

Oslo, 14.03.2024

## **Elements to be considered for the terms of reference for a framework convention on tax cooperation**

Reference is made to the invitation of the Chair of the Ad Hoc Committee to Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation to Member States and other stakeholders to provide substantive inputs to the work of the Committee.

In response to the guiding question for the Committee's deliberations and preparations ("What are some specific problems that could be addressed by a UN framework convention on international tax cooperation?") the Norwegian Academy of International Law (NAIL)<sup>1</sup> wishes to submit the following:

### **A. Structural elements of a framework convention**

#### PROCEDURAL ELEMENTS

##### **1) Decision-making**

To ensure effective decision-making in the implementation of the framework convention, the convention should contain provisions stipulating that decision of the governing body<sup>2</sup> must be able to take decisions on substantive matters, including the adoption of future protocols and amendments (see below), by two-thirds majority, and decisions on procedural matters by simple majority.<sup>3</sup>

##### **2) Adoption of protocols**

To ensure that the framework convention allows for gradual strengthening over time, the convention should spell out procedures for the elaboration and adoption of future protocols, and the relationship between these protocols and the convention. .

##### **3) Institutional arrangements**

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<sup>1</sup> The Norwegian Academy of International Law (NAIL) is a politically independent research association founded with a mission to promote the development of and respect for international law. In 2022, NAIL published a report entitled "A UN Tax Convention?", commissioned by the Norwegian Church Aid (NCA). For more information, see [www.intlaw.no](http://www.intlaw.no).

<sup>2</sup> The term *governing body* is used without prejudice to the final designation by the Treaty (e.g., Conference of the Parties, Meeting of States Parties, Meeting of Parties).

<sup>3</sup> Language for such a provisions can be based on BBNJ (Art. 47.5).

To facilitate effective implementation and gradual strengthening of the framework convention over time, the convention should establish a secretariat. Given the importance of the issue, such a secretariat may be given the status of a new international organization, in recognition of the fact that there is currently no universal organization for cooperation on tax issues.<sup>4</sup> The new convention could rectify this situation by establishing an International Tax Organization,<sup>5</sup> equivalent to what already exists on most other international issues (including trade, health, food and agriculture, maritime issues, or even on the ban of nuclear testing).

## SUBSTANTIVE ELEMENTS

### 1) Harmful preferential tax regimes

The Convention should, either in the main body of the instrument, or through subsequent protocols or amendments, seek to close remaining gaps in the international legal architecture pertaining to the issue of harmful tax competition. The convention should, as a primary objective, seek to address “harmful tax practices in the form of tax havens and harmful preferential tax regimes”.<sup>6</sup> In so doing, the ad hoc committee should, in elaborating the Terms of Reference for the framework convention, give due regard to the following factors:<sup>7</sup>

- **Key factors:**

- No or low effective tax rates;
- “Ring-Fencing” of Regimes;
- Lack of transparency;
- Lack of effective exchange of information.

- **Other factors:**

- An artificial definition of the tax base;
- Failure to adhere to international transfer pricing principles;
- Foreign source income exempt from residence country tax;
- Negotiable tax rate or tax base;
- Existence of secrecy provisions;
- Access to a wide network of tax treaties;
- Regimes which are promoted as tax minimisation vehicles;
- Regimes encouraging purely tax-driven operations or arrangements.

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### 1) Possible control measures to be included in the framework convention or in future protocols

The future negotiating committee should seek to develop control measures for specific issues deemed to pose a significant risk of contributing to harmful tax competition and tax-related illicit financial flows, which may include:

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<sup>4</sup> See e.g., [Gregory, N. \(2012\)](#), "Lax Tax: The Threat of Secrecy Jurisdictions and What the International Community Should Do about It", p. 886.

<sup>5</sup> A relevant precedent to draw on in the elaboration of provisions on this issue is the 1994 [Marrakesh Agreement establishing the World Trade Organization](#).

<sup>6</sup> OECD (1998), “[Harmful Tax Competition: An Emerging Global Issue](#)”, p. 3.

<sup>7</sup> The list is drawn from the abovementioned OECD report (Chapter 2, Section III).

- The establishment of a global registry on beneficial ownership;
- Measures to ensure automatic exchange of financial information between jurisdictions;
- Measures to require country-by-country reporting;
- Measures to ensure a minimum effective national wealth tax;
- Measures to phase out duty free shopping and VAT exemptions;
- Measures to prohibit negotiable tax rates or tax bases;
- Measures to phase out export processing zones;
- Measures to prohibit banking secrecy.

## B. Procedural considerations for the negotiation of the instrument

### 1) Rules of procedure for the negotiating committee

The Terms of Reference for the elaboration of the framework convention should make it clear that the new instrument will be negotiated in accordance with established practice, in particular with regards to decision-making. As stipulated in the Vienna Convention on the Law of Treaties (VCLT), “[t]he adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.”<sup>8</sup>

A formal consensus rule will make a meaningful outcome very unlikely. In fact, it is hard to find examples of any modern multilateral treaty successfully negotiated with formal consensus requirements.<sup>9</sup> By far the most common decision-making rule for multilateral treaties negotiated over the past decades is to strive for consensus, but if all efforts to achieve consensus fails, the negotiating body can resort to voting (two-thirds majority on substantive matters). Inspiration can be drawn from recent examples like the negotiation of the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ)<sup>10</sup> or from the Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes.<sup>11</sup>

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<sup>8</sup> VCLT, Art. 9(2).

<sup>9</sup> The Arms Trade Treaty, adopted in 2013, is one example of a treaty negotiated with formal consensus, but due to the veto of three UN members at the final negotiating conference, the negotiating committee was unable to adopt the instrument. The instrument had to be tabled in the General Assembly, which could adopt the treaty by a majority vote.

<sup>10</sup> See [A/RES/72/249](#), operative paragraphs 17–19.

<sup>11</sup> See [A/RES/75/282](#), operative paragraph 5.