

V) Annex

Table: Taxation ‘carve-out’ clauses in different BITs used as basis for ISDS claims on tax-related cases⁶⁸

No.	Case	Applicable BIT	Taxation ‘carve-out’ clauses
1	<i>Goetz vs Burundi</i>	BLEU – Burundi (in force)	N/A
2	<i>Link-Trading vs Moldova</i>	US – Moldova (in force)	<p>ARTICLE X</p> <p>1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.</p> <p>2. Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following: (a) expropriation, pursuant to Article III; (b) transfers, pursuant to Article IV; or (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1) (a) or (b),</p> <p>to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.</p>
3	<i>Feldman vs Mexico</i>	NAFTA (in force)	Article 2103: Taxation
	<i>Corn Products vs Mexico</i>		1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.
	<i>ADM vs Mexico</i>		2. Nothing in this Agreement shall affect the rights and obligations of any Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency.
	<i>Cargill vs Mexico</i>		
	<i>Longyear vs Canada</i>		<p>3. Notwithstanding paragraph 2: (a) Article 301 (Market Access - National Treatment) and such other provisions of this Agreement as are necessary to give effect to that Article shall apply to taxation measures to the same extent as does Article III of the GATT; and (b) Article 314 (Market Access - Export Taxes) and Article 604 (Energy Export Taxes) shall apply to taxation measures.</p> <p>4. Subject to paragraph 2: (a) Article 1202 (Cross-Border Trade in Services - National Treatment) and Article 1405 (Financial Services - National Treatment) shall apply to taxation measures on income, capital gains or on the taxable capital of corporations, and to those taxes listed in paragraph 1 of Annex 2103.4, that relate to the purchase or consumption of particular services, and (b) Articles 1102 and 1103 (Investment - National Treatment and Most-Favored Nation Treatment), Articles 1202 and 1203 (Cross-Border Trade in Services-National Treatment and Most-Favored Nation Treatment) and Articles 1405 and</p>

⁶⁸ See: Provost, *Taxes on Trial: How Trade Deals Threaten Tax Justice* Annex and Özgür, *Taxation of Foreign Investments under International Law: Article 21 of the Energy Charter Treaty in Context* Annex.

1406 (Financial Services - National Treatment and Most-Favored Nation Treatment) shall apply to all taxation measures, other than those on income, capital gains or on the taxable capital of corporations, taxes on estates, inheritances, gifts and generation-skipping transfers and those taxes listed in paragraph 1 of Annex 2103.4, except that nothing in those Articles shall apply

- (c) any most-favored-nation obligation with respect to an advantage accorded by a Party pursuant to a tax convention,
- (d) to a non-conforming provision of any existing taxation measure,
- (e) to the continuation or prompt renewal of a non-conforming provision of any existing taxation measure,
- (f) to an amendment to a non-conforming provision of any existing taxation measure to the extent that the amendment does not decrease its conformity, at the time of the amendment, with any of those Articles,
- (g) to any new taxation measure aimed at ensuring the equitable and effective imposition or collection of taxes and that does not arbitrarily discriminate between persons, goods or services of the Parties or arbitrarily nullify or impair benefits accorded under those Articles, in the sense of Annex 2004, or
- (h) to the measures listed in paragraph 2 of Annex 2103.4.

5. Subject to paragraph 2 and without prejudice to the rights and obligations of the Parties under paragraph 3, Article 1106(3), (4) and (5) (Investment – Performance Requirements) shall apply to taxation measures.

6. Article 1110 (Expropriation and Compensation) shall apply to taxation measures except that no investor may invoke that Article as the basis for a claim under Article 1116 (Claim by an Investor of a Party on its Own Behalf) or 1117 (Claim by an Investor of a Party on Behalf of an Enterprise), where it has been determined pursuant to this paragraph that the measure is not an expropriation. The investor shall refer the issue of whether the measure is not an expropriation for a determination to the appropriate competent authorities set out in Annex 2103.6 at the time that it gives notice under Article 1119 (Notice of Intent to Submit a Claim to Arbitration). If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 1120 (Submission of a Claim to Arbitration).

4	<i>Enron vs Argentina</i>	US – Argentina (in force)	ARTICLE XII
			1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.
			2. Nevertheless, the provisions of this Treaty, and in particular Article VII and VIII, shall apply to matters of taxation only with respect to the following: (a) expropriation, pursuant to Article IV; (b) transfers, pursuant to Article V; or (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VII(l)(a) or (b),
			to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.
5	<i>Tokios Tokeles vs Ukraine</i>	Lithuania – Ukraine (in force)	N/A (No BIT text in English)
6	<i>Occidental vs Ecuador</i>	US – Ecuador (in force)	Article X
			1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of

	<i>Burlington Resources vs Ecuador</i>		<p>nationals and companies of the other Party.</p> <p>2. Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following:</p> <p>(a) expropriation, pursuant to Article III;</p> <p>(b) transfers, pursuant to Article IV; or</p> <p>(c) the observance and enforcement of terms of an investment Agreement or authorization as referred to in Article VI (1) (a) or (b), to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.</p>
7	<i>Duke Energy vs Peru</i>	N/A	N/A (The claim is not based on a BIT, but on a LSA –Legal Stability Agreement- that contains similar provisions to a BIT, and provided for Income tax stabilization rights).
8	<i>EnCana vs Ecuador</i>	Canada – Ecuador (in force)	<p>Article XII Taxation Measures</p> <p>1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.</p> <p>2. Nothing in this Agreement shall affect the rights and obligations of the Contracting Parties under any tax convention. In the event of any inconsistency between the provisions of this Agreement and any such convention, the provisions of that convention apply to the extent of the inconsistency.</p> <p>3. Subject to paragraph (2), a claim by an investor that a tax measure of a Contracting Party is in breach of an agreement between the central government authorities of a Contracting Party and the investor concerning an investment shall be considered a claim for breach of this Agreement unless the taxation authorities of the Contracting Parties, no later than six months after being notified of the claim by the investor, jointly determine that the measure does not contravene such agreement.</p> <p>4. Article VIII may be applied to a taxation measure unless the taxation authorities of the Contracting Parties, no later than six months after being notified by an investor that he disputes a taxation measure, jointly determine that the measure is not an expropriation.</p> <p>5. If the taxation authorities of the Contracting Parties fail to reach the joint determinations specified in paragraphs (3) and (4) within six months after being notified, the investor may submit its claim for resolution under Article XIII.</p>
9	<i>Micula vs Romania</i>	Romania-Sweden (in force)	<p>Article 3 (National and Most Favoured Nation Treatment of Investment)</p> <p>3. The provisions of Paragraph 1 of this Article shall not be construed so as to oblige one Contracting Party to extend to investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.</p>
10	<i>Quirobax vs Bolivia</i>	Chile-Bolivia (in force)	N/A
11	<i>Nations Energy vs Panama</i>	US-Panama (in force)	<p>Article XI</p> <p>1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.</p>

2. Nevertheless, this Treaty shall apply to matters of taxation only with respect to the following:
 (a) expropriation, pursuant to Article IV;
 (b) transfers, pursuant to Article VI; or
 (c) the observance and enforcement of terms of an investment agreement or authorization, as referred to in Article VII (1)(a) or (b).

12	<i>Spyridon vs Romania</i>	Greece-Romania (in force)	N/A (No BIT text in English)
13	<i>Oostergetel vs Slovakia</i>	The Netherlands-Slovakia (in force)	Article 3 (Fair and equitable Treatment) 3) The provisions of this Article shall not be construed so as to oblige either Contracting Party to accord preferences and advantages to investors of the other Contracting Party similar to those accorded to investors of a third State (a) by virtue of membership of the former of any existing or future customs union or economic union, or similar institutions; or (b) on the basis of an agreement for the avoidance of double taxation, or on the basis of reciprocity with a third State.
14	<i>ConocoPhillips vs Venezuela</i> <i>Mobid vs Venezuela</i>	The Netherlands-Venezuela (terminated)	Article 4 With respect to taxes, fees, charges, and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party with respect to their investments in its territory treatment not less favourable than that accorded to its own nationals or to those of any third State, whichever is more favourable to the nationals concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Party; (a) under an agreement for the avoidance of double taxation; or (b) by virtue of its participation in a customs union, economic union, or similar institutions; or (c) on the basis of reciprocity with a third State.
15	<i>Tza Yap Shum vs Peru</i>	China-Peru (in force)	Article 3 (Fair and equitable Treatment) 3) The treatment and protection as mentioned in Paragraphs 1 and 2 of this Article shall not include any preferential treatment accorded by the other Contracting Party to investments of investors of a Third State base on customs union, free trade zone, economic union, agreement relating for the avoidance of double taxation, or for facilitating frontier trade.
16	<i>Paushok vs Mongolia</i>	Russia-Mongolia (in force)	N/A (No BIT text in English)
17	<i>Perenco vs Ecuador</i>	France-Ecuador (in force)	N/A
18	<i>Bogdanov vs Moldova (2009)</i> <i>Bogdanov vs Moldova (2012)</i>	Russia-Moldova (in force)	N/A (No BIT text in English)
19	<i>MTN vs Yemen</i>	United Arab Emirates-Yemen (in force)	N/A (No BIT text in English)
20	<i>Maersk vs Algeria</i>	Algeria-Denmark (in force)	Article 3 (Treatment of Investments) (3) The provisions of paragraphs 1 and 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party and to their investments the benefit of any treatment, preference or privilege which may be extended by virtue of:

			(a) any existing or future free trade area, customs union or other similar regional economic organisation of which one of the Contracting Parties is or may become a party, or (b) any international agreement or arrangement relating wholly or mainly to taxation.
21	<i>Bozbey vs Turkmenistan</i>	Turkey-Turkmenistan (in force)	Article II (Treatment of Investments) 4. The provisions of this Article shall have no effect in relation to following agreements entered into by either of the Parties. (a) Relating any existing or future customs unions, regional economic organization or similar international agreements, (b) relating wholly or mainly to taxation.
22	<i>Ryan and others vs Poland</i>	Poland - United States of America BIT (in force)	ARTICLE VI (Taxation) 1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of, and commercial activity conducted by, nationals and companies of the other Party. 2. Nevertheless, the provisions of this Treaty, and in particular Articles IX and X, shall apply to matters of taxation only with respect to the following: (a) expropriation, pursuant to Article VII; (b) transfers, pursuant to Article V; or (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article IX(l) (a) or (b), to the extent they are not subject to the dispute settlement provisions of a convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.
23	<i>Bidzina Ibanishvili vs Georgia</i>	France-Georgia (in force)	Article 4 (NT and MFN) Les dispositions de cet Article ne s'appliquent pas aux questions fiscales.
24	<i>Orascom vs Algeria</i>	Egypt-Algeria (in force)	Article 4 (Treatment of Investments) 4 - Le traitement accordé par cet article ne s'étend pas aux Avantages accordés par une partie contractante aux ressortissements ou sociétés d'un Etat tiers par un accord de non double imposition ou tout autre accord dans le domaine fiscal.
25	<i>LSF-KEB vs Korea</i>	BLEU-Korea (in force)	Article 3 (Treatment of Investment) 4. Les dispositions des paragraphes 1 et 2 du présent article ne pourront être interprétées comme obligeant une Partie contractante à étendre aux investissements des investisseurs de l'autre Partie contractante le bénéfice de tout traitement, préférence ou privilège résultant de tout accord ou arrangement international concernant principalement ou exclusivement l'imposition, notamment tout accord tendant à éviter la double imposition.
26	<i>Laos Holding vs Laos</i>	Netherlands-Laos (in force)	Article 4 With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own nationals or to those of any third State who are in the same circumstances,

whichever is more favourable to the nationals concerned. For this purpose, however, any special fiscal advantages accorded by that Party, shall not be taken into account:

- a) under an agreement for the avoidance of double taxation; or
- b) by virtue of its participation in a customs union, economic union or similar institution; or
- c) on the basis of reciprocity with a third State

27	<i>Heritage Oil vs Uganda Tullow Oil vs Uganda</i>	Contract	N/A
28	<i>Federal Elektrik Yatirim vs Uzbekistan</i>	Energy Charter	<p>Article 21: Taxation</p> <p>(1) Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.</p> <p>(2) Article 7(3) shall apply to Taxation Measures other than those on income or on capital, except that such provision shall not apply to:</p> <ul style="list-style-type: none">(a) an advantage accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii); or(b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure of a Contracting Party arbitrarily discriminates against Energy Materials and Products originating in, or destined for the Area of another Contracting Party or arbitrarily restricts benefits accorded under Article 7(3). <p>(3) Article 10(2) and (7) shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to:</p> <ul style="list-style-type: none">(a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii) or resulting from membership of any Regional Economic Integration Organisation; or(b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates against an Investor of another Contracting Party or arbitrarily restricts benefits accorded under the Investment provisions of this Treaty. <p>(4) Article 29(2) to (8) shall apply to Taxation Measures other than those on income or on capital.</p> <p>(5) (a) Article 13 shall apply to taxes.</p> <p>(b) Whenever an issue arises under Article 13, to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:</p> <ul style="list-style-type: none">(i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) shall make a referral to the relevant Competent Tax Authorities;(ii) The Competent Tax Authorities shall, within a period of six months of such referral, strive to resolve the issues so referred. Where non-discrimination issues are concerned, the Competent Tax Authorities shall apply the non-discrimination provisions of the relevant tax convention or, if there is no non-discrimination provision in the relevant tax convention applicable to the tax or no such tax convention is in force between the Contracting Parties concerned, they

shall apply the non-discrimination principles under the Model Tax Convention on Income and Capital of the Organisation for Economic Cooperation and Development;

(iii) Bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) may take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is an expropriation. Such bodies shall take into account any conclusions arrived at within the six month period prescribed in subparagraph (b)(ii) by the Competent Tax Authorities regarding whether the tax is discriminatory. Such bodies may also take into account any conclusions arrived at by the Competent Tax Authorities after the expiry of the six-month period;

(iv) Under no circumstances shall involvement of the Competent Tax Authorities, beyond the end of the six-month period referred to in subparagraph (b)(ii), lead to a delay of proceedings under Articles 26 and 27.

(6) For the avoidance of doubt, Article 14 shall not limit the right of a Contracting Party to impose or collect a tax by withholding or other means.

(7) For the purposes of this Article:

(a) The term "Taxation Measure" includes:

(i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and

(ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.

(b) There shall be regarded as taxes on income or on capital all taxes imposed 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, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

(c) A "Competent Tax Authority" means the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when no such agreement is in force, the minister or ministry responsible for taxes or their authorised representatives.

(d) For the avoidance of doubt, the terms "tax provisions" and "taxes" do not include customs duties.

29	<i>Gunes Tekstil vs Uzbekistan</i>	Turkey - Uzbekistan BIT (in force)	N/A (No BIT text in English)
30	<i>Vodafone vs India</i>	India-Netherlands (in force)	Article 4 (NT and MFN) 4) The provisions of paragraphs 1 and 2 in respect of the grant of national treatment and most favoured nation treatment shall also not apply in respect of any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation or arrangements consequent to such legislation relating wholly or mainly to taxation.
31	<i>Total vs Uganda</i>	Netherlands-Uganda (in force)	Article 4 (Equitable Fiscal Treatment) With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to investors of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own investors or to those of any third State who are in the same circumstances, whichever is more favourable to the investors concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Party:

			(a) under an agreement for the avoidance of double taxation; or (b) by virtue of its participation in a customs union, economic union or similar institution; or (c) on the basis of reciprocity with a third State.
32	<i>Poltava Gas vs Ukraine</i>	Netherlands-Ukraine (in force)	Article 4 With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party who are engaged in any economic activity in its territory, connected with an investment, treatment not less favourable than that accorded in the same circumstances to its own nationals or to those of any third State, whichever is more favourable to the nationals concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Party: (a) under an agreement for the avoidance of double taxation; or (b) by virtue of its participation in a customs union, economic union, free trade area or similar institution; or (c) on the basis of reciprocity with a third State.
33	<i>Hanocal vs Korea</i>	Netherlands-Korea (in force)	Article 3 (Treatment of investments) 6. The provisions of paragraphs (1) and (2) of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from any international agreement or arrangement relating wholly or mainly to taxation, including an agreement for the avoidance of double taxation.
34	<i>Exxon Mobil vs Russia</i>	Contract	N/A