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## UN Model Tax Convention Article 26: Inequitable Exchange of Information Regime – Questionable Efficacy in Asymmetrical Bilateral Settings

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The United Nations Model Tax Convention between Developed and Developing Countries (UN MTC) Article 26 charts out an exchange of information (EOI) regime “between developed and developing countries,” feigning that it is more favorable to the latter set of nations. Contrarily, the Organisation for Economic Cooperation and Development (OECD) MTC Article 26 is professedly geared to protect and promote interests of OECD members – “the club of the rich.” Even a cursory comparative look at the two MTCs intriguingly reveals lack of dissimilarities, and irresistibly leads to the conclusion that materially both provisions are identical. The situation gives rise to a paradox whereby developing countries that are completely at different levels of development have broken governance structures, convoluted fiscal and criminal justice systems and struggling tax administrations, have been yoked into a multilayered EOI regime, which stemmed from an intra-OECD statecraft imperative and is pre-dominantly beneficial to developed countries. The new normal contributes towards enhancement and deepening of the embedded inequities in the neocolonial economic order. The paper seminally dissects the strains generated by absence of dissimilarities between the two MTCs vis-à-vis Article 26, and posits that, in fact, this fundamentally being a developed country project, developing countries have been exploited as ‘beasts of burden’ merely to promote economic interests of dominant partners in the relationship, and by doing so, sheds light on and galvanizes the unjustness latent in the international taxes system – an inherently unequal and lopsided affair. It also delves deeper into an axiological normative evaluation of the extant EOI regime, and finding it untenable, urges a larger paradigm shift. In fact, the UN’s meek convergence with the OECD on EOI regime, ditching developing countries and leaving them to fend for themselves in this critical area of international taxation, is the scarlet thread of the paper.

*L'article 26 du Modèle des nations unies concernant les doubles impositions entre pays développés et pays en développement établit*

un système d'échange de renseignements « entre pays développés et pays en développement », qui feint d'être plus favorable à ces derniers. À l'inverse, l'article 26 du Modèle de Convention fiscale de l'Organisation de coopération et de développement économiques (OCDE) se fixe expressément pour objectif de protéger et promouvoir les intérêts du « club des riches » que sont les membres de l'OCDE. Or, un examen comparatif superficiel des deux conventions fiscales révèle de manière intéressante l'absence de dissemblances et conduit inmanquablement à la conclusion que les deux dispositions sont, en substance, identiques. Il en résulte un paradoxe: des pays en développement qui se situent à des niveaux de développement totalement différents et dont les structures de gouvernance, les systèmes fiscaux et de justice pénale et les administrations fiscales sont malmenés et confrontés à de grandes difficultés, se voient imposer un système d'échange de renseignements à plusieurs niveaux, en raison de manœuvres politiques au sein de l'OCDE, qui profite en priorité aux pays développés et contribue à renforcer et exacerber les inégalités ancrées dans le système économique mondial néocolonial. Le présent document examine de manière approfondie les tensions générées par l'absence de différences entre les deux modèles de convention fiscale s'agissant de l'article 26. Il postule qu'en réalité, ce projet étant fondamentalement un projet conçu par les pays développés, les pays en développement ont été traités comme des « faire-valoir » dans le seul but de promouvoir les intérêts économiques des pays dominants. Il pointe l'iniquité du système fiscal international, qui est fondamentalement inégal et déséquilibré. Il étudie également plus en détail le mécanisme actuel d'échange des renseignements et, le jugeant insoutenable, préconise un changement total de paradigme. En résumé, la convergence observée entre le modèle proposé par les Nations unies et celui de l'OCDE concernant le mécanisme d'échange des renseignements, qui abandonne les pays en développement à leur sort dans ce domaine critique de la fiscalité internationale, constitue le fil conducteur de l'article.

En el artículo 26 de la Convención modelo de las Naciones Unidas sobre la doble tributación entre países desarrollados y países en desarrollo se establece un régimen de intercambio de información "entre países desarrollados y países en desarrollo", que finge ser más favorable para el segundo grupo de naciones. Por el contrario, el artículo 26 del Modelo de Convenio Tributario de la Organización para la Cooperación y el Desarrollo Económicos (OCDE) supuestamente está orientado a proteger y promover los intereses de los miembros de la OCDE, "el club de los ricos". Incluso un rápido ejercicio comparativo de la Convención y el Modelo de Convenio revela una enigmática falta de semejanza, y lleva irresistiblemente a la conclusión de que ambas disposiciones son materialmente idénticas. La situación plantea una paradoja por la que los

países en desarrollo que se encuentran en niveles de desarrollo completamente distintos han roto estructuras de gobernanza y complicado sistemas de justicia fiscal y penal y administraciones tributarias en apuros, y han quedado bajo el yugo de un régimen de intercambio de información multidimensional, que proviene de un imperativo del arte de gobernar interno de la OCDE y es beneficioso principalmente para los países desarrollados. La nueva normalidad contribuye a aumentar e intensificar las desigualdades integradas en el orden económico neocolonial. Este artículo disecciona trascendentalmente las presiones generadas por la ausencia de semejanzas entre la Convención y el Modelo de Convenio con relación al artículo 26, y plantea que, en realidad, siendo este fundamentalmente un proyecto de un país desarrollado, los países en desarrollo han sido utilizados como "bestias de carga" meramente para promover los intereses económicos de los socios dominantes de la relación; al hacerlo, aclara la injusticia latente en el sistema fiscal internacional, un asunto inherentemente desigual y desequilibrado, e incita a tomar medidas al respecto. Asimismo, indaga más a fondo en una evaluación normativa axiológica del régimen de intercambio de información vigente, y al encontrarlo insostenible, insta a un cambio de paradigma más amplio. De hecho, la dócil convergencia de las Naciones Unidas con la OCDE con respecto al régimen de intercambio de información, que abandona a los países en desarrollo y los deja valiéndose por sí mismos en este aspecto fundamental de la tributación internacional, es el hilo conductor del artículo.

## 1. Introduction

The UN MTC[1] Article 26 entitled "Exchange of Information," lays down an EOI regime between **tax administrations of developed and developing countries**. [2] The intent of the UN MTC Article 26 is "to facilitate the proper application of the treaty and to assist the Contracting States in the enforcement of their domestic tax laws." [3] It has further been posited that from the lens of "developing countries, Article 26 is particularly important not only for curtailing cross-border tax evasion and avoidance, but also to abate capital flight [4] that is often accompanied through such evasion and avoidance." [5] Thus, UN MTC Article 26 has

[1] The reference, throughout the article, is to United Nations Model Tax Convention between Developed and Developing Countries, 2021, unless otherwise specified.

[2] Emphasis supplied by the author.

[3] UN, The Commentary - United Nations Model Taxation Convention between Developed and Developing Countries (New York: DESA-FSDO, 2021), 752.

[4] Emphasis supplied.

[5] UN, The Commentary - United Nations Model Taxation Convention between Developed and Developing Countries, 752.

a twin-objective: one, to checkmate international tax evasion; and two, to curtail capital flight from developing to developed countries and to their protectorates – dubbed as “tax havens.” Historically, to what extent the EOI regime has achieved its intended purpose, remains a question?

It is also accentuated that digitalization of economy and spur in electronic commerce have “significantly increased cross-border commercial and financial activity, converting the private sector into largely a world without borders,”[6] correspondingly giving rise to *tax avoision*,[7] and resulting in rather disproportionate increase in capital flight from developing countries. Since most of those mega corporations which operate in digital space happen to be based in developed countries, international cooperation in tax affairs via exchange of information, has been touted as essential for tax administrations dealing with the challenges arising from globalization, and to achieve tax transparency.[8] In fact, apart from rolling out EOI regime, the UN has barely done anything for developing countries – its very constituency. To what extent the EOI regime as currently in vogue is suitably fit to the developing country needs in an unequal and fast-digitalizing world, remains a formidable question.

On the contrary, the OECD MTC Article 26 contemplates a wide-going, all-encompassing EOI regime, which consists of a whole gambit of international conventions, models, frameworks, templates, schema, and administrative setups manned with quality professionals, carefully contrived, and systematically sustained.[9] The UN MTC Article 26 koshers the OECD-sponsored EOI regime rather indifferently. The paper argues that the EOI regime essentially being an OECD-enterprise professedly devised to protect developed countries’ economic interests, is inherently lopsided and purposely engineered to camouflage and perpetuate – **and not abate** – unjustice and inequities primordially embedded in the extant international taxes system in a neocolonial economic order. From a developing country lens, this leads to

a paradoxical situation whereby, on one hand, the UN MTC claiming to be promoter and protector of developing country rights, and on the other, spinelessly abdicating its avowed high position and converging with the OECD, ends up digging ditches and laying traps for developing countries leaving them to fend for themselves in a hostile and anarchic world where economic power still ruled the roost. It is contended that under the OECD-contrived multilaterally sponsored and bilaterally enforced EOI regime, maximum benefits accrue to developed countries, and developing countries end up holding dirty end of the stick.

The quandary of developing countries vis-à-vis the EOI regime manifests itself in their inability to procure information domestically for sharing with partner jurisdictions, request actionable tax information from partner states to build significant revenue-bearing cases by their tax administrations, and their capacity to convert tax information received from other jurisdictions into revenue numbers for their people. It is added that developing countries, notwithstanding the reinforced EOI regime, continue to be robbed and plundered. The annual revenue-tag to the world on poached capital of US\$ 860 billion with a corresponding revenue loss of US\$ 255 billion, is “equal to the annual funds needed to reach the UN’s Millennium Development Goals” (MDGs) by developing countries.[10] Likewise, it was reported that “the amount of funds held by individuals in offshore and onshore tax havens, and undeclared in the country of residence, is about US\$ 11.5 trillion.”[11] Is it a question of below par implementation of the EOI regime or a question of fit? The paper subscribes to and engages with the latter proposition. When analyzing the EOI regime, the paper takes “a developing country” as the unit of analysis making a significant departure from the traditional “a country” subsuming that both developed and developing countries have different economic objectives, strategies, and capacity to pursue them. Shorn of all additives, it is a twin-player scenario with competing interests – pretty much a zero-sum game.

The present EOI regime conceived by the League of Nations and reared by the UN could be interpreted differently by different academic and intellectual schools of thought of political economy and philosophy. Liberals

[6] Anna Passalacqua et al., "Tax Information Exchange Agreements and the Prohibition of Retroactivity," INTERTAX 46, no. 5 (2018): 368.

[7] Collins dictionary defines "avoision" as "the non-payment of tax which cannot be classified as either "avoidance" or "evasion;" the term, in fact, signifies fast-shrinking space for legal avoidance.

[8] UN, The Commentary - United Nations Model Taxation Convention between Developed and Developing Countries.

[9] Passalacqua et al., "Tax Information Exchange Agreements and the Prohibition of Retroactivity."

[10] David Spencer, "The I.M.F and Capital Flight: Redesigning the International Financial Architecture," Brettonwoods Project, <https://www.brettonwoodsproject.org/2006/01/art-507905/>.

[11] Ibid.

would propagate it as a shot in the arm of international cooperation leading to and resulting in all what globalization stands for and implies.[12] A constructivist would equate it with a system of capitalist interaction in which concepts are developed, meanings are created, and norms are generated to facilitate real world transactions. A post-colonial thinker could contend that the way EOI regime has frantically panned out over the past couple of decades, it takes neo-colonialism to a next level, for want of a better word, neo-neocolonialism.[13] A structuralist would view the EOI regime and all what it means to developing nations, as a set of building blocks perfectly reflecting the international system in its compositional formation. Neo-Marxists would prop the instrumentalist perspective to point out the state capture of developed western economies by the MNC resulting in a muffled internationalization of capitalism into developing countries via sundry means.[14] The realist, on the other hand, would argue that the system reflects naked power politics in the international fiscal domain in its brute and raw form. This paper is geared to lay bare different dimensions of the EOI regime from realist and neocolonial angles brining out its implications for developing countries.

The paper consists of seven sections. After section 1 has set the context, section 2 briefly traces roots of UN MTC Article 26 during pre- and interwar periods from a nuanced structuralist perspective. Section 3 builds on the previous section and covers the transition and postwar periods up to the day. Section 4 critically appraises the EOI regime's conceptual constraints in a developed-developing country asymmetrical setting. While section 5 does the same at practical level, section 6 undertakes normative evaluation of EOI regime in unequal economic and bilateral situations in a realist world has by bringing in Rawls-Sen framework of *niti* and *naya* with a view to triggering a fundamental shift in the way the world has so far been looking at the international taxes system. The paper wraps up the debate in section 7 with forebodings for the future and putting alternatives on the table.

[12] Muhammad Ashfaq Ahmed, "U.N. M.T.C. Article 5: The Predatory Ploy: A Neo-Marxist Mapping of the Permanent Establishment," *Manchester Journal of International Economic Law* 17, no. 2 (2020).

[13] *Ibid.*

[14] Umut Özsu, "Grabbing Land Legally: A Marxist Analysis," *Leiden Journal of International Law* 32, no. 2 (2019).

## 2. EOI Regime – Historical Grounding

At this point, it would be illuminating to track the development of the UN-sponsored EOI regime for developing countries. Intriguingly, the symptoms of its being essentially an intra-developed countries affair can be spotted through most phases of its evolution.

### 2.1. Pre-LN Period

In fact, the EOI regime as in vogue currently traces its origins in the 19th century Europe. An agreement for the EOI concerning immovable property possessed in one of the contracting countries by inhabitants of the other was signed between Belgium and France in 1843.[15] An identical framework was entered into by Belgium and Netherlands in 1845. In 1907, France finalized an agreement with Great Britain "under which the taxing authorities of the two countries would exchange certain information with a view to counteracting the evasion of death duties." [16] At the turn of the century, Germany and Czechoslovakia agreed upon comprehensive "arrangements for administrative and judicial assistance in taxation questions." [17] Soon afterwards Germany and Austria also struck a similar deal for exchange of tax information. It has been posited that "the system of exchanging information now in force" would "be a generalization and extension" of the French-Germany Treaty of 1907.[18] It is apparent that European powers of the time were either equal or near-equal in their administrative capacity to seek and use tax information. Similarities in their legal regimes, tax systems, and judicial procedures would also make EOI mutually beneficial to all states.

### 2.2. Interwar Period

In the aftermath of WWI, on January 10, 1920, League of Nations (LN) was established in consequence to the Paris Peace Conference that brought an end to hostilities. The LN Covenant [19] was signed by 42 founding member

[15] League-of-Nations, *Double Taxation and Tax Evasion: Report and Resolutions Submitted by the Technical Experts to the Financial Committee of the League of Nations* (Geneva: Publications of the League of Nations, 1925).

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid.*

[19] The Covenant establishing the League of Nations was included in the Treaty of Versailles, which was signed on June 28, 1919.

countries.[20] The LN, as early as February 1918, had passed a Resolution to “convene an international conference to study the financial crisis and look for the means of remedying and mitigating the dangerous consequences arising from it.”[21] The ensuing International Financial Conference that convened at Brussels between September 24, and October 8, 1920, espoused unto itself, inter alia, international taxation, and professed to make progress on “an international understanding, which, while ensuring the due payment by everyone of his full share of taxation, would simultaneously encourage placing of investments abroad.”[22] It is through the lens of LN's various outputs that one can trace the erratic and subdued evolution of the EOI regime during the inter-war period.

### 2.3. LN Report 1923

The Financial Committee, in September 1921, “decided to engage four well-known experts later known as “the Four Economists,”[23] for their professional input and resolved to explore the “possibility of an international convention regulating the matter.”[24] The Four Economists submitted their complex theory-charged report on April 3, 1923,[25] which, inter alia, did touch upon the EOI for tax purposes. The report averred “that provision should be made for an interchange of information among the respective countries involved.”[26] It went on to explicate that if “conventions

are made between two countries, it would be comparatively simple to provide for this interchange of information.”[27] But, in the event of a convention being “made among several countries” an intriguingly innovative idea was advanced by suggesting that “the possibility might well be considered of establishing some central agency to which all the relevant facts should be reported.”[28] This powerful idea of “establishing some central agency” strangely got lost probably because even in the case of a multilateral convention it would have been an affair amongst equals or near-equals, which would have made little sense. The idea is relevantly resurfacing after a century as now a lot many developing countries have entered the arena.

### 2.4. LN Report 1925

The LN Report 1925, while proposing “a conference of government officials to reach practical solutions on the more pressing double taxation issues,”[29] ended up expressing its serious concerns also about capital flight. The report suggested “to examine measures to address tax evasion to prevent capital flight.[30] The British records indicate that tax evasion was brought in by the French at the tax experts meeting in an effort to discover hidden German wealth but the British did not want it and, therefore, the issue was referred to the League.[31] In fact, the only country at the conference table due to double taxation was Czechoslovakia.[32] Jogaranjan affirms that “the impetus for the conference of government officials was in fact tax evasion and not double taxation as commonly thought,” and that the “countries represented at the conference were chosen due to their interest in tax evasion and not for political reasons, as previously assumed.”[33]

[20] The League's highest ever membership at 58 was from September 28, 1934 till February 23, 1935, which included Argentina, Australia, Belgium, Bolivia, Great Britain, Canada, Chile, China, Columbia, Cuba, Czechoslovakia, Denmark, El Salvador, France, Greece, Guatemala, Haiti, Hondouras, India, Italy, Liberia, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Iran, Peru, Poland, Portugal, Romania, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay, Venezuela, Yugoslavia, Austria, Bulgaria, Finland, Luxembourg, Albania, Estonia, Latvia, Lithuania, Hungary, Ireland, Ethiopia, Dominican Republic, Mexico, Turkey, Iraq, Soviet Union, Afghanistan, and Ecuador. At this time, Costa Rica, Brazil, Japan and Germany had already left, whereas Egypt was yet to join the League. The League was eventually dissolved in 1946.

[21] League-of-Nations, "International Financial Conference Brussels, 1920," in Volume 1, ed. Proceedings of the Conference (1920), 3.

[22] Ibid., 26.

[23] The Four Economists were Prof. Bruins of Commercial University, Rotterdam, Prof. Senator Einaudi of Turin University; Prof. Seligman of Columbia University, and Sir Josiah Stamp of London University.

[24] Provisional Economic and Financial Committee - Report to the Council upon the Session held at Geneva, August-September, 1921 Communicated to the Assembly in Accordance with the Council's Resolution of September 19, 1921 (A.95.1921.II) P.6. See, for further details, Sunita Jogaranjan, "Stamp, Seligman and the Drafting of the 1923 Experts' Report on Double Taxation," World Tax Journal 5, no. 3 (2013).

[25] G. W. J. Bruins, ed. Report on Double Taxation, E.F.S.73.F.19 (Geneva: League of Nations - Economic & Financial Commission, 1923).

[26] League-of-Nations, "Report on Double Taxation," (Geneva: Economic & Financial Commission, 1923), 50.

[27] Ibid.

[28] Ibid.

[29] Minutes of the First Meeting of the Sixth Session fo the Financial Committee of the Provisional Economic and Financial Committee held at 11am on February 23, 1922, in Geneva - League of Nations Archives; Box R 333:E.F/FinanceVI/P.V.I: United Nations, Geneva - as cited by Sunita Jogaranjan, Double Taxation and the League of Nations, Cambridge Tax Law Series (Cambridge University Press, 2018).

[30] "The Drafting of the 1925 League of Nations Resolutions on Tax Evasion," in Studies in the History of Tax Law, ed. Peter Harris and Dominic de Cogan (Hart Publishing, 2015).

[31] Letter from O.E.N. to the Chancellor of the Exchequer dated November 7, 1922 - UK National Archives - IR-40/3419-Part-3 - United Kingdom cited in ibid.

[32] In fact, the Czechoslovakian Foreign Minister wrote to the Secretary General and asked that their treaty negotiator, who had already concluded several DTAs, be allowed to attend the conference; the request was acceded to by the Council.

[33] Jogaranjan, Double Taxation and the League of Nations.

However, to attack tax evasion, international cooperation impinging on EOI had to be developed, but banking secrecy came in its way. In fact, the bogey of banking secrecy has been leveraged since LN days to justify plunder in other countries. While attending to “the inviolability of banking secrecy,” it was emphatically stated “that public opinion in many European countries does not accept the idea that public officials should have power to require information from a third party concerning a taxpayer's personal estate, and that these officials should transmit such information to another State.”[34] This position was further fortified with reference to the Genoa Conference, 1922,[35] whereat the League was requested to “study the question of measures for international co-operation to prevent tax evasion,” with a powerful reservation that “any proposal to interfere with the freedom of the market for exchange or to violate the secrecy of bankers' relations with their customers is to be condemned.”[36] It was finally resolved that “the exchange of information should actually be limited to that in the possession of States or which they can obtain in the course of their administrations.”[37] This was reckoned to be “the first step in the struggle against tax evasion.”[38] It was also stipulated that “...a country will only be entitled to demand information of a kind which it is itself in a position to supply,”[39] and to give effect to this proposition model Articles 1 and 2 were also drafted for consideration.[40]

[34] League-of-Nations, Double Taxation and Tax Evasion: Report and Resolutions Submitted by the Technical Experts to the Financial Committee of the League of Nations.

[35] The Genoa Economic & Financial Conference was a formal conclave of 34 nations held in Genoa, Italy, from April 10 to May 19, 1922, to resolve major political and economic issues confronting Europe - including pariah states of Germany and Russia.

[36] League-of-Nations, Double Taxation and Tax Evasion: Report and Resolutions Submitted by the Technical Experts to the Financial Committee of the League of Nations.

[37] Ibid.

[38] Ibid.

[39] League-of-Nations, "Report and Resolutions Submitted by the Technical Experts on Double Taxation and Tax Evasion," in Publications of the League of Nations (Geneva 1927).

[40] Article 1 reads: "With a view to obtaining a better apportionment of fiscal burdens in the interest both of Government of taxpayers, the Contracting States undertake, subject to reciprocity, to give such other administrative assistance in regard to all matters required for the purpose of tax assessment. Such assistance may consist in: (a) The exchange of fiscal information available in either of the contracting states. The exchange will take place following a request concerning concrete cases, or, without any special request, for the classes of particulars defined in Article 2; (b) Co-operation between the administrative authorities in carrying out certain measures of procedure." Article 2 reads: "The exchange of information as contemplated in paragraph (a) of Article 1 shall relate to natural or juristic persons taxable in one of the contracting countries. The particulars given shall include the names, surnames and domicile or residence of the persons concerned, and their responsibilities, if any, and shall have reference to: (1) Immovable property (capital value or income, rights in rem, charges by way of mortgage or otherwise); (2) Mortgages or other similar claims (description of the mortgaged property, amount and rate of interest); (3)

## 2.5. LN Report 1927

The seeds for yet another effort under LN framework had been sown in the LN Report 1925. It had been proposed that “the League convene an expanded conference of government officials to develop draft international treaties.”[41] The Financial Committee promptly moved to institute a Committee on Double Taxation and Tax Evasion.[42] The International Chamber of Commerce (ICC), which was present at the big table throughout the proceedings, emphasized to ensure that the measures aimed at curbing tax evasion did not hamper free movement of capital.[43] The ICC did receive ready support from the UK, Belgium, and other capitalist economies. It is, however, not clear as to how efforts aimed at curbing tax evasion could, in any manner, hamper movement of capital.

## 2.6. LN MTC 1928

The decade-long spadework done under the LN umbrella, which was published as the Financial Committee's Reports of 1923, 1925, and 1927, culminated into four MTCs[44] released by the Tax Experts Committee on October 16, 1928. However, “despite extensive exchange of views on the types of incomes to be subjected to exchange of information (EOI), potential violation of banking secrecy, and if EOI would be automatic or on-request in relation to specific taxpayers,”[45] a corresponding provision could not make way into the LN MTC 1928. It was remarked that Switzerland opposed bilateral EOI “agreements on the basis that capital would simply flow to those countries which did not conclude such treaties.”[46] Somehow, the concerns for tax evasion and capital flight appeared to be fading amongst the LN member states.

Industrial, commercial or agricultural undertakings (actual or conventional profits, business turnover, or other factors on which taxation is based);

(4) Earned income and director's fees; (5) Transferable securities, claims deposits and current accounts (capital value and income); any information collected by an administration, more especially in connection with exemption or relief granted by that authority by reason of the taxpayers' domicile or nationality.”[41] Jogaranjan, Double Taxation and the League of Nations.

[42] The Committee consisted of Salvador Oria, Argentina; M. Clavier, Belgium; Valdimir Valnicsek, Czechoslovakia; M. Borduge, France; Herbert Dorn, Germany; Pasquale D'Aroma, Italy; Kengo Mori, Japan; J. Sinninghe Damsete, Netherlands; Stefan Salseri, Poland; Haus Blau, Switzerland; Thomas Adams, USA; and Frederico Feo, Venezuela.

[43] Sunita Jogaranjan, "The Drafting of the First Model Treaties on Tax Evasion " Tax Law History Conference IX (2018).

[44] These MTCs were entitled (i) "Draft Bilateral Convention for the Prevention of Double Taxation;" (ii) "Draft Bilateral Convention for the Prevention of Double Taxation in the Special Matters of Succession Duties;" (iii) "Draft Bilateral Convention on Administrative Assistance in Matters of Taxation; & (iv) "Draft Bilateral Convention on Judicial Assistance in Collection of Taxes."

[45] Jogaranjan, "The Drafting of the First Model Treaties on Tax Evasion ".

[46] Ibid.

### 2.7. LN MTC 1935

In view of the feedback received from various governments and cross-sections of the international community, LN MTC 1928 was put through deliberations and "revised by the Fiscal Committee in June 1935.[47] However, a provision pertaining to EOI again could not be included in LN MTC 1935 for lack of broader support and consensus. It was a bit astonishing that the LN member states which had gathered under the LN framework to address the issues of double taxation, tax evasion, and capital flight, mainly ended up focusing on distribution of taxing rights among states.

### 2.8. LN MTC 1943

Primary purpose of Regional Tax Conference (RTC) held in June 1940, in Mexico City was to reappraise LN MTC 1935, and the principles of taxation underlying it.[48] While deliberations continued to be held in the intervening period, the RTC was reconvened in Mexico City, in July 1943.[49] It was in RTC 1943 that LN MTC 1943 alongwith a Protocol was unveiled. The LN MTC 1943, inter alia, put in place an elaborate system of exchange of information by devising and rolling out a comprehensive Model Bilateral Convention for the Establishment of Reciprocal Administrative Assistance for Assessment and Collection of Direct Taxes. It has been remarked that LN MTC 1943 "with its clear bias towards taxing rights for capital importing nations, won little support amongst high-income countries."[50]

The LN MTC 1943 Article I, inter alia, ordained that "to furnish on special request such information in matters of taxation as the competent authorities of each State have at their disposal or are in a position to obtain under their own laws...". Article II thereof obligated each contracting state "to obtain through direct correspondence, from the...other contracting State, information concerning particular cases that is necessary for the assessment of the taxes to which the present

Convention relates." However, a requested state could decline a 'Special request' if it involved "the obligation to obtain or supply information which is not procurable under the legislation of the State applied to or that of the applying State," or "administrative or judicial action incompatible with the legislation and practice of either contracting State,...violation of a professional, industrial or trade secret," if it related "to a taxpayer who is a national of the State applied to," or it compromised "its security or sovereign rights.[51] Although visibly the approach was constrictive, the framework pertaining to EOI was successfully incorporated into LN MTC 1943 for the first time.

### 2.9. LN MTC 1946

No sooner key European powers were done with WWII they scrambled back to stock-take developments that had taken place on fiscal front particularly those at the RTCs in early 1940s. Accordingly, Fiscal Committee was convened in London for its 10th session to come up with MTC 1946. [52] It was observed that the structure of MTC 1943, and MTC 1946 remained identical except certain editorial modifications in latter MTC pertaining to EOI regime. However, LN MTC 1946 expanded scope of EOI regime devised by MTC 1943 by expressly covering "Property, Estates, and Succession." Moreover, liability of the requested state to explain and satisfy the requesting state in certain situations was also waived.[53] Jogaranjan, highlighting politics of EOI regime in asymmetrical bilateral settings, observes that "it was thought to be completely unacceptable that residence-countries would provide information regarding their residents to enable them to be taxed in another (the source) country." [54] Likewise, in 1944, at the time of raising of IMF, both M. Keynes and H. White urged an EOI regime "between governments about capital flight," but the "proposal was allegedly opposed by the US financial community which had benefited from capital flight." [55] This anti-developing country bias in the EOI regime from its formative years, as would be seen, was to continue.

[47] Mitchell B. Carroll, *Global Perspectives of an International Tax Lawyer* (New York: Hicksville, 1978).

[48] Ahmed, "U.N. M.T.C. Article 5: The Predatory Ploy: A Neo-Marxist Mapping of the Permanent Establishment."

[49] The RTC was attended by Argentina, Bolivia, Canada, Chile, Colombia, Ecuador, Mexico, Peru, USA, Uruguay, and Venezuela.

[50] Veronika Daurer and Richard Krever, "Choosing between the UN and Oecd Tax Policy Models: An African Case Study," *African Journal of International and Comparative Law* 1, no. 21 (2014).

[51] League-of-Nations, "Model Bilateral Convention for the Prevention of the Double Taxation of Income and Property," (London: League of Nations, 1946).

[52] "Fiscal Committee: Report on the Work of the Tenth Session of the Committee," (London: League of Nations, 1946).

[53] The waiver was extended vide Articles XIV which reads: "If a request cannot be complied with, the competent authorities of the State applied to shall advise the competent authorities of the applicant State of the reasons which prevent complying with the request, and shall transit to such authorities all information which may have a bearing on the case." Article XX, in the same vein, reads: "Over and above the measures of assistance for which the Convention provides, the competent revenue authorities of the two contracting States may concert together for the exchange of information other than that for which provision is made and also for the purpose of the assessment of the taxes to which the Convention relate."

[54] Jogaranjan, *Double Taxation and the League of Nations*.

[55] Spencer, "The I.M.F and Capital Flight: Redesigning the International Financial Architecture".

### 3. EOI Regime – Transition & Postwar Period

While handing over the baton of international taxes work stream from LN to UN, it was hoped that “the work done both in Mexico and in London could be usefully reviewed and developed by **a balanced group of tax administrators and experts from both capital-importing and capital-exporting countries and from economically-advanced and less-advanced countries**,”<sup>[56]</sup> when the League work on international problems is taken over by the United Nations.”<sup>[57]</sup> Astonishingly, UN did not rush in to assume the responsibility and take over the LN’s work on international taxes in any meaningful manner for almost two decades so as to make an attempt to create a balance between “economically advanced and less-advanced countries,” which also co-incidentally happened to be “capital-exporting” and “capital-importing” countries, respectively. This historical wrong is also reflected in the EOI regime as evolved over the next decades.

#### 3.1. Transition

Contrarily, the Organization of European Economic Cooperation (OEEC), which had been created in 1948, immediately started to fiddle with LN’s legacy work on international taxes and ended up establishing a Fiscal Committee in March 1956 and tasking it to draft an MTC alongwith a comprehensive set of proposals for its implementation.<sup>[58]</sup> In September 1961, the OEEC transmuted into the OECD and within two years the OECD MTC 1963 was successfully published. The OECD MTC 1963 did carry an Article 26, which, *pari materia*, was the provision contained in LN MTC 1943. The OECD MTC 1963 was revised in 1977, and then in 1992, when it was decided to adopt ambulatory approach to update the OECD MTC as and when warranted rather than having to issue completely revised new versions every now and then. The OECD MTC has been updated in 1994, 1995, 1997, 2000, 2002, 2005, 2008, 2010, 2014, and then finally in 2017 – Article 26 included.

It has been averred that the true heir of LN’s extensive work on international taxation was OECD, and not UN as is generally believed.<sup>[59]</sup> It has further been posited that given the higher stakes involved, the developed countries heavily invested in the OECD to marshal the international taxes domain and capacitated it to the kill to churn out dominant ideas, which could overtime, capture almost entire epistemological space in the arena.<sup>[60]</sup> At this stage, it merits mention that since the work on international taxes was deftly inherited by “economically advanced countries,” the EOI regime developed over the next few decades had inevitably to reflect *their* economic interests being oblivious of and at the expense of the developing countries’ economic imperatives.

#### 3.2. UN Pedestrian Pursuit

Once the die had been cast and OECD was already well on its way, UN began its pedestrian pursuit by creating the “Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries” in 1967.<sup>[61]</sup> The very nomenclature of the Group betrays an urge and a standpoint to rectify fiscal inequities extant in international taxes regime between developed and developing UN member states. The 1st UN MTC was rolled out in 1981, which, in fact, is a facsimile of OECD MTC in all essentials and most non-essentials. The UN MTC has gone through modification in 1999, 2001, 2007, 2011, 2017, and then finally in 2021. In fact, the most significant changes made to UN MTC Article 26 have been the consequence of changes made to OECD MTC Article 26 – at different occasions.

#### 3.3. UN MTC Article 26

The UN MTC Article 26 prescribes an EOI regime purportedly for developing countries to adopt while negotiating double taxation agreements (DTAs) with developed countries. The UN MTC Article 26 looking to frame “rules under which information may be exchanged

[56] Emphasis added by the author.

[57] League-of-Nations, “Fiscal Committee: Report on the Work of the Tenth Session of the Committee.”

[58] Muhammad Ashfaq Ahmed, “U.N. M.T.C. Article 8: Was the Source Rule Surrender a Blunder?,” *Intertax* 48, no. 1 (2020).

[59] *Ibid.*

[60] Ahmed, “U.N. M.T.C. Article 5: The Predatory Ploy: A Neo-Marxist Mapping of the Permanent Establishment.”

[61] The Ad-Hoc Group of Experts was established under ECOSOC Resolution 1273 (XVIII) adopted on August 4, 1967.



to the widest possible extent,"[62] obtains six separate provisions mirror-imaging the OECD MTC Article 26 in such entirety that it appears a false-flag operation by the latter. Paragraph 1 conceptualizes fundamental responsibility of Contracting States to bilaterally engage in EOI as is "foreseeably relevant" for the implementation of the provisions of the Convention and administration of their respective taxes imposed at national and sub-national levels. The expression "necessary" was replaced with "foreseeably relevant" in pursuance to changes in OECD MTC Article 26 in 2005 with the underlying stated objective to expand the scope and the nexus of the provision. The stated objectives being that all tax information, which could be helpful to prevent avoidance and evasion of taxes, shall be exchanged.

Paragraph 2, in turn, mandates that the information exchanged shall be confidential and would be accessible only to persons concerned with assessment, adjudication, and collection of taxes as under domestic tax laws. The information exchanged could also be used for "other purposes" if it could be used for those other purposes in both states and the supplying state also agrees to the proposition. Paragraph 3 lays out three scenarios in which the information cannot be exchanged; namely, if (a) the requested state has to carry out measures to collect the requested information that are markedly different from its own routine administrative procedures; (b) the requested tax information is not obtainable in the normal course of tax administration; and (c) the information could be likely to "disclose any trade, business, industrial, commercial or professional secret or trade process." Paragraph 4, subject to the stipulated conditions, reinforces requested state's responsibility to exchange the required tax information. While paragraph 5 debunks banking secrecy as an excuse to avoid supplying the requested information, paragraph 6 suggests developing "appropriate methods and techniques" for the purpose through mutual consultations.

### 3.4. OECD's Incursion

Towards the end of 20th century, not that the UN was

into any creative thinking previously, its work in international taxes arena, in general, and that pertaining to EOI, in particular, started to get submerged under the OECD's mighty effort. Although, roots of the EOI regime as in vogue could be traced back hundred years in the LN work, yet it owes its current vitality to Harmful Tax Competition Report 1998 – prepared under the OECD's auspices. Albeit all accepted modes of exchange of tax information – on-request, automatic, spontaneous, and simultaneous tax examinations have always been read into UN MTC Article 26, yet they got galvanized, shaped up, and crystalized by the OECD over the past couple of decades. Understandably, the OECD being a multilateral bastion of developed countries, was looking to carve out a self-sustaining EOI regime which promoted its members' economic interests. A brief run-down of key nodes of OECD-sponsored EOI regime would be useful.

The Global Forum on Transparency and Exchange of Information for Tax Purposes (GF), which was originally established in 2000, attained its current configuration in 2009. Operating mainly under the OECD, the GF currently has 165 members including many developing nations, and most of the tax havens. The GF is responsible to work with member jurisdictions and help them implement OECD-driven EOI regime in tax matters. The GF's operations are financed through member jurisdictions' contributions. One of the GF's important outputs is the Model Tax Information Exchange Agreement (TIEA), the purpose of which is to enhance and improve EOI regime in tax matters. The origins of TIEA are also anchored in OECD's Harmful Tax Competition Report, 1998. In 2015, scope of TIEA was expanded to expressly cover automatic and spontaneous EOI if jurisdictions bilaterally so desired. The GF through elaborate peer-reviews and follow-ups continually tries to ensure that all member jurisdictions implement the international standards on EOI in right earnest. It has been averred that at the GF all members participate on an equal footing.[63]

In parallel, more at a unilateral level, by one OECD member – the US – passed the Foreign Account Tax Compliance Act, 2010 (FATCA) "to raise revenues from taxing undisclosed offshore incomes generated by US

[62] UN, The Commentary - United Nations Model Taxation Convention between Developed and Developing Countries, 752.

[63] Titiana Falcao, "Exchanging Information with the Developing World: A Digression on the Global Forum Exchange of Information's Interaction with Developing Economies," *Intertax* 39, no. 12 (2011).

citizens and others.[64] The FATCA innovatively ordained foreign banks and non-banking financial institutions to provide financial information (under an intergovernmental agreement or without it) concerning any account-holding US person – including citizens and residents living abroad – directly to US Internal Revenue Service.[65] All non-cooperating banking and non-banking financial institutions were to suffer a confiscatory at-source tax at the rate of 30% of transaction value.

The Convention on Mutual Administrative Assistance in Tax Matters (MC), which was originally developed by Council of Europe and OECD and enforced in 1995, was opened to all states through a protocol in 2010. The purpose of the MC is to facilitate member states in effective EOI through multiple modes. Under the MC, two important information channels have been pursued over the past few years, that is, the Common Reporting Standard (CRS) and the Country-by-Country Reporting (CbCR). The CRS denotes standardization of automatic exchange of bank account and other financial information between tax authorities. The CRS has been modelled on the US FATCA, 2010. The 1st CRS-propelled automatic transmission of bank account information took place in 2018. The GF claims that information regarding overseas financial assets worth € 9 trillion was exchanged in 2020. The CbCR, in turn, obligates MNCs to report their worldwide financials on a country-wide basis to help tax administrations to tax them per law. It has been argued that CbCR is “mainly directed at helping governments audit aggressive international tax avoidance to reduce revenue losses in high tax countries.”[66] There is little doubt that all these EOI mechanism in an intra-OECD environment would be symbiotically beneficial, but the same conclusion cannot be drawn in respect of asymmetrical bilateral settings.

### 3.5. UN's Role – Capitulation

Tax administrations of developing countries have been in a difficult state over the past five decades as they kept recklessly signing DTAs – including EOI regime. This is primarily due to developing countries' blind belief in UN

MTC fundamentally being beneficial and supportive to their cause. Since developing countries are generally operating under serious capacity constraints, such an assumption becomes a convenient and complacent policy choice – sans due diligence and a rigorous cost-benefit analysis.[67] It is not surprising that “the OECD Model is the dominant model and preferred by developed countries since it better serves the interests of their multinational corporations.”[68] Likewise, “developing countries favour the UN Model, which better protects their interests.”[69] But unfortunately not only that “the language of UN MTC Article 26 is comparable to the OECD MTC Article 26 but also that the Commentary to the latter also “generally is relevant in interpreting” the former.[70] Now what if both OECD MTC and UN MTC turn out to be substantively one and the same thing. This ironic situation pushes developing countries into a state of double jeopardy. Rohatgi believes that UN MTC has been a target of censure due to its failure to make any sizable impact on the way developing countries have negotiated and signed DTAs for which one of the important reasons could be that it has trailed OECD MTC – rather subserviently.[71]

Thus, how come UN MTC which essentially toes the line of OECD could be expected to be favorable to the developing countries and fit their fiscal imperatives. In developing countries UN MTC was raised to the mantle of a hallowed object to be followed religiously. Although, a model should only be a model – a template – and not a quasi-convention.[72] The UN MTC enjoys a quasi-cult status in capacity-sapped developing countries, and one knows the fate of cult-followers. It has been posited that while UN assigned unfunded mandates to ensure good governance, reduce poverty, improve health, increase literacy, and ensure sustainable development of their peoples were assigned to developing country governments, it practically turned a blind eye to their being coerced and yoked into unequal and administratively lopsided international commitments.[73]

[67] Ahmed, "U.N. M.T.C. Article 8: Was the Source Rule Surrender a Blunder?."

[68] Hamrawit Abebe et al., "The United Nations' Role in International Tax Policy," in A Research & Policy Brief (New York: Milano School of International Affairs, 2012).

[69] Ibid.

[70] UN, The Commentary - United Nations Model Taxation Convention between Developed and Developing Countries, 752.

[71] R. Rohatgi, Basic International Taxation, vol. II (London: Kluwer Law International, 2002), 60.

[72] Basic International Taxation, vol. I (Richmond, U.K.: Richmond Law & Tax, 2005).

[73] Ahmed, "U.N. M.T.C. Article 5: The Predatory Ploy: A Neo-Marxist Mapping of the Permanent Establishment."

[64] Arthur J. Cockfield, "How Countries Should Share Tax Information," Vanderbilt Journal of Transnational Law 50, no. 5 (2017): 1103.

[65] Ibid.

[66] Ibid., 1107.

#### 4. EOI Regime – Developing Country Perspective

All international cooperation – both bilateral and multilateral – is always couched in and influenced by history. Most developing countries, if not all, have been under colonial subjugation and this fact is not only a significant part of their national consciousness but also weighs on their outlook to the world and impacts their critical decision-making. During centuries of direct colonial rule most developing nations' resources and capital were pillaged and shipped back to the colonial heartland – Europe; they are understandably apprehensive and xenophobic. In post-WWII period, when colonization was coming to an end, the colonial powers made deft moves for a seismic shift to graduate from direct colonization to indirect colonization – broadly dubbed as neo-colonialism. Neo-colonialism implied use of economic, political, cultural, and sundry soft tools to control or influence weaker nations – particularly past colonies – by stronger nations for the maximization of economic and political gains. It is posited that the international taxes system as rolled out over the past hundred years through instrumentalization of LN, UN, OEEC, OECD, and by marshalling international hulks like WB, IMF, and ADB into rallying support, connotes neo-colonial infrastructure and needs to be interpreted accordingly – particularly the EOI regime. In view of these neocolonial underpinnings and cognition, a peculiar developing country perspective on EOI regime has started to shape, straddling on several critical aspects.

##### 4.1. Neocolonial Infrastructure

The neocolonial infrastructural toolkit comprising brute banking secrecy (even for non-citizens), ever-expanding tax havenry, beneficial ownership legislations, citizenship-by-investment schemes, residence-by-investment plans, complex corporate and ownership structures etc. were leveraged into ruthlessly poaching revenues and capital from post-colonial developing countries for as long as possible. However, when the MNC and high net worth individuals (HNWIs) – two of capitalism's favorite offspring – having sated on eating into developing countries' economies, turned back on the developed capitalist states to return the favor; the latter were under duress to find a new solution for new times – EOI regime being one such solution. The neo-

colonial mindset is that developed countries' economic problems are the world's problems but developing countries' economic problems are their own.

##### 4.2. Lack of Symbiosis

The EOI regime, howsoever, brandished to look "inclusive," in fact, lacks semblance of symbiosis. Given the fact that the EOI regime emanates from developed countries' own problems heightened by the MNC and HNWIs' libertarian overtures to outgrow the capitalist state, it lacks convergence with developing countries. This is even though they confront identical challenges of tax base erosion and illicit financial flows, the solution toolkit does not have the right fit in view of their weak administrative and judicial structures, and the additional costs associated. Falcao has authoritatively observed that "it is clear that an effective exchange of information between countries likely to benefit developed nations more than developing nations, at least, for the time being." [74] Moreover, the EOI regime does only cure symptoms and not the malignancy itself. The developed countries undoubtedly have their *stated objectives* and *pursued objectives*, and they do run with the rabbit and hunt with the hound to achieve them. In view of the unequal nature of the bilateral relationship and their lack of administrative readiness to optimize on the EOI regime, it is developing countries which are left high and dry at the end.

##### 4.3. Evolving Tax Evasion Ploys

The MNCs and HNWIs, in combination with big-time tax consultants, are constantly looking to outmaneuver the EOI regime and at the expense of developing countries being most ill-equipped for the challenge. Cockfield remarks that "Tax havens, even if they are forced into binding agreements such as TIEAs, have incentives to subvert the system (e.g., by developing new business and legal entities that may fall outside of current disclosure obligations) and shirk responsibility (e.g., by not meaningfully enforcing EOI agreements by ensuring they do not maintain necessary records subject to a transfer

[74] Falcao, "Exchanging Information with the Developing World: A Digression on the Global Forum Exchange of Information's Interaction with Developing Economies," 612.

request.)<sup>[75]</sup> It has been posited that “Concealed money is an important issue in countries with high levels of bank confidentiality because the countries that provide this service benefit from it in various ways,” and it would, therefore, “be costly to these countries if they were not able to provide the service anymore.”<sup>[76]</sup> There is little doubt that the beneficiary developed nations protect and optimize on the existing evasion apertures. Developed countries also egg on their non-state operators to poach in developing countries by establishing collusive arrangements with corrupt developing country elites. “Elites within low and middle income (often nondemocratic) countries use international financial secrecy as an exit strategy that allows them to move and hide monies offshore (to preserve their family wealth and security).”<sup>[77]</sup> It is contended that due to misaligned and, at times, conflicting objectives, international cooperation in tax matters – contextually, the EOI regime – is confronted with challenges, and its efficacy is compromised for weaker partners in the equation.

#### **4.4. Marriage of Unequals**

It is a wide-going perception that developed countries treat their equal or near-equal DTC partners differently and the unequal ones markedly differently while negotiating or even discharging their EOI commitments. Falcão believes that many developing countries have been wary of including “exchange of information clauses under the fear that they would be compelled to eventually live up to that obligation and provide information regarding their nationals.”<sup>[78]</sup> On the contrary, stronger partners in the equation always could leverage confidentiality doctrine to refuse information. Even under UN MTC Article 26 a “State may continue to refuse to supply such information if that refusal is based on substantial reasons unrelated to the status of the holder of the requested information as a bank, financial institution, agent, fiduciary or nominee, or to the fact that the information relates to ownership interests.”<sup>[79]</sup> It has been averred that Switzerland has been “pressing for lower withholding tax rates on flows from developing countries in return for information exchange on request,” regarding capital illicitly remitted out of developing countries and parked in clandestine Swiss

banking industry.<sup>[80]</sup> This blatantly happened while re-negotiating Pakistan-Switzerland tax treaty in 2014.<sup>[81]</sup> Likewise, the US “rejected calls from Argentina for a TIEA “instead insisting on a double tax agreement that would require Argentina to surrender some of its taxing rights.”<sup>[82]</sup> The arbitrary and selective application of rules is also evident from the OECD not applying “to itself the requirements for information exchange and overriding bank secrecy rules that it has imposed on designated tax havens.”<sup>[83]</sup> Likewise, the EU directive on the taxation of savings did not apply to interest paid by EU countries to residents of non-EU countries, and in the process encouraging capital flight from non-EU countries into EU financial centers.<sup>[84]</sup>

#### **4.5. Economics of EOI Regime**

It is a widespread perception in developing countries that their ruling elites find it fashionable to get entangled into EOI frameworks to gain political mileage without conducting cost-benefit analysis. The membership of the GF, CRS, CbCR, BEPS-Inclusive Framework, and other institutions – all carry an annual membership fee, which for some developing countries could be sizeable. Likewise, cost of expensive hardware and software needed to operate CbCR and CRS mechanisms ran into millions of dollars – simply unaffordable for many developing countries. Cockfield observes that complex network of tax treaties, TIEAs, IGAs, CRS and CbCR, raise “transaction costs for all parties.”<sup>[85]</sup> Interestingly, most developing countries end up releasing more foreign exchange than what they get in additional revenues from the EOI regime.

#### **4.6. Capacity Deficiencies in Utilization**

In a developing country context, being able to receive actionable tax information is one thing and then be able to convert it into revenue numbers is entirely another. It has correctly been remarked that low-income countries might not have requisite human resources and physical infrastructure “to enforce their own domestic tax laws, let

[78] Falcão, “Exchanging Information with the Developing World: A Digression on the Global Forum Exchange of Information’s Interaction with Developing Economies.”

[79] UN, The Commentary - United Nations Model Taxation Convention between Developed and Developing Countries, 782.

[80] Vokhid Urinov, “Developing Country Perspectives on Automatic Exchange of Tax Information,” *Law, Social Justice & Global Development Journal* 1 (2015).

[81] Author led Pakistan delegation in the negotiations in 2014 wherein the Swiss delegation, in return for access to bank account information, dug their heels on reducing tax rate on taxation of dividends.

[82] Urinov, “Developing Country Perspectives on Automatic Exchange of Tax Information.”

[83] Spencer, “The I.M.F and Capital Flight: Redesigning the International Financial Architecture”.

[84] *Ibid.*

[85] Cockfield, “How Countries Should Share Tax Information,” 1108.

alone engage in effective EOI.”[86] Falcão avers that “developing countries suffer with lack of personnel, training, and resources, and therefore exchanging information has historically represented too large a burden to be upheld.”[87] Although, “better cross-border tax information will allow governments to pursue criminal investigations into offshore tax evasion and international money laundering in circumstances where taxpayers use business entities to mask criminal activities,” yet in reality delinquents find newer ways to bypass developing countries’ weak tax systems – mostly in collusion with new-look secrecy jurisdictions. Resultantly, developing countries now keep supporting information transmission without being able to use it for their own purposes. In fact, “authorities may be overwhelmed with data and may not have the resources to parse through it to identify helpful leads.”[88] Ring encapsulates developing country tax administrations’ limitations in terms of unavailability of quality auditors, lack of training, poor understanding of international tax concepts, attrition of trained staff, technological limitations as regards receiving, managing, storing and working with the information exchanged, inability of matching taxpayers, and the “existing culture of limited tax compliance.”[89]

#### **4.7. Complexity of EOI Regulations**

It is, of course, not surprising that most rules and regulations forming EOI regime architecture are complex, convoluted, complicated and cumbersome to implement. The CbCR data exchanged cannot be utilized directly.[90] Instead, algorithms need to run on those data, which makes it extremely difficult for most developing countries to utilize it purposefully. The GF proclaims that information exchanged was able to generate revenue worth €1.16 billion last year, but it does not tell how much of it was generated in developing countries.[91] Cockfield pertinently believes: -

All of this hedging takes place in an environment of highly complex technical rules, making it difficult...to predict how domestic tax laws and tax treaties will mesh with foreign tax laws. In particular, many governments now deploy increasingly technical rules – Specific Anti-Avoidance Rules (SAARs), General Anti-Avoidance Rules (GAARs), judicially promoted anti-avoidance rules, and so on – to thwart aggressive tax avoidance strategies....Many taxpayers with the resources to engage in cross-border tax planning are actually financially better off under this regime as long as their transaction costs are outweighed by global tax savings.[92]

It has been extensively observed that in the post-CRS and CbCR period, the beneficiary has not been the developing countries’ exchequers but developed countries and their tax consulting community. The collusion between non-state operators and beneficiary states have their own agenda to bug, rig, and subvert the international financial system including the EOI regime, at the expense of developing nations in most situations.

#### **4.8. Non-Obligatory EOI Commitments**

The UN stipulation that a state may not avoid its obligations under the EOI regime “through unreasonable time delays, by imposing unreasonable or burdensome procedural barriers, or by intentionally taking steps that prevent it,”[93] makes the entire EOI arrangement non-obligatory in nature – rendering it essentially optional. The morally persuasive nature of the obligation has again been reinforced by haranguing that “the obligation to exchange information ... should be interpreted broadly, and the limitation on that obligation should not be extended by analogy beyond their specific meaning.”[94] In the absence of a central authority vested with requisite power sinews to enforce breaches, it is essentially a moral obligation which a state might be motivated to honor or not honor – the latter scenario being more likely where the bilateral relationship is manifestly unequal or of an existentialist nature for the requested jurisdiction – tax havens. It is developing countries’ common experience that most developed countries do not honor their EOI

[86] Ibid., 1121.

[87] Falcao, "Exchanging Information with the Developing World: A Digression on the Global Forum Exchange of Information's Interaction with Developing Economies."

[88] Cockfield, "How Countries Should Share Tax Information," 1109.

[89] Diane Ring, "Transparency and Disclosure," in U.N. Handbook on Selected Issues in Protecting the Tax Base of Developing Countries, ed. Alexander Trepelkov, Harry Tonino, and Dominika Halka (New York: UN-DESA, 2017), 578.

[90] See, for a detailed account of difficulties *ibid.*

[91] OECD, "Putting an End to Offshore Tax Evasion," in Global Forum on Transparency and Exchange of Information for Tax Purposes (Paris: CTPA, 2022).

[92] Cockfield, "How Countries Should Share Tax Information," 1097.

[93] UN, The Commentary - United Nations Model Taxation Convention between Developed and Developing Countries.

[94] *Ibid.*, 752.

commitments when it comes to material matters – capital siphoned off and held in offshore real estate, money laundering, and sundry vital economic interests. Illustratively, China has been found extremely hesitant to share CbCR data with countries where it has substantial MNC footprint – even after fulfillment of all codal formalities. Switzerland and secrecy jurisdictions filibuster EOI requests through administrative slow-downs and raising flimsy procedural objections.

#### 4.9. Non-Inclusive Inclusivity

Of late, developing countries have been getting a feeling of a shallow inclusivity. Considering that it might not be any more possible to keep the developing countries on the fence and continue framing international tax rules, developed countries started to adopt a condescending approach and started involving developing countries in the international taxes debate. It has been observed that due to “the rise of Consumer market in developing economies and their growing significance, it has become hard...to ignore their want and will in international relations.”[95] However, this inclusion into the process has been rather superficial. While redefining the international taxes system during 2010s “the OECD did only consult with developing countries after the major decisions were made and failed to ask about preferences of developing countries beyond capacity building.”[96]

True, there is an ever-increasing policy and academic support for EOI initiatives that promote global financial transparency, but “the current international tax regime, with its high transaction costs for taxpayers and tax authorities, does not seem particularly amenable to producing optimal outcomes,”[97] particularly for developing countries.

### 5. EOI Regime – Developing Country Constraints

While the previous section brought out the EOI-related developing country constraints at the conceptual level, this section does the same at practical level in respect of all five established EOI modes.

#### 5.1. EOI Regime – Request Mode

In fact, request-based EOI is the oldest and most-widely used EOI mode at the international level. Its concept was laid in LN Report 1923, crystalized via LN Report 1928, but failed to make way into LN MTC 1928 and LN MTC 1935. It was formally incorporated into LN MTC 1943. The OECD MTC 1963 carried it and was reproduced into UN MTC 1981 almost in entirety. Although, UN MTC Article 26 and OECD MTC Article 26 have always been construed to cover all modes of EOI, yet till around turn of the century, it was synonymized with request-based mode. This mode implies that a contracting state may lodge a formal request to its counterpart state seeking actionable tax information. Albeit, substantial literature has been created on the topic, regrettably its critical appraisal from a developing country perspective has not taken place. Developing countries have almost involuntarily been committing themselves into previously bilateral and now multilateral EOI frameworks sans any meaningful cost-benefit analysis at country level or group level, and then struggling to serve their obligations. Empirically intractable, but it is no secret that developing countries – barring few – have rarely been able to raise assessments based on exchanged tax information and then carry them through at appellate forums. There has, however, been sparse negotiated settlements and a negligible increase in deterrence, which, of course, do not outweigh the costs involved. Innuendos, the UN itself legitimizes the lopsided arrangement: -

In freely adopting a convention, the Contracting States presumably have concluded that the convention, viewed as a whole, provides each of them with reciprocal benefits. There is no necessary presumption that each of the articles, or each paragraph of each article, provides a reciprocal benefit. On the contrary, it is commonplace for a Contracting State to give up some benefit in one Article in order to obtain a benefit in another article.[98]

This may be true of an agreement between two equals, but not between two unequal partners – a developed and a developing country – where the latter would always be at a disadvantage – firstly, at the state-to-state negotiations stage and then when the former’s MNCs and HNWIs optimize on the negotiated provisions by engaging

[95] Falcao, "Exchanging Information with the Developing World: A Digression on the Global Forum Exchange of Information's Interaction with Developing Economies," 611.

[96] Markus Meinzer, "Automatic Exchange of Information as the New Global Standard: The End of (Offshore Tax Evasion) History?," in Automatic Exchange of Information and Prospects of Turkish-German Cooperation, ed. Leyla Ates and Joachim English (Istanbul: Onikilehva, 2018).

[97] Cockfield, "How Countries Should Share Tax Information," 1108.

[98] UN, The Commentary - United Nations Model Taxation Convention between Developed and Developing Countries, 774.

with the latter's tax administration. The lopsidedness in EOI regime pans out at five distinct levels. Firstly, when it comes to providing information in response to request – mostly from developed countries since majorly it is their MNCs and HNWI's that are operating in developing countries, the latter must deploy significant resources to serve their commitments, and resources with developing countries' tax administrations are always in short supply. An empirical evaluation is likely to reveal that cost of the relationship borne by developing countries far outweigh the benefits that they derive, which of course, is not the case with developed countries.

Secondly, when it comes to obtaining actionable tax information, quite a few hurdles kick in the way. Since offshore monies are mostly held in anonymized accounts, developing country tax authorities lack basic information to populate request for information in the first place.<sup>[99]</sup> Thirdly, the real ordeal of developing countries starts after receiving the information as they mostly cannot convert actionable tax information into revenue numbers due to lack of refined administrative capacity. It is obvious that MNCs can hire top-notch tax consultants to prepare their cases well in advance keeping in view all legal options. Even when an assessment gets framed based on exchanged information, it faces challenges at tax judicial forums. Cockfield has pertinently observed that the EOI regime has "...largely failed to reduce offshore tax evasion or aggressive international tax planning,"<sup>[100]</sup> majorly for these very reasons.

Fourthly, no doubt third party reporting and tax-withholding disclosures "can provide information to tax authorities to allow them to better gauge risks of offshore tax evasion and aggressive international tax planning."<sup>[101]</sup> However, MNCs have always been found a step ahead of developing countries tax administrations in tax planning particularly when the international tax infrastructure is completely loaded in their favor, and against the source state. This puts developing countries' tax administrations at a significant handicap. Lastly, most developing countries have evolving tax systems and since their counterpart fiscal justice systems are not

developed enough, it becomes extremely difficult to carry through the cases built based on tax information exchanged across the full spectrum of taxpayers' right to appeal.

Moreover, in an unequal bilateral relationship the stronger partner has endless excuses to turn down a request from a weaker partner, including but not limited to, "insufficient confidentiality levels in the requesting state," requirement of giving a notice to taxpayer before supplying the requested information, identification of sources of information in requested state, inability to provide information in requested format, lack of sufficient capacity with requested state tax administration, the alibi of fishing expeditions, questionable foreseeable relevance, client-attorney privilege, jeopardy of disclosure of "trade secret" and "vital state interests," time limitations with respect to past periods, dual criminality doctrine, group requests, and permission to use the information for other purposes.<sup>[102]</sup> Mostly, when these alibis are raised to frustrate an EOI request, it is in an asymmetrical bilateral setting.

### **5.2. EOI Regime – Automatic Mode**

The OECD-sponsored BEPS project has been touted as a major milestone in recent economic history. The BEPS project was set up to develop an international framework to combat tax avoidance by MNCs using tax base erosion and profit shifting tools. From a developing country lens, the BEPS project suffers from two fundamental flaws, namely, that (a) it professedly concerns itself with tax avoidance, that is, legal reduction in tax liability, and (b) it is only bothered by the profits that get shifted to tax havens and not from developing to developed countries or to their tax havens. To backstop BEPS, inter alia, the MC was rolled out under which CRS-based system of automatic exchange of bank account information was put in place. Infrastructural support was provided by OECD and GF in most respects. All participating jurisdictions were to sign a CRS Competent Authority Agreement to be able to receive and transmit information. Expensive hardware and software were needed to be put in place at the administrative level to operationalize CRS regime.

[99] Cockfield, "How Countries Should Share Tax Information," 1104.

[100] *Ibid.*, 1105.

[101] *Ibid.*, 1110.

[102] Ana Paula Durado, "Exchange of Information and Validity of Global Standards in Tax Law: Abstractionism and Expressionism or Where the Truth Lies," in *Global Governance Programme* (Fiesole, Italy: Robert Schuman Centre for Advanced Studies, 2013).

The CRS framework, from a developing country perspective, exhibits significant downsides. Firstly, several developing countries ended up extending amnesties in the run-up to 1st CRS transmissions in 2018. This is true of Pakistan, India, Indonesia, Malaysia, and other countries where ruling elites had benefited from offshore banking secrecy.[103] Secondly, developing countries have not been able to match data with offshore account holders. This might not be a major problem for developed countries but for developing ones it is a major migraine. Pakistan's matching rate for 1st, 2nd, and 3rd transmissions remained around 30 percent.

Thirdly, offshore bank accounts that have been maintained either in name-lenders or anonymized titles do not get reported. Fourthly, past periods have not been covered by CRS transmissions, and only bank-balance of a cut-off date are supplied, which is tantamount to amnestizing past felonious conduct. Fifthly, CBI- and RBI-based illicit financial flows are not shared with developing countries – a major bug in the system. Sixthly, follow-up requests are not responded to by stolen wealth beneficiary jurisdictions by raising objections of all kinds that are spun around to frustrate and filibuster the engagement.

Seventhly, CRS regime does not cover real estates, which harbor bulk of illicit financial flows from developing nations. At times, internal laws and procedures are brought in as excuses to avoid transmitting actionable tax information. According to GF, bank account information amounting to € 9 trillion was exchanged in 2020.[104] It would be interesting to know as to how much wealth belonging to developing countries has left them, and how much revenue they were able to generate with the help of transmitted information. Lastly, since tax havens are operated, directly or indirectly, by various developed countries that are ultimate beneficiary of the illicit financial flows, information required is checkered and incomplete in most significant cases. Cockfield asserts "... many countries, especially tax havens simply do not track these tax information sources so that they are unable to exchange this

information when called upon to do so." [105] In fact, it is tax havens' marketing pitch; they even don't want this information to be collected on a reciprocal basis so that their existing and potential clients do not get alerted and scared away.

In fact, it is feared that CRS may even be exacerbating the situation in that it may be encouraging conversion of liquidity into real estate to avoid reporting.[106] Noked argues that possibly some tax evaders emptied their offshore financial accounts before the start of automatic exchange of information (AEOI) by buying real estate or other non-financial assets.[107] He further apprehends that since "the direct ownership of non-financial assets, such as real property, precious metals, artwork, and collectibles, is not reported to foreign tax authorities under...CRS," some "tax evaders may invest in offshore non-financial assets." [108] In fact, many tax evaders may have "shifted their undeclared offshore financial assets to other tax evasion channels" to steer clear of CRS nexus. [109]

### **5.3. EOI Regime – Spontaneous Mode**

Spontaneous EOI though purportedly always covered under UN MTC Article 26 yet has never been an influential mode. It has its inherent coincidence of wants and design problems. Developing countries' tax administrations have mostly kept it at the backburner for obvious reasons and to avoid allocation of scarce resources. One of its universal downsides is the onus to decide purely unilaterally that a particular piece of information would be useful for a counterpart jurisdiction. In a developed-developing country strain, the developed countries' demand that the spontaneous EOI must be a reciprocal one, has rather kept it a low-performing EOI mode. Given the developing countries' administrative capacity constraints, since spontaneous mode of the EOI has not been fully geared up, the developing countries end up

[105] Cockfield, "How Countries Should Share Tax Information."

[106] Muhammad Ashfaq Ahmed, "U.N. M.T.C. Article 6: Selective Territoriality - the Spectre of Privileged Player in a Rigged Game," *Manchester Journal of International Economic Law* 18, no. 3 (2021).

[107] Noam Noked, "Tax Evasion and Incomplete Tax Transparency," *Laws* 7, no. 31 (2018).

[108] *Ibid.*

[109] Lisa De Simone, Rebecca Lester, and Kevin Markle, "Transparency and Tax Evasion: Evidence from the Foreign Account Tax Compliance Act (Fatca)," *Journal of Accounting Research* 58, no. 1 (2020).

[103] Muhammad Ashfaq Ahmed, "Pakistan: Economy under Elites - Tax Amnesty Schemes, 2018," *Asian Journal of Law and Economics* 10, no. 2 (2019).

[104] [www.oecd.org/taxtransparency/](http://www.oecd.org/taxtransparency/)



losing out on critical actionable tax information regarding revenue collection, in general, and capital flight in particular. Ahmed contends that spontaneous EOI mode's "efficacy is being tested in connection with RBI/CBI programs despite OECD's advice to all states harboring such initiatives to share the particulars of their buyers enabling parent states to enforce laws," and that while "OECD may be working on it, the countries sponsoring such programs are resisting sharing EOI under the framework on various excuses."<sup>[110]</sup>

#### 5.4. EOI Regime – CbCR Mode

The policy push for CbCR to kick in was provided by the Extractive Industries Transparency Initiative (EITI) in 2002, to a large extent.<sup>[111]</sup> The CbCR mode obligated MNCs to disclose to their home and foreign tax administrations complete financials, and business accounts for all countries on the OECD-devised template.<sup>[112]</sup> The unequal nature of relationship between developed and developing countries particularly gets galvanized when it comes to CbCR mode. Keeping in view the fact that infrastructural lay out involves investment amounting to a couple of million dollars to operationalize CbCR, for some countries it may be too expensive an affair. Even the countries that have made this investment, are significantly skeptical about its efficacy and the revenue returns. Developing countries have also expressed their reservations that stronger partners in the equation do not pass on the information as per commitment. Moreover, the data exchanged under CbCR cannot be used directly; rather algorithms need to be run on them, which is a challenge for most developing countries. In some developing country tax systems, the assessments framed based on CbCR, got quashed as their judicial systems were neither tuned to nor were they ready to adapt and adjust to such neo-colonial infrastructures. Developed countries are into it by adopting whole-of-government approach being in EU, OECD, or Council of Europe, which, of course, is not the case with developing countries as there is no political compact to underpin the tax compact. Developing country tax administrations' commitments to international EOI regime sans any overlying political commitments, create complex problems of statecraft for them.

#### 5.5. EOI Regime – Tax Examinations

Although, coverage-wise simultaneous tax examination (STE) has never been considered outside the scope of UN MTC Article 26, yet it has primarily remained a developed country fad. Under STE mode, tax auditors of one jurisdiction travel to the other to undertake a simultaneous tax audit of the taxpayer in which both "have a common or complementary interest."<sup>[113]</sup> It has been averred that STE "may reduce the compliance burden for taxpayers by coordinating enquiries from different States' tax authorities and avoiding duplication."<sup>[114]</sup> It has also been posited that in the past auditors could not go to other countries to obtain evidence; the principle of reciprocity and sovereignty made it impossible.<sup>[115]</sup> Falcão opines that a "country might have to open its territory to foreign tax officials on every circumstance where there is a request for exchange of information," and that this "might give rise to a sovereignty issue."<sup>[116]</sup> This is a serious downside of the STE that makes developing countries wary of adopting it – apart from, of course, the cost considerations and the skepticism surrounding actual revenue generation.

#### 6. EOI Regime – Normative Appraisal

The EOI regime was critically appraised at the conceptual and practical levels in the preceding two sections from an underlying neocolonial perspective. In fact, a wide-going skepticism has recently gripped the entire MTC-based and DTC-sustained international taxes system – the EOI regime being its integral part.<sup>[117]</sup> This cynicism has

<sup>[110]</sup> Ahmed, "U.N. M.T.C. Article 6: Selective Territoriality - the Spectre of Privileged Player in a Rigged Game."

<sup>[111]</sup> Paul Vellar, "The Extractive Industries Transparency Initiative (Eiti) and Trust in Politicians," Elsevier 68, no. (C) (2020).

<sup>[112]</sup> Cockfield, "How Countries Should Share Tax Information," 1107.

<sup>[113]</sup> Alexander Trepelkov, Harry Tonino, and Dominika Halka, U.N. Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries (New York: DESA, Financing for Development Office, 2013).

<sup>[114]</sup> OECD, Model Tax Convention on Income and on Capital: Condensed Version, 2017 (Paris: OECD Publishing, 2017).

<sup>[115]</sup> Banon Keke Irnowo, "Challenges of Implementing Tax Examination Abroad," The Jakarta Post, March 12 2020.

<sup>[116]</sup> Falcão, "Exchanging Information with the Developing World: A Digression on the Global Forum Exchange of Information's Interaction with Developing Economies," 610.

<sup>[117]</sup> See, for instance, Sergio Andre Rocha, "Should Developing Countries Include Article 7 in Their Tax Treaties?," Bulletin for International Taxation, no. IBFD (2017); Ahmed, "U.N. M.T.C. Article 8: Was the Source Rule Surrender a Blunder?"; Katrin McGauran, "Should the Netherlands Sign Tax Treaties with Developing Countries?," (Amsterdam: Centre for Research on Multinational Corporations, 2013); TJN, "Double Taxation Agreements: Gain or Loss to Tanzania?," (Chatham: Tax Justice Network, 2016); Daurer and Krever, "Choosing between the Un and Oecd Tax Policy Models: An African Case Study," IJ. Mosquera Valderrama, "Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism," World Tax Journal 7, no. 3 (2015); Peter D. Byrne, "Developing Countries, Tax Treaties and the United Nations Model Tax Convention," I.L.S.A. Journal of International and Comparative Law 2, no. 695 (1996); Martin Hearson, Measuring Tax Treaty Negotiations Outcomes: The Actionaid Tax Treaties Dataset, vol. 47, Working Paper (Brighton: Institute for Development Studies, ICTD, 2016); Ahmed, "U.N. M.T.C. Article 5: The Predatory

mostly been general in nature, not really delving deeper into and dissecting the issue into its elements and appraising it on some normative principles.[118] It follows that the legitimacy or validity of a principle of law can be analyzed in terms of general canons of justice, equity, and fairness.[119] Similarly, the efficacy of a principle of law can be gauged from its outcomes for its potential affectees – individuals, groups, organizations, and nations. The legitimacy and efficacy of the EOI regime under UN MTC Article 26 can also be appraised on these very principles.

### 6.1. Normative Evaluation

To appraise legitimacy of the EOI regime from a developing country perspective, Rawlsian theory of justice can be inducted into the analysis. Rawls believes that “All social values – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage.”[120] In the Rawlsian framework, with perfect equality absenting, the standpoint of justice is the standpoint of the least advantaged. Rawls asserts that all inequalities stem from an inequality anchored in pre-existing “legal regime” or “birth status.” Contextually, any system that breeds inequality due to one or both reasons, is essentially an unfair system and cannot, under any circumstances, be justified. Rawls holds that the only justifiable reason of inequality is the difference in ‘talent and effort.’ He zeros in his attention on the government as a moderator to minimize all inequality by putting in place institutional frameworks – rules, regulations, and institutions. Rawls argues that for justice to creep in, the institutional infrastructure of the government should step in as a leveler by differentiating those who need most from

those who need less with maximum resources being allocated to those who possess the minimum – the *maximin* principle. Amartya Sen comes up with a formidable critique of Rawls’ theory. Sen contends that the Rawlsian notion of institutional fairness is elusive in that people in adverse situations may not be able to convert legal principles into delivery of justice on the ground. He equates legal or institutional justice with *niti* and actual delivery of justice on ground with *naya*, [121]which perfectly fits the underlying tone and argument of this study, that is, the UN MTC Article 26 – howsoever good or bad it might be – has done neither any good to developing countries nor their efforts to mobilize sufficient funds domestically to lift their people out of poverty.

Frank Garcia, appraising fairness of the world economic order undergird by the prevailing international economic law from a Rawlsian prism, posits that “justification of international trade law is to see the disparities in market power and expertise between states as manifestations of the problem of inequality.”[122] He goes on to stipulate that cross-border “Investment touches so many core social issues and host country responsibilities that it simply cannot be managed from the perspective of capital alone.”[123] However, since the “key elements of the international economic law system favor the intensification of inequality at national and global levels,”[124] the same “must therefore be structured so as to put the power of the developed country markets and knowledge at the service of the least developed countries.”[125] Likewise, it was argued that “both exploitation within a country and unequal exchange between countries are caused by differential ownership of productive assets.”[126] Roemer reinforces the point by contending that if “the initial distribution is highly unequal because some agents robbed and plundered, then clearly there are grounds for viewing the ensuing exploitation as a bad.”[127]

Ploy: A Neo-Marxist Mapping of the Permanent Establishment.”; “U.N. M.T.C. Article 6: Selective Territoriality - the Spectre of Privileged Player in a Rigged Game.”; Oladiwura Ayeyemi Eytayo-Oyesode\*, “Source-Based Taxing Rights from the Oecd to the Un Model Conventions: Unavailing Efforts and an Argument for Reform,” *Law and Development Review* 13, no. 1 (2020); Abebe et al., “The United Nations’ Role in International Tax Policy.”; Sébastien Leduc and Geerten Michiels, “Are Tax Treaties Worth It for Developing Economies?,” in *Corporate Income Taxes under Pressure: Why Reform Is Needed and How It Could Be Designed?*, ed. Ruud A de Mooij, Alexander Klemm, and Victoria Perry (Washington DC: International Monetary Fund, 2021); Hearson, *Measuring Tax Treaty Negotiations Outcomes: The Actionaid Tax Treaties Dataset*, 47. [118] Ahmed, “U.N. M.T.C. Article 6: Selective Territoriality - the Spectre of Privileged Player in a Rigged Game.” [119] *Ibid.* [120] John Rawls, *A Theory of Justice* (Boston: Harvard University Press, 2009).

[121] “In Sanskrit ‘Niti’ means ‘intent’ and ‘naya’ means ‘justice.’”

[122] Frank Garcia, “Trade and Inequality: Economic Justice and the Developing World,” *Michigan Journal of International Law* 21, no. 975 (2000): 1048.

[123] “Investment Treaties Are About Justice,” *Columbia FDI Perspectives* 185 (2016).

[124] “Globalization, Inequality & International Economic Law,” *Religions* 8, no. 78 (2017): 6.

[125] “Trade and Inequality: Economic Justice and the Developing World,” 1048.

[126] Benjamin Ferguson and Roberto Veneziani, “Territorial Rights and Colonial Wrongs,” *European Journal of Philosophy* 29 (2020).

[127] J. Roemer, *Free to Lose* (Cambridge, MA: Harvard University Press, 1988).

Contextually, when *individual* and *government* in Rawlsian framework are replaced with a *developing country* and the *UN*, respectively, one may be able to take a position that the *niti* part is there though not in perfect shape. However, Sen's the *naya* part is almost completely missing from the EOI regime. Thus, the current EOI regime may not come up to Rawlsian standards of justice. Moreover, Sen's critique of Rawls when applied to the EOI regime, appears to capture only half of the problem. What it implies is that not only that the rules of engagement are manipulated at the formulation stage by developed countries, but also that those are continually being maneuvered, twisted, and optimized at the expense of the weaker partners in the relationship. Simply put, the Rawlsian justice as amplified by Sen and Garcia is manifestly the missing component from the prevailing EOI regime – begging for correction by placing the *maximin* principle in the saddle.

## 6.2. Structuralist Evaluation

The structuralist perspective implies that the EOI regime is the product of structural composition and configuration of the prevailing international economic order. Since international economic system is dominated by developed countries which operate self-interestedly while dealing with counterpart developing nations, there ought to be no objections to the extant EOI framework with all its lopsidedness. Thus, for the EOI regime to be equitable, first the underlying structural formation of the international system has to change and become equitable. True, but then either UN should shun its egalitarian posturing or be able to break the operating barriers – short of that developing nations would continue to be trapped and plundered.

## 6.3. Axiological Evaluation

The EOI regime and its potential fallouts for the developing countries can also be evaluated from the Kantian lens of justice and axiology – the branch of philosophy, which deals with adequacy and propriety of human action, and has two competing sub-components. One, deontology – that judges moral validity of an action on the basis of its adherence to a principle, rule or duty. Two, consequentialism – which implies that the morality of an action ought to be judged with reference to its consequences and outcomes. In this connection, Kamm's *Doctrine of Productive Purity*, provides a deontological

prescription for delimiting the boundaries in which people could be allowed to act in a way that could harm others. [128] In the same vein, her *Principle of Permissible Harm* stipulating that one may harm in order to save more if and only if the harm is an effect or an aspect of the greater good itself, provides another yardstick for the purpose. [129]

Now, under none of these doctrines the EOI regime put in place by developed countries and koshered by UN MTC Article 26 for harvesting useful tax information from developing countries, and in fact, at the latter's expense, can justify itself. The wrong gets compounded because then developing countries are neither in a position to harvest actionable tax information with matching power (as they have none) nor can utilize it to their own benefit. This makes the EOI regime brazenly selective and deviating from the principles of fairness, and miserably failing on the standard of consequentialism as it both intrinsically and instrumentally caused economic injustice and disparity – great affluence for a few in the developed world, and abject poverty for the denizens of developing world.

## 6.4. Constructivist Evaluation

The international taxes regime as woven around the EOI regime was inevitably cast in developed-developing country binary, which typically reflected the control of the lexicon in which the latter could conceptually approach the matter and enter deliberations with the former in the critical area of international cooperation in tax matters. The capitalist state, capitalist, and capitalist non-state operator – the MNC and the ICC – systematically helped develop a complete system of language straddling on law, tax, accounting, trade, investment and diplomacy from the spell of which developing countries could never really come out.[130] There has always been going on a meekly debate as to what to include in the EOI regime and what to exclude from it at the UN level, but the real issue of its being essentially an intra-developed country affair was never allowed to be on the table as an agenda item, nor the fact that it was unilaterally beneficial to developed countries in terms of costs shifted and revenue

[128] F.M. Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (Boston: Oxford University Press, 2007).

[129] *Ibid.*

[130] Ahmed, "U.N. M.T.C. Article 5: The Predatory Ploy: A Neo-Marxist Mapping of the Permanent Establishment."

generated. Bachrach et al correctly suggest that dominant actor in the relationship would prefer confining “the scope of decision-making to relatively ‘safe’ issues,” and that being logical and rational, would attempt to keep the real important issues off the agenda.[131] There appears little doubt now that agenda setting at the UN is done in a loaded meticulous manner.

Even at the UN, the developing countries squabbled and fought for the fringes and never for the core. The very title “Double Taxation Agreement” which koshers the EOI regime, has an Orwellian tinge about it – it never was about double taxation; it always was about taxation rights on international business operations and coercing weaker partners in the relationship into accepting the terms and conditions that were not defensible on the canons of law, justice, and fair play. In not too distant a past, the EOI regime was abhorred by developed countries since it did not suit them. After all, EOI’s inclusion in LN MTC 1928 and LN MTC 1935 was doggedly blocked and could only make way into LN MTC 1943, which majorly was the initiative of South American nations. Now it suits them, and systematically developing countries are made to look in greater demand for it. [132] At some level, the UN becomes *Ministry of Truth* and the EOI regime a perfect *Newspeak* – making a fascinating read.

In fact, the developed world by pitching up UN MTC as a *counter* to the OECD MTC practically monopolized the entire epistemological space for any independent alternative thinking by developing countries – a false-flag operation of sorts. With this dimension of the matter in view, one is not sure of any benefits accrued to, but one is more likely to be certain of the costs inflicted by it on the developing countries. The brutest control and domination of one by the other is the control of ideas, concepts, and semantics.

### 6.5. Realist Evaluation

Arguably, the best analytical framework to interpret the prevailing EOI regime is the realist framework. Realism

implies that all states, institutions, and individuals being rational actors pursue their interests without any moral compunctions. Contextually, it implies that the international system reflects naked power politics also in the fiscal domain in its brute and raw form. It has been opined that the “extant international EOI regime exhibits strains and structurally-oriented undercurrents between developing and developed countries,” and that the “realist pro-developed country bias in the international taxes’ cooperation framework is historically embedded.”[133] D’Amato, critically dissecting the international treaty network, and weighing it on the Rawlsian principles,[134] pertinently questions: ‘Are all treaties to be kept? What about ‘unequal’ treaties – those imposed by the larger power upon the smaller? Does this deprive the citizens of the smaller power of their just share or equal liberties, all in the name of a concept that sanctifies treaties?’[135] All these questions elicit a negative response with reference to the extant EOI regime. Even otherwise it has authoritatively been asserted that “prevention of tax evasion and avoidance and of double non-taxation,” which is touted as “an important operational objective of tax treaties,” have in reality “been more likely to create – rather than eliminate – opportunities for tax avoidance.”[136]

Justice at international level is as important as at any other level. Contextually important UN SDG 16 pertaining to “peace, justice and strong institutions,” looks to “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.” In turn, the SDG has 12 targets dispersed over 23 indicators for measurement by 2030. In the absence of corresponding measures being rolled out enabling developing countries to finance these initiatives, the global goals would remain elusive. Albeit a dominating realist measure of the extant international EOI regime, there is no denial that for the international cooperation frameworks to be sustainable over a longer period, those must be just, equitable, and symbiotic – not only in appearance as is the current situation, but in reality, too.

[131] Peter Bachrach & Morton Baratz, “Two Faces of Power,” *The American Political Science Review* 56, no. 4 (1962): 950.

[132] OECD, “Automatic Exchange of Information: A Roadmap for Developing Countries,” ed. Global Forum (Paris: OECD Publications 2014).

[133] Ahmed, “U.N. M.T.C. Article 6: Selective Territoriality - the Spectre of Privileged Player in a Rigged Game.”

[134] Anthony D’Amato, “International Law and Rawls’ Theory of Justice,” *Denver Journal of International Law and Policy* 5 no. 2 (1975).

[135] *Ibid.*

[136] Alexander D Klemm and Li Liu, “The Impact of Profit Shifting on Economic Activity and Tax Competition,” in *Corporate Income Taxes under Pressure: Why Reform Is Needed and How It Could Be Designed*, ed. Ruud A. de Mooij, Alexander D Klemm, and Victoria J Perry (Washington DC: IMF, 2021), 141.

## 7. Conclusion

The paper makes the UN MTC stand in the dock. In fact, by replacing a “country” as the unit of analysis with a “developing country,” it adds a new dimension to the appraisal toolkit of EOI regime, in particular, and international taxes, in general. Upfront, it was premised that the OECD MTC-contrived and UN MTC-koshered EOI regime was not efficacious enough to achieve the intended purpose for developing countries in asymmetrical bilateral settings. It was also asserted that the extant EOI regime was essentially a developed country imperative, and developing countries were yoked into it as beasts of burden making it a key pillar of the neo-neocolonial infrastructure. The roots of these stipulated phenomena are traced in time from 1840s onwards and in the process peeling off international political economy layers wrapped all over it. The UN’s going into withdrawal, and strategic scramble by the OEEC and OECD to take control of LN work on international taxes are brought out to reinforce the premise that throughout past one hundred years, the EOI has been a developed country preoccupation.

The developing countries’ difficulties were brought out to hammer home the point that since their tax administrations were not adequately equipped to receive and purposely utilize the information exchanged, they are the reluctant partners in the relationship, “which was voluntary in appearance but compulsive in essence.”[137] Rawlsian framework of justice is inducted into the analysis to evaluate the current EOI regime on high moral deontological and consequentialist canons and political philosophy yardsticks to conclude that it was an unjust and lopsided regime not tenable on any moral principles. It has been established that in unequal bilateral settings, the EOI regime’s efficacy becomes doubly questionable since it must operate in an anarchic world where there is no supra-authority to act as final arbiter of disputes – mainly emanating from unilateral non-compliances by stronger partners in the equation.

Does it automatically flow from here that developing

countries do not need an EOI regime? No; they do. They do realize that EOI is an important aspect of cooperation on tax matters particularly for combatting tax evasion and capital flight.[138] However, they are now attaining cognition of operating coercive reality and looking to demand a seismic shift in the EOI regime to make it symbiotic, equitable, and egalitarian – not merely *inclusive*. How? This is the time to agree on a common *taxpayer identification number*, which could be matched against the unique one provided by each government in a big database that could readily identify whether the taxpayer had disclosed all of his or her sources of foreign income. [139] Going forward, the repository could be expanded to include a (i) global incorporation number for all corporate entities; (ii) global tax identification number; (iii) global trust registry; (iv) global bank account number; (v) global beneficial ownership registry; (vi) global offshore intermediaries’ registry; and (vii) global registry of offshore financial service providers.

Likewise, an international repository needs to be created and maintained of MNCs that tend to be more mobile internationally and engage in aggressive tax planning. [140] The fact that several governments “have also expanded information reporting for entities owned by these individuals along with broader disclosures of foreign assets and transactions,”[141] would come in handy. It is also the time to devise an international withholding tax system mandating at source deduction of collection by the source state and transfer and remittance of the collected tax amounts to the residence states or the ones which are rightfully entitled to receive them. Similarly, the UN may look to evolve consensus for an early finalization of International Tax Convention duly enforced by an Intergovernmental Tax Organization under the UN framework. The UN’s penchant to blindly validate and baptize, if not all, most of what developed countries churn out unilaterally or multilaterally – needs abatement and reversal. These measures if agreed upon and rolled out soon, would help establish a factually equitable international taxes system capable of placing adequate resources at the disposal of developing countries for achieving the SDGs in the absence of which these continue to remain unfunded mandates.

[137] Ahmed, “U.N. M.T.C. Article 6: Selective Territoriality - the Spectre of Privileged Player in a Rigged Game.”

[138] UN, The Commentary - United Nations Model Taxation Convention between Developed and Developing Countries, 755.

[139] Cockfield, “How Countries Should Share Tax Information,” 1111.

[140] *Ibid.*, 1112.

[141] *Ibid.*

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