Second Session, UN Tax Convention Negotiations
August, 14, 2025
Intervention by Sylvain Aubry, HRW

Thanks chair,

I make these points together with members of the Global Alliance for Tax Justice.
We've had a great discussion today, and we agree it's critical to find fair and effective mechanisms to resolve cross-border tax disputes. What we'd like to outline is why arbitration is not an adequate form of dispute resolution for tax disputes.

First, we've heard a few Global North states promoting arbitration, we'd like to emphasise that 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. Many countries here in the room have faced these challenges.
This is not just an issue of capacities: arbitration mechanisms have inherent challenges that Global North countries have also found challenging. To take just one example: if you had a chance to read *The FfD Chronicle* yesterday (and if you haven't, I highly recommend it, it's a great read!), you probably saw the arbitration case brought against Germany, Denmark and the EU by the Jersey-based Klesh Group. I noticed that you asked, Mr co-lead, for precision and expertise, so let me quote the exact case: it is the ICSID Case No. ARB/23/49, in the case of Germany. This complaint is effectively stopping these countries from collecting much-needed windfall taxes on fossil fuel companies that benefited from soaring prices due the war in Ukraine - and to be precise again, Germany is currently being prevented from collecting 47.2 million euros.
This is also an example of taxes - windfall taxes - that are widely demanded by voters across Europe are blocked by a private tribunal, which also shows how arbitration mechanisms can pose a major democratic risk, at a time where, more than ever, we need to rebuild social contracts.

Secondly, civil society organisations and UN agencies have conducted extensive research and a range of concerns have been identified including. Countries such as the African group, Colombia, and Honduras have clearly laid out why they oppose arbitration, and I just want to point to 6 elements:

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.
They undermine fiscal sovereignty leaving the understanding of complex legal issues to unaccountable private arbitrators.
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.

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.
They give multinational corporations a privileged legal avenue that is not available to citizens or domestic businesses, while excluding affected communities and civil society.
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, as we just heard, the importance of legal certainty. However, the best way to achieve that is not to fragment the law though a multiplicity of private complaint mechanisms, but to have a simple, unified, public mechanism under the Framework Convention.]
We encourage you to focus on prevention mechanisms, as Cameroon just suggested, particularly through public CBCR and by simplifying the system using unitary taxation and formulary apportionment.
I thank you.