Tax Justice Network submission to Workstream II on Taxation of Income from Cross-Border Services (post-Fifth Session)

26 August 2026

Abstract

We appreciate the draft prepared by the former Co-Lead, as well as the opportunity to provide feedback. A full article-by-article analysis of the text is available on our website; here, we focus only on what we consider the most important points in the current draft.

We highlight the importance of keeping a broad scope of covered taxes. We also propose that the Meeting of the Parties should be granted interpretative power over the definitions. We propose that further work on net formulary or fractional apportionment approaches is required to align the protocol with the commitment to a fair allocation of taxing rights.

We suggest that, for the article on automated digital services to be future-proof, its scope should be interpreted in an open-ended way, and that more attention needs to be directed to the attribution of profits in non-payment situations. We raise concerns about risks in the current Article 9, including the discretionary power given to taxpayers to choose their preferred method, the need to refer to the profitability ratio of the multinational group as a whole, and the need to better specify a reasonable allocation of profits.

We propose that the clause on exchange of information should make explicit the information that will be needed to implement the protocol. Finally, we propose that the protocol should not defer its implementation to bilateral renegotiations.

Maintain a broad scope of taxes covered (Art. 2)

We urge Member States to maintain a broad scope of taxes covered under the Protocol. The proliferation of digital services taxes (DSTs) and other quasi-income taxes is a direct consequence of outdated tax norms that tied taxing rights to the existence of physical presence. Efforts to move past these outdated concepts should also address the distortions they created. Preserving a broad scope is also essential to ensure Member States bring ambition to this multilateral process, rather than only pursuing domestic responses to a system that deprives them of a fair allocation of taxing rights.

We therefore support the current language of Article 2, which focus on the substance of the tax, instead of the name it might be given. We recognise, however, that some countries have concerns about how this approach might affect specific instruments they use. Excise taxes, for instance, are designed not primarily to raise revenue, but to change behaviour or address market failures. During negotiations, Brazil pointed to examples such as taxes aimed at deterring gambling. This is a fair concern. We propose that the Meeting of the Parties (MOP) be given an adequate process to identify and exclude such specific taxes on a case-by-case basis, while keeping the overall scope of Article 2 broad.

Grant interpretative power to meeting of the Parties on General Definitions (Art. 3)

We note that Article 3(2) replicates the interpretation rule commonly found in bilateral tax treaties: undefined terms are interpreted by reference to the domestic tax law meaning in the State applying the treaty, unless the context requires otherwise. We are concerned that this approach is not adequate to the multilateral nature of this Protocol. All Parties to the Protocol share an interest in avoiding a situation where individual pairs of Protocol States begin to agree, between them, on divergent interpretations of the Protocol's rules.

In a bilateral tax treaty, this risk is managed through the interpretative mutual agreement procedure between the two countries. This is not an appropriate solution for a multilateral instrument. We therefore concur with the Kenyan delegate regarding the need to include a rule allowing questions on the interpretation or implementation of the Protocol to be resolved multilaterally, through the Meeting of the Parties.

Design source and nexus rules that guarantee a fair allocation of taxing rights (Art. 5)

We would like to raise a doubt regarding the relationship between the source rules in Article 5(5) and the Framework Convention's commitment to a fair allocation of taxing rights, which reflects the real economic contribution of each relevant jurisdiction, “including jurisdictions where value is created, markets are located, revenues are generated and users or data are located[...]".

We understand Article 5(5) establishes a cascading test: place of performance, then consumer residence, then payer residence or deductibility, each condition applying only where the prior one is not met. We are uncertain regarding whether this design is consistent with the Convention's fairness principle. Where a service involves meaningful economic contribution from more than one jurisdiction — for instance, performance in one State, a consumer in a second, and a deducting payer in a third — it is not clear to us how the cascade is meant to operate.

We heard some member states and stakeholders interpret that more than one source State could conclude, based on its own assessment, that its condition is satisfied, resulting in multiple source claims over the same income. In another view, if the cascade functions as we understand it to be intended and only one condition is ultimately "met", the entirety of the source taxing right would fall to a single State, notwithstanding the economic contribution of others.

Given the multilateral nature of this treaty, we consider it must guarantee that all relevant parties that have meaningfully contributed to development of the economic activity are able to ascertain a fair allocation of taxing rights. Considering that the net option would be likely to reflect more closely the idea that multiple jurisdictions may have relevant economic contributions, we suggest a stronger emphasis and elaboration should be undertaken on this method of taxation, including through formulary approaches, while potentially allowing withholding taxes to be used part of the in the *implementation* of this mechanism, as they are generally easier to administer.

Keep the article on Automated Digital Services future-proof (Art. 6)

The issue regarding the cascading test also applies to, and is potentially exacerbated in, Article 6.

In addition, regarding the list of automated digital services in Article 6(4), it is our understanding that the list is illustrative rather than exhaustive, consistent with the broad definition in Article 6(3) and its origin in Article 12B of the UN Model. This means services such as AI-based, crypto-asset, or financial services would already fall within scope where they meet the general definition, even if not expressly listed. Given the rapid pace of change in this sector, however, we recommend the list be expanded to reference these emerging categories explicitly to reduce the risk of ambiguity or inconsistent interpretation across States Parties without narrowing the underlying scope of the definition.

Finally, we believe further work is needed on how "gross revenues" should be determined in cases involving automated digital services where there is no conventional payment to withhold against—for example, where the consideration takes the form of data rather than money. Gross revenues are expected to serve as the basis for both gross payments and the net alternative under Article 9, so this gap matters. As drafted, the gross-withholding framework appears to assume a payment stream that may not exist in all scenarios currently within the protocol's scope.

Include Income from International Shipping and Air Transport (Art. 8)

We have concerns about carving shipping and air transport out of the Protocol's scope. The Framework Convention's commitment to a fair allocation of taxing rights should apply across all sectors, and we see no reason why transport should be treated differently.

Further, this Protocol is broadly modelled on the UN Tax Committee's approach to services taxation, and the 2025 UN Model itself moved in the same direction — reinforcing source taxation of international transport, including air transport, through a redrafted Article 8. We struggle to see why the Protocol would follow the Committee's approach generally yet depart from it specifically on transport. We also note that the Protocol could help resolve incongruency in source taxation across non-treaty countries — a problem that the airline industry lamented facing during Committee debates.

International transport lends itself well to fractional apportionment of net income. Industry itself, through IATA's advocacy for the "maritime formula," has acknowledged that allocating profits by gross revenue share is a workable fallback where residence taxation alone is not feasible.

Protect net attribution of profits from tax avoidance (Art. 9)

We would like to raise some concerns regarding the current drafting operation of Article 9, which are also central to the operation of Articles 5 through 7, given that each of those articles defers to Article 9 upon election or upon a finding of physical presence.

First, we are concerned that the current drafting grants the taxpayer effectively unrestricted discretion to elect between gross and net taxation, without any safeguard or documentation ensuring that the net-basis alternative reflects the actual profitability of the activity being taxed. Absent such a safeguard, we are concerned that this discretion could be used strategically, allowing enterprises to elect into whichever regime reduces their tax liability. Gross taxation as currently drafted would function as the maximum tax. If a scenario where choice is allowed, the withholding rate must be relatively high.

Second, and related to the above, we would urge that any net-basis or profit-allocation mechanism under the protocol take into account the profitability ratio of the multinational enterprise as a whole, rather than relying solely on the accounts of the specific local entity or presence providing the service. Where allocation is based only on the profitability or books of an entity within a group, this creates an avoidance risk: accounts may be structured at the level of the entity performing the service, leaving little for the source state to tax, without a corresponding ability for the source state to audit or challenge arrangements between two non-resident parties.

Finally, the "reasonable allocation" concept in Article 9(1), second sentence, is currently undefined and, in our view, insufficiently precise to guarantee a consistent or principled outcome. As drafted, we do not see how it would prevent widely divergent interpretations of what constitutes a reasonable allocation, nor is it clear which factors beyond gross revenue comparison, if any, should inform that allocation. We would ask that further work be undertaken to develop objective, workable criteria for this allocation, including by allowing the Meeting of the Parties to adopt formula- or fraction-based approaches.

Specify required information under exchange of Information and administrative assistance (Art. 12)

Parties to the Protocol will also be parties to the Framework Convention, so the provision on exchange of information should not replicate what will already be available under the Convention's commitments and the auxiliary instruments the COP adopts to implement it.

It would, however, be important for the Protocol to establish the specific information required for its administration, whether through automated exchange or a centralised database. In particular, it would be important to guarantee the availability of information triggering the different nexus and source rules, including per-country sales by physical performance, by consumer market, by destination, and number of users. This could be modelled on an expansion of CBCR data, and be open ended, so that the MOP can adapt if needed.

Do not require bilateral renegotiation for the protocol to enter into force (Art. 20)

The issue of how the Protocol interacts with pre-existing bilateral tax treaties, an issue currently deferred largely to Article 21 of the Framework Convention, remains under negotiation. There is ambiguity in the draft's current, incomplete state, on whether the Protocol could be read as containing a treaty override; yet, absent an explicit conflict clause, our understanding is that the Protocol would prevail[1].

However, Article 20(3) ties the effective date for treaty situations to Article 21 of the Framework Convention, whose current text refers to

[1] Based on article 30 of the Vienna Convention on the Law of Treaties.

"protocols" only in Article 21(b) (concerning future treaties) and does not address existing ones. We would note that Article 21(3)'s call to align existing treaties "including, where necessary, through renegotiation" implies alignment without renegotiation is also contemplated, consistent with automatic override.

We would urge Member States not to defer this to bilateral renegotiation, nor to allow Parties to unilaterally opt out of the Protocol's application to specific treaties, including through a BEPS MLI-style "covered agreements" mechanism. Such flexibility would let service-exporting countries retain problematic existing treaties selectively while still benefiting from the Protocol's mechanism vis-à-vis non-treaty countries — an outcome evidently inconsistent with a commitment to fairness and one we consider should be avoided at all costs.

We would ask that Article 20 state explicitly that the Protocol prevails over conflicting pre-existing bilateral treaty provisions upon entry into force, without requiring renegotiation or permitting opt-outs.