

# Comments on the Bureau's Proposal for Zero Draft Terms of Reference for a United Nations Framework Convention (FC) on International Tax Cooperation

## General Remarks

IBFD welcomes the call for comments on the Bureau's Proposal for the Zero Draft Terms of Reference and presents some comments following the outline of this document.

### “Objectives”

We recommend that a clear **distinction** be drawn **between “objectives” and “principles”**. Although related, the two have substantively different roles and should not be bundled together; objectives are concrete policy goals, whereas principles are the underlying tenets that inform them. Accordingly, we suggest avoiding overlaps and repetitions, as in paras. 7(a) and 8.

The ToR could include in this section a reference to some **substantive objectives for the establishment of a fair international tax order**, namely: that all taxpayers (corporate and individual) contribute a fair share of taxes; that States have sufficient financial resources in line with the goals of the UN SDGs; maintaining simplicity of tax systems and of the international tax order to the extent possible; ensuring maximum transparency and exchange of information; and providing adequate dispute prevention and resolution mechanisms.

As regards the **wording**, the ToR uses the expression “Member States” while Conventions usually refer to “Parties”. Furthermore, it would be advisable to clarify whether the FC would refer only to States or also to tax jurisdictions that, although lacking statehood, are nevertheless actively engaged in the international tax framework.

### “Principles”

We advise that the ToR **distinguish between fundamental and tax-related principles**. Fundamental or general principles may include: respect for the right of states to define their national tax system while adhering to the principle of comity among states; respect for fundamental human rights; fair allocation of taxing rights among states; international law principles, including those that have been codified; right to an effective legal remedy; and the principle of equality and the rule of law as instruments to prevent arbitrariness.

Tax-related principles would include the specific corollaries of the general principles, such as: the ability-to-pay principle; good tax management; mutual administrative assistance; and an effective system of tax dispute resolution, in fulfilment of the right to an effective legal remedy.

IBFD applauds the reference in the ToR to respect for fundamental human rights as a welcome recognition of the **protection of taxpayers' rights as fundamental human rights**. This protection should strike a fair balance between collective and individual human rights (to be construed as including the rights of taxpayers other than individuals), thereby including the corresponding obligations, as well as between the collective rights of States, in line with the objectives of the UN SDGs.

### “Substantive elements of the Framework Convention”

IBFD welcomes the pursuit of effective international tax enforcement embodied in para. 10 of the ToR. The commitment to secure **effective prevention and resolution of tax disputes** should be a priority for a dedicated early protocol (per para. 14).

IBFD advises amending para. 10 to address ambiguity and questionably founded limitations. For example, the commitment to “equitable taxation” is addressed to “multinational enterprises” only, while “effective taxation” refers only to “high-net-worth individuals”. The

challenges posed by these two categories to the international tax regime justify a specific focus, but the commitments asked of states should be carefully worded.

### **“Structural elements of the Framework Convention”**

The **relationship with other agreements, instruments, and domestic law** is a crucial element, as it defines the FC’s role within the international tax law regime. Similarly, the constitution and functioning (rules of procedure) of the Conference of the Parties would play a key role in the FC’s implementation and the likelihood of its ratification by a critical mass of countries. While discussing the exact wording and content is premature, the ToR should clarify that decisions on issues covered by this section should be informed by its stated objectives and principles.

Although the main focus of the UN initiative is on the **legal** rather than the **institutional framework**, this heading should address the decision-making system. The ToR should distinguish between **governance issues and substantive issues**, but also clarify the connection between them: a good result in respect of substantive issues cannot be achieved without a sound and inclusive governance structure. The ToR should, therefore, instruct the committee to give the governance structure high priority and to consider issues such as: the procedures for setting the agenda; collecting input from all stakeholders; voting procedures; and how to take account of minority and dissenting views.

The committee should also be mandated to consider its work in the context of the efforts of other international organizations, to ensure that it makes the best use of resources and builds on existing studies whenever the content of such materials shares the relevant objectives and principles.

### **“Protocols”**

Protocols help in addressing complex issues and developing a consistent approach to them with the active participation of technical experts, international organizations, and stakeholders.

GA Resolution 78/230 requests consideration of “simultaneously developing early protocols, while elaborating the framework convention”. It is unclear whether this is an obligation or merely an invitation, and whether such early protocols should be developed simultaneously, subsequently, or follow the third approach proposed by distinguished delegates. However, three technical and theoretical issues need to be preliminary addressed.

First, the discussion held in New York (during the First Session, 26 April to 8 May 2024) revealed many different understandings of the **nature and function of protocols**. It is important to bridge said differences within the FC’s broader architecture, stipulate the legal relationship between protocols and the FC, and clarify the legal relationship among protocols.

Second, GA Resolution 78/230 tailors the adoption of “early protocols” to “specific priority issues.” IBFD suggests that the ToR establishes **criteria to define the priorities**. These criteria may focus on giving priority to protocols on less controversial issues, which have better chances of swift adoption. Alternatively, it might be more desirable to start with the more controversial dossiers that require more time. A third option is to focus on issues requiring more urgent action, for example, due to the lack of international agreement or to the presence of a standard that does not comply with the standards envisaged by the United Nations.

Third, IBFD calls for careful consideration of the expression “future protocols” as an alternative to “early protocols”. GA Resolution 78/230 refers neither to “future protocols” nor to protocols developed after the elaboration of the FC. A choice for “early protocols” as well as “future protocols” as embodied in the Zero Draft ToR, would signal a very broad interpretation of the mandate and could lack appropriate legal standing.

Among the topics currently proposed for protocols under paras. 14 and 15, IBFD suggests including **exchange of information for tax purposes** among the priority issues. Despite the abundance of international legal obligations in this field, their effective enforcement might require adjustment to the different capacity and needs of countries, which might lead to a two-tier system, as already argued by IBFD.<sup>1</sup> This early protocol should also include a comprehensive regulation of mutual assistance. Moreover, it might help in addressing the transparency goals indicated under para. 10 and creating the conditions for a more effective reaction to **tax-related illicit financial flows** to follow or operate in parallel.<sup>2</sup>

For similar reasons, it is meaningful to include **dispute prevention and resolution** in early protocols, creating a legal framework with strong international legitimacy that secures the rule of law. Action in this field requires adjustment of existing international agreements to the different needs of countries. This protocol could also determine whether different measures can operate in different contexts, including an à la carte basis determined by the taxpayer. Alternatively, commentaries might be appended to the FC, to facilitate convergent interpretation, help prevent potential disputes, and contribute to greater certainty.

An early **protocol on cross-border services** might be meaningful, considering the alignment of several bilateral treaty provisions with the UN standards for the allocation of taxing powers. It could also lead to a later protocol to address the complex issues raised by the digitalised economy, recognizing the legitimacy of international tax policy goals of different countries and providing effective multilateral mechanisms for achieving a fair allocation of taxing rights. Achieving political consensus on this issue, however, appears unlikely, at least in the short term.

Although a global framework for high-net-worth individuals might constitute an urgent priority, it might be wise to establish it only after or together with an effective framework of tax transparency, which properly functions throughout the world. This also applies to a reaction to harmful tax practices, which are already addressed by other forms of international tax coordination.

Listing environmental and climate challenges as a topic might require more time to allow to properly address the interface between this area and the taxation of income and capital. This protocol might integrate corporate sustainability reporting in the international tax transparency framework or consider the role ESG analysis may play in transfer pricing practice in sensitive segments such as extractive industries.

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<sup>1</sup> P. Pistone, I. Lazarov and A. Turina, *Automatic Exchange of Information and the Protection of Taxpayers’ Rights. Towards a New Multilateral Multi-Tiered Architecture*, accessible at the following link: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4760152](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4760152)

<sup>2</sup> P. Pistone, S. Messina, S. Van der Vlugt, *The Instruments Used to Counter Illicit Financial Flows at the International Level, and their Application to Matters of Taxation*, accessible at the following link: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4759563](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4759563)

### **“Approaches and time frame for negotiation”**

IBFD welcomes the statement that the work of other relevant fora would be considered, leveraging on potential synergies with existing instruments. In this respect, a possible way of co-existence may be found in **a multi-tiered complementarity**. However, as seen above, the FC should include ‘substantive and procedural’ elements covering the relationship with other agreements, instruments, and domestic law.

An important point to clarify is the **nature of obligations on States under the FC**, as different conflicts might arise: (1) a legal obligation conflicting with other internationally contracted legal obligations; (2) a political obligation conflicting with a legal obligation; or (3) a conflict of two political obligations. Enforceability of norms, if they are indeed legal norms, would then be critical to determine the potential overlap and applicable rules in the mediation of any conflict.

The need to deal with these relationships is evident, especially with respect to the digitalized and globalized economy. Any proposal for a new legal framework in the area will face challenges: (a) from a policy perspective to substantiate how it would succeed where previous efforts have failed, given that binding international law can only be created through means of an agreement by a large number of countries; and (b) from a legal perspective, to determine the conflict resolution rules that would apply if different norms address the same subject matter.

Article 30 of the VCLT is clear; a later treaty supersedes an earlier treaty only if the countries involved are both parties to the later treaty. Therefore, an early protocol addressing, for example, the taxation of cross-border services, can amend existing double tax treaties only if both parties to the tax treaty are also parties to the protocol, underscoring the need for decision-making mechanisms ensuring that protocols are supported by a critical mass of countries.

### **Concluding remarks**

IBFD welcomes the UN’s ambitious initiative and commends the Ad Hoc Committee and Bureau’s efforts in tabling the Zero Draft ToR. IBFD is committed to the dissemination of international tax law and stands ready to support, from a technical perspective, the UN’s initiative by conducting additional studies and research.