

Review Article

The organization of the preparatory work for a Framework Agreement on international cooperation in tax matters: general ideas



Jordi Bonet Pérez

Full Professor of Public International and the current coordinator of the Ph. D. Program on Law and Political Science of the University of Barcelona. He was director of the Department of International Law and Economics of the University of Barcelona (20012-16) and secretary of the Department of Criminal Law and Criminology, and Public International Law and International Relations of the University of Barcelona (2016-2021). Additionally, he was member of the board staff of the Catalanian Institute of Human Rights and the Economic, Social and Cultural Rights Observatory. Email: jbonet@ub.edu

Received 20 January 2020, Accepted 20 February 2020

KEYWORDS:

International tax cooperation; global tax governance; international tax cooperation commission; framework agreement; General Assembly; United Nations Economic and Social Council

ABSTRACT:

Three alternative options can be proposed to promote and develop in the United Nations the preparatory work on the initiative for a Framework Agreement on international cooperation in tax matters and global tax governance: 1) Open-ended Working Group of the General Assembly (inter-governmental body) whose mandate shall be to elaborate a general international legally binding instrument (Framework Agreement) to regulate international cooperation in tax issues. Participation in all kinds of stakeholders (including academics) must be guaranteed. 2) A similar kind of body (an open-ended working group or ad hoc inter-governmental committee) can be adopted by the Economic and Social Council, with parallel expectations on an extended and plural social and academic participation. 3) The Committee of Experts on International Cooperation in Tax Matters is an alternative body to rightly develop the initiative (in such case, its work must be opened to observations of States); the question is whether its mandate must be extended or not by a new Resolution of the Economic and Social Council. In any case, the previous decision on including the matter in its agenda, the draft must be considered by the General Assembly: 1) discussing the new international treaty during a regular session of the General Assembly, and adopting it by means of a General Assembly's resolution, and 2) adopting by means of a General Assembly's Resolution the decision to organize an International Conference to adopt the text of the new international treaty (this option doesn't exclude the later submission of the project to the final criteria and decision of the General Assembly, but it supposes a factor of legitimacy to support the initiative).

PALABRAS

CLAVES:

Cooperación fiscal internacional; gobernanza fiscal global; comisión de cooperación fiscal internacional; acuerdo marco; Asamblea General; Consejo Económico y Social de las Naciones Unidas.

RESUMEN:

Tres opciones alternativas pueden ser propuestas para promover y desarrollar en Naciones Unidas los trabajos preparatorios de la iniciativa de un Acuerdo Marco de cooperación internacional en materia tributaria: 1) Grupo de Trabajo de composición abierta de la Asamblea General (órgano intergubernamental) cuyo mandato será elaborar un instrumento general internacional jurídicamente vinculante (Acuerdo Marco) para regular la cooperación internacional en materia tributaria. Se debe garantizar la participación de todo tipo de actores (incluidos los académicos). 2) Un tipo de órgano similar (un grupo de trabajo de composición abierta o un comité intergubernamental ad hoc) puede ser adoptado por el Consejo Económico y Social, con expectativas paralelas de una amplia y plural participación social y académica. 3) El Comité de Expertos sobre Cooperación Internacional en Materia Tributaria es un órgano alternativo para el correcto desarrollo de la iniciativa (en tal caso, su trabajo debe estar abierto a las observaciones de los Estados); la cuestión es si su mandato debe ser prorrogado o no por una nueva Resolución del Comité Económico y Social. En todo caso, previa decisión de incluir el asunto en su agenda, el proyecto deberá ser considerado por la Asamblea General: 1) discutiendo el nuevo tratado internacional en un período ordinario de sesiones de la Asamblea General, y aprobándolo mediante acuerdo de la Asamblea General; resolución, y 2) adoptar mediante Resolución de la Asamblea General la decisión de organizar una Conferencia Internacional para adoptar el texto del nuevo tratado internacional (esta opción no excluye la posterior sumisión del proyecto a los criterios y decisiones finales de la Asamblea General, pero supone un factor de legitimidad para apoyar la iniciativa).

MOTS CLES :

Coopération fiscale internationale; gouvernance fiscale mondiale; commission de coopération fiscale internationale; accord-cadre; Assemblée générale; Conseil économique et social des Nations Unies.

RESUME :

Trois options alternatives peuvent être proposées pour promouvoir et développer au sein des Nations Unies les travaux préparatoires à l'initiative d'un accord-cadre sur la coopération internationale en matière fiscale et la gouvernance fiscale mondiale : 1) Groupe de travail à composition non limitée de l'Assemblée générale (intergouvernemental organe) dont le mandat sera d'élaborer un instrument international général juridiquement contraignant (accord-cadre) pour régler la coopération internationale en matière fiscale. La participation à toutes sortes de parties prenantes (y compris les universitaires) doit être garantie. 2) Un type d'organe similaire (un groupe de travail à composition non limitée ou un comité intergouvernemental ad hoc) peut être adopté par le Conseil économique et social, avec des attentes parallèles en matière de une participation sociale et académique élargie et plurielle. 3) Le Comité d'experts sur la coopération internationale en matière fiscale est un organe alternatif pour développer à juste titre l'initiative (dans ce cas, ses travaux doivent être ouverts aux observations des États) ; la question est de savoir si son mandat doit être prolongé ou non par une nouvelle résolution du Comité économique et social. Dans tous les cas, la décision précédente d'inscrire la question à son ordre du jour, le projet doit être examiné par l'Assemblée générale : 1) en discutant le nouveau traité international lors d'une session ordinaire de l'Assemblée générale, et en l'adoptant au moyen d'un vote de l'Assemblée générale résolution, et 2) adopter au moyen d'une résolution de l'Assemblée générale la décision d'organiser une conférence internationale pour adopter le texte du nouveau traité international (cette option n'exclut pas la soumission ultérieure du projet aux critères finaux et à la décision du Assemblée générale, mais cela suppose un facteur de légitimité pour soutenir l'initiative).

CREATIVE COMMONS LICENSE



This work is licensed under a Creative Commons Attribution 4.0 International License.

The proposal to adopt within the United Nations Organization (UN) a Framework Treaty for International Cooperation in Tax Matters seems to be logical to frame it:

1) within the purpose described in art. 1,3 of the Charter of the United Nations (UN Charter) ("To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms [...]");

2) within the functions assumed by the Social Economic Council, formed by 54 States elected by the UN General Assembly, in charge of organizing the work "concerning international economic, social, cultural, educational, health, and related matters" (art. 62.1 UN Charter), and among whose attributions is that "It may prepare draft conventions for submission to the General Assembly, for matters falling within its competence" (art. 62.4 UN Charter).

According to these coordinates, it seems legitimate to think that the draft international treaty (regardless of who comes from the initiative): 1) must previously become an initiative derived from some item on the agenda of the UN General Assembly or a specific initiative that it be included in the agenda of the General Assembly; or 2) it can be an initiative initially assumed by the Economic and Social Council to be worked on within it and, once the preparatory work is finished, transmit it as a draft international treaty to the UN General Assembly. In the first of the two cases, institutional and functional rationality would indicate that the work proposal on an international treaty of this nature would be transmitted to the Economic and Social Council.

Notwithstanding this, it would also not be unimaginable for the General Assembly to choose to entrust this task to an open-ended Working Group; An example, in this sense, is that of the Open-ended Working Group to promote an arms trade treaty: establishment of common international standards for the import, export and transfer of conventional weapons (Resolution 63/240, of the Assembly General, of December 24, 2008). His work culminated in the adoption by the General Assembly, after a negotiating process with various vicissitudes (including two international conferences), of the Arms Trade Treaty of April 2, 2013. This type of body, with intergovernmental roots, allows broad-spectrum participation among the various stakeholders: the Governments of the Member States, specialized agencies, civil society entities (for example, Non-Governmental Organizations or business groups), and also the university academy.

However, and to also calibrate the possibility of resorting to an already existing open-ended Working Group to more quickly implement the work, among the existing ones, it would seem perhaps to be competent to a certain extent the Special Working Group of Open Composition of the General Assembly to follow up on the issues contained in the Final Document of the United Nations Conference on the global financial and economic crisis and its effects on development, created by Resolution 63/205 of December 31 July 2009. However, it is clear, following the mandate of the afore mentioned final document, that any tax action related to this area of activity should be transferred to the Economic and Social Council, following what is set out in the Annex to the Resolution 63/203, of July 13, 2009:

"38. We stress the need to ensure that all tax jurisdictions and financial centres comply with transparency and regulatory standards. We reiterate the need to further promote international cooperation on tax matters, particularly within the United Nations, among other things, by promoting agreements on double taxation. There should be inclusive cooperation frameworks that guarantee all jurisdictions' participation and equal treatment. We call for the systematic and non-discriminatory application of transparency requirements and international standards for exchanging information.

39. Illicit financial flows, estimated at several times global ODA, hurt financing for development. Therefore, measures to improve regulation, supervision, and

transparency of the formal and informal financial system should control illicit financial flows in all countries. An increase in the openness of the global financial system will also have a deterrent effect on illegal financial flows, in particular to international financial centres. It will increase the capacity to detect illicit activities".

To this end, the Economic and Social Council is requested to:

“c) Examine the strengthening of institutional arrangements to promote international cooperation in tax matters, in particular the United Nations Committee of Experts on International Cooperation in Tax Matters” (Paragraph 56, Annex).

Therefore, it must be assumed that, in practice, one way or another, it seems almost inevitable that any initiative in a sense described would identify the Economic and Social Council as the main body of the UN in charge of uniting the efforts of the international Organization.

From here, the following considerations can be made:

- 1) The matter of a possible Framework Treaty for International Cooperation in Tax Matters should be included in the agenda of the Economic and Social Council, for its institutional treatment in the manner that may be agreed upon, at the request of the General Assembly of the UN or of the Economic and Social Council itself, following Art. 9,1 2 of the Rules of Procedure of the Economic and Social Council (ECOSOC Regulation); or, as a consequence of a category I Non-Governmental Organization, processed through the Committee of Non-Governmental Organizations (Art. 9,1, 3 ECOSOC Regulation).
- 2) The most rational option, based on the institutional configuration of the subsidiary bodies of the Economic and Social Council, seems to be that the potential task of initiating the preparatory work for this international treaty would correspond to the Committee of Experts on International Cooperation in Tax Matters, dependent on the Economic and Social Council.

In any case, this would mean: 1) assessing whether this committee is implicitly competent to address the task of preparing a draft international treaty, or b) if an additional express authorization is required based on a Resolution of the Economic and Social Council; Art. 14 of the ECOSOC Regulation would legally and institutionally justify this decision.

In this sense, it is worth evaluating what the powers of the Committee of Experts on International Cooperation in Tax Matters are under Resolution 2004/69, of November 11, 2004:

“(i) Keep under review and update as necessary the United Nations Model Double Taxation Convention between Developed and Developing Countries and the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries.

(ii) Provide a framework for dialogue with a view to enhancing and promoting international tax cooperation among national tax authorities.

(iii) Consider how new and emerging issues could affect international cooperation in tax matters and develop assessments, comments and appropriate recommendations.

(iv) Make recommendations on capacity-building and the provision of technical assistance to developing countries and countries with economies in transition.

(v) Give special attention to developing countries and countries with economies in transition in dealing with all the above issues.



(e) The Committee shall submit its report to the Economic and Social Council at its substantive session in July 2005, to be considered under the sub-item entitled “International cooperation in tax matters”.

(f) The Committee shall be serviced by a small technical staff, which shall, inter alia, within existing resources, help collect and disseminate information on tax policies and practices, in collaboration with concerned multilateral”.

- 3) Now, the institutional and political-legal legitimacy would demand that the body of experts open its preparatory work: 1) to the Member States of the UN for the purpose of formulating their comments and/or their observations; 2) to other actors of civil society, global and national; and 3) to the university academy.
- 4) It does not seem so simple to create an *ad hoc committee*, for example, of government experts (from the material perspective, similar to an open working group dependent on the UN General Assembly) to carry out the drafting work : not so much because of the legal possibility of its creation (the Economic and Social Council would be authorized by Art. 24 ECOSOC Regulation), but because of the financial repercussions of this decision and/or because of the political opportunity that such a body would depend on the Assembly UN General. In any case, the intergovernmental starting point of this type of body would also outline the need to be open to members of civil society and the university academy.

On these parameters, any draft international treaty in this regard:

- 1) It should be sent to the General Assembly so that it can decide on the definitive form of processing (Arts. 12 to 15 of the Regulations of the General Assembly), even though if you previously came from a mandate from the General Assembly itself, it would be more accessible to processing before it.
- 2) The practice of the international Organization shows that there would be two basic options: 1) Process the adoption of the international treaty directly in the form of a Resolution of the UN General Assembly; and 2) Convene an international conference to finalize the negotiation of the international treaty. This second option has been used whether the subsidiary body or committee that has previously worked on the issue is intergovernmental or made up of experts and, even though it may delay the adoption of the international legal instrument, it is predominantly legitimate for any project from the perspective of forging of the maximum level of confluence of wills between the States. However, without prejudice to this, holding an international conference has its risks from the perspective of the viability of the final project, even when it guarantees the highest level of common denominator that can urge States to express consent.