



University of St.Gallen

Institute for Law and Economics

Dufourstrasse 50, 9000 St.Gallen

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

via E-Mail

University St.Gallen (HSG)
Institute for Law and Economics
Varnbuelstrasse 19
9000 St.Gallen
Switzerland

Prof. Dr. Peter Hongler
Professor of Tax Law
T +41 71 224 7594
peter.hongler@unisg.ch
ile.unisg.ch

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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”. Before discussing a few specific paragraphs, we would like to highlight the overarching goal of a new 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 next decades to come.**

Therefore, we cannot emphasize enough that the focus in the next months of negotiations should indeed be on creating a framework that allows the international tax regime to develop among coalitions of the willing. At the same time the framework convention should provide a comprehensive framework for as many states as possible. Consequently, we are doubtful that the Framework Convention should contain very progressive substantive provisions. In general, we believe that we do not need strong global solutions for most tax issues. 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. At the same time, the international tax regime should, however, not undermine the fiscal self-determination of countries. The latter indeed requires global cooperation to a certain extent.



Lastly, it is key that also OECD countries will 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 and have therefore been reluctant to support the work of the Ad Hoc Group. **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.

1. Preamble

Nothing to add.

2. Objectives, Principles and Substantive Elements

We believe that there are several overlaps between the sections (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 section outlining the goals of the Framework Convention.

If the Framework Convention should indeed become “a” or “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). Besides such main goal, the following are the aims we would suggest including into the Framework Convention – four of the six do already appear in a certain form in the Zero Draft (No. 1, 2, 3 and 6).

1. **Enable fair and equitable cooperation in tax matters:** First and foremost, 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 agreeing on 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 does also mention the term “respecting the tax sovereignty”. We believe that the term “fiscal self-determination” provides more clarity. Of course, what fiscal self-determination means needs to be defined. One way of understanding fiscal self-determination 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 of the term. 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 that each state 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 huge transfers of funds from rich to poor countries. Both 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.¹ We should not aim at something that is difficult or impossible to achieve. The “fair” or the “just” allocation of taxing rights or the “fair” or “just” form of sharing the pie does not exist. 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 greatest forms of injustice instead of trying to create a perfect and ideal international tax regime.
5. **Fight the inhuman conditions through designing an effective international tax regime:** We believe that all of us as humans have 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 from rich to poor countries. International tax policy should partly focus on

¹ For a very persuasive theoretical underpinning of such goal see Sen Amartya, *The Idea of Justice* (The Belknap Press of Harvard University Press 2009).



how to reduce inhuman living conditions around the world.² Therefore, one part of the international tax policy making under the Framework Convention should focus on this particular goal. However, we should not overestimate the impact international tax policy making 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.

3. Capacity building

Nothing to add.

4. Structural Elements of the Framework Convention

This part of the Framework Convention should by far be the most important section of the convention. We strongly believe that the Ad Hoc Committee should spend most of its time 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.³ In order to develop such a framework the following points will be crucial:

- **Secretariat:** Other framework conventions already contain sophisticated ways of designing the secretariat.⁴ These could serve as an inspiration. The secretariat should be responsible to manage all operative tasks attached to the Framework Convention.

² 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> .

³ 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.

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



- Chose an inclusive **Conference of the Parties**: We should understand the Framework Convention as a genuine Framework Convention. This means the main task of the Conference will be to provide a **framework** for international tax cooperation. Therefore, the Conference will be responsible to develop and monitor global projects in tax matters but at the same time the Conference is responsible to enhance international tax cooperation among coalitions of the willing. Therefore, 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 means how negotiations for a new treaty are opened, who can participate, how the formal process works and who oversees the 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, and it could serve as source of inspiration.⁵
- **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 and new agreements can as well be linked to the Framework Convention. 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 agreements “**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.⁶
- **Special and differential treatment**: The Framework Convention should foresee that some agreements linked to the new framework convention could be open for a

⁵ See e.g. Art. 3 WTO Agreement.

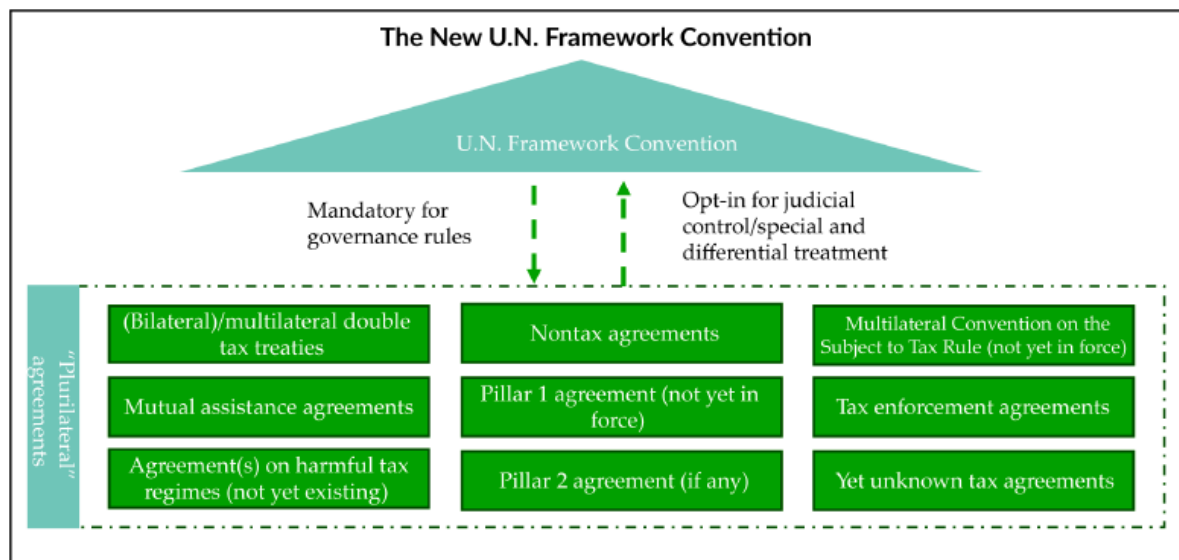
⁶ See for details Hongler Peter & Habich Simon, The New U.N. Framework Convention: Plurilateralism Could Be a Key to Success, Tax Notes International, 22. April 2024, p. 491 et seq. Open access via: <https://www.alexandria.unisg.ch/server/api/core/bitstreams/a4b3b6df-84fd-4e8a-80e0-47265a13290b/content> .



nonreciprocal application (special and differential treatment) for developing – or at least the least developed – countries. The international tax regime does partly contain such clauses, but a much more consistent and institutional approach is necessary.⁷

- **Dispute settlement:** Moreover, the framework needs a dispute resolution mechanism. Judicial control should primarily focus on interstate disputes – whether states fulfil their obligations under tax-related treaties subject to oversight. This is an important piece missing in the current international tax regime as it lacks a judicial control mechanism.

To conclude a Framework Convention could lead to the following structure:⁸



⁷ 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.

⁸ Hongler Peter & Habich Simon, The New U.N. Framework Convention: Plurilateralism Could Be a Key to Success, Tax Notes International, 22. April 2024, p. 495. Open access via: <https://www.alexandria.unisg.ch/server/api/core/bitstreams/a4b3b6df-84fd-4e8a-80e0-47265a13290b/content>.



5. Specific Priority Areas to be Addressed in Early Protocols

As mentioned already we strongly believe that the focus should be on the structural elements of the framework convention and not yet on the future protocols. However, if countries aim at signing a few early protocols, it is crucial to aim at protocols in areas where injustices are particularly serious. And again, these protocols (which we understand as Plurilateral Agreements) should be signed by coalitions of the willing and not necessarily by all Member States of the Framework Convention.

6. Approaches and Time Frame for Negotiation

Nothing to add.

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 and inputs on the Zero Draft and we hope that negotiations will be successful so that a global consensus can be achieved 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