Abstract

Tax Justice Network Africa, in conjunction with the African Civil Society Organisations Working Group on the UN Tax Convention, welcomes the work of Workstream I as outlined in the issues note. We align ourselves with the submissions of members of the African Group, the African Union, the African Tax Administration Forum as well as the Global Alliance for Tax Justice (GATJ).

We make general comments with regard to the design of commitments. We note that two commitments considered within the issues note are closely related to early protocols which are optional in nature and strongly encourage negotiators to include **watertight provisions in this regard that can stand alone irrespective of the protocols.**

We also humbly propose suggestions with regard to the commitments outlined therein. These include the principle of **inter-nation equity** amongst the elements outlined concerning the commitment to fair allocation of taxing rights, including equitable taxation of multinational enterprises (MNEs).

We also propose the inclusion of the element of **openness/transparency** concerning an 'undertaking to establish dispute prevention and resolution mechanisms that are fair, independent, accessible, and effective in resolving disputes in a timely manner for both taxpayers and the tax authorities involved.'

Important Considerations in the Development of Commitments

Opt in and opt out protocols

Paragraph 14 of the Terms of Reference provides that protocols are optional. This approach was first suggested by the Secretary General Report on the promotion of inclusive and effective international tax cooperation at the United Nations. The report envisioned that Protocols could be selected according to domestic priorities and interests. However, at the time when the report was released, the idea of having simultaneous development of protocols was not at the fore. This only came up during the adoption of the UN General Assembly resolution 78/230 when the ad hoc intergovernmental committee was established in order to develop the Terms of Reference.

However, if a protocol is so critical that it requires simultaneous negotiation, then within the practice of public international law, it is odd that it would still be optional. In previous instances where Protocols have been negotiated simultaneously, the Protocols have been mandatory. One of the most notable examples is the 1975 Barcelona Convention, now known as the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, where adoption of the Convention was tied to adoption of at least one of its Protocols. As Member States proceed to the negotiation of the Protocols, this is an issue that may require revisiting. Considering that the first protocol is likely optional, a strengthened Framework Convention that provides watertight provisions, while allowing for enough flexibility for future use, is critical.

Fair allocation of taxing rights, including equitable taxation of multinational enterprises

Elements outlined in paragraph 14

We acknowledge the importance of addressing the historical imbalance of taxing rights and welcome the elements outlined in paragraph 14, namely, that all jurisdictions 'where business activity takes place should have a share in taxing rights over the income generated from such business activities, while recognizing the value of economic efficiency and tax neutrality, simplicity and administrability and the importance of effects on cross-border trade and investment.' In addition to the elements outlined, we propose an additional element, namely, ***inter-nation equity***.

While paragraph 12 of the issues note takes into account that the need for fair allocation of rights arises out of increased globalisation and changes in business models due to digitalisation, this paragraph fails to take into account, one of the key reasons why there is an imbalance of taxing rights. The vast double taxation treaty network has greatly contributed to this imbalance, particularly between residence and source countries, severely limiting the taxing rights of the latter. Source countries are more than often Global South countries. This issue is well captured in paragraph 9 and 11 of the issues notes of workstream II.

Efforts to increase source taxing rights, while commendable, have not been adequate. For instance, the uptake of several provisions of the UN Model Convention on Double Taxation remains low. In a study undertaken by the IBFD, out of 741 DTAs (from 2013 -2023), only 29% of these had included Article 12A on taxation of technical services. This slow uptake has dire consequences for many Global South countries. A study undertaken by South Centre estimated that Kenya experienced revenue losses amounting to an estimated 1.148 million USD from 2005 to 2017 as a result of treaty restrictions on taxation of services.

The end of Paragraph 14 notes that "There might also need to be some explanation of how to determine where business activity takes place in light of digitalization and other new business models." This is a crucial question that needs to be given far greater attention, beyond the question of digitisation or services under Workstream II. The transfer pricing system and the use of the arm's length principle in particular are highly problematic as they fail to recognise the reality that multinational enterprises are incentivised to manipulate transfer prices in order to maximise income, in turn changing where business income is finally declared. As long as taxing rights are limited to the income attributable to subsidiaries with permanent establishment in a jurisdiction, the issue of base erosion & profit shifting is likely to persist. Ultimately, discussion on the fair allocation of taxing rights needs to include the question of unitary taxation of multinational enterprises as a replacement for the transfer pricing system, including the allocation of taxing rights on the basis of value generation. This has the potential to deal with a number of critical issues, including the source-residence balance, inter-nation equity, and profit shifting.

Inter-nation equity

The economist, Musgrave, described inter-nation equity as being based both on 'economic and political fairness'. [1]Economic fairness denotes that a country that allows non-resident investors to use its public goods and services to generate returns, has the right to tax as a means of benefiting from the exploitation of its resources.[2] This is closely aligned with the benefits principle. Political fairness entails addressing 'distribution inequities.'[3] Musgraves advocates for higher allocation of taxing rights to lower-income countries, suggesting that they should have the right to impose higher withholding tax (WHT) rates in order for international redistribution to take place.[4] The principle of tax neutrality may very well defeat this argument from the perspective of the domestic tax system of the source country, however, the concept of inter-nation equity pushes the burden of ensuring tax neutrality to the residence state of the non-resident taxpayer.

While there is much emphasis on the taxation of income from cross-border services in relation to this commitment. Care must be taken to also pay heed to equitable taxation of MNEs within the extractive sector. The principle of inter-nation equity also comes into play when discussing the fair distribution of mineral resource rents. Considering that Africa has around 30% of the world's mineral resources but has not been able to effectively leverage on these for its development, this is of key importance to the continent. This sector is much more susceptible to uncertainty as Africa primarily exports commodities in their raw form or near to raw form hence being susceptible to shocks within international markets. The principle of inter- nation equity when applied here will ensure that African countries receive

[1] https://research.ibfd.org/#/doc?url=/linkresolver/static/tvc_p01&refresh=1752264930712%23tvc_p01
[2] Ibid
[3] Ibid
[4] The use of withholding taxes or lack thereof will be left to the ambit of workstream II

a fair share of resource rents considering the detrimental ecological, environmental and social impact experienced due to the exploitation of these resources.

Commitment on dispute prevention and resolution

The question of transparency

Our remarks are in response to paragraph 10c of the issues note on whether there are additional concerns that should be addressed in addition to what has been outlined in paragraph 9. In addition to elements such as fairness, accessibility, timeliness, independence, among others, we propose the inclusion of an additional element, namely, **transparency**. Transparency and openness are the cornerstone of access to justice, particularly in the landscape of international disputes involving state and non-state actors. Within investor-state dispute resolution processes, the lack of transparency in these processes has been so opaque to the extent that, other than the parties, it is near impossible to be aware of a dispute being initiated. This lack of transparency is likely to be duplicated within international tax disputes, especially if mandatory arbitration is resorted to in accordance with instruments such as the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.[5]

Any disputes involving states are generally subject to public interest and therefore should be open and transparent unlike typical commercial arbitration processes. Indeed, there has been a steady reversal of the opaqueness of investor -state dispute resolution processes as seen in the newer versions of investment contracts.[6] The biggest barrier towards transparency is the need for business confidentiality as may be argued by taxpayers. The case of **Giovanna A Beccara and Others v. The Argentine Republic** provided preliminary guidance on this.[7]

The arbitral tribunal in this case concluded as follows:

[5] TJNA does not support mandatory arbitration as it is a violation of tax sovereignty

[7] https://www.iisd.org/itn/2010/03/10/icsid-tribunal-applies-ad-hoc-approach-to-confidentiality-in-arbitral-proceeding/

1. That the proceedings could be generally discussed
2. That the claimants' personal information was not to be publicly disclosed

The paragraph should not go into details on how transparency would function within the context of cross-border tax disputes. However, in the context of international taxation disputes, particularly disputes between tax administrations and taxpayers, irrespective of whether this is through the mutual agreement procedure or mandatory arbitration, transparency can be exercised in the following manner:

1. Public notices indicating that a dispute has been initiated much like domestic courts
2. Openness and transparency during the proceedings of these disputes
3. Access to the awards/ judgments of these proceedings
4. The taxpayers' personal information can be subject to limited data minimisation

Relationship with paragraph 13 of the Terms of Reference

As noted in paragraph 6 of the issues note, there is a relationship between the commitments and the further elements within paragraph 13 of the Terms of Reference. We urge members of the workstream, to take into consideration not only tax disputes that may arise between taxpayers and tax administrations but also tax disputes that may arise between tax administrations due to differences in the interpretation of the Framework Convention itself. Paragraph 13 is well placed to handle this scenario in line with the elements that will be outlined within the commitment.