT or sales tax, and import/export taxes, with an increasing percentage of claims over time challenging a combination of measures in a single arbitration. Almost two-thirds of all contract-based tax-related investment disputes relate to the oil, gas, and mining sector – an even more pronounced distribution than in treaty-based tax-related disputes.

Investors have more success with both jurisdiction and merits in contract disputes. While treaty-based disputes deliver mixed results in terms of jurisdiction/admissibility of tax-related claims, investors did not face such hurdles in contract-based disputes. Investors in contractual disputes also have a higher success rate than investors in treaty disputes. Investors have succeeded in 60% of contractual tax-related investment disputes, higher than the success rate in treaty-based tax-related claims (~45%). However, significantly fewer investors prevail in all treaty-based disputes (~30%).

III. INSTRUMENTS OF CONSENT AND TAX CARVE-OUTS

States can consent to international arbitration of tax-related disputes through investment protection treaties and through contracts concluded directly with investors. The number of tax-related disputes has risen in the 21st century, and there was a flurry of such cases between 2000-2010. In particular, tax-related disputes peaked between 2003 and 2007, as 29 tax-related disputes were filed in that period (Chart 1).

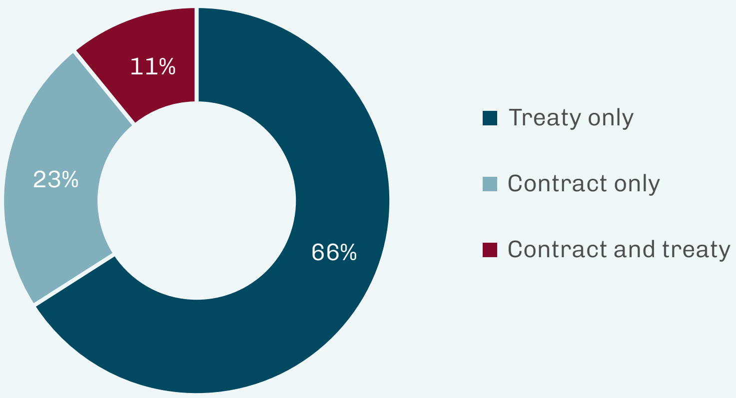
Chart 1: All Tax-Related Disputes - Over Time



*Sample size of 91 **The filing date of five cases is unknown, but four of them were filed before 2000

Over half of the analyzed disputes arose out of treaties (Chart 2), but tax-related disputes also include a significant number of solely contract-based, and a small proportion of mixed treaty-and-contract-based cases.

Chart 2: The Basis of Consent for all Tax-Related Disputes



*Sample size of 91

The analysis of cases confirms that the object of an investment arbitration is not to adjudicate a proper tax dispute, i.e., to decide the dispute under domestic law, but rather to establish if the taxation measure in question breached standards of protection under an investment treaty or provisions of an investment contract. Thus, tribunals under investment treaties and investment contracts do not operate as a court of appeal to re-hear disputes under domestic tax law.

An important exception to a general consent to arbitration in an investment protection treaty comes in the form of a so-called "tax carve-out," discussed below.

A. What Is a Tax Carve-Out?

Taxation remains a politically sensitive issue for any State because authority to tax is one of the fundamental features of sovereignty.[1] Adjudication of tax-related disputes by independent international arbitration panels may be perceived as a threat to the State's sovereign rights. Some States have accordingly taken the policy decision to exclude tax measures from the investment treaty regime.[2] In particular, many treaties try to exempt taxation issues by including tax carve-outs. While some treaties completely exclude tax matters from their ambit ("general carve-out"),[3] other treaties only exclude tax matters from certain provisions or chapters of the treaty ("partial carve-out").[4] Some States have included a tax carve-out in their Model BIT.[5]

Even treaties including a general carve-out may include a provision explicitly allowing certain claims relating to taxation measures ("tax claw-back"), enabling investors to submit claims for alleged breaches of those provisions arising out of taxation measures.[6] Such exceptions are also known as Matryoshka clauses.

Table 1: Definitions of Tax Carve-Out and Tax Claw-Back	
Tax Carve-Out	A provision whereby the treaty parties agree to exempt issues of taxation from the scope of a treaty, or from its dispute settlement mechanism.
Tax Claw-Back (also known as Matryoshka Clause)	A provision which, despite a tax carve-out in the treaty, allows an investor to bring a tax-related claim with respect to certain standards under the treaty.

Some treaties, either in addition to or in lieu of a tax carve-out, require referral of certain tax-related claims to domestic authorities as a precondition to arbitration. We discuss these referral mechanisms in Section IV.F below.

B. How Prevalent Are Tax Carve-Outs?

In recent years, States are increasingly excluding taxation measures from the scope of their investment treaties. It is more common for capital-exporting States to include tax carve-outs in their treaties. Treaties typically include general tax carve-outs (as opposed to partial tax carve-outs only in relation to specific standards of protection), with a tax claw-back for any standards of protection that should not be covered by the general carve-out.

Most first-generation investment treaties from the 1990s do not exclude tax measures.[7] However, many States, supported by UNCTAD,[8] have modified their treaties to minimize the risk of claims with respect to tax measures by including tax carve-outs. Many investment treaties, and especially those entering into force more recently, contain a tax carve-out that limits and controls the treaty's application to tax measures.[9]

MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY

2.4. This Treaty shall not apply to:

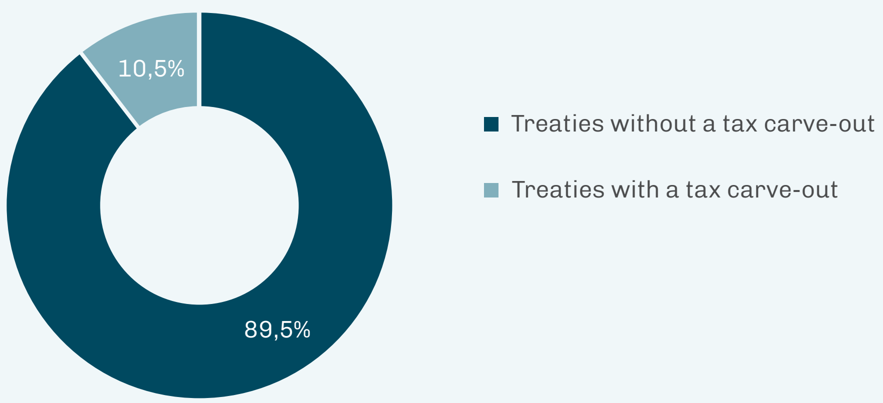
(i) any measure by a local government;
(ii) any law or measure regarding taxation, including measures taken to enforce taxation obligations.

For greater certainty, it is clarified that where the State in which investment is made decides that conduct alleged to be a breach of its obligation under this Treaty is a subject matter of taxation, such decision of that State, whether before or after the commencement of arbitral proceedings, shall be non-justiciable and it shall not be open to any arbitration tribunal to review such decision.

Model Text for the Indian Bilateral Investment Treaty (2015)

Out of all investment treaties, around 10% include a tax carve-out, as Chart 3 demonstrates.

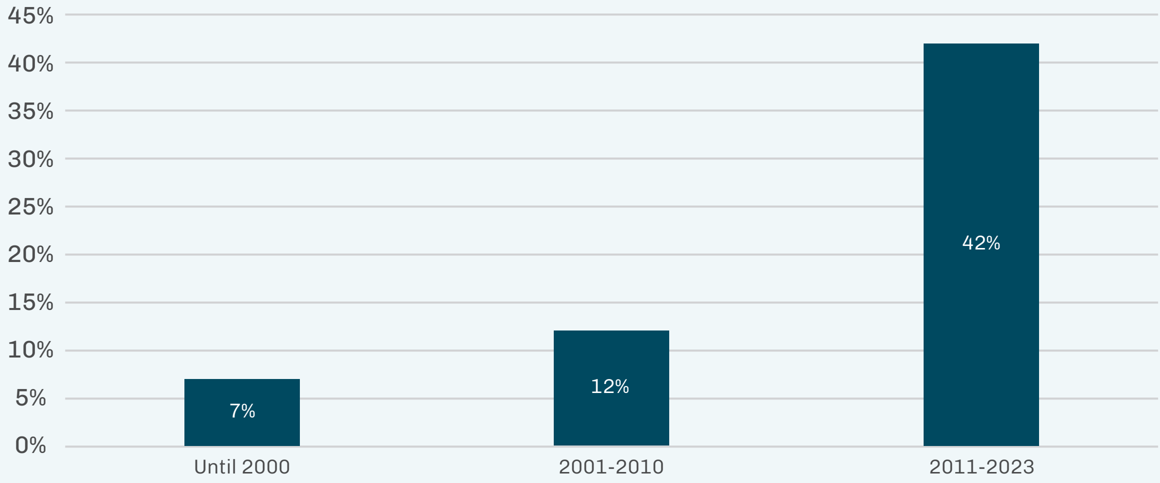
Chart 3: Treaties with Tax Carve-Outs - All Investment Treaties



*Sample size of 2,584. Source: UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping (consulted on 6 November 2023)

Chart 4 shows that States have recently been including tax carve-outs more frequently, especially since 2011. Nearly half of investment treaties that have entered into force since 2011 include a tax carve-out.

Chart 4: Treaties with Tax Carve-Outs as a Percentage of All Treaties - By the Date of Entry Into Force



*Sample size of 1,707 (until 2000), 722 (2001-2010), and 155 (2011-2023). Source: UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping (consulted on 6 November 2023)

Capital-exporting States, such as Canada, the United States, Japan and the United Kingdom, most frequently include tax carve-outs (Table 2). The same table demonstrates that many capital-importing States do not include, or have not yet included, tax carve-outs in their treaties. This may be because such capital-importing States are keener to attract foreign investment, and thus less willing to include provisions that may dissuade investors.

Table 2: States by the Number of Treaties that Include a Tax Carve-Out

NUMBER OF BITS/MITS WITH TAX CARVE-OUTS	PARTY
38	Canada
33	United States
27	Singapore
20	Japan
17	Colombia
16	Finland
11	Republic of Korea
10	United Kingdom
9	China
8	Chile, Spain

☐ **Table 2:** States by the Number of Treaties that Include a Tax Carve-Out

NUMBER OF BITS/MITS WITH TAX CARVE-OUTS	PARTY
7	Denmark, Hungary, Hong Kong SAR, India, Latvia, New Zealand, Peru, Ukraine, Viet Nam
6	Austria, Azerbaijan, Czechia, Egypt, Germany, Mexico, Mongolia, Panama, Russian Federation, Trinidad and Tobago, United Arab Emirates
5	Bahrain, Israel, Jordan, Kuwait, Lithuania, Mauritius, Netherlands, Thailand, Uruguay
4	Australia, BLEU, Bosnia and Herzegovina, Bulgaria, France, Georgia, Italy, Kazakhstan, Malaysia, Pakistan, Switzerland, Türkiye
3	Armenia, Belarus, Bolivia, Brazil, Cambodia, Cameroon, Costa Rica, Croatia, Ecuador, El Salvador, Estonia, Honduras, Montenegro, Mozambique, Nigeria, Philippines, Poland, Portugal, Sri Lanka, Tanzania
2	Argentina, ASEAN, Bangladesh, Greece, Guatemala, Indonesia, Jamaica, Kyrgyzstan, Moldova, Nicaragua, North Macedonia, Romania, Senegal, Slovakia, Slovenia, Taiwan, Tunisia, Uzbekistan
1	Albania, Algeria, Barbados, Belize, Benin, Brunei Darussalam, Burkina Faso, Congo, Congo DR, Côte d'Ivoire, Cuba, Cyprus, Dominican Republic, EFTA, Equatorial Guinea, Ethiopia, EU, Ghana, Guinea, Iran, Ireland, Kenya, Korea DPR, Lao PDR, Lebanon, Mali, Morocco, Myanmar, Oman, Papua New Guinea, Rwanda, Saint Vincent and the Grenadines, Saint Lucia, San Marino, Serbia, South Africa, Sweden, Syrian Arab Republic, Turkmenistan, Uganda, Zambia

*Source: UNCTAD, International Investment Agreements Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping (consulted on 6 November 2023).

Investment treaties feature different kinds of carve-out clauses,[10] but the majority of treaties that have given rise to tax-related claims contain a general exclusion of tax matters (Chart 5). Less than one-quarter of these treaties with tax carve-outs include a partial tax carve-out.

HONG KONG, CHINA SAR - NEW ZEALAND BIT TAX CARVE-OUT

Article 8

Exceptions

2. The provisions of this Agreement shall not apply to matters of taxation in the area of either Contracting Party. Such matters shall be governed by the domestic laws of each Contracting Party and the terms of any agreement relating to taxation concluded between the Contracting Parties.

Agreement between the Government of Hong Kong– and the Government of New Zealand for the Promotion and the Protection of Investments (1995)

ECUADOR-FRANCE BIT TAX CARVE-OUT

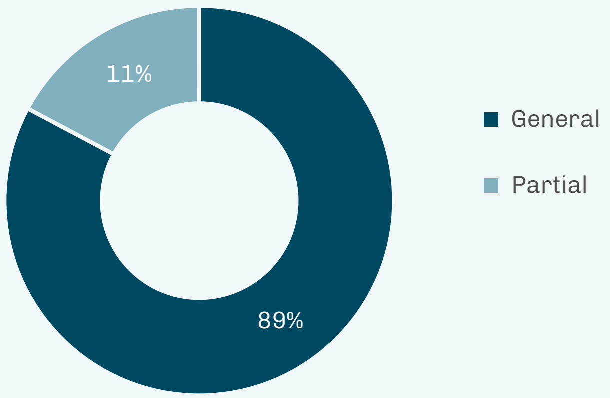
Article 5

Each Contracting Party shall apply to nationals or companies of the other Contracting Party as regards their investments and activities associated with such investments, the treatment accorded to its own nationals or companies or the treatment accorded to nationals or companies of the most favoured nation, whichever is more favourable. In this connection, the nationals of one Contracting Party who are authorised to work in the other Contracting Party shall be entitled to the facilities necessary for the performance of their professional activities. [...]

The provisions of this article shall not apply to tax matters.

Agreement between the Government of the French Republic and the Government of the Republic of Ecuador for the Promotion and Protection of Investments (1994)

Chart 5: Scope of Tax Carve-Outs in Treaties Invoked in Tax-Related Disputes



*Sample size of 37

The vast majority of tax carve-outs in the treaties giving rise to tax-related claims include tax claw-backs (Chart 6), allowing investors to challenge tax measures under specified treatment standards despite the inclusion of a general tax carve-out.

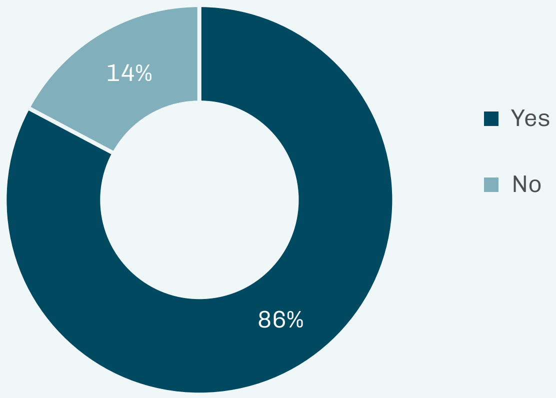
NAFTA TAX CLAW-BACK

Article 2103

1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures. [...]
6. Article 1110 (Expropriation and Compensation) shall apply to taxation measures [...]
   (c) the observance and enforcement of terms of an investment agreement or authorization, as referred to in Article VII (1)(a) or (b).

North American Free Trade Agreement (1994)

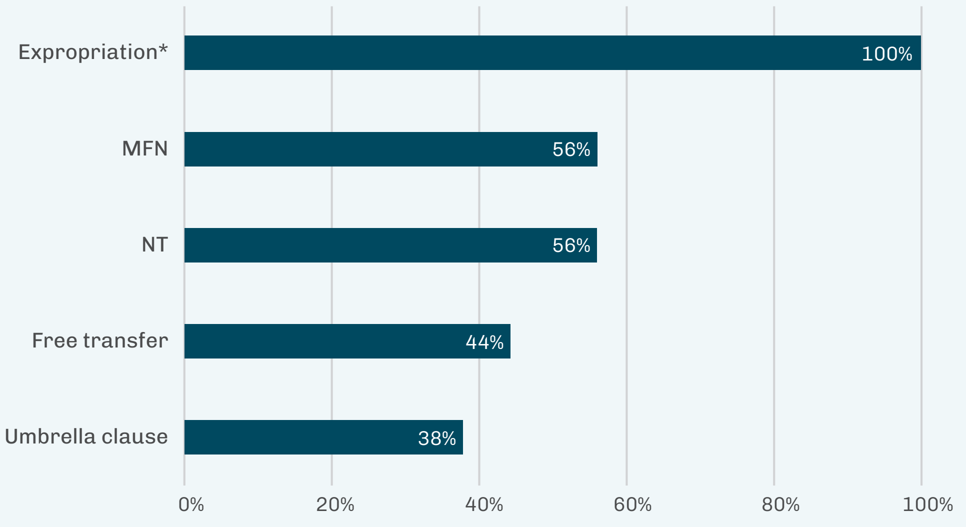
Chart 6: Tax Clawbacks in Treaties Invoked in Tax-Related Disputes



*Sample size of 37

In tax-related treaty disputes brought under treaties with a tax carve-out, the treaty included a tax claw-back allowing the investor to bring claims for expropriation. Chart 7 shows that, as well as allowing investors to bring expropriation claims, over half of tax claw-backs also cover the most favored nation and national treatment standards. Further, over one-third of all tax claw-backs allow investors to bring claims relating to host States' free transfer and umbrella clause obligations. Empirical data indicates that the FET standard is not generally covered by tax claw-backs in the treaties giving rise to tax-related claims.

Chart 7: Tax Clawbacks - Standards Covered



*One third of these "expropriation" claw-backs contain an exception that an investor can bring an expropriation claim unless the Contracting States agree that there has been no expropriation

**Sample size of 32

The type and extent of the exclusion of taxation measures and the discretion granted to the host State depend on the specific treaty language.[11] The next section addresses some of the key interpretive issues with respect to such provisions.

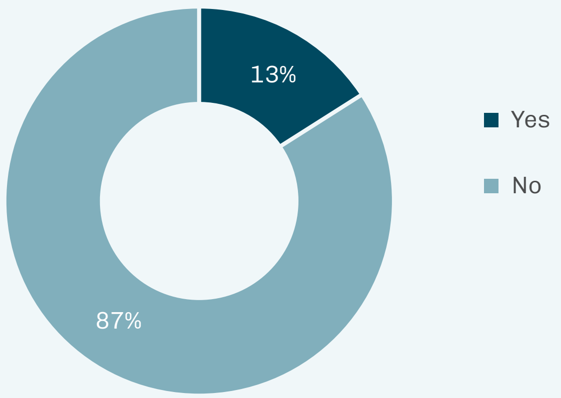
To sum up, capital exporting States frequently include tax carve-outs in their treaties. Investors have generally invoked treaties that included a tax carve-out, despite the fact that only a small percentage of all treaties contain them.[12] Those treaties typically included a general, rather than partial carve-out, and treaties that included a general carve-out often also included a tax claw-back.

C. Do Tax Carve-Outs Effectively Prevent the Arbitration of Excluded Tax Disputes?

Many investment treaties do not define terms such as tax, taxation measure and taxation policy,[13] and tribunals have to interpret the treaties to decide whether tax carve-outs apply. Investment tribunals do not necessarily rely on the relevant domestic law or international standard practices regarding the definition of "taxes" or other terms included in such provisions. However, most tribunals have engaged in a detailed analysis of the definition of "taxes" under domestic law, and some also under international law, as part of their analysis.[14]

Various commentaries have discussed whether tax carve-outs effectively prevent the arbitration of tax disputes.[15] Our empirical analysis shows that tax carve-out provisions barred less than 20% of tax-related claims (Chart 8) and so do not have a significant effect on preventing tax-related claims.

Chart 8: Claims Barred by Carve-Out

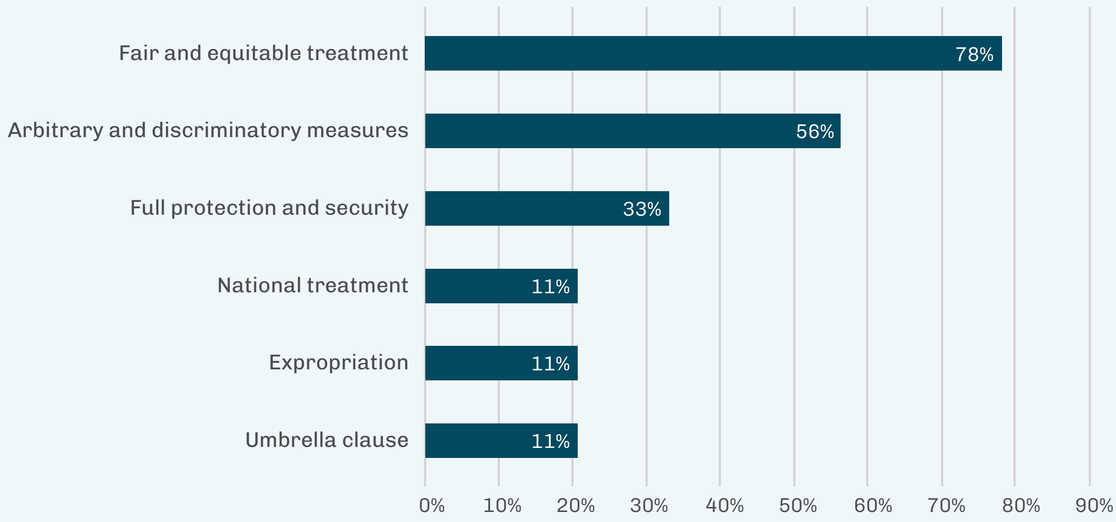


*Sample size of 67

Two main factors may explain this. First, as discussed above, even though most treaties invoked in tax-related claims include general tax carve-outs, the vast majority of those general tax carve-outs include tax claw-backs (Chart 6). Thus, investors were able to bring claims covered by those tax claw-backs.

As Chart 7 shows, all tax claw-backs cover the expropriation standard (though some are caveated), but none cover the FET standard. Even though investors frequently invoke these two standards in tax-related claims (as discussed below), the vast majority of claims barred by tax carve-outs were FET claims, and only a small proportion of claims barred by tax carve-outs were expropriation claims (Chart 9).

Chart 9: If Claim Barred by Carve-Out, Type



*Sample size of 9

Second, some tribunals have adopted interpretations that reduced the effectiveness of tax carve-outs. For example, tribunals have read down or even ignored carve-out clauses by reading a good faith requirement into the characterization of a measure as a taxation measure that would fall within the scope of a tax carve-out.[16] In *Yukos v. Russia*, where Russia argued that Article 21 of the Energy Charter Treaty ("ECT") barred Yukos' expropriation claim, the tribunal held that the tax carve-out in Article 21 would only apply to "bona fide taxation actions, i.e., actions that are motivated by the purpose of raising general revenue for the State."[17] Accordingly, the tribunal held that Article 21 did not apply to Russia's tax measures, because the measures were aimed at achieving "an entirely unrelated purpose," namely the "elimination of a political opponent" and "the destruction of a company."[18]

Tribunals can also take different approaches to the interpretation of the same or very similar wording of tax carve-outs, affecting the possibility of bringing tax-related claims.

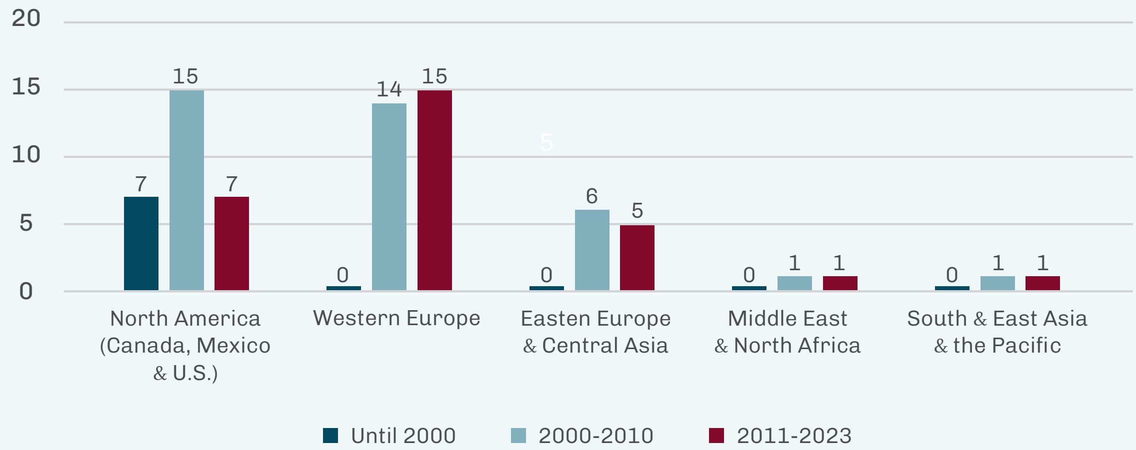
For example, approaches in the decisions of *Occidental v. Ecuador* and *El Paso v. Argentina* show clear inconsistencies.[19] In *Occidental v. Ecuador*, the tribunal found that Ecuador's VAT laws breached the FET and national treatment standards in the United States-Ecuador BIT.[20] In *El Paso v. Argentina*, El Paso invoked the United States-Argentina BIT, which featured a nearly identical tax carve-out provision as that in *Occidental*.[21] However, unlike the tribunal in *Occidental*, the *El Paso* tribunal found that the tax carve-out prevented the investor from bringing a tax-related FET claim.[22]

IV. TAX-RELATED TREATY DISPUTES

A. Geographic Origin of Parties

The analysis of cases shows that investors from capital-exporting States in North America and Western Europe have initiated the vast majority of tax-related treaty arbitrations. Claims by North American investors spiked between 2000-2010 before reverting to pre-2000 levels. Although Western European investors did not bring any known tax-related claims prior to 2000, they have consistently brought a significant number of claims since then.

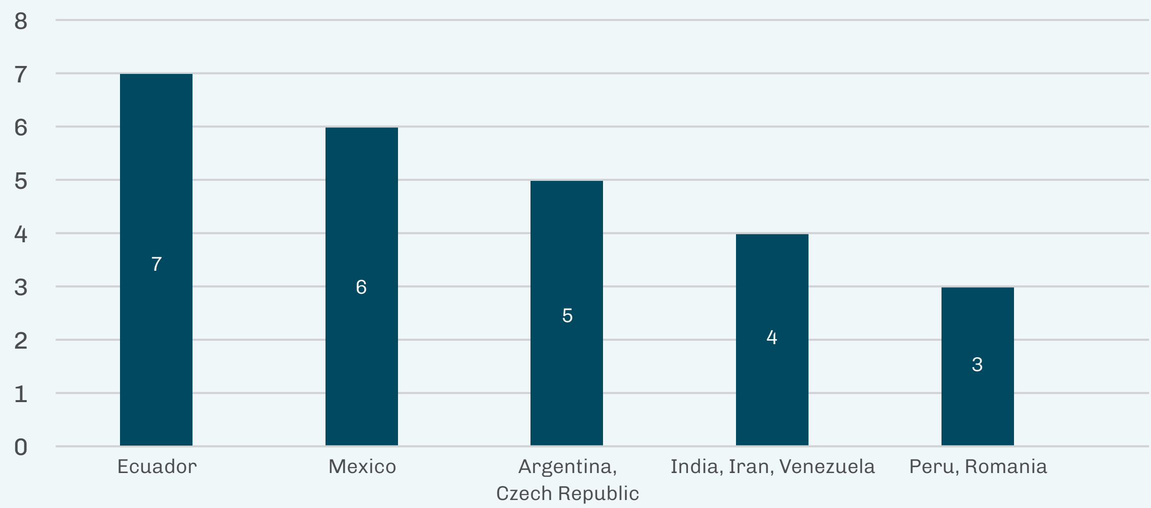
Chart 10: Region of Investors in Tax-Related Treaty Disputes - Over Time



*Sample size of 70

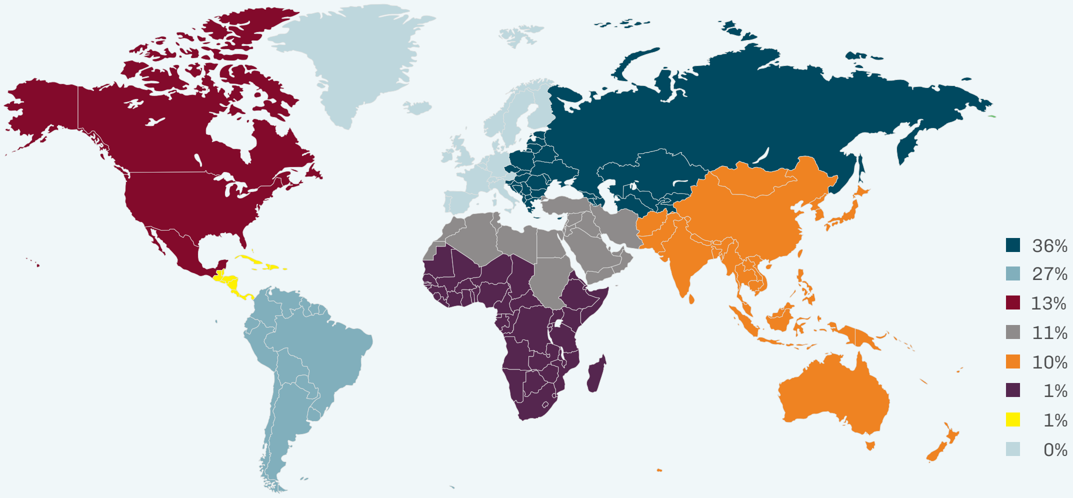
The table below shows the top five respondent States against which the most tax claims have been submitted:

Chart 11: Respondent States That Have Faced the Most Tax-Related Claims



South American States, and States in Eastern Europe and Central Asia, together faced over half of all known tax-related claims. Some States faced multiple cases arising from the same tax measure (e.g., Ecuador, Mexico). However, more commonly States faced claims arising from a variety of tax measures. Venezuela, for example, faced four claims with respect to several tax measures, including the enactment of a windfall tax, enactment of new or increased taxes, withdrawal of tax incentives, breach of a contractual tax-stabilization commitment, enactment of an extraction tax and refusal of tax credits with respect to a combination of taxes.

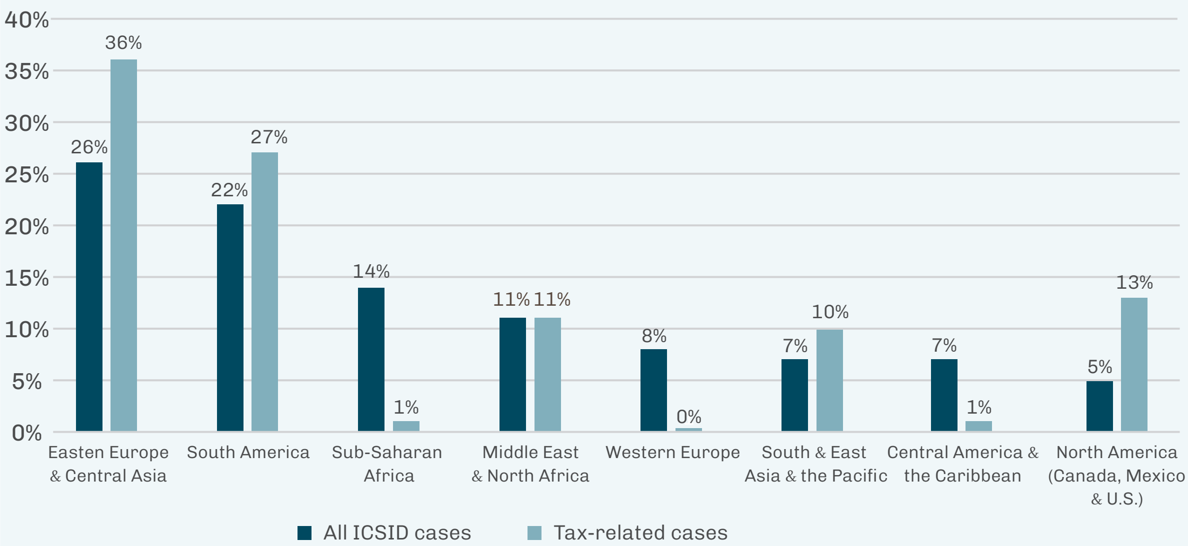
Map 1: Region of Respondent States



*Sample size of 70

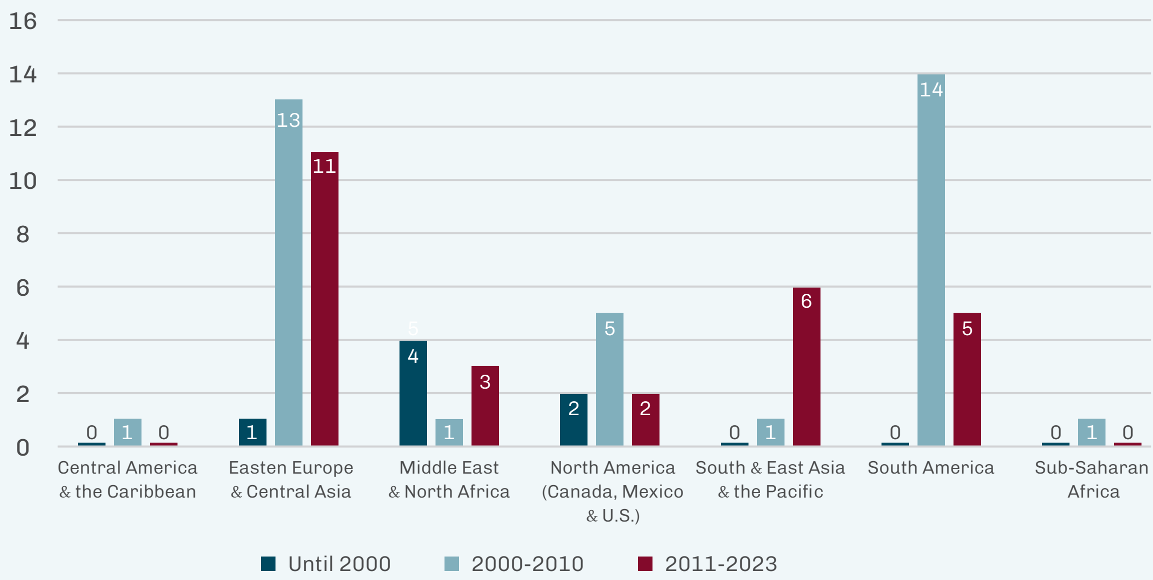
As Chart 12 demonstrates, the region of respondent States to tax-related treaty claims parallels the region of respondent States to all investor-state disputes, particularly in terms of the predominance of South American and Eastern European States.

Chart 12: Region of Respondent States - All ICSID Cases/Tax-Related Cases



*Sample size of 910 for all ICSID cases. Source: ICSID, The ICSID Caseload – Statistics, Issue 2023-1, p. 12.
**Sample size of 70 for tax-related cases.

Chart 13: Region of Respondent States - Over Time



*Sample size of 70

Cases against South American States, which faced over a third of all tax-related claims, spiked between 2000-2010, as demonstrated by Chart 13. Ecuador and Argentina faced 11 tax-related claims during this period, mostly arising from the same measure or measures taken around the same time. Ecuador faced six such claims, mostly arising from the tax imposed on windfall oil profits in 2006.[23] Argentina also faced five cases, arising from the measures it took in the face of its financial crisis in 2001.[24] Since 2010, South American States have faced far fewer tax-related claims, suggesting the spike between 2001-2010 is unlikely to be repeated.

In summary, the large majority of investors that have filed tax-related treaty claims have been from North America and Western Europe, and this trend aligns with the regions of investors that have filed all investor-State claims. In contrast, although South American States faced a significant number of tax-related treaty claims between 2000-2010, the distribution of tax-related treaty claims overall is relatively evenly spread across States from a number of regions.

As explained below, Ecuador and Argentina are parties to some of the most frequently invoked treaties, mainly due to the cases they faced between 2000-2010.

B. Treaties Relied Upon by Investors

Many treaties have only been invoked once in relation to tax-related claims. In addition to the ECT and the NAFTA, investors have relied on only six other treaties more than once (as listed in Table 3, below).

☐ **Table 3:** Most Frequently Invoked Treaties	
TREATY	**NO. OF CASES**[25]
Energy Charter Treaty[26]	8
North American Free Trade Agreement[27]	7
United States-Ecuador BIT (1993)[28]	5
Algiers Accords (1981)[29]	4
United States-Argentina BIT (1991)[30]	4
United Kingdom-India BIT (1994)[31]	2
Netherlands-Venezuela BIT (1991)[32]	2
Cyprus-Czech Republic BIT (2001)[33]	2

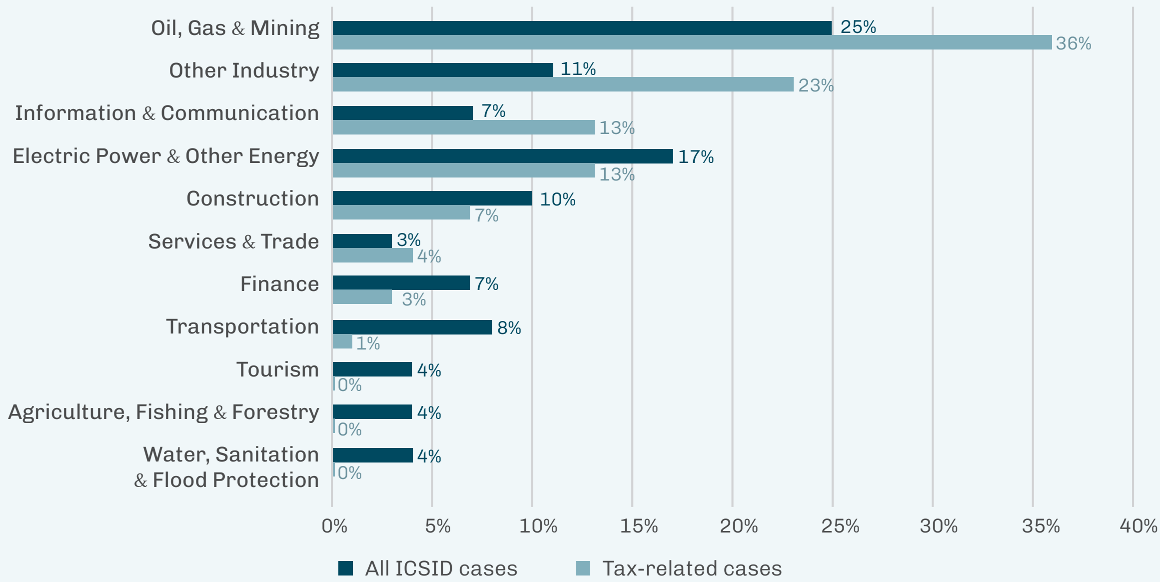
Investors filed eight tax-related claims (four of which related to corporate income tax) under the ECT, making it the most frequently invoked treaty. For example, in three cases, investors challenged the Czech Republic's solar levy, which reduced the level of government support to solar energy producers.[34] The other five cases concerned non-renewable energy sources and were filed by European investors against host States from Eastern Europe and Central Asia.[35]

C. Industries in Which Tax-Related Claims Arise

Over one-third of all tax-related treaty claims concerned sectors that are typically heavily taxed, such as energy, oil and gas, and mining. North American investors asserted most of such claims against South American States.

Oil, gas and mining disputes constitute the largest share of tax-related disputes (as in ISDS cases generally[36]), likely due to the amounts of money at stake, the long-term nature of investments, and the corresponding risk of adverse State action. Electric power and other energy cases accounted for less than 15% of tax-related claims. This is likely due to the large number of renewable energy cases under the ECT that, as explained below, have been excluded from the tax claims analysis. Over half of claims from "other industries" were in the food and beverage industry, partly due to U.S. and Canadian investors filing claims against Mexico concerning the enactment of a 20% excise tax applicable to certain soft drinks and syrups.[37]

Chart 14: Industries - All ICSID Cases/Tax-Related Cases



*Sample size of 910 for all ICSID cases **Sample size of 70 for tax-related cases

D. Types of Taxes That Have Given Rise to Investor-State Claims

In almost one-half of all tax-related treaty claims, investors challenged a combination of taxes (Chart 15). Such claims included VAT/sales tax and corporate income tax, and other combinations of taxes. In other cases, investors have challenged a single type of tax. In particular, investors have frequently challenged corporate income taxes, VAT or sales taxes, import/export taxes, and excise taxes.

Corporate income tax is a tax on the profits of a corporation. The taxes are paid on a company's taxable income.

Value-added tax (VAT) is a consumption tax on goods and services that is levied at each stage of the supply chain where value is added, from initial production to the point of sale.

Import/export tax is levied on certain goods, services, or other transactions that are imported and exported. Duty rates are a percentage determined by the total value of the goods paid for in another country.

Excise tax is a tax on specific goods or services at the time they are purchased. Goods subject to excise taxes could be fuel, tobacco, and alcohol, among others.

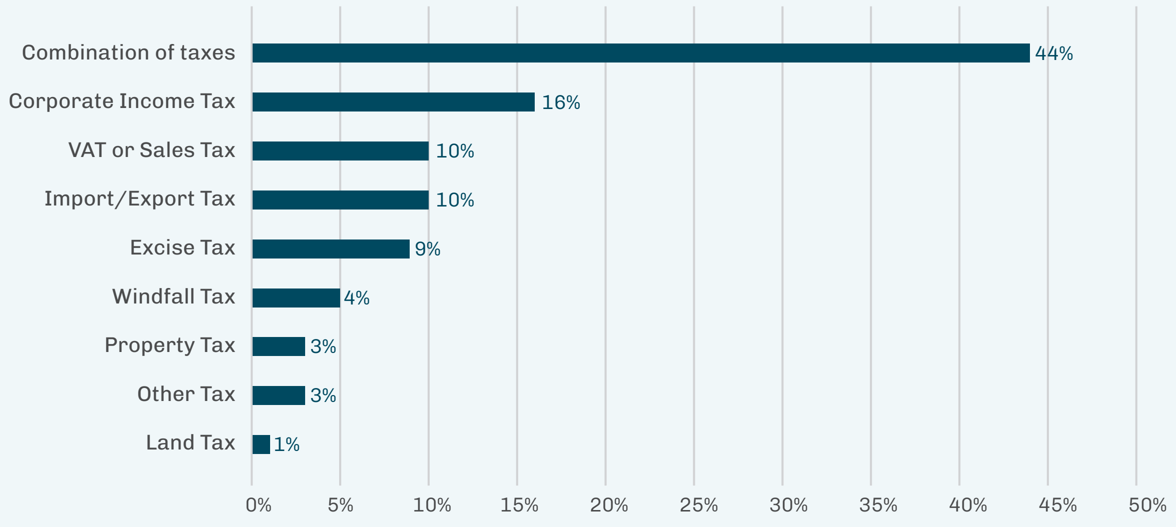
Windfall tax is a one-off tax levied on companies deemed to have made unreasonably high profits.

Land tax is a method of assessing property taxes that only considers the value of the land itself and related improvements, and not the structures built on the land.

Property tax is a tax paid on property owned by an individual or other legal entity, such as a corporation.

Investopedia (https://www.investopedia.com)

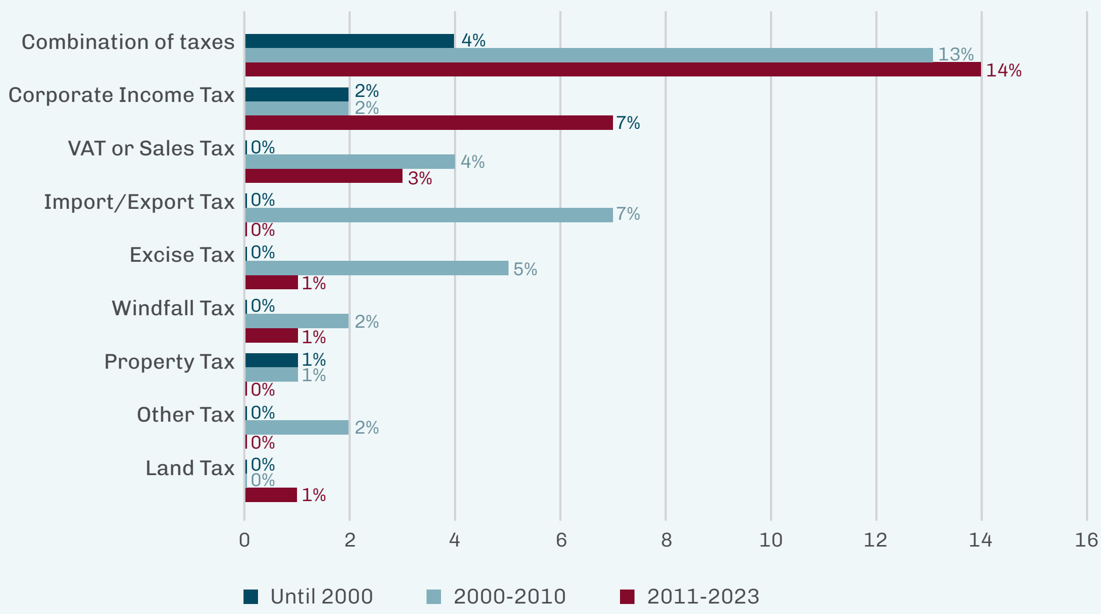
Chart 15: Types of Disputed Taxes



*Sample size of 70

Claims challenging a combination of taxes rose dramatically after 2000, comprising the majority of all claims filed between 2000 and 2023, as Chart 16 demonstrates.

Chart 16: Types of Disputed Taxes - Over Time



*Sample size of 70

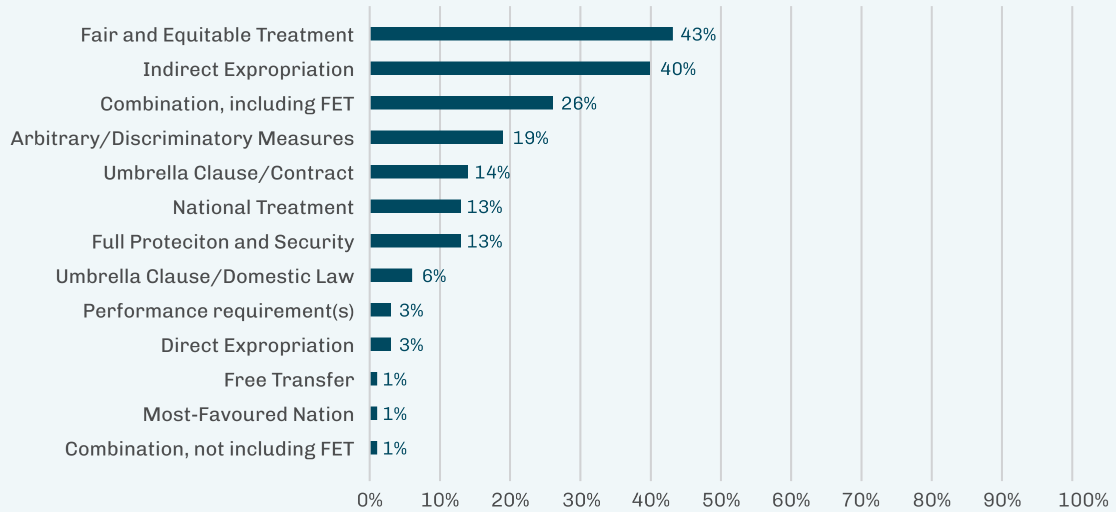
A third of the tax-related claims filed before 2000 concerned corporate income taxes, primarily filed in the 1980s before the Iran-United States Claims Tribunal ("IUSCT").[38] The IUSCT is an international arbitral tribunal established by the Algiers Accords to resolve disputes between the United States and Iran, and their nationals. The IUSCT closed to new claims from private individuals on 19 January 1982, which explains its greater relevance with respect to pre-2000 tax claims.

The available data shows that over the past two decades, it has become increasingly common for investors to bring claims related to a combination of taxes. Aside from such combined claims, the most frequently disputed types of tax over the past decade have been corporate income taxes and VAT or sales taxes.

E. Protection Standards Invoked in Tax-Related Claims

Most frequently, investors have invoked the FET standard, either as a standalone claim or in combination with other standards, in over two-thirds of all tax-related claims. As Chart 17 shows, they also invoked the indirect expropriation standard in almost half of tax-related treaty claims.

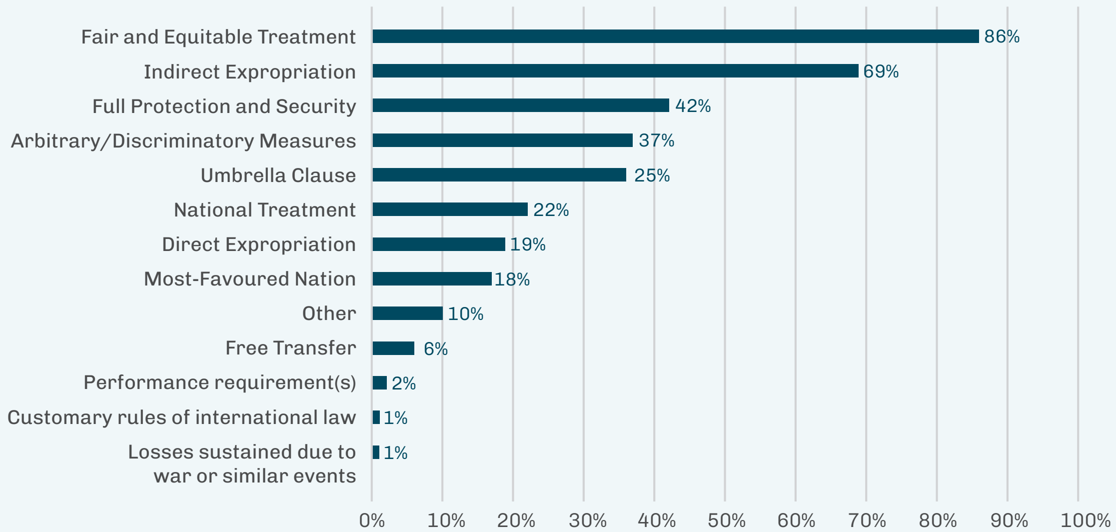
Chart 17: Standard Invoked - Tax-Related Treaty Claims



*Sample size of 70

The prevalence of FET and indirect expropriation claims is not limited to taxation issues. Investors have invoked these standards in similarly high frequency in all investment treaty claims (Chart 18).[39]

Chart 18: Standard Invoked - All Treaty Claims



*Sample size of 755. Source: UNCTAD, International Dispute Settlement Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement (consulted on 6 November 2023)

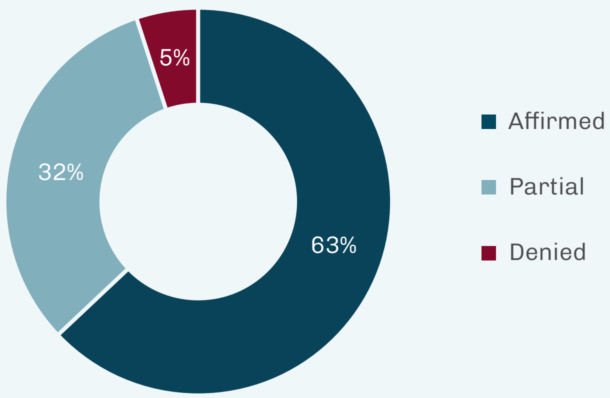
However, the data indicates that investors have invoked the FET standard less frequently with respect to tax-related claims than in investor-State disputes more generally. Moreover, even though investors invoked direct expropriation in 19% of all investment arbitration disputes, they have only invoked this standard in approximately 3% of all tax-related claims.

F. Investors' Chances of Success in Tax-Related Treaty Disputes

1. Jurisdiction/Admissibility

Tribunals have only fully declined jurisdiction/admissibility over tax claims in three of 65 cases (Chart 19). However, in 37% of all treaty disputes, tribunals have declined jurisdiction/admissibility over at least one allegation of breach in a claim arising out of tax measures. In the remaining cases, which amount to three-fifths of all cases, tribunals fully affirmed jurisdiction/admissibility over tax claims.

Chart 19: Jurisdiction/Admissibility Over Tax-Related Treaty Claims



*Sample size of 65[40]

Investors' chances of success with respect to jurisdiction/admissibility varied based on the protection standard invoked. While tribunals upheld jurisdiction/admissibility over 32 out of 36 tax-related expropriation claims (direct and indirect), they denied jurisdiction/admissibility in nearly a quarter of all FET claims.

Thus, FET claims were less likely to reach the merits stage than expropriation claims, probably because most general tax carve-outs included tax claw-backs that only covered the expropriation standard and not the FET standard (Chart 7).

Further, some investment treaties – such as the NAFTA – included referral mechanisms that required investors to refer a tax measure to competent authorities (the domestic tax authorities of the contracting parties) as a prerequisite to filing a tax-related claim under the treaty.[41]

NAFTA

Article 2103(6)

The investor shall refer the issue of whether the measure is not an expropriation for a determination to the appropriate competent authorities set out in Annex 2103.6 at the time that it gives notice under Article 1119 (Notice of Intent to Submit a Claim to Arbitration). If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 1120. (Submission of a Claim to Arbitration).

Annex 2103 (6)

For purposes of this Chapter: competent authority means

(a) in the case of Canada, the Assistant Deputy Minister for Tax Policy, Department of Finance;
(b) in the case of Mexico, the Deputy Minister of Revenue of the Ministry of Finance and Public Credit ("Secretaría de Hacienda y Crédito Público");
(c) in the case of the United States, the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury.

ECT

Article 21(5) (b) and (7)

i. The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) shall make a referral to the relevant Competent Tax Authorities;

ii. The Competent Tax Authorities shall, within a period of six months of such referral, strive to resolve the issues so referred. [...]

iii. Bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) may take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is an expropriation. [...]
[...]

For the purposes of this Article:

(c) A "Competent Tax Authority" means the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when no such agreement is in force, the minister or ministry responsible for taxes or their authorised representatives.

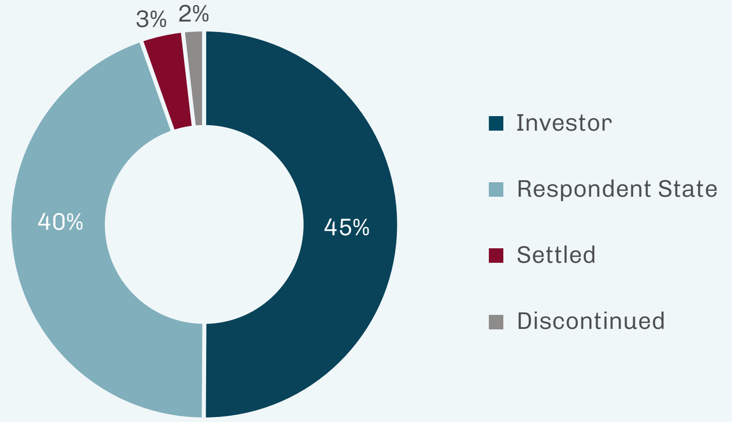
Investors referred a tax measure to competent authorities in only seven cases (five NAFTA cases and two ECT cases). In four NAFTA cases filed against Mexico, investors were able to submit their claims to arbitration, as the competent authorities failed to agree that the relevant measure was not an expropriation or allowed the claims to proceed to arbitration.[42] In the fifth NAFTA case, *Resolute Forest v. Canada*, the tribunal took note of the investor's failure to submit the claim to the appropriate competent authorities before concluding that it would not have jurisdiction over the taxation measures in any case.[43] In *Yukos Universal v. Russia*, the tribunal held that it would be futile for the investor to pursue the referral mechanism prescribed under Article 21(5) of the ECT, as the competent authorities could not reach a timely conclusion due to the size of the record.[44] Finally, in *Plama v. Bulgaria*, the tribunal found that the relevant tax measure did not violate Bulgaria's obligations under the ECT, and took note of the investor's failure to refer the issue to the competent tax authority.[45]

Although an investor may be barred from filing a claim with respect to a tax measure if the applicable treaty requires the investor to refer the claim to competent authorities, and those authorities agree that the tax measure does not constitute a violation of the relevant standard under the applicable treaty, this does not yet appear to have occurred.

2. Merits

As Chart 20 shows, once a tax-related treaty claim has reached the merits stage, investors have success in almost half of the claims. Respondent States are wholly successful in defending such claims in over one-third of claims, and only a very small proportion of claims are settled.

Chart 20: Success on Merits in Treaty-Based Tax-Related Claims

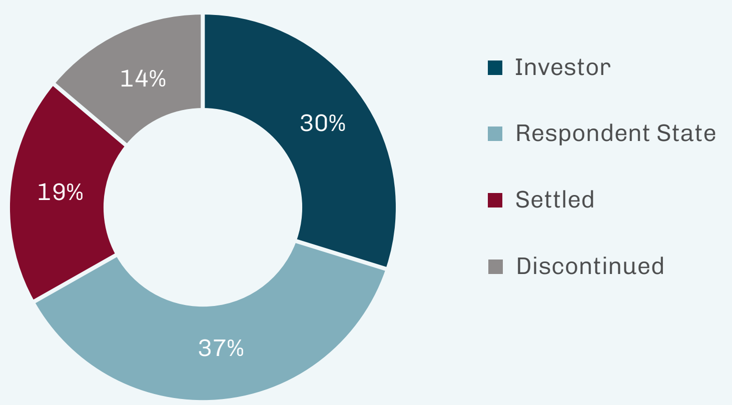


*Sample size of 62

**The chart provides information solely with respect to claims based on tax measures, and not other potential bases for claims.

However, as Chart 21 shows, investors in tax-related treaty claims are more successful than in all treaty claims, in which less than one-third of investors win on the merits and are awarded damages.[46]

Chart 21: Overall Success in Treaty-Based Disputes

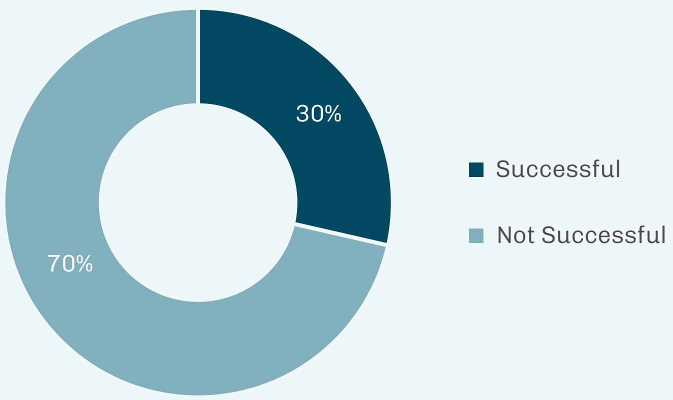


*Sample size of 890. Source: UNCTAD, International Dispute Settlement Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement (consulted on 6 November 2023)

Our analysis of cases indicates that tribunals have granted almost half of tax-related FET claims that proceeded to the merits (Chart 23). Investors have been much less successful with respect to tax-related expropriation claims than with claims under other standards of treatment.

This may be due to the broad nature of the FET standard. The FET standard is generally understood to protect investors from bad faith conduct, arbitrary and discriminatory governmental measures, including infringements of due process and measures that violate an investor's legitimate expectations. In contrast, establishing a breach of the expropriation standard is generally more difficult, as it requires an investor to demonstrate a taking of property or a substantial deprivation of the value of an investment. The standard for showing a tax measure is expropriatory is especially stringent, given that taxes are by definition a (usually permissible) taking.[47] Further, it is uncommon for a tax measure to destroy the value of an investment to the extent it could amount to an expropriation.

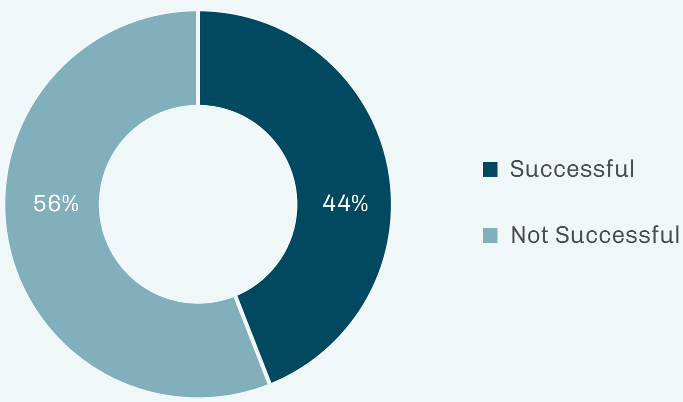
Chart 22: Success of Expropriation Claim**



*Sample size of 30

**Includes direct and indirect expropriation

Chart 23: Success of FET Claim



*Sample size of 34

V. RENEWABLE ENERGY CASES UNDER THE ENERGY CHARTER TREATY

As mentioned above, most of the tax-related claims filed under the ECT have been excluded from the main dataset and above analysis. These cases (the vast majority of which involve the renewable energy sector) were not solely, or even primarily tax-related. Only eight ECT cases are in the main dataset, including five cases involving the non-renewable energy sector,[48] and only three cases involving the renewable energy sector (the cases filed against the Czech Republic in relation to a solar levy).[49] This standalone section provides a brief overview of tax-related claims brought under the ECT.

The ECT is an international treaty with the purpose of promoting the cooperation of States in the energy sector. It entered into force in 1998. Currently, there are 53 signatories to the ECT, including the European Union.[50] In July 2023, European Commission called for the EU and its member states to withdraw from the treaty as the ECT is “no longer compatible with the EU’s enhanced climate ambition.”[51] Recently, France, Germany and Poland have formally given notice of their withdrawal from the ECT, which took effect on 8, 20 and 29 December 2023 respectively.[52]

In the early 2000s, several European States introduced generous incentive programs to attract investors to the renewable energy sector, triggering an investment boom. These programs guaranteed investors reasonable profitability rates, a fair return, or a certain payback period through feed-in tariffs.[53] However, incentive payments put a strain on public finances after the global financial crisis of 2008. As a result, Spain, Italy, and the Czech Republic rolled back their incentive schemes and introduced new taxes.

For instance, Spain issued decrees imposing a tax on power generation, and the Czech Republic imposed a retroactive levy on revenues from solar electricity. Shortly thereafter, between 2013 and 2016, foreign investors that had flocked to the market in light of the incentive schemes filed numerous investment arbitrations against these States.[54] Western European investors, including from the Netherlands and Luxembourg, have filed a significant number of claims against Spain, Italy, and the Czech Republic under the ECT, rather than potentially available BITs.[55]

Thirty-two ECT cases initiated against Spain and Italy involve some element of a tax claim. Tribunals have denied jurisdiction over the tax-related measures in the vast majority of these ECT cases due to the tax carve-out in the ECT. Article 21(1) of the ECT excludes taxation measures from the scope of the treaty, except for certain provisions, such as the expropriation provision in Article 13.[56] However, these cases are not solely, or even primarily, tax-related. Many of them are primarily based on other alleged State misconduct with the tax claim merely “tacked on” to the primary claim. We have therefore excluded these cases from our data set so as not to skew the analysis. By contrast, we have included the cases filed against the Czech Republic, as those cases were primarily related to a solar levy, which the investors argued was a tax measure (but the tribunals held that it was not).

VI. TAX-RELATED CONTRACTUAL DISPUTES

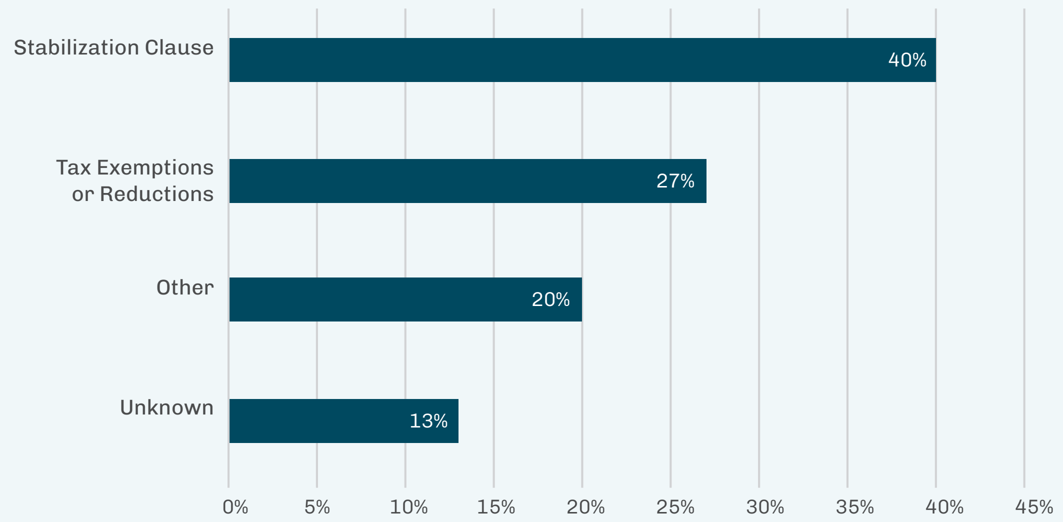
Our research on tax-related claims covers 91 investor-State disputes, excluding most of the cases filed under the ECT. As Chart 2 shows, investors filed the majority of these claims under an investment treaty (66%), or a treaty as well as a contract (11%). Section IV covers these cases.

This section addresses claims brought only under a contract, which amount to nearly a quarter of all investor-State disputes involving tax-related claims (21 cases).

Investors do not negotiate investment treaties nor typically have obligations under them.[57] By contrast, both parties contribute to drafting the contract and assume obligations under it in a contractual investor-State dispute. For instance, investors and States regularly sign long-term concession contracts with respect to major energy or infrastructure projects.[58] Investors have raised many contractual tax-related claims under such concession contracts and production sharing contracts ("PSCs").[59] Other cases have involved contracts such as consolidation agreements, legal stability agreements, settlement deeds, and establishment agreements.

Under such contracts, investors usually undertake to follow the tax law of the host State, while host States often grant investors some limited tax reduction or exemption for a certain period (Chart 24). States may also agree not to change the relevant legislation or applicable rules (or not to apply any such changes to the investor) under stabilization clauses.[60]

Chart 24: Type of Tax Provision in Contracts



*Sample size of 15[61]

For example, in *Duke Energy v. Peru*, Duke brought a claim under a legal stability agreement concluded between Peru and Duke's subsidiary, DEI Bermuda. DEI Bermuda argued that Peru imposed a tax assessment in violation of certain guarantees in the legal stability agreement.[62] As Table 4 shows, the legal stability agreement included a tax stabilization clause:

☐ **Table 4:** Tax Stabilization Clause in Duke v. Peru	
CLAUSE THREE	By virtue of this Agreement, [...] and as long as it remains in effect, in connection with the investment referred in CLAUSE TWO, the STATE guarantees legal stability for DUKE ENERGY INTERNATIONAL, according to the following terms: 1. Stability of the tax regime with respect to the Income Tax, as stipulated in subsection a) of Article 10° of Legislative Decree No. 662, in effect at the time this Agreement was executed, according to which dividends and any other form of distribution of profits, are not taxed, in accordance with the stipulations of subsection a) of article 25 of the Amendment Text of the Income Tax Law, approved by the Supreme Decree No. 054-99-EF in effect at the time this Agreement was executed. Neither the remittances sent abroad of amounts corresponding to DUKE ENERGY INTERNATIONAL for any of the items contemplated in this subsection are taxed pursuant to the aforementioned law.
CLAUSE FIVE	This Legal Stability Agreement shall have an effective term of ten (10) years as from the date of its execution. As a consequence, it may not be amended unilaterally by any of the parties during this period, even in the event that Peruvian law is amended, or if the amendments are more beneficial or detrimental to any of the parties than those set forth in this Agreement.

Similarly, in *SNEPCO et al. v. NNPC*, where the parties concluded a PSC relating to a deep offshore oil prospecting license in Nigeria, the PSC included the following tax stabilization clause:

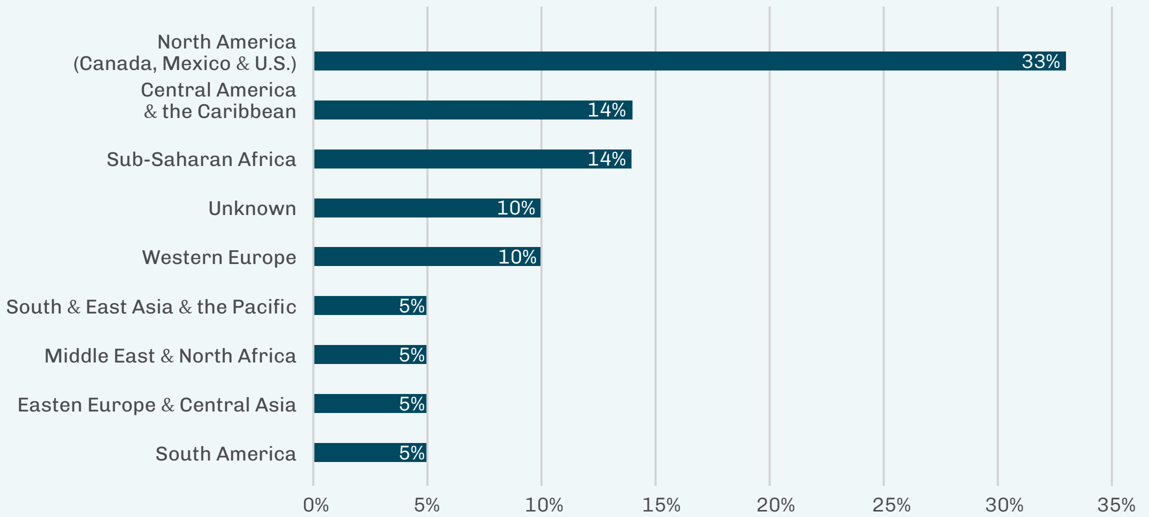
☐ **Table 5:** Tax Stabilization Clause in SNEPCO et al. v. NNPC
"In the event that any enactment of or change in the laws or regulations of Nigeria or any rules, procedures, guidelines, instructions, directives, or policies, pertaining to the Contract introduced by any Government department or Government parastatals or agencies occurs subsequent to the Effective Date of this Contract which materially and adversely affects the rights and obligations or the economic benefits of the CONTRACTOR, the Parties shall use their best efforts to agree to such modifications to this Contract as will compensate for the effect of such changes. If the Parties fail to agree on such modifications within a period of ninety (90) days following the date on which the change in question took effect, the matter shall thereafter be referred at the option of either Party to arbitration under Article 21 hereof. Following arbitrator's determination, this Contract shall be deemed forthwith modified in accordance with that determination."

A. Geographic Origin of Parties to Contractual Tax-Related Claims

1. Geographic Origin of Investors in Contractual Tax-Related Claims

North American investors filed one-third of all contractual investor-State tax disputes (Chart 25). This may be due to the strength of North American energy companies and the prevalence of contracts concluded between such companies and resource-rich, developing States in relation to the extraction of natural resources.

Chart 25: Region of Claimants in Contractual Tax-Related Claims



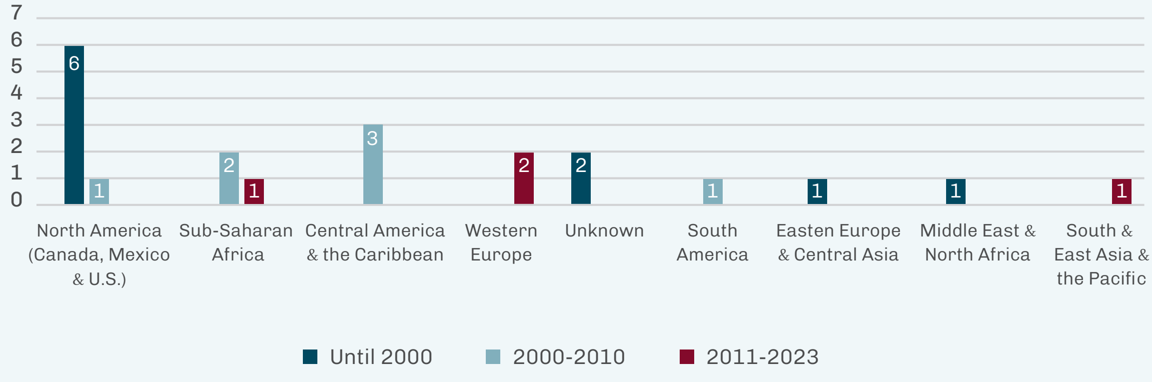
*Sample size of 21

There is a significant difference between the regions of investors in tax-related treaty claims versus tax-related contract claims. Even though North American and Western European investors combined have brought the vast majority of tax-related treaty claims (as shown in Chart 10), they combined to bring under half of tax-related contract claims. In particular, Western European investors filed nearly half of all tax-related treaty claims, whereas they only filed 10% of all contractual claims.

The data also shows that investors in contractual tax-related disputes are not exclusively from developed countries. Indeed, investors from Central America & the Caribbean, Sub-Saharan Africa and other developing countries were involved in nearly half of disputes.

Almost half of tax-related contract claims were brought before 2000 (10 out of 21 cases). The declining number of tax-related contract claims is most evident in claims brought by North American investors as Chart 26 shows. The declining number of contractual tax-related disputes is possibly due to the increasing prevalence of investment treaties and use of investment treaty arbitration.

Chart 26: Region of Claimants in Contractual Tax-Related Claims - Over Time

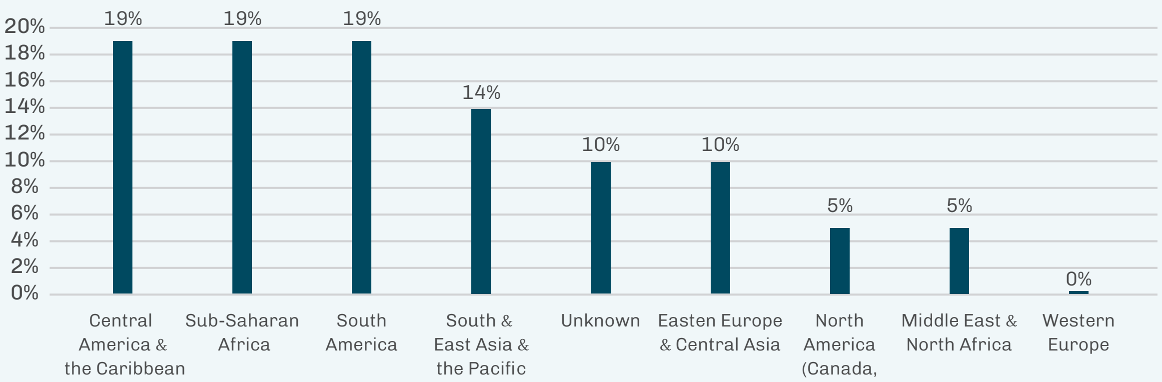


*Sample size of 21: 10 (until 2000), 7 (2001-2010), 4 (2011-2023)

2. Geographic Origin of Respondent States in Contractual Tax-Related Claims

The vast majority of respondent States in contractual investor-State tax-related disputes have been from fuel-exporting, developing regions such as South America, Sub-Saharan Africa, the Caribbean and the Middle East/North Africa (Chart 27).

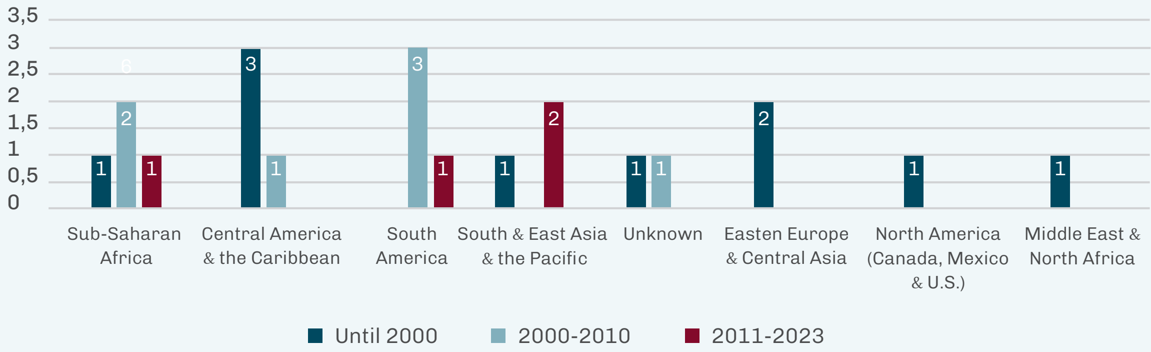
Chart 27: Region of Respondent States in Contractual Tax-Related Claims



*Sample size of 21

Three respondent States together have faced one-third of all contractual tax-related claims, as Jamaica faced three claims,[63] and Venezuela[64] and Mali[65] each faced two claims. Chart 28 sets out the regions of respondent States to contractual investor-State tax-related disputes over time.

Chart 28: Region of Respondent States in Contractual Tax-Related Claims - Over Time



*Sample size of 21: 10 (until 2000), 7 (2001-2010), 4 (2011-2023)

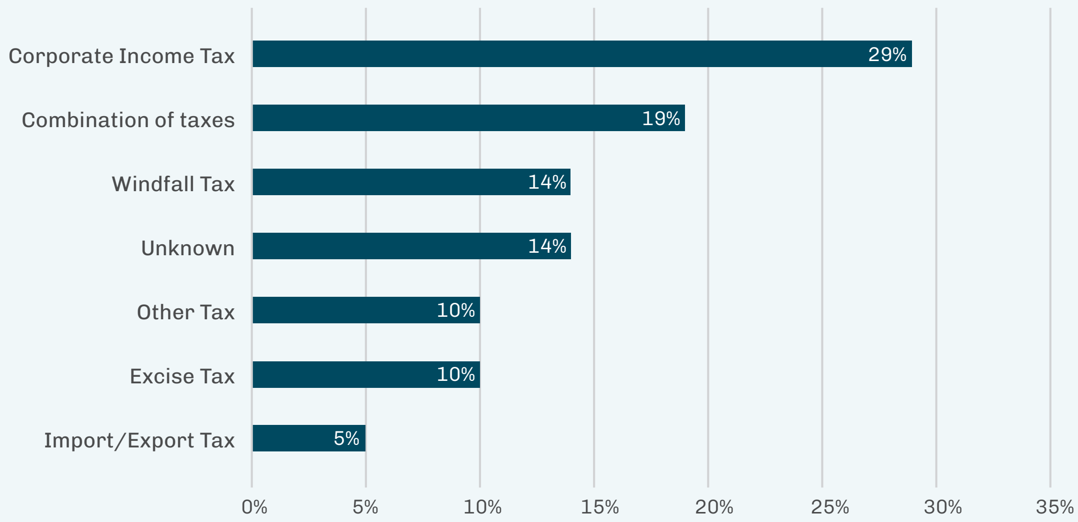
Respondent States from several regions faced several claims prior to 2011, but those regions have had no further claims since then. For example, in the Caribbean, Jamaica faced a series of cases in 1974, arising from the increase of taxes on the mining of bauxite under the Bauxite (Production Levy) Act, 1974. In *Kaiser Bauxite Company v. Jamaica*, *Alcoa Miners v. Jamaica* and *Reynolds v. Jamaica*, investors raised a contractual claim with respect to a contractual stabilization clause.[66]

North American States have only been party to one tax-related contractual dispute,[67] and no Western European State has ever faced such a dispute. This may be because any contracts to which such States are parties are less likely to include tax incentives or stabilization clauses that may give rise to disputes. It could also be because domestic courts efficiently resolve such disputes without a need to go to international arbitration.

B. Type of Disputed Taxes in Contractual Tax-Related Claims

Investors most frequently challenged corporate income tax in tax-related contract disputes (Chart 29).

Chart 29: Types of Disputed Taxes in Contractual Tax-Related Claims



*Sample size of 21

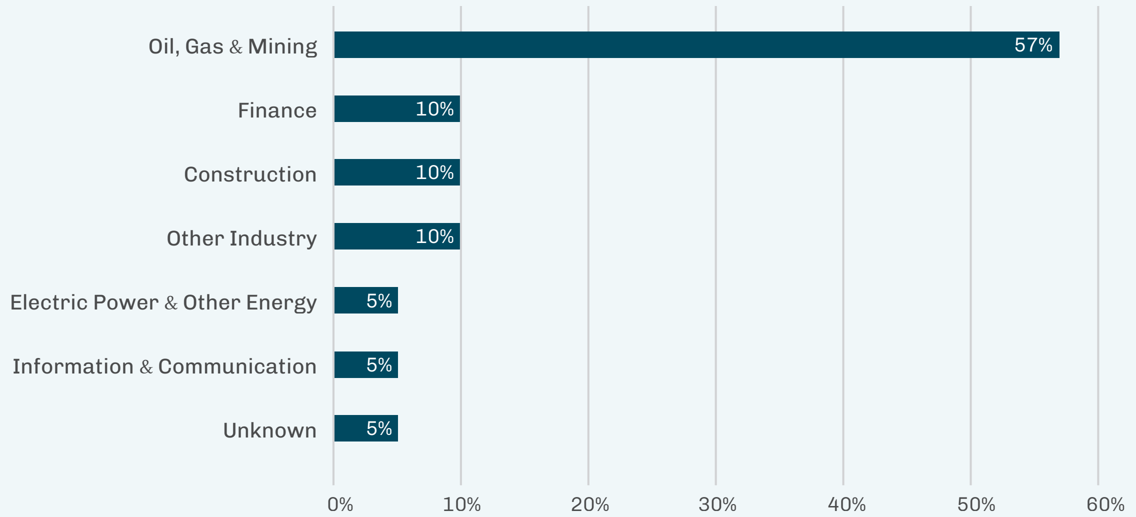
In some cases, investors challenged a combination of taxes, including VAT or sales tax, and corporate income tax.[68] Other cases involved different combinations of taxes. For example, in *Autopista v. Venezuela*, the investor argued that Venezuela breached a concession agreement by not taking the appropriate steps to make the investor exempt from paying the interest tax and by not exempting from import taxes any equipment which the investor or its subcontractors would require to perform the concession.[69]

In *Duke v. Peru*, the investor challenged Peru's tax assessment, which involved a tax concerning certain corporate transactions and the use of depreciation rates concerning certain assets.[70]

C. Industries Giving Rise to Contractual Tax-Related Claims

The majority of contractual investor-State tax disputes concern natural resources, with almost two-thirds of cases in the oil, gas and mining sector.

Chart 30: Industries in Which Contractual Tax-Related Disputes Were Filed



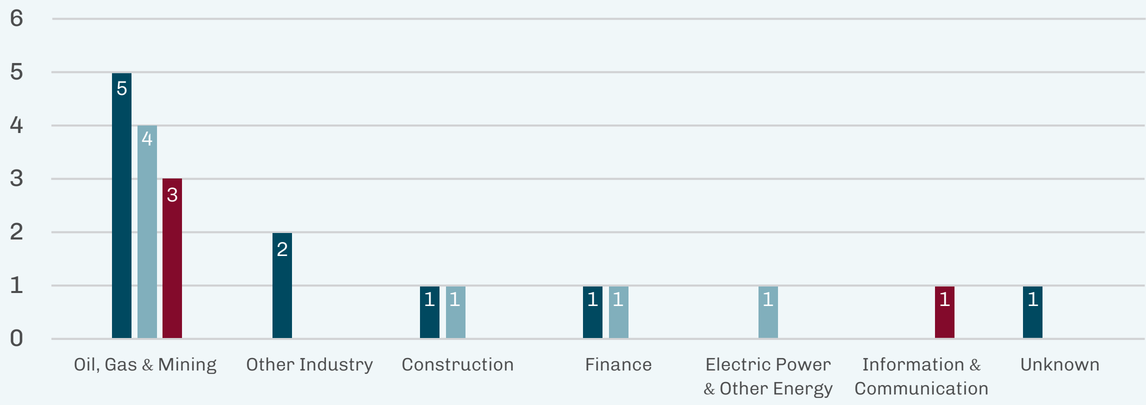
*Sample size of 21

A significantly higher proportion of contractual investor-State tax disputes concern natural resources, as only one-third of all tax-related treaty disputes concern natural resources.

Historically, resource-rich States often concluded with foreign investors contracts with tax-related clauses, such as product sharing agreements (PSCs) to extract natural resources.[71] This may explain why natural resource-related disputes constitute the majority of contractual disputes. Such contracts are typically concluded between experienced energy companies originating from developed countries and resource-rich developing countries. The data concerning the regions of investors and respondent States reflects this pattern.

Chart 31 shows that investors involved in the oil, gas and mining sector filed five contractual claims prior to 2000. Although this sector remains the most prevalent in which tax-related contractual claims have been filed, the number of cases has steady declined over the past two decades, with only three such claims filed between 2010 and 2023.

Chart 31: Industries in Which Contractual Tax-Related Disputes Were Filed - Over Time



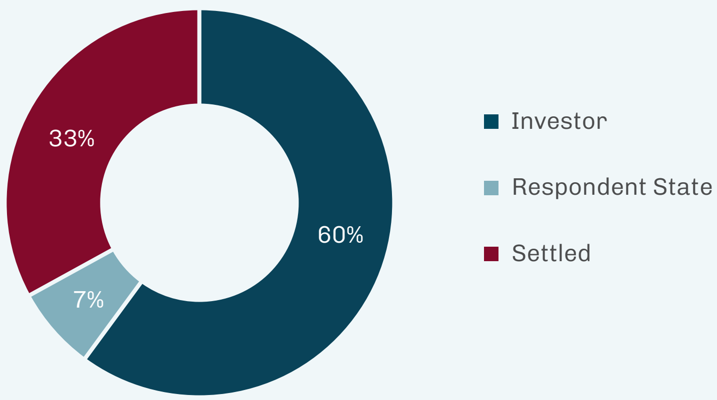
*Sample size of 21: 10 (until 2000), 7 (2001-2010), 4 (2011-2023)

D. Investors' Chances of Success in Contractual Tax-Related Claims

While treaty-based disputes involve mixed results in terms of jurisdiction/admissibility of tax-related claims, investors in contract-based disputes did not have such issues. Treaty claims typically require the investor to prove it has made an "investment" pursuant to the relevant treaty, which may explain the difference. Further, while many treaty disputes involve tax carve-outs that bar investors from bringing claims concerning taxation measures, contracts typically contain no such carve-outs.

Investors have prevailed on the merits in almost two-thirds of all contractual investor-State tax disputes. Respondent States prevailed in less than 10% of cases. The remaining cases were settled, which means that respondent States have not prevailed in any of the known contractual disputes.

Chart 32: Outcome on Merits in Contractual Tax-Related Claims



*Sample size of 15[72]

**The chart provides information solely with respect to claims based on tax measures, and not other potential bases for claims.

Thus, as can be seen in the comparative Chart 20 above , investors in contractual disputes have a higher success rate compared to treaty disputes.

Tax-related contract disputes mostly concern whether a contractual commitment made by the respondent State has been violated. These contractual commitments are often broad and may impose a stricter standard of conduct on the State than the substantive obligations in investment treaties. Taken together, these factors may explain the high success rate of investors in contractual cases as compared to treaty disputes.

VII. METHODOLOGY

The research was conducted in three phases:

Phase 1: locating the publicly available tax-related investor-State treaty and contractual disputes in the ICSID, italaw, ISLG, UNCTAD and other major databases, resulting in locating 70 publicly available cases on tax-related investor-State treaty disputes (excluding most renewable energy-based ECT cases) and 21 publicly available contractual tax-related disputes.

Phase 2: identifying the information required in order to analyze these located decisions, reviewing and analyzing the decisions, and collating the relevant data from the decisions.

Phase 3: producing the statistical data and the charts and graphs presented in this Report. The qualitative information was used to identify trends and analyze tax-related investment and contractual disputes covered in the Report.

Renewable-energy tax-related claims under the ECT, with the exception of claims against the Czech Republic, have not been included in the dataset. Such cases rarely focus on taxation measures, and tribunals have generally rejected jurisdiction over the tax-related aspects of these cases. As a result, including them in our dataset would have skewed the data in an unrepresentative way.

THE AUTHORS

Danielle Morris is a partner in the Litigation/ Controversy Department and a member of the International Arbitration Practice. Ms. Morris' practice spans both private and public international law. She has 15 years of experience representing clients in both ad hoc and institutional arbitrations, including under the rules of ICSID, the LCIA, the SCC and UNCITRAL. She has represented clients in various sectors, including mining, oil and gas, financial services, construction, pharmaceutical and automotive.

Ms. Morris regularly advises clients on the substantive protections and dispute resolution mechanisms under various investment treaties, both bilateral and multilateral, and has represented both investors and States in investment arbitrations. She has also advised an African State regarding a boundary mediation.

Danielle Morris

Partner at WilmerHale

Email:
danielle.morris@wilmerhale.com

Professor Yarik Kryvoi is an academic with the British Institute of International and Comparative Law, a co-founder of the Arbitration Lab and an Of Counsel at Keidan Harisson. He specialises in international and comparative law, with a particular focus on dispute resolution and foreign investment law. He has represented investors and states under various arbitration rules. Professor Kryvoi has published extensively and managed large-scale projects on international dispute resolution, international economic law, investment law, as well as law and policy in the countries of the former Soviet Union, the Middle East and Asia.

He was admitted to the New York Bar in 2009 and prior to joining the academia, he practiced in the area of international dispute resolution with leading law firms in Washington, DC and London. His website is http://kryvoi.net.

Professor Yarik Kryvoi

Director of the Investment Treaty Forum, British Institute of International and Comparative Law

Email:
y.kryvoi@biicl.org
Web:
http://kryvoi.net

Sam Winter-Barker is a senior associate in the Litigation/Controversy Department, and is a member of the International Arbitration Practice Group. Mr. Winter-Barker has advised States, State entities and companies on commercial and investment arbitrations under a variety of rules, including the ICC, ICSID, PCA and UNCITRAL rules. Mr. Winter-Barker also has experience in enforcement and attachment and other proceedings in English and US courts.

Prior to joining WilmerHale, Mr. Winter-Barker worked as an associate in the international arbitration practice of a leading London law firm.

Sam Winter-Barker

Senior Associate at WilmerHale

Email:
sam.winter-barker@wilmerhale.com

Tunç Savaş is an associate in the Litigation/Controversy Department and is a member of the International Arbitration Practice Group.

Mr. Savaş has represented clients involved in the construction, oil and gas, transportation, manufacturing and hospitality sectors on commercial and investment arbitrations under a variety of rules, including the ICC, ICSID, UNCITRAL and SIAC Rules. Mr. Savaş has particular experience with investor-state disputes. Mr. Savaş also has experience in commercial proceedings in Turkish courts.

Tunç Savaş

Associate at WilmerHale

Email:
tunc.savas@wilmerhale.com

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Endnotes

1 Allison Christians, *Sovereignty, Taxation, and Social Contract*, 18 Minn. J. Int'l. L. 99, 104 (2009).

2 Such an exclusion does not appear to be justified by systemic – as opposed to political – reasons. *See, e.g.*, Danon & Wuschka, International } Investment Agreements and the International Tax System: The Potential of Complementarity and Harmonious Interpretation, 75 (11/12) Bull. Int. Tax. (2021), pp. 687-703; *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-07, Final Award, 21 December 2020, para. 798 (noting that "guarantees of fairness of the taxation regime are in line with the objective of encouraging more foreign investment").

3 *See, e.g.*, Agreement between the Government of Hong Kong and the Government of New Zealand for the Promotion and the Protection of Investments (1995), Art. 8(2); Model Text for the Indian Bilateral Investment Treaty (2015), Art. 2.4(ii).

4 *See, e.g.*, Agreement between the Government of the United Kingdom of Great Britain and of Northern Ireland and the Government of the United Mexican States for the Promotion and the Protection of Investments (2006), Art. 5(b); Agreement between the Kingdom of the Netherlands and the Republic of Turkey on Reciprocal Encouragement and Protection of Investments (1986), Art. 3(3)(b).

5 *See, e.g.*, Model Text for the Indian Model Bilateral Investment Treaty (2015), Art. 2.4(ii); United States Model Bilateral Investment Treaty (2012), Art. 21(1).

6 *See, e.g.*, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (1993), Art. X(2)(c).

7 With a small nuance that many of these first-generation treaties exclude from the most favored nation provision any treatment granted by virtue of a double taxation agreement or other agreements concerning matters of taxation. See, e.g., Czech Republic-Germany BIT (1990), Art. 3(4); Lithuania-Ukraine BIT (1994), Art. 3(3); Netherlands-Romania BIT (1994), Art. 3(3).

8 UNCTAD, *World Investment Report: International Tax Reforms and Sustainable Investment*, 2022, at pp. 90-91.

9 UNCTAD, *International Investment Agreements and Their Implications for Tax Measures: What Tax Policymakers Need to Know*, 2021, at pp. 16-18; UNCTAD, *Policy options for IAA reform: treaty examples and data*, 2015, at p. 7; M. Davie, *Taxation-Based Investment Treaty Claims*, J. Int. Disput. Settl., Vol. 6(1), 2015, at pp. 210-211; C. Cherian, *Between the Scylla and Charybdis: Tax Carve-outs and Tribunal Jurisprudence*, Indian J. Arb. L., Vol. 10(1), 2021, at pp. 156-174.

10 J. Chaisse, *Investor-State Arbitration in International Tax Dispute Resolution – A Cut Above Dedicated Tax Dispute Resolution?*, Virginia Tax Review, Vol. 35, 2016, at pp. 158-165; J. Chaisse and J. Kirkwood, *Foreign Investors vs. National Tax Measures: Assessing the Role of International Investment Agreements*, [2021], at pp. 150-152; C. Cherian, *Between the Scylla and Charybdis: Tax Carve-outs and Tribunal Jurisprudence*, Indian J. Arb. L., Vol. 10(1), 2021, at pp. 156-174 (noting that some commentators have classified taxes into multiple groups based on permutations and combinations of these devices and that one commentator identified seven such groups, whereas another identified five groups); M. Davie, *Taxation-Based Investment Treaty Claims*, J. Int. Disput. Settl., Vol. 6(1), 2015, at pp. 202, 211-219.

11 UNCTAD, *International Investment Agreements and Their Implications for Tax Measures: What Tax Policymakers Need to Know*, 2021, at p. 17.

12 As shown in Chart 3 above, only 10.5% of all treaties contain a tax carve-out, yet 37 of the 70 (53%) tax-related investor-State disputes involved treaties with tax carve-outs.

13 C. Cherian, *Between the Scylla and Charybdis: Tax Carve-outs and Tribunal Jurisprudence*, Indian J. Arb. L., Vol. 10(1), 2021, at pp. 160.

14 UNCTAD, *World Investment Report: International Tax Reforms and Sustainable Investment*, 2022, at p. 88.

15 *See, e.g.*, D. Uribe and M. Montes, *Building a Mirage: The Effectiveness of Tax Carve-out Provisions in International Investment Agreements*, Investment Policy Brief, No. 14, March 2019, at pp. 1-11; M. Davie, *Taxation-Based Investment Treaty Claims*, J. Int. Disput. Settl., Vol. 6(1), 2015, at pp. 223-226; C. Cherian, *Between the Scylla and Charybdis: Tax Carve-outs and Tribunal Jurisprudence*, Indian J. Arb. L., Vol. 10(1), 2021, at pp. 166-174.

16 M. Davie, *Taxation-Based Investment Treaty Claims*, J. Int. Disput. Settl., Vol. 6(1), 2015, at pp. 223-226.

17 *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. 2005-04/AA227, Award, dated 18 July 2014, at para. 1407.

18 *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. 2005-04/AA227, Award, dated 18 July 2014, at para. 1407.

19 *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA Case No. UN3467; *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481; C. Cherian, *Between the Scylla and Charybdis: Tax Carve-outs and Tribunal Jurisprudence*, Indian J. Arb. L., Vol. 10(1), 2021, at p. 160; J. Adam, *International Tax Arbitration: Recent Developments and Forthcoming Improvements* in C. Gonzalez-Bueno (ed.), *40 under 40 International Arbitration*, 2018, at pp. 381-382; W. Park, *Arbitrability and Tax* in L. Mistelis and S. Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives*, 2009, at pp. 194-200; D. Uribe and F. Montes, *Building a Mirage: The Effectiveness of Tax Carve-out Provisions in International Investment Agreements*, Investment Policy Brief, No. 14, 2019, at p. 7.

20 Article X(1) of the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment provided that: "[w]ith respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party" but Article X(2) provided that the treaty would only apply with respect to certain standards such as expropriation, without mentioning, and therefore excluding, the FET standard.

Endnotes

21 Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, Art. XII ("1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party. 2. Nevertheless, the provisions of this Treaty, and in particular Article VII and VIII, shall apply to matters of taxation only with respect to the following: (a) expropriation, pursuant to Article IV; (b) transfers, pursuant to Article V; or (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VII(l)(a) or (b), to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time").

22 The tribunal analyzed Article XII of the Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, and found that it only creates "a best effort obligation" with respect to the FET standard, because the article only required that "each Party should strive," and the tax claw-back in Article XII(2) did not refer to fair and equitable treatment. *See Award of 31 October 2011 in ICSID Case No. ARB/03/15, El Paso Energy International Company v The Argentine Republic*, at paras. 291, 448-449.

23 *See, e.g.*, *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, dated 2 June 2010; *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, dated 12 September 2014; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, dated 5 October 2012.

24 *See, e.g.*, *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award, dated 31 October 2011; *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, dated 10 April 2013.

25 There are many bilateral treaties under which just one tax-related dispute has been brought – these are not included in the table.

26 Energy Charter Treaty (1994). This number only includes the cases that were not excluded from the scope of this report.

27 North American Free Trade Agreement (1992).

28 Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (1993).

29 For the purposes of this report, Iran-US Claims Tribunal cases have been considered as "Treaty" cases.

30 Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (1991).

31 Agreement between the Government of the United Kingdom of Great Britain and of Northern Ireland and the Government of the Republic of India (1994).

32 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela (1991).

33 Agreement between the Czech Republic and the Republic of Cyprus for the Promotion and Reciprocal Protection of Investments (2001).

34 *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19; *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22; *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21; *Voltaic Network GmbH v. The Czech Republic*, PCA Case No. 2014-20 (four cases were part of one multi-party arbitration and, therefore, were considered as one case in this Study); *Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic*, PCA Case No. 2014-01; *Natland Investment Group NV, Natland Group Limited, G.I.H.G. Limited, and Radiance Energy Holding S.A.R.L. v. The Czech Republic*, PCA Case No. 2013-35.

35 *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. 2005-03/AA226; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227; *Veteran Petroleum Limited v. The Russian Federation*, PCA Case No. 2005-05/AA228 (three cases were part of one multi-party arbitration and, therefore, were considered as one case in this Study); *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24; *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005; *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I)*, SCC Case No. 116/2010.

36 ICSID, *The ICSID Caseload – Statistics*, Issue 2023(1), at p. 12.

37 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, dated 21 November 2007; *Corn Products International Inc. v United Mexican States*, ICSID Case No. ARB(AF)/04/1, Award, dated 18 August 2009; *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, dated 18 September 2009.

38 *Computer Sciences Corporation v The Government of the Islamic Republic of Iran, Ministry of Finance, Ministry of National Defence, Iran Aircraft Industries, Information Systems Iran, Bank Mellat, Bank Tejarat, the Successors of the Following Entities: Imperial Iranian Air Force, Imperial Iranian Ground Force, Imperial Iranian Navy, Imperial Iranian Gendarmerie, Imperial Iranian National Police, the Supreme Commander's Staff,* IUSCT Case No. 65, Award, dated 16 April 1986; *Aeronutronic Overseas Services, Inc. v The Government of the Islamic Republic of Iran, the Air Force of the Islamic Republic of Iran, Bank Markazi Iran,* IUSCT Case No. 158, Award, dated 20 June 1986; *Cosmos Engineering, Inc. v Ministry of Roads and Transportation,* IUSCT Case No. 334, Award, dated 13 November 1986; *Artur Young & Company v The Islamic Republic of Iran, Telecommunications Company of Iran, Social Security Organization of Iran,* IUSCT Case No. 484, Final Award, dated 30 November 1987.

Endnotes

39 UNCTAD, Investment Dispute Settlement Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement (consulted on 13 July 2023).

40 The sample size for Chart 19 is smaller than the sample size for Chart 17 as it excludes cases that are still pending and where the decision is unknown.

41 *See* also Energy Charter Treaty (1994), Article 21(5); Peru – United States Trade Promotion Agreement (2006), Article 22.3; Agreement between Canada and the Republic of Peru for the promotion and protection of investments (2006), Articles 16.3 and 16.4.

42 *Corn Products International, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/04/1, Notice of Arbitration, dated 28 October 2003, at paras. 11-13; *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, dated 18 September 2009, at paras. 12-20; *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/04/5, Notice of Arbitration, dated 4 August 2004, at paras. 12-14; *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Notice of Arbitration, dated 30 April 1999, at para. 4.

43 *Resolute Forest Products Inc. v Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, dated 30 January 2018, at paras. 325-329.

44 *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, dated 18 July 2014, at paras. 1424-1428.

45 *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, dated 27 Aug 2008, at para. 266.

46 UNCTAD, Investment Dispute Settlement Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement (consulted on 6 November 2023)

47 In general, tribunals have accepted that taxation may amount to expropriation, but applied a high threshold. For instance, the tribunal in *Encana v Ecuador* held that "[o]nly if a tax law is extraordinary, punitive in amount or arbitrary in its incidence would issues of indirect expropriation be raised." *See EnCana Corporation v Republic of Ecuador (formerly EnCana Corporation v Government of the Republic of Ecuador)*, LCIA Case No. UN3481, Award, dated 3 February 2006, at para. 177. *See also* J. Chaisse, *Investor-State Arbitration in International Tax Dispute Resolution – A Cut Above Dedicated Tax Dispute Resolution?*, Virginia Tax Review, Vol. 35, 2016, at pp. 170-193; J. Chaisse and J. Kirkwood, *Foreign Investors v National Tax Measures: Assessing the Role of International Investment Agreements*, 2021, at pp. 154-163; M. Burgstaller and A. Zarowna, *The Growing Importance Of Investment Arbitration In Relation To Tax Measures In The Energy And Natural Resources Sectors*, Turkish Commercial Law Review, Vol. 4(1), 2018, at pp. 93-94. On tax measures and expropriation more generally, see A. Lazem and I. Bantekas, *The treatment of tax as expropriation in international investor-state arbitration*, Arb. Int'l., 2015, at pp. 94-130.

48 *Hulley Enterprises Ltd. v. Russian Federation,* PCA Case No. 2005-03/AA226; *Yukos Universal Limited (Isle of Man) v. The Russian Federation,* PCA Case No. 2005-04/AA227; *Veteran Petroleum Limited v. The Russian Federation,* PCA Case No. 2005-05/AA228 (three cases were part of one multi-party arbitration and, therefore, were considered as one case in this Study); *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania,* ICSID Case No. ARB/11/24; *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24; *Limited Liability Company Amto v. Ukraine,* SCC Case No. 080/2005; *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I),* SCC Case No. 116/2010.

49 *WA Investments-Europa Nova Limited v. The Czech Republic,* PCA Case No. 2014-19; *I.C.W. Europe Investments Limited v. The Czech Republic,* PCA Case No. 2014-22; *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic,* PCA Case No. 2014-21; *Voltaic Network GmbH v. The Czech Republic,* PCA Case No. 2014-20 (four cases were part of one multi-party arbitration and, therefore, were considered as one case in this Study); *Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic,* PCA Case No. 2014-01; *Natland Investment Group NV, Natland Group Limited, G.I.H.G. Limited, and Radiance Energy Holding S.A.R.L. v. The Czech Republic,* PCA Case No. 2013-35.

50 The International Energy Charter, The Energy Charter Treaty, available at https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ (consulted on 4 August 2023).

51 European Commission, *European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty* (7 July 2023), available at https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07 (consulted on 4 August 2023).

52 The International Energy Charter, *Written notifications of withdrawal from the Energy Charter Treaty* (22 March 2023), available at https://www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty/ (consulted on 4 August 2023).

53 I. Timofeyev, J. Profaizer and A. Weiss, *Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty*, Global Arbitration Review, 10 November 2020; M. Schmidl, *The Renewable Energy Saga from Charanne v Sapin to the PV Investors v Spain: Trying to See the Wood for the Trees*, Kluwer Arbitration Blog, 2021.

54 *See, e.g., Charanne and Construction Investments v Spain,* SCC Case No. V 062/2012, Award, dated 21 January 2016; *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain,* ICSID Case No. ARB/14/1, Award, dated 16 May 2018; *9REN Holding S.a.r.l v Kingdom of Spain,* ICSID Case No. ARB/15/15, Award, dated 31 May 2019; *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain,* ICSID Case No. ARB/15/36, Award, dated 6 September 2019; *Isolux Netherlands, BV v Kingdom of Spain,* SCC Case V2013/153, Award, dated 17 July 2016; *Greentech Energy Systems A/S, et al v Italian Republic,* SCC Case No. V 2015/095, Final Award, dated 23 December 2018; *CEF Energia BV v Italian Republic,* SCC Case No. 2015/158, Award, dated 16 January 2019; *Belenergia S.A. v Italian Republic,* ICSID Case No. ARB/15/40, Award, dated 28 August 2019; *Antaris Solar GmbH and Dr. Michael Göde v The Czech Republic,* PCA Case No. 2014-01, Award, dated 2 May 2018; *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v Czech Republic,* PCA Case No. 2014-03, Award, dated 11 October 2017; *Voltaic Network GmbH v Czech Republic,* PCA Case No. 2014-20, Award, dated 15 May 2019.

Endnotes

55 *See, e.g., Masdar Solar & Wind Cooperatief UA v Kingdom of Spain,* ICSID Case No. ARB/14/1, Award, dated 16 May 2028; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain,* ICSID Case No. ARB/14/11, Award, dated 31 May 2019; *Isolux Infrastructure Netherlands, BV v Kingdom of Spain,* SCC Case No. V2013/153, Award, dated 6 July 2016; *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v Kingdom of Spain,* ICSID Case No. ARB/13/31, Award, dated 15 June 2018; *CEF Energia BV v Italian Republic,* SCC Case No. V2015/158, Award, dated 16 January 2019.

56 Article 21(5)(b) requires the referral of the tax matter to the relevant Competent Tax Authority.

57 Nevertheless, States have raised counterclaims against investors, including with respect to taxation. *See, e.g., Anglo American PLC v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, dated 18 January 2019; *Aeronutronic Overseas Services v The Government of the Islamic Republic of Iran and The Air Force of the Islamic Republic of Iran*, IUSCTR Case No. 158, Award, dated 20 June 1986; *Cosmos Engineering Inc v Ministry of Roads and Transportation of Iran*, IUSCTR Case No. 334, Award, dated 13 November 1986.

58 L. Brazier, *The Arbitrability of Investor-State Taxation Disputes in International Commercial Arbitration*, Journal of Int'l. Arb., Vol. 32(1), 2015, at pp. 9-13.

59 *See, e.g., Autopista Concesionada de Venezuela, C.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, dated 23 September 2003; *Phillips Petroleum Company Venezuela Limited, Conocophillips Petrozuata B.V. v Petroleos De Venezuela, S.A., Corpoguanipa, S.A., PDVSA Petroleo, S.A.*, ICC Case No. 20549/ASM/JPA (C-20550/ASM), Final Award, dated 24 April 2018; *The Government of the State of Kuwait v The American Independent Oil Company (AMINOIL)*, 21 ILM 976 (1982), Final Award, dated 24 March 1982.

60 L. Brazier, *The Arbitrability of Investor-State Taxation Disputes in International Commercial Arbitration*, Journal of Int'l. Arb., Vol. 32(1), 2015, at pp. 9-13.

61 This sample size is smaller than the 21 total contract cases as it excludes cases brought under contracts that did not contain a tax provision.

62 *Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru*, ICSID Case No. ARB/03/28, Award, dated 18 August 2008, at para. 2.

63 *Kaiser Bauxite Company v. Jamaica*, ICSID Case No. ARB/74/3, Decision on Jurisdiction and Competence, dated 6 July 1975; *Alcoa Minerals v. Jamaica*, ICSID Case No. ARB/74/2, Decision on Jurisdiction and Competence, dated 6 July 1975; *Reynolds Jamaica Mines Limited and Reynolds Metals Company v. Jamaica*, ICSID Case No. ARB/74/4, Order Taking Note of the Discontinuance of the Proceeding pursuant to ICSID Arbitration Rule 44, *dated 12 October 1977.*

64 *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, dated 23 September 2003; *Phillips Petroleum Company Venezuela Limited, Conocophillips Petrozuata B.V. v. Petroleos De Venezuela, S.A., Corpoguanipa, S.A., PDVSA Petroleo,* S.A., ICC Case No. 20549/ASM/JPA (C-20550/ASM), Final Award, dated 24 April 2018.

65 *Société d'Exploitation des Mines d'Or de Sadiola S.A. v. Republic of Mali*, ICSID Case No. ARB/01/5, Award, dated 25 February 2003; *Société des Mines de Loulo S.A. v. Republic of Mali*, ICSID Case No. ARB/13/16, Award, dated 2 June 2016.

66 In all three of these cases, investors argued that Jamaica violated the "no further tax" clause in the contracts, which were concluded around the end of the 1960s and the beginning of the 1970s, by imposing a further tax on the mining of bauxite. *Kaiser Bauxite Company v. Jamaica and Alcoa Miners v. Jamaica* were eventually settled and *Reynolds v. Jamaica* was discontinued in 1977.

67 *Revere Copper Brass v OPIC*, AAA Case No. 1610013776, Award, dated 24 August 1978.

68 *See, e.g., Société des Mines de Loulo S.A. v. Republic of Mali*, ICSID Case No. ARB/13/16, Award, dated 2 June 2016; *Phillips Petroleum and Conocophillips v PDVSA and others*, ICC Case No. 20549/ASM/JPA, Award, dated 24 April 2018; *Societe B v Etat A*, Award, dated 24 August 1978.

69 *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, dated 23 September 2003, at para. 169.

70 *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award, dated 18 August 2008.

71 M. Burgstaller and A. Zarowna, *The Growing Importance Of Investment Arbitration In Relation To Tax Measures In The Energy And Natural Resources Sectors,* Turk. Comm. L. Rev., Vol. 4(1), 2018, at pp. 81-82.

72 This sample size is smaller than the 21 contract cases as the outcome is unknown for 3 of those cases. Additionally, 3 cases were excluded in which the tax issue was raised by the Respondent State as a counterclaim or defense and rejected by the tribunal.

73 British Institute of International and Comparative Law: www.biicl.org

74 Investment Treaty Forum: www.biicl.org/itf

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