International investment arbitration: A new way to settle tax disputes?

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INTRODUCTION

International tax disputes are often related to Double Taxation Agreements (DTAs), although international investment agreements (IIAs) should also be considered. Tax matters usually fall outside the scope of IIAs as taxation carve-out clauses are included. Recently, tax matters have been discussed under the non-expropriation, fair and equitable treatment and non-discrimination standards. Also, arbitral tribunals have dealt with this matter in different ways, so it is not so clear when a taxation measure can violate IIA's standards. Investors can initiate arbitration directly and most of the cases are investor-State arbitrations. But maybe this is not the suitable way to solve tax-related issues because some serious obstacles may arise. This work explores how these awards address tax issues and analyze if investment arbitration is the best way to solve tax disputes.

A tax approach must be taken in order to analyze the remarkable increase of tax-related awards

Tax-related arbitration case law

1999 **Feldman v. United Mexican States**

Claims arising out of Mexico's application of certain tax laws to the export of tobacco products which allegedly denied claimant's local company the benefits of a law that allowed certain tax refunds to exporters.

2005 **Yukos Universal v. Russia**

Claims arising out of a series of actions undertaken by the Russian Government against Yukos Oil Company, including large tax assessments, which allegedly led to the bankruptcy of the company and eliminated all value of claimant's shares in Yukos.

2015 **Novenergia v. Kingdom of Spain**

Claims arising out of a series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.

OBJETIVES

- To study and interpret tax-related awards
- To explore the obstacles that may arise
- To analyze if taxation based investment arbitration is the best way to solve tax disputes

RESEARCH QUESTION: Is international investment arbitration the proper way of dealing with tax matters? Some obstacles may arise:

1. **TAX SOVERTNIGHTY -REGULATORY CHILL EFFECT**
It is important to support the effective fiscal sovereignty of countries over the design of their own tax systems. Also, the outcome of an award may influence the course of tax policy development of a given State as tax authorities will probably refrain from approving new legal tax measures.

2. **INVESMENT LAW PRINCIPLES AND STANDARDS**
Arbitrators apply IIAs principles and standards but these parameters are completely alien to international tax law, and therefore cannot be used to interpret a tax measure.

3. **MISCONCEPTION OF TAX CARVE OUT CLAUSE**
Sometimes, the tax carve-out clause in IIA's is poorly drafted and arbitrators can resolve in different ways.

4. **DENIAL OF BENEFITS**
IIAs can include a clause in which States reserve the right to deny the benefits of the treaty to a company that does not have an economic connection to the state on whose nationality it relies. Not all investment treaties contain a denial-of-benefits clause. This is against DTAs main purpose and also BEPS objectives.

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