Briefing Note in Advance of the First and Second Sessions of the Intergovernmental Negotiating Committee on the UN Framework Convention on International Tax Cooperation (UNFCITC)

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Background

This brief distils the state of play on Work-stream II (WS II): the protocol on taxing cross-border services, by first recalling how the Co-Leads' issues note for Work-stream I (WS I) frames the broader negotiation, then weaving in the observations, demands and innovations offered by African and non-African stakeholders, before drawing out the patterns of convergence and the fault-lines that are now in view.

WS I is intended to supply three "constitutional" commitments for the future convention:

i. Effective prevention and resolution of tax disputes,
ii. Fair allocation of taxing rights, and
iii. Cooperation that advances sustainable development.

The draft note emphasises that these broad promises must be agreed by the end of 2025 so that the detailed protocols can be finalised by 2027, and it asks delegations to indicate how prescriptive the language should be, warning that over-specification could hamper later technical bargaining. It also flags that dispute-resolution language appears three times across the mandate: in the Convention, as a protocol, and as an "other element" so co-ordination across work-streams is vital. In effect, WS I tells negotiators that the Framework must be concise yet solid enough to anchor specialised protocols, and invites views on capacity building, governance architecture and the development lens that should run through the text.

Those same principles frame WS II. If the Convention is to promise "fair allocation of taxing rights" it must eventually demonstrate, in the services arena, that market jurisdictions will receive a meaningful share of profit even when suppliers have neither staff nor servers within their borders. The Co-Leads' choice to handle cross-border services in an "early" protocol was therefore no technical happenstance: it is the test case that will reveal whether the new regime truly departs from century-old residence-bias or merely glosses it with capacity-building rhetoric.

Stakeholder Submissions

African submissions approach that test with uncommon unity. Senegal, Nigeria, the African Union (AU), the African Tax Administration Forum (ATAF) and the Africa Group all insist that the protocol must cover all remote services: streamed media, cloud hosting, consultancy, algorithmic offerings yet to be invented and must do so without conditioning source-taxing rights on physical presence. The rationale is straightforward: if economies whose consumer bases and data fuel global profits cannot tax that value, the promise of "fair allocation" is hollow.

To operationalise the point:

i. Their input endorses a Significant Economic Presence test, calibrated to the scale of smaller markets so that low-volume jurisdictions are not priced out of nexus.
ii. For collection they converge on a default gross-basis withholding tax (WHT) because it is simple to administer and verifiable through payment channels rather than transfer-pricing audits.
iii. Treaty networks that still confine services income to residence states are deemed an obstacle, so the bloc demands either a fast-track multilateral override or a "most-favoured-nation" style floor that automatically upgrades old treaties.
iv. Finally, Africa is keenly aware of administration: rules must function in offices with limited audit capacity and unstable connectivity, hence the attraction of payment-based collection and elective safe-harbours for documented taxpayers.

Yet each African input adds nuance:

i. Senegal suggests WHT rates calibrated as a "realistic proxy" for net income and proposes an explicit credit mechanism so residence countries recognise the source tax.
ii. Nigeria reminds negotiators that the UN Model already offers tested language: Articles 8-Alt A, 12B, 12C, 12AA that could be imported wholesale and that "value creation" ought to include user participation and data harvesting.
iii. ATAF sketches an optional net-basis for compliant multinationals, combined with an anti-abuse rule for intra-group service fees and a tailored nexus threshold for least developed states.
iv. The AU floats a "basket of tools" approach: countries could mix nexus triggers, WHT and elective net assessmen, so that capacities dictate design rather than vice-versa.

These refinements show Africa is not dogmatic: it wants administrable equity, not headline victories that collapse in practice.

The non-African inputs fall into two recognisable camps, plus a bridging middle.

i. Reform-oriented voices (Third World Network, Tax Justice Network, ICRICT, the G-24 group) argue that only unitary or fractional apportionment of global service profits will truly prevent gaming. They champion broad SEP nexus, default gross WHT or "deemed profit" methods, public transparency, and in the case of TWN, a bold proposal to re-label Digital Services Taxes as income taxes so that they attract foreign-tax credits and evade trade retaliation.
ii. At the other pole sit the **business and residence-oriented submissions**: the International Chamber of Commerce, the United Kingdom, the OECD's Centre for Tax Policy and Administration. They accept that purely physical presence does not suffice but prefer to limit new nexus rules to very large multinationals, to preserve arm's-length net taxation and to rely on dispute-prevention instruments familiar from bilateral treaties. Gross WHT is depicted as blunt and investment-chilling; treaty override is characterised as an assault on legal certainty. The ICC presses for a permanent Business Advisory Council inside the Convention structure, a suggestion likely to meet civil-society resistance.
iii. Between these poles stand bridging inputs from the IBFD Centre for Studies in African Taxation, Saudi Arabia and, on some points, the OECD note. They concede that markets need a simple, bankable share, and float tiered withholding linked to deemed margins or elective net safe-harbours as compromise. Saudi Arabia supports broad SEP but stresses clear revenue thresholds and anti-fragmentation clauses; the IBFD paper stresses compatibility with existing instruments while offering innovative rate calibration.

Commonalities and Points of Departure

Across all these submissions several patterns recur.

i. First, no-one seriously defends a physical-presence-only test; the debate is over how expansive the alternative nexus should be and whether it is complemented by gross or net taxation.
ii. Second, administrative capacity is invoked by every side: reformers say simplicity obviates capacity gaps, business groups say complexity in turnover-based taxes will overwhelm companies and smaller tax authorities alike.
iii. Third, flexibility is fashionable: menus, phased adoption and optional clauses are common proposals, though motives differ--some see flexibility as an on-ramp, others as an escape hatch.
iv. Fourth, transparency and development are now structural arguments, not footnotes: every paper, even the ICC, frames compliance burdens or tax certainty in relation to sustainable development narratives.

The following potential head-butts therefore, flow directly from these patterns.

i. The gross-versus-net cleavage is the most immediate; if drafters elevate gross WHT as the default, residence states may threaten reserve clauses or high treaty thresholds.
ii. The reform bloc's push for unitary apportionment collides with years of OECD transfer-pricing guidance and the political investment some capitals have in Pillar One.
iii. Treaty override: central to Africa's strategy, faces orthodox objections from countries that fear a multilateral instrument could upend their bilateral networks.
iv. Scope is another flashpoint: broad language catches routine back-office outsourcing that some negotiators see as low-margin and uncontroversial, whereas others argue that excluding it today invites loopholes tomorrow.
v. Finally, the Committee on Fiscal Studies input on data, that it be treated less as intangible labour and more as extractable resource.

Taken together, the submissions shape the landscape that negotiators will face. Africa's coherent package: broad scope, SEP nexus, default gross WHT, treaty upgrade, capacity-sensitive options, gives the continent bargaining power it lacked in earlier OECD-led processes. Reform advocates from civil society and academia amplify that power by providing intellectual scaffolding for market-based allocation and by reframing resource mobilisation as a human-rights obligation. The bridging camp offers the technical design space to craft compromise: tiered withholding, elective net regimes, clear thresholds, mutual update clauses that soften the rhetoric of "override". Residence-state sceptics will lean on legal-certainty arguments, but their own submissions hint at recognition that granting source-states "something" is politically unavoidable.

Next Steps

For the UN Framework Convention process the lesson, therefore, is clear. A WS II protocol that:

i. Embeds a Significant Economic Presence threshold designed downwards for small economies,
ii. Grants the source state the right to apply a moderate gross-basis tax unless the taxpayer elects a net assessment under specified conditions,
iii. Includes a multilateral clause that updates inconsistent treaties, and
iv. Links capacity-building obligations to the revenue importance of the rules, would respond to the strongest common denominators while still leaving room for opt-in refinements.

Drafters will need to script preamble language that connects the protocol to the sustainable-development commitment already envisaged in WS I, thereby demonstrating cross-stream coherence. Negotiators should also focus on three delicate balances.

i. Simplicity versus precision: enough clarity to ensure administrability and creditability, but not so much granularity that loopholes multiply or developing administrations are forced into expensive audits.
ii. Flexibility versus coherence: optionality attracts signatures, but too many bespoke carve-outs resurrect the fragmentation that the convention is meant to cure.
iii. Innovation versus certainty: unitary apportionment and data taxation ideas embody future-proof fairness, yet they must be phased so that businesses and administrations can adapt without paralysing litigation.

From this mapping four substantive questions stand out for the negotiators:

1. **How should nexus be defined.**
    - There is consensus that Significant Economic Presence must appear, but thresholds are open. Africa and the G-24 insist on figures low enough for small economies; business insists on clarity and anti-fragmentation rules. Negotiators will need to convert that

political bargain into an article that combines quantitative triggers with qualitative tests like sustained user engagement.

2. **Which tax base and collection method will prevail.**
    - Africa, Third World Network and many NGOs want default gross withholding, citing administrative ease and treaty obstacles. The ICC and the UK call such taxes "distortive" and argue for net profit rules. The compromise path is the IBFD idea of tiered gross rates with a voluntary net filing safe harbour, or the G-24 proposal for fractional apportionment of local sales. The committee must weigh revenue certainty for developing states against the neutrality concerns of exporters, and decide whether the protocol offers a single method with options or a true menu.
3. **What place should treaty override or fast track reform hold.**
    - Every African submission laments outdated bilateral treaties that block source taxes. The Africa Group proposes an automatic multilateral instrument; the ICC warns that undermining bilateral pacts threatens legal certainty. The technical negotiation here will revolve around whether the protocol is self-executing, whether it inserts most-favoured-nation floors, or whether it offers a model article for states to retrofit bilaterally.
4. **How much detail on allocation formulas belongs in the early protocol.**
    - Workstream I text requests commitments without locking in technical minutiae. Yet ICRICT and the Tax Justice Network argue that without explicit unitary language reform will forever be postponed. A possible middle road is to enshrine guiding principles: equitable allocation, transparency, administrability, and mandate the Conference of Parties to adopt formulas by decision, subject to capacity support and opt-in clauses.

On the technical plane several items go to the heart of international taxation and thus merit space reserved drafting effort.

1. *The arm's length principle versus formulary allocation.* Each side marshals fairness and administrability arguments, but the practical choice is binary and will decide whether disputes revolve around comparables or around factor weights.
2. *Withholding tax rate structure.* Whether a single cap applies, whether rates are stratified by service type, and how these interact with credit in residence states are engineering questions that will dictate revenue outcomes. Senegal's call for rates that act as a "realistic proxy" for net income offers an anchor.
3. *Definition of services in scope.* All African submissions favour a catch-all description that spans professional, digital, intra-group and consumer services. Business is wary that this breadth may sweep in low margin outsourcing. Agreement on a technology neutral, function-based definition, combined with exclusions identified by industry, will be necessary.
4. *Anti abuse rules tied to intra-group fees.* ATAF proposes a specific safeguard so that management charges are not used to bleed profits. The design must dovetail with broader transfer pricing or allocation rules to avoid duplication.
5. *Capacity building obligations.* Every camp invokes administrative capacity. Embedding binding assistance, or linking phased implementation to measurable support, will determine whether new rules work in practice.
6. *Dispute prevention architecture.* Workstream I places dispute prevention in both the convention and a later protocol. The services protocol will need to clarify how withholding controversies or fractional disputes feed into that machinery and whether arbitration is mandatory, optional or excluded.

Against this background the negotiators can craft a balanced outcome if they fold the following four design principles into the text:

First, equity: a clear statement that taxing rights follow user markets, resource inputs and regulatory support, not only capital export.

Secondly, simplicity: gross tools, safe harbours and bright line thresholds are to be preferred unless capacity allows otherwise.

Thirdly, flexibility: optional routes, phased thresholds and an adaptive Conference of Parties can bridge the gap between least developed and high income states.

Fourthly, coherence: everything in the services protocol must align with the broader commitments of Workstream I on fair allocation, dispute resolution and sustainable development.

If those principles are honoured, the committee can turn decades of academic argument and regional frustration into a ruleset that genuinely reallocates taxing rights while keeping compliance feasible. The mapping shows there is already a floor of agreement and a menu of workable technical devices. The remaining task is to trade depth for breadth with care, ensuring that what is finally written secures revenue for source countries without paralysing investment or spawning fresh complexity. That is the essence of international taxation laid bare by these documents: deciding where profit is said to arise, how that profit is measured, and how states collaborate to collect it in a way that underwrites development and respects sovereignty.