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The United Nations Intergovernmental Process – An Opportunity for a Paradigm Shift

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Efforts are underway to strengthen the inclusiveness and effectiveness of international tax cooperation so that the current tax structures consider the equitable interests of developing countries. This is necessitated as a section of developing countries has lost confidence in the OECD and there is a lingering doubt whether OECD has developing countries' best and equitable interests in mind. As a result, the United Nations General Assembly has launched intergovernmental talks to enhance international tax cooperation and draft a UN Tax Convention that aims to establish inclusive norms for transparency and tax cooperation, that leads to development of an acceptable and frictionless worldwide tax policy.

Des efforts ont été entrepris afin de faire en sorte que la coopération fiscale internationale soit plus inclusive et efficace et que les structures fiscales actuelles prennent davantage en compte les intérêts des pays en développement. Ces efforts sont rendus nécessaires par le fait qu'une partie des pays en développement n'a plus confiance dans l'OCDE et qu'il subsiste un doute quant à la volonté de cette dernière d'agir dans leur intérêt. En conséquence, l'Assemblée générale des Nations unies a décidé de lancer des discussions intergouvernementales afin de renforcer la coopération fiscale internationale et d'entamer la rédaction d'une convention fiscale prévoyant des mesures en matière de transparence et de coopération fiscale et visant à promouvoir la mise en place d'une politique fiscale qui soit acceptable pour tous les pays et contribue à éviter les tensions.

Se están llevando a cabo iniciativas para reforzar la inclusión y la eficacia de la cooperación internacional en cuestiones tributarias para que las estructuras fiscales actuales consideren los intereses equitativos de los países en desarrollo. Esto es necesario, ya que una parte de los países en desarrollo ha perdido la confianza en la OCDE y persiste la duda sobre si la OCDE tiene en mente los mejores intereses equitativos de los países en desarrollo. Como consecuencia, la Asamblea General de las Naciones Unidas ha iniciado conversaciones intergubernamentales con el fin de mejorar la cooperación internacional en materia fiscal y elaborar un Convenio Tributario de las Naciones Unidas, cuyo objeto sea establecer normas inclusivas en favor de la transparencia y la cooperación fiscal, que dé lugar al desarrollo de una política impositiva aceptable y sin complicaciones en todo el mundo.

Introduction

In the United Nations (UN) Resolution 69/313 of 27 July 2015[1], referred to as the “Addis Ababa Action Agenda of the Third International Conference on Financing for Development”, the Member States committed to scaling up international tax cooperation. However, the present tax norms are mainly led by organizations like the Organisation for Economic Cooperation and Development (OECD) which for the last decade has been mandated by the Group of Twenty (G20)[2] to devise tax policies on Base Erosion and Profit Shifting (BEPS) and the taxation of the digital economy. The increasing globalization and digitization have complicated the tax issues to such an extent that market jurisdictions, particularly those belonging to the lower income group feel seriously disadvantaged.

The United Nations General Assembly (UNGA) has decided to start “intergovernmental discussions”[3] with an aim to find ways to strengthen the inclusiveness and effectiveness of international tax cooperation. The resolution was tabled by Nigeria on behalf of the Group of African States highlighting the significance of countering illicit financial flows, particularly for developing nations since they are vulnerable to the harmful effects of illicit financial flows, and the corrosive effect that aggressive tax avoidance and tax evasion has on sustainable development thereby harming the poorest and most vulnerable. The resolution requires countries to work together on ways to strengthen the inclusiveness and effectiveness of international tax cooperation and help in eliminating tax evasion and addressing BEPS, thereby ensuring that taxes are paid to

the Governments where the economic activity[4] has taken place as per the international and prevailing domestic laws of that jurisdiction.

Immediate trigger for the UN resolution

Kenya, Nigeria, Pakistan, and Sri Lanka have abstained from joining the Two-Pillar Solution.[5] Kenya and Nigeria have expressed their concerns about the deal stating, “*The truth is that there’s little or no money coming from either Pillar One or Pillar Two to developing countries*”,[6] with Kenya saying it may cause it to end its new digital services tax (DST) and both countries raising issues with the deal’s dispute resolution requirements. [7] According to the Federal Inland Revenue Service (FIRS) of Nigeria,[8] only six companies would be covered by the new deal in Nigeria whereas, as per the Kenya Revenue Authority (KRA),[9] only 11 companies that fit the requirement[10] of Pillar One operate in Kenya, yet the country currently has 89 companies paying the DST, which targets such businesses.

As things have recently progressed, some countries have lost confidence in the OECD. Fresh calls for a more powerful UN role in international tax policy reveals a lack of trust in the policies produced through the OECD processes and there is a lingering suspicion whether OECD has developing countries’ best and equitable interests in mind.[11]

[1] Refer to ‘Resolution adopted by the General Assembly on 27 July 2015’ at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_69_313.pdf (accessed on 27 January 2023).

[2] The Group of Twenty, or G20, is the premier forum for international cooperation on the most important aspects of the international economic and financial agenda. It brings together the world’s major advanced and emerging economies. The G20 comprises Argentina, Australia, Brazil, Canada, China, the European Union, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom and the United States of America. The G20 countries together represent around 90% of global gross domestic product (GDP), 80% of global trade, and two thirds of the world’s population.

[3] Refer to ‘Resolution 77/244 adopted by the General Assembly on 30 December 2022: Promotion of inclusive and effective international tax cooperation at the United Nations’ at https://www.un.org/development/desa/financing/sites/www.un.org/development_desa.financing/files/2023-02/A%20RES%2077-244%20English.pdf (accessed on 27 January 2023).

[4] Developing and capital importing countries are of the view that compensation to market jurisdictions should align with the economic activity that is determined by demand and sales, whereas, developed and capital exporting countries opine that compensation and profit allocation should be based on creation of value that is determined by generation/usage of intellectual property (IP) and manufacturing.

[5] Refer to ‘International community strikes a ground-breaking tax deal for the digital age’ by OECD, published on 8 October 2021 at <https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm> (accessed on 27 January 2023).

[6] Refer to the paper ‘The principles for human rights in fiscal policy in the context of tax reforms in the global south’ by Meggy Katigbak, December 2021, page 8, citing the comments from Nigeria’s Federal Inland Revenue Service at https://derechosypoliticafiscal.org/images/ASSETS/Principles_for_Human_Rights_in_Fiscal_Policy_In_the_Context_of_Tax_Reforms_in_the_Global_South_1.pdf (accessed on 30 January 2023).

[7] Refer to article ‘Why Kenya and Nigeria haven’t agreed to a historic global corporate tax deal’ by Carlos Mureithi, published on 2 November 2021 at <https://qz.com/africa/2082754/why-kenya-and-nigeria-havent-agreed-to-global-corporate-tax-deal> (accessed on 27 January 2023).

[8] *Ibid.*

[9] *Ibid.*

[10] The primary condition of applicability of Pillar One is that it covers MNEs with global turnover of at least Euro 20 billion and at least 10% profit before tax.

[11] Refer to article ‘What the OECD’s Pillar Two Impact Assessment Misses’ by Daniel Bunn, President and CEO, Tax Foundation at <https://taxfoundation.org/global-minimum-tax-revenue-impact-assessment/> (accessed on 28 January 2023).

Expectations from the UN resolution

The resolution initiates intergovernmental discussions on the structure of international tax cooperation including a proposal for a UN Tax Convention which will set inclusive standards for transparency and tax cooperation. Despite intense opposition from the OECD and some wealthy countries led by the United States, the resolution mandates the UN to monitor, review, and set worldwide tax standards, as well as to promote the development of a global tax authority. It is expected that the Intergovernmental Process under the aegis of the UN would place nations in the global South on an equal footing in navigating and negotiating global tax regulations. The resolution *inter alia* mandates the UN Secretary-General to report^[12] the detailed possibilities by:

- analysing all relevant international legal instruments, other documents and recommendations that address international tax cooperation,
- considering the avoidance of double taxation model agreements and treaties, tax transparency and exchange of information agreements, mutual administrative assistance conventions, multilateral legal instruments,
- considering the work of the Committee of Experts on International Cooperation in Tax Matters, the work of the OECD/G20 Inclusive Framework (IF) on BEPS and other forms of international cooperation,
- outlining potential next steps, such as the establishment of a Member State-led, open-ended ad-hoc intergovernmental committee to recommend actions on the options for strengthening the inclusiveness and effectiveness of international tax cooperation.

Article 12B to get a new lease of life

Article 12B under the UN Model Double Tax Convention (DTC) provides a simpler and easy-to-implement

solution as it allows a State to tax income from certain digital services paid to a resident of the other State on a gross basis at a bilaterally negotiated rate with an option for the taxpayer to pay tax on a net profit basis for the whole year. Article 12B is deemed to automatically apply once the automated digital service (ADS) (having minimal human intervention and administered through electronic network, internet) has been provided and has no thresholds in terms of its application. The provisions have been carefully designed keeping in mind that many developing countries have limited administrative capacity and need a simple, reliable and efficient method to enforce tax imposed on income from ADS derived by non-residents. Article 12B has no impact on unilateral tax provisions imposed by countries like equalisation levy which shall continue to be retained. This ability to derive income from a country with little or no physical presence in that country is considered by the UN Tax Committee sufficient to justify source taxation of income from ADS. [13] Although the UN Tax Committee comprises of revenue officers including from G20 countries (working in their personal capacity), the adoption of Article 12B lost out to the OECD's Two-Pillar Solution since the members of the G20 that mandated the OECD to work on taxation of the digitalised economy have a commitment of sorts to implement the OECD's proposal. However, with the United Nations Intergovernmental Process mandating the UN Secretary-General to submit a report considering *inter alia* the work of the Committee of Experts on International Cooperation in Tax Matters, there is a distinct possibility that interest in Article 12B will get revived, its provisions refined going forward and that it may get a new lease of life.

Reaction of G20

In October 2021, 136^[14] nations agreed on the Two-Pillar Solution, which was worked out by the OECD. While the OECD, which has 38 member nations, is considered as a club of the wealthy, it has grown more inclusive in its approach, with non-members engaging in discussions about global tax solutions.

[12] Refer to 'Resolution 77/244 adopted by the General Assembly on 30 December 2022: Promotion of inclusive and effective international tax cooperation at the United Nations' at https://www.un.org/development/desa/financing/sites/www.un.org.development_desa.financing/files/2023-02/A%20RES%2077-244%20English.pdf (accessed on 27 January 2023).

[13] Refer to South Centre's Policy Brief No 14 of June 2021 by Kuldeep Sharma at <https://www.southcentre.int/wp-content/uploads/2021/06/Tax-PB-14.pdf> (accessed on 28 January 2023).

[14] The number of jurisdictions in agreement to OECD's Two-Pillar Solution now stands at 138 out of the 142-member strong Inclusive Framework (IF).

With the UN now stepping in to play a critical role, history may be rewritten. Since, the report of the UN Secretary-General shall be considered at its seventy-eighth session,[15] it would be interesting to see how G20 will respond to recommendations of the UN Intergovernmental Process if its recommendations turn out to be at variance with those of the OECD.

Conclusion

With the setting-up of the UN Intergovernmental Process, it is envisaged that the following benefits shall accrue across the globe in the realms of taxation:

- coherent global system;
- coordinated global action;
- avoidance of double taxation and double non-taxation;
- globally coordinated and inclusive decisions.

The report of the UN Secretary-General will have at its disposal commendable work done by the OECD through the Two-Pillar Solution. Since the system for allocating earnings under Pillar One has been a major point of contention among some developing countries, they are hoping that the UN approach would result in a more equitable allocation. Also, while it is too early to predict,

perhaps the UN-led solution will result in a greater number of enterprises falling within the purview of a more equitable profit allocation. One way to take all countries on board could be to *inter alia* retain the powers to implement the DST for the Multinational Enterprises (MNEs) that do not fall under the scope of Pillar One. Of course, MNEs and developed countries will provide stiff opposition to this proposition.

Finding inclusive and sustainable solutions to the dysfunctional international financial system has the potential to significantly accelerate progress toward the Sustainable Development Goals (SDGs) and should be considered as a long-term investment. The process initiated with the adoption of the UN resolution shall enable all countries, particularly those belonging to the global South, to have a fair chance to articulate their own individual and collective viewpoints. It will also encourage them to fully participate in the intergovernmental negotiations, and will ultimately contribute to the construction of an equitable (frictionless) global tax policy.

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[15] To be held on 12 September 2023.

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