

Distr.: General  
2 October 2023

Original: English

---

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

Geneva, 17-20 October 2023

Item 3(p) of the provisional agenda

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

#### **Co-Coordinators' 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.

On **Workstream A** on the **relationship of tax and investment agreements**, the Subcommittee *seeks the Committee's views on the issues raised in this paper, particularly on the draft outline for possible Committee guidance at Annex A*. The Subcommittee proposes to submit a first draft of the guidance to the Twenty-eighth Session and a draft for final approval to the Twenty-ninth Session.

On **Workstream B**, as part of work on examining **options for improving guidance on the interaction of tax treaties with the WTO General Agreement on Trade in Services ("GATS")**, the Subcommittee proposes that the GATS provision currently found in the UN Model Tax Convention Commentary on Article 25 (at para 53) should be given greater visibility by including it directly into the text of the Model Article. Furthermore, the Subcommittee is exploring the possibility of an extended provision that encompasses other agreements such as Free Trade Agreements in the Model Article of the Commentary. The Subcommittee *seeks Committee views* on these issues. *A Secretariat background note on country practice in this area is at Annex B*.

**Workstream C** (Other Issues in Trade Agreements or Mixed Trade and Investment Agreement) has not yet required separate attention, as the Subcommittee has been able to consider all issues relating to such agreements that have so far been identified as part of Workstreams A or B.

### ***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.

### ***Subcommittee Workstream Progress and Key Developments***

4. At the Committee’s Twenty-fourth Session, three workstreams were proposed by the Subcommittee ([E/C.18/2022/CRP.5](#)) and accepted by the Committee, as reflected in the [Report](#) of that Session. They were:

- 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;

At that stage, the initial focus was on Workstream A.

5. At the Committee’s Twenty-fifth Session, the Committee considered the outline of a paper prepared by Mr. Alain Castonguay, presented as an attachment to paper [E/C.18/2022/CRP.18](#), and the discussions and conclusions helped shape the work since.

6. In the Co-Coordiators’ Report to the Committee’s Twenty-Sixth Session ([E/C.18/2023/CRP.2](#)) a short form of an outline of possible guidance on the relationship of tax and investment agreements was provided as well as the final form of Mr. Castonguay’s consultant’s report.

7. During the Session, Mr. Castonguay summarized the report, highlighting the key points: 1) the role and main features of international investment agreements, generally and in relation to tax measures, tax policy and double tax agreements; 2) the specific international investment agreement-

type provisions that interacted with tax, highlighting the issue of unintended consequences on taxation; and 3) some concrete steps to address the interaction in a whole-of-government way. Mr. Castonguay noted that the issue was significant because of the number of international investment agreements and their impact on taxation, especially given the increasing number of arbitration cases, many of which involve tax issues, and the related high cost of such “litigation”. He recognized the legitimate role of international investment agreements, but also the legitimacy of tax officials’ concerns, although his report did not propose specific solutions. The report noted the diverse treatment of tax in international investment agreements, with varying approaches. Finally, the report proposed how revenue officials could ensure that tax matters were properly considered at the country level as part of a whole-of-government approach, including participation in negotiation teams and involvement in dispute resolution.

8. The [Report of that Twenty-sixth Session](#) noted the discussions and outcomes as follows:

120. [Co-coordinator] Mr. Ligomeka drew attention to the proposed outline of a guidance document in paragraph 10 of the Co-Coordination report, drawing upon Mr. Castonguay’s report, United Nations Conference on Trade and Development reports and other relevant work. He noted that the Subcommittee sought also to commence progress on workstream B on the relationship of tax treaties with the General Agreement on Trade in Services in earnest, with both workstreams to be treated equally.

121. Members and observers supported the general outline, expressing that the principal purpose should be to assist tax officials, though it might also benefit investment officials. One member noted that the jury was still out on the investment benefits of international investment agreements, so the guidance should not be seen as assuming such benefits. He said that the most important thing that could be done was to assist in preventing tax issues from being litigated in international investment agreement contexts. He also noted that the vast majority of disputes were brought against developing countries, and that there was a significant distinction between old and new investment treaties in any analysis, so it was an issue of particular relevance to such countries.

122. Another member said that the tax carveouts and investor-State dispute settlement issues were especially important aspects of the guidance. Others supported the importance of tax and investment officials coming together in common understandings and ensuring efficiency in applying resources and policy coherence; knowledge of what agreements might influence tax policy and “tax policy space”; and addressing the issue of tax incentives in the guidance. Another member commended the link made in the report to achieving the Sustainable Development Goals. One member said the possibility of not having international investment agreements should be noted, but so should the possibility of renegotiating old such agreements. Another mentioned that the relationship of such agreements with contractual and/or domestic law stability clauses was an important issue. One member called for a focused, accessible and practical document.

123. With regard to workstream B, a member noted the importance of the forum shopping clause and said that the Committee should recommend that developing countries use the provision. The practice of some countries in applying the clause provided in the United Nations Model Convention and the OECD Model Tax Convention, and the importance of any guidance suggesting that developing countries use the clause in practice was expressed by more than one member.

124. Observers welcomed the work, noting the different responses of countries to investor-State dispute settlement, and the range of investment treaty experiences. The Sustainable Development Goal framework for those considerations was supported, and the obligations of investors were indicated as a counterpoint to the obligations to investors. Mediation was noted as a possibility, and the previous and current Vienna University of Economics and Business work on investment treaties and tax issues was referenced.

125. Other observers underscored the great variety of international investment agreement carveout clauses and the need for tax officials to have the final say on tax issues. The cost to

countries of blanket tax exemptions, including on import duties and VAT, and the work of the United Nations Commission on International Trade Law on multilateralizing investor-State dispute settlement, were both emphasized. Observers also pointed out the need to stress responsible investment as linked to the Sustainable Development Goals. The Subcommittee thanked participants for their comments and suggestions and would consider them going forward. The two workstreams would continue, both as priorities. Further inputs could be made by members and observers until May 2023.

#### ***Proposed Action on Workstream A***

9. The ***extended outline at Annex A to this paper is put forward for Committee consideration and comment***. Drawing upon the work so far and further comment at this Session, the Subcommittee proposes to put forward a first draft of the guidance at the Twenty-eighth Session, with a view to seeking final approval at the Twenty-ninth Session.

#### ***The GATS Issue***

10. The **GATS issue (Workstream B)** was outlined in [CRP.36](#) of the Committee's Twenty-third Session. The following points are essentially extracted from that paper's analysis of the issue, but further detail is now added on the "grandfathering" of pre-1995 double tax agreements.

- In examining compatibility of tax and non-tax agreements on these points, the World Trade Organisation (WTO) agreements are relevant both in their own right and because most non-discrimination provisions in non-tax agreements are based in significant part on the WTO provisions. The General Agreement on Trade in Services (GATS) is a trade agreement; however, it also constitutes an investment agreement because the definition of modes of service covers, in effect, investment through "commercial presence". When the GATS was negotiated, there was a concern that some tax measures where distinctions are made based on taxpayer resident might be in violation of the GATS National Treatment obligation. Both the OECD and UN Models note, in their commentaries to Article 24 (Non- Discrimination), that discrimination based on residence is not contrary to the National Treatment obligation.
- The GATS has an exception allowing measures inconsistent with the National Treatment obligation where "the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members". The GATS was amended, before its conclusion, to incorporate a footnote to that provision intended to illustrate with some degree of specificity what Members regarded as measures meeting the "equitable or effective" standard.
- A provision was also included in the GATS stating that the National Treatment obligation could not be invoked under the Agreement's dispute settlement procedures: "with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services". The final decision in the event of a dispute as to whether a measure falls within the scope of a tax agreement between them is therefore made by the Council for Trade in Services, a high-level body of country representatives at the WTO in Geneva referring the matter to binding resolution under the WTO dispute settlement procedure.
- A footnote to that provision, however, stipulates that "[w]ith respect to agreements on the avoidance of double taxation which exist on the date of entry into force of the WTO Agreement, such a matter may be brought before the Council for Trade in Services only with the consent of both parties to such an agreement". This additional requirement thus places the decision with respect to the above issue in the hands of the parties, as opposed to the Council, and effectively provides an opportunity for taxation authorities of the parties to participate in such a decision, but only for what are now rather old treaties. The date of entry into force of the WTO Agreement was 1 January 1995.

- Nevertheless, treaties concluded after the entry into force of the WTO Agreement and, arguably, existing treaties substantially amended after that date, are not captured by the language of the above-mentioned footnote. 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 as follows:

“Contracting States may wish to avoid these difficulties by extending bilaterally the application of the footnote to paragraph 3 of Article XXII of the GATS to conventions concluded after the entry into force of the GATS. Such a bilateral extension, which would supplement— but not violate in any way—the Contracting States’ obligations under the GATS, could be incorporated in the convention by the addition of the following provision: ‘For purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that, notwithstanding that paragraph, any dispute between them as to whether a measure falls within the scope of this Convention may be brought before the Council for Trade in Services, as provided by that paragraph, only with the consent of both Contracting States. Any doubt as to the interpretation of this paragraph shall be resolved under paragraph 3 of Article 25 or, failing agreement under that procedure, pursuant to any other procedure agreed to by both Contracting States.’”

- Surprisingly, very few countries, especially developing countries, make use of that provision. The decision on whether an issue is within the scope of a tax treaty is therefore left to non-tax experts in the WTO dispute settlement system.

- There is at least some question of whether the provision should be elevated from an option in the Model Commentaries to a provision in the text of the Convention itself. A similar provision may be useful in relation to other trade-related agreements, especially the increasingly common regional trade and investment agreements.

11. A Secretariat background note on country practices in this area is at Annex B. The Subcommittee has considered possible options for improving guidance to countries in this area and is of the view that, while the likelihood of this issue arising in practice remains uncertain, there is value in raising the prominence in the Model of the proposed clause – found in both the OECD and UN Models. The Subcommittee considers that having the clause in the Text of Article 25 itself would help achieve this, without obvious disadvantages.

12. On this basis, the next question is whether the Committee guidance should be limited to the GATS, as in the current UN and OECD Models, or else should be broadened and updated to include an alternative option that include coverage of other agreements such as Free Trade Agreements, drawing upon increasing state practice of such broader or “GATS-plus” provisions. The pros and cons of such an option would be considered as part of such extended guidance.

13. As Workstream B involves a possible input into the update of the UN Model, the Subcommittee will consult with the Subcommittee on the Update of the Model as the work progresses.

#### ***Proposed Action on Workstream B***

14. The Subcommittee intends to submit drafting at the Twenty-eighth Session (for first consideration), with a view to including a GATS clause in the text of Article 25. It will also work on an option for countries wishing to extend the clause to other relevant agreements and report back on the issues, with drafting for the Commentary, at the same Session.

#### ***Workstream C (Other Issues in Trade Agreements or Mixed Trade and Investment Agreements)***

15. No current work towards this “gap-filling” third workstream appears necessary at this stage, as no items have been identified that cannot be effectively addressed in the other workstreams (such as the possible extension of the GATS clause to Free Trade Agreements, as noted above). Nonetheless,

the Subcommittee will continue to monitor the issue and will report back to the Committee at the Twenty-eighth Session.

### ***Sustainable Development Goals***

16. 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.

17. 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.

18. 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.

### ***Summary of Proposed Next Steps***

19. Drawing upon the work so far and further comment at this Session, the Subcommittee proposes to submit a first draft of the **Workstream A** guidance at the Twenty-eighth Session, with a view to seeking final approval at the Twenty-ninth Session.

20. On **Workstream B**, the Subcommittee intends to propose drafting at the Twenty-eighth Session (for first consideration), with a view to including a GATS clause in the text of Article 25. It will work on an option for countries wishing to extend the clause to other relevant agreements and report back on the issues with drafting for the Commentary at the same Session. Both strands of this work will draw upon the work so far and further comment at this Session,

21. The Subcommittee will report back at the Twenty-eighth Session as to whether distinct **Workstream C** issues that cannot be dealt with under the other workstreams have been identified.

22. As Workstreams A and B involve possible inputs into the update of the UN Model, the Subcommittee will consult with the Subcommittee on the Update of the Model as the work progresses.

## Annex A

# Addressing the Issue of Taxation in International Investment Agreements: Guidance for Tax and Investment Officials for the Implementation of an Integrated Approach<sup>1</sup>

## *Proposed Outline of a Committee of Experts on International Cooperation in Tax Matters Guidance Document*

*Rev. 5 - September 12, 2023*

### 1. Introduction (1.5 page)

- Indicate in broad terms the general issue – the interaction of International Investment Agreements (IIAs) with tax policy and administration.
- Define the principal audience: tax officials, especially in developing countries.
- Additional audiences: officials responsible for international investment agreement policy and negotiation; tax practitioners
- Broadly - Why is the issue and guidance on it important?
  - Potential Impact on Tax “policy space” – i.e., policy options might involve actions for damages;
  - Potential Impact on tax administration – e.g., some administration actions may fall short of a due process requirement implicitly or explicitly required.
  - Potential costs:<sup>2</sup>
    - “Awards against states regularly climb into the hundreds of millions of dollars, and have reached billions of dollars. As of June 2021, the average amount sought by investors in each ISDS claim is US\$1.16 billion.<sup>3</sup> The average amount states are ordered to pay is US\$437.5 million.<sup>4</sup>”
  - Awareness of these issues and “whole of government approaches” can lead to better informed investment policy and agreements and better informed tax policy and administration.
  - Disputes can be avoided or dealt with early effectively.
- With that context, what is the purpose of the proposed guidance:
  - Provide basic information on IIAs relevant to tax officials, in particular;

---

<sup>1</sup> Provisional title.

<sup>2</sup> Columbia Center on Sustainable Investment, Primer on International Investment Treaties and Investor-State Dispute Settlement, 2021, [https://ccsi.columbia.edu/sites/default/files/content/docs/Primer%20on%20International%20Investment%20Treaties%20and%20Investor-State%20Dispute%20Settlement\\_12.19.21.pdf](https://ccsi.columbia.edu/sites/default/files/content/docs/Primer%20on%20International%20Investment%20Treaties%20and%20Investor-State%20Dispute%20Settlement_12.19.21.pdf) at p.7.

<sup>3</sup> Removing a set of particularly large claims against Russia for tens of billions of dollars, the average amount sought in each case is US\$817.3 million [original footnote].

<sup>4</sup> Removing the awards against Russia, which are particularly large outliers ordering that government to pay US\$50 billion to investor claimants, the average ISDS award is US\$169.5 million [original footnote].

- Put IIAs in their context;
- Set out the implications of IIAs for taxation;
- Formulate approaches (what can be done and by whom) to achieve outcomes acceptable to tax policy makers and more generally the government;
- Do all the above with a focussed and practical approach, with examples and checklists where helpful.
- Summarize range of possible actions for tax policymakers:
  - Develop a position on treatment of taxation in IIAs, including possible reforms;
  - Integrate a team responsible for tax aspects of IIA negotiations and seek involvement in negotiations that may impact on tax policy and administration;
  - Seek to achieve these goals as part of an on-going “whole-of-government” approach;
  - Develop and maintain awareness of existing treaties and their tax interactions (including by relevant field officers), as well as of tax-related IIA cases internationally;
  - Look to possible early warning systems for disputes;
  - Develop skills and networks to deal with negotiation and implementation issues, as well as disputes that may arise.

## 2. What are International Investment Agreements (2.5 pages)

- Set out the basic stated purpose of IIAs: to provide a framework conducive toward inward international investment, especially long-term investment, by providing relative legal predictability and certainty for foreign investors.

[N.B. This guidance will not address the questions of how effective or otherwise IIAs are in increasing foreign direct investment (FDI) and whether countries should seek to have IIAs or not. Views differ on those issues and the guidance will at most acknowledge this and stay neutral. The guidance merely assumes that at least some IIAs will be a “given” to some extent for most tax officials.]
- The investment policy background and potential tax aspects

NB This will note broadly the investment policy environment and tax aspects, based on linking to some relevant materials from e.g. [these are only early examples]: UNCTAD,<sup>5</sup> UNDESA<sup>6</sup>, World Bank Group,<sup>7</sup> IMF,<sup>8</sup> OECD,<sup>9</sup> regional<sup>10</sup>

<sup>5</sup> <https://investmentpolicy.unctad.org/investment-policy-framework> ; <https://unctad.org/publication/world-investment-report-2022>; <https://investmentpolicy.unctad.org/news/hub/1673/20210303-a-guide-for-tax-policymakers-iias-and-their-implications-for-tax-measures>

<sup>6</sup> <https://www.un.org/esa/ffd/wp-content/uploads/2017/08/handbook-tax-base-second-edition.pdf> at Chapter IX: Eric Zolt; *Tax incentives in developing countries: maximizing the benefits and minimizing the costs.*

<sup>7</sup> <https://documents1.worldbank.org/curated/en/099040009302225750/pdf/P1755370c5d4fe0440b2e40efcc6443b101.pdf>; <https://documents1.worldbank.org/curated/en/180341583476704729/pdf/Evaluating-the-Costs-and-Benefits-of-Corporate-Tax-Incentives-Methodological-Approaches-and-Policy-Considerations.pdf>

<sup>8</sup> <https://www.imf.org/-/media/Files/Publications/PP/2023/English/PPEA2023001.ashx>;  
<https://www.imf.org/en/Publications/Fiscal-Affairs-Department-How-To-Notes/Issues/2022/11/How-to-Evaluate-Tax-Expenditures-525166>

<sup>9</sup> <https://www.oecd.org/daf/inv/mne/pfi.htm>; <https://www.oecd.org/daf/inv/investment-policy/2506900.pdf>;  
<https://www.oecd.org/investment/investment-policy/oecd-investment-tax-incentives-database-2022-update-brochure.pdf>; [https://www.oecd-ilibrary.org/finance-and-investment/fdi-qualities-policy-toolkit\\_7ba74100-en](https://www.oecd-ilibrary.org/finance-and-investment/fdi-qualities-policy-toolkit_7ba74100-en)

<sup>10</sup> E.g., from ECLAC: [https://www.cepal.org/en/pressreleases/foreign-direct-investment-latin-america-and-](https://www.cepal.org/en/pressreleases/foreign-direct-investment-latin-america-and)



and other entities<sup>11</sup>, particularly those aimed at assisting the often challenging investment environments of least developed countries, landlocked states, and small island developing states<sup>12</sup>. [Properly referenced, these sorts of materials, perhaps included in an annex, could be very helpful, especially if systematized as between general and more tax-specific investment policy guidance and also guidance focussing on particular groups or types of countries or of investment categories].

- Provide a very brief description of design features whereby IIAs seek to achieve their stated objectives:
  - Nature of obligations imposed on governments;
  - How the dispute and enforcement mechanisms work:
    - Mandatory binding arbitration; and
    - Enforcement of arbitral decisions.
- Provide key relevant facts about IIAs:
  - Number of IIAs, how the network developed over time;
  - Definition includes provisions in Free Trade Agreement;
  - Newer IIAs are more sophisticated than first-generation IIAs, in large part due to adjustments compelled by experience gained in operation of first IIAs.
  - In particular, taxation is more often addressed in a comprehensive manner in new IIAs; often with a greater role for tax officials, especially where tax officials from both countries are in agreement (e.g., that a tax is not an expropriation under the IIA or that an inconsistency exists between the IIA and the tax treaty, with the latter then taking precedence (e.g., as in the US/ Mexico/ Canada Agreement)).
  - About 95 per cent of the reviewed decisions concerned claims based on old-generation international investment agreements (IIAs) signed between 1980 and 2010<sup>13</sup>. So, there is a general need to be aware of old treaties even if your country is moving to a new model.
  - Beyond the issue of taxation, a number of issues have been identified with IIAs and considerable analysis has been devoted to developing options for reforms of IIAs (UNCTAD's IIA Reform Accelerator, launched in November 2020, was developed to facilitate the interpretation, amendment and replacement of such older IIAs.<sup>14</sup>

---

[caribbean-rose-552-2022-reaching-historic; https://www.ataftax.org/en/publications/45204-tax-incentives-businesses-latin-america-and-caribbean-summary](https://www.ataftax.org/en/publications/45204-tax-incentives-businesses-latin-america-and-caribbean-summary) From ATAF:

[https://events.ataftax.org/index.php?page=documents&func=view&document\\_id=204](https://events.ataftax.org/index.php?page=documents&func=view&document_id=204); from the ADB:

<https://www.adb.org/sites/default/files/publication/28114/pb023.pdf>; From ESCAP:

<https://www.unescap.org/kp/2023/policy-guidebook-attracting-and-promoting-fdi-digital-economy>

<sup>11</sup> E.g., from Canada, [https://www.international.gc.ca/world-monde/assets/pdfs/issues\\_development-enjeux\\_developpement/priorities-priorites/SIDS-PEID-eng.pdf](https://www.international.gc.ca/world-monde/assets/pdfs/issues_development-enjeux_developpement/priorities-priorites/SIDS-PEID-eng.pdf); and from the Commonwealth:

<https://www.thecommonwealth-ilibrary.org/index.php/comsec/catalog/view/340/341/2985>

<sup>12</sup> World Bank Group, "Enhancing Competitiveness in Small Island Developing States",

<https://www.worldbank.org/content/dam/Worldbank/Enhancing%20competitiveness%20in%20SIDS.pdf>; The Commonwealth Secretariat; "Designing an innovative financial system to attract sustainable investment for Small Island Developing States", <https://thecommonwealth.org/news/designing-innovative-financial-system-attract-sustainable-investment-small-island-developing>

<sup>13</sup> UNCTAD Issues Note: *Review of 2021 Investor–State Arbitration Decisions: Insights for IIA Reform*,

[https://unctad.org/system/files/official-document/diaepcbinf2023d3\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2023d3_en.pdf) The Reform Accelerator can be found at [https://unctad.org/system/files/official-document/diaepcbinf2020d8\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf)

<sup>14</sup> Ibid.

*[Note: This section will essentially be descriptive. It is not intended to advocate for or against IIAs but to stress the fact that, since they exist, tax officials must be aware of them as a matter of practice and should consider taking steps to ensure that they do not unduly restrict the normal conduct of tax policy. The section will draw especially from the work of UNCTAD and the March 2023 consultant's report<sup>15</sup>.]*

### **3. The Specific Relevance of IIAs to Tax Policy and Administration (2 pages)**

- Explain why IIAs are relevant to tax policy and administration (which would include issues such as whether any due process requirements implied by Fair and Equitable Treatment (FET) or other IIA provisions (such as procedural fairness in the application of procedures);
- In brief, general terms, explain how taxation measures can run afoul of certain provisions of IIAs, what are the consequences of an arbitral decision that finds a taxation measure to be a breach of an IIAs, both from a financial point of view (financial compensation paid to a claimant) and on the subsequent conduct of tax policy. The 2022 UNCTAD Issues Note: Facts on Investor–State Arbitrations in 2021: with a Special Focus on Tax-Related ISDS Cases<sup>16</sup> is relevant in this regard.
- Note, as indicated in the previous section, that most litigation concerns old-generation IIAs and explain why this may be relevant to tax matters – what are general differences between older and newer types of IIAs (some specific differences will be dealt with below at 4). Address the possibility of excluding tax policy and administration from IIA coverage: often different perspectives from the “investment side” and the “tax side”; possible pros and cons and practical possibilities – what are the trends to balance the need for a stable and predictable investment climate with the need for certain preservation of sufficient tax “policy space”.
- Outline in brief, non-technical, terms, how certain IIA panel decisions have affected actual taxation measures and their implementation – could use boxed examples.

*[Note: As the reader is not necessarily familiar with the specific provisions of IIAs, which are described in the next section, this section will remain general in nature but will stress the fact that the impact of IIAs on taxation is not merely a theoretical issue, but has had very practical consequences, in particular with small and developing countries that rely on foreign investment for economic growth. Recognising the point of view of investment officials and its impact on how they see the interaction of taxation with IIAs would be helpful in this Section.]*

### **4. Key provisions of International Investment Agreements and How They Affect Taxation (6-8 pages)**

- Provide an overview of key tax-relevant provisions (brief – with references/ links to more detailed material, and possibly some brief examples, but stressing potential risks to tax policy and administration):
  - The overall coverage of IIAs;
  - Definitions: “Investors of a Party” and “Investment”;
  - National Treatment (NT);

---

<sup>15</sup> Attached to [CRP.2 Tax Trade and Investment 26 CITC 12 March 2023 Final.pdf \(un.org\)](#)

<sup>16</sup> [https://unctad.org/system/files/official-document/diaepcbinf2022d4\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf)

- Most Favoured Nation (MFN);
- Fair and Equitable Treatment (FET);
- Full Protection and Security (FPS);
- Expropriation;
- Transfer of Funds;
- Stability/ Stabilization provisions (How non-treaty stability clauses interact with e.g., Umbrella clauses in IIAs will be clarified);
- Tax carveouts;
- Investor-State Dispute Settlement; and
- Enforcement Actions.
- [Tax treatment of awards and any EOI issues? N.B. The Subcommittee is currently considering whether and to what extent this issue should form part of guidance]

*[Note: Each issue will include a description of the provision and how it is relevant to taxation. This will necessarily be short and will include references to the detailed March 2023 consultant's report by Alain Castonguay<sup>17</sup> and UNCTAD and other sources as necessary.]*

## **5. Tax-relevant movements to reforms International Investment Agreements (1.5 pages)**

*[This part will address briefly the broader context of reforms, in a practical way, within which the guidance offered in the subsequent sections must be assessed. In particular, this section will recognise that potential solutions to certain issues specific to taxation (e.g., dispute settlement reforms) do not fall solely or even principally within the purview of taxation officials. It will seek to inform tax officials of opportunities to identify and manage some of the risks in the older treaties. The intention is to give some of the broader context and possible options, which will e.g., assist these tax officials when engaging with investment officials]*

- Provide a brief description and list of existing tools and approaches for evaluating and implementing IIA reform options and modernizing older treaties to address issues of the type noted in para. 4 (e.g., UNCTAD work such as the [Investment Policy Framework for Sustainable Development](#)<sup>18</sup>, and the UNCTAD IIA Reform Accelerator<sup>19</sup>, as well as the consultant's paper currently attached to the Twenty-sixth Session paper<sup>20</sup>. Annexes could be used, but should be relatively short (e.g., executive summaries, as the longer documents can be hyperlinked to).
- This would include a discussion of the interplay of tax incentives with IIAs (e.g., stability clauses, possibly MFN and NT clauses, can be addressed here, but any reference to broad issues of good policy and practices relating to tax incentives would only be by footnote or similar cross-referencing. Examples could be, for example the OECD guidance [here](#), the UN ECLAC guidance [here](#), and the World Bank Group guidance [here](#).

<sup>17</sup> Found as an Attachment to the paper at [CRP.2 Tax Trade and Investment 26 CITC 12 March 2023 Final.pdf \(un.org\)](#)

<sup>18</sup> <https://investmentpolicy.unctad.org/publications/149/unctad-investment-policy-framework-for-sustainable-development>

<sup>19</sup> <https://unctad.org/publication/international-investment-agreements-reform-accelerator>

<sup>20</sup> [CRP.2 Tax Trade and Investment 26 CITC 12 March 2023 Final.pdf \(un.org\)](#)

Mediation could be mentioned as an option, probably by reference to UN or other work on mediation as a dispute prevention and settlement option.<sup>21</sup> The UNCITRAL Draft Guide on Investment Mediation<sup>22</sup> may be relevant. More broadly, the UNCITRAL (Working Group III) work on possible multilateral investor-state dispute settlement and mediation options will be relevant to several aspects of this note.<sup>23</sup>

## **6. A Framework to Address the Tax Aspects of International Investment Agreements** (7 pages)

### (a) Why a framework and what sort of framework (2 pages)

- Set out the benefits of developing a general approach and an internal capability to address the tax aspects of IIAs at country-level, and examining practical possibilities for promoting integrated, or whole-of-government (and preferably “one-stop shop”), approaches.
- In particular, this means:
  - Identifying and conveying within government the needed policy space for tax policy and administration, with an awareness of the perceived investment climate-related drivers (including the possible benefit for investment officials of tax treaty expertise in dealing with issues arising under IIA that are familiar to tax officials, such as treaty shopping).
  - Exploiting existing government-wide framework for facilitating inter-agency co-operation where expertise from multiple government departments must be relied on or, else, create an integrated approach within which tax officials may work with relevant agencies and contribute their input into the overall international investment policy.<sup>24</sup>

---

<sup>21</sup>There is some relevant IIA practice on this that can be referenced. A recent study has concluded: “In summary, our research has revealed that a low proportion of IIAs contain investor-State conciliation and/or mediation provisions. It has also demonstrated that there are several ways to improve the quality of many of the currently existing provisions. We believe an increase in numbers of IIAs with well-drafted conciliation and/or mediation provisions will send out a stronger signal from States that these dispute resolution methods are worthwhile and need more serious consideration by parties involved in investor-State disputes. In turn, this is likely to encourage and promote the utilisation of these dispute resolution mechanisms in ISDS in the future. Once this begins to happen, we look forward to the day when investor-State conciliation and mediation are no longer ‘rarely observed’ practices but frequently deployed modalities of dispute settlement that efficiently achieve mutually beneficial results for both investors and States.”; Romesh Weeramantry and others, Conciliation and Mediation in Investor-State Dispute Settlement Provisions: A Quantitative and Qualitative Analysis, *ICSID Review - Foreign Investment Law Journal*, Volume 38, Issue 1, Winter 2023, Pages 201–237, <https://doi.org/10.1093/icsidreview/siab049>

<sup>22</sup> <http://undocs.org/en/a/cn.9/1151>

<sup>23</sup> [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state)

<sup>24</sup> Some whole of government materials can be found at:

[Module 2.3 Whole of Government.pdf \(un.org\)](#)

A whole of government approach promoted in relation to employment investments usefully notes:

“A whole-of-government approach refers to a set of joint activities performed by diverse public agencies to support a common or aligned solution to issues. CLASP recommends the following elements for applying a whole-of-government approach that leverages subsidized employment and transitional jobs programs to reduce economic inequity and marginalization:

- Common goals and principles across federal funding streams to help guide the design, implementation, and use of program funds over time.
- Common or aligned performance measures across programs whenever possible.

- How to ensure that this whole of government approach follows the whole life of the IIA, not just negotiation, and extends to ratification and implementation, for example.
- The possible need for one-stop-shops to suitably integrate tax policy administration aspects, i.e., to be truly whole of government.

(b) Specific Guidance for the Implementation of the Proposed Framework (5 pages)

- Specific guidance for an integrated approach has three distinct but related components:
  - First, designing a substantive position on the treatment of taxes in IIAs to be defended by negotiators in the course of IIA negotiations with other countries;
  - Second, setting up a process under which tax officials are involved in the design of the above position and in the process of IIA negotiations; and
  - Third, setting up a process to ensure the participation of tax officials in the handling of disputes arising under IIAs where the disputed measure is a taxation measure.

[Checklists to be used for this part at least, where they are short, add value and are not too inflexibly used]
- **Design of a substantive position on the treatment of taxation in IIAs:** draft specifics provisions for inclusion in IIAs that set out how and to what extent the IIA's obligations will apply to taxation measures and how the IIA will relate to the country's existing network of double taxation agreements.
  - It is chiefly the responsibility of tax officials to carry out this design, but it must ideally be done in cooperation with other officials responsible for the negotiation of IIAs, in order for them to gain acceptance of the provisions in a negotiation, as well as ensuring balance between the objective of encouraging inbound investment while preserving tax policy space.
  - Once a position on taxation is arrived at for purposes of negotiating future IIAs, tax officials will also be in a position to make recommendations with respect to existing IIAs whose content, as regards the treatment of taxation, diverges from the position, identifying vulnerabilities and prioritising the IIAs most in need of renegotiation.

*[Note: the report will identify the broad parameters of potential IIA tax provisions but will not put forward a specific set of proposals for the design of IIA tax provisions, as it is for each country to determine the approach that it wishes to follow. However, it will make the case for a balanced approach, and note the issues/difficulties, from an investment policy point of view, with completely removing tax matters from the scope of IIAs.*

*The guidance will stress the two possible elements of taxation provisions: substantive provisions and provisions that affect or complement the dispute settlement process by*

- 
- Appropriate capacity-building resources at the federal, state, and local levels to support implementation that aligns with best and promising practices and equity goals.
  - Leadership and coordination across the federal government to support a coordinated communications and public engagement strategy, guide implementation of best and promising practices, and measure effectiveness in advancing equity goals."

<https://www.clasp.org/publications/report/brief/economic-inequity-whole-government-approach/>

See also <https://publicadministration.un.org/egovkb/Portals/egovkb/Documents/un/2012-Survey/Chapter-3-Taking-a-whole-of-government-approach.pdf>

Whole of government approaches are increasingly advocated in dealing with climate policy, see e.g.,

<https://climateinstitute.ca/wp-content/uploads/2021/11/FINAL-Whole-of-Government-report-2021-Nov19.pdf>

*assigning a role to tax officials in the determination of selected issues. The latter element is a key component of managing risks.*

*Reference will be made to the March 2023 consultant's report for an overview of existing practices<sup>25</sup>. Some sort of Annex may be in order, perhaps a matrix showing categories of such provisions]*

- **Setting up a cooperative process between tax and investment officials for the negotiations of IIAs:** ideally, tax officials should be full participants in the bilateral negotiation of the tax aspects of IIAs. They hold the expertise to explain the nature of the concerns that the proposed provisions aim to address and how the proposed provisions will address them.
  - Where an intergovernmental process already exists to handle inter-agency cooperation, securing cooperation between tax and investment officials will be facilitated;
  - Where no such process exists, it will be the responsibility of tax officials to initiate contact with both relevant central agencies and the department responsible for IIA policy in order to put in place the proper integrated process that will confer tax officials a role in the preparation negotiations and in the actual negotiation of the tax provisions of IIAs with other countries; and
  - Other officials may be centrally involved, such as foreign ministries – it may be possible to describe what their key objectives are likely to be.
- **Setting up a cooperative process between tax and investment officials for the handling of tax-related disputes under IIAs:** because of their expertise, tax officials have an important role in defining how the government will respond to investors' allegation that a taxation measure is a breach of the IIA. In some cases, the participation of taxation officials is mandated under the terms of the IIA's such as when certain issues must be referred directly to them by investors.
  - Tax officials, beyond providing analysis to inform the country's position before an arbitral panel, can also offer views at the outset on the composition of the panel and, where appropriate, the participation of expert witnesses.
  - Beyond the handling of particular case, tax expertise will also help translate lessons to be drawn from a panel decision for the benefit of the formulation of future tax policy and investment agreement policy.

## 7. Conclusion (1.5 pages)

- Stress the practical importance, for tax officials, of the issues discussed in this guidance.
- Importance to strive to integrate tax and investment policy and practice with an awareness of the risk and of possible responses.
- In this context, an integrated or whole-of-government approach at each step of the process (pre-negotiation, negotiation, handling of disputes) is desirable to enhance effectiveness.

*[Note: the APEC Handbook on Obligations in International Investment Treaties - [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/apec\\_handbook\\_on\\_obligations\\_in\\_iiit.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/apec_handbook_on_obligations_in_iiit.pdf) - might in some respects give some ideas for Committee guidance and the last few pages give some useful guidance for officials*

---

<sup>25</sup> Attached to [CRP.2 Tax Trade and Investment 26 CITC 12 March 2023\\_Final.pdf \(un.org\)](#)

*to help them bear in mind investment agreement obligations. Potentially some useful approaches, even though it is about investments generally.]*

*[Total page count: 22-24]*

## Annex B

### **SECRETARIAT NOTE: COUNTRIES UTILIZING THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) CLAUSE IN RECENT TAX TREATIES**

Below is a general description of selected countries' tax treaty practices concerning the utilization of the GATS clause. The overview primarily focuses on five key countries: Canada, Chile, Brazil, Australia and the US, which are the most frequent users of this provision, with an emphasis on its recent application.

It is worth noting that the information hereby provided centers on the use of a provision that explicitly references the GATS, whether through the inclusion of the GATS clause as proposed in the Commentaries to the OECD Model Convention or through alternative text. Consequently, different practices, such as employing similar provisions that specifically reference other trade agreements or adopting more general provisions, are not fully explored. These alternative approaches are mentioned for reference, as seen in the cases of the United States or Mexico.

Furthermore, it is important to highlight that the data presented is not exhaustive. It does not provide an extensive historical background on changes in the positions of countries over time, nor does it identify the reasons for the inclusion or exclusion of the GATS clause in their respective treaties.

#### **CANADA**

Canada stands out as the country that most frequently includes the GATS clause in its treaties. Out of a total of 96 treaties, 59 of them (with 2 pending) incorporate the GATS clause. Notably, all treaties signed by Canada since 2002, which amount to 27 treaties until 2016, feature the GATS clause as proposed in the OECD Commentaries, except for the treaties with Azerbaijan (2004) and Greece (2009), which include the following alternative clauses:

##### **Azerbaijan:**

*Irrespective of the fact that a Contracting State is or may become a signatory to the General Agreement on Trade in Services (GATS) or to other international agreements, the Contracting States shall, in their tax relations, be governed by the provisions of the Convention.*

##### **Greece:**

*Irrespective of the participation of the Contracting States in the General Agreement on Trade in Services (GATS), or in other international agreements, the Contracting States in their tax relations shall be covered by the provisions of this Convention.*

#### **CHILE**

Chile follows Canada in terms of employing the GATS clause. Out of 37 treaties (with 1 pending), 36 of them include the GATS clause. The only exception is the treaty signed with Ecuador in 1999, which does not incorporate the clause. Since 2012, Chile has signed 11 treaties, and although most of them include the GATS clause as proposed in the OECD Commentaries, a few recent treaties diverge from this trend: the United Arab Emirates (2019) and Japan (2016), which use the following alternative version:

##### **United Arab Emirates:**

*Art. 24: Non-discrimination*

*(...)*

*6. Any question arising as to the interpretation or application of the Convention and, in particular, whether a measure is within the scope of the Convention, shall be determined exclusively in*



*accordance with the provisions of Article 25 of the Convention [MAP], and the provisions of Article XVII of the General Agreement on Trade in Services shall not apply to a measure unless the competent authorities of the Contracting States agree that the measure is not within the scope of this Article. For the purposes of this subparagraph, the term "measure" means a law, regulation, rule, procedure, decision, administrative action, or any other similar provision or action, as related to taxes covered by the Convention.*

**Japan:**

*Protocol:*

*1. With reference to the Convention,*

*(...)*

*(d) Any question arising as to the interpretation or application of the Convention and, in particular, whether a measure is within the scope of the Convention, shall be determined exclusively in accordance with the provisions of Article 25 of the Convention [MAP], and the provisions of Article XVII of the General Agreement on Trade in Services shall not apply to a measure unless the competent authorities of the Contracting States agree that the measure is not within the scope of Article 24 of the Convention. For the purposes of this subparagraph, the term "measure" means a law, regulation, rule, procedure, decision, administrative action, or any other similar provision or action, as related to taxes covered by the Convention.*

Previous treaties containing alternative clauses that make reference to the GATS were signed with the United States (2010), Korea (2002) and Brazil (2001):

**US**

2006 US version (see US section)

**Korea:** It differs from the wording contained in the Commentaries to the OECD Model in that the second part of the last sentence is deleted:

*Protocol:*

*(...)*

*5. Other Miscellaneous*

*(...)*

*4) For the purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that, notwithstanding that paragraph, any dispute between them as to whether a measure falls within the scope of this Convention may be brought before the Council for Trade in Services, as provided by that paragraph, only with the consent of both Contracting States. Any doubt as to the interpretation of this paragraph shall be resolved under paragraph 3 of Article 25.*

**Brazil:**

*The provisions of Article II and Article XVII of the General Agreement on Trade in Services shall not apply to a tax measure unless the competent authorities agree that such measure is not within the scope of Article 23 of this Convention [Non-discrimination].*

**BRAZIL**

Brazil, with 41 treaties (5 pending), includes the GATS clause in 16 of them. Notably, in recent years, Brazil has consistently included the GATS clause in its treaties and renegotiations since 2017. It is important to note that 10 of the treaties that reference the GATS clause in Brazil have alternative text, deviating from the standard proposed in the OECD Commentaries. This alternative text is featured in treaties with Colombia (2022), Norway (2022), Poland (2022), Uruguay (2019), Turkey (2010), Peru (2006), Venezuela (2005), Russia (2004), South Africa (2003), and Argentina (1980, clause added in the 2017 Protocol):

**Colombia, Norway, Poland, Uruguay, Turkey, Peru, Venezuela, Russia, South Africa, Argentina:**

*It is understood that, irrespective of the participation of the Contracting States in the General Agreement on Trade in Services (GATS), or in any other international agreements, the tax issues with regard to the taxes covered by the Convention arising between the Contracting States shall be governed only by the provisions of the Convention.*

Another treaty that contains an alternative wording was signed with Chile (2001) (see Chile's section). Finally, treaties with China (1991, clause added in the 2022 Protocol -pending), UK (2022, pending), Switzerland (2018), United Arab Emirates (2018) and Singapore (2018) follow the text proposed in the OECD Commentaries.

**AUSTRALIA**

Australia incorporates the GATS clause in 15 out of 46 treaties (1 pending). Since 2006, Australia has included the GATS clause in all its treaties, being the only exception, the treaty signed with Israel in 2019. It is worth mentioning that, in all treaties, Australia has used the text proposed in the OECD Commentaries.

**UNITED STATES**

Below are the relevant provisions of the last 3 US Models which are used for the treaties signed by the US. 2006 and 2016 models have small changes (differences from the previous model are shown in **bold**). It should be noted that the 1996 Model did not make reference to the GATS but to the General Agreement on Tariffs and Trade.

1996 Model	2006 Model	2016 Model
<p>Article 1 General Scope (...) 2. The Convention shall not restrict in any manner any benefit now or hereafter accorded: a) by the laws of either Contracting State; or b) by any other agreement between the Contracting States.</p> <p>3. Notwithstanding the provisions of subparagraph 2(b):  (a) the provisions of Article 26 (Mutual Agreement Procedure) of this Convention exclusively shall apply to any dispute concerning whether a measure is within the scope of this Convention, and the procedures under this Convention exclusively shall apply to that dispute; and</p>	<p>Article 1 General Scope (...) 2. This Convention shall not restrict in any manner any benefit now or hereafter accorded: a) by the laws of either Contracting State; or b) by any other agreement <b>to which</b> the Contracting States <b>are parties</b>.</p> <p>3. <b>a)</b> Notwithstanding the provisions of subparagraph b) of paragraph 2 <b>of this Article:</b> <b>i) for purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that any question arising as to the interpretation or application of this Convention and, in particular, whether a taxation</b></p>	<p>Article 1 General Scope (...) 2. This Convention shall not restrict in any manner any benefit now or hereafter accorded: a) by the laws of either Contracting State; or b) by any other agreement to which <b>both</b> Contracting States are parties.</p> <p>3. a) Notwithstanding the provisions of subparagraph (b) of paragraph 2 of this Article: i) for purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that any question arising as to the interpretation or application of this Convention and, in particular, whether a taxation measure is within the scope of this Convention, shall be</p>

<p>(b) unless the competent authorities determine that a taxation measure is not within the scope of this Convention, the nondiscrimination obligations of this Convention exclusively shall apply with respect to that measure, except for such national treatment or most-favored-nation obligations as may apply to trade in goods under the General Agreement on Tariffs and Trade. No national treatment or most-favored-nation obligation under any other agreement shall apply with respect to that measure.</p> <p>(c) For the purpose of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action, or any similar provision or action.</p>	<p><b>measure is within the scope of this Convention, shall be determined exclusively in accordance with the provisions of Article 25 (Mutual Agreement Procedure) of this Convention; and</b></p> <p><b>ii) the provisions of Article XVII of the General Agreement on Trade in Services shall not apply to a taxation measure unless the competent authorities agree that the measure is not within the scope of Article 24 (Non-Discrimination) of this Convention.</b></p> <p>b) For the purposes of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action, or any similar provision or action.</p>	<p>determined exclusively in accordance with the provisions of Article 25 (Mutual Agreement Procedure) of this Convention; and</p> <p>ii) the provisions of Article XVII (<b>National Treatment</b>) of the General Agreement on Trade in Services shall not apply to a taxation measure unless the competent authorities agree that the measure is not within the scope of Article 24 (Non-Discrimination) of this Convention.</p> <p>b) For the purposes of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action or any similar provision or action.</p>
---	--	--

### Treaties using US Model 2016: 1 treaty

1. Croatia (2022 – pending)

### Treaties using US Model 2006: 10 treaties

1. Vietnam (2015 – pending)
2. Poland (2013 – pending)
3. Chile (2010 – pending)
4. Hungary (2010 – pending)
5. Malta (2008)
6. Bulgaria (2007)
7. Belgium (2006)
8. Spain (1990, added in the 2013 Protocol)
9. Finland (1989, added in the 2006 Protocol)
10. New Zealand (1982, added in the 2008 Protocol)

Additionally, 3 treaties -Japan (2003), UK (2001) and Netherlands (1992, added in the 2004 Protocol)- contain variations from the 2006 US Model (~~strikethrough~~ or **bold** text):

Japan	UK	Netherlands
<p>(...)</p> <p>3. a) Notwithstanding the provisions of subparagraph b) of paragraph 2 of this Article:</p> <p>i) <del>for purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that</del> any question arising as to the interpretation or application of this Convention and, in particular, whether a taxation measure is within the scope of this Convention, shall be determined exclusively in accordance with the provisions of Article 25 (Mutual Agreement</p>	<p>(...)</p> <p>3. a) Notwithstanding the provisions of subparagraph b) of paragraph 2 of this Article:</p> <p>i) <del>for purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that</del> any question arising as to the interpretation or application of this Convention and, in particular, whether a taxation measure is within the scope of this Convention, shall be determined exclusively in accordance with the provisions of Article 25 (Mutual Agreement</p>	<p>(...)</p> <p>3. a) Notwithstanding the provisions of subparagraph b) of paragraph 2 of this Article:</p> <p>i) <del>for purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that</del> any question arising as to the interpretation or application of this Convention and, in particular, whether a taxation measure is within the scope of this Convention, shall be determined exclusively in accordance with the provisions of Article 25 (Mutual Agreement</p>

<p>Procedure) of this Convention; and ii) the provisions of Article XVII of the General Agreement on Trade in Services shall not apply to a taxation measure unless the competent authorities agree that the measure is not within the scope of Article 24 (Non-Discrimination) of this Convention.</p> <p>b) For the purposes of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action, or any similar provision or action, <b>as related to taxes of every kind and description imposed by a Contracting State without regard to Article 2 and subparagraph (d) of paragraph 1 of Article 3.</b></p>	<p>Procedure) of this Convention; and ii) the provisions of <b>Article II and</b> Article XVII of the General Agreement on Trade in Services shall not apply to a taxation measure unless the competent authorities agree that the measure is not within the scope of Article 24 (Non-Discrimination) of this Convention.</p> <p>b) For the purposes of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action, or any similar provision or action.</p>	<p>Procedure) of this Convention; and ii) the provisions of Article XVII of the General Agreement on Trade in Services shall not apply to a taxation measure unless the competent authorities agree that the measure is not within the scope of Article 24 (Non-Discrimination) of this Convention.</p> <p>b) For the purposes of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action, or any similar provision or action.</p>
---	---	---

#### Treaties using US Model 1996: 12 treaties

1. Iceland (2007)
2. Bangladesh (2004)
3. Italy (1999)
4. Denmark (1999)
5. Slovenia (1999)
6. Venezuela (1999)
7. Latvia (1998)
8. Estonia (1998)
9. Lithuania (1998)
10. Ireland (1997)
11. South Africa (1997)
12. Sri Lanka (1985, added in the 2002 Protocol)

Additionally, 8 treaties contain a variation from the 1996 US Model (in **bold**):

1. Austria (1996)
2. Thailand (1996)
3. Turkey (1996)
4. Switzerland (1996)
5. Luxembourg (1996)
6. France (1994)
7. Portugal (1994)
8. Sweden (1994)

1996 Model	Austria, Thailand, Turkey, Switzerland, Luxembourg, France, Portugal, Sweden
<p>Article 1 General Scope (...) 2. The Convention shall not restrict in any manner any benefit now or hereafter accorded: a) by the laws of either Contracting State; or b) by any other agreement between the Contracting States.</p> <p>3. Notwithstanding the provisions of subparagraph 2(b):</p>	<p>Article 1 General Scope (...) 2. The Convention shall not restrict in any manner any benefit now or hereafter accorded: a) by the laws of either Contracting State; or b) by any other agreement between the Contracting States.</p> <p>3. Notwithstanding the provisions of subparagraph 2(b):</p>

<p>(a) the provisions of Article 26 (Mutual Agreement Procedure) of this Convention exclusively shall apply to any dispute concerning whether a measure is within the scope of this Convention, and the procedures under this Convention exclusively shall apply to that dispute; and</p> <p>(b) unless the competent authorities determine that a taxation measure is not within the scope of this Convention, the nondiscrimination obligations of this Convention exclusively shall apply with respect to that measure, except for such national treatment or most-favored-nation obligations as may apply to trade in goods under the General Agreement on Tariffs and Trade. No national treatment or most-favored-nation obligation under any other agreement shall apply with respect to that measure.</p> <p>(c) For the purpose of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action, or any similar provision or action.</p>	<p>(a) <b>Notwithstanding any other agreement to which the Contracting States may be parties, a dispute concerning whether a measure is within the scope of this Convention shall be considered only by the competent authorities of the Contracting States, as defined in subparagraph 1(h) of Article 3 (General Definitions) of this Convention, and the procedures under this Convention exclusively shall apply to the dispute.</b></p> <p>(b) unless the competent authorities determine that a taxation measure is not within the scope of this Convention, the nondiscrimination obligations of this Convention exclusively shall apply with respect to that measure, except for such national treatment or most-favored-nation obligations as may apply to trade in goods under the General Agreement on Tariffs and Trade. No national treatment or most-favored-nation obligation under any other agreement shall apply with respect to that measure.</p> <p>(c) For the purpose of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action, or any similar provision or action.</p>
---	--

Finally, it is worth mentioning that in treaties signed by the US with Ukraine (1993) and Kazakhstan (1993), a note concerning GATS was exchanged with each country, both in 1995, with the following text:

*(1) notwithstanding Article XXII and footnote 11 of the GATS, in the event that the GATS applies between the United States and [Ukraine/Kazakhstan], a dispute concerning whether a measure is within the scope of the Taxation Convention shall be considered only pursuant to Article 26 (Mutual Agreement Procedure) of the Taxation Convention by the competent authorities of the United States and [Ukraine/Kazakhstan] as defined in subparagraph 1() of Article 3 (General Definitions); and*

*(2) unless the competent authorities determine that a taxation measure is not within the scope of the Taxation Convention, national treatment or most-favored-nation obligations under any other agreement (including GATS in the event that it applies between the United States and [Ukraine/Kazakhstan]) shall not apply a taxation measure, except for such national treatment or most-favored nation obligations as may apply to trade in goods under the Agreement on Trade Relations between the United States and [Ukraine/Kazakhstan], signed on [May 6/May 19] , 1992, and the General Agreement on Tariffs and Trade if it applies between the United States and [Ukraine/Kazakhstan].*

## MEXICO

Mexico has the GATS clause in 6 treaties, 3 signed with countries that usually include it: Australia (2002), Canada (2006) and Chile (2005) and 3 with other countries: Peru (2011), New Zealand (2006) and China (2005). It is worth noting that Mexico's consistent practice has been to include a broader clause in its treaties, which has been observed in 36 out of 61 treaties, 13 of which were signed since 2010: Argentina (2015), Costa Rica (2014), Guatemala (2015), Jamaica (2016), Philippines (2015), Latvia (2012), Turkey (2013), Estonia (2012), Malta (2012), Qatar (2012), Hungary (2011), Bahrain (2010), and Panama (2010). The wording of this clause is provided below, although some variations are present in certain treaties:

*Notwithstanding any other treaties of which the Contracting States are or may become parties, any dispute over a measure taken by a Contracting State involving a tax covered by Article 2 or, in the case of non-discrimination, any taxation measure taken by a Contracting State, including a dispute whether this Agreement applies, shall be settled only under the Agreement, unless the competent authorities of the Contracting States agree otherwise.*

**TURKEY**

Turkey has 11 treaties containing the GATS clause. However, it has not been included in recent treaties, being the last signed including the GATS clause with Oman in 2006.

**PERU**

Peru has the clause in 6 treaties, 3 with countries that usually include it: Brazil (2006), Canada (2001) and Chile (2001) and 3 with other countries: Mexico (2011), Portugal (2012) and Japan (2019).