KENYA'S INPUT INTO THE TERMS OF REFERENCE OF THE UNITED NATIONS FRAMEWORK CONVENTION

Kenya congratulates the Chairman and colleagues at the Bureau on their election as the Chair and Vice-Chairs of the Committee mandated to develop terms of reference for a UN Framework Convention on International Tax Cooperation. Having faced challenges within the current international tax governance structure, Kenya fully supports the development of a structure that will ensure fairness in the distribution of taxing rights worldwide while respecting the sovereignty and developmental priorities of each nation.

In response to the call for input to the work of the Committee, Kenya would like to align with the input submitted by the Africa Group. In our national capacity, and as guided by the question below, we would like to add the following:

'What are some specific problems that could be addressed by a UN framework convention on international tax cooperation?'

1. **The equal distribution of taxing rights between countries.**
   The Framework Convention should address the imbalance in the distribution of taxing rights between countries, especially within the framework of tax treaties. Countries should have the right to tax income that has been derived from the jurisdiction even where it is not based on physical presence within that jurisdiction. The areas that should be addressed include, but are not limited to:

   (a) Taxation of cross-border services
   There is a significant imbalance in the current distribution of taxing rights between treaty partners, with the taxing rights of market or source jurisdictions being unfairly curtailed. This existing structure has been supported by the archaic policy that countries should only tax the income of a non-resident were there is a physical presence within that jurisdiction.

   Business models have drastically evolved especially due to globalisation and digitalisation. Tax rules should evolve along with business models to ensure that countries can support their domestic resource mobilisation.

   (b) Taxation of offshore indirect transfers
   The Framework Convention should address the imbalance in the distribution of taxing rights over gains from the alienation of shares and comparable interests where they derive their value from immovable property located within a jurisdiction or from the capital of a company

resident in that jurisdiction. Developing countries have had a difficult time negotiating the inclusion of these provisions within tax treaties while this is clearly income that is derived from those jurisdictions.

In addressing the areas above, the Framework Convention should include a protocol that would ensure the adoption of these taxing rights into existing tax treaties which contain the imbalance in distribution of taxing rights. There should also be a provision for assistance in collection of taxes and effective exchange of information among Member States because the recipients of the income will not be resident in the source jurisdiction.

2. **Combating of Illicit Financial Flows.**

The Framework Convention should promote the fight against illicit financial flows by increasing transparency and cooperation between governments and by creating more coherent and less complex global tax rules and standards. The current exchange of information standard is flawed because a number of the key economic players are exploiting loopholes within the standard to not share the information requested by another country.

The standard is also not globally implemented therefore information cannot be requested from large economies that have companies operating within many other jurisdictions. The uptake of this standard has also been slow among developing countries because of the high capacity and infrastructure costs associated with being able to receive the required information.

The Framework Convention should address this by developing policies that will take into consideration the different capabilities of Member States and ensuring that there will be global adoption of the policies to ensure effective implementation.

3. **International cooperation on assistance in collection of tax debt.**

Cross-border assistance in the recovery of taxes is crucial especially for developing countries who rely heavily on tax revenues for their national budget. The recovery of unpaid taxes in the cross-border context has been a challenge for Kenya mainly because key economic partners have placed reservations against the implementation of the standards that would have allowed for this assistance.

The Framework Convention should develop a policy that will ensure effective international cooperation in the recovery of tax debt. It should also provide for technical assistance to ensure that proper structures and resources are developed for the management of cross-border tax collection.

4. **Reduction in complexity in tax rules, especially in taxation of cross-border transactions.**
The current rules on taxation of cross-border transactions were developed without considering the different circumstances of the countries that are implementing them. An example is in transfer pricing whereby implementation of the arm's length principle requires the use of comparables and access to platforms that would provide the necessary data.

Many developing countries do not have local comparables or the resources required to access the necessary data. The Framework Convention should develop common tax policies in this area that can be tailor-made and adapted according to the specific needs of countries or regions. The new system could allocate taxing rights between governments based on an agreed formula supplemented by a minimum effective corporate tax rate and minimum amount of tax on cross-border payments whether base eroding or not.

5. **Reconsideration of recently developed international tax policies that affect countries which were not involved in their formulation.**
Kenya has been among a number of countries that have raised concerns around recently developed international tax policies because of their complexity and failure to consider the unique concerns of developing countries. The Framework Convention should review these policies on a platform with more inclusive participation and consider the concerns and priorities of all countries, especially those who would be adversely affected by these policies but were not included in their development.

6. **Promotion of government accountability on tax expenditure.**
The Framework Convention has the opportunity to create a policy that would promote government accountability and transparency on tax expenditure. Many countries are unable to hold their governments accountable on the revenue collected within the jurisdiction which has led to misuse of funds and a decline in the provision of public services. The Convention should call on governments to commit to transparency and accountability on expenditure of revenue which will in turn ensure that they allocate the resources in the best interests of the country and meet their sustainable development goals.

7. **Dispute prevention and resolution.**
A majority of developing countries do not implement policies on Advance Pricing Arrangements and Mandatory Binding Arbitration as tools for enhancing dispute prevention and resolution. The main reasons for this include low capacity and expertise to effectively implement those tools, the high costs associated with implementing them and the impartiality of the arbitrators who would mostly come from developed countries.

The Framework Convention should develop dispute prevention and resolution mechanisms that can be implemented on an equal footing taking into account the unique circumstances of each region. It should also provide for robust capacity building to developing countries in these areas to ensure that they have the required capability and resources to effectively implement these tools.

8. Capacity building.

In addition to the above, the Framework Convention should contain provisions on tailor-made capacity building to Member States to ensure that their unique needs and priorities are met. Capacity building is sometimes done without focusing on the specific priorities of countries and on tax policies that they did not take part in formulating. It is crucial for the Framework Convention to offer need-based capacity building to member states so that all the technical policies that will be developed can have wide and effective implementation.

9. Carbon trading.

The Framework Convention aims to promote progressive tax systems and link global tax governance and other governmental commitments and obligations, including those relating to environmental protection. To achieve this, the Framework Convention should develop policies promoting international cooperation and transparency to ensure effective regulation of the trade of carbon credits. This is a market that is difficult to track and regulate because it lacks transparency and operates on both compliance and voluntary basis. International cooperation and transparency would ensure that once a carbon credit is transferred out of one jurisdiction to another, it should not be claimed in the first jurisdiction. It would also prevent the risk of financial fraud and money laundering through this market. Capacity building in this area will be crucial to ensure effective administration, monitoring and verification.