The FfD Chronicle

CIVIL SOCIETY FINANCING FOR DEVELOPMENT Mechanism

The CS FfD Mechanism is an open civil society platform including several hundreds of organizations and networks from diverse regions and constituencies around the world. CS FfD Mechanism's core principle is ensuring that civil society can speak with one collective voice.

COURTING DISASTER: THE THREAT OF ARBITRATION

Last Friday, employees of the British government's Department of Trade awoke to the news that they were being sued by a Singaporean investment company and potentially liable to millions of pounds in public money.

Why? Because the UK's High Court had quashed an application to open a new coal mine in Cumbria in the north of England, noting its incompatibility with UK climate targets. This decision, the investors argued, fell foul of a 1975 UK-Singapore trade agreement which included an investor-state dispute settlement (ISDS) clause. The UK must, they argue, pay compensation for the profits the company lost as a result of the coal mine being blocked.

ISDS mechanisms have become rightly notorious. These instruments establish often secret and largely unaccountable arbitration mechanisms that exist in parallel to a country's regular legal system. These 'secret courts' have been used again and again by companies suing governments over policies which could impinge on their profits.

The closure of the UK's last coal-mine was considered one of the British government's major climate achievements. To suddenly find themselves on the hook for millions of pounds in compensation as a result of it must have stung.

You might expect such an experience to put one off the whole notion of secret arbitration courts. Yet the UK, and many other victims of ISDS, have continued to flirt with arbitration in their written and verbal submissions to the UN Tax Convention (UNTC) process. Similarly, several EU Member States have also continued to argue for arbitration.

Let us be absolutely clear: arbitration undermines the tax rights and sovereignty of *all* states, both in the Global North and in the Global South, to the benefit of a select group of companies.

According to data from UNCTAD, investors have challenged tax-related measures in 165 ISDS cases between 1987 and 2021. From those, Spain is the country that has been most challenged, with 42 cases between 2012 and 2021. 60% of the tax-related cases in that period were brought against developed countries. And this is to the benefit of companies based in a few countries: for instance, 26 of these cases came from companies based in the US.

So, we're all losing out from arbitration, and there are many examples of how arbitrations can be detrimental to all countries and the public interest.

This is not just an issue of capacities: arbitration mechanisms have inherent challenges that Global North countries have also found challenging. Civil society organisations and UN agencies have conducted extensive research and a range of concerns have been identified. For example:

1. As they generally don't have a mandate over the full legal framework, arbitration mechanisms contribute to legal fragmentation, and privileges investor interests over public interests, sustainable development, and human rights.
2. They undermine fiscal sovereignty leaving the understanding of complex legal issues to unaccountable private arbitrators.
3. They lack transparency: the decisions are not consistently published, whereas they set negative precedents that may benefit individual corporations but are often detrimental to societies.
4. They create a regulatory chill, including on fiscal laws and are often used to challenge public interest laws, including environmental protections and health regulations that are critical to address contemporary challenges.
5. They give multinational corporations a privileged legal avenue that is not available to citizens or domestic businesses, while excluding affected communities and civil society.
6. They often fail to deliver equitable outcomes, not least because tribunals lack expertise in domestic tax law, development policies, and human rights.

We hear the argument that a lot of this evidence concerns tax-related arbitration in trade or investment treaties, but there is no reason to think it would be different for cross-border tax issues: the problematic logic and mechanisms of arbitration are the same.

We want to emphasise this point: like other measures that complexify and privatise the tax system, arbitration is not in the interest of any country - only to private actors'.

And even for businesses, there are questions: the private sector often stresses the importance of legal certainty. However, the best way to achieve that is not to fragment the law through a multiplicity of private complaint mechanisms, but to have a simple, unified, public mechanism under the Framework Convention.

The way to reduce the amount of disputes is to focus on prevention - including by introducing public country by country reporting, as well as simplifying the system using unitary taxation and formulary apportionment.

SWEETHEART, NO!

With the negotiations diving into the world of corporate taxation, this week has been a journey through fiction land. Next up is the idea that fair and easy fixes to transfer pricing tax disputes can be found.

Reading the Issues Note for Workstream III, it is clear that some governments believe the system might become safer with the help of advance pricing agreements (APAs).

However, a glimpse into the more recent history of this particular type of tax ruling raises strong concerns about this way being the right one out of the labyrinth. APAs are sometimes used as a tool to negotiate an agreement between individual multinational corporations and a specific tax administration (so-called unilateral APAs) about how the unclear rules of the transfer pricing system will be interpreted and applied.

But APAs are highly controversial, not least after the LuxLeaks scandal in 2014, where they quickly became known as "Sweetheart Deals". Around the same period, a number of APAs became the subject of several state aid cases initiated by the European Commission.

The Commission ended up losing a lot of these cases in court, but in 2024, the most famous of these cases – the so-called "Apple case" – ended with two APAs being struck down by the European Court of Justice. The country that had issued the APAs, namely Ireland, allegedly spent €10 million in tax payers money fighting against the Commission. The most absurd part of the case was that the consequence of Ireland losing the case was that the country had to reclaim approximately €13 billion in unpaid taxes from Apple. In relation to the discussion about "fair allocation of taxing rights", it's worth noting that Apple's revenue had been generated in countries all across Europe, Africa, the Middle-East and India.

The moral of the whole story is: APAs do not provide certainty to anyone, and we won't fix the injustice in the current global corporate tax system by packing a fundamental problem into a protocol on dispute resolutions. We need a fundamentally different system, and the place to make that happen is in Workstream I, namely under the Convention.

AND THEN, WE NEED A 3RD PROTOCOL TO RESOLVE DISPUTES UNDER PROTOCOL 1, AND A 4TH PROTOCOL TO SOLVE DISPUTES BETWEEN PROTOCOLS 1, 2, AND 3.

I'M TELLING YOU - IT'S GENIUS!

A STORY ABOUT HOW THE UN TAX CONVENTION NEGOTIATIONS CAME TO BE

THEY HAVE BEEN A PROMINENT FIGURE IN CIVIL SOCIETY'S FIGHT FOR A FAIR, EFFECTIVE AND PROGRESSIVE UN TAX CONVENTION.

WATCH THE HISTORY OF THE GLOBAL TAX BODY!