

The Chairman

Intergovernmental Committee to draft a United Nations Framework Convention on International Tax Cooperation and two early protocols,
United Nations Headquarters,
New York, USA

The Co-lead

Workstream II: Protocol 1 on taxation of income derived from the provision of cross-border services in an increasingly digitalized and globalized economy

Re: Written inputs from the Africa Group on the Issues Note produced by Workstream II

The Africa Group (AG) appreciates the contributions made by the co-lead, the Secretariat and UN Member States in the development of the Note and wishes to submit the comments below on behalf of our members.

Abstract

1. The AG advocated for the simultaneous negotiation of Protocol 1 to address the challenges faced by its members in taxation of cross-border services in order to ensure fair allocation of taxing rights and enhance domestic resource mobilization.
2. While the Issues Note has captured many of the contributions made by our members, the AG wishes to highlight the following:
 - a) The Protocol should cover a wide range of services, including digital services as well as new and emerging services, and not be limited to traditional services. This will ensure that the provisions will be truly ‘future-proof’ as advocated in paragraph 14 of the Note.
 - b) The Protocol should enhance fair allocation of taxing rights by ensuring that tax is paid to the Governments of countries where economic activity occurs, value is created and from where revenues are generated, as recognized by the General Assembly in Resolution 78/230.
 - c) The Protocol should adhere to the principles specified in the Terms of Reference of the Framework Convention by providing for taxation rules that are simple and easy to administer.
 - d) Since many countries face challenges in this area due to the restrictions imposed by tax treaties, the protocol should include a multilateral solution to these restrictions such as a fast-track instrument to update the existing treaties or a provision in the Protocol that could be applied in place of existing treaties.

Specific Comments

The Committee is asked to consider:

(a) Whether Section III(a) comprehensively describes current rules for the taxation of services and the reasons behind the call for change, or whether there are additional considerations that should be taken into account in the workstream's discussions

1. While the Note broadly captures the discussions of the workstream, the current rules and reasons behind the calls for change described in the Note may not be exhaustive.
2. As the Issues Note has stated in paragraph 6, there are differences in the ways that income from cross-border services is taxed under the domestic laws of member States.
3. While paragraph 9 generally refers to the rules that align with the domestic laws of developed countries, those rules can also align with the domestic laws of some developing countries. The same applies to the provisions in paragraph 10, which may also align with the domestic laws of some developed countries.

(b) What considerations are most important in developing possible new rules for the taxation of services

1. The AG notes and supports the general acknowledgment within the workstream, as contained in paragraph 13 of the Note, that the current tax rules, which limit source State taxation to cases in which services are provided in that State, do not reflect current ways of doing business. Paragraph 8 of the Note includes a recognition that new ways of doing business has led to the exploration of broader nexus rules.
2. The rules for the taxation of services should therefore not be based on outdated principles such as physical presence but should reflect the current business models emanating from globalization and digitalization.
3. The tax rules should also comprehensively take into account the contributions made by both the source and residence States. This will ensure fair allocation of taxing rights and recognition of market contributions to the generation of income.
4. The considerations for taxation of services should reflect the General Assembly's recognition in Resolution 78/230 that all taxpayers should pay taxes to the Governments of countries where economic activity occurs, value is created and from where revenues are generated.
5. The rules should therefore not be limited to value creation or taxation based on deduction of expenses but should take into account the various ways in which income from services is recognized and subjected to taxation.
6. In this regard, the concept of "source state" should be considered to include all jurisdictions that make valuable contributions to an income. For example, the jurisdiction where the user data was sourced in the case of income from use or alienation of user data.
7. The Protocol should also adhere to the principle of simplicity and ease of administration as laid out in the Terms of Reference. It should therefore provide for rules that are

simple and easy to administer, such as gross-basis withholding taxes or simple apportionment of income to relevant jurisdictions.

8. Taxation on a net basis would present a significant challenge to members of the AG in terms of difficulty in administration, risk of misdeclaration and lack of transparency to ensure compliance with the rules.
9. Due to the significant differences in the ways that UN member States tax income from cross-border services, the Protocol can provide different options of implementing the tax rules to enhance effectiveness and allow member States to adopt the rules that are most suitable.
10. The AG believes that the recent updates to the United Nations Model Tax Convention, to include Articles 12AA, 12B and 12C, provide a good example of recognition of new ways of doing business as well as a balance in the allocation of taxing rights between the source and residence States.
11. The AG notes the caution in paragraph 16 of the Issues Note on the effect of gross taxes on services with a low profit margin and believes that withholding taxes can be set at a rate that will avoid over-taxation of businesses by ensuring that the rate represents a proxy for taxation net basis, and does not erode the taxation right of the resident state and other jurisdictions that make valuable contributions to the income.
12. It is important to note that, while paragraph 11 states that many of the tax treaties of developing countries are based on older version of the UN Model, many of these treaties are also based on the OECD Model.
13. Since many countries face challenges in the taxation of cross-border services due to the restrictions imposed by tax treaties, the Protocol should include a multilateral solution to these restrictions such as a fast-track instrument to update the existing treaties with the rules that will be developed under the Protocol or a provision in the Protocol that could be applied in place of existing treaties.

(c) How the workstream can best define the scope of the protocol in terms of the taxes and services that it will cover

1. The AG recognizes that, while the scope of the protocol has not yet been defined, the workstream should ensure that the scope will be broad enough to cover a wide range of services, including digital services.
2. The focus should therefore not just be on traditional services but should include digital services and new and emerging services.
3. The protocol should also include provisions that will prevent tax avoidance, eliminate double taxation as well as prevent shifting of the tax burden by the taxpayers to the consumers of services.
4. On the type of taxes to be covered by the protocol, as raised in paragraph 20 of the Issues Note, the AG believes that the protocol should clearly indicate income tax as the nature of tax intended to be covered.
5. The AG notes that the first early protocol is on the taxation of cross border services; the workstream should therefore focus on its mandate which is the taxation of cross-

border services and avoid consideration of matters relating to taxation of goods or any other matter that are outside of that mandate.

The AG once again appreciates all the efforts that have gone into the development of this Issues Note and restates its commitment to contribute to the discussions across all three Workstreams.