

Dispute resolution under a Framework Convention on the Promotion of Inclusive and Effective International Tax Cooperation at the United Nations

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1. Need for ‘suitable’ dispute resolution mechanisms in the Framework Convention

As noted in the Secretary-General’s Report of July 2023, a fully inclusive and more effective tax cooperation systems requires robust processes for avoiding and resolving tax disputes in a principled and effective manner. As such, the General Assembly recognized in Resolution 78/230 that dispute resolution mechanisms are the procedural elements to should be considered in a UN Framework Convention on International Tax Cooperation (UNFCITC).

The question then arises how ‘suitable’ dispute resolution mechanisms under the Framework Convention should look like. On the one hand, one can look at the dispute resolution mechanisms included in other multilateral conventions (both framework and standard). On the other hand, one can also refer to the existing mechanisms used to solve international tax disputes. Arguably, suitable dispute resolution mechanisms are those mechanisms that are able to further the ‘object and purpose’ of the Framework Convention and foster ‘community interest’. It is believed that object and purpose of the Framework Convention can be expressed as “*the establishing of international tax cooperation regime that respects countries’ rights and obligations under the UN Charter*”. ‘UN Charter’ stands for the body of norms developed under the auspices of the UN in other policy areas, like human rights, sustainable development or climate change. ‘Community interests’ are established by obligations that have an *erga omnes* nature. Unlike in the current tax regime which is essentially composed of only bilateral obligations, one can argue that the Framework Convention has the ability to establish principles and obligations in international tax that are owed to the community of states. For example, a general principle under the Framework Convention could be that countries are committing to leave no income untaxed if they are allocated the right to tax that income. It can be said that given the diffuse negative spill-overs of non-observance, it can be said that the obligation to avoid non-taxation is owed to the community of states as a whole. Whereas it would go too far to create ‘universal standing’ (like under the Genocide Convention) in case of non-observance by a country under the Framework

¹ This submission is based on the article ‘Dispute resolution under a Framework Convention on the Promotion of Inclusive and Effective International Tax Cooperation at the United Nations’, written by author for the purpose of the Tax Justice Network conference on ‘How can a UN tax convention address inequality in Europe and beyond?’ (Paris, 14-15 March 2024). A draft of the full article is available at: <https://ssrn.com/abstract=4760752>. The opinions expressed in the article and this submission are the authors personal opinions only. The author can be contacted at bob@taxjustice.net.

Convention, it is believed that suitable dispute resolution mechanisms can be designed to reflect the fact of solving disputes in line with the objectives and principles of the Framework Convention matters to all countries. Transparency in dispute resolution and the avoiding of 'bilateralisation' of dispute resolution is therefore a key consideration. Resolution 78/230 emphasizes the need for a holistic approach to the creation of international tax rules which consider interaction with other policy domains. It is believed that also 'suitable' dispute resolution mechanisms are those that are able to achieve dispute resolution on a 'holistic way', namely with consideration of not just the interpretation and application of the tax rule in question but also countries' commitments and obligations in other policy domains.

2. Overview of dispute resolution mechanisms

2.1. Non-binding dispute resolution ('mutual agreement procedure')

Under the UN Charter, countries are obliged to settle disputes in a peaceful manner by resorting to negotiation. Negotiation is the most common form of dispute resolution in the current international tax regime where it is known as the 'mutual agreement procedure' (MAP). MAP finds its legal ground in bilateral tax treaties. The OECD's work under BEPS Action 14 ('making dispute resolution more effective') has streamlined the MAP process across countries, resulting in a massive spike in the number of MAP cases around the world.

Negotiation in the form of MAP should also be the default mechanism for the settlement of state/state disputes and state/state-taxpayer disputes under the Framework Convention and its Protocols. The Framework Convention can draw heavily on countries' current MAP practices and processes. At the same time, the development of the Framework Convention also creates the opportunity to solve two fundamental flaws of the current MAP regime. First of all, transparency of MAP decision making should be improved under the Framework Convention. The reasoned parts of MAP decisions should be published. Unlike under the current MAP regime where the disputes rules pertain to a bilateral instrument, MAP under the Framework Convention will essentially concern multilateral rules. The community of states has a fundamental interest to see how two countries settle their disputes and to be able to ascertain whether their approach is inline with the objectives of the Framework Convention. Secondly, the Framework Convention also has the potential to create a universal legal ground for MAP so that access to MAP is no longer dependent on the existence of a bilateral tax treaty. BEPS Action 14 may have improved the effectiveness of the MAP process; it has done nothing to improve access to MAP for countries with limited tax treaties. MAP is mostly used in practice to settle transfer pricing cases. The fact that a country has no bilateral tax treaty in place will not stop transfer pricing cases from arising. Especially for the least developed countries, universal MAP access will aid the fight against aggressive transfer pricing by involving the

other country in the relevant transactions to assist in clarifying the matters at hand. Universal access to ‘interpretative MAP’ and ‘legislative MAP’ will allow competent authorities to sign multilateral understandings on interpretative and unresolved issues in relation to substantive tax matters dealt with in any of the protocols to the Framework Convention.

2.2. Binding dispute resolution

2.2.1. Arbitration

Mandatory binding arbitration of unresolved MAP cases was included as one of the optional standards in the OECD’s BEPS Multilateral Instrument and also figures in the most recent versions of both the OECD and UN Model Tax Convention. Yet in tax treaty practice, arbitration remains rare. Especially countries in the Global South remain skeptical about the merits of arbitration of tax treaty disputes, which is often seen as an impediment to national sovereignty, coming with huge revenue risks and difficulties in the selection of impartial arbitrators.

Arbitration can have a place in the Framework Convention but only if it can address the concerns generally raised by the Global South countries. One option can be the creation of an arbitration tribunal under the Framework Convention with a roster of suitable arbitrators and fixed procedures with publication of arbitration decisions.

However, caution is due. Arbitration essentially serves to allow adjudication to zero in on technical tax rules and ignore the wider context of tax rules and spillovers to other policy domains. In a sense, arbitration is the *nemesis* of holistic dispute resolution. This has been made abundantly clear in the recent [report](#) adopted by the Special Rapporteur on Human Rights on the catastrophic consequences of investor-state arbitration under bilateral investment treaties. While MAP arbitration in tax matters is not exactly the same as investor-state arbitration, some of the considerations on the lack of a holistic approach in the latter are also relevant in relation to arbitration as a possible means to settle disputes under the Framework Convention.

2.2.2. Dedicated ‘tax court’ under the Framework Convention

Resolution of disputes by a judicial court has the advantage of providing procedural guarantees, independent and objective decision making in a holistic manner: judges tend to consider all relevant legal norms that apply to parties in a dispute and not just those legal norms agreed by the parties. As such, adjudication of international disputes under the Framework Convention by a court fits the requirements of a ‘suitable’ dispute resolution mechanism.

A first option for adjudication of disputes under the Framework Convention is the establishment of a ‘world tax court’, similar to the establishment of the Appellate Body (AB) under the Marrakesh Agreement establishing the World Trade Organization (WTO).

The establishment of such an international court dedicated to tax matters is politically quite difficult. For example, the binding jurisdiction of the WTO AB was accepted by countries like the United States based on three factors: the early nineties is considered the height of multilateralism; the WTO AB was perceived as part of a package deal under the WTO agreement; and the binding jurisdiction of the AB was perceived as mostly being useable to reign in trade law violations by other countries, rather than used against the United States itself. None of these factors is present in the current time with regard to the setting up of a Tax Court under a Framework Convention.

Furthermore, the recent downfall of the WTO AB because of the political blocking by the United States shows that even if countries agree to set up a specialized tax court, if powerful countries' opinions on the merits of such a court change, they might be able to sink the ship in the middle of the journey.

2.2.3. International Court of Justice

A second option for binding judicial dispute resolution under the Framework Convention is to rely on the International Court of Justice (ICJ). All countries member of the United Nations are also member to the ICJ, which is a sister organization of the UN General Assembly. The ICJ is the only general court in international law and has the competence to hear all legal disputes between countries. For cases to be admissible, the ICJ has however to have jurisdiction.

Many international treaties contain a 'compromissory clause' by which the ICJ is granted mandatory jurisdiction to hear disputes in relation to the legal obligations contain in the treaty. In recent times, more and more conventions – including the UNFCCC – have inserted an optional compromissory clause in which countries are invited to express their wish to be bound by the ICJ. The reason for this is the political challenge to have countries accept mandatory jurisdiction of the ICJ. This will not be different under the Framework Convention on International Tax Cooperation.

ICJ jurisdiction to hear disputes in relation to international tax cooperation has however tremendous advantages, as it provides a way of dispute resolution that is highly authoritative, transparent and holistic which makes it perfectly in line with the objective of the Framework Convention.

2.3. Advisory jurisdiction of the International Court of Justice

Besides its 'contentious jurisdiction', the ICJ also has an 'advisory jurisdiction' on the basis of which it can render non-binding advisory opinions on legal questions submitted to it by the UN General Assembly or a limited number of mandated UN agencies. While not binding, these opinions are highly authoritative. Also in the context of the Framework Convention, ICJ advisory opinions can be very useful to shed a light on some of the larger questions that arise in relation to the Framework Convention's holistic approach to

international tax cooperation, like *‘does this type of preferential tax regime and its negative spill-overs in the form of profit shifting violate other countries’ right to development and attainment of the sustainable development goals’*. Opinions by the ICJ on matters like these can serve as a beacon of orientation for international tax policy making under the Framework Convention.

As such, if the Framework Convention sets up a UN agency on international tax cooperation, this agency should be mandated to submit requests for advisory opinions to the ICJ.

3. Concluding remarks

Dispute settlement regimes are a crucial procedural aspect of the Framework Convention on International Tax Cooperation at the United Nations. However, because of the double clash with national sovereignty – both tax and mandatory binding dispute resolution in general are politically sensitive topics – it is expected that agreement on suitable mechanisms will be a tough nut to crack.

It is clear that existing mechanisms like MAP negotiation should also play an important role in the Framework Convention but at the same time, crucial improvements are needed to suit the objectives of the Framework Convention. Transparency and universal access are key points.

Finally, much more than arbitration, judicial dispute resolution fits the bill of holistic dispute resolution in line with the objectives of the Framework Convention. A specialized UN Tax Court seems politically farfetched. Mandatory jurisdiction of the ICJ to hear disputes under the Framework Convention is the best option. Realistically speaking, this option too might have to be watered down to an optional compromissory clause.

Contentious jurisdiction of the ICJ should in any case be complemented by granting any UN body set up under the Framework Convention with the power to request the ICJ to issue advisory opinions on matters pertaining to the Framework Convention.