August 26, 2026

Intergovernmental Negotiating Committee on the
United Nations Framework Convention on International Tax Cooperation
c/o Financing for Sustainable Development Office
United Nations Department of Economic and Social Affairs
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Re: NFTC Comments on the Co-Lead's Draft Protocol on the Taxation of Income from Cross-Border Services (A/AC.298/CRP.33) — Workstream II, Protocol One

The National Foreign Trade Council (the "NFTC") is pleased to provide written comments on the *Draft Protocol on the Taxation of Income from Cross-Border Services*, A/AC.298/CRP.33 (20 July 2026) ("the Draft Protocol").

The NFTC, organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities and represents most major sectors of the U.S. economy. NFTC members account for over $6 trillion in global revenue and employ nearly 6 million people in the United States. Our members value work that establishes and maintains international tax norms that provide certainty to enterprises conducting cross-border operations.

Abstract

NFTC recognizes the work of the UN Secretariat and appreciates the opportunity to provide feedback. The objectives of the protocol need to be balanced with the need to ensure that the rules are clear and administrable. Our central concern is that the Draft Protocol would substantially increase the risk of double taxation notwithstanding the relief contemplated in Article 10. That risk arises from the interaction of several provisions: gross-basis taxation under Articles 5(2), 6(2) and 7(2), a definition of covered services broad enough to capture nearly every cross-border payment, sourcing rules that permit more than one State to claim the same payment, the absence of any physical presence requirement, and a relief mechanism that does not adequately address all circumstances.

We further caution that provisions which evolve over time erode certainty for administrations and taxpayers alike. Finally, material portions of the draft remain unwritten. Every rate is bracketed, and Article 20(3)(b), which determines the Draft Protocol's effect where an existing treaty applies, has not been circulated. Our comments are therefore necessarily provisional, and we ask for a further opportunity to comment once those measures are developed.

Comments

Gross-Basis Taxation

Articles 5(2), 6(2) and 7(2) each authorize source taxation on the gross amount of the payment. Gross-basis taxation has been described in these discussions as "simple." Simplicity does not make it the right answer. Gross-basis taxation is economically inefficient, and academic studies indicate that it will inhibit growth and development.

Gross-basis taxation does not account for the expenses of running a business. It imposes a liability without regard to whether the taxpayer has realized any profit and would therefore affect companies operating at a loss or on low-margin activities. The result is over-taxation and double taxation, which will inevitably reduce overall domestic investment.

In practice, these effects are compounded in several respects. Where gross-up clauses apply, the tax will decrease the return on investment. Withholding taxes have a risk that the cost is passed on to the local customer. The result is that the economic burden falls in significant part on the market the measure is intended to benefit. Additionally, this most acutely impacts companies with low-margin activities or in early-year loss positions.

The rates in Articles 5(2), 6(2) and 7(2) remain bracketed. We do not believe that a single fixed ceiling can accommodate the diversity of margins across industries and business models.

NFTC members are opposed to gross-basis withholding taxes on cross-border services, and that opposition does not turn on the rate. A low rate applied to gross receipts still taxes revenue rather than income. Should the framework nonetheless adopt such taxes, it is essential that any tax, including any withholding tax, be creditable in the State of residence.

Economic Consequences

NFTC encourages the Committee to evaluate these proposals through a rigorous economic lens. ICC commissioned an independent study from Oxford Economics assessing Article 12AA of the UN Model Tax Convention, a closely analogous provision. That study finds that the withholding tax revenue such a measure would generate for developing economies would be fully offset by indirect losses from reduced services trade, lower foreign direct investment and weaker growth, resulting in a net fiscal loss.

Before the rates in Articles 5(2), 6(2) and 7(2) are settled, NFTC agrees with the recommendation of many member-states that the economic effect of these taxes be analyzed on a State-by-State basis, recognizing that any given State may act as either an importer or an exporter of services.

Net-Basis Taxation and the Article 9 Election

NFTC supports taxation on a net basis in principle, and we note that Articles 5(4)(b), 6(6)(b) and 7(4)(b) already contemplate an election into Article 9. However, those provisions direct the taxpayer to the "reasonable allocation" standard in Article 9(1), which is not sufficiently developed to permit an assessment of whether the election would operate as intended. We would need to see fuller proposed language before commenting substantively on the mechanism, and we request that any further development of Article 9(1) be made available for comment

Relief from Double Taxation — Articles 10 and 2

Article 10 provides an ordinary credit subject to the standard limitation, under which the deduction "shall not exceed that part of the tax… attributable to such items of income." We do not believe this conventional formulation is adequate to address the double taxation the Protocol would generate.

In the experience of our members, withholding taxes frequently fail to be fully creditable. This occurs, for example, where the tax exceeds the tax due on the associated profits in the provider's State of residence, where timing mismatches arise, where documentation and procedural barriers prevent crediting, and where credits are denied because the tax is considered inconsistent with an applicable treaty. The first of these would follow as a matter of course under the Draft Protocol, since tax is levied on gross receipts and many service activities are low-margin or loss-making. Article 10 addresses none of these circumstances and provides no carryforward for excess credits.

These concerns are heightened for U.S. taxpayers, who are subject to the U.S. foreign tax credit limitation system. A credit that is unavailable, deferred or limited under domestic law does not relieve double taxation, whatever the Draft Protocol may provide.

Article 2 compounds these concerns by extending the Protocol to taxes "irrespective of the manner in which they are levied," expressly including digital services taxes, equalization taxes and excise taxes. Because those levies are covered taxes, Article 10 would on its face oblige the residence State to credit them. However, many States, including the United States, do not permit a credit for taxes that are not income taxes. This creates an obligation that residence States may be unable to perform, leaving the taxpayer to bear the shortfall. NFTC recommends that the scope of Article 2 be confined to conventional income taxes. In the alternative, Article 10 should be revised to address relief where a covered tax is not creditable under domestic law.

We further recommend that the relief mechanism be tested against the domestic credit systems of the States expected to become parties before the Draft Protocol is finalized.

Nexus and the Departure from Physical Presence

Articles 5(1) and (2) would permit source taxation of service fees without any requirement of physical presence. Article 9, although titled "Taxation Based on Physical Presence," operates only as an alternative to that rule rather than as the governing threshold. This represents a departure from the established permanent establishment and business profits nexus.

NFTC members operate around the world. These companies have physical presence, pay taxes, and contribute to the economies of each of those countries. We understand the concern about evolving business models that have led certain administrations to champion more flexible mechanisms. However, we believe that any new taxing right should be grounded in meaningful economic nexus or substantive engagement with the source jurisdiction, rather than in the mere passive receipt of a service, which is in substance a tax on the customer. Physical presence remains relevant for businesses of all kinds, and NFTC recommends that it be retained among the available nexus options rather than displaced.

Interaction with the Existing Tax Treaty Network

NFTC's most serious structural concern is that the Draft Protocol proposes to supersede or modify outcomes under existing bilateral tax treaties without sufficiently precise coordination rules. Article 20(3)(b), which governs when the Draft Protocol takes effect where an applicable tax instrument is already in force, currently reads "[provision to come based on discussions of Article 21 of the Framework Convention]." Article 3(1)(g) defines "applicable tax instrument," but the rule resolving conflicts has not been circulated.

As this rule is part of the Convention workstream and is not yet finalized, we do not have visibility to determine the effect on the treaty network. Article 19 compounds this difficulty by prohibiting reservations, which removes the mechanism States might otherwise use to manage the interaction. Until the coordination rule is available, we do not believe that States or taxpayers can assess how the Draft Protocol would impact the existing treaty network. NFTC recommends that this provision be developed and made available for comment before the Draft Protocol is finalized.

We also wish to respond to a suggestion that has appeared in these discussions, namely that bilateral tax treaties impede taxation. In reality, treaties are designed to prevent double taxation and thereby facilitate cross-border economic activity. That some treaties may no longer reflect what particular States consider an equitable balance of taxing rights is an argument about the terms of specific instruments, not about the utility of treaties generally. Undermining the treaty network would remove one of the few legal instruments that provide predictability in international tax matters.

Scope and Sourcing

Article 5(3) defines "fees for services" to mean "any payment in consideration for any service," with the sole exclusion of amounts paid to an individual as an employee. A definition of this breadth would capture nearly every cross-border payment and would overlap with payments separately treated as royalties, software, financing, goods and insurance.

The ordering among the relevant provisions is also incomplete. Article 5 applies only where Articles 6 through 9 do not, and Article 6(5) provides that the automated digital services article does not apply where a payment qualifies as royalties. However, no article of the Draft Protocol addresses royalties, so a payment carved out of Article 6 on this basis would not be excluded from the Draft Protocol but would instead fall within Article 5(3) as a fee for services. We do not believe this result is intended.

The sourcing rules raise similar concerns. Article 5(5)(c) would treat fees as arising in a State where the payment is merely deductible there, even if the payer is resident elsewhere, and Article 6(7) applies a separate three-tier test to automated digital services based on consumer residence, end-user location and the origin of user data. In many cases, the service provider will not have the information necessary to apply these tests.

NFTC recommends that the definition in Article 5(3) be narrowed and that complete ordering rules be provided for payments capable of falling within more than one category. We further recommend that the scope of Article 5(5)(c) be limited and that a single, clearly ordered nexus test be adopted for automated digital services.

Administrative and Compliance Burden

NFTC has consistently encouraged the adoption of rules that rely on objective data and avoid undue compliance burdens, and we are concerned that the draft Protocol does not meet that standard. Article 6 would apply to enterprises with thousands or millions of customers across many jurisdictions. Determining consumer residence, end-user location, or the origin of user data on a transaction-by-transaction basis across a customer base of that size would impose an excessive operational burden, and in many cases, the cost of compliance would not be justified by the tax at stake.

In our view, compliance obligations should remain proportionate to the transaction at hand and to the tax due. Where they are not, the effect is to discourage investment in the affected market, an outcome that serves the interests of neither the source State nor the taxpayer. NFTC recommends a de minimis rule exempting one-off and small-dollar transactions.

Dispute Resolution — Article 11

NFTC welcomes the inclusion of a dedicated dispute settlement provision in Article 11, and the defined timeframe for presenting a case under Article 11(3)(a).

We urge that Article 11 also include protections against the inappropriate denial of dispute settlement mechanisms, and of the mutual agreement procedure in particular. As drafted, Article 11(3)(b) requires a competent authority to seek resolution only "if the objection appears to it to be justified." Access to MAP therefore rests within the discretion of the authority whose own action is being challenged, with no obligation to consult the other competent authority and no limit on the grounds for refusal. While Article 11(3)(a) imposes a three-year deadline on the taxpayer, no corresponding timeframe applies to the competent authorities, and no mechanism applies where they are unable to agree.

The draft Second Protocol (A/AC.298/CRP.34) offers a workable model. It permits denial of MAP access on procedural grounds only on an exhaustive list of narrow bases, requires consultation with the other competent authority before an objection may be found unjustified, and sets indicative timeframes at each stage. However, because Article 11(2) applies the Second Protocol only where all relevant States Parties are parties to it, taxpayers will in many cases rely on Article 11(3) alone. NFTC recommends that these safeguards be replicated in Article 11(3), so that a minimum standard applies regardless of Second Protocol participation.

Conclusion

Gross-basis taxation of cross-border services, combined with an expansive scope, broad sourcing rules, the elimination of a physical presence requirement, and a relief mechanism that does not reliably deliver relief, will impose tax in excess of profit in a meaningful number of cases. That outcome does not improve investment growth or the fiscal health of any country. We urge the Committee to address this before the Draft Protocol is finalized and to develop and expose the coordination rule at Article 20(3)(b) for comment.

Decisions on these matters should be principled, avoid undue complexity, and avoid double taxation of the same income. Any outcome failing to meet these objectives will cause instability in the international tax system. We encourage continued direct engagement with the business community as this work proceeds.

We are happy to answer any questions or provide clarification on any of the issues raised. Please contact Anne Gordon, Vice President, International Tax Policy (agordon@nftc.org).