

# **Ad Hoc Committee to Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation**

## **Terms of Reference – Proposals from CANZ**

### **1. Preamble:**

We propose that the preamble first set out the purpose for the terms of reference:

These terms of reference are intended to support the negotiation of the framework convention by establishing guidance for the negotiation process and setting broad directions for the structure and contents of the convention.

The preamble should also make explicit the fact that the terms of reference are not binding in respect of the rules of procedure that will govern the negotiations nor the substance of the convention. We propose the following provision:

It is acknowledged that the present terms of reference are indicative only and are not binding with respect to the substance of the framework convention to be negotiated and the rules of procedure the Intergovernmental Negotiating Committee decides to adopt.

For the same reason, we recommend that the terms of reference avoid prescriptive formulations (e.g., “should”).

### **2. Rules for adoption of the Framework Convention:**

Consistent with the request by a number of states at the last session, the terms of reference should address procedural issues and stipulate:

In light of the importance of international tax cooperation, it is recommended that every reasonable effort be made for the adoption of the Framework Convention to take place by the consent of the States participating in its drawing up. If all efforts at reaching such consent have been exhausted and the Chair, upon a decision of the Bureau, has informed the Intergovernmental Negotiating Committee that all such efforts have been exhausted, it is recommended that, as a last resort, the adoption of the Framework Convention take place by the vote of two thirds of the States present and voting.

Seeking the broadest possible consensus on the Framework Convention is essential to support its adoption and implementation, and thereby its inclusiveness and effectiveness. The rule proposed above is consistent with the General Assembly rules of procedure, and there are precedents for its adoption at the UN, most recently for the adoption of the UN cybercrime convention.

### **3. Negotiation of early protocols:**

The terms of reference should stipulate:

It is recommended that protocols under the Framework Convention not be negotiated prior to the adoption of the Framework Convention.

It is expected that the Framework Convention will contain rules governing the development and adoption of protocols. Developing protocols while the Framework Convention is being negotiated would not be appropriate as this conceptual and institutional framework that is to be established under the Framework Convention will not yet have been adopted. Negotiating early protocols would also not support the inclusiveness of the process. States would require significant resources to participate in multiple negotiations at once; it is not realistic to expect that five protocols could be negotiated at the same time as the convention, in particular given the technical assistance needs identified by a number of states at the first session.

### **4. Topics for protocols:**

The terms of reference should include a provision regarding the scope of protocols under the convention:

It is recommended that the Framework Convention set out criteria for the selection of topics for protocols under the convention. In that regard, the Intergovernmental Negotiating Committee could consider the following:

Protocols to be adopted under the Framework Convention should concern issues that:

- require widespread multilateral coordination among Member States that cannot otherwise be achieved than through legally binding instruments; and
- have some level of commonality among a sufficiently large number of Member States so that the issues can be effectively and efficiently addressed through a common approach.

### **5. Objectives of the Framework Convention:**

The terms of reference should recommend the following objectives for the Framework Convention:

To strengthen international tax cooperation and the mobilization of fiscal resources in Member States in support of the public mission of States, including achieving sustainable social and economic development and growth;

To promote the development of tax policies that achieve an appropriate balance between the relevant policy objectives of taxation, including revenue generation, fairness, economic efficiency, ease of administration and compliance, integrity, certainty, predictability, adaptability, revenue stability, and transparency;

To combat international tax evasion and aggressive international tax avoidance;

To set out principles to guide efforts to achieve greater cooperation and coordination among Member States in the development and implementation of tax policies and to support the inclusiveness and effectiveness of such efforts;

To establish a Conference of the Parties and associated subsidiary bodies capable of taking actions in support of the achievement of the above objectives.

## **6. Principles to guide international tax cooperation:**

Consideration should be given to the following guiding principles:

Participation in the development of tax policy standards and other multilateral tax cooperation initiatives should be open to all Member States when intended to be universal in scope;

Broad consensus should be sought among Member States involved in the development of tax policy standards, in support of the adoption and implementation of these standards;

Not all international tax cooperation issues are relevant to all Member States. The degree to which international tax cooperation has to be universal depends on the specific issue that is to be addressed as well as the specific action being considered. At the same time, all Member States should be able to participate in the development of standards that are intended to be universal in scope, and broad consensus should be sought among participating Member States.

When developing tax policy standards and other multilateral tax cooperation initiatives, consideration should be given to the different circumstances of the Member States for which the standards and initiatives are intended, in particular with respect to their capacities to implement and administer a given standard or join a given initiative;

In lieu of the expression “needs, priorities, and capacities of countries in special situations”, the particular needs/priorities that are to be taken into account should be specifically identified.

The development of tax policy standards and other multilateral tax cooperation initiatives should take into account the economic, social, and environmental impact of such standards and initiatives;

This formulation avoids terms like “holistic” and “sustainable development perspective” that are more vague. Supporting sustainable development should be presented as an objective rather than a principle (as is proposed above).

Tax policy standards should reflect an appropriate balance between competing policy objectives;

Simplicity, certainty, resiliency, etc. are better presented as normative objectives for tax systems (again, see above proposal). The corresponding principle should be that there

should be a proper balance among competing objectives – it is not the case that one objective must always be prioritized in all circumstances.

Tax policy standards should respect the sovereignty of each Member State in fiscal and taxation matters;

Tax policy standards should respect the rights of taxpayers, including the right to privacy, and recognize the rule of law as the foundation of tax regimes;

These two principles underline the fundamental need for any multilateral actions to respect the rights of States and taxpayers.

The development of tax policy standards and other multilateral tax cooperation initiatives should take into account existing standards, instruments, other arrangements and institutions to ensure consistency and complementarity with these standards, instruments, arrangements and institutions;

The need to ensure consistency and complementarity with existing institutions, standards, instruments and arrangements is an important guiding principle that should be set out in the terms of reference.

The form of a tax policy standard should be compatible with the objective(s) being pursued and the issue(s) to be addressed, and in particular tax policy standards with respect to domestic tax policy issues should not be legally binding.

The need for policy levers to be congruent to the issues they aim to address is also an important principle that should guide policy actions.

Concerning the allocation of taxing rights across jurisdictions, two principles are generally recognized as underpinning this allocation: the rights of countries to exercise their tax jurisdiction on a source or residence basis (or both), and the notion that the allocation of taxable profits should reflect the value-creation process. We do not see a need to depart from these recognized principles.

## **7. Commitments and obligations for inclusion in the Framework Convention**

The terms of reference should stipulate:

It is recommended that the Framework Convention only include commitments and obligations that are directly related to the implementation of the Framework Convention, such as reporting on the implementation of the Framework Convention or the resolution of disputes that arise in respect of this implementation.

It is proposed that high-level commitments that are political in nature should rather be presented as objectives or topics for future protocols. This would support the broader adoption of the Framework Convention.

Commitments and obligations to be included in the Framework Convention can only be binding on Parties to the convention. As such, the text proposed in paragraphs 11 and 12 of the Chair's proposal does not seem appropriate, as it is targeted at international and regional tax organizations. A commitment to support capacity building should also cover all relevant functions, and not be limited to just the capacity to participate in multilateral policy discussions. A possible formulation for such a commitment could be as follows:

Parties commit, through their membership and involvement in relevant international and regional organizations, to promote the provision of technical and capacity-building assistance with respect to tax policy development and tax administration, in particular to developing countries.

## **8. Intergovernmental Negotiating Committee**

With respect to the operation of the Intergovernmental Negotiating Committee, the terms of reference should recommend that:

A preliminary agenda and programme of work for each negotiation session be drafted and communicated to the Negotiating Parties at least thirty days before the start of the negotiating session.

Negotiating Parties be allowed to provide written comments on all text that is proposed for inclusion in the Framework Convention, as well as on any other documents produced by or for the Intergovernmental Negotiating Committee, and that such written comments be communicated to all other Negotiating Parties without undue delays.

All efforts be made to circulate documents and drafts to Negotiating Parties at least fourteen days prior to the start of the negotiation session at which these documents and drafts are to be considered or fourteen days prior to the deadline to submit comments on the documents and drafts.

Analysis be prepared to inform the negotiation process, in particular to research the issues that might require action and to identify and evaluate options to address these issues, in accordance with a program of research to be approved by the Intergovernmental Negotiating Committee.

Throughout its work, the Intergovernmental Negotiating Committee take into consideration existing standards, instruments, other arrangements and institutions that support international tax cooperation efforts, to ensure that the Framework Convention and its protocols are consistent with and complement such existing standards, instruments, arrangements and institutions.