GUEST EDITORIAL

International Tax Cooperation at the United Nations: Clearing the Way for Everlasting Deliberation

1 Introduction

The summer of 2023 will be remembered as a watershed moment for international tax cooperation. It was when the United Nations (UN) Secretary General published a report on the 'Promotion of inclusive and effective international tax cooperation at the United Nations'.[1] It outlined three alternative routes for achieving this: (1) a multilateral convention on tax; (2) a framework convention on international tax cooperation; and (3) a framework for international tax cooperation.[2] The UN General Assembly swiftly approved a resolution at the end of the same year that called for establishing terms of reference (ToR) for a framework convention on international tax cooperation.[3] Stated otherwise, the general assembly preferred option (2) which was described in the report as a 'legally binding multilateral instrument (…) that is "constitutive" in nature, in that it would establish an overall system of international tax governance'.[4]

The year 2024 marked the ToR's development for which a final draft was adopted by the ad hoc committee on 16 August 2024.[5] They stress how the UN framework convention on international tax cooperation should establish 'fully inclusive and effective' cooperation[6] while also emphasizing that 'every Member State has the sovereign right to decide its tax policies and practices'.[7] This explicit reference to sovereignty should probably be considered in the context of the sense of dissatisfaction with the OECD's role in the current system of international tax governance. As such, the value of sovereignty is reflected in the section of the ToR on protocols which stresses that each state 'should have the option whether or not to become party to a protocol on any substantive tax issues'.[8] Such protocols constitute the legal instruments under the umbrella of the framework convention that will eventually transform the agreements between states into binding treaties.[9]

The work on developing the UN framework convention for tax cooperation will continue in 2025. Hence, this is certainly an opportune moment to dedicate a special issue to this topic. It is this author's pleasure to share a few observations about the ongoing turn of events in this guest editorial in which the search for a governance structure, the importance of legitimacy as the core underlying value, and the challenges of deliberation will be addressed.

2 Search for a governance structure

The point of departure of the ongoing initiative is the search for a governance structure that establishes effective international tax cooperation in such a way that the voice of all states is properly included in the process. A preliminary but crucial matter is obviously whether it is actually not overly idealistic to expect that states would be willing to cooperate for mutual benefit on these terms. Tax lawyers tend to take such willingness for granted, but political scientists may paint a much bleaker picture of the world. It is therefore very constructive to study the contribution of Broekhuijsen and Van Apeldoorn in this

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1 United Nations, Promotion of Inclusive and Effective International Tax Cooperation, Report of the Secretary General, A/78/235 (2023). This report was a follow-up to the adoption of Resolution A/RES/77/244 by the general assembly on 30 Dec. 2022 that called for intergovernmental discussions on this topic.

2 *See* para. IV of the Report of the Secretary General.

3 United Nations, Promotion of Inclusive and Effective International Tax Cooperation at the United Nations, General Assembly, A/RES/78/230 (22 Dec. 2023).

4 *See* s. 55 of the Report of the Secretary General.

5 United Nations, Chair's Proposal for Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation, Ad Hoc Committee, A/AC.295/2024/L.4 (15 Aug. 2024). The final report of the secretary general that was sent to the general assembly on 30 Aug. 2024 is available as document A/79/333. At the time of this writing, the latter had not yet approved it.

6 *See* Art. 7.a. of the ToR's final draft.

7 *See* Art. 9.b. of the ToR's final draft.

8 *See* Art. 14 of the ToR's final draft.

9 Articles 15–17 of the ToR's final draft specify the substantive topics that would need to be addressed in the future protocols. A protocol on the 'provision of cross-border services in an increasingly digitalized and globalized economy' should be developed simultaneously to in the establishment of the framework convention.

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special issue. They convincingly illustrate how such a neorealist view on international relations regards international tax cooperation as a 'zero-sum competition between the major powers whose most important aims is to secure their own survival'. These authors explain how the current developments at the UN should be merely regarded as an attack on the hegemonic power of the United States and the rest of the western world. In this view, the odds of establishing truly inclusive and effective international cooperation are actually limited, and we should simply accept a multipolar world of international taxation conflicts between the longstanding hegemon (i.e., the United States) and its twenty-first century rival (i.e., China).

Actually, this neorealist perspective is very similar to the worldview of the political scientist E.H. Carr.[10] This scholar was a well-known skeptic of idealistic views on international cooperation between states. In his famous work, 'The Twenty Years' Crisis', he concluded regarding the League of Nations – the predecessor of the UN – that 'those elegant superstructures must wait until some progress has been made in digging the foundations'.[11] This leads this author to the contribution of Jogarajan and Teo in this special issue. They outline, as a follow-up to Teo's book,[12] for what reasons previous attempts for international cooperation at the UN level were unsuccessful. At the same time, they stress no less than seven reasons to be optimistic about the current efforts to realize a UN framework convention for tax cooperation. In their view, the contemporary situation is actually different from the past. Should we therefore respond to Carr that progress has indeed been made?

A notable difference with the past is probably that there is no more fear that the UN initiative will develop into some type of 'superstructure' as Carr stated. We are speaking about an intergovernmental model of global (tax) governance that works as an instrument for the states' benefit.[13] More in particular, the current discussions are about what is known as a framework convention that serves as the foundation for future international legal agreements (the protocols) about substantive matters.[14] It is already being used in the context of the UN's work on climate change and other areas such as public health. Its aim is to outline the objectives of international tax cooperation, its governing principles, and the further details of the governance structure.[15]

The idea for a specific UN framework convention for tax cooperation was actually launched by Chowdhary and Picciotto in a policy brief published back in 2021.[16] For a more comprehensive understanding of the workings of a framework convention, it is very instructive to study Broekhuijsen's work on the institutional design of a multilateral tax treaty.[17] This scholar outlined in great detail how the combination of a broad framework convention and future protocols would create the conditions for a system of global tax governance that is flexible by nature. He wrote in this regard:

> In the framework convention-protocol design, inspired by the regime on climate change (…), states initially focus on the negotiation of broad, standard-setting commitments. Once consensus has built up, detailed commitments are fleshed out in protocols. Such broad standards set directions for further negotiation, whilst the institutional setup of the regime facilitates the gathering of further information on the problem and builds trust among participants. This prevents negotiation breakdown. Once parties start negotiating detailed commitments in protocols, the design allows for the inclusion of certain parties only, so that states wishing to engage in deeper cooperation are included in further deliberations, whilst states that do not wish to do so remain bound to the regime's core commitments. Interpretative flexibility mechanisms such as reservations, menu-options and 'rules of the road' may be used to tailor-make obligations to the taste of the individual state.[18]

Broekhuijsen addresses several specific advantages of this combination of a framework convention and protocols including the fact that not all states are required to consent to a protocol.[19] Eventually, these benefits amount to the fact that this governance structure creates the institutional

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[10] *See* S. McGlinchey, *E.H Carr and The Failure of the League of Nations*, E-International Relations (2010), https://www.e-ir.info/2010/09/08/e-h-carr-and-the-failure-of-the-league-of-nations-a-historical-overview/. (access on 24 November 2023).

[11] E. H. Carr, *The Twenty Years' Crisis, 1919–1939* 219 (Palgrave Macmillan, London 2016).

[12] N. Teo, *The United Nations in Global Tax Coordination* (Cambridge University Press, Cambridge 2023).

[13] M. Zürn, *Survey Article: Four Models of a Global Order With Cosmopolitan Intent. An Empirical Assessment*, 24(1) J. Pol. Phil. 88–119 (2016), doi: 10.1111/jopp.12070. It is another matter whether such an intergovernmental model is actually sufficient from a normative point of view. Compare in this regard, e.g., C. Peters, *Global Tax Justice: Who's Involved?*, in *Ethics and Taxation* 172–173 (R. van Brederode ed., Singapore: Springer 2020).

[14] Compare ss 55 and 56 of the Report of the Secretary General.

[15] Compare s. 55 of the Report of the Secretary General.

[16] Abdul Muheet Chowdhary & Sol Picciotto, *Streamlining the Architecture of International Tax Through a UN Framework Convention on Tax Cooperation*, South Centre, 2021, Tax Cooperation Policy Brief, no. 21.

[17] D. Broekhuijsen, *A Multilateral Tax Treaty: Designing an Instrument to Modernise International Tax Law* (Alphen aan den Rijn: Kluwer Law International 2018).

[18] *Ibid.*, at 126.

[19] *Ibid.*, at 155–156.

basis that is needed to resolve shared problems of international taxation in a gradual manner on the basis of inclusive dialogues between those states that are willing to cooperate. It is exactly this ascertainment that explains why the evolving governance structure of the UN framework convention for tax cooperation satisfies the demands of the normative standard of legitimacy that is addressed below. The international tax system needs a governance structure that finds a proper balance between some constitutional unity and a diversity of policies and solutions.[20]

It is this need to guarantee flexibility and diversity that instigates critics such as Dourado and Lammers in this special issue who are worried about a fragmented international tax system that is no longer effective. Basically, the underlying fear is that there will eventually be two completely separate systems: one under the heading of the OECD and one under the auspices of the UN. In this author's view, it is probably correct to assume that the international tax system will not evolve into a coherent and properly coordinated global arrangement but dares to doubt whether it will become much worse than it is now. Moreover, these critics underestimate the chances that the UN and the OECD will find some form of mutual adjustments. In any case, theory determines that a UN framework convention for tax cooperation would not eliminate the work done in other institutions.[21] The guiding idea is that the OECD, the Inclusive Framework on BEPS in particular, the UN Tax Committee, and the Global Forum on Transparency and Exchange of Information for Tax Purposes would continue their efforts to establish norms for international tax cooperation.[22] It should therefore be stressed, as done by Brauner, that the new 'initiative should not be viewed as a replacement for the OECD'.[23] In this context, it is actually a hopeful sign that the UN is hinting at cooperating with the OECD on a significant topic like dispute resolution.[24]

3 LEGITIMACY AS THE CORE UNDERLYING VALUE

The UN's ongoing discussions about inclusive and effective international tax cooperation are basically about the legitimacy of the systems of global tax governance and international tax law. They are a reflection of the view that a somewhat more democratic form of global tax governance is needed since it is simply not realistic to assume that (somewhat) effective solutions of international tax law are sufficient to guarantee such legitimacy in the longer run.[25] Legitimacy is obviously an elusive concept with many different shades. Broekhuijsen and Van Apeldoorn aptly write in this regard – referring to Buchanan and Keohane – that '(i)t is not sufficient that the relevant actors agree that some institution is needed; they must agree that this institution is worthy of support'.[26] This author opines that it is actually rather straightforward to see why a renewed system of international tax governance under the UN's guardianship rather than the current system merits such support.

The most obvious reason is that a UN framework convention would afford each individual UN Member State (193 in total) a voice in the decision-making processes about international tax law. Such a level of participation is simply not available in the OECD/G20 Inclusive Framework on BEPS (currently 147 members). Consequently, as Brauner is explaining in this special issue, this is one of the things that the UN can do that the OECD cannot or will not do.[27] Such a broad level of inclusivity undoubtedly enhances the legitimacy of the system of international tax governance.

A closely related matter is that the current joint efforts on the design of the UN framework convention on international tax cooperation are actually contributing to the legitimacy of the project in the longer run. This position is based on the well-established view that appropriate procedures should constitute the foundation for law that is regarded as legitimate.[28] After all, it is fair to claim, in the spirit of Habermas, that there are no eternal truths about international tax law so that it is actually up to a process of 'reason-giving' within an adequate procedural framework to grant legitimacy to the outcomes of deliberations about this subject matter.[29] Similarly, 'reason giving is both a means of arriving at better outcomes and a way to recognizing each participant as equal and free'.[30] Consequently, it is actually very significant that the UN framework convention will be founded on a 'constitutive'

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[20] This author's earlier work developed a somewhat more ambitious initiative ('deliberative international tax law'). C. Peters, *On the Legitimacy of International Tax Law* 311–328 (Amsterdam: IBFD 2014).

[21] Compare Chowdhary & Picciotto, *supra* n. 16, at 1.

[22] *Ibid.*

[23] Y. Brauner, *A UN Dawn for the International Tax Regime*, 52(2) Intertax, at 102, 2024.

[24] S. Soong & K. Strocko, *UN Official Floats Cooperation With OECD on Tax Dispute Issues*, Tax Notes International 862 (4 Nov. 2024).

[25] *See* Peters, *supra* n. 20, at 346–347.

[26] *See* p. 59 in this issue.

[27] *See* p. 45-46 in this issue.

[28] This author is specifically referring to Habermas' discourse theory of law that is based on such a proceduralist basis. This position is elaborated in Peters, *supra* n. 20.

[29] *Ibid.*

[30] S. Chambers, *Deliberative Democracy*, in *The Cambridge Habermas Lexicon* 95 (A. Allen & E. Mendieta eds, Cambridge: Cambridge University Press 2019).

and legally binding multilateral instrument that will facilitate an ongoing dialogue between states. Such a process of the further institutionalization of the rules of the game of global tax governance is therefore undeniably a major improvement compared to the present situation.

It should be clear by now why it is this author's view that there are strong reasons to support the ongoing work on a framework convention in combination with protocols. This particular system of global tax governance is built on this procedural understanding of legitimacy. After all, it is attempting to develop a robust set of institutions that 'force all states to take part in a continuing process of reason giving in an inclusive dialogue'[31] Consequently, it is actually fair to argue that the necessary preconditions for a more legitimate system of global tax governance are readily available. Still, we should be careful not to begin celebrating the new initiative too early. Substantial work still has to be done on crucial aspects of the appropriate procedures 'within the black box of governance' (i.e., throughput legitimacy).[32] The ongoing debate about the decision-making procedure as addressed below is probably the most obvious example in this regard. There are, however, many other issues that should be addressed. Article 13 of the ToR's final draft mentions many – equally important – topics such as financial resources, Conference of the Parties, a secretariat, and procedures to create amendments to the framework convention. Moreover, it addresses the crucial issue of defining the relationship of the framework convention and future protocols with other agreements, instruments, and domestic law. Thus, there is still a significant amount of work to be done in the coming years!

4 THE CHALLENGES OF DELIBERATION

It is important to stress that these types of difficulties to guarantee (throughput) legitimacy are actually the real Achilles' heel of the work on Pillar Two within the G20/OECD Inclusive Framework.[33] We certainly cannot take it for granted that the UN will do a better job than the OECD in this regard. One reason for this is that the normative standard for 'good' throughput legitimacy is actually rather demanding so that it is not quite straightforward to translate values such as transparency, inclusiveness, openness, and accountability into concrete procedures.

The second reason is that it is eventually the delegates of the states that must translate their national preferences into tangible international outcomes. This requires a true willingness to treat each other as equal members on the table and to exchange reasons (or arguments) to find an agreement. It is obviously a fair question whether it is realistic to count on such action concerning matters of international taxation with its vast distributional implications.

In this context, reading Michael Lennard's contribution in this special issue incites hope. He advocates a blending of tax and diplomatic expertise to accomplish, in his words, 'national needs within a system aspiring for a higher, more collective, and more permanent improvement in international tax cooperation mechanisms and outcomes'.[34] Such an attitude is clearly conducive to the outlined normative measure of (throughput) legitimacy. It is a variation of 'deliberative diplomacy' that broadly builds on Habermas' concept of 'communicative action'.[35] It is fair to claim that the (future) work within the UN's framework will only be a success when the diplomats do indeed have such an attitude of overcoming differences towards alliances.

In relation to this, it is important to stress how Lennard's plea for 'multilateral tax diplomacy' also addresses the contentious balancing of national interests with the demands of effective international cooperation. This is an interesting take on the decline of the longstanding (bilateral) standard of state consent as the paragon for the legitimacy of international tax law.[36] It is already difficult enough to establish the explicit consent of both states in a bilateral context, but it is nearly impossible in a multilateral context with 193 states. States should be willing to go beyond their national interests when they are indeed serious about finding solutions with a global reach. Lennard's position is therefore aptly illustrating how the tension between explicit consent of all states and the need for effective solutions of international tax law is a highly political matter that should be resolved as such.[37]

This very topic obviously relates to the decision-making procedure of the new initiative that is probably – as addressed before – still the most contentious outstanding topic.[38] The modus operandi of the UN in the general

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[31] *See* C. Peters, *The Legitimacy of Pillar Two: An Analysis of the Overconfidence in a 'Develish Logic'*, 51 Intertax 571 (2023), doi: 10.54648/TAXI2023057.

[32] Compare V. Schmidt, *Europe's Crisis of Legitimacy. Governing by Rules and Ruling by Numbers in the Eurozone* 31 (Oxford: Oxford University Press 2020).

[33] *See* Peters, *supra* n. 20, at 554.

[34] *See* p. 14 in this special issue.

[35] *See* Peters, *supra* n. 20, at 328–334 on communicative action and a social constructivist understanding of the international society of states. The term 'deliberative democracy' is used by Wheatley (cf., S. Wheatley, *The Democratic Legitimacy of International Law* 138–145 (Oxford and Portland: Hart Publishing 2010)).

[36] Peters (2014), *supra* n. 20, at 227–234.

[37] Stated otherwise, it is really no longer possible to regard such tensions as merely technical disagreements that can be resolved in a technocratic fashion.

[38] The topic is not addressed in the ToR's final draft. *See* L. Parada, *U.N. International Tax Cooperation: The Terms of References Final Draft*, Tax Notes International (4 Nov. 2024).

assembly is majority voting. Such a procedure presupposes a loss of control on the outcomes which is why cooperation within the framework of the OECD and the Inclusive Framework is always based on consensus. It would exceed the parameters of this editorial to comprehensively elaborate on this matter.[39] This author's suggestion would be to not dismiss a form of (super) majority voting too easily. The reason for this is exactly that it is quite likely that there will be no consensus on delicate matters of international taxation. Consequently, it is probably justified to rely on a form of (super) majority voting to make a decision that reflects the (unfinished) state of the deliberations after a specific period of time.[40] Such a decision-making procedure for both the framework convention and future protocols would therefore guarantee the effectiveness of the new governance system under the auspices of the UN. It makes a good match with the discussed essential flexibility of the system. After all, it should not be forgotten that states eventually have the option to either become a party to a protocol or not do so.

This author is certainly very much aware that this solution appears to be utterly naïve to the group of specialists of international tax law in the realist tradition. In their view, international tax cooperation is about winning and losing tax revenues so that it is simply idealistic to speak in terms of tax diplomacy and communicative action. This author's response would be that it is very clear that we are moving towards a multipolar world in which there are clear limits to cooperation between states. A united and gracefully coordinated international tax system will not be experienced in this author's lifetime in which fragmentation and incoherence will be the fate for the time being. It is exactly for this reason that the UN's ongoing work on international tax cooperation should be cherished as a form of progress for the fragile modern world. The work on the framework convention could genuinely result in an institutional framework that facilitates dialogue between 193 equal Member States on an equal basis. Subsequently, it will always remain humanity's work to realize international cooperation. It will fail over and over again, but it is the only hope to proceed further in this interconnected world.

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[39] In this special issue, both Brauner and Lennard point at some disadvantages of consensus as the primary mechanism for making decisions. Brauner mentions the likelihood of low common denominators and the concern that consensus is merely a facade for plain (economic) power. Lennard stresses how '(c)onsensus is generally not as readily observable as a vote, so the issue of who decides if there is consensus can be become an important factor in whether claims of consensus have legitimacy'. At the same time, a procedure on the basis of majority voting also has drawbacks such as the risk of polarization. *See* Parada, *supra* n. 38, at 781.

[40] Habermas writes in this regard: 'Because of its internal connection with a deliberative practice, majority rule justifies the presumption that the fallible majority opinion may be considered a reasonable basis for a common practice until further notice (…).' *See* J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* 306 (Cambridge: Polity Press 1997). Scharpf elaborated on this view in the context of European Union. He concludes how the theory of deliberative democracy 'offers a legitimation of majority rule that is generated by the process of political communication and policy-oriented deliberation itself'. At the same time, Scharpf argues that such legitimation depends 'on the intensity of the conflicts that need to be resolved'. *See* F. Scharpf, *De-constitutionalisation and Majority Rule: A Democratic Vision for Europe,* 23 Eur. L. J. 328–330 (2017), doi: 10.1111/eulj.12232.