



# Subcommittee on the Relationship of Tax, Trade and Investment Agreements – Report

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Paper [CRP.9](#)  
28<sup>th</sup> Session  
UN Tax Committee  
19-22 March 2024

# GENERAL OBJECTIVES/ GUIDING PRINCIPLES

- ***Create awareness*** of the potential impact of non-tax agreements on tax policy and administration;
- ***Assist tax officials*** involved with trade or investment treaty policy or negotiation;
- ***Encourage understanding between tax, trade and investment experts***, including as to language used; and
- ***Promote whole of government approaches in this area.***

# WORKPLAN

## Workstream A – Tax and Investment Agreements (IIAs)

- Draft guidance on tax (policy and admin measures) and its relationship with International Investment Agreements (IIAs) for tax officials:
  - Guidance for ***negotiations*** of IIAs;
  - ***Domestic law interactions with IIAs***; and
  - Guidance for ***dispute prevention and guidance in the event of a dispute.***

# WORKPLAN

Workstream A – Tax  
and Investment  
Agreements (IIAs)

## What is Sought?

- Seeking the ***Committee's views on the draft guidance at Attachment A.***
- The Subcommittee proposes to submit a second draft of the ***guidance to the Twenty-ninth Session with a view to final approval.***

# WORKPLAN

## Workstream A – Tax and Investment Agreements (IIAs)

### Attachment A – Draft Guidance

***1. If you are a tax policymaker, international investment agreements should be of interest to you.***

- You should ***get to know them***, understand how they work and how they might potentially affect taxation measures.
- Then, you should work together with officials in your country responsible for negotiating investment agreements to help ***ensure that such agreements properly address how they apply to taxation measures.***

# WORKPLAN

## Workstream A – Tax and Investment Agreements (IIAs)

### Attachment A – Draft Guidance

- The basic purpose of the draft guidance is to: inform you about investment agreements, their implications for taxation measures and to provide practical guidance to assist you in the process of developing a proactive approach to address the treatment of taxation in such agreements.

# WORKPLAN

## Workstream A – Tax and Investment Agreements (IIAs)

### Attachment A – Draft Guidance

2. *Investment agreements can affect taxation measures and, more broadly, the development and implementation of tax policy.*

- Investment agreements are international treaties that contain ***legally-binding obligations on the parties***. They are intended to provide a degree of ***predictability*** in the treatment by the host country of foreign investment and their investors.

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### Attachment A – Draft Guidance

- They also include *a process to handle disputes* arising when a foreign investor alleges that measures of a country are inconsistent with the obligations of the agreement. This process is *mandatory and legally-binding arbitration*.
- *The interpretation of key provisions of investment agreements*, such as national treatment and the obligation to grant fair and equitable treatment to foreign investors and investment, *can be unpredictable*.
- This and other issues are the *source of some uncertainty that can affect taxation measures and constrain the development of tax policy*.



# WORKPLAN

## Workstream A – Tax and Investment Agreements (IIAs)

### Attachment A – Draft Guidance

3. ***Defending against an investor allegation*** that a taxation measure is inconsistent with the terms of an investment agreement ***can be costly in time and financial resources.***

- Different types of tax measures have been the ***subject of litigation*** before international tribunals and a number of them have been found to ***contravene the applicable investment agreement.***
- This has resulted in investment tribunals awarding ***financial compensations to investors ranging from a few million dollars to in excess of 100 million dollars.***

# WORKPLAN

## Workstream A – Tax and Investment Agreements (IIAs)

### Attachment A – Draft Guidance

4. The remedy to mitigate risks and uncertainty with respect to taxation measures is to ***set out with precision in the investment agreement how and to what extent its obligations apply to taxation measure.***

- This is achieved by including in the investment agreement ***a dedicated article addressing all aspects of taxation.***
- Crafting an appropriate tax article requires that ***tax officials work together with officials responsible for investment policy in the context of a whole-of-government approach.***

# WORKPLAN

## Workstream A – Tax and Investment Agreements (IIAs)

### Attachment A – Draft Guidance

- Essentially, *under a whole-of-government approach, public service agencies work together across organisational portfolio boundaries in a shared response to particular issues.*
- In this case, the departments responsible respectively for tax policy and investment policy should work together to arrive at a *mutually satisfactory treatment of taxation in investment agreements.*
- *Different approaches exist to design the content of a taxation article* – they are set out in the Attachment.

# WORKPLAN

## Workstream A – Tax and Investment Agreements (IIAs)

### Attachment A – Draft Guidance

- An effective tax article stipulates with precision ***which obligations of the investment agreement apply or do not apply to taxation measures.*** In addition, ideally, it also provides a role to taxation authorities within the investment agreement so that ***when a dispute arises, they can jointly decide certain issues relating to the dispute; such decisions are binding on the arbitral tribunal.***

# WORKPLAN

## Workstream A – Tax and Investment Agreements (IIAs)

### Attachment A – Draft Guidance

5. *Taxation officials should participate in the negotiation of the tax provisions of investment agreements, in coordination with and under the supervision of investment negotiators. **They should also have input in the defence of taxation measures examined by an arbitral tribunal.***

- Tax officials hold the expertise to address, in the course of negotiations of investment agreements, ***how specific taxation measures work and why certain obligations of the agreement should not apply to them.***
- Experience has shown that the involvement of tax expertise ensures ***a more efficient negotiation and a better substantive outcome.***

# WORKPLAN

## Workstream A – Tax and Investment Agreements (IIAs)

### Attachment A – Draft Guidance

6. For tax policymakers, *implementing the whole-of-government approach that I just described is demanding.*

- Participating in the negotiation of investment agreements and in disputes that involve taxation measures *requires the long-term commitment by the tax policy department of sufficient human and financial resource for that purpose.* This necessarily carries some cost.
- However, in determining the costs and benefits of engaging resources for that purpose, it is essential to bear in mind that *choosing to do nothing can be costly as well.*

# WORKPLAN

## Workstream B -

Relationship of Tax

Treaties and WTO

General Agreement on

Trade in Services (GATS)

## Relationship of GATS provisions and tax treaties

- Relevant to developing and developed countries.
- The Subcommittee ***proposed at the 27<sup>th</sup> Session 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.***

# WORKPLAN

## Workstream B -

Relationship of Tax

Treaties and WTO

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Trade in Services (GATS)

## Proposed wording follows wording suggested in UN and OECD Models:

“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 this Article or, failing agreement under that procedure, pursuant to any other procedure agreed to by both Contracting States.”



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*The Commentary would be drafted to reflect the Committee's views, in particular updated* for the provision now being in the Article Text and it is proposed that there is no need to maintain quotation from the OECD Model.

# WORKPLAN

## Workstream B -

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- The Subcommittee has also been ***exploring the possibility of an extended provision that encompasses other agreements such as Free Trade Agreements*** in the Model Article of the Commentary
- As noted in Annex B of the [paper to the 27<sup>th</sup> Session](#), there is ***country practice on this.***

# WORKPLAN

## Workstream B -

Relationship of Tax

Treaties and WTO

General Agreement on

Trade in Services (GATS)

- ***Should the extended provision*** (i.e. a clause referencing the interaction of the tax treaty with trade and investment treaties other than the GATS), to address the interaction with such non-GATS treaties go ***as a clause in the Model Article text or in the Commentary?***
- ***If the answer is “in the Model”, which of the two possible draft texts should be in the Model and, in consequence, the other be in the Commentary?***

# WORKPLAN

## Workstream C – Issues

in trade agreements or mixed trade and investment agreements other than those addressed by the first two workstreams

- Considering *issues in other trade agreements or mixed agreements other than issues addressed in Workstreams A and B.*
- *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 either Workstream A or B.
- The Subcommittee recommends that *no further action is necessary on Workstream C in the term of this Committee membership.*

QUESTIONS AND COMMENTS?