



Faculdade de Direito da Universidade NOVA de Lisboa, Campus de Campolide.

1099-032 Lisboa, Portugal

<https://taxlab.novalaw.unl.pt/>

To: Mr. Ramy M. Youseff
Chair of the Ad Hoc Committee

Via Email

Lisbon, 21th June 2024.

Subject: Comments on the Zero Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation

Dear Mr. Youssef,

We kindly appreciate the opportunity to comment on the “*Zero Draft Terms of Reference*” (ToR).

Our main concern, over its content, relates with the issue of the principles, upon which an inclusive and harmonized worldwide tax cooperation system is to be grounded. Therefore, in this first contribution, the NOVA Tax Research Lab has dedicated itself to discussing those principles that we believe are decisive for the discussions on the (ToR).

1. Principles associated with an harmonized worldwide tax cooperation system

The tax coherence principle¹, viewed from a holistic point of view (i.e., to be applied uniformly amongst different jurisdictions) would assure a straightforward and simplified international tax framework, whilst simultaneously taking into account the agility of the new system to accommodate, in an efficient manner, all future innovations on business models and technology.

¹ Developed, strictly from a domestic point of view, by the Court of Justice of the European Union - TERRA, BEN J. M. e WATTEL, PETER J. (2012). *European Tax Law*, Sixth Edition.

Therefore, there should be a common effort to assure that, in each jurisdiction, economic transactions, business models and/or types of income are subject to the same legal framework, (despite differences in tax rates), in order to avoid hybrid mismatches arrangements² (i.e., aggressive tax planning methods of exploiting differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions, to achieve double non-taxation or long-term taxation deferral).

The tax coherence principle must be applied in conjunction with the principles of tax transparency, solidarity, and cooperation.

2. Principles concerning the establishment of a system of governance, which respects the tax sovereignty of each Member State

In order to assure tax sovereignty³, tax coherence should be viewed through the lenses of a higher standard: the principle of a balanced allocation of the power to impose taxes.

This principle prescribes the need for clear, simplified legal standards regulating – with the utmost certainty – the country entitled to tax specific kinds of income/economic transactions.

In order to assure the effectiveness of such legal standards, it is vital to promote an inclusive and cooperative debate amongst representatives of all the involved jurisdictions, with the aim of achieving the greatest possible consensus.

² OECD/G20 Base Erosion and Profit Shifting Project - Neutralising the Effects of Hybrid Mismatch Arrangements - ACTION 2: 2015 Final Report.

³ Following the approach provided by Peter Dietsch, sovereignty is seen as Responsibility. That means, when a State is deciding about which tax actions and tax rules are to be undertaken, that same State must decide considering what should and what should not be done. Being tax decision a choice, not an imposition, decisions must be made contemplating what should and what should not be done. (DIETSCH, P. (2015). **Catching Capital. The Ethics of Tax Competition.** Oxford University Press, specifically p. 167-187). Additionally, Rita Pires, assuming that tax sovereignty, is more than domestic sovereignty; it also goes beyond westphalian sovereignty and integrates more elements than the traditional 'international legal sovereignty', argues that 'Contemporary Tax Sovereignty' should be all about 'Shared Sovereignty'. The author emphasises that 'Contemporary Tax Sovereignty' implies a double composition, being the first element 'Responsibility and Shared Sovereignty' as self-preservation and as second element, 'Responsibility and Shared Sovereignty' as integrity, assigning an ethical approach to tax design, interpretation, application, and control. (PIRES, R. C. (2022). **Multilateralism, Multilateralism, Who Is Sovereign after All? Tax Sovereignty after BEPS Multilateral Instrument** in Sergio André Rocha & Allison Christians. A Multilateral Convention for Tax From Theory to Implementation, Kluwer Law International B.V., specifically p. 18-19).

3. Principles regulating a fair allocation of taxing rights, including equitable taxation of multinational enterprises⁴ and effective taxation of mobile tax bases.

Defining what is just or equitable is an almost impossible endeavour.

(Re)allocating tax revenue to other jurisdictions – on the basis of a more fair distribution of resources, so to better achieve an equitable status amongst states⁵ – will, quite possibly, give rise to domestic tensions, in high and medium-income countries, since public opinion might perceive this as a subsidization mechanism, deprived of democratic legitimacy (i.e., disinformation, associated with the lack of interest to follow the proposals, might cause public opinion to inadequately react to the initiative).

In this sense, the principles of caution⁶ and of democratic legitimacy⁷ should be taken into consideration, when assessing/defining the tools associated with the implementation of a more efficient and responsible international cooperative tax system, that assumes ‘global tax justice’ as an essential component.

4. Hierarchical structure proposed principles

Given the abovementioned arguments, we suggest the following hierarchical structure of (proposed) principles, when assessing the implementation of a more inclusive/harmonized and cooperative international tax system:

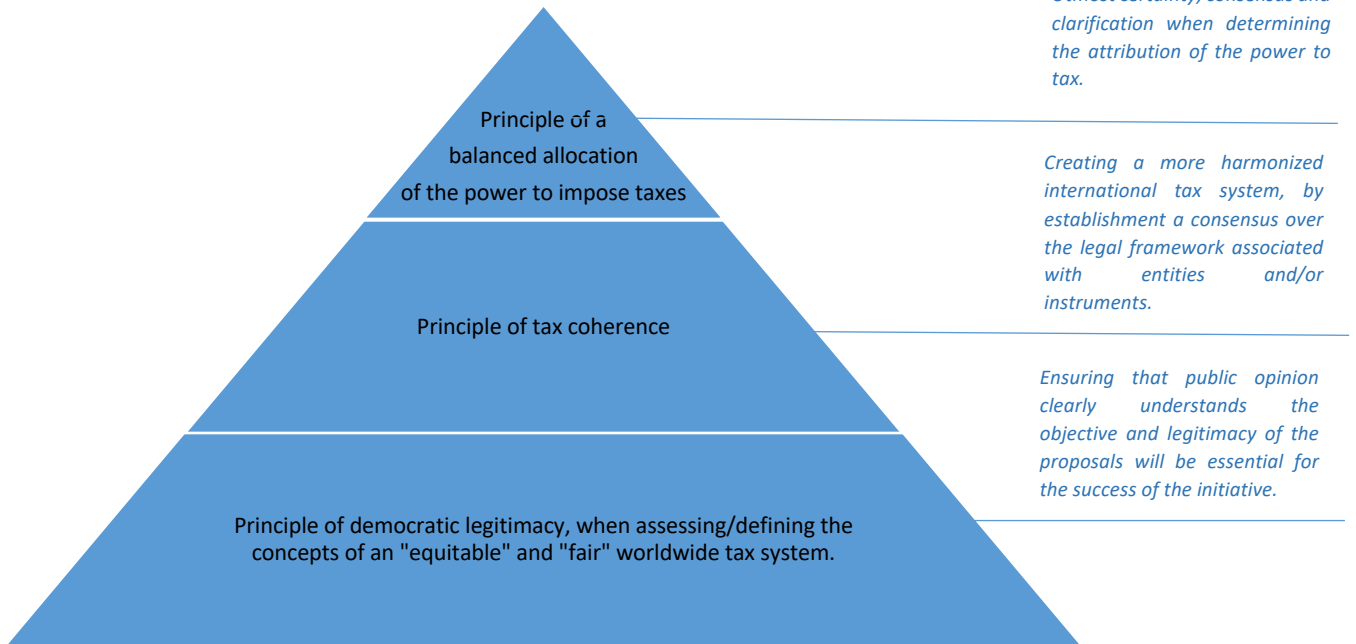
⁴ As highlighted by Maarten Floris de Wilde, it should guarantee that the ‘tax pie’ is fairly distributed. (WILDE, MAARTEN FLORIS DE. (2017). **Sharing the Pie. Taxing Multinationals in a Global Market**. IBFD, ISBN 9789087224158)

⁵ The allocation of taxes must be fair and tax revenue distribution must be equitable. It must provide both inter-taxpayer equity and inter-nation equity. (PIRES, R. C. (2022). **Multilateralism, Multilateralism, Who Is Sovereign after All? Tax Sovereignty after BEPS Multilateral Instrument** in Sergio André Rocha & Allison Christians. A Multilateral Convention for Tax From Theory to Implementation, Kluwer Law International B.V., specifically p. 18-19).

⁶ To be realised together with the idea of ‘Shared Sovereignty’, ou seja, the States must meet their interests in a balanced way and base their choice of tax regimes and tax measures on what should or should not be done. This comprises self-restraint as a choice toward an active and responsible type of tax cooperation. (PIRES, R. C. (2022). **Multilateralism, Multilateralism, Who Is Sovereign after All? Tax Sovereignty after BEPS Multilateral Instrument** in Sergio André Rocha & Allison Christians. A Multilateral Convention for Tax From Theory to Implementation, Kluwer Law International B.V., specifically p. 24).

⁷ International tax legitimacy implies an active and global participation; one that does not endorse what was designed by some, but rather one that divides responsibility and decision. (PIRES, R. C. (2022). **Multilateralism, Multilateralism, Who Is Sovereign after All? Tax Sovereignty after BEPS Multilateral Instrument** in Sergio André Rocha & Allison Christians. A Multilateral Convention for Tax From Theory to Implementation, Kluwer Law International B.V., specifically p. 24).

⁸ International tax legitimacy can even help restore national fiscal legitimacy. In this sense, Tsilly Dagan explains that “when States initiate multilateral cooperation to restore their legitimacy, they each entrust the multilateral regime with the authority to act on their behalf so as to enable them to provide their constituents with justice. This is the sine qua non for their legitimacy. They incorporate their otherwise impaired individual coercive power into a collective regime that encompasses more power than the sum of its components’ power.” (DAGAN, TSILLY (2017) **International Tax and Global Justice**. 18 Theoretical Inquiries in Law 1, 35 n. 1, specifically p. 31).



Ultimately, it is extremely important, when designing global tax rules, that the principles highlighted above are thought out and used to correctly tax a dual reality, represented by physical economic models that remain, even if they contain a mobility bias, and a growing reality, represented almost entirely by the digital economic model.

Finally, NOVA Tax Research Lab would like to express our gratitude for the opportunity to collaborate actively by offering insights on the **Zero Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation**. We truly believe and we are optimistic that the negotiations will lead to a successful **Global Framework Convention**, enabling effective international tax cooperation, where the primary purpose is global tax justice.

Rita Calçada Pires

Prof. Dr. Rita Calçada Pires

NOVA Tax Research Lab Director

Prof. Dr. Pedro Costa Monteiro

Mariana Passos Beraldo

NOVA Tax Research Lab Coordination Team