For the kind attention of:

Mr. Ramy Mohamed Youssef, Chair of the Intergovernmental Negotiating Committee to draft a United Nations Framework Convention on International Tax Cooperation and two early protocols (INC), Ms. Marlene Nembhard-Parker and Mr. Michael Braud, Co-Leads of Workstream III.

Cc: Permanent Representatives and Observers to the UN in New York

11 July 2025

***Subject*: ETFE's submission regarding the Draft Issue Note of Workstream III (WS III – the protocol on dispute prevention and resolution) of the Intergovernmental Negotiating Committee on the UN Framework Convention on International Tax Cooperation (UN FCITC).**

Please find below the submission of *Espacio de Trabajo para una Fiscalidad con Equidad (ETFE)*, a network from Argentina working on fiscal justice. We appreciate the opportunity to submit comments to this negotiating committee.

Abstract

This submission comments on the Draft Issue Note of Workstream III (WS III), focusing on the prevention and resolution of international tax disputes. While bilateral tax treaties traditionally rely on the Mutual Agreement Procedure (MAP) to resolve conflicts, the rise in transfer pricing disputes—now exceeding 5,000 cases annually—reveals systemic flaws in the current framework. The OECD's Multilateral Instrument (MLI) introduced optional arbitration to encourage settlements. However, concerns remain over sovereignty and the dominance of multinational enterprises (MNEs) in dispute resolution.

The primary barriers to effective dispute prevention lie in the structural design of international tax rules, particularly the arm's length principle and residence-based taxation, which fuel incoherence and litigation. The Issue Note overlooks how these rules incentivize disputes by treating entities within MNEs as separate entities rather than the conglomerates they are in practice. Advance Pricing Agreements (APAs), though providing certainty, often favor the biggest taxpayers due to information asymmetries and lengthy negotiations.

WS III should prioritize dispute prevention by advocating for simpler international taxation of MNEs and strengthening administrative cooperation—such as automatic information exchange for tax purposes—over adversarial mechanisms. The proposal for an intergovernmental dispute resolution body is impractical. Tax disputes remain inherently sovereign matters, and any protocol must respect optionality while addressing cross-border conflicts.

In conclusion, WS III's focus should shift from procedural fixes to systemic reforms: replacing the flawed arm's length standard and enhancing multilateral cooperation to reduce disputes while safeguarding fiscal sovereignty, particularly for developing countries.

Comments on the Draft Issue Note of Workstream III (WS III)

Introduction

International tax disputes generally concern divergences in interpretation of provisions in bilateral tax treaties. To deal with these, the treaties have long included what is known as the Mutual Agreement Procedure (MAP), which enables the 'competent authorities' of the treaty partners to resolve conflicts bilaterally. This has been essentially an administrative procedure between the tax authorities concerned. Multinational enterprises (MNE) tax advisers have long pressed for a procedure that could be binding and ensure no 'double taxation', preferably by arbitration.

Most international tax disputes arise from divergent interpretations of transfer pricing rules.

The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI") -Action 15 of the OECD's Inclusive Framework on BEPS Action Plan- included an optional arbitration clause, intended to encourage settlements rather than frequent arbitration. However, many countries opted out or imposed reservations, limiting its impact. The OECD has prioritized strengthening MAP under BEPS Action 14, publishing member profiles and dispute data.

The best way to prevent conflicts is to ensure that the rules are clear, simple and effective, and underpinned by a framework for administrative cooperation.

Arbitration mechanisms in bilateral investment treaties and the WTO have long proved inappropriate and, considering the sovereign nature of taxation, it should be rendered unacceptable for countries' tax sovereignty to be restricted by international arbitration or adjudication, which would become dominated by MNE tax advisers.

Specific issues addressed in the public consultation

(a) whether Section III describes the primary barriers to prevention and resolution of tax disputes that Member States encounter

Even when Section III is quite comprehensive in the reach of the barriers for prevention and resolution of tax disputes, a key issue seems to be missing which is how the design of the rules (i.e. the arm's length principle together with the priority given to residence taxation in tax treaties contribute to the lack of coherence of the global tax architecture, and the lack of coherence of global jurisprudence, particularly in respect of transfer pricing cases).

Further, there some issues that raise concerns in the current drafting of Section III.

Paragraph 26 suggests that given that there is a considerable amount of cross border disputes, this protocol could be used in order to create an intergovernmental body where such disputes could be taken in order to address an imaginary related tax disputes equivalent number.

International disputes are between sovereign states. It's very rare for states to accept binding procedures for dispute resolution in any treaty, especially one based on third-party adjudication.

The WTO created an adjudicative mechanism, the Appellate Body, for disputes between states under the WTO agreements. This is currently suspended due to non-cooperation by the US. This appellate body actually issued resolutions in relation to tax issues, which resulted in conflicting solutions both for countries attempting to apply defensive mechanisms, as well as for investors.

Bilateral investment treaties have been based on a model that included an investor-state dispute settlement (ISDS) arbitration procedure. It is not an appropriate model for tax, which is central to state sovereignty.

Tax treaties include what is essentially an administrative procedure, for the 'competent authorities' of the parties to consult on issues of interpretation of the treaty and 'endeavour' to resolve them (the MAP procedure). These include Advance Pricing Agreements.

Unless APAs involve simplification rules, they typically entail lengthy negotiations—sometimes spanning years—favoring well-resourced taxpayers. While APAs provide tax certainty, this certainty is often skewed in favor of MNEs due to information asymmetries that disproportionately disadvantage tax administrations. Moreover, once an APA is finalized, the arm's length principle makes it nearly impossible to be challenged by tax administrations, even in cases of evident missuses of the tax certainty tool.

Working Session III should prioritize examining the root causes of tax disputes and developing preventive solutions. As highlighted in the Issues Note, transfer pricing controversies dominate international tax

conflicts due to fundamental flaws in the current OECD-designed system. The core problem lies in the rigid application of the arm's length principle, which artificially treats multinational enterprise (MNE) group members as independent entities rather than recognizing their integrated economic reality.

This flawed approach mandates separate "functions, assets, and risks" analyses for each entity, forcing tax authorities to conduct jurisdiction-by-jurisdiction assessments while double taxation claims (under Article 9.2 of model treaties) evaluate impacts on the entire corporate group. The inherent contradiction between these approaches inevitably generates complex, fact-intensive disputes that are notoriously difficult to resolve.

The solution requires abandoning this dysfunctional system in favor of an economic reality principle that align with MNEs' actual business operations. By recognizing MNEs as single economic entities rather than fragmented legal structures, this approach would:

- Eliminate double taxation while ensuring minimum taxation
- Provide much-needed certainty for both taxpayers and administrations
- Reduce compliance burdens and dispute volumes

Such reform would mirror economic reality while simplifying international tax governance - a critical improvement over the current transfer pricing regime that generates more conflicts than it resolves.

Finally, dispute prevention can also be sorted out through administrative cooperation foreseen in bilateral and multilateral exchange of information agreements, in non-binding manners.

(b) whether the protocol should address only tax disputes involving cross-border transactions, or whether it might be appropriate to include mechanisms for the prevention or resolution of purely domestic disputes

Dispute prevention and resolution of tax disputes could either refer to the judicialization of tax adjustments by tax administrations, or applicable procedures for among two or more countries.

The level of judicialization in cases of international taxation has been growing. The subjectivity of the arm’s length principle in transfer pricing enables multinationals to exploit it in order to avoid taxes and creates uncertainty in the tax compliance process by increasing the number of tax disputes.

Notwithstanding, the issues surrounding the national judiciary processes are of a national sovereignty nature and are not only related to the design of the international tax rules, but also to the design of the national judiciary system in each case.

(c) *whether the concept of optionality with respect to mechanisms provided in the protocol is generally acceptable to the Committee (with specifics to be elaborated as the protocol is drafted).*

Adherence to the protocol cannot be anything but optional.

Countries subscribing to the protocol would agree however to an instrument that would be biding once the ratification process is concluded.