

Response to call for input on:

*“What are some specific problems that could be addressed by a UN framework convention on international tax cooperation?”*

Dear Chair of the Ad Hoc Committee to Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation,

Our input focusses on how to situate the UN Framework Convention in response to the deficiencies of the existing institutional landscape of international tax. We first discuss our diagnosis on a high-level. Then, we highlight likely implications of different procedural choices (without recommending one definite particular path to follow). Finally, we suggest substantive elements that could be included in protocols.

## Shortcomings in global tax governance

Through our research we have diagnosed the following shortcomings in the process and in the outputs of global tax governance:

First, many lower-income countries (LICs) face challenges negotiating effectively in the existing technical forums. These challenges arise in part from the limited resources that they can devote to negotiations, and in part from the modalities of negotiations, such as the pace, frequency, and lack of timely translation of drafts (Christensen et al 2020; Cadzow et al. 2023).

Second, the agenda and output of existing technical bodies operating on the basis of consensus (such as the Inclusive Framework) are often perceived as different to the priorities of LICs. This may be because their implementation requires too many administrative resources, or because they do not allocate sufficient taxing rights to LICs (Hearson et al. 2020). Current institutions do not deal well with the emerging pattern of strong, diverging preferences between global North and South.

Third, there is insufficient coordination between technical experts and the political decision-makers in many LICs. This results in challenges forming coalitions that can set the international agenda, political decisions that do not sufficiently reflect technical experts’ opinions, lack of political backing for positions adopted by technicians, and lacklustre implementation of commitments (Cadzow et al. 2023).

Fourth, an inclusive *political* body on tax matters is currently absent in the international tax regime complex. While technical bodies such as the UN tax committee, Inclusive Framework and Global Forum are part of a more inclusive technical landscape, there is no political body to

complement them (Cadzow et al. 2023; Chowdhary and Picciotto 2021). Yet, as international tax negotiations have become increasingly politicized, organisations such as the G7, G20 and European Union have become important spaces for agenda-setting, brokering high-level political agreements, and setting mandates for technical bodies. This risks reinforcing the exclusion of countries from the global South that historically have not been able to participate in standard-setting.

## Goals of the UN Framework Convention on international tax cooperation

To address these shortcomings, the high-level goals of the framework convention should be to

1. Establish an inclusive *political* body that is complementary to existing technical spaces  
The framework convention should above all seek to establish an inclusive political body that could “orchestrate” the work of technical bodies, whether new or existing. This would attenuate concerns about duplicating existing work – a concern that due to a scarcity of time and resources available for multilateral negotiations is also shared by negotiators from LICs (Cadzow et al. 2023). Establishing such a relationship may come with its own challenges. Different procedural questions such as the financing mechanism, dispute resolution provisions and voting rules matter so that the framework convention can actually fulfil this function and will not simply be ignored or bypassed.

2. Enshrine the principle of Special and Differential Treatment in substance and process of global tax governance

Special & Differential Treatment (S&DT) provides for preferential rights in favour of developing countries, predicated on remedying the asymmetrical economic, technical and political relationship between global north and south countries. While the principle gained prominence in the multilateral regimes on trade and environment, it is already reflected in some of the substantive outputs of global tax governance. For example, certain developing countries are exempt from peer review on dispute resolution under BEPS Action 14, while there are specific rules for “low capacity jurisdictions” in the Pillar 1 Amount B proposal. However, it is not consistently applied across all priority areas of LICs. In trade, S&DT relies on binding rules which obligate countries to accord favourable treatment to developing countries.

3. Permit the development of various solutions rather than a one-size-fits-all approach  
If cooperation is meaningfully inclusive, it will naturally entail a re-examination of the appropriateness of standards that have mainly been developed by high-income countries for the different contexts found in other states. In some instances, the outcome of multilateralism in tax cooperation may be to minimise the friction created by the emergence of multiple standards by managing the interface between them, rather than reaching global consensus. This may also work

as an antidote to lowest common denominator agreements that come short of attaining their original objectives. We have discussed below how a Framework Convention could be designed with plurilateral initiatives in mind.

## Structural elements

### Decision-making rules

As negotiations in the ad hoc group have already demonstrated, the question of whether decisions under the Framework Convention are to be adopted by consensus of all members or by a majority (and if so, of what size) is likely to be contentious. If decisions can only be adopted by consensus this likely means that progress is slow and decisions will be complex compromises. In contrast, if decisions can be adopted by a majority, an important number of countries may not ratify and implement all decisions (though, as recent OECD negotiations have demonstrated, consensus is not a guarantee of universal adoption).

It is unlikely that states would agree on an FC with rules that could lead to them being bound to decisions rules with consequential outcomes on themselves without their consent. However, not all decisions that would be taken by the Conference of the Parties under Framework Convention will necessarily be highly consequential (for instance on the adoption of analytical reports, or procedural issues). Therefore, it could be evaluated to use different decision-making rules for different types of decisions. Under the UNFCCC, annexes to the convention, which are of a more technical nature, can be adopted by a  $\frac{3}{4}$  majority whereas protocols require consensus.

A Plurilateral option may provide Countries with policy space to develop rules open to the wider north-south membership, without binding members that do not accede to them. The success of such option requires defined rules/criteria/procedures on how such open plurilateral agreements will operate (Hoekman et al. 2022). Moreover, not every agreement needs to be universally adopted by all countries in order to be useful. Hence, specific decision-making rules for agreements that are “plurilateral”, i.e., only applicable to a subset of countries, could be contemplated, as well. The Framework Convention could enable countries to negotiate and adopt such agreements in the absence of a universal agreement (even in the absence of a majority), unless a non-participating country can demonstrate that the agreement violates the principles of the Convention. For example, a protocol on digital service taxes could help to standardise such measures among countries that ratify it. A multilateral consensus would, however, be more useful if the protocol also provides for double taxation relief in residence countries. On the existing UN tax committee, Article 12B was adopted on a non-consensual basis. As a result, it is a tool for standardisation among developing countries, but there is little prospect at present of OECD members adopting it in their treaties.

## Principles for plurilateral cooperation

Plurilateral cooperation is already widely practiced in tax matters. One can distinguish three forms: First, there can be rules adopted by a subset of countries that only apply within a subset of countries and do not significantly impact the interests of other countries, such as the many EU directives on tax matters that only concern EU countries. Second, there can be multilateral agreements that include an alternative set of rules, with countries being free to choose among these alternatives, as for instance in the Multilateral Instrument from the BEPS Project. Third, there can be rules that are negotiated and applied by a subset of countries in a coordinated fashion but that have an impact on other countries.

The first and second type of rules may not need to be specifically addressed in a framework convention. However, the FC may contemplate developing rules for the third type of plurilateral agreements, among which we count, for instance, the EU list of non-cooperative jurisdictions and the Global Minimum Tax developed under Pillar 2. The Framework Convention may attempt to set principles and establish a dispute resolution mechanism under which affected countries can object to such plurilateral agreements.

## Funding cooperation under the framework convention

Many international organizations function on the basis of both mandatory contributions (which can be equal for all members or based on their ability to contribute) and voluntary resources contributed by members to specific projects. The respective share has implications for agenda setting: relying on voluntary resources may increase the conference of the party's ability to initiate projects, but a disadvantage is that doing so may give large and wealthy states a disproportionate power to determine the agenda and the project that gets most attention. However, it may also reduce the likelihood of individual states blocking certain projects, as they can disengage by opting out of their funding.

## Time frames and translation

A frequent criticism of current negotiations relates to the pace of negotiations in technical forums. In the Inclusive Framework, participants from small countries with more limited administrative resources say that they find it difficult to express an informed opinion on documents prepared by the OECD Secretariat that are only shared in English and little in advance of a discussion. Similarly to rules laid down in other UN frameworks, the Framework Convention's rules of procedure could set specific deadlines at which documents need to be shared before a session (possibly depending on their length) and specify the circumstances in which there is a requirement for translation. This will also enable adequate floating of proposals among a broad range of stakeholders within countries, such as local and regional governments, civil society, and the private sector.

## Possible early protocols

Many useful suggestions have already been made by others, and should be considered within the negotiations. In addition, we would like to add the following ones:

### Mainstreaming UN Model provisions

Within the UN Tax Committee, the elaboration of a fast-track-instrument to implement new and recent additions into countries' tax treaty networks is currently being discussed. We believe that such an instrument would be useful. We suggest that it include not only recent or future clauses of the UN Model it, but also earlier provisions. Their absence from some countries' treaties may be due to the fact that older treaties were negotiated by less experienced teams or under different political circumstances. Our research shows that some provisions that have been part of the UN Model for a long time, such as the unique aspects of the permanent establishment provision (articles 5(3)(a), 5(3)(b), 5(4)(a), 5(4)(b) and 5(7)), have become more popular in recent years, which suggests greater acceptance by partner countries (Hearson, Heitmüller, and Arel-Bundock 2023).

### Global South-led agreement on digital services taxes

Many countries have adopted digital services taxes, though they are quite diverse in their design. Notably, some have been designed as covered taxes under tax treaties, whereas others have been designed to fall outside of tax treaties so that they can even be applied to transactions with countries that are governed by a tax treaty. The current situation is not desirable for businesses because of the additional burden of having to comply with a variety of rules and because some countries may have designed their DSTs in tougher way than they would otherwise have done in order to have more leverage in international negotiations. Considering that an agreement on Pillar 1 may not materialize, an early protocol among willing countries could serve to streamline DSTs among countries of the Global South. A recent policy brief by ATAF identified five design options (ATAF 2024). These could serve as basis for such a protocol.

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15 March 2024.

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## About the ICTD

The International Centre for Tax and Development is an independent research centre, based at the Institute of Development Studies and focused on improving tax policy and administration in lower-income countries. It was founded in 2010 and is funded by the UK Foreign, Commonwealth and Development Office (FCDO), the Bill & Melinda Gates Foundation and the Norwegian Agency for Development Cooperation (Norad).

