

*Response to call for input on: Zero Draft Terms of Reference*

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

We thank you for the opportunity to comment on the Zero Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation. Our input focusses on four key issues highlighted in the Zero Draft: interactions between tax and investment law, balancing tax certainty with government certainty, options for dispute resolution, and the need for free and independent reporting of the UN tax negotiations to enable greater participation of developing countries.

## Background

The International Institute for Sustainable Development (IISD) is an award-winning independent think tank championing and accelerating sustainable solutions to 21st century problems. Our goal is to promote human development and environmental sustainability. Our big-picture view allows us to address the root causes of some of the biggest challenges facing our planet today and particularly the greatest threat – climate change. In the face of this enormous challenge, our Economic Law and Policy Program draws on three decades of international expertise to develop legal frameworks, policy changes, and economic pathways that can set the world on a sustainable trajectory.

IISD has a strong track record working on international and domestic taxation. In 2018, we set up a program to address tax base erosion and profit shifting issues (BEPS) in the mining sector. The Global Mining Tax Initiative (GMTI) is delivered with the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) Secretariat, hosted by IISD. We work in partnership with the OECD, ATAF, CIAT, and several other regional and non-governmental organizations. We sit on the United Nations Subcommittee for Extractive Industry Taxation in Developing Countries.

Our expertise on international taxation extends beyond the mining sector. We helped inform the development of the OECD Global Minimum Tax (GloBE) through our expert commentary and support to countries participating in the negotiation. We were one of the first organizations to provide guidance to developing countries on how to understand and adapt to the global minimum tax. We are also working with developing countries on assessing tax incentives and investment frameworks.

## Taking a broader view of tax policy ecosystems

We support the objective to “ensure fairness in allocation of taxing rights under the international tax system that contributes to achieving sustainable development”. To achieve this goal, we recommend that the Ad Hoc Committee does not restrict its mandate to tax legislation, but also considers the impact of other legal instruments on taxation, particularly bilateral investment treaties and national investment laws and contracts. Investment laws and policies [may be interpreted as limiting the scope for tax reform, both domestically and internationally](#). The Ad Hoc Committee would also benefit from engaging with investment policy makers who are often sidelined from tax policy discussions despite having a mandate that overlaps with tax policy, such as granting [tax incentives](#). Modernising the

international tax system requires taking a broader view of the legal framework and institutional settings in which tax policy and administration occur both at the national and global level.

## Balancing tax certainty with revenue certainty

The Zero Draft Terms of Reference emphasize the need for the UN framework convention to increase the certainty of the international tax system. We agree that predictability is important for both taxpayers and governments. However, when discussing tax certainty and designing related legal instruments, the emphasis is too often on the stability of tax rules for taxpayers. There is another side to tax certainty, and we would like to take this opportunity to emphasize the importance to governments of revenue certainty. This is critical to achieving a balance between taxpayers' and governments' rights and obligations. It means that governments should not be prevented from taking action to address base erosion and profit shifting when faced with taxpayers' decisions on company structuring, operations involving related parties, offshore sales of assets, and other decisions that have major impact impacts on the expected revenue base of the government. The UN framework convention should reinforce that two sets of expectations, taxpayer and government, need to come together and provide tax certainty for both parties. The Convention should also explicitly empower governments to use legitimate legal tools to protect their rights, just as taxpayers do. Governments should not be prevented from responding to the threat of base erosion and profit shifting by guarantees (legal or otherwise) of tax certainty.

## Dispute resolution

Existing tax-based dispute resolution platforms have severe limitations. The current international tax dispute resolution system is a patchwork of incremental solutions. Whilst Mutual Agreement Procedures (MAP) can be a useful solution to addressing double taxation issues arising in tax treaties, [it has been found to be ineffective](#). One of the key issues is the 'lack of finality': MAPs do not impose an obligation on either treaty partner to arrive at an agreement or, at a minimum, ensure an agreed upon application of treaty provisions. On the other hand, mandatory and binding arbitration requires jurisdictions to accept the binding authority of an arbitration panel requiring the surrender of tax sovereignty – a major concern for developing countries.

In parallel, [the world has witnessed a rise in tax-related ISDS. Between 2000 and 2021, tax-related claims accounted for about 15% of the 1,190 publicly known ISDS cases filed overall. The rise in investment arbitration rulings on taxation matters is especially concerning given the high value of damages awarded to investors](#). For instance, the *Yukos v. Russia* case found unlawful expropriation regarding the enforcement of a tax assessment raised in 2000. Ultimately, an arbitration award of US\$ 50 billion was granted to the investor and has since been upheld by the Hague Court of Appeal. It is essential that the UN framework convention address the effectiveness of international tax dispute resolution mechanisms to avoid the drift towards international tax arbitration which can be costly for governments and opaque.

## Free and independent reporting of UN tax negotiations

We strongly support the call for Member States that are able to do so, to support developing countries to participate fully in the process to negotiate a UN framework convention. Developing countries struggled to participate in recent global tax negotiations within the OECD's Inclusive Framework. The volume of meetings, information, cost of travel, and time away from their "day jobs"/ primary duty stations made it difficult for them to keep up with the pace of negotiations. Relying on New-York based diplomats should place negotiations on a more equal footing at the UN. Yet it remains difficult for

countries with fewer staff in their UN mission to follow every negotiation or develop the issue-specific knowledge required. One way to increase participation is to provide transparent, comprehensive, independent, and freely available reporting of the UN tax negotiations. IISD is proposing to do this through its [Earth Negotiations Bulletin](#) (ENB), which has provided independent reporting from sustainable development meetings since 1992.

Alexandra Readhead, Thomas Lassourd, and Kudzai Mataba

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