

U.N. International Tax Cooperation: The Terms of References Final Draft

by Leopoldo Parada

Reprinted from *Tax Notes International*, November 4, 2024, p. 771

U.N. International Tax Cooperation: The Terms of References Final Draft

by Leopoldo Parada



Leopoldo Parada

Leopoldo Parada is a reader in tax law at the Dickson Poon School of Law, King's College London.

In this article, Parada explains the development of an international forum for the creation of a more inclusive international tax regime; he focuses on developments at the U.N. and relates them to OECD developments in this area.

Copyright 2024 Leopoldo Parada.
All rights reserved.

Introduction

On August 16 the U.N. member-state-led, open-ended, and ad hoc intergovernmental committee approved the final draft of the Terms of References (TOR) for a U.N. Framework Convention on International Tax Cooperation, negotiated in New York between July 29 and August 16.¹

The TOR final draft is the result of a long-standing debate on international tax cooperation within the U.N., having as immediate precedents the revised draft TOR² and the zero draft TOR.³

¹U.N., "Chair's Proposal for Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation," A/AC.295/2024/L.4 (Aug. 16, 2024).

²U.N., "Bureau's Proposal for Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation" (July 18, 2024).

³U.N., "Bureau's Proposal for the Zero Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation" (June 7, 2024). The zero draft was based on input from more than 100 U.N. member states and other stakeholders worldwide. See also the full list of inputs received.

The TOR final draft establishes an institutional structure to achieve a more transparent, simple, and inclusive international tax cooperation, reflecting the agreement of the international community on these matters, particularly among developing countries and emerging economies.

This article analyzes the TOR final draft, arguing that while it establishes a foundational governance structure for the U.N. framework convention, captures the political momentum, and provides a degree of legal certainty, it also leaves open several areas for improvement.

These include the need for more precise objectives and principles, the avoidance of vague legal language, a narrower focus on priority areas for both early and future protocols, and more transparent decision-making procedures. Moreover, this article suggests that beyond the specific analysis of the TOR final draft, it is crucial to recognize its importance as a key advancement toward a more balanced and flexible global tax framework, especially considering the pressing need for counterbalances in the ongoing international tax policy debate.⁴

The article is structured in four parts. First, it provides a background of the U.N.'s recent work on international tax cooperation, which has served as fuel for the TOR final draft. Second, it analyzes the TOR final draft text, highlighting both its positive contributions as well as its missing points, especially bearing in mind the aims of a more inclusive and effective international tax system. Third, it argues that beyond a specific analysis of the TOR final draft, it is important to understand that it marks an

⁴For more on the need for counterbalances in the current international tax debate, see Leopoldo Parada, "International Cooperation on Tax Matters at the United Nations: A Turning Point in History?" 1 *Caribbean Tax L. J.* 5, 2024.

important step for a more balanced and flexible global tax framework. Fourth, and finally, it concludes, stressing the unique opportunity that the TOR final draft represents, especially to achieve the aim of an independent, more democratic and participative forum for global tax cooperation.

Background

The international tax cooperation debate has gained prominence over the last decade, generating consensus in the international community that coordinated approaches in tax matters are indeed plausible. This is important given notorious global challenges, including, for example, the digitalization of the economy and climate change.⁵ However, there is also consensus among different international communities that the paths toward international tax cooperation require more transparency, simplicity, and inclusivity, especially in relation to the participation of developing countries and emerging economies.⁶

The international consensus to promote more inclusive, transparent, and simple international tax cooperation has been recognized in the work of the U.N. during the last decade, although with more prominence over the last couple of years. At least four developments can be seen as paving the route for the current negotiations.

First, U.N. General Assembly resolution 69/313 of July 27, 2015, on the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, which committed member states to consider fairness, transparency, effectiveness, and efficiency within their tax systems. This resolution also set out the importance of international cooperation and

establishing clear goals for domestic resource mobilization.⁷

Second, the U.N. General Assembly resolution 77/244 adopted on December 30, 2022, which highlighted both the importance and compromise from member states to increase and enhance international tax cooperation that may ultimately serve as assistance for all countries, particularly developing countries. This resolution also kicked off intergovernmental discussions at the U.N., requesting the U.N. secretary general to write a report explaining the existing arrangements, identifying additional options, and outlining potential next steps.⁸

Third, the U.N. secretary general report on the promotion of inclusive and effective international tax cooperation at the U.N.⁹ The secretary general report benefited from input from more than 80 member states and members of the civil society, business, and academia. The inputs were made public before the 2023 Economic and Social Council meetings on financing for development.¹⁰

The secretary general report concluded that enhancing the role of the U.N. in tax-norm shaping and rule-setting, considering the existing multilateral and international agreements, appears as the most viable way to achieve inclusiveness and effectiveness in international tax cooperation. Most notably, it presented three options for this purpose: a multilateral convention on international tax cooperation, a framework convention on international tax cooperation, and a framework for international tax cooperation.

⁵ The work of the OECD on base erosion and profit shifting, particularly with the multilateral instrument, and the two-pillar approach to deal with the challenges of the digitalized economy are the best examples of the global willingness of countries to address global tax issues with a common approach. See OECD, "Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS" (2015). See also OECD, "Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy" (Oct. 8, 2021).

⁶ See, e.g., Allison Christians and Laurens van Apeldoorn, "The OECD Inclusive Framework," *Bulletin for International Taxation* (Apr./May 2018) (on the elusive idea of inclusivity projected by the inclusive framework).

⁷ Resolution adopted by the General Assembly on July 27, 2015, A/RES/69/313, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) (Aug. 17, 2015).

⁸ Resolution adopted by the General Assembly on December 30, 2022, A/RES/77/244, promotion of inclusive and effective international tax cooperation at the United Nations (Jan. 9, 2023). See also Parada, "Response to the UN Resolution on A/RES/77/244 on Promotion of Inclusive and Effective International Tax Cooperation at the United Nations," SSRN (June 3, 2023).

⁹ Report of the Secretary-General on the Promotion of Inclusive and Effective International Tax Cooperation at the United Nations, General Assembly, A/78/235 (Aug. 26, 2023).

¹⁰ The full list of inputs can be consulted at U.N. Department of Economic and Social Affairs, Inputs: Tax Report 2023.

U.N. member states finally opted for a framework convention (option 2).¹¹

Fourth, General Assembly resolution 78/230 adopted on December 22, 2023, which established the ad hoc committee for the purpose of drafting the general terms of a U.N. framework convention on international tax cooperation.¹² The ad hoc committee has overseen the elaboration of the zero draft TOR, the revised draft TOR, and more recently, the TOR final draft. The latter document will be the main subject of analysis in the remaining part of this work.

Analysis of the TOR Final Draft

This section analyzes the TOR final draft with an emphasis on its positive contributions, missing points, and its scope for improvement. The analysis adopts the perspective of developing countries and emerging economies, with a focus on the two main goals informing the whole process: inclusivity and effectiveness of international tax cooperation.

Generalities

Following General Assembly resolution 78/230 adopted on December 22, 2023, which established a member-state-led, open-ended, and ad hoc intergovernmental committee for the purpose of drafting the general terms of a U.N. framework convention on international tax cooperation, the TOR final draft sets out the basic parameters for a framework convention, reflecting the (nonunanimous) position of the U.N. member states.¹³ The TOR final draft is structured in five parts with their corresponding subparts as follows:

- I. Introduction
- II. Structural elements of the convention
 - Preamble
 - Objectives

- Principles
- Commitments
- Capacity building
- Other elements

III. Protocols

IV. Approaches and time frame for negotiation

V. Resources to support the work of the negotiating committee

The structure of the TOR final draft deviates from its two immediate precedents (the revised draft and the zero draft TOR) because of negotiations that took place at the U.N. headquarters in New York between July 29 and August 16. While the core content is largely the same, there are a few noteworthy exceptions.

First, unlike the zero draft TOR, but maintaining the position from the revised draft TOR, the TOR final draft eliminates the reference to “illicit financial flows” from the objectives. The zero draft TOR originally stated in para. 7, letter c) of the objectives:

Establish an inclusive, fair, transparent, efficient, equitable, and effective international tax system for sustainable development, with a view to enhancing the legitimacy, certainty, resilience, and fairness of international tax rules, *while addressing tax-related illicit financial flows* and other challenges to strengthening domestic resource mobilization [emphasis added].¹⁴

The text of the TOR final draft (objectives, para. 7, letter c) now states:

Establish an inclusive, fair, transparent, efficient, equitable, and effective international tax system for sustainable development, with a view to enhancing the legitimacy, certainty, resilience, and fairness of international tax rules, while addressing challenges to strengthening domestic resource mobilization.¹⁵

¹¹ This coincided with an earlier recommendation from me to a group of countries. See Parada, “Internal Report for Member of the Digital Cooperation Organization (DCO) on the Report of the Secretary General on Promotion of Inclusive and Effective International Tax Cooperation at the United Nations,” U.N. General Assembly A/78/235 of August 26, 2023, DCO (Sept. 6, 2023) (on file with the author).

¹² Resolution adopted by the General Assembly on December 22, 2023, A/RES/78/230, Promotion of Inclusive and Effective International Tax Cooperation at the United Nations (Dec. 28, 2023).

¹³ TOR final draft, *supra* note 1, at Introduction.

¹⁴ Zero draft TOR, *supra* note 3, at para. 7, letter c).

¹⁵ TOR final draft, *supra* note 1, at para. 7, letter c). This text also mirrors that of the revised draft TOR.

The modification seems reasonable because addressing illicit financial flows makes more sense as a matter of specific protocols rather than as a guiding principle of the framework convention. This was the approach adopted in the revised draft TOR, which included tax-related illicit financial flows as one of the priority areas for early protocols,¹⁶ and it was repeated in the TOR final draft. The draft includes a reference to illicit financial flows in a new subsection called “Commitments” (paragraph 10), which includes “addressing tax-related illicit financial flows, tax avoidance, tax evasion and harmful tax practices.” Similarly, paragraph 16 of the TOR final draft includes the topic of “measures against tax-related illicit financial flows” in the list of subjects highlighted as priority areas for the second early protocol.¹⁷

Second, the list of principles included in the TOR final draft resembles the content and order proposed in the revised draft TOR. However, it deviates from the zero draft TOR, at least in terms of organization. This is not a substantive change, considering that nowhere in the document is it stated that principles are listed in a hierarchical manner. However, it reflects the results of the negotiations and implicit priorities of the participant countries.

In addition, the TOR final draft includes among the principles that should help achieve the objectives of the framework convention the following: “in the pursuit of international tax cooperation be aligned with States’ obligations under international human rights law.” To a certain extent, this text is more moderate in comparison to the revised draft TOR, which stated that the framework convention should “be fully aligned with international human rights law and States’ existing commitments under human rights conventions to respect, protect and fulfil all human rights for all people in all countries.”¹⁸ However, the need and extent of an explicit

reference to human rights and its protection is still doubtful, as will be further stressed in the article.

Positive Contributions

There are several positive contributions that can be recognized from the TOR final draft, including its contribution to a basic governance and structure, its capacity to capture and materialize the political momentum, and its contribution to legal certainty, especially with the scope for early and future protocols. These positive contributions are analyzed below.

Establishing a Foundational Governance and Structure

One of the most important goals of the second option in the 2023 secretary general report was establishing the basis for a framework convention that could be constitutive in nature, capable of addressing overall international tax governance.¹⁹ A basic governance and structure is noticeable in at least two aspects of the TOR final draft.

First, the TOR final draft provides comprehensive objectives and principles that don’t only recognize inclusivity and effectiveness, but also the respect of tax sovereignty as core elements of the international tax system.²⁰ The objectives also highlight two policy aims that have been evidently forgotten in the current developments of the international tax system — simplicity and ease of administration.²¹ An important part of the international tax community agrees that the levels of complexity in the current design of the international tax debate have increased, affecting mostly, but not exclusively, developing countries.²² This is particularly

¹⁹ Parada, *supra* note 8, at 12.

²⁰ TOR final draft, *supra* note 1, at para. 9, letter b, which states: “every Member State has the sovereign right to decide its tax policies and practices, while also respecting the sovereignty of other Member States in such matters.”

²¹ TOR final draft, *supra* note 1, at para. 9, letter g.

²² See, e.g., Joachim Englisch, “GloBE Rules and Tax Competition,” 48(12) *Intertax* (2022) (warning about the “inherently complex GloBE rules”). See also Parada, “Global Minimum Taxation: A Strategic Approach for Developing Countries,” 15(2) *Colum. J. of Tax L.* 187-211 (2024); Dylan Moroses, “US’ Shunning of Top-Up Tax Could Unwind Global Deal,” *Law360*, Aug. 26, 2022 (featuring the opinion of Leopoldo Parada on these matters).

¹⁶ This is the suggestion below promoting the reduction in the scope of early protocols, including a holistic one — dispute resolutions and exchange of information — that contains tax-related illicit financial flows and mutual administrative assistance, among others.

¹⁷ TOR final draft, *supra* note 1, at para. 16.

¹⁸ Revised Draft TOR, *supra* note 2, at para. 9.

evident with the OECD pillars 1 and 2 project.²³ In this regard, it is important that the TOR final draft recognizes, as a principle, that the framework convention must “provide for rules that are simple and easy to administer as the subject matter allows.”²⁴ The experience with OECD pillars 1 and 2 is strong evidence that simplicity and administrability are not always at the center of the international tax debate. Therefore, this recognition, although merely declarative, is extremely valuable at this point in time.

Second, the TOR final draft provides specific commitments for the framework convention to achieve its objectives, including, for instance, the fair allocation of taxing rights and equitable taxation of multinationals; addressing tax evasion and tax avoidance by high-net-worth individuals while ensuring their effective taxation; and the effective mutual administrative assistance in tax matters, including transparency and the exchange of information for tax purposes, among others.²⁵ Similarly, there are several other commitments that are fundamental to achieving proper governance. Most notably, the effective prevention and resolution of tax disputes. However, it is important that promoting effective prevention and resolution of tax disputes not only focuses on the taxpayer-tax administration relationship but also on state-state relationships. This is something the current international tax system, particularly tax treaties — including the OECD MLI — do not offer. It would be helpful if the framework convention could develop a specific mechanism by which a country’s international tax obligations could be controlled by other countries through specific legal tools.²⁶

Moreover, highlighting the role of the Conference of the Parties (COP) is important as

part of the “other elements” of the framework convention to ensure both inclusivity and effectiveness in international tax cooperation. However, it is equally important to avoid restricting the COP to only member states but rather to extend it to other actors, especially regional organizations that may represent various countries.²⁷ Ultimately, the COP’s role could slowly take the lead on the monitoring and implementation of international measures adopted within the U.N. to assure that global tax policy decisions are both designed and taken within this new global tax forum.²⁸

Capturing and Materializing the Political Momentum

Negotiations for a U.N. framework convention have taken place simultaneously with those of the OECD pillars 1 and 2, another highly sensitive international tax debate.²⁹ In this context, the dissatisfaction of some members of the OECD inclusive framework has, to a certain extent, sparked the political momentum to discuss a new governance structure in international tax law, with the TOR final draft emerging as a tangible symbol of this development. In fact, putting aside its content technicalities, missing points, and the reasonable scope for improvement, it is undeniable that the TOR final draft, as a political instrument, accomplishes an important role in articulating a need for change.³⁰

This can be noted, for example, in the recognition of member states’ sovereignty as a reciprocal principle as well as in the flexibility offered to countries when dealing with the content and structure of the framework convention, particularly for future protocols.³¹

²³ This has been stressed in the tax literature already. See, e.g., Parada, “The Unified Approach Under Pillar 1: An Early Analysis,” *Tax Notes Int’l*, Dec. 16, 2019, p. 983. See also, more recently, Cedric Döllefeld et al., “Tax Administration Guidance: A Proposal for Simplifying Pillar Two,” TRR 266 Accounting for Transparency Working Paper Series No. 70 (2022) (promoting alternatives for the simplification of the OECD pillar 2).

²⁴ TOR final draft, *supra* note 1, at para. 9, letter g.

²⁵ TOR final draft, *supra* note 1, at para. 10, letters a, b and d.

²⁶ In this regard, see also Peter Hongler, “Comments on the Zero Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation,” at 6-7 (June 18, 2024) (proposing a specific mechanism for interstate judicial control of tax treaty obligations).

²⁷ For example, the African Tax Administration Forum or the Inter-American Center of Tax Administration.

²⁸ Parada and Manel Bondi, “Comments on the Zero Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation,” DCO (June 21, 2024).

²⁹ OECD, “Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy” (Oct. 8, 2021). See also OECD, “Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy” (July 1, 2021).

³⁰ See, e.g., Parada, *supra* note 4.

³¹ The TOR final draft states in paragraph 9, letter b, that “every Member State has the sovereign right to decide its tax policies and practices, while also respecting the sovereignty of other Member States in such matters.” See also Parada, *supra* note 4, at 12-14.

This is important because flexibility is an element that has been largely omitted in the debate on international tax cooperation, despite its connection with inclusivity.³² To put it simply, flexibility may open opportunities for countries to address global tax concerns without renouncing the economic reality of their territories. In the long term this may invite more fruitful cooperation on tax matters.

Contributing to Legal Certainty

The framework convention is not meant to be a binding document. However, the use of legally binding protocols may help address more detailed commitments on specific tax matters, ultimately contributing to more legal certainty. This can be seen in the TOR final draft, which states in paragraph 14: “Protocols are separate legally binding instruments, under the framework convention, to implement or elaborate the framework convention.”³³ However, this does not mean that member states lose flexibility to opt in or out of any protocol, which is also very important to secure political adherence. In the words of the TOR final draft:

Each party to the framework convention should have the option whether or not to become party to a protocol on any substantive tax issues, either at the time they become party to the framework convention or later.³⁴

In addition, the TOR final draft reduces the negotiation of early protocols to two specific matters. First, the “taxation of income derived from the provision of cross-border services in an increasingly digitalized and globalized economy.”³⁵ Second, a subject that is going to be determined from a pool of priority areas that include:

- the taxation of the digitalized economy;
- measures against tax-related illicit financial flows;
- the prevention and resolution of tax disputes; and

- tax evasion and avoidance by high-net-worth individuals, including their effective taxation in relevant member states.³⁶

Similarly, the TOR final draft provides four topics, *inter alia*, that can be addressed in future protocols after the framework convention is agreed:

1. tax cooperation on environmental challenges;
2. exchange of information for tax purposes;
3. mutual administrative assistance on tax matters; and
4. harmful tax practices.³⁷

Although the ultimate success of these protocols will depend on the decree of political consensus that can be achieved on the specific matters they regulate, it is undeniable that agreeing on specific tax issues may offer a better likelihood of agreement. However, one must also recognize that this will depend on how controversial these matters may be, as well as on how they are ultimately approached. For example, the taxation of business profits in the absence of a physical presence has proved to be a quite controversial issue in the international community, particularly when it comes to the agreement on a single solution. OECD pillar 1, which provides a single approach to the issue, has lost momentum, especially because developing countries have found better alternatives to deal with the core issue — the exercise of business taxation in the absence of a physical business presence.³⁸ In this regard, a protocol that insists on a single approach to this issue would be a mistake and should be avoided.

Missing Points and Scope for Improvement

Despite all the positive contributions from the TOR final draft as a constitutive document for the U.N. framework convention, there are several missing points and room for improvement. These issues are analyzed in detail below.

³² Parada, *supra* note 8, at 6-7. See also Parada, *supra* note 4, at 12-14.

³³ TOR final draft, *supra* note 1, at para. 14.

³⁴ *Id.*

³⁵ TOR final draft, *supra* note 1, at para. 15.

³⁶ TOR final draft, *supra* note 1, at para. 16, letters a, b, c, and d.

³⁷ TOR final draft, *supra* note 1, at para. 17, letters a, b, c, and d.

³⁸ Parada, “Moving On: The Case for Developing Nations to Leave the OECD Pillar One Behind,” Kluwer International Tax Blog, July 10, 2024.

Concise Objectives and Principles

The TOR final draft provides similar objectives and principles as its predecessors. Although the existence of objectives and principles is necessary to provide robustness to the framework convention, the TOR final draft appears to have missed an opportunity to adopt a more precise approach.

Objectives

The objectives of the framework convention, although clearly stated, seem to overlap with each other, ultimately diluting the message the framework convention needs to convey. For example, a simpler approach would have been to promote a “single objective” that could include the several aims stressed in the TOR final draft. The text could have read:

The Framework Convention aims to guarantee a system of governance for international tax cooperation that is fully inclusive, effective, transparent, and which promotes a more equitable international tax system, respecting the individual capacity of countries to determine their fiscal affairs according to their needs, especially that of developing countries, emerging economies, and countries in special situations, such as Small Island Developing States (SIDS).

Providing a clear and concise single objective would have strengthened the role of the U.N. framework convention as the core international instrument in tax matters, a goal presumably pursued by the U.N. ad hoc committee. In addition, the reference to “developing countries, emerging economies, and countries in special situations, such as Small Island Developing States (SIDS)” would bring back — more comprehensively — the original purpose behind the negotiations for a framework convention: to guarantee a more inclusive international tax forum that would better recognize the interest of different actors in the international tax context, many of them totally disregarded in other fora, including the inclusive framework.

Principles

Regarding principles, there are three main issues that raise concerns in the TOR final draft that need to be considered.

First, the document states that the framework convention should:

be universal in approach and scope and should fully consider the different needs, priorities, and capacities of all countries, including developing countries, in particular countries in special situations.³⁹

Although the wording suggests an inclusive approach and a scope that expressly includes developing countries, it would have been clearer to recognize the interest of developing countries and emerging economies because these two terms are not necessarily synonyms, although they tend to be used interchangeably.⁴⁰ The interests of these groups of countries was indeed the origin of the discussions on international tax cooperation at the U.N. Similarly, for the reference to “countries in special situations,” the wording is disappointing. If the intention was to refer to countries in special geographical, economic, or political situations, such as SIDS, an express text would have been preferable.⁴¹ It is no surprise following the negotiations of the TOR final draft that the member states pushing to maintain this part of the wording of paragraph 9, letter a, were representatives of so-called SIDS.⁴² Bearing this in mind, an alternative wording could have been:

The framework convention therefore should: . . . be universal in approach and scope and should fully consider the different needs, priorities, and capacities

³⁹ TOR final draft, *supra* note 1, at para. 9, letter a.

⁴⁰ One could presume that the intention was to follow the traditional classification provided by the U.N., which includes 159 countries from around the world. However, some could question whether this classification has another subcategory, also elaborated within the U.N., the category of “least developing countries,” or whether the TOR aimed for an independent definition. After all, neither the terms “developing countries” or “emerging economies” are uncontroversial. For the controversies of using the term developing countries, see, e.g., Tariq Khokhar and Umar Serajuddin, “Should We Continue to Use the Term ‘Developing World’?” World Bank Blogs, Nov. 16, 2015.

⁴¹ See the discussion at *supra* headline “Objectives” in this article.

⁴² The reference to “countries in special situations” was permanently requested by the delegates of Jamaica during the negotiations in New York, apparently in reference to countries in a geographically, politically, or economically disadvantageous position vis-à-vis other countries.

of all countries, in particular developing countries, emerging economies, and countries in special geographical, economic, or political situations, such as Small Island Developing States (SIDS).

The TOR final draft missed an opportunity to clarify that many countries with special features and vulnerabilities because of their geographical location, lack of natural resources, or higher risk of economic or environmental shocks, need special consideration. This starts with the use of more precise terminology like the alternative wording above.

Second, the TOR final draft confirms the idea that the framework convention should be “aligned with States’ obligations under international human rights law.”⁴³ This idea was stressed for the first time in the revised draft TOR, which stated that the framework convention should “be fully aligned with international human rights law and States’ existing commitments under human rights conventions to respect, protect and fulfil all human rights for all people in all countries.”⁴⁴ However, nothing similar existed in the zero draft TOR.

The text of the TOR final draft seems to aim for a more comprehensive recognition of the protection of taxpayers’ rights, as well as other human rights associated with the main subjects of the framework convention. However, its inclusion in the express text of the framework convention is questionable and unnecessary, especially considering that the framework convention is meant to be an international instrument regulated under international law.⁴⁵ As such, one could expect a natural alignment with other

international instruments, including those on matters related to human rights.⁴⁶

Yet one should still recognize the benefits of making an express recognition of this alignment, particularly from an interpretative point of view.⁴⁷ Still, it is important that the core of the framework convention does not deviate from its main essence: establishing inclusive and effective international tax cooperation.⁴⁸

Third, the principles stated in the TOR final draft seem to overlap both with themselves and with the other principles stated in the document, despite their importance for the functioning of the framework convention, protocols, and any other legal instruments associated with them. In this regard, the TOR final draft could have adopted a more focused approach, concentrating on three key principles: simplicity, flexibility, and transparency.⁴⁹ In fact, the OECD pillars 1 and 2 experience demonstrate that simplicity is generally overlooked or underestimated, posing serious challenges for countries, especially developing countries and emerging economies.⁵⁰ Similarly, an inclusive international tax cooperation cannot be achieved without a degree of flexibility — that is, recognizing the inherent differences among countries, both between developed and developing countries, as well as among developing countries themselves. In this regard, a more flexible debate provides the opportunity for countries to address global tax concerns without ignoring the economic reality of their own territory.⁵¹

⁴⁶ Some commentators argue that this connection between tax law and public international law is quite novel. See Assaf Harpaz, “The U.N. Framework Convention: Can It Bridge the North-South Divide?” *Tax Notes Int’l*, Sept. 16, 2024, p. 1779. To some extent, this affirmation is correct. However, in my opinion, the novelty does not rely upon the connection itself but rather upon how such a well-established connection (now recognized) is used for interpretation purposes, particularly in the context of international taxation. For an early analysis on these matters, see Reuven Avi-Yonah, *International Tax as International Law* (2007).

⁴⁷ It can also be perceived as a concession to the specific requests of some member states, or as how the classic division between global north and global south persists. See Harpaz, *supra* note 46, at 1780-1781.

⁴⁸ After all, the U.N. framework tax convention is a tax instrument, despite concerns of some member states that human rights may not prevail, among other reasons, because of the several armed conflicts arising in the international context.

⁴⁹ I have argued this in the past. See, e.g., Parada, *supra* note 8.

⁵⁰ See various authors cited at *supra* note 22.

⁵¹ Parada, *supra* note 8, at 6-7. See also, Parada, *supra* note 11, at 13.

⁴³ TOR final draft, *supra* note 1, at para. 9, letter c.

⁴⁴ TOR final draft, *supra* note 1, at para. 9, letter b.

⁴⁵ In contrast, see Philip Baker, “Reform of the International Tax Architecture: The UN Fails to Reach Consensus,” 1676 *Tax J.*, at 13 (Sept. 6, 2024) (demonstrating his astonishment because even the inclusion of a reference to human rights in the TOR proved to be controversial).

Moreover, transparency appears as another cornerstone in a system that guarantees fairness and equity. In fact, overcoming issues of transparency in the decision-making process of current international tax reforms is a challenge because it increases administrative costs for countries around the world, especially developing countries that lack capacity building. It also may put at risk the protection of taxpayers' rights.⁵²

Reducing the focus to three key principles provides a better understanding of the role of the U.N. framework convention — to guarantee a system of governance for international tax cooperation that is fully inclusive, effective, transparent, and that promotes an equitable international tax system, respecting the individual capacity of countries to determine their fiscal affairs according to their needs, especially developing countries and emerging economies.

Avoiding Vague Terminology

The TOR final draft opts for the use of some vague terminology, including the unpalatable concept of fairness. For example, the objectives of the U.N. framework convention state that they should “establish an inclusive, *fair* . . . tax system . . . enhancing *fairness* of international tax rules” (emphasis added).⁵³ Similarly, among the TOR final draft commitments it is stated that the framework convention should include a “*fair* allocation of taxing rights” (emphasis added).⁵⁴

Although referring to fairness as an objective as well as a commitment of the U.N. framework convention is sound and sensitive, the concept of fairness in taxation is controversial among academics and policymakers.⁵⁵ Past experience shows that the use of vague terminology, such as fairness, only worsens international cooperation because it imposes moral standards that depend on who is leading the international debate.⁵⁶

Similarly, although intuitive, the concept of fairness can create more confusion than clarity. After all, everyone seems to agree that taxation should be fair. However, nobody knows the level of fairness that should be exercised.⁵⁷

It would have been better, especially from an interpretative point of view, to avoid entirely the use of the terms “fair” and “fairness” in the text or alternatively, to allow a more precise terminology that better reflects the idea of an international tax system that rejects different forms of injustices. This is still an issue to consider in the negotiations of future protocols.

Reducing Priority Areas for Early and Future Protocols

Although the proposal for different international tax law issues to be addressed in early and future protocols is a contribution to legal certainty, the number and content of these protocols should have been revised. Most notably, the specific priority areas stated in the TOR final draft, which aims to be the subject of the second early protocol as well as a topic for future protocols, could have been moderated to avoid overlapping and facilitated a speedy approval. In this regard, three main priority areas could have been drawn for the organizational session of the intergovernmental negotiating committee:

- taxation of business profits in the digitalized economy;
- tax competition and tax incentives; and
- dispute resolution and exchange of information.

These three specific priorities address the more urgent tax matters for developing countries and emerging economies right now. They also align well with the objectives and principles of the U.N. framework convention for a few reasons.

First, the taxation of business profits in a highly digitalized world is a challenge that persists regardless of past international efforts to address it. The OECD's pillar 1 project not only has a slim political chance of gaining worldwide approval, but in practice, it does not address the original concern among developing (market)

⁵² *Id.*

⁵³ TOR final draft, *supra* note 1, at para. 7, letter c.

⁵⁴ TOR Final Draft, *supra* note 1, at para. 10, letter a.

⁵⁵ See, e.g., Thomas Pogge and Krishen Mehta, *Global Tax Fairness* (2016). For a recent analysis, see Rita de la Feria, “What Is Tax Fairness?” 33(4) *EC Tax Review* 142-145 (2024).

⁵⁶ Allison Christians and Laurens Van Apeldoorn, *Tax Cooperation in an Unjust World* (2021).

⁵⁷ Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* 13 (2002).

countries: how to tax business profits in the absence of a physical presence.⁵⁸ In fact, OECD pillar 1 evolved from the original question of how business profits could be taxed in the absence of a physical presence to how highly profitable tech companies could be taxed.⁵⁹ This reduces the opportunities for market countries to get allocated substantial taxing rights and, potentially, new tax revenues.⁶⁰

Countries' unilateral reactions around the world seem to be not only a response to the OECD proposal, but also a recognition that the original concern has been forgotten.⁶¹ Some might consider that the issue is addressed in paragraph 16 of the TOR final draft that refers to the "taxation of the digitalized economy" as one of the specific priority areas for the second early protocol that will be decided by the organizational session of the intergovernmental negotiating committee. However, the reference is broad and imprecise because the real issue is not taxation of the digitalized economy, broadly speaking, but the taxation of business profits associated to highly digitalized businesses.

Second, developing countries will be affected by the adoption of OECD pillar 2 around the world, posing serious challenges to the ways in which they attract foreign direct investment using, among other tools, their corporate income tax systems.⁶² When we look at OECD pillar 2 and its effect on developing countries, it is easy to see that the project is supported by unconvincing assumptions, including:

- All corporate income tax incentives play an evil role in attracting foreign direct investment.
- All developing countries can seamlessly transition from corporate tax competition to other forms of tax and non-tax competition.

- Supporting or opposing the OECD pillar 2 project could either boost or diminish their tax revenues.⁶³

This leaves developing countries in a challenging position — making policy decisions about corporate income tax incentives that may compromise future tax revenue. Therefore, the issues of tax competition and tax incentives should be at the core of the international tax debate. Still, it is important that issues are not addressed under the classic, and sometimes pejorative, qualification of "harmful tax practices," as suggested, *inter alia*, in the subjects for future protocols in paragraph 17 of the TOR final draft.⁶⁴ Instead, these matters should be addressed in a more holistic manner that includes the broader ideas of tax competition and tax incentives, two issues at the center of interest for developing countries and emerging economies moving forward.

Third, the use of dispute resolutions and the exchange of information are matters perfectly aligned with the structural elements of the U.N. framework convention. The TOR final draft partially recognizes this when it refers to the "effective prevention and resolution of tax dispute" as one of the commitments in paragraph 10.⁶⁵ However, as noted already, it is important that the scope of dispute resolutions is not only extended to the taxpayer-tax administration relationship, but also to state-state relationships. In other words, this priority area should include the design of a mechanism by which the international tax obligations of a country are controlled by other countries. This could also be achieved, for example, by offering a clarification of the term "tax disputes" in future protocols.⁶⁶ As for the exchange of information for tax matters, this should be interpreted holistically, including, for example, assistance among tax administrations. This could allow those other specific areas stressed in the TOR final draft, such as tax-related illicit financial flows and mutual

⁵⁸ Parada, *supra* note 38.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² The reality of many developing countries is that they "offer [corporate income tax] incentives reliant upon both corporate and non-corporate tax features to generate real and substantive investment, employment, and economic growth." Parada, *supra* note 22, at 195.

⁶³ Parada, *supra* note 22, at 194-202 (for a deeper analysis of these three presumptions).

⁶⁴ TOR final draft, at para. 17.

⁶⁵ TOR final draft, at para. 10.

⁶⁶ For a specific proposal in this regard, see Hongler, *supra* note 26.

administrative assistance, to be considered as part of the same package without the need for a textual reference.

Clearer Decision-Making Procedures

Lastly, the TOR final draft is silent on the decision-making process that will take place both as part of the framework convention as well as the protocols that will be negotiated in parallel. The lack of clarity promotes tensions and speculation among participating countries. The current debate is precisely on whether a decision-making process should be adopted following the U.N. secretary general's decision-making process, that is, majority vote; or whether a consensual approach would be more convenient. Both options have trade-offs.⁶⁷

On one hand, adopting a majority vote approach could end up marginalizing minority opinions of participating countries, which may result in decisions that do not consider the perspectives and needs of all countries involved. Similarly, there is a risk of polarization, dividing countries into opposing factions. In simple terms, there is a risk of turning the process into an us-versus-them scenario ultimately reducing cooperation.⁶⁸ Finally, there is some scope for oversimplification of complex matters, reducing the debate to binary choices. This issue can be relevant when some matters require a more nuanced approach, including the exploration of alternative solutions.

On the other hand, a consensual approach is not exempt of problems either. Indeed, reaching a consensus often requires extensive discussion, negotiations, and compromise, which can be very time-consuming. This could prevent, for example, the adoption of protocols on highly sensitive matters. Similarly, to accommodate everyone's opinions and achieve unanimous agreement, the final decisions may become a compromise that lacks strong direction or effectiveness. This can lead to diluted solutions that fail to address issues

adequately or to the satisfaction of all parties involved. There is also the chance that consensus will give opportunities for countries with stronger voices to dominate the debate, something already experienced within the inclusive framework in which more outspoken members have achieved "consensus" on matters that do not reflect the opinions and interests of all participants.

Regardless of the approach finally adopted, the silence in the TOR final draft is a clear downside for the whole process. This is something U.N. member states should stress in future negotiations: working for clarity in the decision-making process and suggesting, perhaps, a more nuanced approach that includes a combination of consensus and majority vote depending on the matters involved.

Beyond the Text of the TOR Final Draft

Although it can be easy to get lost in the details of the TOR final draft, and despite its undeniable scope for improvement, we should not be distracted from what really matters. Beyond its text, the document represents the materialization of a necessary change in how the international tax agenda has been and will be shaped.⁶⁹ It is important to recognize that the U.N. framework convention is not an isolated anecdote attributable to the simple discontent of some countries within the inclusive framework.⁷⁰ In contrast, it represents a reaction to a much-needed decentralization of the international tax policy debate that has been in the hands of the OECD.⁷¹ The TOR final draft may not (and will never) satisfy everyone, but it provides a strong signal to countries to endorse more active global tax cooperation. It is the role of U.N. member states to create a proper forum that provides the necessary counterbalances in the dynamics of power at the international tax level.⁷² For this purpose, at least three main compromises are required.

⁶⁹ Parada, *supra* note 4, at 12.

⁷⁰ *Id.*

⁷¹ Tax commentators have already recognized that the current international forum does not provide an effective platform for cooperation. For the creation of an alternative "tax cooperation forum," see H. David Rosenbloom, Noam Noked, and Mohamed S. Helal, "The Unruly World of Tax: A Proposal for an International Tax Cooperation Forum," 15(1) *Florida Tax Rev.* 57-87 (2014).

⁷² *Id.*

⁶⁷ However, some commentators consider that any result that does not approximate to "consensus like" does not bode well for a successful outcome, getting closer to a disaster. In this regard, see Baker, *supra* note 45, at 12.

⁶⁸ For Baker this is already evident in the recent negotiations of the TOR final draft in New York, which has demonstrated the division between the Global North and Global South. *Id.* at 13.

First, flexibility in the framework convention negotiations. For those who followed the latest negotiations in New York, it was worrisome to witness the at times intransigent position of some representatives, forgetting that golden opportunities come as easy as they go.⁷³ The framework convention is ultimately a political instrument, and representatives should understand that concessions are not only necessary, but mandatory to achieve a long-lasting, positive outcome.⁷⁴

Second, the practice of inclusivity. Unless countries want to end up with the unpalatable creation of a parallel international tax system, as some commentators have predicted, they need to provide inclusion signals.⁷⁵ This could start, for example, with the creation of working groups that include both developed and developing countries (or Global North and Global South), especially in sensitive matters to be included in future protocols, like the taxation of business profits in the absence of physical presence.

Third, and finally, defining the role of other tax-related bodies within the U.N., particularly in

relation to the COP and the U.N. Committee of Experts; and outside the U.N., including the OECD. This can be a crucial step to ultimately get OECD countries more involved in, and committed to, the U.N. process.

The risk of doing nothing is too high because it would not only solidify the status quo characterized by OECD dominance of the international tax debate but would compel smaller developing nations to continue accepting the long-standing paternalistic approach to taxation imposed on them for decades.⁷⁶

Final Remarks

The TOR final draft represents a unique opportunity for countries to assume a more active role in international tax matters, creating the space for an independent, more democratic, and participative forum for global tax cooperation. This is what the TOR final draft is all about. It is the responsibility of U.N. member states to contribute to this, avoiding mistakes of the past, leaving aside individual interests, and assuming the task of preventing a tax world dominated by acronyms and policies “made in Paris.” ■

⁷³ See Baker, *supra* note 45 (stressing similar concerns regarding the amount of disagreement among countries’ representatives during the negotiations in New York).

⁷⁴ A U.N. Framework Convention without developed countries as signatory countries may become meaningless. In this regard, *see, e.g.*, Mindy Herzfeld, “Dissecting the U.N. Multilateral Convention Process,” *Tax Notes Int’l*, Sept. 9, 2024, p. 1647.

⁷⁵ *Id.* at 14-15.

⁷⁶ See Parada, *supra* note 22 (referring to the international tax paternalism toward developing countries in the context of the OECD pillar 2). Other commentators have argued that many of the tax principles used today are the result of the dynamics of colonization in the past, posing an interesting angle to the idea of paternalism. *See* Natalia Quiñones, “Decolonizing Tax Rules: A New Era for Tax Cooperation in the Global South,” 6 *Caribbean Tax L. J.* 13-17 (2024).