

## **Comments of the United States on the Zero Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation**

Thank you for the opportunity to provide written comments on the zero draft of the Terms of Reference for a United Nations Framework Convention on International Tax Cooperation (“ToR”). We continue to believe that the work undertaken by the Ad Hoc Committee should proceed with an emphasis on reasonable negotiation, compromise, and consideration of many viewpoints. To that end, our comments include procedural and substantive views that we hope will helpfully inform the preparation of the updated ToR text.

### Procedural comments

#### *A need to focus on procedural elements*

We reiterate our view that the focus of the ToR should be the procedures for negotiating the Framework Convention, not the substance of the Framework Convention, which should be left to a future negotiating committee once it is established by the General Assembly. Such procedural directions could include, among other items, modalities relating to the negotiating process, to encourage clear and transparent decision-making; a process for a negotiating committee to determine appropriate substantive topics for inclusion in the Framework Convention (or subsidiary negotiations) that is designed to ensure that these substantive topics are included based on sufficient analysis; and procedures to ensure that all Member States’ views are taken into account during the expected negotiations.

In addition, we reiterate that the ToR should not prejudge the mandate for, or the outcomes of, the work of a negotiating committee. The zero draft includes several instances that appear to overstep the bounds of the mandate of the Committee by attempting to require a negotiating committee to work on specific issues. For example, paragraphs 7 through 10 list specific topics that the Framework Convention “should” include, and paragraph 14 lists early protocol topics that “should” be developed. The ToR should be clear that these topics are non-binding examples to preserve a negotiating committee’s flexibility.

Moreover, paragraph 14 lists specific priority issues “to be addressed” through early protocols. “To be addressed” abrogates any power that the members of a future negotiating committee have to consider the merits of developing early protocols on these topics. On this issue, we suggest that the ToR use more neutral language to make clear that, consistent with Resolution 78/320, a negotiating committee has the option to consider early protocols.

#### *The importance of consensus-based decision-making*

One important procedural point that is not included in the zero draft is the process under which a negotiating committee would make decisions. As stated in our prior written input and our interventions at the First Session, we support consensus or broad-based decision-making by a negotiating committee. If the ultimate goal of this effort is to make meaningful and durable changes to international tax cooperation, the only way to do so is by achieving broad-based support. Inclusive and effective international tax cooperation inherently requires global buy-in. Despite extensive discussion of decision-making at the First Session, the zero draft is silent on

this important topic. We request that sufficient time be dedicated to discussing this topic at the Second Session. To facilitate this discussion, we suggest that the updated draft ToR include placeholder language to make clear that this and potentially other important procedural matters will be addressed in the ToR.

*A need for appropriate process sequencing*

As reflected in our prior inputs, clear and transparent decision-making by a negotiating committee requires the appropriate sequencing of negotiations. We are especially concerned that the simultaneous consideration of early protocols would create confusion and conflict, and inappropriately restrict a negotiating committee's work on refining conceptual objectives, principles, scope, and considering vehicles other than protocols.

As the Committee knows, a Framework Convention creates the conceptual and institutional framework under which protocols would be developed. It would be premature to develop a protocol before there is a Framework Convention in place to guide the negotiation and development of protocols. In addition, protocols are only one way to address issues under a Framework Convention. Mandating, before undertaking any analysis, that a complex substantive issue must be addressed through a protocol—to the exclusion of any other mechanism such as voluntary commitments or an exchange of best practices—risks removing many appropriate consensus-building tools from a negotiating committee's toolkit.

Moreover, while we acknowledge the urgency expressed by Member States at the First Session, the resource commitments that would be required to simultaneously negotiate a Framework Convention and five potentially complex early protocols are considerable. The resource challenges created by large projects can significantly undermine inclusivity, especially as jurisdictions must choose how to best participate among many international tax projects across multiple fora, on top of handling day-to-day operations. This is the case even where work on a project builds on previous technical work, since not all Member States may have reviewed that work or may have since received other political direction that requires refreshed domestic processes to review. We consider the risks posed to transparent and inclusive negotiations by resource challenges to be as important as the potential substantive confusion and conflict that could be caused by early protocol consideration.

*A need for greater transparency in the process*

In many ways, the zero draft does not appear to fully reflect the views expressed by all delegates at the First Session. It is unclear how the balance between different views was struck and how compromises were made in the drafting of the zero draft. For example, during the First Session, there was extensive discussion of decision-making, and yet that topic is not reflected anywhere in the zero draft. In contrast, there was no robust discussion at the First Session on the merits of categorizing certain topics as "early" protocols or "future" protocols, but the zero draft includes a section on potential future protocols. The process of drafting the ToR should be transparent in order to give legitimacy to the process and confidence by delegates and stakeholders.

There was significant agreement among delegates in the First Session that there is a need for greater transparency in the Committee. While not directly related to the draft ToR text, we think this issue is important enough to the drafting process to provide suggestions for improvement here. A detailed agenda circulated in advance of each meeting day and a written summary of each day's deliberations could provide better structure to the negotiations and allow Member States to clarify positions. As the draft ToR is revised during the Second Session, for each issue on which Member States have differing views, the Chair could provide to the Member States a written recommendation for a resolution, alternative proposals, and the reasons for the Chair's recommendation. Resolution 78/230 stresses that international tax cooperation requires "transparent decision-making structures" and "clear and transparent rules" to ensure meaningful engagement, and we provide these comments in that spirit.

*A need to take into account work in other fora*

Paragraph 6(d) of Resolution 78/230 mandates that the Committee, in elaborating the ToR, "take into consideration the work of other relevant forums, potential synergies and the existing tools, strengths, expertise and complementarities available in the multiple institutions involved in tax cooperation at the international, regional and local levels." In order to adequately take into account paragraph 6(d), the ToR should emphasize that every effort should be made to ensure a process that is complementary to, and not duplicative of, existing processes in other fora. Simultaneous discussions in multiple fora will result in the fragmentation of efforts to strengthen international tax cooperation and, as noted above, require jurisdictions with resource challenges to choose between competing processes. Our concerns on this point apply to many of the issues that are included as potential commitments or protocols in the zero draft, such as the commitment and protocol on exchange of information and the commitment related to equitable taxation of MNEs, among others.

Further, the specific location of paragraph 6(d) of the Resolution in the zero draft suggests that it is of lesser importance than the other principles listed in paragraph 6. The zero draft lists the topics in paragraphs 6(a) through (c) of the Resolution as "guiding principles" for the Framework Convention, and relegates paragraph 6(d) to a section headed "Approaches and time frame for negotiation." This differing treatment in the zero draft of the principles listed in paragraph 6 is at odds with the Resolution. This is also an example of an important decision made by the ToR drafters for which Member States, which were divided on this issue during the First Session, should receive a written explanation of the reasoning and the alternatives considered.

Substantive comments

*A need for greater focus on domestic resource mobilization*

One point on which many delegates agreed was the importance of domestic resource mobilization. However, the zero draft only mentions domestic resource mobilization in one place, and in such a way that little importance is placed on it.

Domestic resource mobilization is an area where the UN brings significant expertise. Additionally, Resolution 78/230 recognized that developing a Framework Convention will help

in accelerating the implementation of the Addis Ababa Action Agenda on Financing for Development and the 2030 Agenda for Sustainable Development. A focus on domestic resource mobilization could productively leverage this expertise as a negotiating committee undertakes its work. While we note other Member States' views that a future negotiating committee must look beyond domestic resource mobilization objectives, the Committee and a negotiating committee should consider linkages to, and impacts on, domestic resource mobilization efforts in the context of its negotiations.

*A need for more clarity on the substantive topics included in the zero draft*

The zero draft includes a number of terms and concepts that are subject to multiple interpretations. We recognize that the ToR is a higher-level document than a draft text of a Framework Convention or subsidiary negotiating documents. However, many of the topics included in the zero draft as commitments or protocols are so high-level that their meaning is ambiguous. For Member States to understand the ToR, and for a negotiating committee to productively undertake its work, there must be a common understanding of the scope of each issue.

By way of example, the zero draft includes “tax-related illicit financial flows” as an objective and a priority area for an early protocol. While we acknowledge that the term “illicit financial flows” (IFFs) is increasingly utilized within the UN system, this term lacks an agreed-upon international definition. Because there is no clear understanding of the contours of “illicit financial flows,” it is difficult for us to evaluate the obligations related to IFFs proposed in the zero draft. For instance, “tax-related illicit financial flows” could include tax avoidance and commercial practices that may not be illegal depending on the jurisdiction. We think it is critical to maintain a clear distinction between tax crimes and inappropriate but lawful behavior. While the latter is an important public policy issue, it is not a matter of tax criminality. This fundamental distinction is important enough, and high-level enough, to be addressed in the ToR—especially where a negotiating committee is mandated to address the topic.

Similar ambiguities exist regarding other protocols and commitments mentioned in the zero draft, such as the references to “equitable taxation of multinational enterprises” and “taxation of high-net worth individuals.” While we do not expect the ToR to contain technical or even significant conceptual detail, we are concerned that such ambiguous phrasing at this early stage will leave a negotiating committee with a very challenging and potentially confusing scoping task. That concern is amplified by the fact that the zero draft already seems to explicitly mandate that a negotiating committee include these items in the Framework Convention or design early protocols around these phrases.

Thank you again for the opportunity to provide these written comments. We hope that the drafters will consider our views as they continue their work, and we look forward to discussing the updated draft at the Second Session.