EDITORIAL

A UN Dawn for the International Tax Regime

In the twilight of 2022, the General Assembly of the UN took a stand on the importance of full inclusiveness for the international tax regime. In an unprecedented resolution it signaled that the UN was prepared to take the lead in matters of international cooperation on tax matters.[1] The resolution was followed by a report by the Secretary-General that concluded that enhancing the role of the UN in tax norm shaping and rule setting appeared to be the most viable path for making international tax cooperation fully inclusive and more effective.[2] The report further examined three options for next steps, including a multilateral tax treaty, a framework convention on international tax cooperation, and a framework (without a convention) under the UN. Eventually, a Resolution adopted by the General Assembly in late November 2023 decided to proceed with the option to develop a framework convention on international tax cooperation.[3]

This decision by the UN may signal the beginning of a new phase for the international tax regime, which evolved from the work at the League of Nations pre-World War II (WWII), and fully developed under the strong hand of the OECD after the war. Now, a century later it may finally be shaped as a true, legitimate international legal regime under the auspices of the UN. The need for this third phase for the regime has been obvious. The hold of the OECD, an organization not open to all states, and dominated by the richest (and mostly former colonial power) economies in the world, over the regime denied it legitimacy. The geo-political changes in the turn of the Millennium presented challenges to this hold, the answer to which has been the organization of a satellite forum to the OECD, ironically known as the Inclusive Framework.[4] The Inclusive Framework was designed to legitimize the dominance of the OECD, and mostly rubber stamp its agenda established during the BEPS project. This fig leaf was used by the OECD and some of its richest members in fierce resistance to the UN initiative based on the argument that the Inclusive Framework sufficiently legitimizes the work at the OECD, making the UN initiative duplicative, superfluous, and even disruptive for the 'progress' made by the OECD (more on that below).[5]

A more shameful (albeit more honest) form of opposition to the UN initiative may be found in the argument that such initiative has no aim or purpose beyond the 'voice' that it gives the (huge majority of the world's) states that do not have it in the current, OECD-led regime. This argument[6] is problematic for many reasons. First, it dismisses the basis for the initiative as merely moral and hence naïve since (allegedly) the powerful states do not care about the basic principles of comity, equality of states, and mutual respect among states. There are multiple reasons not to accept such cynicism. Some level of international cooperation has always been required for the regime to be stable and for its primary benefactors to continue and benefit from it. Some level of fairness not only makes the regime morally (yes) acceptable but also gives it legitimacy without which no state can progress (by peaceful means). Second, there is vast scholarship on the importance of voice for (different levels of) cooperation. Third, this view reminds one of the classic colonialist ideology (of the same states that dominate the OECD), which, as one should know by now, has been proven untenable. Fourth, the attempt to ignore the interests of the poorer states of the world based on some tweaked status-quo has obviously failed, as demonstrated by the inability of the OECD to respond inter alia to the

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1 A/RES/77/244 Resolution adopted by the General Assembly on 30 Dec. 2022 (Jan. 9. 2023).

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

3 The draft resolution is available as A/C.2/78/L.18/Rev.1 Resolution on the Promotion of Inclusive and Effective International Tax Cooperation at the United Nations.

4 For my specific critique of the Inclusive Framework, *see* Yariv Brauner, Serenity Now! The (not so) Inclusive Framework and the Multilateral Instrument, 25 Fla Tax Rev. 489 (2022), doi: 10.5744/ftr.2022.2001. *See also* e.g., Lucinda Cadzow, et. al., *Inclusive and Effective International Tax Cooperation: Views from the Global South*, ICTD Working Paper 172 (Aug. 2023).

5 *See* e.g., the stark division expressed by the different states who spoke during the ECOSOC discussion of the UN initiative. E/2023/SR.15 ECOSOC Special Meeting on International Cooperation in Tax Matters, 31 Mar. 2023 (Summary) (16 Aug. 2023).

6 I chose to not refer directly to those who expressed this view in order to keep the debate principled rather than personal.

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challenges presented by the digital economy, and its organization of the Inclusive Framework. Finally, an attempt to imply that only the OECD has the expertise required for international tax reform is laughable. UN membership includes all OECD and satellite states, so state contribution should unquestionably favor the UN, and although the OECD Secretariat is currently larger, no one could seriously ignore the expertise, experience and brain power already inhabiting the UN tax initiative, even before the implementation of the new resolution that promises to expand it.

Unfairness and a lack of inclusiveness were the primary triggers of the movement to shift the center of gravity of the international tax regime to the UN. It is not surprising that the resolution was sponsored by Nigeria, which had been one of the very few states to stand up to the Inclusive Framework ruse. Nigeria, one should not forget is also Africa's largest economy, and an important force behind the regional work on tax cooperation in Africa in various fora including the African Union (a G20 member) and ATAF (African Tax Administration Forum). This regional work inspired others, most notably the Latin American and Caribbean initiative, to explore the opportunity for a new, legitimate model of international tax cooperation.[7]

A new phase for the international tax regime was needed however not only to remedy the unfairness and illegitimacy caused by the reign of the OECD, but also by economic and market changes that challenged the graying regime, especially sophisticated (primarily derivative) financial instruments, transfer pricing, and the ascent of intangibles found unsatisfactory answers in the existing rules. The challenge became acute with the rise of the digital economy, to which the BEPS project found no answer. The most recent maneuver by the OECD attempted to conceal this lack of progress with a more ambitious international tax reform, known to all of the readers of this Journal as the two Pillars program. The alleged progress of this program is at the heart of the OECD's overt opposition to the UN initiative. This editorial argues that it best demonstrates the deficits of the current OECD-dominated regime and the hope represented by the UN initiative.

The architecture of the Pillars' program attempts to rebuff unfairness claims in at least three distinct ways. First, it is presented as a compromise between the demands of developing countries for more source taxation (answered by Pillar One) and the quest of developed countries to tax homeless or undertaxed income (answered by Pillar Two). A compromise intuitively implies equality and balance between the demands of the two groups. Second, presenting the program as a compromise permits it to be short on principles and blur the biases involved. Third, each of the pillars was presented as beneficial to developing countries: Pillar One with its new taxing right and Pillar Two in ensuring a floor tax rate below which developing countries won't be forced to compete. This thin veil convinced no one. A few challenges for this OECD stance may be noted: first, from the beginning it was clear that the OECD put most of its effort into Pillar Two, and still, even after some work was done on Pillar One, few believe that it has any future. Second, and perhaps most notably, even OECD estimates point to minuscule revenue gains to developing countries as a result of the program, with larger (although still modest) revenue gains to the richest countries in the world.[8] Third, and relatedly, although Pillar One is presented as granting a new taxing right, one that does not require physical presence, in fact its effect is to *limit* this right, and further limit alternative taxation at source in the forms of digital service taxes ('DST') and the likes. For most developing countries these limits are likely to restrict rather expand their fiscs.[9] Fourth, Pillar One depends on a multilateral convention that will be meaningless without the United States and in any way is designed in a way that would effectively require ratification by the United States, which no serious observer anticipates possible in the current political climate. Pillar Two, on the other hand, self-executes with its adoption by different states. Although many experts argued that it needs a multilateral convention, and, even more obviously, implementing it with a multilateral convention would be the *right* thing to do,[10] the OECD pushes it based on Model Rules crafted by the OECD with a self-policing mechanism which draws serious questions about the authority of the OECD to engage in such making of international norms. Fifth, the tremendous complexity of the program presents obvious disadvantages to poorer countries.[11] Sixth, beyond its complexity, Pillar Two includes an inherent bias in favor of cash rich countries (that can provide in-kind and more sophisticated tax incentives that are Pillar Two safe) and countries with nimble political systems that can quickly legislate and implement the UTPR, for example, at the expense of

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[7] *See* e.g., https://www.minhacienda.gov.co/webcenter/portal/TributacionIncluyente/pages_TributacionIncluyente/ilatinamericancaribbeantaxation.

[8] *See* e.g., https://www.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-economic-impact-assessment_0e3cc2d4-en;jsessionid=GshSh6is2PZ5VQIzQC65PZTZFuPNgkL7mRYHcwtE.ip-10-240-5-53.

[9] *See* e.g., Julie McCarthy, *A Bad Deal for Development: Assessing the Impacts of the new Inclusive Framework Tax Deal on Low- and Middle-Income Countries*, Brookings Global Working Paper #174, 15–17 (May 2022).

[10] *See* e.g., a review of some of the critiques in Yariv Brauner, Editorial: The Rule of Law and Rule of Reason in the Aftermath of BEPS 51 Intertax 268 (2023). *See also* Peter Hongler, et al., *UTPR – Potential Conflict with International Law*, 111 Tax Notes Int'l 141 (10 Jul. 2023).

[11] Ironically, even the Pillar One draft convention includes about 1000 pages with the explanation. Few treaties (on any matter) come even close to that.

countries that require years to legislate and implement the Pillar Two rules. Seventh, shielding oneself from Pillar Two requires a 'qualified' domestic minimum top-up tax, which qualification is controlled, presumably, by the OECD and its dominant Member States. Many more critiques have been explored by tax experts, but the above are sufficient to expose the disingenuousness of the claim that the Pillars' program is balanced and fair.

What then could the UN initiative do to improve things? This editorial argues that beyond fairness, legitimacy, flexibility and openness to innovation, the UN initiative could also effectively help to preserve the international tax regime. This initiative should not be viewed as a replacement for the OECD and does not require a reversal of the achievements of the existing international tax regime. The two pillars program should look very different if only reshaped by the UN initiative. A few examples can be mentioned here, but many other scholars are making suggestions these days to similar effects. The most obvious example is Pillar One Amount A. At this point in time, it is clear that there is no intelligent argument in support of taxation solely based on physical presence.[12] Pillar One explicitly permits taxation without Physical presence and many state practices do so as well (through DSTs, significant economic presence rules, etc.). The sole, albeit really complex question, is how much 'source' taxation would be acceptable to the relevant 'residence' states. It is a classic treaty question, and should be negotiated in tax treaties (in that I agree with the view that the 'deal' should be struck within the income tax framework, not outside it, if possible – including relief for double taxation). The existing bilateral treaties-based regime can tolerate non-uniform solutions or formulary solutions that are freer from OECD politics (intending to minimize source taxation at all cost). The UN initiative will have an advantage both because of its earlier adoption of withholding solutions in Article 12A/B and because it will be free of the richest states political veto on the removal of physical presence from the discussion of appropriate business taxation norms.

Pillar Two could be aided even more by the UN initiative. Most obviously, it could provide at least a treaty skeleton for its basic rules. It could also set the minimum tax rate at a more acceptable level, much closer to the average world corporate tax rate. This is more appropriate because Pillar Two is a minimum tax only in form. In substance its incentives are constructed to almost unify the effective rate of corporate taxation. It will impact source or host states more significantly than other states and hence should be set at a level that allows them to preserve more-or-less their (domestically determined) desired level of taxation. Developing states attempted to do that within the Inclusive Framework with no success. Most importantly, the UN initiative could simplify the global minimum tax so that all states could realistically and somewhat equally implement it. One obvious change would be to eliminate the exclusions of 'Substance Based' income and refundable credits, which is desirable for both policy and simplification reasons, but serves the interests of particular groups at the OECD. This is not the place to develop this point, but the most obvious alternative is to convert Pillar Two from a policing regime to a collaborative agreement, to try and have an agreement on a minimum corporate tax rate of 15% based on acceptable tax accounting standards and a negotiation of acceptable and non-acceptable tax incentives or substance requirement. Thought should be given to the reference to financial accounting, to improving the automatic exchange of information system (regional arrangements could save much of the costs, an issue that is particularly sensitive for developing states), and to the impossible dispute resolution mechanisms proposed by the Pillars program. These will be obviously more appropriately, and hopefully more collaboratively, dealt with in a legitimate standard setter such as the UN. One may argue that that will take time and that the OECD is on the verge of delivering Pillar Two, yet, first, the rush that typified the OECD work during the BEPS project has proven questionable as is evident by its inability to resolve the challenges of the digital economy in over a decade of BEPS; second, quick and uniform bad solutions are obviously not superior to legitimate and more sustainable ones, even if those shall take some time to negotiate; and, finally, we are quite far from a universal adoption and implementation of Pillar Two (even some of its staunch proponents have halted implementation or postponed the originally conceived deadlines for implementation). Of course, a desirable, reshaped Pillar Two would be easily absorbed into the UN work on international tax cooperation if it were so.

Finally, this editorial wishes to applaud the UN for its choice of a Framework Convention as the main goal of its new tax initiative.[13] This choice prefers a framework convention over a comprehensive multilateral tax convention, presumably based on the belief that latter is untenable at the present for a variety, including political reasons, but also based on the understanding that it is unnecessary. A UN initiative should not and does not position itself to demolish the existing international tax regime and its achievements, but rather to build on these and ensure the stability and sustainability of the regime. This choice also prefers a framework convention over a

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[12] The attempts by developing states to expand the scope of Pillar One during the Inclusive Framework negotiations were reported to had been simply rebuffed. This should not be the case in a fully inclusive forum such as the UN.

[13] Full disclosure: the author encouraged the UN to take this step in his speech during the ECOSOC special meeting. *See supra* n. 5.

'convention-less' framework, or the organization of a new international tax forum, presumably based on the belief that the current state of international affairs and international tax relations among states are unlikely to allow that framework to produce sufficient progress in a timely fashion.

In my view, the choice of a framework agreement is not merely taking the middle road or compromising in any way, but rather opting for the most realistic option that gives fair international tax cooperation a chance. The UN initiative is not only a change in the flatform; It also changes the decision-making method. The OECD purportedly operates by consensus, which can only produce either the lowest common denominator or whatever is desired by the strongest party/ies as they force the hands of others to agree. The UN allows for a more flexible majority-based decision-making like the one that adopted the November Resolution. A multilateral convention could only accommodate such flexibility with much complexity, while a framework agreement could serve as a set of game rules allowing different arrangements fitting the differing interests of states, and at the same time making sure that they do not go out of bounds.

By the same token, the UN initiative should put less emphasis on the distinct interests of the most dominant states, which typically frown upon flexibility for domestic (source) legal systems. A case in point is the UN Model's adoption of Article 12A (and 12B) in comparison to the Pillar Two program. The former respects the international law system and the need to rearrange international relations in a formal agreement, using traditional and known tax mechanisms, while the latter is based on states 'policing' each other without a clear international legal framework, despite the drastic departure from existing norms. The former allows source taxation some flexibility in implementation, while the latter effectively confines states to boxes constructed by others. Again, a framework agreement can make different domestic measures legitimate (yet still controlled) without the complexity that a multilateral treaty would require. It would not require measures of the one-size-fit-all variety, and could accommodate thinking outside the OECD box, which itself will continue to operate and serve, as it did in the past, its members' interests. This is true beyond the Pillars; the UN initiative should be more open to giving withholding taxation and simplified measures, such as safe harbors, a more prominent role which has been consistently eroded by the OECD over the last sixty years.

A framework agreement also alleviates the imbalance among states when they come to negotiate international agreements, an imbalance that dominates the existing international tax regime[14] only to become even more acute with the Inclusive Framework.[15] This editorial cannot comprehensively review, of course, the potential of the UN initiative, which will face many other technical tax problems (sufficient to just mention the need to replace the arm's length standard for transfer pricing purposes and the need to improve dispute resolution, among others). This potential has already inspired much scholarship and professional literature and promises only to increase in volume. One should hope that this third phase of the international tax regime will be given a chance to materialize, preserve the integrity of the regime, and improve its stability and sustainability.

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[14] *See* Yariv Brauner, *Tax Treaty Negotiations: Myth and Reality*, 4 Int'l Tax Stud. 8 (2021), doi: 10.2139/ssrn.3722607.

[15] *See supra* n. 4.