

**SUBMISSION RELATED TO WORKSTREAM 1 – CO-LEAD’S DRAFT  
FRAMEWORK CONVENTION TEMPLATE (A/AC.298/CRP.26)**



**SUBMITTED BY**

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## Abstract

This submission addresses four substantive provisions of the draft United Nations Framework Convention on International Tax Cooperation requiring strengthening to fulfil the mandate of General Assembly resolution 78/230. On fair allocation of taxing rights, it proposes formulary apportionment principles, binding renegotiation timelines, explicit recognition of digital economy value creation including high-value episodic digital transactions and user-generated value as productive factor input, and a transaction-value nexus complementing continuity-based criteria. On harmful tax practices, it urges restoration of the October 2025 draft's substance requirements. On exchange of information and mutual administrative assistance, it advocates automatic exchange as primary mechanism, the "may be relevant" standard, specified response timelines of ninety and one hundred and eighty days, elimination of bank secrecy as grounds for refusal, and provisions for assistance in collection of taxes on digital services where no domestic withholding agent exists. On reciprocity and most favoured nation treatment, it proposes Article 22(5) addressing cascading erosion of withholding tax rates and preventing strategic non-participation in protocols. Each proposal includes recommended treaty text.

### I. Fair Allocation of Taxing Rights (Article 5)

Article 5 of the January 2026 draft correctly identifies that jurisdictions where value is created, markets are located, revenues are generated, or economic activities occur possess taxing rights over income generated from such activities. The requirement that States Parties take such actions as are necessary and renegotiate existing tax agreements inconsistent with this provision is a marked improvement over the October text. However, three critical deficiencies remain.

First, the article provides no definition of what constitutes fair allocation. Without specification, each bilateral negotiation will define fairness according to relative power rather than objective criteria. Bilateral tax treaties have systematically allocated primary taxing rights to residence states, reflecting historical power dynamics wherein treaties were negotiated under conditions of asymmetric capacity during colonial or immediate post-colonial periods. The provision requires a formulary basis anchoring allocation to genuine economic substance. [The following paragraph is proposed:](#)

*"Fair allocation shall be determined according to formulary principles reflecting the economic substance of activities in each jurisdiction, including but not limited to sales or revenues generated, employment and payroll, tangible assets located, and other factors reflecting value creation as may be agreed by the Conference of States Parties."*

Second, the article imposes no timeline for treaty renegotiation. Without temporal specificity, the obligation to renegotiate becomes a commitment that states may defer indefinitely. States should be required to notify all existing tax agreements within three years of Convention entry into force and complete renegotiation of inconsistent agreements within five years. The Common Reporting Standard, which specifies annual collection and exchange by September

of the following year, demonstrates the precision distinguishing enforceable treaty obligations from aspirational declarations.

Third, whilst the provision conceptually encompasses digital transactions, it does not explicitly address the fundamental challenge that digital platforms extract substantial value from markets without physical presence. The permanent establishment threshold in existing treaty law conditions source-country taxation on physical presence, enabling enterprises to generate revenue from African consumers through data harvesting, algorithmic engagement, and network effects without any tax liability in those jurisdictions.

The value extraction problem is more acute than the current draft acknowledges. In advertising-driven platforms such as Instagram, users in source jurisdictions are not merely consumers; they contribute unpaid productive input through content, behavioural data, attention, and network effects that constitute the platform's core revenue-generating asset. This is extractive appropriation of factor inputs from the source jurisdiction's population, and it demands source taxation grounded in a factor-input rationale, not merely a market-access theory. Moreover, the draft's implicit focus on sustained digital engagement overlooks high-value, low-frequency digital transactions. A single automated data analytics engagement worth five million US dollars, consuming source-jurisdiction data and generating insights deployed exclusively in that market, escapes every nexus criterion premised on continuity or user numbers. The protocol requires a transaction-value nexus as a complement to continuity-based criteria.

The following sentence should be added to Article 5:

*“For purposes of this Article, business activities include the provision of goods or services through digital means, and physical presence in a jurisdiction is not required for that jurisdiction to exercise taxing rights where users or customers are located, data is collected or utilised, users contribute content or behavioural data constituting productive inputs, or other value is derived from that jurisdiction's market, whether through sustained engagement or through individual transactions exceeding a value threshold to be determined by the Conference of States Parties.”*

## **II. Harmful Tax Practices (Article 8)**

The regression between the October 2025 and January 2026 drafts of Article 8 is the most troubling development in the negotiating text. The October draft stated explicitly that *any tax incentives provided by States Parties should be substance-based, linked to investment or performance, and not merely profit-based*. The January draft has deleted this prescriptive standard, replacing it with an obligation merely to develop and enhance tools for monitoring and identifying harmful practices. States could satisfy this weakened obligation by monitoring perpetually whilst harmful practices continue unabated.

More concerning still, the January draft amends Article 8, paragraph 1 from harmful practices that undermine the ability of all countries to tax income fairly to harmful practices undermining the ability to tax income in accordance with their domestic laws and policies. This replaces an objective standard of fairness with a circular reference to domestic law. If a jurisdiction's domestic law is itself the instrument of harmful tax practice, referencing that law as the

benchmark renders the provision self-defeating. The Committee should restore the objective fairness standard.

The following amendments are proposed. First, reinstate and strengthen the October substance requirement:

*“Tax incentives and preferential regimes shall be substance-based and linked to genuine economic activity and investment in the jurisdiction providing the preference. States Parties shall not provide preferential tax treatment based solely on legal form, intellectual property ownership, or other factors unconnected to substantial business operations in the jurisdiction.”*

Second, insert a definitional paragraph specifying that harmful tax practices include regimes offering effective tax rates below fifteen per cent without requiring substantial economic activity, regimes ring-fenced to apply only to non-residents or foreign-source income, regimes lacking transparency regarding beneficiaries and amounts of preferential treatment provided, and regimes facilitating base erosion through artificial separation of income from the activities generating it. Third, require disclosure of all preferential tax regimes to the Secretariat within six months of entry into force, including legal provisions, eligibility criteria, beneficiaries, and revenue impacts.

### **III. Exchange of Information and Mutual Administrative Assistance (Article 9)**

Article 9 of the January 2026 draft commendably expands upon its predecessor, enumerating specific assistance modalities and introducing accountability measures absent from the October text. However, five amendments are necessary to convert this provision from aspiration into enforceable obligation.

First, the phrase *widest measure of mutual administrative assistance* provides no specific floor below which assistance is inadequate. The phrase should be replaced with a binding formulation: States Parties shall provide mutual administrative assistance.

Second, the Convention must establish automatic exchange as the primary mechanism for information exchange, not merely one modality among several. Exchange on request requires the requesting state to already possess sufficient information to formulate a specific enquiry, creating a paradox: states must know what they do not know. This structural disadvantage falls disproportionately on developing country revenue authorities. The Convention should adopt the standard of *may be relevant* rather than *foreseeably relevant* as the threshold for exchange. The foreseeably relevant standard, derived from OECD Model Tax Convention Article 26, has been deployed by requested states to refuse or delay compliance, particularly where requesting states lack analytical capacity to articulate precise relevance of information they have not yet seen.

Third, paragraph 3 requires requested states to act as soon as possible but provides no definition of promptness. Experience administering tax treaties demonstrates that without binding

deadlines, as soon as possible becomes eventually or never. The following provision is proposed:

“Requested States Parties shall respond to information requests within ninety days for straightforward requests and within one hundred and eighty days for complex requests requiring third-party information. Extensions beyond these periods shall require written notification explaining necessity and providing a revised completion date. The Conference of States Parties may adopt technical standards specifying timeframes for other forms of assistance.”

Fourth, the provision should specify valid grounds for refusal whilst clarifying that bank secrecy, absence of domestic tax interest in the requested information, and commercial confidentiality cannot constitute legitimate grounds for declining a request. These exclusions have been used historically to frustrate cooperation, and their prohibition would bring the Convention into alignment with the standard already adopted by the one hundred and forty-seven parties to the OECD/Council of Europe Multilateral Convention.

Fifth, Article 9 must address assistance in collection for digital services where no domestic withholding agent exists. When a consumer in a developing country subscribes directly to a non-resident digital service provider, the source state has no intermediary through which to collect tax. Withholding, the backbone of source taxation enforcement in developing countries, is structurally unavailable for business-to-consumer digital transactions. The provision should therefore require residence states to assist in enforcement of source-state tax claims against their resident digital enterprises, and the Conference of States Parties should be empowered to designate payment processors and financial intermediaries as collection agents where the non-resident enterprise fails to comply with registration obligations. Without an enforceable collection mechanism, source taxation rights over B2C digital services exist in law but not in practice. Additionally, information exchange provisions must support threshold verification: where Protocol 1 establishes revenue thresholds for nexus, residence states should be required to provide source states, upon request or automatically, with data on the revenue their resident enterprises derive from services rendered in the source jurisdiction.

#### **IV. Most Favoured Nation Treatment and Protocol Reciprocity (Article 22)**

Article 22(4) establishes that States Parties are not bound by protocols they do not join. This submission does not challenge that principle. However, two distinct problems arising from the interaction of optionality with existing treaty networks must be addressed if the Convention is to avoid entrenching the asymmetries it was designed to dismantle.

The first concerns the cascading erosion of withholding tax rates through most favoured nation clauses in existing bilateral tax treaties. A developing country negotiates a bilateral treaty with State B at a withholding rate of ten per cent on service fees. Its existing treaty with State C contains an MFN clause providing that if a lower rate is subsequently agreed with any other state, that rate extends automatically to State C. When the developing country later concludes a treaty with State D at five per cent, the MFN clause in the State C treaty is triggered, reducing

the rate to five per cent without renegotiation, without reciprocal concession, and frequently without the developing country recognising the cascade has occurred. The result is a ratchet effect driving withholding rates systematically downward. The Indian Supreme Court confronted this directly in its [2023 rulings in the Nestlé and Steria](#) cases, holding against automatic MFN application, but this judicial intervention demonstrated that the problem requires a multilateral solution. The Convention should establish a floor below which MFN clauses in bilateral treaties cannot reduce withholding rates.

The second problem concerns the absence of any mechanism linking protocol participation to bilateral treaty entitlements. A state could ratify the Convention, decline all substantive protocols, yet continue benefiting from bilateral arrangements with states that have accepted protocol obligations. [This submission proposes the insertion of Article 22\(5\)](#):

*“Recognising that effective international tax cooperation depends on reciprocal commitments, States Parties shall, when negotiating or revising bilateral tax agreements, give due consideration to whether the other State Party has participated in protocols implementing the core commitments established in Articles 4, 6, 7, and 8 of this Convention. States Parties participating in such protocols may, in their mutual relations, provide treatment that reflects their participation in such protocols. When applying most-favoured-nation treatment or non-discrimination principles, States Parties may distinguish between States Parties based on participation in protocols, provided that such distinction is reasonably related to the objectives of this Convention and does not preclude non-participating States from subsequently joining protocols.”*

This formulation achieves three objectives. It requires states to give due consideration to protocol participation when negotiating bilateral arrangements, creating transparency expectations without mandating particular outcomes. It permits protocol participants to provide treatment reflecting their reciprocal commitments, enabling willing coalitions to advance cooperation without requiring universal participation. And it clarifies that states committed to different levels of cooperation are not similarly situated for purposes of MFN and non-discrimination principles, thereby preventing non-participating states from free-riding on the commitments of participating states whilst preserving their right to join subsequently.

## **V. Conclusion**

Each of these proposals is directed at the same structural concern: the draft Convention risks creating a multilateral instrument that codifies cooperative aspiration without generating enforceable obligation. The proposals draw on established treaty practice and are offered in the recognition that this Convention represents the most significant opportunity since the 1960s to construct an international tax architecture grounded in inclusivity, legitimacy, and accountability. The Committee is respectfully urged to incorporate these proposals into the negotiating text.