

Working paper

PROTOCOLS TO THE UNITED NATIONS FRAMEWORK CONVENTION ON TAX COOPERATION



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HUMAN RIGHTS
IN FISCAL POLICY

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Working Paper - Protocols to the United Nations Framework Convention on Tax Cooperation

This paper summarizes the research conducted by the Initiative for Human Rights in Fiscal Policy (the Initiative) on the protocols that will complement the Framework Convention on Tax Cooperation, currently negotiated at the United Nations (the Convention, or UNTC). The Convention creates a unique opportunity to improve the inclusiveness and effectiveness of international tax cooperation, therefore better positioning States to align their tax policies with their human rights obligations.

Under Framework Conventions, protocols can play crucial roles. The approved terms of reference (TOR) for the Convention make some definitions around its protocols. However, there are still many open questions on the topic. This working paper seeks to contribute to some of the open discussions, summarizing information on the scope, functioning and content that protocols can have in conventions such as the UNTC.

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I. What do the UNTC's terms of reference say about protocols?

The approved terms of reference of the UNTC define the commitments that the Convention must contain to achieve its objectives. These commitments include:

- Fair allocation of taxing rights.
- Addressing tax evasion and avoidance by high-net worth individuals and ensuring their effective taxation.
- International tax cooperation approaches that contribute to sustainable development.
- Effective mutual administrative assistance in tax matters, including with respect to transparency and exchange of information for tax purposes.
- Addressing tax-related illicit financial flows, tax avoidance, tax evasion and harmful tax practices.
- Effective prevention and resolution of tax disputes.

Beyond the commitments of the Convention, the TORs envision additional protocols, which they define as separate binding legal instruments, in the context of the Convention, to implement or elaborate on its contents. States members of the Convention may or may not become parties to these protocols (either at the time of becoming a party to the Convention or later).

In addition, the TORs determine that two "early" protocols should be developed simultaneously to the text of the Convention: one on taxation of income derived from the provision of cross-border services in an increasingly digitalized and globalized economy; and another one to be defined among the following areas:

- Taxation of the digitalized economy.
- Measures against tax-related illicit financial flows.
- Prevention and resolution of tax disputes.
- Addressing tax evasion and avoidance by high-net worth individuals and ensuring their effective taxation.

Beyond these protocols, the TORs mention possible protocols for future consideration,

which such as those related to tax cooperation on environmental challenges; exchange of information for tax purposes; mutual administrative assistance on tax matters; and harmful tax practices.

II. What are the current discussions around the UNTC protocols?

The issue of the UNTC protocols has sparked debate. Countries and regions have expressed different preferences for some of the topics that could be included in the second early protocol. Others have stated, during the drafting of the TORs, that negotiating protocols in parallel to the Convention was too ambitious.

Some organizations have raised the question of whether it was possible to "merge" into a single protocol content relevant to more than one of the areas listed for early protocols. This could be feasible given that the TORs refer broadly to thematic "areas", because the process of negotiating a treaty is not formally regulated¹, and given the variety of approaches to developing protocols in Framework Conventions, as will be explained below.

The General Assembly Resolution that approved the TORs² decides that the Convention negotiating committee must deliver, during the first quarter of the United Nations General Assembly 82, the final text of the Framework Convention and of the two early protocols. The content of the second protocol will be decided at the organizational session of the negotiating committee that will take place in New York between February 3 and 6, 2025.

III. What are protocols in UN Conventions? How do they differ from similar instruments?

In the context of international treaties, the term "protocol" can refer to a variety of agreements³. Although protocols may be stand-alone instruments, they are usually supplementary to a main treaty they modify or complement in some way⁴. Protocols may be adopted simultaneously

1 See <https://opil.ouplaw.com/display/10.1093/law/epil/9780199231690/law-9780199231690-e1481>

2 A/C.2/79/L.8/Rev.1

3 See Bodansky, Daniel. (1999). Framework Convention/Protocol Approach.

4 Idem.

or subsequently to the main treaty; be optional or mandatory to the parties to the treaty (the States that agreed to be bound by it); and have the same or separate institutions from those of the main treaty.

The United Nations recognizes different meanings for the term "protocol"⁵. In some cases, a protocol may be ancillary to a main treaty and refer to secondary and formal issues. In other cases, optional protocols establish rights and obligations additional to those of the treaty to which they are associated. The latter, as they entail a separate process for adoption, may have parties different to those of the main treaty. A protocol may also be an instrument for amending, modifying or supplementing an earlier treaty.

In the field of international taxation, and in relation to bilateral treaties, the term "protocol" often refers to documents that provide interpretations or auxiliary provisions⁶ or, mostly, that modify the original treaty (*amending protocols*⁷).

The following sections of this document focus specifically on protocols in the context of so-called "framework conventions", such as the UNTC.

Importantly, protocols are in general binding instruments. Therefore, to understand their typical contents, they need to be differentiated from other documents. For example, memorandums of understanding generally refer to less formal instruments that regulate operational issues, or very detailed technicalities⁸. Some treaties may also have annexes, detailing technical information that may be difficult to include in the main body of the treaty⁹. The institutions that emerge from a treaty (such as its conference of parties -COP- or other bodies in charge of monitoring its implementation) can in turn produce documents such as reports, declarations, manuals, guides, more specific rules on certain topics, etc¹⁰.

5 See https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml#protocols

6 See <https://globtaxgov weblog.leidenuniv.nl/2024/08/01/un-framework-convention-the-role-of-early-protocols/>

7 See https://www.un.org/esa/ffd/wp-content/uploads/2015/10/TT_Introduction_Eng.pdf . For an example of an amending protocol, see <https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties/country/united-states-america-protocol-2007.html>

8 See https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml#protocols

9 See, in general, <https://www.ilo.org/resource/annex#:~:text=Annexes%20are%20normally%20used%20to,and%2015%20Recommendations%20contain%20annexes.>

10 See, for example, <https://unfccc.int/documents>

IV. What are protocols to Framework Conventions? Definitions and examples

There is no legal definition of "Framework Conventions". Including the term "framework" in the name of a treaty has no legal consequences, and there may be such conventions even if they do not carry such a title. Broadly speaking, a Framework Convention is binding treaty¹¹ of international law like any other, which establishes only general commitments and a governance structure that applies to the parties to the treaty¹². More specific provisions supplementing general commitments are then detailed in additional instruments to the Framework Convention¹³ (although even in the absence of such instruments, the Convention has effects on its own). Additional instruments may consist of national legislation or of international agreements, usually referred to as "protocols".

The adoption and negotiation of Framework Conventions has resulted in what literature has called a "framework convention and protocol approach"¹⁴. Under this approach, an incremental process of law-making is generated, starting with the establishment of a general system of governance, to advance in the adoption of more specific commitments over time¹⁵.

Framework Conventions have been adopted especially in environmental matters¹⁶. There are several reasons to negotiate a Framework Convention. These include uncertainty and complexity on the issues regulated, the need for flexibility for other reasons, and the absence of strong political consensus on a topic. Framework Conventions can generate feedback and knowledge-building mechanisms from conferences of the parties to the Convention and other institutional mechanisms. On this basis, more political consensus can be built around the issue throughout time (although there is contradictory evidence in this regard¹⁷).

11 According to Article 2.1(a) of the Vienna Convention on the Law of Treaties, a treaty "means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

12 Oxford Public International Law Search, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e703>

13 Idem.

14 See Daniel Bodansky, Framework Convention/Protocol Approach.

15 Idem.

16 Nele Matz-Lück, Framework Conventions as a Regulatory Tool, *Goettingen Journal of International Law* 1 (2009) 3, 439-458.

17 George W Downs, Kyle W Danish and Peter N Barsoom, 'The Transformational Model of International Regime Design: Triumph of Hope or Experience' (1999) 38 *Columbia Journal of Transnational Law* 465, 465."

According to the United Nations, protocols to Framework Conventions are instruments with specific substantive obligations that implement the general objectives of the Convention, thus allowing for a more streamlined negotiation process¹⁸ (therefore, to be a party to a protocol a State needs to be a party to the Framework Convention as well). However, since protocols are treaties themselves, there may be significant difficulties in negotiating them¹⁹.

Protocols can be envisaged and even negotiated from the beginning of the Framework Convention negotiation process. In addition, the regular rules of treaty procedures apply to them (e.g. for their entry into force, which will regularly require a minimum number of parties accepting to be bound by it, etc.).

In practice, the content of Framework Conventions can vary across conventions that set only minimal and procedural content (such as the Convention on Certain Conventional Weapons), and others that are more detailed and contain substantive commitments (such as the United Nations Framework Convention on Climate Change). In addition, Framework Conventions can (and often do) include rules on the protocols that will complement them (e.g. on rules for their adoption). The following chart summarizes basic information on some of the Framework Conventions currently in force and their related protocols:

18 See https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml#protocols

19 See <https://d-nb.info/999418092/34>

Convention	Scope/ Year	Content	Text of the Convention in connection to protocols	Current protocols	Ratification status
United Nations Framework Convention on Climate Change	UN / 1992	<p>It contains definitions, principles, objectives, concrete commitments, convention mechanisms, dispute resolution, etc.</p> <p>It has more substantive content than other Framework Conventions.</p>	<p>It allows the <u>Conference of the Parties</u> to adopt protocols to the Convention. To that end, the Secretariat must communicate the draft protocol to the parties 6 months in advance of the session. Each protocol will set its conditions for entry into force. Only parties to the Convention may be parties to a protocol, and only parties to a protocol may take decisions within its framework (art. 17).</p>	<p>*Kyoto Protocol (1997)</p> <p>*Paris Agreement²⁰ (2015)</p>	<p>197 parties to the Convention</p> <p>192 parties to the Kyoto Protocol</p> <p>196 parties to the Paris Agreement.</p>
Framework Convention on Tobacco Control	WHO/ 2005	<p>It contains objectives, principles, institutional arrangements, provisions on cooperation, and various substantive contents. COPs produce guidelines and other documents.</p>	<p>It assumes a separate adherence process for protocols. It mentions that Parties will consider the development of a protocol to prohibit cross-border tobacco advertising.</p> <p>It also provides for the COP to adopt protocols, annexes and amendments to the Convention. Any party may propose them, and their adoption must be by consensus or by a three-fourths majority of those present (art. 33). The Secretariat should disseminate the draft at least six months in advance. Only Parties to the Convention may be Parties to a protocol. Any protocol to the Convention <u>shall be binding only on the Parties to the protocol in question and only they can</u> make decisions relating to it. The conditions for the entry into force of the protocol shall be those <u>established by protocols themselves</u>.</p>	<p>Protocol to Eliminate Illicit Trade in Tobacco Products (complements Article 15 of the Convention).</p>	<p>183 parties to the Convention</p> <p>41 parts to the protocol.</p>

²⁰ Although there is almost identity of parties between the Convention and the Paris Agreement, and the latter is based on the previous existence of the UNFCCC, this instrument is formally called an "agreement", and not a "protocol".

Convention	Scope/ Year	Content	Text of the Convention in connection to protocols	Current protocols	Ratification status
<u>Vienna Convention for the Protection of the Ozone Layer</u>	UN/1985	It contains definitions, general obligations, provisions on cooperation, operation of the COP, dispute settlement. It is largely procedural/institutional, although it has annexes where more substantive issues are "recognized".	The Conference of the Parties may adopt protocols at its meetings. The Secretariat shall communicate to the Parties, at least six months in advance of such meetings, the text of any proposed protocol.	Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 (which has annexes, and several amendments itself).	Convention and protocol: ratified by 197 countries (this is a successful case due to its level of implementation and its practically universal subscription).
<u>Convention on Certain Conventional Weapons</u>	UN/1980	It is a procedural Convention, with little substantive content outside of its protocols.	<u>Article 1 already refers to the annexed protocols, which are mentioned throughout the text. It sets the conditions for their entry into force. It also defines that: "The expression of consent to be bound by any of the Protocols annexed to this Convention shall be optional for each State, provided that at the time of deposit of its instrument of ratification, acceptance, approval or accession to this Convention, that State notifies the Depository of its consent to be bound by two or more of those Protocols."</u>	There are 5 protocols with restrictions and other regulations on different types of weapons (3 adopted with the Convention, 2 later). The contents are variable, ranging from categorical prohibitions to provisions ordering measures at the national level.	Parties to the Convention: 128 Parts of the different protocols of each weapon type: between 99 and 121

Convention	Scope/ Year	Content	Text of the Convention in connection to protocols	Current protocols	Ratification status
Convention on Biological Diversity	UN/ 1992	It has definitions, principles, provisions on cooperation, and various substantive regulations.	Parties shall cooperate in the formulation and adoption of protocols, which shall be adopted at <u>a meeting of the Conference of the Parties</u> . The <u>Secretariat</u> shall communicate the proposed text to the Parties at least 6 months in advance. To be a party to the protocol, a State must be a party to the Convention, and decisions relating to any protocol may only be taken by the Parties to the protocol in question. However, any Party that has not adopted a protocol may participate as <u>an observer</u> in any meeting of the Parties to that protocol.	Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 (which has annexes, and several amendments itself).	Convention and protocol: ratified by 197 countries (this is a successful case due to its level of implementation and its practically universal subscription).
Convention for the Protection of the Mediterranean Sea against Pollution	UN/ 1976	It contains definitions, general commitments, surveillance programs, provisions on scientific cooperation, creation of an institutional framework, procedural issues, etc.	<u>It determines that the parties will cooperate in the elaboration of protocols for the implementation of the Convention, in addition to those approved by the Convention itself. They will be adopted at a diplomatic conference at the request of two-thirds of the parties.</u>	There are protocols on pollution from different sources (2 adopted with the Convention, 5 more in subsequent instances).	Agreement: 22 parties
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes I	UN/ 1989	It contains definitions, general obligations, institutional mechanisms.	In addition to the protocols, it regulates the annexes.	*Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal (1999)	*Parties to the Agreement: 170

In sum, there are a variety of ways to develop Framework Conventions and the protocols that often accompany them. In some cases, the Conventions have little substantive content beyond protocols; in others, they contain substantive commitments themselves. The protocols may or may not be ratified by virtually all parties to the Convention. In some cases, protocols create their own institutional mechanisms (see, for example, protocols to the Convention on Biodiversity). Protocols may be approved simultaneously with the convention or subsequently, and be mandatory or optional for the parties to the main treaty.

V. What content can protocols of the Framework Conventions have?

Despite the variety of outcomes of the Framework convention-protocol approach, protocols are treaties themselves and are therefore generally binding. Consequently, they shall regulate issues normally contained in binding norms. In addition, they should be more specific than the Framework Convention itself, as they are complementary to them and instrumental for their implementation.

Protocols could focus on substantive commitments, or on institutional arrangements (or both). With respect to substantive commitments, they could refer to one or more specific issues addressed in the Convention, or to the generality of the Convention's commitments (but in a more specific manner).

Examples of protocols' content:

1. [Cartagena Protocol to the Convention on Biodiversity](#). It contains general provisions, definitions, obligations on imports and exports, including some procedural obligations that each party has to observe, and other substantive obligations. In all cases, it refers specifically to the issue of modified organisms. It regulates the designation of focal points, information exchange, capacity building, awareness-raising, and relations with States that are not party to the protocol. It uses the same COP and Secretariat as the Convention.

2. [Montreal Protocol to the Ozone Convention](#). It provides definitions; specific substantive obligations on ozone-depleting substances; import and trade prohibitions; assessment and data reporting systems. It contains provisions on cooperation, information exchange and assistance; uses the same Secretariat as the Convention and adds a specific meeting of the parties to its mechanisms.

VI. Conclusions

In the case of the UNTC, the TORs have chosen optional protocols (i.e. each party to the Convention will decide independently whether to adopt them or not), which can be negotiated either simultaneously or subsequently to the adoption of the Convention. Protocols with a thematic (rather than institutional) focus on substantive issues have been envisioned, which should bring more specificity to the Convention's commitments. Beyond possible thematic "areas" listed in the TORs, parties to the future Convention should have the flexibility to adopt protocols on the issues they deem most appropriate, as long as they are a tool for implementing the general commitments of the Convention.

The way in which protocols are adopted and the institutional mechanisms that will accompany each protocol would be determined in the text of the Convention or in the protocols themselves. The level of detail and importance of each protocol will vary according to the type of commitments eventually made in the Convention itself (the fewer substantive commitments the Convention has, the more central the protocols will be).