Arno E. Gildemeister  

“in this world nothing can be said to be certain, except death and taxes”  
Benjamin Franklin

The right to impose taxes is traditionally perceived as an essential part of a State’s sovereignty. It is, in light of the aforementioned role of sovereignty, unsurprising that incidences of foreign investors challenging tax measures, through the medium of international arbitration, have given rise to a number of complex questions in relation to the arbitrability of tax disputes in investor-State arbitration.\(^1\) The interplay between international investment law and taxation has consequently gained considerable attention by arbitration scholars and practitioners.\(^2\)

Nevertheless the book written by Arno E. Gildemeister entitled “*L’arbitrage des différends fiscaux en droit international des investissements*” fills without doubt a void in the legal scholarship by giving, for the first time, an extensive and systematic analysis of the relationship between international investment law and taxation, which is undoubtedly of significant practical value to lawyers, arbitrators, treaty negotiators and policy makers in the field of international investment law and taxation.

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1 Amto LLC. v. Ukraine, SCC Case No. 080/2005; Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico, ICSID Case No. ARB (AF)/04/5; Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9; Duke Energy International Peru Investments No. 1, Ltd. v. Peru, ICSID Case No. ARB/03/28; EnCana Corporation v. Ecuador, LCIA Case No. UN3481, UNCITRAL; Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1; Goetz and others v. Burundi, ICSID Case No. ARB/95/3; Occidental Exploration and Production Company v. Ecuador, LCIA Case No. UN3467; Pan American Energy LLC and bp Argentina Exploration Company v. Argentina, ICSID Case No. ARB/03/13; Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24; Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18.

Gildemeister, an arbitration practitioner and university lecturer, thoroughly explores the nature of tax-related disputes and their implications on the standards of protection under international investment treaties. The book, which has been awarded with the prestigious Prize of the ICC Institute of World Business Law, is divided in two parts, each part containing two subsections with a total of eight chapters. In the preface written by Professor Emmanuel Gaillard the reader is introduced to the complexity of the subject and becomes aware that the study will be characterized by the multilayered interplay of investment protection and the respect for fiscal sovereignty and public policy concerns. The preface is followed by a historical introduction in which the author comprehensively depicts the evolution of tax-related disputes in arbitration.

The Arbitral Tribunal’s Competence in Tax-Related Matters

In a book concerned primarily with the interplay between investment protection and national tax regimes, it is sensible that the book begins by focusing on the fundamental question of competence in relation to the arbitral tribunal in tax-related matters. Gildemeister skillfully employs the differing conceptions of arbitrability under French and German law to demonstrate that, where the State has validly entered into an international obligation to arbitrate, national restrictions on arbitrability do not apply to the competence of international tribunals (paras. 90 et seq.). The argument is then developed in the context of enforcement of arbitral awards. It is posited that if a State has validly entered into an obligation to arbitrate, which also relates to taxation, the fulfillment of such obligation cannot subsequently be deemed to be contrary to the State’s public policy. The obvious logic of such a conclusion makes the contention difficult to rebut.

The book continues by offering an assessment of the scope of a State’s consent to arbitrate tax-related disputes. The analysis first turns to the case of investment contracts and the issue of competence. The book posits the question whether the tribunal has the competence to rule on contractual obligations containing matters of taxation – such as the promise made to an investor to be taxed according to a different scheme than the generally applicable tax laws provide for – and provides a clear answer. In the author’s view, the tribunal should declare itself competent as long as the claim is genuinely based on the contract, irrespective of the fact that it also indirectly relates to taxation (para. 162). A comparable analysis is carried out with respect to Article 25(1) ICSID Convention, drawing the conclusion that tribunals are competent to