Tax Justice Network submission to the

Call for contributions on the Draft Issue Note of Workstream III of the Intergovernmental Negotiating Committee on the UN Framework Convention on International Tax Cooperation

July 2025

TAX JUSTICE NETWORK

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For the kind attention of:
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Cc: Permanent Representatives and Observers to the UN in New York
Date**:** 11 July 2025

Abstract

The Tax Justice Network (TJN) welcomes the opportunity to provide input on the Draft Issues Note of Workstream III, as presented on 27 June 2025. As an independent, international organisation advocating for greater transparency, accountability, and fairness in tax systems, TJN supports the overall direction of the Workstream's approach to outlining of the issues that may be addressed in a protocol on the "prevention and resolution of tax disputes".

In this submission, the Tax Justice Network provides input on the Draft Issues Note released under Workstream III on 'dispute resolution and prevention' of the current negotiations of a United Nations Framework Convention on International Tax Cooperation.

We welcome the emphasis in the Draft Note that universal and inclusive access to dispute resolution in tax matters is currently missing in the global tax landscape and may be one of the crucial objectives for the Protocol, not in the least to assist Global South Countries to tackle aggressive transfer pricing.

We also welcome the emphasis on the need for dispute prevention which we believe can be achieved through the adoption of less dispute-prone tax rules (e.g. by replacing transfer pricing with unitary taxation and formulary apportionment) and dispute resolution procedures which instrumentalize the publication of dispute settlements for the avoidance of future disputes.

We also provide input on the use of options and reservations in the protocol, which based on prior experience on other multilateral tax instruments presents challenges, but which may be necessary to achieve progress on certain peripheral aspects of a dispute resolution regime that is fit for purpose of the Convention.

In this submission, we take the opportunity to highlight some of the issues raised in the Co-Leads' Draft Issues paper. We provide some background on why we think these issues are relevant to be addressed in the Protocol and make some suggestions on how this could be achieved.

We take the three questions for the Committee that the Draft Issues Note presents and respond to each in turn.

(a) Whether Section III of the Draft Issues Note describes the primary barriers to prevention and resolution of tax disputes that Member States encounter.

We affirm the Draft Issues Paper's setting out of the primary barriers to prevention and the resolution of tax disputes, and identify additional issues as follows.

Universal access to mutual agreement procedure (MAP)

Currently, the only mechanism for cross-border dispute settlement in tax matters is the 'mutual agreement procedure' (MAP), which is a diplomatic form of dispute settlement by which tax authorities come to a negotiated agreement on tax disputes. These disputes can be taxpayer based (individual taxpayer MAP) or relate to interpretation conflicts of a general nature (interpretative MAP).

The legal ground for MAP is provided in the bilateral tax treaties. Under BEPS Action 14, the use of MAP has been streamlined, and advanced dispute resolution tools have been developed, all based on the legal ground for MAP in countries' bilateral tax treaties.

But while BEPS Action 14 may have made dispute resolution more effective, it has utterly failed to make it more inclusive. As pointed out in the Draft Issues Paper, many countries do not have extensive bilateral tax treaties, and, as such, many countries have no access to dispute resolution.

This situation is untenable. As pointed out in the Draft Issues Paper, a majority of tax disputes settled through MAP involved transfer pricing disputes. All countries face transfer pricing disputes, regardless of whether they have tax treaties in place or not. Per the agreed UN definition, illicit financial flows 'from aggressive tax avoidance' include those resulting from the 'manipulation of transfer pricing. Transfer pricing disputes are necessarily involving two countries, as a tax base correction in one country necessarily implies an effect

on the tax based in the related party jurisdiction. It cannot be that Global South countries are left to their own devices (and bogged down national judiciaries) to fight aggressive transfer pricing, with the only legal venue to request accountability of the other country involved depending on the existence of a bilateral tax treaty.

This does not mean the dispute resolution protocol should endorse the separate entity approach and the arm's length principle. On the contrary: we strongly support the distribution of the multinational corporate tax base on the basis of unitary taxation and formulary apportionment. Unitary taxation and formulary apportionment has the potential of settling both the issue of fair and equitable allocation of taxing rights and the prevention of tax disputes as such a system would be less prone to disputes than the current transfer pricing system.

The protocol provides a unique opportunity to 'emancipate' dispute resolution from bilateralism in tax matters. A similar process occurred with the bilateral tax treaty provisions on administrative assistance (exchange of information and assistance in the collection of taxes): once part of the bilateral bargain of tax treaties, it is now commonly accepted that the relevance of these provisions outweighs bilateral tax treaties. For many countries in the Global South, the legal ground for administrative assistance is found in the multilateral MAAC, making the absence of bilateral tax treaties irrelevant.

The protocol provides an important opportunity to do the same for dispute resolution. Certain regions have already achieved this level of 'emancipation' of dispute resolution, demonstrating its reasonableness and feasibility. For example, the most important achievement of the EU Arbitration Convention was not EU countries' access to arbitration in tax matters – these provisions have seldom been used – but access to MAP in transfer pricing disputes in absence of the existence of a bilateral tax treaty. The EU Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the EU builds on the arbitration convention but widens the scope so that the harmonized dispute resolution mechanisms apply to any type of double taxation.

While the protocol should not endorse the arm's length principle, it can and should create a universal legal ground for dispute resolution through MAP. This legal ground can take the form of a provision which combines the features of article 25(1) of the UN Model on individual taxpayer MAP and the features of article 25(3), *second sentence*, of the UN Model on legislative MAP.

In line with the legislative MAP provision in the UN Model, the protocol should allow competent authorities to '*consult together for the elimination of any double taxation*', whether caused by transfer pricing, tax treaty interpretation,

clashes of uncoordinated domestic tax laws, or current or future protocols under the UNFCITC with substantive cross border tax rules.

We note that the BEPS MLI has tried to create a universal ground for legislative MAP (see Article 16(4)(c)(2) of the MLI) but failed because of the low number of countries participating in the MLI and low numbers of 'covered agreements'. This has resulted in the notorious absence of legal ground for an inclusive dispute resolution mechanism to settle GloBE disputes. The Protocol can and must do better.

Prevention of disputes

We appreciate the Draft Issues Paper emphasis on the importance of dispute prevention. As to the development of appropriate mechanisms to prevent cross-border tax disputes, there are three dimensions to dispute prevention that should be addressed.

First, as mentioned in the Draft Issues Paper, tax disputes can be prevented by the development of certain mechanisms that allow taxpayers and tax authorities to anticipate future clashes. We urge however caution with the use of unilateral APAs. Besides the lack of transparency and the risk of preferential treatment and the ability of MNEs to effectively negotiate a lower tax liability than other businesses, we also like to underscore that in cross-border disputes, such practices only make sense if they include participation of all relevant jurisdictions, with all jurisdictions agreeing on the division of the tax base and levying corporate tax accordingly.

Second, the most effective way of preventing tax disputes is by adopting substantive tax rules that are less prone to resulting in conflicts on interpretation and application. Adopting unitary taxation with formulary apportionment instead of transfer pricing based on the arm's length principle would be a significantly reduce cross-border tax disputes. It should also be pointed out that under the current rules, many disputes are not a flaw of the system but rather triggered by design. In the last decades, many rules in the OECD Model have been complemented with default fallback rules that point to the mutual agreement procedure as the ultimate decider on how tax treaty rules are to be interpreted. This is the case in the interpretative rule in Article 3(2) of the Model, the dual residence rules in article 4(2) and (3) of the Model and PE profit attribution in Article 7(3) of the Model. In a sense, the rising stock of MAPs and of unresolved MAPs is also a self-fulfilling prophecy if countries, by design, cannot apply rules without entering into dispute resolution to settle on the meaning of these rules.

The adoption of rules that cannot be applied without competent authority negotiation should in any case be avoided under the UN Framework Convention.

Third, there are also important dispute prevention gains to be made through the improvement of the current MAP process for dispute resolution. Under BEPS Action 14, the success of MAP has been celebrated by the ease of which competent authorities initiate and finalize the ever-rising stock of MAP cases. As pointed out in the Draft Issues Note, the stock of open MAP cases reached 6500 at the beginning of 2023. However, one can wonder how many of these cases feature unique rule interpretation and application problems.

MAP may be an efficient way for individual taxpayers and tax authorities to settle disputes, as compared to dispute resolution through the national judiciaries. But unlike traditional jurisprudence, MAP decisions are protected by the cloak of confidentiality of the diplomatic negotiation process. External parties have no information on what grounds disputes are settled, whether they do so consistently across all individual taxpayers or in relation to all other countries. This is problematic from a dispute prevention perspective. One of the reasons why traditional jurisprudence is public and many countries apply a system of binding or authoritative precedent, is to foster transparency and prevent future disputes on the identical issues. None of this is achieved in the dispute resolution mechanism of MAP.

Especially in the case of disputes regarding the substantive rules under the UN Framework Convention (like in the services protocol), the current format of MAP cannot be used without drastic reforms. The settling of disputes on the interpretation of multilateral rules cannot be left to bilateral negotiations under the cloak of diplomatic confidentiality, as is the case under the current MAP regime. Operative parts and reasons of MAP decisions should be published and made available to all parties to the Convention. Only in this way can dispute resolution serve its implicit role of dispute prevention.

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

Given the Convention itself relates to international tax cooperation, the protocol's priorities should be in the creation of fair and inclusive mechanisms to settle disputes involving *cross-border* transactions only. It is up to individual countries to decide on how they organize administrative and judicial tax dispute

resolution frameworks. This does not detract from the fact that countries may benefit from assistance on how to rationalize their domestic approaches, and the Convention has a role to play in providing such assistance. But the fundamental purpose of the Protocol is to propose binding rules for cross-border dispute resolution, and not domestic dispute resolution.

Additionally, as above, one of the objectives of the Protocol is to create universal access to dispute resolution so to avoid that countries are forced to frame cross-border disputes as domestic disputes simply because they have no venue to pursue the other country involved. This is especially the case in transfer pricing disputes, which by their transactional nature typically involve more than one jurisdiction. Transfer pricing disputes should not be framed as domestic disputes, as such a framing risks resulting disputes triggering unilateral downward profit adjustments that are not complemented with an upward adjustment in other relevant jurisdictions.

(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).

We urge caution with regards to the use of options and reservations which may allow countries to reduce sharply their individual commitments, under the guise of contributing to multilateral progress.

The BEPS MLI is a prime example of thinly veiled multilateralism without fundamental commitment to universal and inclusive principles. The MAAC is another example. A recent study by the Tax Justice Network reveals how the MAAC's reservation possibilities regarding assistance in the collection of taxes and exchange of information beyond income tax have curbed this multilateral convention's usefulness. The Protocol should avoid taking, or facilitating, the same path to unprincipled multilateralism.

The Draft Issues Paper does however illustrate how the workstream on dispute resolution packs together a variety of distinct issues and solutions, each of which has a varying group of countries in support or against.

To avoid a lack of consensus or overall majority support to close certain policy venues, a protocol with certain issue-specific titles which are optional could be envisaged. To avoid the trap identified, a dispute resolution ground and procedure to settle disputes regarding the Convention itself and the Protocol should be mandatory. A sub-protocol that makes this mechanism applicable to disputes regarding any type of double taxation may be optional, as for example

with the sub-protocol that implements the ‘extended clause’ of Article 25(7) of the UN Model (2025) which asserts priority of tax dispute resolution fora over ISDS in international investment agreements. As seen in the discussions at the UN Tax Committee, this issue strongly divides countries, but this division need not and should not stop the Workstream from proposing solutions that can be adopted by a coalition of the willing.