Tax Justice Network

submission to Workstream III on Dispute Prevention and Resolution (post-Fifth Session)

24 August 2026

Abstract

This submission outlines the recommendations by the Tax Justice Network for the for the Protocol on Dispute Prevention and Resolution. The submission is based on the Co-Leads' zero draft and its discussions during the Fifth Session of negotiations.

We believe the protocol should be redrafted so that it compiles the essential provisions at treaty level and moves prescriptive operational provisions to a separate 'Meeting of the Parties Implementation Agreement' (MOPIA). We also think the draft protocol generally fails to implement elements of transparency across all mechanisms. The mechanisms should also be redesigned to avoid the taxpayer serving as the trigger for their application. We strongly support delegates' wish to work on a provision that prevents or limits the application of ISDS to tax-related investment disputes.

Regarding the dispute prevention mechanisms, we consider the draft protocol's focus on transfer pricing inappropriate and incompatible with a future-proof Convention. Given their resource intensive nature, dispute prevention mechanisms should furthermore not be characterized as 'core'.

Regarding the dispute resolution mechanisms, we believe the Protocol's MAP mechanism should be compulsory to settle any disputes under other Framework Convention protocols. The mechanism of mandatory binding MAP arbitration will not find any 'takers' as is, and should therefore be substantially re-envisioned. Binding dispute resolution in a fair and equitable way requires the setting up of a 'UN Tax Dispute Settlement Body', a judicial body that decides and operates in line with the transparency and impartiality standards of the judiciary.

General observations

Balance between regulatory and treaty provisions

We agree with the delegates from the African Group, India and Mauritius that the draft protocol contains a level of detail and prescriptiveness that is not in line with its fundamental nature as a treaty. We think the protocol should be a legally sound, self-contained instrument confined to the rights, obligations and essential elements of the prevention and resolution mechanisms.

We agree with the Co-Leads on the need to develop to develop not just the abstract legal grounds for the mechanisms but also the detailed operational provisions. However, these operational provisions should be contained in a separate instrument, similar to how rules on MAP arbitration are addressed in many bilateral tax treaties.

As noted by the delegate from the Netherlands, it will be impossible to provide all necessary rules for actual implementations. The protocol should be able to accommodate additional rules and the changing of existing rules on implementation. It would therefore be a mistake to add all operational rules in the protocol itself and submit additions and changes to the formal procedure for amending a protocol. The 'meeting of the protocol' parties should be given the mandate to develop any operational rules needed to execute the provisions of the protocol.

The procedure to alter and change this 'Meeting of the Parties Implementation Agreement' (MOPIA) should be more flexible than formal protocol amendment.

We also note that the protocol is a treaty between governments for the purpose of improving cross-border dispute resolution and prevention. As noted by Brazil, India and others, the mechanisms should be geared towards strengthening governments' access to relevant mechanisms.

General lack of transparency measures

In the Co-Leads' concept note for the Fourth Session, "*providing transparency rules*" is one of the elements the legal bases of the dispute prevention and resolution mechanisms could provide for. We believe that the Co-Leads' view on the need for transparency elements in the mechanisms was justified, especially because a number of lower income countries have repeatedly stressed the relevance of sharing among countries information on prevented and settled disputes. We add that besides information sharing among countries, public scrutiny of competent authority decision making is an important pillar of universal and inclusive tax cooperation.

We note that in none of the mechanisms have any transparency rules been foreseen.

- No mechanisms have been foreseen to share or publish coordinated **unilateral, bilateral or multilateral advance rulings**. Confidentiality rules may prevent full publication, but the protocol can make the sharing and publication of anonymized substantive summaries obligatory. The fact that cross-border rulings are essentially based on the legal ground of MAP should not prevent adopting transparency measures, even if only the sharing of aggregate and statistical information.

- In the case of **mutual agreement procedure** too, the concept note hammers on the importance of "*enhanced transparency*" but the draft protocol fails to deliver on this point. The Fourth Session note expressly mentions that the Task Force would be mandated to look into tools with high-level MAP summaries.

  In previous sessions, universal support for work on transfer pricing databases was lacking. There was clear pushback from certain developing countries claiming it was inappropriate for the Workstream to devote its own and the Secretariat's scarce resources to this project. There was far less pushback against MAP summary databases, yet this aspect of the Task Force's mandate has been glossed over without explanation.

- The **arbitration** mechanism in the protocol does not come with any obligation to publish arbitration decisions, in full or in abstract. We find the failure to provide transparency, in itself, sufficient to make the arbitration mechanism unfit for purpose. Universal and inclusive international tax cooperation cannot be achieved by locking binding dispute resolutions behind the doors of an arbitration board.

Taxpayer mechanisms trigger

As highlighted by Brazil, India and various other countries during the negotiations, many of the protocol's mechanisms have been designed to allow the taxpayer to trigger their application.

Given that the point of the protocol is to create mechanisms that cater to the realities and needs of developing countries, we think the mechanisms should take into account legitimate concerns of being forced to dedicate scarce resources or abdicate tax sovereignty against their wishes. For example, countries should not be forced to give reasons why they deny APA requests (cfr. Article II(1)(2)). Access to MAP should not be deniable merely on procedural grounds (cfr. Article III(1)(2)). The non-treaty consultation mechanism should be redrafted to prevent expectations or binding capacity commitments on the part of the requested tax authority.

Protocol override of ISDS in tax-related investment disputes

We are keen to support delegates from Mexico, the United Kingdom and the African Group in their statements that the protocol should look at the issue of ISDS in tax-related investment disputes. We are pleased to hear the German Co-Lead supporting this suggestion.

As we have consistently argued in previous submissions, the Dispute Protocol is well suited to include an optional provision to allow pairs or groups of countries to list 'covered investment treaties' with unrestricted ISDS access, and have these overridden by the protocol mechanism.

Two approaches can be followed for the drafting of the mechanism:

- The Mexican alternative (based on Mexican tax treaty practice): the protocol could include an optional mechanism which overrides investment treaties so that tax-related investment disputes can only go to ISDS if both (tax) competent authorities agree for this to happen. Without agreement, there is no access to ISDS. The rule would provide that tax-related disputes "*shall be settled only under the* [protocol]*, unless the competent authorities of the Contracting States agree otherwise*" (based on article 25(5) of the Mexico Germany Tax Treaty (2008))

- The UN Model (2025) alternative: additionally, or alternatively, the protocol could include a rule similar to Article 25(6)(Alternative A) of the UN Model (2025) (see here for a description of the new model provision). The rule would provide that "*the settlement of* [tax related investment disputes] *shall, unless the competent authorities of the Contracting States agree otherwise, be undertaken without recourse to any dispute resolution arrangements under* [listed investment treaties]. *Such disputes shall be settled only by reference to the provisions of this protocol.*"

Dispute prevention mechanisms

Inappropriate focus on transfer pricing

In line with the position above on the treaty nature of the protocol and the need for operational rules in a separate instrument, we consider it inappropriate to create a mechanism in the protocol that is exclusively focused on transfer pricing. As a matter of fact, there are no treaties that use the term 'transfer pricing'. It would be far more appropriate to refer to the 'attribution of profits of multinational enterprises', instead of using the colloquial term, transfer pricing.

We suggest to merge and reduce Article II(1) and Article II(2) so that the provision would merely introduce the legal basis for bilateral and multilateral rulings, nothing more and nothing less.

If there is a need for specific rules to implement or operationalize the mechanisms in relation to disputes regarding certain types of tax measures, then these rules should be included in the MOPIA but not in the protocol itself.

Dispute prevention mechanisms are not 'core'

During the Fifth Session, the co-leads have expressed the desire to make at least one of the prevention mechanisms a 'core mechanism' for which there is no opt-out possibility.

We note that many developing countries have expressed their position against this idea. We also note that many of those countries have highlighted the resource intensive nature of APA programmes. Making these mechanisms mandatory will force some countries to conclude that they (literally) cannot afford to sign the protocol.

We also note that the capacity building commitment under Article II(10) which says that countries shall make efforts to support other countries' implementation is drafted in a vague way.

We believe that if prevention mechanisms are good enough to be 'core', the protocol should also make the capacity building obligations under the protocol 'core', meaning that a signature of the protocol comes with an effective and earmarked financial contribution by developed countries to implement this.

Dispute resolution mechanisms

Mutual Agreement Procedure: not-optional for protocol disputes

We believe the MAP in Article III(1) is the natural 'go-to' mechanism for dispute resolution in cross-border tax matters and therefore the only mechanism that merits 'core' status.

We noted that the function of this protocol is essentially two-fold: develop better mechanisms of dispute settlement to apply to current tax disputes, but also to develop the mechanisms that will apply in relation to other protocols under the Framework Convention, like the Services Protocol.

In this regard we want to point out that the current interaction between the Dispute Protocol and the Services Protocol is unclear. Article 11(2) provides that if all parties in a dispute under the Service Protocol are also party to the Dispute Protocol, "*the latter protocol will govern the resolution of the dispute*".

Article V(1) of the Dispute Protocol applies in the case of "*another bilateral or multilateral tax-related instrument* [is] *in force between two or more Parties* [and] *provides for a mechanism that is substantially similar …*". It is not clear whether this also covers the Services Protocol (and future protocols).

It is not clear whether it is the drafters' intention for Article V(1) to allow countries that have signed both the Dispute Resolution Protocol and the Services Protocol to actively prevent the Dispute Resolution Protocol to apply in disputes under the Services Protocol and settle disputes under the Services Protocol by means of that protocol's native MAP provision in Article 11(3) of the Services Protocol.

We believe such an option is not appropriate. The Dispute Protocol's forward-looking role is to create inclusive and universal dispute resolution rules. If there are disputes on tax rules created under the same Framework Convention on which the protocol is based, then the protocol mechanisms should be applicable in any case. In other words, countries should not be allowed to use old mechanisms in the case of disputes regarding new rules.

Article 11 should be amended with an additional paragraph to make this clear.

Mandatory binding MAP arbitration: high risk of a dud

We consider Article III(3) on Arbitration in the draft highly problematic. We note that many countries, and especially African Group members, have repeatedly made clear their opposition to including an optional mechanism with mandatory binding MAP arbitration in the protocol. We urge the Co-Leads to delete this mechanism or to re-envision it completely.

If included as is, the arbitration mechanism will most likely be a dud. Many countries oppose mandatory arbitration out of principle. But the mechanism in Article III(3) goes further than any bilateral or multilateral (BEPS-MLI) MAP arbitration has ever gone: it does not allow countries to limit the scope of the type of cases that can be subject to MAP arbitration.

37 out of 107 jurisdictions opted in to the MLI's mandatory arbitration provisions. Of these 37, only about 10 jurisdictions did not use the reservation in Article 28(2)(a) of the BEPS MLI. The large majority of jurisdictions restricted access to MAP arbitration in certain types of cases, like anti-avoidance cases (Germany, Spain), double non-taxation cases (Portugal, France), specific OECD Model articles (Canada), or cases mutually agreed as unsuitable for arbitration (France, Hungary).

The United Kingdom is one of the very few countries that have accepted MAP arbitration access without restrictions on the scope of cases, a decision which it came to regret in the *Glencore* case in which it was forced to accept a diverted profit tax dispute to be settled through MAP arbitration.

We think the current draft mechanism on arbitration should be re-envisioned. Even if made optional, and access to arbitration made subject to case-by-case approval, the mechanism will not suit countries that simply do not want to submit their tax sovereignty to third party arbitration.

We do believe there is an important role to be played for binding dispute resolution under the protocol and the framework convention in general, but this role can only be assumed by a ‘UN Tax Dispute Settlement Body’ that operates like a judicial body, with permanently appointed judges that cannot be selected by parties, abide to full procedural transparency, publication of decisions, and decision-making that allows adjudicators to apply all relevant sources of law (including human rights law, and climate law) *ultra petita*.