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

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

Dear Mr. Youssef

We appreciate the opportunity to comment on the “Zero Draft Terms of Reference”. Generally, we would like to highlight the overarching goal of a UN Framework Convention. It is our understanding that the international tax regime lacks an institutional structure that allows international tax cooperation to happen in a fair and equitable manner. **To change this, the drafters of the Framework Convention should ensure that the convention is limited to the lowest common denominator among the highest number of countries. Only this would enable an effective development of the international tax regime in the decades to come.**

Therefore, we cannot overemphasize that the focus in the next months of negotiations should be on creating a framework that allows the international tax regime to develop among coalitions of the willing, while providing a comprehensive framework for as many states as possible. Consequently, we are doubtful that the Framework Convention should contain very progressive substantive provisions. Generally, we believe that strong global solutions for most tax issues are not needed. Pillar 2 has demonstrated that it is basically impossible to steer global tax projects with significant impact on domestic tax legislation in a fair and equitable manner. Moreover, these global initiatives tend to be imperialistic. However, the international tax regime should not undermine the fiscal self-determination of countries. The latter indeed requires at least some global cooperation.



Lastly, it is key that OECD countries will also be persuaded by the content of the Framework Convention. One way of achieving such consensus is to understand the Framework Convention as a way of regulating international tax policy making by creating an institution that is more transparent from a governance perspective than the Global Forum on Transparency and Exchange of Information for Tax Purposes (sic!) and the Inclusive Framework. OECD countries have argued that there is a risk of duplication of the work of the Global Forum and the Inclusive Framework, which resulted in reluctance to support the work of the Ad Hoc Committee. **However, we believe that the Framework Convention could finally uplift the work of the Global Forum and Inclusive Framework into a regulated institutional structure. There is no risk of duplication, but there is a chance of persuasive institutionalization.**

In the following we will provide some comments on specific sections of the Zero Draft.

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## 1. Preamble

Nothing to add.

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## 2. Objectives, Principles and Substantive Elements

We believe that there are several overlaps between the (i) objectives, (ii) principles and (iii) substantive elements in the current Zero Draft. It would be more concise if all three sections are combined into one, outlining the goals of the Framework Convention.

If the Framework Convention should indeed become “the” framework convention in tax matters, it is crucial that the main objective of the convention is to provide a framework for a fair and equitable development of the international tax regime. Therefore, we see this as the main goal (see below No. 1). Additionally, the following are the aims we would suggest including into the Framework Convention – four of the six already appear to some extent in the Zero Draft (No. 1, 2, 3 and 6).

1. **Enable fair and equitable cooperation in tax matters:** Primarily, the framework should aim at a fair and equitable cooperation in tax matters.
2. **Achieve cross-border transparency and an effective exchange of information for tax purposes.** We believe that transparency in tax matters is a key requirement for the Framework Convention to be operational. Countries committing to the Framework



Convention should commit to cross-border transparency. **It might be an option to directly attach the Multilateral Convention on Mutual Administrative Assistance as an Appendix to the Framework Convention.**

3. **Enable fiscal self-determination of countries:** The Zero Draft also mentions the term “respecting the tax sovereignty”. We believe that the term “fiscal self-determination” provides more clarity. Certainly, what fiscal self-determination means needs to be defined. One way of understanding the term is that countries should be able **to tax income created in a territory by using the benefits of a state**. This is a narrow definition; however, we believe that there is consensus for such an understanding. One could also claim, for instance, that fiscal self-determination means that each state should be able to define its level of domestic distribution and must have access to sufficient tax revenue to decide upon its domestic level of redistribution. However, the latter follows a cosmopolitan logic and would require substantial transfers of funds from rich to poor countries. From a practical but also from a theoretical perspective, such an understanding is not persuasive.
4. **Eliminate the greatest forms of injustice in domestic and international tax matters:** It is very difficult to define what a just international tax regime means. We strongly believe that international tax cooperation is more effective if the goal is to eliminate the greatest forms of injustice as people tend to agree on what unjust means but disagree on what justice requires.<sup>1</sup> We should not aim at something that is difficult or impossible to achieve. Neither the “fair” nor “just” allocation of taxing rights or form of sharing the pie exists. For instance, if a global formulary apportionment would be introduced, some countries will feel disadvantaged as any allocation key always knows winners and losers. Therefore, it would be more effective to understand international tax policy as a way to reduce the severest forms of injustice instead of trying to create a perfect and ideal international tax regime.
5. **Fight inhuman conditions through designing an effective international tax regime:** We believe that all humans have a duty to fight inhuman conditions, also through the international tax regime. However, such a duty is much more limited than a cosmopolitan duty of distributive justice which would require cross-border transfer of funds. International tax policy should partly focus on how to globally reduce inhuman living

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<sup>1</sup> For a very persuasive theoretical underpinning of such goal see Sen Amartya, *The Idea of Justice* (The Belknap Press of HUP 2009).



conditions.<sup>2</sup> Therefore, one part of the Framework Convention should focus on this particular goal. However, we should not overestimate the impact international tax policy has on improving the life of the poorest around the world.

6. **Fight climate change through an effective tax regime:** The goal of fighting climate change is undisputed and should be part of the Framework Convention.

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### 3. Capacity building

Nothing to add.

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### 4. Structural Elements of the Framework Convention

**This part of the Framework Convention should by far be the most important section. We strongly believe that the Ad Hoc Committee should focus on this section.**

As mentioned, the main aim of the Framework Convention should be to provide a framework for future cooperation among countries which believe cooperation improves the international tax regime (i.e. coalitions of the willing). The current international tax regime does not provide for such a bottom-up approach. Its most recent proposals (in particular Pillar 2) rather follow a top-down mechanism.<sup>3</sup> In order to develop such a framework the following points will be crucial:

- **Secretariat:** Other framework conventions contain sophisticated ways of designing the secretariat.<sup>4</sup> These could serve as an inspiration. The secretariat should be responsible to manage all operative tasks attached to the Framework Convention.
- Choose an inclusive **Conference of Parties:** We should understand the Framework Convention in a genuine way. This means the main task of the Conference will be to

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<sup>2</sup> For details Hongler Peter, Justice in International Tax Law, IBFD 2019, 343 et seq. Open access via:

<https://www.alexandria.unisg.ch/server/api/core/bitstreams/97d48a27-2d70-4979-aaf8-661cdd7e72e7/content> .

<sup>3</sup> Such a bottom-up approach could also mean that regionalism becomes more important. See Cadzow Lucinda et al., Inclusive and Effective International Tax Cooperation: Views From the Global South, ICTD Working Paper 172, August 2023, p. 18 et seq.

<sup>4</sup> See, for instance, Art. 8 of the United Nations Framework Convention on Climate Change.



provide a **framework** for international tax cooperation. Therefore, the Conference will be responsible to develop and monitor global projects in tax matters but also to enhance international tax cooperation among coalitions of the willing. Consequently, all tax projects which involve more than just two countries should be negotiated under the umbrella of the Framework Convention and the Conference should be responsible for such task.

- **Negotiations of new agreements and amendments of existing agreements:** The Framework Convention should contain rules on how bilateral or multilateral treaties in tax matters are developed in a fair and equitable matter. This concerns the opening, participation, general process, and oversight of negotiations. Of course, some rules can also be part of a specific on the rules of procedure. The WTO Agreement, for instance, contains similar clauses on how agreements are negotiated under the WTO umbrella, which could serve as source of inspiration.<sup>5</sup>
- **Relationships with other agreements:** The international tax regime as a treaty-based regime is fragmented. The Framework Convention could help to consolidate most existing agreements in tax matters. Therefore, we recommend that existing tax agreements can be linked to the Framework Convention as well as new agreements. So far, the Ad Hoc Committee has used the term “protocol” for future agreements linked to the Framework Convention. We strongly believe that it would be more effective to call these “**Plurilateral Agreements**”. It should indeed be a key feature of the Framework Convention that countries can agree on further reaching tax agreements. However, we are very sceptical that these “protocols” will be signed by all members of a future Framework Convention. Therefore, it would be more effective to speak of Plurilateral Agreements which will be signed by a subgroup of Member States to the Framework Convention.<sup>6</sup>
- **Special and differential treatment:** The Framework Convention should foresee that some agreements linked to it could be open for a nonreciprocal application (special and differential treatment) for developing — or at least the least developed — countries.

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<sup>5</sup> See e.g. Art. 3 WTO Agreement.

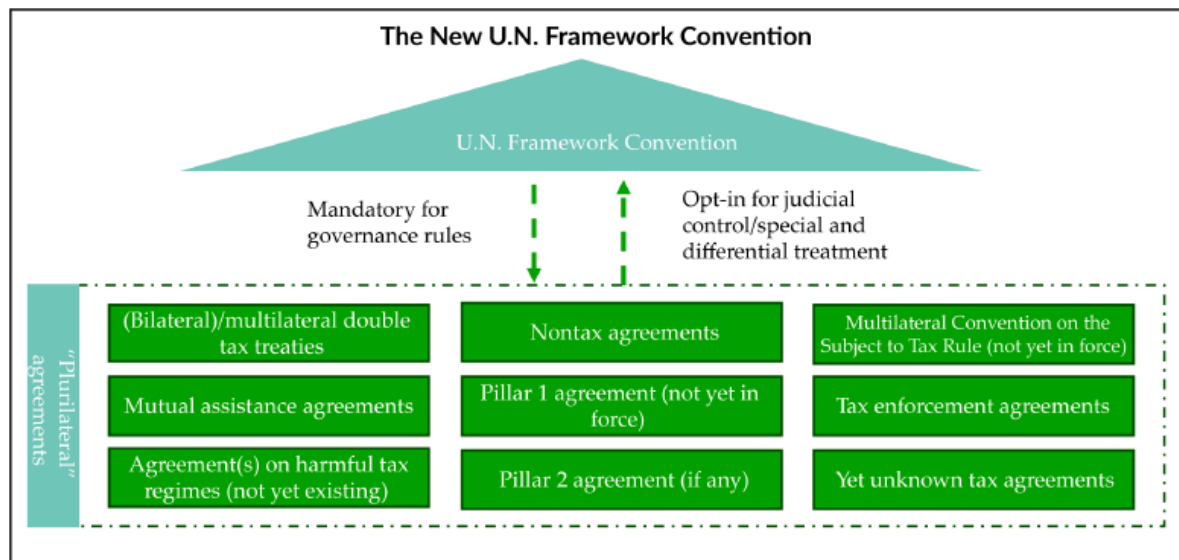
<sup>6</sup> See for details Hongler Peter & Habich Simon, The New U.N. Framework Convention: Plurilateralism Could Be a Key to Success, Tax Notes International, 22. April 2024, p. 491 et seq.



The international tax regime does partly contain such clauses, but a much more consistent and institutional approach is necessary.<sup>7</sup>

- **Dispute settlement:** The Framework needs a dispute resolution mechanism. Judicial control should focus on interstate disputes – whether states fulfil their obligations under tax-related treaties subject to oversight. This is an important piece, which so far has been missing in the international tax regime.

To conclude a Framework Convention could lead to the following structure:<sup>8</sup>



## 5. Specific Priority Areas to be Addressed in Early Protocols

As already mentioned, we strongly believe that the focus should be on the structural elements of the framework convention and not on protocols. However, if countries choose to sign a few early protocols, it is crucial to aim at protocols in areas where injustices are particularly severe. And again, these protocols (which we understand as Plurilateral Agreements) should be signed

<sup>7</sup> For details see Mbakiso Magwape, Agenda Setting and Decision Making under the OECD/G20 IF and the WTO – Developing Countries and Reform, Intertax 2024, p. 270 et seq.

<sup>8</sup> Hongler & Habich (n 6) p. 495.



by coalitions of the willing and not necessarily by all Member States of the Framework Convention.

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**6. Approaches and Time Frame for Negotiation**

Nothing to add.

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**7. Resources to Support the Work of the Negotiating Body**

Nothing to add.

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We would like to thank you for the opportunity to provide our feedback on the Zero Draft and we hope that successful negotiations lead to a global consensus and international tax cooperation can help societies to prosper.

Kind regards

A handwritten signature in black ink, appearing to read 'Peter Hongler'.

Peter Hongler

A handwritten signature in black ink, appearing to read 'Simon Habich'.

Simon Habich