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**Committee of Experts on International  
Cooperation in Tax Matters  
Twenty-fifth session**

Geneva, 18-21 October 2022

Item 3(p) of the provisional agenda

**Relationship of tax, trade and investment agreements**

**Co-Coordinator's Report**

*Summary*

This paper outlines the current and proposed work of the Subcommittee on the Relationship of Tax, Trade and Investment Agreements, as well as some relevant background to that work, in accordance with the workstreams of the Subcommittee agreed by the Committee at the Twenty-fourth Session.

The Subcommittee seeks *the Committee's views on the issues raised in this note, particularly on the draft outline for a consultant's report on the relationship of tax and investment treaties commissioned by UNDESA and which is annexed to this note.*

### ***Background and Subcommittee Mandate***

1. Note [E/C.18/2021/CRP.36](#) (“the 2021 Note”) on the relationship of taxation with trade and investment agreements gave a history of the UN Secretariat work on the interaction of taxation policy and administration, including an earlier note [E/C.18/2019/CRP.14](#) (“the 2019 Note”) on similar issues. The 2021 Note recognized the work of the United Nations Conference on Trade and Development (UNCTAD) in that area, notably the March 2021 publication: [International Investment Agreements and Their Implications for Tax Measures: What Tax Policymakers Need to Know](#). UNCTAD consulted with the Secretariat and others when preparing that document, and the UNCTAD publication itself acknowledges the 2019 Note.

2. The 2021 Note addressed the need for guidance to tax policymakers and administrators on a variety of issues about the interaction of trade and investment treaties with tax policy and administration, including, but not limited to, tax treaties.

3. At the Twenty-third Session the 2021 Note was considered and the [Report of that Session](#) noted the presentations made and the general discussion on the subject. As also indicated in the Report, at para 114:

The Committee agreed to establish a Subcommittee on the Relationship of Tax, Trade and Investment Agreements, with Ms. Kana, Mr. Ligomeka, and Mr. Roelofsen as Co-Coordiators, and with the following mandate:

The Subcommittee is mandated:

- To identify priority issues where guidance from the Committee may most usefully assist developing countries in differing situations, in particular, on the relationship of tax with investment and trade agreements, and initially report to the Committee on such issues at its twenty-fourth session, in 2022
- Within the above context, to make proposals for consideration by the Committee, with a view to providing guidance at various points during the current membership of the Committee

The Subcommittee may consult broadly, taking into account relevant work by other bodies in this area.

### ***Meetings of the Subcommittee***

4. Sixteen Members of the UN Tax Committee are currently participating in the Subcommittee. The first two meetings of the Subcommittee so constituted were conducted virtually on 26 January and 3 March 2022 to consider the following issues:

- The composition of the Subcommittee;
- A proposed workplan; and
- The outline of a report to the Twenty-fourth Session.

5. The outcomes of the first two Subcommittee meetings were outlined in the Co-Coordiators’ report to the Committee’s Twenty-fourth Session ([E/C.18/2022/CRP.5](#)). In particular the proposal of three workstreams:

- Workstream A – Tax and Investment Agreements;
- Workstream B – Tax and The General Agreement on Trade in Services (GATS); and
- Workstream C – Other Issues in Trade Agreements or Mixed Trade and Investment Agreements;

was accepted by the Committee at the 24<sup>th</sup> Session, as reflected in the [Report](#) of that Session. As noted in the Report at para. 113: “The work would be continued with a view to undertaking whole-of-government approaches and bringing together tax, trade and investment communities.”

6. The third Subcommittee meeting (on 29 September 2022) considered issues relating to this note

for the Twenty-fifth Session and particularly discussed and gave feedback on a prior (but very similar) version of the attachment, a draft outline of a paper on the treatment of taxation in International Investment Agreements being prepared by Mr. Alain Castonguay as a consultant to the Secretariat. This work and his report are expected to greatly assist the Subcommittee in developing guidance. Committee comments on the draft outline attached will particularly assist the Subcommittee as well as the consultant and Secretariat.

7. Other matters addressed in Subcommittee meetings and Committee Sessions that inform the work can be summarized as follows:

- The participation in the Subcommittee has not been extended beyond the Committee Members, but other participants will be invited to participate on an ad hoc basis, as called for by the stage of Subcommittee work.
- In view of the proposal to have workstreams covering the impact on taxation and tax measures of trade agreements, investment agreements and mixed agreements, and the existence of specialist expertise in each of these areas, the proposed configuration is a flexible one that is seen as the best blend of continuity of the Subcommittee with the ability to dialogue with, and draw upon, leading expertise on relevant issues to ensure the most informed, practical and impactful guidance.
- Challenges as identified relate broadly to;
  - a. Lack of awareness among tax officials of the potential impact of non-tax agreements on tax measures, including legislation, regulation and administration;
  - b. Lack of awareness among trade and investment negotiators of the potential overlap, including of the coverage of tax treaties;
  - c. Challenges in achieving “whole of government” approaches to pre-empting problems, identifying them and responding to them;
  - d. Uncertainties about the scope of the overlap, especially because of the many undefined or broadly defined terms used in such treaties, variations from treaty to treaty and diverse “jurisprudence” as to their interpretation;
  - e. Rules of supremacy chosen to address the overlap and their clarity or otherwise;
  - f. Questions, in a dispute, about *who decides whether there is an overlap*, which may be affected by their tax or non-tax knowledge and perspectives; and
  - g. The often stark differences between dispute resolution provisions in the agreements – with mandatory binding arbitration at the instance of the investor (investor-state dispute resolution) being the norm in investment agreements and very specific trade agreement provisions. For tax treaties, the Mutual Agreement Procedure (a country-to-country procedure) is relied on and mandatory binding arbitration is rarely part of that process, for developing countries in particular, though it is an option provided for in the [UN Model Tax Convention](#).

8. Specific issues as identified in the 2019 and 2021 paper appear to remain relevant (subject to the consultant’s report and the further work of the Subcommittee) including as follows:

**For Investment Agreements**

- a. *Definitions, such as of “investments” and of “investors”* which can have a tax impact (such as by providing “indirect investors” with treaty protection);
- b. *National Treatment* (NT) provisions in IIAs protecting foreign investors against *de facto* and *de jure* discrimination, *vis-à-vis* national investors;
- c. *Most Favoured Nation* (MFN) provisions ensuring that the treatment offered to a foreign investor of one state is also offered to foreign investors of another state;

- d. ***Fair and Equitable Treatment*** (FET) provisions, which are broad and may cover an array of investor expectations such as transparency and regulatory stability as well as “due process”;
- e. ***Expropriation***. Investors have at times successfully challenged some tax measures, stating that they amount to indirect expropriation; and
- f. ***Umbrella Clauses***, which may make otherwise purely contractual obligations between the state and a foreign investor then fall under international (investment) treaty obligations, so that contractual standstill or stabilization clauses may prevent updating new tax systems or reducing tax incentives – at least without damages being paid.

#### **For Tax Treaties and the General Agreement on Trade in Services**

- a. As indicated in the 2021 Note, the World Trade Organisation (WTO) General Agreement on Trade in Services (*GATS*) ***has a complicated relationship to tax treaties.***
- b. To address that issue, in its 1995 Commentary on Article 25, ***the OECD Model Double Tax Convention proposed language for inclusion in tax treaties.*** The effect of the wording is to ensure that tax treaties concluded or amended since 1995 receive the same “grandfathered” protections as pre-1995 treaties. ***The UN Model picks up the language proposed,*** and the explanation of it. The OECD Commentary, as picked up in the UN Model, notes the potential difficulties of leaving these tax issues to trade experts.
- c. As indicated in the 2021 Note, ***few countries, especially developing countries, actually make use of that OECD/UN Model provision.*** The decision on whether an issue is within the scope of a tax treaty is therefore in most cases left to non-tax experts in the WTO dispute settlement system.
- d. ***The current work presents an opportunity to re-evaluate the issues, risks and any opportunities in this area.***
- e. Some aspects of the work will involve some ***coordination with the Subcommittee on the UN Model Tax Convention between Developed and Developing Countries.***

#### **For Free Trade and Similar Agreements**

- a. ***A third workstream involves considering issues in trade agreements*** (possibly including issues under other WTO agreements such as the WTO Subsidies and Countervailing Measures Agreement) ***or mixed trade and investment agreements, being issues other than those addressed by the first two workstreams.***
- b. ***The Subcommittee has not prioritized this aspect of the work so far,*** as many of the issues raised by free trade and similar agreements may be sufficiently addressed by the other workstreams. ***Possible novel components of this workstream will emerge and will be evaluated as the other work progresses.***

#### ***Relationship to the Sustainable Development Goals***

9. As noted in the [Report of the Committee’s Twenty-third Session](#), held in October 2021, the Committee agreed:

- (a) To continue to discuss taxation and the Sustainable Development Goals regularly during sessions, as a permanent agenda item;
- (b) To request the secretariat to provide regular updates on taxation and the Sustainable Development Goals, at each session:
  - (i) **To preserve the focus of the Committee’s work in the area;**
  - (ii) To identify any gaps in guidance;

(iii) To establish priorities for technical work to be carried out by the secretariat; and

(c) To have subcommittees reflect on the link between their work and the Goals.

10. In addressing paragraph (c) of that conclusion, the subcommittee recognizes that by promoting fair and effective tax systems, which support both revenue and trade and investment for development, through guidance products and through advising UN DESA on capacity building activities, the Committee's work contributes to achieving the interlinked SDGs as a totality.

11. More specifically in relation to the work of the Subcommittee, an effective guidance effort in this area will promote the balance of revenue needs and the development-focused investment climate which many countries seek, by promoting whole of government and informed approaches to interlinked tax, trade and investment policy objectives. This builds greater certainty for all stakeholders in tax systems. While contributing to achieving all the interlinked SDGs, this will particularly contribute to SDG 16 (Peace, Justice and Strong Institutions) in terms of helping develop effective, accountable and transparent institutions at all levels and SDG 17 (Global Partnerships for the Goals), in terms of strengthening domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection.

***Next Steps.***

12. The Subcommittee proposes to continue work on Workstreams A and B after this Twenty-fifth Session of the Committee, but prioritizing the former, and to also collect information on possible issues for Workstream C, reporting further on all workstreams at the Twenty-sixth Session of the Committee. It will particularly draw upon the work of the UNDESA-engaged consultant, Mr. Castonguay, in furthering Workstream A guidance on the relationship of tax and investment agreements.

13. The Subcommittee seeks *the Committee's views on the issues raised in this note, particularly on the draft outline for a consultant's report on the relationship of tax and investment treaties commissioned by UNDESA and which is annexed to this note.*

## **Attachment: The treatment of taxation in International Investment Agreements: Issues raised and possible policy responses**

### Paper Outline

Alain Castonguay, Consultant to UNDESA

*September 2022 Draft*

*Table of contents – 1 page*

**Introduction – 1 page**

- Purpose of paper and outline of content

**1. Impact of International Investment Agreements on taxation – 10 -12 pages**

#### **1.1 Introduction**

- Short factual background on IIAs, including investment chapters of free trade agreements (FTAs)
- Role and purpose of international investment agreements (IIAs) – framework to provide certainty for investors
- Controversial nature of certain aspects of IIAs
- Relevance for tax policy makers and tax administrations: IIAs have the potential to restrict a country's policy flexibility, including in the area of taxation

#### **1.2 Key provisions of International Investment Agreements – role and effect**

- Definition of “Investors of a Party” and “Investment”
- National treatment (NT)
- Most favoured nation treatment (MFN)
- Fair and Equitable Treatment (FET)
- Protection against uncompensated expropriation
- Transfer of funds
- Umbrella provisions
- Investor-state dispute settlement (ISDS) procedures and enforcement provisions

*The purpose of this section is to provide a short description of the main provisions of IIAs, so that the reader acquires a basic understanding of how they operate. The section deliberately leaves out any discussion of the potential impact of each provision on taxation measures, which is addressed separately in the following section.*

#### **1.3 The impact of International Investment Agreements on taxation**

- How IIAs can conflict with tax policy and administration – review of relevant provisions (substantive and dispute settlement)
- Definition of “Investors of a Party” and “Investment”
- Possible effect of NT on taxation measures
- How NT differs from standard found in tax treaties

- Possible effect of MFN on taxation measures and tax treaties
- Possible effect of FET on taxation measures
- Possible effect of expropriation provisions on taxation measures
- Possible effect of transfer of funds provisions on taxation measures
- Differences between ISDS and the mutual agreement procedure (MAP) (including arbitration provisions found in some tax treaties)

*The purpose of this section is to analyze how the provisions identified in section 1.2 can affect taxation measures and bilateral tax treaties. It draws on actual arbitral cases initiated under IIAs that have dealt with taxation*

#### **1.4 Consequences of IIAs on taxation**

- Litigation risks arising from investor-state dispute settlement and associated costs
- In case of a finding of a breach of the terms of an IIA:
  - Monetary penalty imposed on the country
  - Possible far-reaching enforcement measures
  - Possible obligation to amend/repeal the disputed taxation measure

*This section sets out the risks for taxation associated with the existence of IIAs. First the risk of litigation inherent in the ability conferred to investors to trigger the formation of an international arbitration tribunal to adjudicate a complaint by an investor concerning a taxation measure. Second, the potential implications for a government and, in particular, its conduct of tax policy, of a finding by an international arbitration tribunal that a taxation measure is a breach of one of more obligation of an IIA. The section will include statistics that draw attention to the vulnerability of developing countries to investor claims in respect of taxation measures.*

## **2. Proposals to address the issue of taxation in International Investment Agreements – 10-12 pages**

### **2.1 Introduction**

- IIAs need not have negative impacts on taxation to achieve their objectives
- Current problems facing taxation under IIAs reflect the lack of tax expertise historically brought to bear in the formulation of IIA policy and the negotiation of IIAs
- Possible to draft IIAs to take into account the legitimate conduct of tax policy and the role of tax treaties
- This requires that the interests of tax policy makers be better integrated in the overall formulation of national IIA policy
- This in turn requires the existence of proper communication channels between tax and investment experts

*This introductory section argues that IIAs can be crafted in a way that they do not have unintended consequences on the ability of a country to formulate tax policy or on the integrity and operation of bilateral tax treaties. For this to happen, however, requires deliberate decisions and actions within a government that aim to better coordinate the respective interests of tax policy makers and investment negotiators.*

### **2.2 Proposals regarding the content of International Investment Agreements**

- Address, **from a substantive point of view**, how to avoid unintended consequences on taxation of the provisions of IIAs
- Different approaches are possible: provide a review of existing approaches to address specific provisions of IIA and their pros and cons

- National treatment (NT)
- Most favoured nation treatment (MFN)
- Fair and Equitable Treatment (FET)
- Prohibition against expropriation
- Umbrella provisions
- Investor-state dispute settlement (ISDS) procedures
- Some thoughts on possible impact of existing reforms of the international tax architecture

*This section sets out different approaches that tax policy makers can adopt (and have been used in actual IIAs) in the course of the negotiation of IIAs to address the overall issue of the treatment of taxation therein. No single or preferred model or approach is being proposed. The section explains the different balances of interests (between the tax and investment worlds) that can be achieved with one approach or another.*

*Particular attention will be given to dispute settlement in a wide sense. First, whether further refinements are necessary in a context where disputes are adjudicated under an investor-state dispute settlement procedure: for example, whether there should be an expanded role for filters involving tax experts, whether there should be more explicit rules regarding who decides jurisdictional issues (e.g., does the tax treaty prevail over the IIA? Is the measure a taxation measure?). Second, does the previous discussion suggest that the investor-state dispute settlement procedures should be replaced with state-to-state dispute settlement procedures when the dispute concerns a taxation measure? Is it a realistic option?*

*The section concludes with a discussion of the adequacy of existing approaches in light of the possible implications of reforms intended to implement the outcome of BEPS.*

### **2.3 Proposal regarding the respective role of taxation experts and investment experts**

- Articulate, **from a process point of view**, an integrated approach to addressing taxation in IIAs, at different stages
- The role of taxation experts in
  - The identification of areas of risks in the conduct of tax policy and the administration of the tax system, and their management
  - the formulation of national IIA policy
  - the negotiation of IIAs
  - the management of litigations involving tax measures, either before ISDS (filters) or at ISDS stage

*This section sets out the broad principle for a whole-of-government approach to the negotiation and operation of IIAs in order to ensure that the interests of tax policy makers are reflected at each stage.*

## **3. Practical implementation of guidance – 3-4 pages**

### **3.1 Implementing the integrated approach in future IIAs**

- Within the department/branch responsible for the formulation of tax policy:
  - Make IIAs an integral part of the responsibilities of the unit
  - Design a policy for dealing with taxation in IIAs
- Establish dialogue coordination with the department(s) responsible for the negotiation of IIAs
- Gain whole-of-government acceptance of policy
- Establish a role for tax policy experts in the negotiation of the tax aspects of IIAs



- Establish procedures to ensure tax policy experts are made aware of litigation under IIAs when it involves taxation measures
- The above could require the identification of priority areas requiring the development of capacity (for which UN capacity building would be relevant)

*This section sets out the practical steps that can be contemplated in order to implement the principle described in section 2.3 within a government. It discusses the role of both tax policy experts and investment specialists.*

### **3.2 Dealing with existing IIAs**

- Conduct risk analysis of network of existing IIAs and identify priorities for renegotiation in accordance with the integrated approach
- Priority can be established by reference to different parameters:
  - IIAs that have been the object of recent litigation
  - Most important IIAs (measured by investment flows)
  - IIAs that leaves taxation measures most vulnerable (e.g., older IIAs)
- There is no “quick fix”: Can there be a multilateral approach to speed up such revision?  
Unlikely: MOUs have questionable legal effects, multinational amendments of IIAs as seen in the tax world are probably not a realistic option

*Once the integrated approach described in section 3.1 has been put into place, this section discusses how to address existing IIAs whose treatment of taxation is lacking. It explores whether alternatives to the bilateral renegotiation of IIAs can provide a quick solution to unsatisfactory IIA provisions.*