

# Kluwer International Tax Blog

## United Nations Tax Framework Convention: Terms of Reference for an Inclusive and Effective International Tax Cooperation? Critical Issues

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The terms of reference (ToR) adopted by the Ad Hoc Committee[i] will be submitted to the UN General Assembly and voted during its 79<sup>th</sup> session – taking place from 10 to 24 September 2024 in New York. If these terms of reference are adopted, the negotiating committee will be expected to submit a final text to the General Assembly for its consideration at the 82<sup>nd</sup> session. 193 UN Member States could be voting on a UN global tax treaty in late 2027. If adopted by the General Assembly by a two-thirds majority, this Framework Convention would then be opened for signature and ratification to all UN member jurisdictions.

This is not the time to look the other way, nor to engage in mere futile exercises of “cooperation washing”. If, as the Chair of this Committee said, this is a journey towards achieving justice and equity, and non-exclusion in tax matters, there is still a lot of work to be done. The quantitative and qualitative degree of exclusion can be measured in the eye of the beholder, in similar terms to instability. Whether instability is positive or negative depends on who is judging such instability. A change is destabilizing only if the person judging that change, is determined to maintain, for whatever reason, the status quo. Change in international tax and financial law is constant and normal, because they are not static. What changes are (un)acceptable changes? Do they threaten stability (or not)?[ii]

It has been said that “the momentum for the UN Tax Convention has reached such strength that it will only continue to grow”[iii]; but also that “a UN initiative should not and does not position itself to demolish the existing international tax regime and its achievements, but rather to build on these and ensure the stability and sustainability of the regime”[iv] .

The terms of reference received significant backing from many member States, but some major economies voted against it. It is a real pity that even the fundamental skeleton on which the framework convention is to be built could not be approved by consensus, as difficult as it is to find a balance of all delegations’ inputs and comments. What you say is as important as how you say it. Diplomats skilled in UN negotiations, who were not tax experts may help find a middle ground using less contentious words and sentence constructions.

The root of the problem is that a common mindset for universal concerns is still lacking. Certainly, creating mechanisms for raising some revenues at a global level for global spending may not only solve the problems posed by mobility, digitalization and the difficulty in allocating taxing rights to jurisdictions all over the world, but it may also bring an opportunity to create a fund for spending in global common goods[v].

It would not be a bad experience to force tandems between countries at different levels of development when it comes to promoting future negotiations by thematic areas. Many States seem to have already learned to take a leap towards the regional approach, overcoming an ineffective unilateral (or bilateral) approach. The role played by regional cooperation in the approval of Resolution 78/230 and the subsequent work by the Ad Hoc Committee must be highlighted[vi]. The classic tension between multilateralism and unilateralism in the international tax architecture is a manifestation of the conflict between centripetal forces and centrifugal forces. Instability may be created by a lack of agreement on substantive issues, but there is also instability in the process[vii]. It is easily understandable that any counterbalances in the dynamics of powers in international taxation should be accompanied by flexibility as a policy strategy that may foster a more inclusive international tax cooperation in the future[viii].

In the last meeting of the Ad Hoc Committee, the Nigerian representative called on those who had remained on the margins hesitant to join this process: “your perspectives are valuable, and your participation is important. Join us as we move forward together”. Previous drafts had described the Convention as “contributing” to the ongoing “system of governance,” but the final text states that the Convention will “establish [...] an international tax system”. This is in line with the position of the African group: the Convention should not be subsidiary to any other ongoing or past international tax reform process that might limit its scope. Thus, developing countries, as Mataba explains, “preferred to give the negotiating committee as much guidance as possible, likely fearing that if the ToR contained broad, unspecific language, it could weaken the operational force of the Convention and sideline their priority areas”. On the contrary, “developed countries wanted the ToR to provide broad, high-level, and non-prescriptive language to ostensibly allow the negotiating committee to have minimal restrictions in designing the Convention”. To what extent are the existing terms of reference guiding the future negotiating Committee without unduly limiting its flexibility?

In any case, the G7 Finance Ministers and Central Bank Governors’ Communiqué[ix] had explicitly supported consensus-based decisions and had asked to prioritize issues more likely to achieve it. This perspective was not accepted. As consensus-only decision-making could allow a minority of states to wield veto power, the developing countries’ bloc favored voting by a simple majority if no consensus emerges[x]. However, we fear that the sense of risk derived from venturing blindfolded (specifically in case of developed States concerned on how future decisions would be made) may lead all to bear the cost of inaction.

Despite the recent conversations in the UN wider forum, some criticism has been pointed out: “Ultimately, it may only serve the purpose of giving developing countries a sense of increased participation in global tax policy formulation – without providing any real participation in actual decision-making. The economic reliance of most developing countries on the developed world and powerful multinationals may be exploited to defeat any true democratization of international tax law and policy formulation at the UN. There is also the risk of compromising the quality of international tax law and policy rules because the OECD may arguably have more expertise on the subject than the UN”[xi]. Brauner argued that “this initiative should not be viewed as a

replacement for the OECD and does not require a reversal of the achievements of the existing international tax regime”. We share Quiñones’s view: “the media discourse that has pitted developed against developing countries and the OECD against the UN actually hurts the likelihood of achieving global simple and fair international tax standards, which is a goal for countries and taxpayers alike” . This should not be a discussion centered around what institution takes control and the underlying question of economic dependence[xii]. It is true that “changing the procedural forum, from the OECD to the United Nations, does not change the complexity of the substantive issues, nor the political issues”[xiii] . The problem is that the United Nations is not more likely than the OECD to achieve a consensus on the major, complicated and sensitive international tax issues, and on the numerous technical issues. But “the UN initiative is not only a change in the platform; it also changes the decision-making method. The OECD purportedly operates by consensus, which can only produce either the lowest common denominator or whatever is desired by the strongest party/ies as they force the hands of others to agree. The UN allows for a more flexible majority-based decision-making”, as Brauner recalls, and a framework agreement can make different domestic measures legitimate and does not require measures of the one-size-fit-all variety.

Three types of legitimacy have been identified: input legitimacy (who has a say), throughput legitimacy (procedural criteria, comprising participation, agenda-setting, decision-making and implementation) and output legitimacy (uptake and utility of the end product, or ‘substantive criteria’). Evidently the UN process has had input legitimacy, “but throughput and output considerations are both very alive in the uncertainty about the outcome of the Convention negotiations, and its ultimate relevance and impact”[xiv] . If rules of procedure are not clear so the Convention can achieve its key objective, Bena alerts: “it will be very damaging to the UN’s reputation and at that point there will be no other place to go to negotiate tax rules. So, let’s not take for granted that things will be different this time simply because the negotiations are happening at the UN”.

The G7 Finance Ministers and Central Bank Governors’ Communiqué also highlighted the importance of domestic resource mobilization and capacity building. Many countries agreed on that but felt that these tools were not enough. They think that “while we can make significant changes within our own countries, having a global architecture that supports these efforts would strengthen these moves and greatly amplify their impact”[xv] .

Fortunately, this is not a now or never for “nay-sayers” or “yea-sayers”, although all this could lead to the end of the tax world as we now know it. The UN News announced, “a blueprint for a new universal tax accord that represents an historic step towards changing the financial landscape”. It stressed that “more inclusive and effective international tax cooperation is critical in enabling countries to respond to existing tax-related challenges, from digitalization to global operations of large multinational enterprises, as well as to mobilize domestic resources and use tax policy for sustainable development”, it “is expected to generate significant additional tax revenues for many countries, especially those in the Global South”[xvi] . As can be seen in these explanations, the traditional vision of a Treasury determined to increase its revenue collection (over the rest), prioritizing this objective over other extra-fiscal (non-revenue) goals, continues to prevail. However, Faccio and Ghosh believe that “The UN Convention provides a platform to rework the current defective international tax rules towards more comprehensive solutions and thereby generate a bigger tax pie to be shared among countries”.

In fact, voices are already being heard warning the business sector of the consequences of this sort

of tectonic plate movement: “Companies should monitor ongoing developments with respect to the Framework Convention and the protocols that are contemplated. Given the significant potential implications for the international tax landscape going forward, companies may want to engage with policymakers in relevant jurisdictions to share their perspectives”<sup>[xvii]</sup>. The addition in the final text of “ensur[ing] certainty for both taxpayers and governments” has been explained as “a critical addition to the balance between taxpayer and government rights and obligations. It seeks to untie the hands of governments when faced with taxpayers practicing tax base erosion and profit shifting, as well as other decisions that can significantly impact the expected revenue base of the government. The ToR understands that there are two critical sets of expectations, those of the taxpayer and the government, and that governments are entitled to tools to enforce the rules underpinning their rights, just as companies are”.

Other proposals made to deal also with small initiatives that favor the growth of the social and solidarity economy have been ignored so far<sup>[xviii]</sup>, although, with good will, they could be derived from generic provisions on sustainability<sup>[xix]</sup>, as happens with climate aspects. In the case of the latter there is a clearer compromise, as environmental protection is expressly foreseen as a possible protocol in the final text. In this regard, Mataba says: “Although several positive proposals by developing countries made it into the final text, some key issues had to be watered down to secure broader agreement. The removal of the reference to the need to cooperate on climate-related tax measures illustrates this compromise. Some negotiators against the reference argued that such issues were already being handled in other forums such as the UNFCCC and for that reason should not be duplicated in the Convention. However, the Convention explicitly requires consideration of work from other forums, which should allow for climate-related issues to remain on the agenda regardless. In an attempt to find common ground, the ToR also includes broad language that commits the Convention to explore international tax cooperation approaches aimed at achieving sustainable development, including environmental matters. Furthermore, it opens the possibility for the prioritization of work on environmental challenges through the early protocols, which should give the negotiating committee a sufficient mandate to address climate-related tax measures”.

Apart from the geopolitical and strategic benefits that one could expect from siding with the demand of Global Majority countries, when it comes to sharing some of its own declared policy objectives (like decarbonization of the economies), the European Union “stands to gain a great deal if it can work with others at the UN to achieve a comprehensive UN convention. This is not just about taxation, but also about the future role of the EU in a changing world”<sup>[xx]</sup>. At least in fixing some red lines in problems affecting humankind, there should be consensus. As it is well-known, member States are already bound by obligations set out in their human rights treaties, and the Center for Economic and Social Rights reminded us that “these rights offer a benchmark by which to assess international financial architecture in general and international tax systems in particular”<sup>[xxi]</sup>, and also mentioned States’ duty to mobilize maximum available resources towards realizing human rights, States’ duty to cooperate internationally, States’ extraterritorial obligation to realize human rights beyond their borders, among others, with the aim of creating a fair and transparent international tax system. Although its input emphasized that the Framework Convention should specify resourcing and realizing human rights as one of its key goals, the final text just reads “Principle 9. Efforts to achieve the objectives of the framework convention should therefore: [...] c. in the pursuit of international tax cooperation be aligned with States’ obligations under international human rights law”.

Will all member States be able to overcome entrenched positions and find common ground at a later stage? The Framework Convention and its protocols should not be considered a chicken-and-

egg dilemma at all. Negotiators should be people first. Even if a win-win solution cannot be found, a wise agreement can still be reached that is better for both sides than the alternative<sup>[xxii]</sup>. Think of the divergent, convergent, and transform plate boundaries in tectonic movements. Until now, divergent interests, particularly between developed and developing countries, have heavily influenced the discussions. In the future, one could get more or less of something instead of another and play with timing. As St. Francis of Assisi said: “Start by doing what is necessary, then what is possible. Suddenly you are doing the impossible”.

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[i] More information is available at the following link: [https://financing.desa.un.org/un-tax-convention/second-session?\\_gl=1\\*oi4olw\\*\\_ga\\*NTY3MDIwODg1LjE3MjQ3ODA4ODM.\\*\\_ga\\_TK9BQL5X7Z\\*MTcyNDc4MTAzMS4xLjEuMTcyNDc4MTE2MS4wLjAuMA](https://financing.desa.un.org/un-tax-convention/second-session?_gl=1*oi4olw*_ga*NTY3MDIwODg1LjE3MjQ3ODA4ODM.*_ga_TK9BQL5X7Z*MTcyNDc4MTAzMS4xLjEuMTcyNDc4MTE2MS4wLjAuMA)

[ii] Spencer, D.E., “Change and (In)Stability”, *Journal of International Taxation*, Vol. 34, No. 8, 2023, p. 29.

[iii] Bena, “A UN tax convention is finally in the making. Now what?”, *Global Policy Journal Blog*, 7 February 2024. <https://www.globalpolicyjournal.com/blog/07/02/2024/un-tax-convention-finally-making-now-what>

[iv] Brauner, Y., “A UN Dawn For The International Tax Regime”, *Intertax*, Vol. 52, No. 2, 2024, p.3.

[v] Quiñones, N., “The UN Framework Convention On Tax Matters And A New Hope For Multilateralism And Simplification In The Area Of International Taxation”, *Kluwer International Tax Blog*, 3 April 2024. <https://kluwertaxblog.com/author/natalia-2/>

[vi] This is the case of Africa, Latin America and the Caribbean. See Quiñones, N., cit., 2024; K., “Inside the UN Tax Negotiations: Key outcomes and future challenges”, *IISD*, 23 August 2024. <https://www.iisd.org/articles/explainer/United-Nations-Tax-Negotiations>

[vii] See Spencer, D.E., cit., 2023, p. 28.

[viii] Parada, L., 2024, p. 1. See also Picciotto, S., “The Design of a UN Framework Convention on International Tax Cooperation” (April 5, 2024). Available at SSRN: <https://ssrn.com/abstract=4785381>

[ix] G7 Finance Ministers and Central Bank Governors’ Communiqué, Stresa, 23-25 May 2024, p. 8. <https://www.g7italy.it/wp-content/uploads/Stresa-Communique-25-May-2024.pdf>

[x] Matonga, G., “Wealthy countries push back as UN moves ahead with global tax plan”, *ICIJ*, 3 June 2024.

[xi] Onyeabor, E., “Towards a United Nations Tax Convention: Prospects and Challenges for Developing Economies”, *Afronomicslaw*, 12 December 2023, p. 3. <https://www.afronomicslaw.org/category/analysis/towards-united-nations-tax-convention-prospects-and-challenges-developing>. See also PWC, “UN releases draft Terms of Reference for negotiating a Framework Convention on International Tax Cooperation”, *Tax Policy Alert*, 11 June 2024.

<https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-un-releases-draft-for-negotiating-a-framework-convention.pdf>

[xii] Smith, C., Rudgewick, O., “Power shift on tax gives UN the upper hand”, *Public Finance*, No. 1, 2024, p. 12.

[xiii] Spencer, D.E., “The United Nations: A Forum for International Tax Reform”, *Journal of International Taxation*, Vol. 34, No. 11, 2023, p. 47.

[xiv] Hearson, M., “What to do with a global majority: making the most of a UN tax convention”, *ICTD blog*, 22 May 2024. See also Mosquera Valderrama, I.J., *Global tax governance: legitimacy and inclusiveness: why it matters*, Inaugural lecture, Leiden, 30 June 2023. Retrieved from <https://hdl.handle.net/1887/3621136>

[xv] Faccio, T., Ghosh, J., “Why Should EU Countries Support a UN Framework Convention on International Tax Cooperation”, *Intertax*, Vol. 52, No. 5, 2024, pp. 359-360.

[xvi] Travers, E., Why the world needs a UN global tax convention, *UN News*, 16 August 2024. <https://www.un.org/en/desa/why-world-needs-un-global-tax-convention>

[xvii] EY, “UN Ad Hoc Committee advances Terms of Reference for a Framework Convention on International Tax Cooperation,” *Tax News Update*, global edition, 22 August 2024 (2024-1590).

<https://globaltaxnews.ey.com/news/2024-1590-un-ad-hoc-committee-advances-terms-of-reference-for-a-framework-convention-on-international-tax-cooperation#>.

<https://globaltaxnews.ey.com/news/2024-1590-un-ad-hoc-committee-advances-terms-of-reference-for-a-framework-convention-on-international-tax-cooperation#>

[xviii] See my previous input: [https://financing.desa.un.org/sites/default/files/2024-03/Grau%20Ruiz%2C%20Maria%20Amparo\\_Input\\_AHC%20Tax%20%5BENG%5D.pdf](https://financing.desa.un.org/sites/default/files/2024-03/Grau%20Ruiz%2C%20Maria%20Amparo_Input_AHC%20Tax%20%5BENG%5D.pdf)

[xix] The approved text reads: “10. The framework convention should include commitments to achieve its objectives. [...] c. international tax cooperation approaches that will contribute to the achievement of sustainable development in its three dimensions, economic, social and environmental, in a balanced and integrated manner”. See Boletto, G., Grau Ruiz, M.A., “A New Bottom-Up Perspective in International Tax Cooperation for Sustainable Development”, *Revue Européenne et Internationale de Droit Fiscal*, No. 4, 2023, p. 473; Grau Ruiz, M.A., “Repensando la cooperación internacional en cuestiones de tributación para que sea verdaderamente inclusiva y eficaz”; Andrés Aucejo, E., “Hacia una nueva arquitectura de la cooperación tributaria internacional institucionalizada en el siglo XXI, bajo el rol clave de Naciones Unidas: a propósito de la Resolución A 77/441 (29 dic. 2022) y del informe de la Secretaría General A/78/235 (julio 2023), de Naciones Unidas sobre *promotion of inclusive and effective international tax cooperation at the United Nations*” both in García Moreno, A., Machancoses García, E. (eds), *Medio siglo de*

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*Derecho Financiero y Tributario: Estudios en memoria del Profesor Carmelo Lozano Serrano*, Aranzadi, Pamplona, 2024.

[xx] See Faccio, T., Ghosh, J., cit., 2024, p. 360.

[xxi] Countries are losing \$480 billion dollars a year due to tax abuse. The brunt of that harm is falling on lower-income countries, whose tax losses equate to roughly 49% of their public health budgets (compared to just 9% in higher-income countries). See Orgette, M., Palak, P., “The UN framework convention on international tax cooperation is now a certainty: What can and must it address?”, *Blog Center for Economic and Social Rights*, 25 March 2024. <https://www.cesr.org/the-un-framework-convention-on-international-tax-cooperation-is-now-a-certainty-what-can-and-must-it-address/>

[xxii] Fisher, R.; Ury, W; Patton, B., *Getting to yes. Negotiating agreement without giving in*, Penguin, New York, 2011, p. xii.

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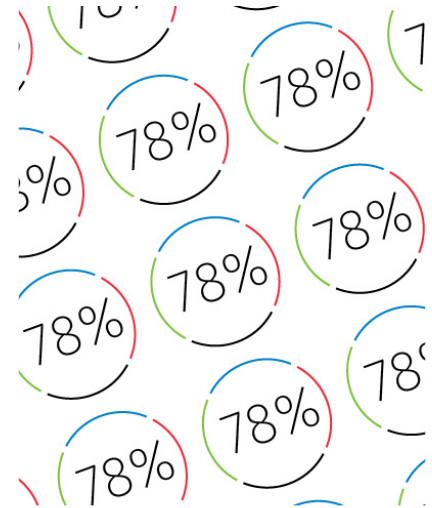
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