

Who Guards the Tax Gate? The Case for Mediation in Modern IIA Tax Carve-Outs

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This note examines the treatment of taxation measures under international investment agreements (IIAs), with particular focus on the operation and effectiveness of tax filter mechanisms. These mechanisms, designed to preserve States' fiscal sovereignty by referring tax-related claims to competent authorities prior to arbitration, have become a distinctive feature of modern tax carve-outs. Drawing on treaty practice and arbitral jurisprudence under NAFTA, the Energy Charter Treaty, and recent free trade agreements, the article demonstrates that referral mechanisms have played only a marginal role in practice and have frequently failed to deliver timely, transparent, or reasoned outcomes. The analysis further shows that tax filter mechanisms re-politicize disputes, limit investor participation, and are structurally ill-suited to resolving complex legal questions concerning expropriation and treaty compliance. Against this background, the article explores mediation—particularly under the International Center for Settlement of Investment Disputes (ICSID) Mediation Rules—as a functional and normatively preferable alternative. It argues that mediation offers a more balanced framework by combining technical expertise, confidentiality, procedural flexibility, and the preservation of access to arbitration. In light of recent developments in international mediation, including the Singapore Convention on Mediation, the article concludes that a mediation-based model provides a more coherent and effective approach to managing tax-related investment disputes than the existing referral regime.

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Attorneys

Iacopo A. Accolla
(212) 379-6042
iaccolla@capdale.com

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