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South Centre Inputs on Workstream III on dispute prevention and resolution (Co-Leads' Draft Protocol on the Prevention and Resolution of Tax Disputes)

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I. Abstract

The South Centre supports the development of an effective multilateral framework for the prevention and resolution of tax disputes. The Protocol should reflect the different capacities of States and provide sufficient flexibility for broad participation.

The Protocol should contain sufficient legal and procedural detail to provide a legal basis for mechanisms where none currently exist and to ensure coherence with mechanisms available under existing instruments. As such, the protocol itself should establish who can invoke it, when it applies, the obligations of competent authorities, and the relationship with existing instruments, and minimum procedural safeguards. Detailed operational procedures such as how an advance pricing arrangement (APA) or joint audit is conducted or mediator is appointed should be addressed through accompanying guidance issued by the Parties to the Protocol.

The protocol should cover the broad range of dispute-prevention mechanisms, but none should be mandatory, to allow flexibility given different State capacities.

The Mutual Agreement Procedures (MAPs) could constitute the core mechanism for the resolution of tax disputes under the Protocol, as it has a well-established basis in international tax practice.

The Protocol should not establish mandatory arbitration. Any arbitration mechanism, if retained, should be expressly voluntary and based on the consent of all competent authorities concerned.

The timelines provided in the protocol should be indicative rather than hard deadlines.

The protocol should provide for capacity building and technical assistance for the implementation.

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II. General Comments

The South Centre commends the Co-lead, secretariat, and Intergovernmental Negotiating Committee (INC) for the progress under WS III and for the preparation of the Co-Leads' Draft Protocol on the Prevention and Resolution of Tax Disputes.

III. Specific Comments

Below are specific comments and inputs for all the Chapters and general observations:

Optionality

Optionality is welcome, to allow broad participation of all countries.

Level of detail

The Protocol should contain sufficient legal and procedural detail to provide a legal basis for mechanisms where none currently exist and to ensure coherence with mechanisms available under existing instruments.

The protocol should provide the legal basis such as who can invoke it, when it applies, the obligations of competent authorities, the relationship with domestic law and existing instruments, optionality and reservations, and minimum procedural safeguards such as indicative timelines for the mechanisms, confidentiality, and capacity building.

The protocol should not prescribe operational detail such as:

- how a joint audit is conducted
- how an APA application is processed
- the precise format of information requests
- detailed mediator/arbitrator appointment procedures
- detailed timelines for every stage
- technical transfer-pricing methodologies.

These detailed processes should be contained in the accompanying guidance issued by the Parties to the Protocol.

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Use of the word 'may'

The word "may" should be used where it is intended to provide optionality or discretion, and should not be used where the provision is intended to impose an obligation on the competent authority. In such cases, stronger mandatory language, such as "shall," should be used instead.

Thus, it is necessary to replace the word "may" with "shall" where the provision imposes an obligation on the competent authority. For example:

In Article II.1, paragraph 3, and Article II.2, paragraph 3, the second use of "may" could be replaced with "shall endeavor…"

Preamble

The inclusion of a preamble setting out the basis and the objectives of the Protocol is welcome. The preamble should recognise the different capacities of States, the need to facilitate the efficient prevention and resolution of tax disputes without imposing disproportionate administrative burdens, and the importance of technical assistance, and capacity building, particularly for developing countries. The preamble should remain short and be relevant for the interpretation of the operative provisions of the protocol: its adoption should follow agreement on the latter.

Chapter I - GENERAL PROVISIONS

The general definitions are sufficient.

There is no need to define cross-border tax dispute at this point, so as to allow applicability in different country contexts. The two guiding features provided in the Concept note i.e. State-to-State disputes and a shared legal framework, are still sufficient for drafting purposes. A definition, if deemed necessary, can be done once the operational provisions to the Protocol have been developed to allow flexibility during the drafting process.

Chapter II - PREVENTION OF TAX DISPUTES

The broad options for dispute prevention mechanisms are sufficient. None should be made a core mechanism, to allow flexibility, accommodate different levels of capacity, and allow Parties to determine the mechanisms appropriate to their domestic legal frameworks.

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The capacity building provisions under Article II.10 are welcome. However, the wording in paragraph 1 that "*the Parties shall make efforts, in coordination with each other, with the United Nations and with relevant international and regional organizations*" can be strengthened as follows:

> *…the Parties shall establish, through the Meeting of the Parties and with the support of the United Nations and with relevant international and regional organizations, a dedicated programme for capacity building in the prevention and resolution of tax disputes…*

Chapter III - RESOLUTION OF TAX DISPUTES

MAP can be made the core mechanism for dispute resolution, as it is already established in international tax practice in many countries.

The MAPs should not force countries into mandatory arbitration. It should follow article 25 of the UN Model, alternative A - without an embedded arbitration paragraph.

The protocol should allow all tax disputes, including those under trade and/or investment agreements to be resolved under the protocol, rather than being fragmented across different dispute-settlement mechanisms.

Timeframes should be flexible. The Protocol can support longer timeframes for complex cases, beyond the 24 months provided.

Other dispute resolution mechanisms such as mediation and conciliation should remain optional, as they remain largely untested in resolving cross border tax disputes. Parties should be allowed to make reservations on them if they so desire.

Mandatory arbitration should be excluded.

In case, however, it is decided that arbitration is retained, it should be voluntary and it should be available only where both competent authorities concerned agree to apply it. Neither competent authority should be able to unilaterally compel the other Party to submit an unresolved tax dispute to arbitration. Countries should be able to make reservations on the arbitration mechanism.

The roster of mediators, conciliators and arbitrators should have balanced geographical and gender representation with relevant qualifications, as established by the Meeting of parties.

Define '**a person directly affected by the case**' as mentioned in Articles III.3 and Article III.4, to indicate whether it refers to the taxpayer or competent authority

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Meeting of the Parties

There needs to be a dedicated Article defining the powers and functions of the Meeting of the Parties.

This Article should *inter alia* clearly define decision-making rules of the Meeting of the Parties, which should be by simple majority.

Financial obligations

Each Party should make regular, mandatory contributions. There should be penalties for Parties who do not make these contributions.

Chapter IV - CONSULTATIONS IN THE ABSENCE OF AN APPLICABLE TAX INSTRUMENT

Consultations in the absence of an applicable tax instrument should remain voluntary and should not override domestic law.

Chapter V – RESERVATIONS

Reservations provide the flexibility needed to secure broad participation. The protocol should allow reservations on all non-core mechanisms.

This approach supports flexibility, continuity and legal certainty, while allowing Parties to adopt the Protocol's mechanisms where they consider them more appropriate or effective.