

Article 25(6) OECD MC 2025: GATS national treatment and tax treaties

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1. Introduction

Both tax treaties and international trade law contain non-discrimination provisions, and those rules might substantively overlap. There are, of course, numerous differences between the two regimes: Tax treaties cover taxpayer-State relations,¹ while WTO law addresses State-State relations.² Non-discrimination provisions along the lines of Art 24 OECD MC are commonplace in the more than 3.500³ existing (bilateral) tax treaties, while the WTO regime is multilateral in nature. Tax treaties continue to thrive as bilateral and reciprocal solutions, while the WTO system seems to be increasingly under pressure.⁴ In any event, after the 2025 Updates of the OECD and the UN Models, both WTO law (Art XXII:3 GATS) and the tax treaty models (e.g., Art 25(6) OECD MC 2025) explicitly address the relationship between those two spheres of law and their respective non-discrimination obligations. This contribution will briefly explore the national treatment obligation under Art XVII GATS (Chapter 2), followed by a discussion of the 'procedural defence' under Art XXII:3 GATS and its effectuation by Art 25(6) OECD MC 2025 (Chapter 3). Chapter 4 will conclude. This contribution will, however, not reflect on the UN

1. Although it should be noted that the non-discrimination article in some tax treaties is structured as a government-to-government matter and does not confer rights on taxpayers (see, e.g., Art 24 of the 1982 Australia-US tax treaty).

2. Although the EU is party to the WTO and the GATT and GATS are binding on it (Art 216(2) TFEU), the WTO rules do not have direct effect in the EU legal system in the sense that they could be claimed by taxpayers in national courts (see, e.g., CJEU, 12 Dec. 1972, 21-24/72, *International Fruit Company*, EU:C:1972:115, para. 27; CJEU, 23 Nov. 1999, C-149/96, *Portugal v. Council*, EU:C:1999:574, para. 27; CJEU, 2 May 2001, C-307/99, *OGT Fruchthandelsgesellschaft mbH*, EU:C:2001:228, para. 29-39).

3. OECD, *Enhancing Simplicity to Foster Tax Certainty and Growth: OECD Report to the G20* (OECD Publishing, 2025), 17.

4. See e.g., Gisela Grieger, *The WTO's negotiating function – Towards plurilaterals and new trade challenges*, European Parliamentary Research Service PE 760.443 (Apr. 2024) 1; Joost Pauwelyn, *The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?* 22:5 World Trade Review 2023, 693 (693-701); Gisela Grieger, *International trade dispute settlement: World Trade Organisation Appellate Body crisis and the multi-party interim appeal arbitration arrangement*, European Parliament Research Service PE 762.342 (June 2024).

Model's 'extended provision', which goes beyond the 'GATS clause' and aims at removing the discipline of taxation from investment arbitration.⁵

2. National treatment under the General Agreement on Trade in Services (GATS)

While the product-focused General Agreement on Tariffs and Trade (GATT) only has limited impact on direct taxation, that is potentially different for General Agreement on Trade in Services (GATS).⁶ That multilateral agreement applies to 'measures by Members affecting trade in services' (Art I:1 GATS) and defines 'trade in services' as 'the supply of a service'.⁷ The 'measures' that might affect trade in services include direct tax measures.⁸ Moreover, the notion of 'direct tax' covers, inter alia, income taxes (Art XXVIII(o) GATS).⁹ Those measures are within the scope of GATS if they 'affect trade in services' (Art I:1 GATS), which is understood in the broader sense of having 'an effect on services', and not the much narrower sense of specifically seeking to regulate or govern trade in services.¹⁰ The 'origin' of foreign services or foreign service suppliers trading under the modes of supply is defined in Art XXVIII GATS, relying, among other things, on nationality, creation, ownership, and control; these concepts, of course, do not necessarily coincide with the notion of 'residence' in domestic tax law or tax treaties.

GATS provides for most-favoured nation treatment (Art II GATS) and for national treatment (Art XVII GATS). In principle, both non-discrimination provisions apply to the tax treatment of

5. For a critical discussion of the 'extended provision' (Art 25(6) UN MC) see, e.g., Robert Danon/Adolfo Martín Jiménez, *The UN Model Tax Convention's Attempt to Override Investment Treaties: A Critical and Normative Assessment*, 177 Tax Notes International 825 (841-848) (Feb. 10, 2025); Robert Danon, *Relation between Non-Discrimination Clauses under Double Taxation Conventions and International Investment Agreements: The Impact of the New International Investment Agreement Clause in the UN Model*, in: Guglielmo Maisto (ed.), *The Non-Discrimination Provision in the OECD Model* (IBFD, 2025) Chapter 3.2.2.; Sam Jacob van der Vlugt, *Excluding Investment Arbitration through Double Tax Agreements with a New Article 25 of the UN Model: A Feasible Way Forward?* 18:1 World Tax Journal 2026; Georg Kofler, *Non-Discrimination of Foreign Firms, Persons, and Products*, 80:4 Bulletin for International Taxation 2026. For an anticritical position see Suranjali Tandon/Chetan Rao, *U.N. Model Article 25 Extended Provision and Investor-State Dispute Settlements*, 120 Tax Notes International 1991 (1991-1999) (Dec. 22, 2025).

6. For a recent discussion see, e.g., Georg Kofler, *Non-Discrimination of Foreign Firms, Persons, and Products*, 80:4 Bulletin for International Taxation 2026.

7. Such as the cross-border supply and consumption of services, but also the commercial presence for the supply of services (Art I:2 GATS): the 'supply' of a services includes the production, distribution, marketing, sale and delivery of a service (Art XXVIII(b) GATS). The modes of 'supply' cover the 'cross-border supply' and 'consumption of services' (modes 1 and 2), and the cross-border movement of the service suppliers through the establishment of branches or subsidiaries ('commercial presence'; mode 3) or in person ('presence of natural persons'; mode 4). The coverage of 'services' is broad: The WTO lists around 160 different types of 'services', grouped under twelve broad headings (e.g., business services, financial services, health-related and social services, tourism and travel-related services, transport services etc) and sub-divided down to three levels.

8. See, e.g., *Group of Negotiations on Services, Chairman's Statement*, MTN.GNS/49 (11 Dec. 1993) 1; Vincent Beyer, *Direct Taxes and the GATS: Substantive and Procedural Defences for Non-compliant Income Tax Measures*, 52:3 Journal of World Trade 2018, 351 (352-353).

9. Under that provision, 'direct taxes' comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amount of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

10. See, e.g., Panel Report, 30 Sept. 2015, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/R, para. 7.99 et seq.

local subsidiaries and branches of a foreign service provider.¹¹ However, the impact on direct taxation is limited in several ways.¹² For example, the major tax-related exception from most-favored national treatment concerns difference in treatment that 'is the result of an agreement on the avoidance of double taxation' (Art XIV(e) GATS). As for the national treatment obligation, under Art XVII GATS

'each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers'.¹³

However, the States' reluctance to apply national treatment unconditionally to direct taxation is expressed in two provisions, one substantive (Art XIV(d) GATS) and one procedural (Art XXII:3 GATS); those exemptions were introduced because

'tax experts [...] felt so strongly about the matter that they were able to force late changes [...] despite concerns [...] that this demand could unravel the GATS as a whole'.¹⁴

As for the 'substantive defences', the concerns that certain tax measures that differentiate based on taxpayer residency could breach the national treatment obligation of Art XVII GATS are explicitly addressed in Art XIV(d) GATS: subject to the 'chapeau', this provision explicitly allows measures that diverge from the national treatment provision if such differences are 'aimed at' ensuring 'equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members'.¹⁵ The scope of this exception is further clarified in footnote 6 to that Article, which offers a list of measures that meet the 'equitable or effective' criteria, broadly upholding, *inter alia*, different taxation of residents and non-residents and measures to prevent the 'avoidance or evasion of taxes', and arguably covering numerous international tax measures, ranging from withholding taxation to thin capitalization and CFC rules:

'[A] large number of specific tax measures were mentioned as illustrations of the kind of action which might be taken by governments to meet the objectives mentioned in the footnote: for example, the imposition of withholding taxes or the denial of personal reliefs and reductions; the non-granting of dividend tax credits to non-residents; reporting, record-keeping and collection systems for cross-border transactions; meas-

11. See, e.g., Michael Daly, *Is the WTO a World Tax Organization? A Primer for WTO Rules for Policy Makers*, IMF Technical Notes and Manuals (Mar. 2016) 27-28.

12. See, e.g., Servatius van Thiel, *International Tax Law and International Trade Law*, in: Florian Haase/Georg Kofler (eds), *The Oxford Handbook of International Tax Law* (Oxford University Press, 2023) 213 (225-226); Lijun Zhao/Angelina Karaivanova/Pengfei Zhang, *The Complementary Role of the WTO in the Enhancement of the Base Erosion and Profit Shifting Project*, 2 World 2021, 267 (283); see also Vincent Beyer, *Direct Taxes and the GATS: Substantive and Procedural Defences for Non-compliant Income Tax Measures*, 52:3 Journal of World Trade 2018, 351 (351-373).

13. This national treatment obligation does not apply generally, but rather only if a member has scheduled market access commitments under Art XVI GATS and not scheduled specific exceptions from the national treatment obligation (so-called 'bottom up' approach). See the EU's consolidated schedule of commitments in GATS/SC/157 (7 May 2019) ([2019] OJ C 278/1 (16 Aug. 2019)) as amended by GATS/SC/157/Suppl.1 (27 Feb. 2024) ([2022] OJ L 315/71 (7 Dec. 2022)). There, all Member States, for instance, have indirectly limited the national treatment obligation in respect of, *inter alia*, direct taxes, by inscribing in its schedule of commitments (GATS/SC/157) a horizontal limitation on national treatment that provides in relation to mode 3 (and for Austria also for modes 1 and 4) that the national treatment obligation applies only to the establishment of subsidiaries and not also to branches of companies from non-EU Member States. Moreover, the schedule explicitly provides that less favourable treatment may be given to European subsidiaries of companies from third countries unless it can be shown that these subsidiaries have an effective and continuous link with the economy of one of the Member States.

14. Michael Lennard, *The GATT 1994 and Direct Taxes: Some National Treatment and Related Issues*, in: Michael Lang/Judith Herdin/Ines Hofbauer (eds), *WTO and Direct Taxation* (Kluwer Law International, 2005) 73 (76); for an extensive analysis see Nicolas F. Diebold, *Non-Discrimination in International Trade in Services: 'Like-ness' in WTO/GATS* (Cambridge University Press, 2010).

15. 'Direct taxes' are defined in Art XXVIII(o) GATS somewhat similar to Art 2 OECD MC and might therefore exclude, e.g., digital services taxes (DSTs); see also, e.g., Chris Noonan/Victoria Plekhanova, *Taxation of Digital Services Under Trade Agreements*, 23:4 Journal of International Economic Law 2020, 1015 (1035).

ures that reduce the tax burden on persons subject to tax on their world-wide income; thin capitalization measures and measures that tax resident persons on all or part of the income, profits or gains earned by a non-resident. The number of possible examples is almost infinite [...].¹⁶

Measures

'found to be justified under the footnote would normally be expected also to meet the requirement in the chapeau to Art XIV that they should not constitute a disguised restriction on trade'.¹⁷

Hence, only exceptionally will a direct tax measure fall outside the broad exception of Art XIV(d) GATS.¹⁸ One example might be a situation where a State subsidizes domestic activities by offering a tax benefit only to residents who purchase services domestically and not from a non-resident service supplier.¹⁹

3. Dispute resolution in tax matters (Art XXII:3 GATS and Article 25(6) OECD MC 2025)

The GATS not only substantively carves out a broad range of direct tax measures as 'substantive defences' under Art XIV GATS, but also broadly blocks access to dispute resolution in tax matters as a 'procedural defence' under Art XXII:3 GATS.²⁰ This provision reads:

'3.A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services. The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.'

Under that provision, therefore, Members may not invoke national treatment (Art XVII GATS) either for consultation (Art XXII) or dispute settlement and enforcement (Art XVIII GATS)

'with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation'.²¹

Art XXII:3 GATS does not 'switch off' the substantive national treatment obligation, but rather removes the option of a remedy under the WTO dispute settlement process,²² making it essentially a *lex imperfecta* in tax treaty situations. If the respective States disagree 'as to whether a measure falls within the scope' of a tax treaty, that matter can be brought before the Council for Trade in Services, with subsequent final and binding arbitration. For pre-GATS (i.e., pre-1995 or pre-accession²³) tax treaties, a footnote indicates that this recourse is only available with both States' consent:

16. *Group of Negotiations on Services, Chairman's Statement*, MTN.GNS/49 (11 Dec. 1993) 3.

17. *Group of Negotiations on Services, Chairman's Statement*, MTN.GNS/49 (11 Dec. 1993) 3.

18. See also the discussion of various domestic regimes by Servatius van Thiel, *General Report*, in: Michael Lang/Judith Herdin/Ines Hofbauer (eds), *WTO and Direct Taxation* (Linde, 2005) 13, p. 40-44.

19. See Jennifer E. Farrell, *The Interface of International Trade Law and Taxation* (IBFD, 2013) Chapter 8.6.2.

20. See on that 'procedural defence' extensively V. Beyer, *Direct Taxes and the GATS: Substantive and Procedural Defences for Non-compliant Income Tax Measures*, 52:3 *Journal of World Trade* 2018, 351, p. 354-365.

21. For a brief analysis see, e.g., Jennifer E. Farrell, *The Interface of International Trade Law and Taxation* (IBFD, 2013) Chapter 8.4.2.2.

22. Vincent Beyer, *Direct Taxes and the GATS: Substantive and Procedural Defences for Non-compliant Income Tax Measures*, 52:3 *Journal of World Trade* 2018, 351, p. 355.

23. For a detailed discussion *ratione temporis* see Vincent Beyer, *Direct Taxes and the GATS: Substantive and Procedural Defences for Non-compliant Income Tax Measures*, 52:3 *Journal of World Trade* 2018, 351, p. 357-361.

‘With respect to agreements on the avoidance of double taxation which exist on the date of entry into force of the WTO Agreement, such a matter may be brought before the Council for Trade in Services only with the consent of both parties to such an agreement.’

Switching from a GATS to a tax treaty perspective, two issues have been highlighted: First, the distinction between pre- and post-GATS tax treaties was seen as inappropriate, especially in the case of a subsequent renegotiation or amendment of a pre-existing tax treaty. Second, the phrase ‘falls within the scope’ is inherently ambiguous, as it is

‘unclear whether the phrase covers all measures that relate to taxes that are covered by all or only some provisions of the tax convention’.²⁴

This question is, for example, relevant for digital services taxes, which are generally not ‘covered taxes’ (Art 2 OECD MC), but may nevertheless be viewed to abstractly ‘fall’ under an OECD-modelled tax treaty’s non-discrimination provision (Art 24(6) OECD MC).²⁵ Conversely, a narrow perspective focusing on the concrete substantive scope could be taken, for example arguing that cases of *de facto* discrimination do not ‘fall’ within a tax treaty’s scope, as treaty non-discrimination clauses only address direct discrimination.²⁶

These two issues were addressed not only, e.g., in the US MC since 1996,²⁷ but – until 2025 – also as alternative provisions in the OECD and UN MC Commentaries.²⁸ Both, the 2025 Updates to the UN MC and the OECD MC²⁹ brought their alternative provision into the texts of the respective Model Convention, to provide ‘a clear, consistent framework to address potential issues arising from the interaction between tax treaties and the GATS’.³⁰ In essence, the new wording of Art 25(5) UN MC 2025³¹ simply transfers the existing alternative provision into the Model and – just as Art 1(3) US MC 2016³² and the pre-2025 alternative provision in the OECD MC Commentaries³³ – leaves the decision, also for post-GATS tax treaties, whether a measure falls ‘falls within the scope’ of a tax treaty to an agreement between the competent tax authorities and effectively gives each of them a veto with regard to GATS dispute resolution. Art 25(6) of the 2025 OECD Model Update shares a similar objective to the pre-2025 alternative provision and the UN MC 2025 but goes further by defining the circumstances in which a measure ‘falls within the scope’ of a tax treaty by reference to the non-discrimination provision of Art 24. Expanding the footnote to Art XXII:3 GATS, disputes as to whether this is the case are removed from GATS for all pre- and post-GATS treaties and put in the hands of the competent authorities. Art 25(6) OECD MC 2025 reads:

24. See, e.g., Art 25 para. 91-92 OECD MC Comm. 2017 and Art 25 para. 91-92 OECD MC Comm. 2025.

25. See for that issue also Chris Noonan/Victoria Plekhanova, *Taxation of Digital Services Under Trade Agreements*, 23:4 Journal of International Economic Law 2020, 1015, p. 1036.

26. See Vincent Beyer, *Direct Taxes and the GATS: Substantive and Procedural Defences for Non-compliant Income Tax Measures*, 52:3 Journal of World Trade 2018, 351, p. 356.

27. See Art 1(3) US MC 1996/2006/2016, and for an analysis of the 1996 US Model see Richard L. Doernberg/Kees van Raad, *The 1996 United States Model Income Tax Convention: Analysis, Commentary and Comparison* (Kluwer Law International, 1997), p. 10-11.

28. Art 25 para. 93 OECD MC Comm. 2017.

29. OECD, *The 2025 Update to the OECD Model Tax Convention* (OECD Publishing, 2025).

30. Art 25 para. 59 UN MC Comm. 2025.

31. As the UN MC contains two alternatives for Art 25, with both largely reproducing Art 25 of the OECD MC and Alternative A omitting paragraph 5 on arbitration, and Alternative B including it, also the new so-called ‘GATS provision’ – which is inserted before the new ‘extended provision’ (see *infra* Chapter 4.) – comes in two alternatives, Art 25(5) (Alternative A) and Art 25(6) (Alternative B). For simplicity, the following text will focus on Alternative A.

32. See for the corresponding provision in the 1996 US Model already R. L. Doernberg/K. van Raad, *The 1996 United States Model Income Tax Convention: Analysis, Commentary and Comparison* (Kluwer Law International, 1997) 10, noting that, ‘unless the competent authorities otherwise agree, any national treatment [...] obligations contained in other treaties between the Contracting States are not applicable to a taxation measure’.

33. See Art 25 para. 93 OECD MC Comm. 2017.

'6. For purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that –
 a) a measure 'falls within the scope of this Convention' only if it is a measure to which the provisions of Article 24 apply; and
 b) notwithstanding paragraph 3 of Article XXII of the General Agreement on Trade in Services, any dispute between them as to whether a measure falls within the scope of this Convention shall be resolved under paragraph 3 of Article 25 or, failing agreement under that procedure, any other procedure agreed to by both Contracting States.'

The rationale behind Art 25(6) OECD MC 2025 is that where

'the non-discrimination discipline provided by Article 24 applies to a 'measure', that discipline should not be displaced by the non-discrimination obligations provided under Article XVII of the GATS'.³⁴

Hence, if implemented, the tax treaty would take full priority over GATS in the 'discipline' of non-discrimination: the interaction between Art 25(6) OECD MC 2025 and Art XXII:3 GATS means that a national treatment dispute between treaty partners involving any tax matter (Art 24(6) OECD MC) – whether or not actually addressed by Art 24 OECD MC – may only be solved under a mutual agreement procedure under Art 25 (applying the non-discrimination provisions of Art 24) and will only be brought into the GATS process if both treaty partners agree that either a measure does not 'fall within the scope of [the] Convention' or 'the dispute should be resolved by the Council for Trade in Services'.³⁵ Conversely, if Art 25(6) OECD MC is adopted in a bilateral treaty, the national treatment under Art XVII GATS will remain directly relevant for non-income taxes only if such treaty – in deviation from Art 24(6) OECD MC – restricts its non-discrimination provisions to 'covered taxes' under Art 24 OECD MC.³⁶

Of course, neither the UN MC nor the OECD MC (can) address the specific situation of the EU and its Member States, all of which are members of the WTO. The EU's exclusive competence for the common commercial policy (Art 3(1)(e) TFEU), which includes the commitments under GATS,³⁷ makes the Union the sole proper respondent or claimant in the WTO dispute settlement context from a European perspective (Art 207 TFEU).³⁸ Conversely, it is not the EU but rather the Member States which have the competence to (and do) enter into tax treaties, which might include provisions such as Art 25(5) UN MC or Art 26(5) OECD MC. By its literal terms, however, the procedural defense of another WTO Member under Art XXII GATS would not apply where the EU acts as a complainant (as the EU is not party to the tax treaty), and conversely the EU could not invoke it if (and not a Member State) is named as the respondent.³⁹ The OECD MC Comm. addresses these issues: As Art XXII GATS refers to a tax treaty 'between them', i.e., the 'Members', this potential incongruity should be resolved by an interpretation of the term 'Member' in the GATS under the principles of customary international law

'to permit Article XXII to have its intended effect with respect to bilateral tax treaties to which EU Member States are parties'.⁴⁰

34. Art 25 para. 92.1 OECD MC Comm. 2025.

35. Art 25 para. 92.1 OECD MC Comm. 2025.

36. See Art 25 para. 92.3 OECD MC Comm. 2025.

37. CJEU, 16 May 2017, Opinion 2/15 ('Singapore'), EU:C:2017:376, para. 36 and 54; CJEU, 6 Oct. 2020, C-66/18, *Commission v. Hungary*, EU:C:2020:792, para. 73.

38. For a detailed discussion see Allan Rosas, *The EU and international dispute settlement*, 1:3 Europe and the World 2017 1, p. 20-28; CJEU, 6 Oct. 2020, C-66/18, *Commission v. Hungary*, EU:C:2020:792, para. 68-93. The procedure for the situation of a WTO complaint by the EU is laid out in Regulation (EU) 2015/1843, [2015] OJ L 272/1 (16 Oct. 2015).

39. For this and the rather complex considerations of whether and in which situations the Member States would act as organs of the EU see Vincent Beyer, *Direct Taxes and the GATS: Substantive and Procedural Defences for Non-compliant Income Tax Measures*, 52:3 *Journal of World Trade* 2018, 351, p. 362.

40. See the footnote to Art 25 para. 89 OECD MC Comm. 2025.

4. Summary and Conclusions

The exclusion of tax treaties from most-favoured nation treatment (Art XIV(e) GATS), the broad exemption from national treatment for 'equitable or effective' direct tax measures (Art XVI(d) GATS), combined with the limitation of access to GATS dispute settlement for those national treatment violations that fall 'within the scope' of a tax treaty (Art XXII:3 GATS) and the corresponding deference to tax treaty procedures in Art 25(5) UN MC 2025 and Art 25(6) OECD MC, clearly signals that the core of States' tax systems is quite sheltered from the impact of the GATS.⁴¹

41. See Jennifer E. Farrell, *The Interface of International Trade Law and Taxation* (IBFD, 2013) Chapter 8.6.2.