Preserving Tax Sovereignty

Leveraging the UN Tax Convention to stop tax-related cases from being diverted to investor–state dispute settlement

IISD REPORT

International Institute for Sustainable Development

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August 2026

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Abbreviations and Acronyms

ATAF	African Tax Administration Forum
BEPS	base erosion and profit shifting
BIT	bilateral investment treaties
DTA	double taxation agreement
ISDS	investor–state dispute settlement
IISD	International Institute for Sustainable Development
MAP	Mutual Agreement Procedure
MBA	mandatory binding arbitration
MFN	most-favoured nation
MLI	multilateral instrument

1.0 Purpose of This Briefing

Tax measures adopted by states are increasingly being challenged through investment arbitration. These cases go to the core of tax sovereignty: decisions over fiscal policy are assessed through investment protection standards, rather than through tax-specific mechanisms. This can expose states to high-value damages claims, costly proceedings, and pressure to delay, weaken, or avoid legitimate tax reforms because of the threat of arbitration. Tax-related investor–state dispute settlement (ISDS) risks turning the exercise of taxation powers into a source of investment treaty liability.

This briefing aims to identify possible avenues for negotiators to prevent the continued expansion of tax-related ISDS cases. This work is informed by new empirical research conducted in partnership with NYU School of Law. For this purpose, NYU students Jovan Tay and Selene Tanne, under the supervision of Professor Miranda Stewart, developed a structured database of publicly available tax-related treaty-based ISDS cases. This evidence provides the basis for the problem definition and for the options presented below.

This briefing is intended to serve as a working document for discussion. It will benefit from the input of negotiators, investment law experts, practitioners, academics, and civil society organizations. The options presented are not mutually exclusive, and each comes with advantages and limitations. Their feasibility will depend not only on legal design, but also on political support, institutional capacity, and the way they interact with existing investment agreements. The objective is therefore not to propose a single definitive solution, but to provide negotiators with a structured basis for assessing how the Framework Convention or the Protocol could help protect tax disputes from being channelled into ISDS.

This work builds on the International Institute for Sustainable Development's (IISD's) engagement on tax, sustainable investment, and the United Nations Framework Convention on International Tax Cooperation (UN FCITC). It follows IISD's 2025 publication *A Roadmap for Negotiating the Protocols to the United Nations Framework Convention on Tax*, which examined the early protocols on cross-border services taxation and dispute resolution, as well as other identified priority and potential protocols under the Framework Convention. It also builds on IISD's first dedicated publication on the topic of tax dispute resolution and ISDS, published earlier this year: *Arbitration and the United Nations Framework Convention on Tax: Risks and Lessons from Investor–State Dispute Settlement*. It set out why ISDS is ill-suited for tax disputes and identified lessons from ISDS to avoid importing similar risks into the Protocol. Building on these knowledge products, this briefing takes the analysis one step further by identifying concrete options that negotiators could consider to prevent tax-related disputes from being channelled into investment arbitration.

The briefing is sequenced as follows: it first sets out the problem by examining how tax-related ISDS cases have developed and the risks these disputes pose for states. It then explains why the UN Tax Convention process is an appropriate forum to address this issue, particularly given the limitations of relying solely on reforms to investment treaties. Finally, it presents a menu of options that negotiators could consider for inclusion in the Framework Convention or the Protocol. For each option, the briefing discusses its objective, possible technical design, legal and practical implications, and the main challenges that may arise.

2.0 The Problem: A rise in tax-related cases going to ISDS

2.1 Mapping Existing Tax-Related ISDS

Tax-related ISDS cases have become increasingly common over the past two decades. ISDS is an arbitration process distinct from the dispute resolution mechanisms included in tax treaties. It is rooted in investment treaties, investment contracts, or domestic investment laws, and allows investors to bring claims directly against states, often seeking millions of dollars in damages. The table below briefly compares ISDS with treaty-based tax arbitration known as mandatory binding arbitration (MBA).

Table 1. High-level comparison between MBA and ISDS

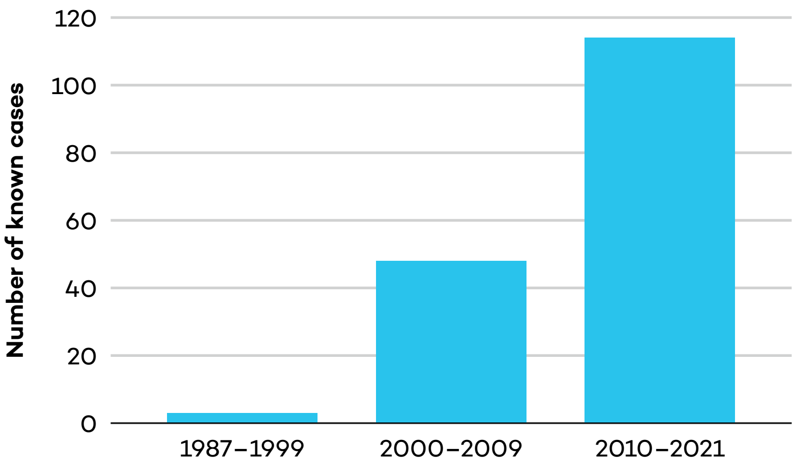
Feature	MBA	ISDS
Standing and parties	State to state, but taxpayers can trigger the initiation of the process or consent to it.	Investors to state. Investors have direct standing—no requirement to pursue settlement through domestic courts.
Scope	Limited to disputes over the interpretation or application of tax treaties.	Protections contained in investment agreements (such as bilateral investment treaties), investment contracts, or (rarely) investment laws.
Purpose	Designed to resolve disputes that the Mutual Agreement Procedure (MAP) cannot settle.	Designed to enforce investment protection in a "neutral" forum for foreign investors.
Enforcement	Implementation is through the tax authorities. Taxpayers can reject the outcome. States can agree on a different resolution.	Decisions are binding and enforceable through judicial mechanisms; no appeal possible.

Source: Authors, based on Organisation for Economic Co-operation and Development, 2019; Ostřanský et al., 2025; Owens, 2018.

Between 2000 and 2021, tax-related claims accounted for about 15% of the 1,190 publicly known treaty-based ISDS cases filed overall (United Nations Conference on Trade and Development [UNCTAD], 2022). Almost 70% of these tax-related cases were initiated between 2010 and 2021.

For this research, we conducted a mapping exercise based on the publicly available information on tax-related ISDS cases. The database identifies 134 tax-related treaty-based ISDS cases from the 2000s to the present. For each case, the research tracks variables such as the type of tax measure challenged, the existence of a tax treaty between the relevant states, what type of dispute resolution mechanisms the treaty contemplated, the investment standards alleged to have been breached, the existence of tax carve-outs or claw-back provisions in the relevant investment treaty, and the amount of compensation claimed or awarded where this information is publicly available.

Figure 1. Growth of tax-related ISDS cases over time (1987–2021)



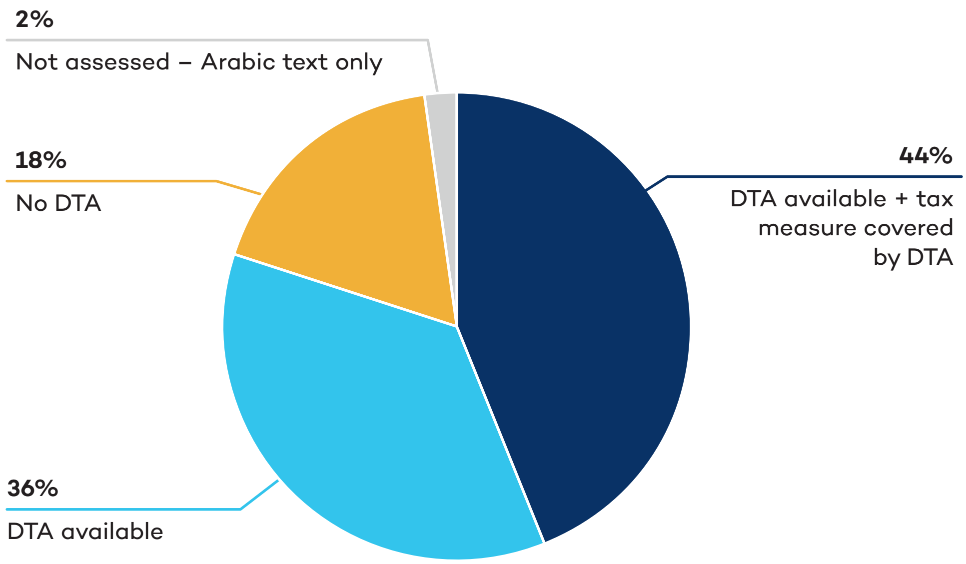
Source: UNCTAD, 2022.

The findings show why this issue is crucial for the UN Tax Convention process, especially as the negotiation process includes the development of an early Protocol on Dispute Prevention and Resolution in parallel with the negotiation of the Framework Convention. Investors have repeatedly used investment arbitration to challenge measures arising from the exercise of taxation powers. The imposition of taxes on multinational enterprises, foreign investors, or their investments often brings sovereign taxation measures into direct interaction with the rights granted to foreign investors under international investment law. When confronted with this situation, ISDS tribunals have been willing to review taxation measures where they consider that the exercise of taxation powers was abusive, unreasonable, or disproportionate (Ranjan, 2023).

Five key findings emerge from the research:

The first main observation is that tax-related ISDS often arises even where a double taxation agreement (DTA) exists between the relevant states. In 80% of the cases surveyed, there was a DTA between the home state of the investor and the host state. All of these DTAs contained dispute settlement provisions: 76% provided only for MAP, while 18.5% also included MBA. While not all taxes are covered by DTAs, the research also considered whether the specific tax at issue fell within the scope of the applicable DTA and its dispute settlement mechanisms. In fact, in 53% of the ISDS cases where there was a DTA available, the subject matter of the dispute concerned a tax covered by the DTA, usually corporate income tax or transfer pricing adjustment. This is a significant portion of cases that could have been addressed between states, with the involvement of tax authorities responsible for fiscal policy and who have expertise in the relevant subject matter. Instead, these disputes were brought before investment tribunals composed of three arbitrators, where tax expertise is not guaranteed and where the state has less agency over the process. The presence of tax treaty mechanisms does not, by itself, prevent investors from using investment treaties as a parallel route to challenge tax measures.

Figure 2. Share of tax-related ISDS cases where a DTA was available between the parties



Source: NYU collaborators and authors.

Secondly, our research showed that investment treaty safeguards have not been sufficient to prevent tax-related ISDS claims. In 65% of the tax-related ISDS cases surveyed, the relevant investment treaty contained a tax carve-out. This means that states had explicitly sought to exclude taxation from the scope of investment treaty protection. In other words, these carve-outs were included precisely to prevent tax matters from being diverted away from tax-specific dispute mechanisms and into investment arbitration. However, in almost all those cases (92%), the treaties also contained some form of claw-back, allowing certain claims relating to taxation to proceed, particularly where the investor framed the claim as expropriation, discrimination, or another protected obligation. This shows that the problem is not only the absence of tax carve-outs in investment treaties, but also their limited design and practical effect. ISDS tribunals have recognized that taxation is an integral element of a state's sovereign powers that should not be questioned lightly (*Burlington v. Ecuador, 2012; Eiser v. Spain, 2017*). But these recognitions have not prevented tribunals from reviewing tax measures under investment protection standards. In practice, tax carve-outs may not be applied depending on how the investor frames the claim and how the tribunal interprets the carve-out. The conclusion is that existing carve-outs in bilateral investment treaties (BITs) are too limited or too easily bypassed. This reinforces the concern that this cannot be addressed solely through BIT reform; it requires a collective effort on the tax side.

Third, tax-related ISDS' high costs create direct fiscal exposure for states. The outcomes of these cases also show why the issue matters for states. Of the cases with known outcomes, investors prevailed in a significant number of disputes. The database records 58 investor-favourable outcomes, compared with 43 state-favourable outcomes, with additional cases settled, pending, discontinued, or otherwise unresolved. The amounts at stake are also significant. In the cases where information on damages is publicly available, the average amount awarded against states is approximately USD 754 million, with some awards reaching up to billions of USD. It should be noted that these figures do not capture the full cost of defending ISDS claims, nor the pressure that high-value claims may place on tax administration and settlement decisions.

Fourth, the high financial risks of tax-related ISDS also have broader policy effects by weakening tax sovereignty. Governments that are aware of the possibility of costly ISDS claims may be discouraged from adopting or enforcing legitimate tax reforms. This is often described as regulatory chill. In the tax context, this can be particularly harmful because the hidden costs are not limited to litigation expenses or damages awards. They may also include revenue that is not collected, reforms that are delayed, or tax benefits that are maintained because of the perceived risk of investor claims. These effects are difficult to quantify, but they can have a real impact on public finances.

Exposure to tax-related ISDS claims has prompted some states to act to avoid a potential regulatory chill. In *Vodafone International Holdings BV v. Republic of India (2020)* and *Cairn Energy PLC and Cairn UK Holdings Limited v. Republic of India* (2020), investors successfully challenged the retrospective application of capital gains tax measures. In *Cairn*, the tribunal awarded approximately USD 1.2 billion in damages. In response, India adopted a new Model BIT explicitly excluding taxation from its scope (Ostřanský & Perez Aznar, 2021; Pathak & Singh, 2023). This approach has also been followed by several developed countries, including Canada, the United States, Japan, and the United Kingdom (Morris et al., 2024).

Lastly, our findings show that tax-related ISDS reflects broader structural asymmetries in investment arbitration. Investors bringing tax-related ISDS cases predominantly consist of parties in North America and Western Europe bringing claims against states in South America, Eastern Europe, and Central Asia, and with a growing tendency for claims to challenge multiple tax measures simultaneously (Morris et al., 2024). Tax-related ISDS cases are part of the broader asymmetries that characterize the investment arbitration system. A related finding concerns the age and type of investment treaties used in these claims. Almost all of the cases reviewed (94%) arose under first-generation treaties signed in the 1990s or early 2000s, with only eight cases arising under treaties signed after 2005. Among these, a significant number of cases arise under the Energy Charter Treaty, which accounts for 58 cases (43%) in the database. While some Energy Charter Treaty disputes concern energy policy measures that may be qualitatively different from direct income tax disputes, they still illustrate the broader risk that older-generation investment treaties can be used to challenge measures with fiscal implications. This shows that existing (and, in particular, old-generation) treaties are a central part of the problem: tax-related ISDS claims are not only a question of future treaty design but also how to address legacy instruments that continue to provide access to ISDS.

One limitation of this research should be acknowledged. Our mapping does not allow us to determine with certainty why investors choose ISDS instead of tax-specific dispute settlement mechanisms. Several possible explanations arise, including the possibility of more favourable outcomes for investors combined with the availability of damages and compensation, the absence of restrictions on pursuing both dispute settlement avenues—or turning to ISDS once the tax avenue has failed—the perceived weaknesses of tax dispute mechanisms, or even the possibility that high-value ISDS claims may discourage states from adopting taxation measures. These questions require further research.

Nevertheless, the patterns identified in the data are striking. Tax-related ISDS cases frequently arise despite the existence of DTAs with tax dispute settlement provisions and tax carve-outs in investment treaties. This alone provides a strong basis for considering a coordinated and sustainable solution to stem the diversion of tax disputes into ISDS.

2.2 Why the UN Tax Convention?

The problem we seek to address is how to prevent cross-border tax disputes from being redirected into investment arbitration. The aim is to protect sovereign tax measures adopted by states from being assessed through investment protection standards, by tribunals that often do not have tax expertise, and in lengthy and costly proceedings that generate significant fiscal exposure for states (Ostřanský et al., 2025). This concern has been raised in the UN FCITC negotiations. Several stakeholders have referred to the negative experiences with ISDS when expressing caution about arbitration-based mechanisms in tax matters (African Tax Administration Forum, 2025; Nigeria, 2025; Tax Justice Network, 2025; South Centre, 2025). This reflects a broader concern with tax sovereignty and with transferring authority over tax disputes to adjudicators outside the tax system.

The mapping above shows why this issue matters for the UN Tax Convention process. First, investors are already using ISDS to challenge a wide range of taxation measures. Second, the existence of DTAs and tax carve-outs in BITs does not necessarily prevent these claims from being filed. Third, the financial and policy consequences for states can be significant. If the Protocol aims to strengthen tax dispute prevention and resolution, it cannot leave unaddressed the risk that tax-related disputes continue to be channelled into investment arbitration. Otherwise, the Convention may improve tax-specific mechanisms while leaving open a parallel route that allows investors to bypass them.

The UN Tax Convention has an important role to play. The Protocol provides a multilateral instrument dedicated specifically to address international tax dispute prevention and resolution. It can send a clear signal that tax-related disputes should not be diverted into ISDS, which in turn may also discourage investors from using investment arbitration as a forum for tax disputes. The multilateral nature of the Framework Convention makes it a particularly important space to address this issue collectively, where different interests can be heard, including those of least developed economies, which are often among the most exposed to the consequences of tax-related ISDS. This is a key element, considering that in bilateral treaty negotiations countries may have different levels of bargaining power, technical capacity, or leverage.

In short, the UN Tax Convention provides an opportunity to create a collective tax-side response to a problem that investment treaty reform alone has not solved, preventing tax disputes from being diverted into investment arbitration.

3.0 Potential Solutions: A menu of options for negotiators to address ISDS

The three options presented below are not mutually exclusive. They should be understood as different layers of protection that can be combined. Each option addresses a different part of the problem:

- **substantive safeguards** clarify how tax measures adopted by states should be treated under international investment agreements;
- **procedural safeguards** exclude ISDS access for tax-related claims, and require competent tax authorities to decide whether a measure falls within this exclusion;
- a **coordinated amendment list** addresses existing investment treaties that continue to provide access to ISDS for tax-related disputes.

In our view, the preferable approach would be to combine these options. At a minimum, negotiators should consider including substantive safeguards in the Framework Convention and procedural safeguards in the Protocol, while remaining open to where and how each safeguard is best reflected within the UN FCITC architecture. This will depend on negotiators' assessment of the most effective legal vehicle for each option. The key objective is to ensure that the Convention process sends a clear signal that tax measures should be assessed through tax-specific dispute mechanisms by tax institutions, while expressly excluding ISDS for tax-related disputes and providing an important role for tax authorities in this decision. The coordinated amendment list would be the most important to address legacy BITs that continue to provide access to ISDS.

Table 2. Summary of the menu of options

Option	Purpose	Main opportunities	Main challenges
3.1 Substantive safeguards for tax policy space in the Framework Convention	Includes a principle in the Framework Convention clarifying that taxation measures should not give rise to breaches of investment protection standards.	Sends a clear signal that tax measures should be assessed through tax-specific mechanisms; may be more politically acceptable than a full ISDS exclusion.	It may have limited practical effect as it does not directly prohibit tax claims from being taken to ISDS.
3.2 Procedural safeguards to prevent tax-related ISDS	Provides that disputes concerning taxation measures should not be submitted to ISDS and requires competent tax authorities to decide whether a measure falls within this exclusion.	Provides the clearest way to prevent tax disputes from being diverted to ISDS; ensures tax expertise is involved in determining whether a dispute is tax-related; creates procedural obstacles that may discourage speculative or high-value claims.	Some states/ investors may view a complete exclusion as too restrictive; exceptions may become gateways for continued ISDS claims; requires coordination between tax authorities and other government actors.
3.4 Coordinated amendment list for existing investment treaties	Creates an opt-in mechanism, inspired by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("BEPS Multilateral Instrument [MLI]"), through which states can list BITs they agree to amend in relation to tax-related disputes.	Avoids renegotiating each BIT separately; creates a collective and transparent process while allowing states to retain control over which treaties they amend.	Requires coordination between tax and investment treaty negotiators; coverage may remain partial if states do not list the same BITs.

Source: Authors.

3.1 Substantive Safeguards for Tax Policy Space in the Framework Convention

3.1.1 Purpose of the Option

A baseline option for negotiators would be to include substantive safeguards in the Framework Convention strengthening the sovereign right of states to tax and clarifying how tax measures should be treated under international investment agreements. The objective is to reduce the substantive basis on which investors can challenge tax measures before investment tribunals. Unlike the safeguards discussed in Section 3.2, this option would not address the procedural route to exclude ISDS for tax-related disputes. Rather, it would provide an interpretative baseline that can help prevent ordinary tax measures from being reframed as investment treaty claims.

Drawing on the approach taken by the 2025 UN Model Tax Convention, the Framework Convention could declare that taxation measures, as defined by the Convention, should not be considered breaches of other international agreements. This would not only protect the formal right to tax, but also the state's ability to modify tax rules over time, enforce tax obligations, modify or remove tax benefits, and adopt anti-avoidance or anti-abuse measures. If the procedural safeguards mentioned in Section 3.2 are not adopted, this provision could still provide guidance to dispute settlement bodies when tax measures are invoked as the basis of an investment treaty claim.

While this option appears to fit most naturally in the Framework Convention, negotiators may also wish to consider where and how it could best be reflected within the broader UN FCITC architecture. Article 13 of the Framework Convention currently includes a placeholder on the prevention and resolution of tax disputes, which could provide a basis for including this provision. Since this safeguard is not a procedural rule on how tax disputes should be resolved, but a general principle on the treatment of tax measures, including it in the Framework Convention could give it broader interpretative relevance and provide a baseline for the Protocol and for future treaty practice.

At the same time, as the safeguard is formulated only as a general principle, investment tribunals may still have room to interpret its scope narrowly. For this reason, this option should be paired with the procedural safeguards in Section 3.2, so that investment tribunals are not left entirely free to interpret this principle.

3.1.2 Relevance to Tax-Related ISDS

This option is important because tax-related ISDS claims are often not framed only as "tax disputes." Although international investment law recognizes the sovereign right of states to tax (as seen in the previous section), tribunals have also accepted that, in certain circumstances, taxation may give rise to investment treaty claims, including claims for indirect expropriation (Ranjan, 2023). Investors may therefore argue that a tax measure violates fair and equitable treatment, legitimate expectations, indirect expropriation, non-discrimination, full protection and security, or an umbrella clause. In practice, this allows disputes about tax policy to be repackaged as investment disputes.

This safeguard would clarify that tax measures should not be treated as investment treaty violations merely because they affect the value, profitability, or expected fiscal treatment of an investment. While not addressing the procedural avenue to ISDS directly, this option would protect the state's right to tax. It's a principle declaration that signals to investors and taxpayers that tax measures are not to be repackaged as investment protection violations. It would also protect the state's ability to reform its tax system. Tax law is not static. States may need to introduce new taxes, adjust rates, remove exemptions, adopt minimum taxes, modify tax incentives, revise transfer pricing rules, strengthen anti-abuse measures, or implement internationally agreed tax standards. If every change to the tax framework can be framed as a breach of investment law, the state's ability to adapt its tax system is weakened.

3.1.3 Considerations Reflecting This Option in the Framework Convention

If negotiators decide to pursue this option, several drafting considerations should be taken into account. The text should clearly reaffirm the sovereign right of states to tax. This could be done by referring to the state's ability to design, adopt, amend, administer, enforce, apply, withdraw, or modify taxation measures. If negotiators decide to include examples of specific tax measures, the text should make clear that the list is illustrative and does not exclude other relevant measures. If, instead, negotiators decide to include an exhaustive list, the drafting should be sufficiently broad to avoid leaving important tax measures outside the safeguard, and sufficiently clear to prevent disputes over whether a measure falls within the list.

As a follow-up affirmation, we suggest including language asserting that tax measures should not give rise to breaches of international investment agreements. The purpose of this paragraph would be to address the substantive basis of tax-related ISDS claims. This is different from excluding access to ISDS as a procedural route, which is addressed in Section 3.2. It does not, by itself, prevent an investor from initiating arbitration. Rather, it would establish a substantive safeguard that limits the legal basis on which tax measures can be characterized as violations of investment treaty obligations.

The following box sets out illustrative drafting elements that could be considered if negotiators decide to reflect this option in the Framework Convention. The formulation is not intended as final treaty language, but as a basis for discussion on the scope, structure, and legal effect of the safeguard.

Box 1. Illustrative drafting to include substantive safeguards in the Framework Convention

"1. State Parties retain the sovereign right to [design, enact, amend, withdraw, administer, apply or enforce] taxation measures. For the purpose of any treaty between State Parties concerning the promotion or protection of investment, a taxation measure [PLACEHOLDER: that is in accordance with this Convention] shall not constitute a breach of that treaty."

3.1.4 Opportunities and Challenges of This Option

Table 3. Opportunities and challenges to consider when adopting substantive safeguards for tax policy space

Opportunities	Challenges
Helps prevent taxation measures from being reframed as breaches of investment standards.	It may have limited practical effect as it does not directly prohibit tax claims from being taken to ISDS.
Provides negotiators with a flexible tool to protect tax policy space without necessarily excluding all claims.	If included, a narrow list of protected measures could leave important tax measures outside the safeguard.
Sends a clear signal that tax measures should be assessed primarily through tax law and tax institutions.	Some states and investors may be concerned that broad safeguards could shield abusive or confiscatory measures.

Source: Authors.

3.2 Procedural Safeguards to Prevent Tax-Related ISDS: Exclusion of consent to arbitration and tax authority determination

3.2.1 Purpose of the Option

A second option for negotiators is to include procedural safeguards in the Protocol to prevent tax-related disputes from being submitted to ISDS. This option would combine two elements: an express exclusion of ISDS for tax-related disputes, and a mechanism requiring competent tax authorities to determine whether a claim concerns a taxation measure before an ISDS tribunal can proceed.

While the substantive safeguards discussed in Section 3.1 would reduce the legal basis for challenging tax measures under investment protection standards, this option addresses the procedural route itself. Its objective would be to clarify that disputes concerning tax measures should not be submitted to ISDS but should instead be addressed through tax-specific mechanisms or domestic remedies. Where an investor nevertheless seeks to bring a claim involving a taxation measure, the Protocol should require the question to be referred to the competent tax authorities of the relevant states before the tribunal proceeds.

This option should be understood as another layer of protection, building on the substantive safeguards discussed in Section 3.1. The substantive safeguard clarifies how tax measures should be treated. The procedural safeguards go one step further by excluding access to ISDS for tax-related disputes and ensuring that tax authorities are involved in determining whether the dispute falls within that exclusion. Even though this option can also operate as a stand-alone mechanism, negotiators should consider pairing it with broader efforts to address the continued effect of existing BITs, as discussed in Sections 3.3 and 3.4.

Contrary to what some authors have argued (Danon & Jiménez, 2025; Vlugt, 2025), removing tax-related disputes from ISDS is not inconsistent with a "whole-of-government" approach. Excluding tax-related disputes from ISDS requires tax and investment authorities to work together to determine how tax measures should be treated across overlapping treaty regimes. The purpose of the exclusion is not to fragment governance further, but to reduce fragmentation by clarifying which forum should deal with tax disputes and involving tax authorities in this decision. A whole-of-government approach should not mean that every dispute can be litigated in every forum. It should mean that the relevant authorities coordinate to ensure that tax issues are addressed by institutions with the appropriate mandate and expertise.

The involvement from tax authorities follows the standard practice of DTAs, and tax authorities' intervention is already included in some BITs (Bahrain-Republic of Korea, 2024; Canada-Mongolia BIT, 2016; Chile-Switzerland BIT, 2025; Hong Kong SAR-Chile BIT, 2016; Indonesia-Singapore BIT, 2018) and draws inspiration from the proposal made to exclude climate-related claims by Paine and Sheargold (2023).

3.2.2 Relevance to Tax-Related ISDS

This option is particularly important because existing investment treaty safeguards have often proved insufficient to prevent tax-related claims from reaching ISDS. We have observed that even where states have attempted to protect tax policy space through tax carve-outs in BITs, those carve-outs have often proved insufficient (Morris et al., 2024). Many existing BITs with tax carve-outs (92% according to our research) include claw-backs: exceptions that allow claims to proceed where investors frame their claims as expropriation or discrimination.

On top of that, we have seen that tribunals like *Yukos* (2014) have also interpreted tax carve-outs narrowly, reducing their practical effect. As a result, even a general recognition in BITs that taxation is excluded from the scope of ISDS is not enough if the application of that safeguard is left entirely to ISDS tribunals to decide. This is why an express exclusion should be paired with a procedural mechanism involving tax authorities. If an investor argues that a measure is not genuinely a tax measure, investment arbitrators will decide for themselves whether the safeguard applies. This would recreate the same problem identified in Section 2: tax disputes would continue to be filtered through investment arbitration, rather than through tax expertise.

For this reason, the Protocol could go beyond substantive guidance and establish a clearer rule on forum allocation: when a dispute concerns a tax measure, it should be addressed through tax-specific procedures or domestic remedies rather than through ISDS. This would help prevent overlap between legal regimes and reduce the possibility that investors use investment arbitration as a parallel route after, or instead of, pursuing tax remedies. To make this rule operational, the Protocol should also include a process for determining whether a claim concerns a taxation measure. The involvement of competent tax authorities would help ensure that this assessment is informed by tax expertise and not decided solely through the lens of investment arbitration.

Although a full exclusion would provide the strongest protection to prevent tax disputes being diverted to ISDS, some states may be reluctant to exclude all tax-related disputes from ISDS. This might be the case if investors are concerned that a tax measure could be used as a disguised confiscatory measure. A key question for negotiators would therefore be whether the exclusion should allow for narrow and clearly defined exceptions, and what role tax authorities should play in determining whether a dispute falls within the exclusion. Any exception may become the main gateway through which investors continue to bring tax-related ISDS claims.

However, even including some form of exception could still have important practical effects. By creating serious jurisdictional obstacles and ensuring that the threshold question is assessed through tax expertise, it may reduce the attractiveness of tax-related ISDS claims. This matters because ISDS is often used not only for the possibility of legal success but also for the pressure it exerts on states through high litigation costs, reputational concerns, and the risk of large damages (Ostřanský et al., 2025). A clear procedural safeguard would make it less likely that investors, counsel, or third-party funders view tax disputes as viable high-value investment claims. In that sense, the exclusion would not only prevent certain claims from succeeding—it could discourage them from being filed in the first place.

3.2.3 Considerations for Reflecting This Option in the Protocol

The drafting of this option should address two related issues: first, the scope and legal effect of the exclusion of ISDS for tax-related disputes; and second, the procedure for determining whether a claim concerns a taxation measure. Box 2 sets out illustrative drafting elements that could be considered if negotiators decide to reflect this option in the Protocol.

Scope and Legal Effect of the ISDS Exclusion

The provision should set out clearly that a dispute concerning a taxation measure adopted by a state should not be submitted to treaty-based investor–state arbitration. For the provision to be operational, the text should define when a dispute is considered to concern a taxation measure. This is important because investors are unlikely to present their claim as a tax dispute. Instead, they will frame the state conduct as a breach of investment protection standards. Thus, the provision should focus on the factual basis of the claim, rather than on the legal label used by the investor.

The drafting should also address legitimate concerns that states or investors may raise regarding legal certainty and pending proceedings. This is particularly important because an exclusion of ISDS for tax-related disputes should be clear about its temporal scope and should not be understood as retroactively altering the parties' positions in disputes that have already crystallized. Negotiators could therefore clarify that the exclusion would not apply to disputes that have already been submitted, notified, or formally communicated before the Protocol enters into force. This would preserve legal certainty for pending or already initiated proceedings, while ensuring that the exclusion applies to future claims.

A further consideration concerns access to justice for investors. This will depend on which options negotiators decide to adopt, especially in relation to Section 3.1. If negotiators adopt both the substantive safeguards in Section 3.1 and the express exclusion of ISDS, some investors or states may view this as restricting access to justice. Investors may then seek to bring tax-related claims as a denial of justice to argue that access to arbitration was improperly denied. If negotiators adopt only the express exclusion of ISDS, BIT protections will formally remain available; the exclusion would only apply to ISDS for tax-related disputes. If investors consider that a tax measure breaches protections granted under BITs, they would still be able to seek review through domestic courts and administrative procedures.

Finally, negotiators may need to decide whether to include any exceptions to the exclusion. If they consider this necessary, the exceptions should be introduced after clarifying the scope of the exclusion. However, any exception should be drafted narrowly to avoid becoming the main gateway through which tax-related ISDS claims continue to be brought.

Tax Authority Determination Mechanism

To make the exclusion effective, the Protocol should also establish a procedure for determining whether a claim concerns a taxation measure. The main function of this mechanism would be to ensure that an ISDS proceeding involving a tax measure does not continue before there has been a determination by the competent authorities, such as tax authorities or ministries of finance, on the nature of the measure.

The provision should set out the procedure for triggering the mechanism. Similar provisions in the Chile–Switzerland BIT (2025) and the Indonesia–Singapore BIT (2018) could be taken as a departure point. These provisions require the respondent state to refer the matter in writing to the competent authorities of both the respondent state and the home state of the investor within a fixed time frame. This is intended to prevent abuse of process: these mechanisms should not be used to delay proceedings once they have already advanced, but rather as an early defence available to states.

The request for a joint determination should suspend the proceedings, as the arbitration and the tax procedural filter should not move forward at the same time. To avoid extensive delays, similar provisions provide for a 6-month time frame for the suspension. Negotiators could adapt this timeline according to their experiences and needs.

The drafting should also clarify what the possible outcomes from the tax authority determination and the consequences attached to each of them are. In the case of the BITs mentioned above, if the competent authorities agree that the measure is a taxation measure, the determination is binding, and the claim should not proceed under ISDS. This is the most important feature of the mechanism. If an ISDS tribunal could disregard the conclusion reached by the competent authorities, the mechanism would be merely consultative and would not meaningfully shift the threshold question away from investment arbitrators.

On the other hand, if there is an unfavourable or no joint determination within the agreed time frame, the suspension ceases to apply, and the case may proceed to ISDS. However, the absence of a joint determination should not be treated as confirmation that the disputed measure is not a tax measure, and the tribunal should not draw any adverse inference from it. This avoids turning silence or disagreement between the competent authorities into a substantive decision against the respondent state.

Box 2. Illustrative drafting to include procedural safeguards to prevent tax-related ISDS

A. Exclusion of consent to ISDS for tax-related disputes

"1. No claim may be submitted to, or pursued in, investor–State dispute settlement under any investment treaty between the State Parties in respect of a taxation measure. 'Taxation measure' means a measure of a State Party relating to the imposition, administration, collection, or enforcement of taxes, whether adopted under the domestic law of the State Party or pursuant to any international agreement or arrangement relating to taxation by which it is bound.

2. This provision shall not apply to disputes that have already been submitted, notified, or formally communicated before the entry into force of this Protocol between the relevant State Parties.

3. Nothing in this provision shall prevent investors from seeking review of taxation measures through domestic administrative procedures, domestic courts, tax tribunals, or tax-specific dispute settlement mechanisms."

B. Tax authority determination mechanism

"4. Where an investor submits a claim to investor-state dispute settlement that the respondent State Party considers to concern a taxation measure covered by [paragraph 1], the respondent State Party may refer to its Competent Authority and to the Competent Authority of the State Party of the investor the question of whether and to what extent [paragraph 1] applies to the claim. Any such referral shall be made no later than the date fixed for the respondent's first submission on the merits, and the respondent shall promptly notify the tribunal or other body seized of the claim.

5. The Competent Tax Authorities concerned shall consult and endeavour in good faith to reach a joint determination on whether and to what extent [paragraph 1] applies to the claim, and shall promptly notify the disputing parties and the tribunal of any joint determination reached or of their inability to reach one. The absence of a joint determination shall be without prejudice to the right of the respondent State Party to invoke, at a later stage of the proceedings, that the measure is a taxation measure or that the dispute falls within the scope of this Protocol. The arbitral tribunal shall draw no adverse inference from the absence of a joint determination.

6. Where the Competent Tax Authorities under [paragraph 5] determine that [paragraph 1] applies to the claim in whole or in part, the investor is deemed to have withdrawn, and to have discontinued the proceeding in respect of, the claim or that part of it. The tribunal shall take note of the discontinuance and shall have no authority to proceed with the claim or part so discontinued. Any part not covered by [paragraph 1] may continue to be pursued.

7. From the date of a referral under [paragraph 4] until a determination is made or the applicable period expires, the tribunal shall suspend its proceedings."

3.2.4 Opportunities and Challenges of This Option

Table 4. Opportunities and challenges to consider when adopting procedural safeguards to prevent tax-related ISDS

Opportunities	Challenges
Provides the clearest way to prevent tax-related disputes from being channelled into ISDS.	Some states and investors may view a complete exclusion as overly restrictive, particularly if they are concerned that it removes investment law oversight.
Reduces the risk that ISDS tribunals narrowly interpret tax safeguards or exclusions, by ensuring that the threshold question is assessed through tax expertise.	If exceptions are included, they require careful drafting to avoid them becoming a gateway for continued ISDS claims.
Discourages the filing of speculative or high-value tax-related ISDS claims by creating procedural obstacles.	Some states may need additional institutional capacity to respond quickly and coordinate across ministries and in partnership with other countries' competent authorities.
Preserves investors' access to domestic remedies under tax and investment treaty protections.	The exclusion may be ineffective against legacy BITs unless paired with provisions on treaty interaction or coordinated BIT reform (see Option 3.3).

Source: Authors.

3.3 Coordinated Amendment List

3.3.1 Purpose of the Option

A complementary option for negotiators would be to consider a coordinated mechanism to amend the application of existing BITs to tax-related disputes. This option responds to one of the main limitations of the options discussed above: even if the Protocol includes substantive and/or procedural safeguards, investors may still rely on existing investment treaties that provide the jurisdictional basis for tax-related ISDS claims.

The Protocol therefore needs to address its relationship with the legacy BITs that allow tax-related claims under ISDS, especially considering how 94% of the cases identified in Section 2.1 arose from old-generation treaties. A coordinated amendment list could provide the cleanest and most organized format for doing so. Instead of assuming that the Protocol automatically overrides all investment treaties, states could expressly identify the treaties they agree to amend for the purposes of tax-related disputes.

This mechanism could draw inspiration from the approach used in the BEPS MLI. The MLI does not replace existing tax treaties. Rather, it amends the application of tax agreements that the parties have expressly listed as covered agreements (Cui, 2024). So far, the MLI has been signed by 107 jurisdictions and covered more than 1,900 tax treaties, out of more than 3,000 tax treaties worldwide (Laudage Teles, 2023; Organisation for Economic Co-operation and Development, 2026). A similar approach could be considered in the context of tax-related ISDS, as an opt-in system. States could be invited to list the BITs that they agree to amend for the purposes of tax-related disputes. Where both parties to the same BIT list that treaty, the relevant BIT would be amended to reflect the safeguards included in the UN Tax Convention.

This option reinforces the effectiveness of the options set out in Sections 3.1 and 3.2. Without a mechanism to address existing BITs, investors may continue to rely on legacy treaties to bring tax-related ISDS claims, even where states have agreed that tax disputes should be handled through tax-specific procedures. A coordinated amendment list would therefore help ensure that the Protocol does not remain limited to future disputes under the UN Tax Convention but also addresses the existing treaty network that currently enables tax-related ISDS.

3.3.2 Relevance to Tax-Related ISDS

This option is relevant because tax-related ISDS is not only a problem of future treaty design. It is also a problem of existing treaties, and almost all that gave rise to tax-related ISDS. Many BITs currently in force were negotiated before states had fully considered the risks of tax-related ISDS. These treaties often contain broad ISDS clauses, general standards of protection, tax carve-outs with claw-backs, and other provisions that investors may rely on to bring tax-related claims.

The main advantage of this approach is that it would avoid the need to renegotiate each BIT separately. It would also allow states to act collectively and transparently, while retaining control over which treaties they agree to amend. This is particularly important given the large number of existing BITs—2,625 as of 2025, according to UNCTAD (2025)—and the practical difficulties of reforming them one by one. A coordinated amendment mechanism could therefore create a practical bridge between the UN Tax Convention process and the longer-term reform of investment treaties.

This option does not imply that the Protocol automatically overrides all investment treaties as a matter of treaty conflict. Rather, it creates a reciprocal process through which states identify the BITs they agree to amend, not a unilateral derogation. It is an agreed amendment between the parties to the relevant BIT limited to the treatment of tax-related disputes.

This clarification is important because concerns may arise over the relationship between the Protocol and existing BITs. It has been argued that the UN Tax Convention and BITs do not concern the same subject matter, and that treaty conflict rules such as Article 30 of the Vienna Convention on the Law of Treaties may therefore not, by themselves, resolve the relationship between them (Vlugt, 2025). However, the coordinated amendment mechanism proposed here would not depend on the Protocol automatically prevailing over existing BITs as a matter of treaty conflict. Rather, it would operate through the express consent of the relevant state parties to amend the application of specific investment treaties that they have both listed. In this sense, the relevant basis would be Article 39 of the Vienna Convention on the Law of Treaties, which allows treaties to be amended by agreement between the parties.

States can expressly agree, through a coordinated mechanism, to amend specific BITs that both parties have listed in relation to tax-related disputes.

However, it is important for the mechanism to be clear in how it works. Following the logic of the BEPS MLI, the instrument should provide that, where a covered investment treaty is amended, the Protocol prevails in the event of any incompatibility in relation to tax-related disputes. This would be particularly important where existing BITs contain broad clauses that could otherwise be invoked to resist the application of the Protocol. As Peat et al. (2025) note in relation to similar reform proposals, some investment treaties contain clauses that may complicate later amendment. The mechanism should therefore clarify that such clauses do not prevent the agreed amendment from taking effect between the parties.

3.3.3 Considerations for Reflecting This Option in the Protocol

The design of this option could draw inspiration from the logic of the BEPS MLI, while adapting it to the relationship between the Protocol and existing investment treaties. The objective would be to create an opt-in mechanism through which states can identify the investment treaties they agree to amend in relation to tax-related disputes.

A first drafting consideration concerns the definition of "Covered Investment Treaties." The Protocol would need to clarify that only BITs expressly identified by the relevant state parties would be amended. This would mean that both parties would need to list the treaty for it to become a Covered Investment Treaty.

A second consideration concerns the listing mechanism. The Protocol would need to establish where and how states should deposit the list of investment treaties they agree to amend. This could be done through the relevant body responsible for administering the implementation of the UN FCITC. The procedure should be sufficiently clear to allow states and investors to know which treaties have been covered, between which parties, and from what date.

A third consideration addresses the legal effect of the amendment. Where a treaty becomes a Covered Investment Treaty, the Protocol should clarify that its provisions concerning tax-related disputes would apply to that treaty and prevail in the event of incompatibility. This would help ensure that, for covered treaties, the Protocol governs the treatment of tax-related disputes, regardless of pre-existing language included in the investment treaty. The drafting should also address the possible use of MFN clauses. Investors may try to rely on MFN provisions in a Covered Investment Treaty to import more favourable access to ISDS from a non-covered treaty. The Protocol could therefore clarify that MFN clauses cannot be used to bypass the treatment of tax-related disputes established for Covered Investment Treaties.

Box 3 sets out illustrative drafting elements that could be considered if negotiators decide to reflect this option in the Protocol. The formulation is not intended as final treaty language, but as a basis for discussion on the scope, structure, and legal effect of the safeguard.

Box 3. Illustrative drafting to include a coordinated amendment list in the Protocol

"1. This Protocol amends, in relation to tax-related disputes, all Covered Investment Treaties, meaning any bilateral treaty concerning the promotion or protection of investment which the two State Parties to that treaty have identified in a list deposited with [TBC: the relevant administrative body].

2. Where a treaty is a Covered Investment Treaty, the provisions of this Protocol concerning tax-related disputes shall apply to that treaty and shall prevail to the extent of any incompatibility in relation to tax-related disputes."

3.3.4 Opportunities and Challenges of This Option

Table 5. Opportunities and challenges to consider when adopting a coordinated amendment mechanism for existing investment treaties

Opportunities	Challenges
Allow states to amend selected BITs collectively, rather than renegotiating each BIT separately.	This option is legally and politically more complex than safeguards included directly in the Protocol. It requires coordination between tax negotiators, investment treaty negotiators, and other relevant government authorities.
Addresses one of the main limitations of the Protocol by targeting the existing BITs that provide access to ISDS.	The mechanism may benefit from additional rules on matching, entry into force, reservations, and its administering body.
Helps create coherence between the tax treaty system and the investment treaty system.	The mechanism would only amend BITs where both parties agree to list the same treaty, meaning coverage may remain partial.

Source: Authors.

3.4 Longer-Term Agenda: Reforming BITs and future investment treaty practice

The options discussed above focus on what negotiators could include in the Framework Convention or in the Protocol to prevent tax-related disputes from being diverted into ISDS. However, these options should not be understood as a substitute for broader investment treaty reform. They are part of a tax-side response to the problem, but the investment treaty system also needs to be addressed directly.

This is important because existing legacy BITs will continue to provide the legal basis for tax-related ISDS claims unless they are modified, replaced, or terminated (Ostřanský et al., 2025). Even in the case of a coordinated amendment list, investors may still try to structure their investment through another jurisdiction to rely on a different BIT that allows them to trigger ISDS. This can create risks of forum shopping and could reduce the practical effect of reforms adopted only in specific treaties (Vlugt, 2025). For this reason, a durable response to tax-related ISDS also requires investment policymakers to review the existing BIT network and identify where tax-related claims may still be possible. This longer-term agenda could include terminating outdated BITs, replacing them with modern investment treaties, removing or limiting consent to ISDS, and narrowing investment protection standards (Ostřanský & Bonnitcha, 2024).

Tax and investment reform need to move together. The UN Tax Convention can provide an important collective response from the tax side, but it cannot fully solve the problem if legacy BITs continue to provide alternative routes to ISDS. For this reason, the work under the Convention should be seen as part of a wider reform agenda requiring coordination between tax authorities, ministries of finance, and investment treaty negotiators.

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