E/C.18/2025/CRP.2

Distr.: General
11 March 2025

Original: English

Committee of Experts on International Cooperation in Tax Matters
Thirtieth session

New York, 24-27 March 2025
Item 3(p) of the provisional agenda
Relationship of tax, trade and investment agreements

Co-Coordinators' Report

Summary
This paper outlines the concluding work of the Subcommittee on the Relationship of Tax, Trade and Investment Agreements, in taking forward the two workstreams of the Subcommittee agreed by the Committee at the Twenty-fourth Session and confirmed at the Twenty-eighth Session. This follows the final approval of the **Workstream A** guidance document on the **relationship of tax and investment agreements**, at 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") and non-tax agreements such as free trade agreements,** the Subcommittee proposed at the Twenty-seventh Session that the GATS clause 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. The Committee agreed to this at the Twenty-eighth Session, and the text of the GATS clause was finalized at the Twenty-ninth Session.

At the Twenty-ninth Session, the Committee preferred the option at Attachment B.2 of E/C.18/2024/CRP.23 with two elements:

- A draft of the GATS clause as a provision in Article 25, with attendant commentary; and
- A draft of the "extended provision" as a provision in Article 25, with attendant commentary.

Following the first consideration of that text at the Twenty-ninth Session, and taking into account the comments at that session and in the Subcommittee since then, the draft of the GATS clause and "extended provision", and Commentary for both, is provided at the Annex to this paper for ***consideration by the Committee with a view to final approval***.

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-Coordinators, and with the following mandate:
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> The Subcommittee is mandated:
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> - 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.
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> 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-Coordinators' 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. 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. At the Twenty-sixth Session a basic outline of possible guidance was presented for comment and at the Twenty-seventh Session a more detailed version was discussed. The report of the Twenty-seventh Session noted the discussions and suggestions to be taken in drafting the guidance.

9. At the Twenty-eighth Session in March 2024, the Committee considered the Subcommittee report (E/C.18/2024/CRP.9) and the discussions and conclusions were as outlined in the Report of that Session (E/2024/45/Add.1). At the Twenty-ninth Session, the Committee considered the Subcommittee Co-Coordinators' report (E/C.18/2024/CRP.23) and the discussions and conclusions were as outlined in the Report of that Session (E/C.18/2024/4):

> 79. The Co-Coordinator of the Subcommittee on the Relationship of Tax, Trade and Investment Agreements, Aart Roelofsen, presented the Co-Coordinators' report on the progress made in the Subcommittee's work and its workstreams (E/C.18/2024/CRP.23).
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> 80. With regard to workstream A, on tax and international investment agreements, draft guidance on tax policy and administrative measures and their relationship with international investment agreements was presented for approval. The guidance included recommendations on the negotiation of such agreements and potential impacts on tax and addressed such topics as the interaction between international investment agreements and domestic law and dispute prevention. The draft guidance incorporated feedback gathered during the Twenty-eighth Session of the Committee. Mr. Roelofsen highlighted the main changes, which focused primarily on issues relating to the discussions on investment incentives, stabilization clauses and the importance of involving tax officials at an early stage of disputes.
>
> 81. Several members expressed strong support for the draft guidance, emphasizing its usefulness for both tax and investment officials. One member suggested that additional points could be added to ensure safeguards against potential abuse by investors. Another member suggested that the section on relevant work by the United Nations Conference on Trade and Development could be expanded, although that was not seen as a barrier to approval, given that it could be done editorially. An observer expressed appreciation for the balanced approach of the paper and offered to contribute practical experiences in relation to any ongoing work. The Co-Coordinator reiterated that the aim was to have the paper approved at the current session, as the Secretariat had confirmed that the proposed refinements could be addressed as an editorial matter in consultation with the Co-Coordinators. The Co-Chair, Ms. Kana, noted the work that Alain Castonguay, as a consultant to the Department of Economic and Social Affairs, had done on the paper, expressed gratitude for the comments received and invited members to approve the paper, subject to any necessary purely editorial changes. The Committee approved the paper.
>
> 82. On workstream B, concerning the relationship between tax treaties and the General Agreement on Trade in Services of the World Trade Organization, the

Subcommittee submitted for approval a draft text of a clause addressing the relationship of the General Agreement dispute settlement provisions with tax treaties. The clause had formerly been addressed only in the commentary, by means of an optional provision, but would now be placed in article 25 of the Model Convention, with attendant commentary, after first consideration at the Twenty-eighth Session. The Co-Coordinator requested direction from the Committee on whether to incorporate an extended provision covering other agreements directly in the text of the article itself or solely in the commentary.

83. On the proposed draft text of the General Agreement clause, some members suggested minor language changes. One member fully supported the text of the article, preferring not to alter it given its established presence in the commentary. The Co-Chair confirmed that there was no opposition to approving the text of the General Agreement clause, and the Committee accordingly approved it. Purely editorial changes could, as always in such cases, be made in consultation with the Co-Coordinators.

84. Regarding the commentary on the clause, a member put forward editorial suggestions for paragraphs 59 and 60 that would eliminate duplication and offered to submit them in writing. It was noted that although the commentary would undergo further review and be presented for final approval at the next session, no significant changes were anticipated.

85. With regard to the extended provision, another Co-Coordinator, Ms. Kana, clarified that the decision on incorporating an extended provision had already been taken at the previous session of the Committee; the decision to be taken at the current session was whether to place the provision in article 25 or only in the commentary. In that regard, members expressed differing opinions.

86. Some members expressed strong support for including the extended provision in the article, arguing that it would provide greater visibility and ensure that tax officials considered it during negotiations, especially in developing countries. One member noted that many existing tax treaties, including those of OECD member countries, already incorporated extended provisions, indicating that their inclusion did not inherently conflict with constitutional or legal frameworks. Another member emphasized that the main reason for having the provision in the article was to help prevent forum-shopping by ensuring that tax disputes were resolved by tax experts rather than general trade or investment dispute mechanisms.

87. Conversely, other members raised concerns about the potential legal uncertainty of a novel provision and the broad scope of the provision. One member argued that even though an extended provision existed in some treaties, it used different wording, was not widely used and did not appear ever to have been applied in practice. Another member cautioned that the provision could lead to conflicts with existing and future investment agreements and suggested that including it only in the commentary would allow for further evaluation of its practical implications. Concerns were also expressed about the extended provision overriding dispute resolution provisions agreed in existing and future trade and investment agreements and the potential constitutional issues that that could pose for some jurisdictions. Another member raised the concern that the inclusion of such a provision in the Model Convention was not consistent with the whole-of-government approach promoted in the approved guidance paper under workstream A.

88. Following the debate, a member called for a vote. A substantial majority of the Committee, by a margin of 15 to 8, voted in favour of placing the extended provision

in article 25. The Subcommittee would re-present the text of the provision, with attendant commentary, which would include a minority view expanding on the concerns raised at the session alongside the views of those not sharing those concerns, for finalization at the next session.

10. After the Twenty-ninth Session, the Subcommittee met virtually several times to advance the remaining Workstreams B issues. All Committee Members and participants in the UN Model Update Subcommittee were also invited to participate. The Annex to this report represents the result of that further work. In particular the draft Commentary now includes minority positions and the option of the extended provision applying to "any other treaty of which the Contracting States are, or become, parties" is retained, but as an option in the Commentary, rather than being provided for specifically in the text of the Article. The text of the article applies to International Investment Agreements (IIAs) identified in bilateral negotiations.

11. As Workstream B involves an input into the update of the UN Model, the Subcommittee has been consulting with the Subcommittee on the Update of the UN Model Tax Convention as the work has progressed.

Proposed Action on Workstream B

12. ***The Subcommittee submits the draft text of an "extended provision" and draft text of Commentary on both the GATS clause and the extended provision, attached as an Annex to this Report, for final approval at the Thirtieth Session.;***

Sustainable Development Goals

13. 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.

14. 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.

15. 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.

ANNEX

Article 25

MUTUAL AGREEMENT PROCEDURE

(1) Changes to Article 25

Article 25 (Alternative A)

(…)

5. [Notwithstanding paragraph 6, for] [F]or 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 3, 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.

6. A taxation measure, taken by a Contracting State, that is in accordance with this Convention shall be deemed not to breach any other treaty of which the Contracting States are parties, and any dispute over whether a taxation measure taken by a Contracting State is in accordance with this Convention, or whether the measure falls within the scope of the Convention, shall be settled only by reference to the provisions of the Convention and without recourse to dispute resolution arrangements under any other treaty of which the Contracting States are parties. As respects any other dispute over a taxation measure, or as to whether a measure is a taxation measure, the settlement of such dispute shall, unless the competent authorities of the Contracting States agree otherwise, be undertaken without recourse to any dispute resolution arrangements under *[such treaties as are agreed to be covered]*.

Article 25 (Alternative B)

(…)

6. [Notwithstanding paragraph 6, for] [F]or 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 3, 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.

7. A taxation measure, taken by a Contracting State, that is in accordance with this Convention shall be deemed not to breach any other treaty of which the Contracting States are parties, and any dispute over whether a taxation measure taken by a Contracting State is in accordance with this Convention, or whether the measure falls within the scope of the Convention, shall be settled only by reference to the provisions of the Convention and without regard to dispute resolution arrangements under any other treaty of which the Contracting States are parties. As respects any other dispute over a taxation measure, or as to whether a measure is a taxation measure, the settlement of such dispute shall, unless the competent authorities of the Contracting States agree otherwise, be undertaken without regard to any dispute resolution arrangements under *[such treaties as are agreed to be covered]*.

(2) Changes to Article 25 Commentary

…. [Apart from the first sentence of paragraph 53, the text of Section D has been replaced by the following text in bold italics, which also includes, in a new Section E, commentary in relation to the *extended provision*.]

D. INTERACTION BETWEEN THE MUTUAL AGREEMENT PROCEDURE AND THE DISPUTE RESOLUTION MECHANISM OF THE GATS

[Paragraph 5 of Article 25 (Alternative A)/ Paragraph 6 of Article 25 (Alternative B)]

53. In some rare cases, a dispute between countries concerning the application of the national treatment rule of Article XVII of the General Agreement on Trade in Services (GATS) to taxes covered by a tax treaty could lead to both the mutual agreement procedure and the dispute resolution mechanism of the GATS being applicable to address the issue.

54. The negotiation of the GATS raised concerns that certain tax measures that differentiated based on taxpayer residency could breach the national treatment obligation contained in Article XVII of the GATS. To remedy potential conflicts, Article XIV of the GATS allows measures that diverge from the national treatment provision if such differences aim to ensure "equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members". A specific footnote to this article provides examples of measures that meet the "equitable or effective" criteria.

55. Additionally, Article XXII, paragraph 3, of the GATS stipulates that a Member cannot invoke Article XVII under the dispute resolution mechanisms provided by Articles XXII and XXIII in relation to a measure falling within the scope of a bilateral double taxation agreement. Should there be a dispute over whether a measure falls within the scope of such an agreement, either Member may seek resolution through the Council for Trade in Services, which shall refer the matter to arbitration. Notably, a footnote indicates that for

double taxation agreements in existence as of the date of entry into force of the GATS – January 1, 1995 – this recourse is only available with both parties' consent.

56. Article XXII, paragraph 3, of the GATS and its related footnote introduced two critical issues concerning tax treaties. First, the different treatment of tax agreements established before and after the GATS entry into force could be seen as inappropriate, in particular where a convention in existence at the time of the entry into force of the GATS is subsequently renegotiated or where a protocol is concluded after that time in relation to a convention existing at that time. Second, the term "falls within the scope" of a tax Convention, can be difficult to apply in practice, which may lead to disputes, as indicated by the inclusion in paragraph 3 of Article XXII of the GATS of both an arbitration procedure to deal with such disputes and a clause exempting pre-existing conventions from the application of that arbitration procedure.

57. To mitigate these complications, the Commentary on Article 25 of this Model (from 2001 – quoting the OECD Model discussion first seen in the equivalent Commentary from 1995) proposed an optional provision with the aim of extending the grandfathering protection of pre-1995 treaties, provided for in the footnote to paragraph 3 of Article XXII of the GATS, to those concluded or modified after the GATS came into effect. The proposed provision was the same in both Models:

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.

58. Accordingly, under this provision, disputes about the scope of a Convention would require mutual consent for referral to the WTO Council for Trade in Services. This approach was endorsed in the Commentary on Article 25 of this Model, from 2001 until the 202[5] version.

59. In 202[5], the Committee decided to amend Article 25 to include in the text of Article 25 itself the provision referred to in the preceding paragraph, with no substantive amendments. It is paragraph 5 in Alternative A of Article 25 and paragraph 6 of Alternative B. In making this change, the Committee recognized the need for a clear, consistent framework to address potential issues arising from the interaction between tax treaties and the GATS. The inclusion of the GATS clause in the Article itself was in response to concerns that providing the text of the GATS provision in the Commentary alone did not sufficiently promote solution of the identified potential issues.

60. In making this change, the Committee noted that this provision had not been included in tax treaties to the extent that might have been expected. In the view of the Committee,

integrating the GATS provision into the text would raise the profile of a solution already provided in both the UN and OECD Models. The Committee considered that the provision's presence in the Article itself would encourage not only discussion of the treaty interaction issue, before and during treaty negotiations, but also wider adoption across jurisdictions, recognizing the importance of the UN Model Tax Convention in tax treaty negotiations, especially for developing countries. In light of these considerations, the Committee deemed it prudent to elevate the GATS provision, establishing it as a standard element of the text of Article 25. It is important to note, however, that the supporting reasons for such a provision in the UN Model and OECD Model Commentaries are essentially the same, despite being stated differently.

E. INTERACTION BETWEEN THE CONVENTION AND OTHER INTERNATIONAL TREATIES: THE 'EXTENDED PROVISION'

[Paragraph 6 of Article 25 (Alternative A)/ Paragraph 7 of Article 25 (Alternative B)]

General Considerations

61. Previous versions of UN and OECD Model Commentaries to Article 25, noted that issues similar to those discussed above in relation to the GATS may arise in relation to other bilateral or multilateral agreements related to trade or investment and that Contracting States may, in the course of their bilateral negotiations, amend the provision suggested above "so as to ensure that issues relating to the taxes covered by their tax convention are dealt with through the mutual agreement procedure rather than through the dispute settlement mechanisms of such agreements."

62. However, the GATS provision is a provision directed towards specific aspects of the interaction of the GATS and Double Tax Conventions: As a limited coordination provision directed towards GATS-specific purposes, the GATS provision is not a model provision that could be readily adapted, as respects a wider range of bilateral of multilateral investment agreements, to the broader purposes, which underlie the extended provision, of ensuring the primacy of double taxation conventions and domestic tribunals and courts in relation to tax disputes.

63. Accordingly, while the UN and OECD Model Commentaries have long indicated that the GATS provision could be a basis for provisions of wider application, the Committee's discussions leading to the development of the extended provision focused instead on a significant number of actual bilateral provisions of wider scope. These provisions were in treaties between Contracting States that included developed and developing countries. Therefore, rather than looking to the long-standing GATS provision, it was from considering more recent actual provisions, which were substantially broader in scope than the GATS provision, that the elements of the model extended provision were derived: The extended provision has been developed by the Committee taking account of actual in-force provisions that are substantially wider in scope than the GATS provision.

64. On foot of that work, in 202[5] the Committee decided to include a specific clause in Article 25 to address the relationship of tax treaties to a wider range of bilateral or multilateral agreements related to trade or investment. This model clause comprises paragraph 6 of Article 25 (Alternative A) and paragraph 7 of Article 25 (Alternative B). Adoption in bilateral tax Conventions of the specific model provision, which addresses interactions of tax treaty-related measures and other tax measures with a wider range of agreements, will enable greater uniformity in those interactions.

65. With that background, the purpose of this paragraph ("the extended provision") is to ensure that tax disputes, whether or not they relate to a Double Taxation Convention, do not become subject to a dispute resolution procedure under an International Investment Agreement (IIA) – being, for the purposes of this Commentary, an investment agreement or other treaty that, in whole or part, addresses international investment. Under the extended provision, where a dispute could be settled by reference to the provisions of the Convention, it must be settled solely by reference to the provisions of that Convention and without recourse to dispute resolution arrangements under any other treaty.

66. It is important, for an accurate understanding of the extended provision, to note that, unlike what was envisaged for provisions adapted from the GATS provision (see text quoted at paragraph 61 above), such settlement "by reference to the provisions of the Convention" need not be under MAP or arbitration provisions set out in Article 25: A determination by a Court or Administrative Tribunal by reference to any provisions of the Convention concerned would equally be a settlement "by reference to the provisions of the Convention." Although the extended provision has been added to the Model Convention in Article 25, its main purposes are, first, to prescribe an appropriate interaction between, on one hand, IIAs and their dispute resolution arrangements, and, on the other hand, tax measures that are in accordance with the tax Convention concerned and, second, to limit recourse to IIA dispute resolution arrangements for disputes about tax measures that do not involve the tax Convention. Consistent with these purposes, the extended provision gives no priority to MAPs or arbitration as a means of dispute settlement over other means, such as recourse to domestic administrative tribunals or courts. Consistent with those purposes also, specific terms used in the extended provision have not been aligned with terms used in other provisions of Article 25.

67. In the case of a dispute that does not relate to the Convention concerned (i.e., "any other dispute in relation to a tax measure" in the words of the extended provision), it is to be settled without recourse to dispute resolution arrangements under the IIAs identified in the extended provision. This exclusion of recourse to such dispute resolution arrangements applies unless both competent authorities agree that such arrangements may be used, i.e. the exclusion of recourse to such arrangements will continue to apply if one of the competent authorities concerned has not agreed to such arrangements being used.

68. Some Contracting Parties may regard this provision as rendering a specific GATS clause unnecessary. Others may prefer to follow the established wording in relation to GATS in so far as, unlike the extended provision, it could, with the agreement of both Competent

Authorities, provide access to the Council for Trade in Services for disputes that relate to the tax Convention concerned. If that is the preference of the Contracting States, the GATS provision should be expressed as applying 'notwithstanding' the extended provision.

69. A [XX] minority of the members of the Committee did not agree with the arguments put forth in justifying the introduction of the "extended provision".

70. Those members do not consider that the problems identified in relation to GATS are similar to issues that may arise in relation to other bilateral or multilateral agreements related to trade or investment. The "GATS provision" (paragraph 5 in Alternative A and paragraph 6 in Alternative B), is a coordinating provision ensuring that potential issues arising from the interaction between tax treaties and the GATS are addressed; i.e., for the purposes of paragraph 3 of Article XXII (Consultations) of the GATS, a dispute as to whether a measure falls within the scope of a tax treaty may be brought before the Council for Trade in Services, only with the consent of both Contracting States. In contrast, the "extended provision" (paragraph 6 in Alternative A and paragraph 7 in Alternative B) is an override provision, not a coordinating provision. The first sentence of the "extended provision" overrides the substantive standards of protection and the dispute settlement provisions in an IIA. The second sentence of the "extended provision" overrides the dispute settlement provisions in an IIA, effectively limiting the investor's recourse for a tax-related trade or investment dispute to the competent authority process under Article 25, if applicable, or the domestic courts of the host state. In addition, if Article 25 of the Convention does not include an arbitration provision, investors face the risk that the competent authorities will agree to disagree, with the result that there is no effective resolution for the investor.

71. Further, those members note that the "extended provision" impacts all taxes, not only taxes covered by the Convention as referred to in paragraph 61. Those members do not agree that taxation measures falling outside the scope of the Convention are best dealt with in the "applicable tax environment" rather than in the "investment agreement environment". First, most countries do not have tax specialist courts, and some that do would not have the jurisdiction to hear a tax-related investment or trade agreement dispute. Second, a dispute that falls outside the scope of the Convention and is based on a standard of protection under an IIA is arguably more related to the investment environment than to the tax environment.

72. Those members were also concerned that the "extended provision" could frustrate the whole-of-government approach adopted in the guidance document "Addressing the Issue of Taxation in International Investment Agreements: Guidance for Tax and Investment Officials for the Implementation of an Integrated Approach", approved by the Committee at its 29th session (attachment A to E/C.18/2024/CRP.23). To ensure that a whole-of-government approach is respected, it would be important for tax officials to have in-depth discussions with investment officials regarding both the GATS provision and the "extended provision" and to develop a common view as to how tax measures should be addressed in IIAs. Those members are of the view that if government policy has changed since the conclusion of an IIA, it would be preferable to renegotiate the IIA directly rather than indirectly overriding certain aspects of the IIA in a tax treaty. IIAs and tax treaties both serve the purpose of facilitating cross-border trade and investment. IIAs and tax treaties govern different subject matters and use different tools to promote that purpose. Tax treaties primarily achieve this by allocating taxing rights between the parties with a view to eliminating double taxation. IIAs set out rights and obligations for the contracting states

and for investors and their investments in the wider regulatory framework with a view to encouraging cross-border investment by ensuring access to the market by aiming for equal treatment by domestic and foreign investors. In addition, those members were of the view that directly amending the IIA, rather than introducing the "extended provision", would provide more certainty and transparency for taxpayers and investors. It would also avoid the possibility of an investor making a claim under an IIA and the claim proceeding to an arbitration panel because one or more of the parties is unaware of the existence of the "extended provision" (and the IIA makes no reference to such provision) or an arbitration panel does not agree that the "extended provision" effectively negates the dispute settlement provisions under the IIA.

73. Further, those members of the Committee that did not agree with the inclusion of the "extended provision", noted the complexity of international law in relation to successive treaties and conflicts and the uncertainty that could be introduced. They noted that the concern is more acute if, in accordance with paragraph 81, the "extended provision" covers not only specifically listed IIAs but also any other future treaty. As in the above paragraph, and assuming the country adopts a whole-of-government approach, explicitly dealing with tax measures in the IIA would provide more certainty and transparency for taxpayers and investors.

74. Those members of the Committee that did not agree with the inclusion of the "extended provision", were also concerned that several terms, such as "taxation measure" and "whether a taxation measure taken by a Contracting State is in accordance with this Convention", used in the Article were not adequately defined in the Article itself. Further, the terminology used in the "extended provision" is not consistent with the terms otherwise used in Article 25 such as "actions" of a contracting state resulting in "taxation not in accordance with the provisions of the convention, "a case", and "endeavor…to resolve". Those members were therefore concerned that the application of the Article would result in increased uncertainty and disputes.

75. As a matter of broader economic policy, those members that opposed the inclusion of the "extended provision" were concerned that, as a result of the "extended provision", foreign investment may be reduced or discouraged given the override of the IIA and the resulting restriction on the recourses available to an investor to enforce the investment protection rights granted to them under an IIA.

76. Those members were of the view that countries sharing the above concerns may wish not to include the extended provision in their bilateral tax treaties.

Commentary on the 'Extended Provision'

77. The extended provision comprises two sentences, each of which has its own separate focus: The first sentence sets out that, as respects disputes about tax measures that concern the scope and correct application of the Convention, such disputes are to be settled solely ("only") by reference to the provisions of that Convention and without recourse to dispute settlement arrangements under other treaties. The second sentence then restricts recourse to dispute settlement arrangements under IIAs as respects all other disputes about tax measures.

78. While "taxation measure" is a core term used in both the first and second sentences of the extended provision, it is not defined. In IIAs, the term "measure" is frequently used

without reference to taxation, as well as in references to "taxation measures". It is often left undefined in IIAs or else defined very broadly, but not exhaustively, such as by providing that "a 'measure' includes any law, regulation, procedure, requirement, or practice". The term is used in the extended provision to represent the area of likely overlap between an IIA and the tax Convention concerned (first sentence) or between an IIA and taxation outside the scope of the tax Convention (second sentence). Where the relevant term used in investment agreements between the two parties to a tax Convention is different, or if some form of definition would be seen as helpful, these matters could be addressed in the Convention concerned or its explanatory material.

First sentence of the extended provision

79. The first part of the first sentence provides that to the extent that a taxation measure taken by a Contracting State is in accordance with the bilateral Convention concerned, the measure will be deemed not to breach any other treaty of which the Contracting States are parties:

- ***If a tax-related measure that is taken by the State is in accordance with the tax Convention relevant to the investor making a claim, then the first sentence of the extended provision excludes any possibility that it could, nevertheless, be construed as contravening or breaching any provision of an IIA.***
- ***To be "in accordance with" a Convention, a measure must, first, be a tax measure and, second, fall within the scope of the Convention concerned. It must, therefore, involve a tax covered by Article 2 of the Convention or, where relevant, covered by paragraph 6 of Article 24 or paragraph 1 of Article 26 ("taxes of every kind and description"). Accordingly, the scope of "taxation measures" encompassed by this first sentence will, as respects the type of tax involved, be determined by the provisions of the Convention concerned.***
- ***By providing that there can be no breach of an IIA if the tax measure concerned is in accordance with the provisions of the Convention, the first sentence of the extended provision will, in effect, require all claims under IIAs to be channeled into a consideration of whether the measure concerned is in accordance with the Convention (which, as set out above, will include the initial steps of considering whether the measure is a tax measure and, if so, whether it falls within scope of the tax Convention concerned).***

80. Accordingly, providing that a tax measure is deemed not to breach an IIA if that measure is aligned with the tax Convention concerned ensures that consideration under the Convention is a mandatory requirement for all investor claims in respect of tax measures – and this creates the context for what is set out in the second half of the first sentence.

81. The second part of the first sentence provides that every dispute about whether a measure is aligned with a Convention, or within the scope of the Convention, must be determined or settled solely ("only") by reference to the provisions of that Convention. Settlement by reference to the provisions of the Convention could, but need not, be through a procedure under Article 25: The requirement or constraint set out is* not *settlement by reference to the provisions of Article 25; the requirement is settlement by reference to the provisions of the Convention. In many cases, such settlement would be a determination, by reference to the provisions of the Convention, by the Courts of the Contracting State whose measure is alleged not to be in accordance with, or within the scope of, the Convention concerned.

Accordingly, where the Contracting States adopt the extended provision in a Double Taxation Convention, the prospect of final settlement of disputes in relation to tax measures will not be dependent on the inclusion of an arbitration provision in that Convention.

82. In addition to the requirement that every dispute about whether a measure is in accordance with the Taxation Convention concerned, or within the scope of that Convention, must be determined or settled solely by reference to the provisions of the Convention, the first sentence of the extended provision prohibits, without qualification, recourse to dispute settlement arrangements under any other treaty of which the Contracting States are parties. This is to prevent any interpretation or application of this first sentence as permitting dispute settlement under such arrangements so long as the sole provisions taken into account in settling the dispute under such arrangements are provisions of the Convention.

83. Accordingly, disputes within the scope of the Convention will be determined, firstly, solely by reference to the provisions of the Convention and, secondly, without recourse to dispute resolution arrangements under any other treaty. Further, in the case of first-sentence disputes, the competent authorities have no discretionary power whatsoever to allow recourse to dispute resolution arrangements under any other treaty.

84. It should be noted that, in the case of disputes within the scope of the Tax Convention concerned ("first-sentence disputes") it is not just the procedural provisions for dispute settlement under IIAs that are inapplicable: No substantive provision of any IIA may be considered in a first-sentence dispute, since such a dispute must be decided solely by reference to the provisions of the tax Convention concerned.

85. The first sentence of the extended provision may be negatively characterized as overriding protections under IIAs. However, a focus, on the non-application of IIA-related, substantive and procedural, provisions as respects disputes in relation to tax measures, ignores the clear delineation and purpose of the first sentence of the extended provision, in so far as it disapplies such IIA provisions if, and only if, the tax measure in dispute can be shown to be in accordance with the provisions of the Double Taxation Convention entered into by the Contracting States concerned, which are provisions that set out the intentions of those States as respects the tax matters within the scope of those provisions. Instead of characterizing the first sentence of the extended provision as overriding IIAs, it is more accurately and appropriately viewed as a carefully circumscribed provision that upholds the operation of the tax Convention, where the facts and circumstances of a case involve the intended tax outcomes by reference to that Convention.

Second sentence of the extended provision

86. ***The second sentence of the extended provision addresses "any other dispute over a taxation measure, or as to whether a measure is a taxation measure". Such other disputes are disputes that do not relate to the first-sentence issues of whether the tax measure falls within the scope of a Convention and whether it is in accordance with that Convention.***

Disputes over taxation measures could fall outside the scope of the relevant Convention for various reasons, including the following (as possible examples only):

- ***The Convention could be silent in relation to the alleged IIA breach, in the sense that the Convention Articles might include no provision on the basis of which the disputed claim could be determined – for instance, a claim that a generally applicable increase in a tax rate represents an expropriation.***

- ***The disputed claim could involve an indirect tax, in a context in which the Convention does not apply to indirect taxes.***

- ***A dispute in relation to administrative actions that are the subject of a claim might not come within the scope of the Convention.***

87. As respects any dispute over a taxation measure that could not be settled by reference to the provisions of the relevant Convention, the second sentence prohibits a claimant from recourse to dispute resolution arrangements under other treaties. The purpose of the second sentence is to prevent the involvement of such arrangements in the settlement of disputes in relation to tax measures, where such disputes are outside the scope of the Convention. The underlying approach is that even those disputes that relate to taxation measures falling outside the scope of the Convention concerned are best dealt with in the applicable tax environment rather than in the investment agreement environment.

88. Having so provided, the second sentence goes no further to limit the modes of settlement of such disputes. The investor may bring its case to the relevant courts, claiming a breach of the IIA concerned, or to any tribunal seized with such matters— but not to any dispute settlement arrangements provided under an IIA.

89. It should be noted that the prohibition or exclusion refers only to the dispute settlement arrangements under an IIA. The restriction or exclusion does not extend to the substantive provisions of an IIA— and an investor will remain entitled to invoke the protections set out in such provisions in making its claim to the Courts. Accordingly, while the second sentence disapplies IIA procedural provisions, the substantive IIA provisions are unaffected by this second leg of the extended provision.

90. In the case of disputes that cannot be settled under the Convention (second-sentence disputes), the competent authorities have discretion to allow recourse to the IIA dispute settlement arrangements— but only if both competent authorities agree to permit such recourse. In the absence of the agreement of one competent authority the exclusion of recourse to such dispute settlement arrangements will continue to apply in relation to the dispute in question.[1] In that case, the prohibition of such recourse would be the intended

[1] ***The requirement, of agreement by*** **both** ***competent authorities if discretionary access to a dispute settlement arrangement under an IIA is to be allowed, is the same as for the exercise of a similar discretion under the GATS***

result of the extended provision agreed by the Contracting States; and the parties to the dispute would be obliged to recognize and respect that prohibition, which would be beyond the powers of an IIA dispute settlement panel to set aside or ignore.[2]

91. The second sentence also recognizes the possibility of a dispute about whether a measure is a tax measure. An example would be where the tax elements of a measure might not be readily separated from significant non-tax elements of a State action: A claimant might wish to dispute the identification of the measure as a tax measure and, if there were no specific reference to such disputes in the provision, an IIA dispute settlement panel could effectively disapply the whole provision by determining that the measure was not a tax measure. However, under the extended provision, such a dispute cannot be brought to an IIA dispute settlement panel unless both competent authorities are agreeable to involving the panel in the settlement of the dispute.

92. The provision is to operate with a targeted, specific, coverage, as respects the other international treaties concerned. This targeted approach identifies relevant existing bilateral or multilateral treaties, access to the dispute settlement arrangements of which would be restricted under the extended provision. The treaties concerned would be identified by the Contracting States.

93. The adoption of the extended provision in a tax Convention will align with general whole-of-government approaches to IIAs that assign primacy to Double Taxation Conventions and to domestic tribunals and courts in relation to tax disputes. In addition, the identification of specific bilateral and multilateral treaties in the second sentence of the extended provision enables the scope of the disapplication of IIA dispute settlement arrangements by that sentence, as respects the treaties identified, to be agreed so as to recognize and complement the prior inclusion of comprehensive tax carve-outs in, or their absence from, such treaties. As respects both the general approach to the interaction of tax Conventions and IIAs and the specific identification of particular interactions, the coherence and alignment of the respective policies will be enhanced by arrangements to ensure timely and effective communication between the tax arm and the trade and investment arm of government policymaking.

94. On the agreement of an actual bilateral tax Convention, the italicized brackets and text of the Model Tax Convention would be replaced by the agreed identification of the treaties concerned, which, on a straightforward approach, could be the inclusion of the full titles of the identified treaties.

95. The Contracting States may negotiate a new IIA after they have entered into the tax Convention and wish the tax Convention to continue to have primacy in disputes concerning tax measures. In such circumstances, the Contracting States may either arrange for

provision, although the relevant matters in dispute would be different.

[2] ***Such action or omission, in respect of the extended provision prohibition, by the panel would be*** **ultra vires**, ***in the absence of any superseding provision of a subsequent treaty between the Contracting States, conferring such powers on the panel.***

appropriate tax carve-outs from the IIA concerned or, alternatively, for the agreement of a Protocol to add the new IIA to the treaties specified in the extended provision in Article 25 of the Tax Convention.

96. While the second sentence of the Model Tax Convention's extended provision included in Article 25 only applies to the IIAs identified in bilateral negotiations, some Contracting States may prefer a very broad application of the prohibition of recourse to dispute settlement arrangements under IIAs that would extend to explicitly covering treaties entered into subsequently to the agreement of the extended provision in the tax Convention concerned. In that case the extended provision could be stated to exclude recourse to such arrangements under—

"any other treaty of which the Contracting States are, or become, parties."

Any "other treaty" would be any treaty, such as bilateral or multilateral treaties, other than the Convention concerned. Such a broad coverage expressed in general terms would, of course, only be possible with the agreement in principle of both Contracting States concerned. Where the Contracting States adopt this very broad approach in the second sentence of the extended provision, they may also wish to consider replacing one or both instances of the phrase "any other treaty of which the Contracting States are parties" in the first sentence with the following words—

"any other treaty of which the Contracting States are, or become, parties."

97. Where the approach set out in paragraph 81 is adopted and the provision is intended to operate in relation to treaties later in time than the tax Convention, care should be taken (drawing upon relevant government expertise) to make sure that such an intention is clear and will be effective in practice, as treaty practice might otherwise defer to the later treaty.[3] Nevertheless, this approach of giving the tax agreement precedence over IIAs that are later in time would prima facie be effective in applying to subsequent IIAs. However, it is important to note that the Contracting States would not be bound by such a provision as to what they could agree in subsequent treaties: They could, at that later time, provide that, notwithstanding the provisions of the tax Convention, the subsequent IIA would prevail.

98. Whether the extended provision text agreed between Contracting States is the text in the Model Article 25 or follows the paragraph 81 approach, provisions of a separate treaty or other legal instrument that do not directly amend the Tax Convention concerned but, instead, apply alongside the Convention and modify its effect, could be inappropriately treated as provisions of "any other treaty", in the words of the extended provision. This would be contrary to the intention of the Contracting States that the Convention concerned should be construed together with the applicable provisions of that separate treaty or

[3] ***The Committee noted that countries considering using the approach set out at paragraph 81, should carefully evaluate the issues that could arise in relation to its interaction with their specific network of bilateral and multilateral agreements, whether with respect to international law, constitutional or other legal considerations. This, including consultation with other relevant departments or ministries, would be important for avoiding misunderstandings and inconsistencies and for ensuring the effectiveness over time of any such provisions.***

instrument. Where this consideration is relevant[4] for Contracting States that propose to include the extended provision in their bilateral tax treaty, they may wish to include a third sentence in the extended provision as follows:

"In this paragraph, references to this Convention shall be construed as including references to such provisions of any other convention or instrument as modify this Convention and references to 'any other treaty' shall be deemed not to refer to those provisions."

[4] ***For example, this would be relevant where both Contracting States are Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) and their Double Taxation Convention is a "covered tax agreement" for the purposes of the MLI. In such cases, the Contracting States may wish to refer specifically to the MLI in the third sentence of paragraph [6/7], as follows:***

> ***"In this paragraph, references to this Convention shall be construed as including references to such provisions of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting as modify this Convention and references to 'any other treaty' shall be deemed not to refer to those provisions."***