



June 19, 2024

To the Bureau of the Ad Hoc Committee

## **UN Framework Tax Convention and Global Tax Governance: What changes are needed to enhance global tax governance?**

The Zero draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation is the first step towards a more inclusive and effective international tax cooperation.

However, in this first step, it is important to give attention not only to the topics to be covered in such a Framework Tax Convention, but also to the process. Main important question is how to ensure that this process is not questioned as it has been the case of the OECD/G20 and the BEPS Inclusive Framework.

In my research in the GLOBTAXGOV project <sup>1</sup> that investigates global tax governance, I have researched under what conditions can international tax law making by the OECD/G20/EU be legitimate and feasible for developed and developing countries. This question is also relevant for the UN. Therefore, in my view, it is important to enhance input, output and throughput legitimacy as I have addressed in my research.<sup>2</sup>

My contribution focus on the objectives, guiding principles and substantive elements of this UN Framework Convention.

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<sup>1</sup> The GLOBTAXGOV Project (2018–2023) has been funded by the European Research Council (ERC) under the European Union's Seven Framework Programme (FP/2007–2013) (ERC Grant agreement n. 758671). The overall aim of GLOBTAXGOV is to assess the feasibility and legitimacy of the current model of global tax governance and the role of the OECD, G20 and the EU in international tax law making. In addition in this research project, we have investigated the implementation of the four BEPS minimum standards in eight countries (Australia, Colombia, India, Mexico, the Netherlands, Nigeria, Senegal, and Spain). Some of the GLOBTAXGOV research has already been published in several articles, reports, PhD dissertation and also book chapters (open access) in the GLOBTAXGOV blog available here ([Project Outputs – GLOBTAXGOV \(leidenuniv.nl\)](https://www.leidenuniv.nl/project-outputs-globtaxgov)) accessed 19 June 2024

<sup>2</sup> For this purpose, the definition of Scharpf including the distinction between input legitimacy i.e. government by the people and output legitimacy i.e. government for the people has been taken into account. F. Scharpf, *Governing in Europe: Effective and Democratic*, (Oxford University Press 1999) p. 7. See for an analysis in international tax law making. I. Mosquera Valderrama *Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism*, 7 *World Tax J.* 3 (2015), *Journals IBFD*.

<https://scholarlypublications.universiteitleiden.nl/handle/1887/62377>

More specifically on BEPS 4 Minimum standards see I. Mosquera Valderrama (2018), *Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative*, *Bulletin for International Taxation* 72(3) <https://www.ibfd.org/shop/journal/output-legitimacy-deficits-and-inclusive-framework-oecd-g20-base-erosion-and-profit> and I. Mosquera Valderrama *Throughput Legitimacy of the Peer Review Process of the Four BEPS Minimum Standards: A Case Study*, (2024), 52, *Intertax*, Issue 3, pp. 171-189, <https://kluwerlawonline.com/journalarticle/Intertax/52.6/TAXI2024025> accessed 19 June 2024.

In my view, the objectives and the guiding principles in the current zero draft of terms of reference for the UN Framework Convention are too broad and general and they lack a specific approach to improve governance and decision making within the UN. I truly believe that having clear objectives and guiding principles will help to enhance the legitimacy of the UN Framework Convention.

Furthermore, in my view, the topics covered by the UN Framework Convention should keep in mind the work already done by the OECD as well the differences between enhancing mutual administrative cooperation vs. creating new taxes and/or allocating taxing rights to countries. This distinction will also help to enhance the feasibility of the UN Framework Convention.

### **1. Clear and defined objectives and purpose of the UN Framework Convention**

By using a lot of terminology in the objectives without a clear definition, it is not clear what would be the main objective, and how the legitimacy of the UN Framework Convention can be enhanced. The zero drafts states in para. 2 that “A United Nations framework convention on international tax cooperation should include a clear statement of its purposes. Among the statements are (i) to establish an inclusive, fair, transparent, efficient, equitable, effective international tax system (para. 7(c)), and (ii) to enhance legitimacy, certainty, resilience and fairness of international tax rules (para 7(c)).

In my view, a clear path is lacking on what this UN Framework Convention wants to achieve to strengthen international tax cooperation and to make it fully inclusive and more effective. For instance, in the past, this author has addressed (with Burgers) the different approaches to fairness (political, economical, philosophical, juridical) which may result in different outcomes for citizens, countries, and organizations.<sup>3</sup> Therefore, the use of so many words without a clear definition/part will not help to ensure legitimate, inclusive and effective international tax cooperation.

### **2. Enhancing governance process as one of the guiding principles of the UN Framework Convention**

Para. 8 and 9 address the guiding principles of the UN Framework Convention. However, there is no reference to governance as one of the principles. In my view, the UN could benefit from enhancing governance in the design and implementation of the UN Framework. This could be done by giving attention, not only to the participation in agenda setting and decision making process (input legitimacy), or by linking the outcome of the UN Convention to the Sustainable Development Goals (output legitimacy) but also by enhancing accountability, transparency, inclusiveness and openness (throughput legitimacy).

The analysis of throughput legitimacy of the BEPS 4 Minimum Standards has been carried out by this author elsewhere with a comparison of the peer review process in seven

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<sup>3</sup> I. Burgers and I. Mosquera Valderrama Fairness: A Dire International Standard with no Meaning? (2017), 45, Intertax, Issue 12, pp. 767-783. <https://globtaxgov.weblog.leidenuniv.nl/files/2020/06/Burgers-Mosquera-Fairness-Intertax.pdf> Accessed 16 June 2024.

countries (Cameroon, Congo, Costa Rica, Jamaica, Peru, Sri Lanka, and Viet Nam). The analysis concluded that there are throughput legitimacy deficits in the peer review process of the BEPS 4 Minimum Standards.<sup>4</sup>

As in the peer review process, the analysis of the role of the OECD and the UN through the perspective of throughput legitimacy can help to ascertain which problems of legitimacy and inclusiveness, the OECD, the BEPS Inclusive Framework and the UN may encounter during the drafting /implementation of international tax law rules and how to resolve these issues.

This analysis is necessary to ensure that the content of the OECD and/or BEPS Inclusive Framework initiatives in international tax law making (Exchange of Information, BEPS Project, Pillar One and Pillar Two) is valid and that countries and multinationals comply voluntarily with the implementation of these rules. This analysis is also necessary for the UN and the UN Ad Hoc Committee when deciding on the guiding principles of the UN Framework Convention.

In light of throughput legitimacy, agenda setting and decision-making should be transparent. Furthermore, the UN should be held accountable for the decisions taken. The process should be open to all stakeholders, and responsive to the needs of all countries. These are clear principles that can strengthen the legitimacy and inclusiveness of the UN in international tax law making.

Furthermore, para. 11 on capacity building states the support for countries “to participate in agenda setting, debates and decision making”, but this should not be only part of the capacity building approach but as one the guiding principles in this UN Framework Convention.

To conclude, for any international tax global body to function either at the UN or as separate international tax body or any international or regional tax organization, it is important to keep in mind that it is not only about the input and output legitimacy, but also about throughput legitimacy i.e. transparency, accountability, responsiveness and openness.

### **3. Substantive elements of the Framework Convention (administrative cooperation vs. allocation of taxing rights)**

Among the substantive elements, the zero draft addresses the transparency and exchange of information, fair allocation of taxing rights, including equitable taxation of multinational enterprises, effective taxation of high-net worth individuals, effective prevention and resolution of tax disputes.

#### **Administrative cooperation**

In my view, there are differences in these substantive elements, since for instance exchange of information is about mutual assistance among tax administrations, so it does not require more than administrative cooperation. The situation will be different if there was

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<sup>4</sup> I. Mosquera Valderrama Throughput Legitimacy supra no. 2

a discussion on the benefits of exchange of information for developed and developing countries, and the introduction of a revenue sharing mechanism<sup>5</sup> in case that developed countries benefit more from exchange of information than developing countries.

Another substantive element that has limitations is for instance the effective prevention and resolution of tax disputes which is also a matter of administrative cooperation among countries. The experience of the implementation of BEPS Action 14 has shown that countries are not yet ready to engage in this administrative cooperation, but this has to do more with their national rules. This is also one of the arguments that was used to give deferral on the peer review of BEPS Action 14 to developing countries.<sup>6</sup>

Therefore, it is not clear why the UN Framework Convention wants to introduce these as substantive elements, since there has been a lot of progress regarding exchange of information, whereas on the resolution of disputes, there has been a lot of limitations taking into account developing countries development.

### **Allocation of taxing rights**

Two of the most important substantive elements of the UN Framework Convention could be fair allocation of taxing rights, including equitable taxation of multinational enterprises, effective taxation of high-net worth individuals. However, by introducing the word equitable, it is not clear how this element of equitability will be analyzed taking into account the different views by countries on equity, equality, fairness, as addressed above. The use of wording should have a meaning, and therefore a specific definition is needed to make sure that countries are discussing the same. Otherwise, it remains to be seen, how this allocation of taxing rights can be effectively put into practice, due to the different approaches to equity among countries.

To sum up, in my view, it is important for the UN Ad Hoc Committee and the forthcoming discussions to address the governance and the process for the adoption of the UN Framework Convention. One way could be to address clear guiding principles such as the ones identified in throughput legitimacy such as openness, transparency, accountability, and inclusiveness. These principles should have clear definitions that can be agreed by countries.

Kind regards

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<sup>5</sup> On revenue sharing see section 5.3.1.2. I. Mosquera Valderrama Legitimacy and the Making of International Tax Law supra n.2 and A. Turina, Information-based Administrative Tax-Cooperation, Consolidating Standards, Emerging Actors and Evolutionary Perspectives, Doctoral Thesis defended at Bocconi University Milan 2013.

<sup>6</sup> At the time that the BEPS Action 14 was introduced, most developing countries received a deferral regarding the peer review of BEPS Action. However, this deferral is currently being revisited by the OECD. See section 3.3.3.2. at I. Mosquera Valderrama Throughput Legitimacy supra no. 2