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The Design of a UN Framework Convention on International Tax Cooperation

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ABSTRACT

The creation of a UN-led framework for international tax cooperation is an opportunity for an institutional and conceptual reset, to re-establish a global perspective that has been disrupted by the assumption of an increasingly dominant role in international tax by the OECD. The OECD's expansive proselytisation of its approach, aiming to encourage foreign investment by restricting taxation of income at source where it derives, has paradoxically taken place in counterpoint with growing concerns about the evident dysfunctionality of that approach. The current process should learn from the past to design a global framework fit for the future, by embodying the aims and general principles that have come to be recognised especially in the recent period as essential guideposts for effective international tax reform.
KEYWORDS: *Framework Convention on International Tax Cooperation (FCITC), United Nations (UN), International Tax Cooperation, Organisation for Economic Co-operation and Development (OECD), International Tax, International Tax Reform*

La création d'un cadre de coopération fiscale internationale sous l'égide des Nations unies est l'occasion d'une remise à zéro institutionnelle et conceptuelle qui permettra de favoriser une perspective globale souvent empêchée par la prédominance de l'approche adoptée par l'OCDE en matière de fiscalité internationale. Le prosélytisme affiché par l'OCDE en faveur de son approche, qui vise à encourager les investissements étrangers en limitant l'imposition des revenus à la source, a fait naître, de manière paradoxale, des préoccupations croissantes en ce qui concerne son efficacité. Le processus en cours doit tirer les leçons du passé afin de concevoir un cadre mondial adapté à l'avenir, qui s'appuie sur les objectifs et principes généraux qui ont été reconnus, en particulier au cours de la période récente, comme des points de repère essentiels pour une réforme fiscale internationale efficace.
MOTS-CLÉS: *Convention-cadre sur la coopération fiscale internationale, Organisation des nations unies (ONU), Coopération fiscale internationale, Organisation de coopération et de développement économiques (OCDE), Fiscalité internationale, Réforme fiscale internationale*

La creación de un marco de cooperación fiscal internacional liderado por la ONU es una oportunidad de reseteo institucional y conceptual para restablecer una perspectiva global que se ha visto perturbada por la asunción de un papel cada vez más dominante en la fiscalidad internacional por parte de la OCDE. El proselitismo expansivo del enfoque de la OCDE, cuyo objetivo es fomentar la inversión extranjera restringiendo la imposición de los ingresos en la fuente de donde proceden, se ha producido paradójicamente en contrapunto con la creciente preocupación por la evidente disfuncionalidad de ese enfoque. El proceso actual debe aprender del pasado para diseñar un marco global adecuado para el futuro, incorporando los objetivos y principios generales que han llegado a ser reconocidos, especialmente en el período reciente, como guías esenciales para una reforma fiscal internacional eficaz.
PALABRAS CLAVES: *Convenio marco de cooperación fiscal internacional, Organización de las naciones unidas (ONU), Cooperación fiscal internacional, Organización para la cooperación y el desarrollo económicos (OCDE), Fiscalidad internacional, Reforma fiscal internacional*

KEY MESSAGES

- The creation of a global tax framework would itself be an enormous step towards strengthening tax cooperation and coordination, simply by enabling the organisation of regular meetings under the auspices of a public international organisation designed to be inclusive.
- The apex body of a framework convention is usually a Conference of Parties (COP), the meetings of which generally involve a much wider gathering of specialists, stakeholders and civil society.
- It is a myth that treaties are necessary to prevent 'double taxation', since national laws generally provide for tax credits and exemptions in respect of foreign income, regardless of treaties. Leading academic analysts agree that arrangements for administrative coordination and cooperation are much more important for dealing with the frictions created by the interactions of tax systems.

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Introduction

The aim of this paper is to explore the possible form and content of a United Nations (UN) Framework Convention on International Tax Cooperation (FCITC). An earlier paper has outlined the concept of a framework convention as an appropriate way to rationalise the institutional architecture of international taxation (Chowdhary and Picciotto, 2021; see also Ryding, 2022). Following the political initiative of the Africa group at the UN to promote inclusive and effective international tax cooperation, this concept was identified as the central option in the report of the UN Secretary-General (UNSG, 2023), which led to a General Assembly resolution setting in motion the process of negotiation of such a framework convention (UNGA, 2023a). This paper aims to contribute to the wider public discussion on the nature and design of such a convention that is important to underpin a successful outcome.

Much can be learned from the experience of creation of other global governance arrangements, notably the UN Framework Convention on Climate Change (UNFCCC). Such comparisons may be helpful in considering the legal and institutional design aspects, while bearing in mind that each issue has its own social, political and economic roots and dynamic. Action on climate change has been strongly driven by the scientific understanding of a novel phenomenon, and by public opinion, mainly in the global North, particularly in Europe. Tax cooperation has a longer history, and the current initiative is driven by the global South, seeking the reorganisation of existing institutional arrangements, the historical emergence of which was moulded by the political and economic strategies of dominant capitalist powers. Despite these significant differences, both are key issues that call for international cooperation and coordination to strengthen the ability of states to provide security and prosperity for their citizens and to ensure a sustainable future for humanity.

A. Factors Shaping the Design

1. The Rationale for a Framework Convention

The UN Secretary-General (UNSG)'s report succinctly explains that a framework convention is essentially "constitutive" in nature. This means that it would establish "an overall system of international tax governance", by outlining "the core tenets of future international tax cooperation, including the objectives, key principles for the cooperation and the governance structure of the cooperation framework" (UNSG, 2023, para. 55). In short, it would be the constitution for a global tax body.

The Framework Convention for International Tax Cooperation (FCITC) would be a binding multilateral agreement, but would differ from a multilateral convention on tax, since it would not itself directly regulate taxation. Its obligations would be between participating states, and remain at the level of public international law, rather than having direct effect in national law to create rights and duties for individuals and legal persons, as tax treaties do. However, substantive regulatory regimes governing specific aspects of tax could be adopted as protocols or other kinds of instruments under the general umbrella of a FCITC. On the other hand, it would be a formal legally binding treaty creating both general obligations on states to cooperate in tax matters, as well as a new international institution. This differs from the third option identified in the UNSG's report, that would have established only an agenda for coordination among existing bodies, which already exists with the Platform for Collaboration on Tax.

The preference for a framework convention flows from two key issues discussed in the UNSG's report: both *inclusivity* and *effectiveness* are central in designing the institutional architecture. The need to balance the aim of universal membership with maintaining momentum towards measures that could have worthwhile impacts will be the main driver in the next stage of discussions to shape the new framework. Inclusivity is explained in the UNSG's report as the *opportunity* to participate "by right and without preconditions" in the agenda-setting and decision-making procedures. At the same time, the report points out that "[t]ax sovereignty also implies that countries have the right not to participate in a given process and to choose not to be bound by the outcome thereof". While success will require support from a critical mass of states, the reluctance of some should not be allowed to create obstacles to progress.

Hence, the content of the FCITC should not be diluted to satisfy a minority of countries, which may resist the inclusion of principles and procedures essential for effective international cooperation and coordination of taxation. As the momentum for a FCITC becomes accepted as unstoppable, the powerful countries and other actors that have opposed the proposal will switch to trying to mould its content to suit their interests and perspectives. This could take two forms: they may continue to aim for a minimalist instrument, with anodyne content and institutions that would not disturb the status quo; alternatively, some may support the creation of a global framework, while seeking to entrench in it outdated paradigms and failed approaches to international tax. The latter may be more dangerous, since a new global framework should aim to facilitate a reconsideration and reform of existing rules, which have now been widely recognised as defective, facilitating evasion and avoidance by the wealthy and large corporations, and hindering sustainable economic development. While it's important to formalise principles that have wide support, a new institutional framework should provide the flexibility to transcend outdated paradigms and create tax systems that are equitable and effective and fit for the future.

Effectiveness also implies that the new framework should aim to rationalise and, if possible, reduce rather than increase, the number of international bodies dealing with international tax. This came out clearly from many of the submissions made to the UN on this issue, particularly from governments, including both those supporting the initiative and those that regarded it as an unnecessary duplication.[1] This point was carefully expressed by the representative of Canada (speaking also for Australia and New Zealand) in the UN Second Committee, who referred to the need to 'develop and leverage current arrangements, while avoiding the duplication of existing structures and instruments' (UNGA, 2023b, para. 87).

In fact, there is considerable scope for streamlining the current institutional architecture of international tax, due to its conflictual and uneven historical evolution. This history, sketched out in the next

1 Available here.

section, shows that duplication has arisen largely due to the drive by the Organisation for Economic Co-operation and Development (OECD) to dominate international tax standard-setting, despite the increasing evidence of the unsuitability of the OECD's perspectives. While the success of the OECD in this drive for expansion has shown the need for global tax cooperation, it is the flaws and limitations of some of its outcomes that have led many countries that have joined the OECD or umbrella bodies it has created to now support the initiative to create a truly inclusive global body.

2. The Need to Rationalise Existing Arrangements

This streamlining of existing arrangements should focus mainly on a reorganisation of the tax structures that have developed through the OECD and in the United Nations. In recent years the OECD has greatly expanded the range and scope of its work on tax policy and standards, creating a series of organisations claiming to be global. The UNSG's report analyses the lack of inclusivity of these institutions from a procedural perspective. However, consideration of how they developed shows also how the domination of the perspective of the OECD countries has skewed the resulting policies and standards, and made them increasingly dysfunctional. The current process offers an opportunity for a reconsideration and reset of both the organisational basis of the institutions and the approach towards international tax reform.

The UN and the OECD

At its foundation in 1945, the UN was intended to continue the work of the League of Nations in the tax field, but this failed due to both political tensions (North-South and East-West), and a divergence of perspectives on international tax (Teo, 2023). Instead, the OECD established a Committee on Fiscal Affairs (CFA), which began as a modest effort to formulate a tax treaty model suitable for a relatively small group of developed countries. In line with the OECD's aims to facilitate the liberalisation of capital flows, its model convention, first published in 1963, aimed to encourage foreign investment particularly by transnational corporations (TNCs). Since the leading OECD countries were mainly home countries for TNCs, the convention focused on the prevention of 'double taxation' and gave priority of taxing rights to the country of residence, by restricting taxation of income at source, in the country from which they derive (Picciotto, 2021a).

This proved unsuitable for most non-OECD countries, so in 1967 the UN took on the task of developing a model more suitable for wider use, through a Group of Experts, later upgraded to the UN Committee of Experts on International Tax (UNTC). Over a decade of debate produced a more balanced compromise in 1980, but this also helped to legitimise such tax treaties (Ahmed, 2022). The tax treaty network greatly expanded in the 1990s, due largely to the OECD's efforts in promoting the view that tax treaties are needed to encourage investment, while confining discussion of their provisions to technicalities (Latulippe, 2012).

While the UNTC remained narrowly focused, the OECD's work on tax greatly expanded.[2] A significant step was the creation of the Forum on Tax Administration in 2002, at Tax Commissioner level, which now has 53 members and works on a wide range of tax issues through various 'networks', 'communities of interest' and task forces, including several programmes relating to international tax evasion and avoidance. In 2009, prompted by the Group of Seven (G7), it restructured its efforts to improve exchange of information (EoI) for tax purposes by creating the Global Forum on Transparency and EoI, and in 2012 it established a Global Forum on VAT (value added tax). With the Group of Twenty (G20) approval, following the first phase of the Base Erosion and Profit Shifting (BEPS) project in 2016 it formed the Inclusive Framework on BEPS, and finally in 2023 an Inclusive Forum on Carbon Mitigation Approaches. Hence, there are now five putative global organisations formed by and based at the OECD dealing with tax.

At the same time, the OECD sought to expand its global impact by engaging with a wider range of countries. In 2010 it set up the Tax and Development Programme, now under the Global Relations Programme; and in 2015 it partnered with the UN Development Programme to create Tax Inspectors Without Borders. In parallel, it aimed to draw more prominent countries into the OECD orbit. Some of these became members (notably, Mexico, Chile and Colombia) while others remained aspirants, and some important countries (Brazil, China, India, Indonesia and South Africa) are considered 'key partners'.[3] It is significant that all these countries are now supporting the UN process, and the positions they take will clearly have a decisive impact on the outcome. Without their continued support the apparent attempt of the OECD to become a de facto global tax organisation would clearly fail. Equally, they will play a key role in determining whether the new global framework can provide a basis for new approaches to taxation fit for the 21st century.

Membership of the OECD is the opposite of inclusive: candidate countries must go through an evaluation to ensure that they apply key OECD standards. In the tax field the accession process aims to ensure conformity particularly with the OECD's approach to the allocation of TNC income for tax purposes, based on the arm's length principle and the OECD Transfer Pricing Guidelines, as well as the OECD model tax treaty standards that restrict source taxation. This approach has become deeply embedded in the technocratic community of tax experts, largely dominated by the vast army of advisers to TNCs (Picciotto, 2021b). Much of the pressure to conform occurs through confidential negotiations, informal peer pressure and acculturation.[4] There has also been more formal and public scrutiny, notably of Mexico's transfer pricing rules (OECD, 2003; Picciotto, 2018, pp. 38-9), and most recently those of Brazil (OECD and Receita Federal, 2023). In both cases this created pressures for these countries to adopt the complex and subjecti-

2 This began under the leadership of Jeffrey Owens, expanding further under his successor Pascal St-Amans from 2012 (Picciotto *et al.*, 2017, pp. 6-8); the extent of the empire was outlined in three official reports on "OECD Work on Taxation" 2016, 2018 and 2021, though they provide scant details on organisation and funding.

3 Between 2007 and 2021, OECD membership grew to 38, with the addition of eight new Members (Chile, Colombia, Costa Rica, Estonia, Israel, Latvia, Lithuania and Slovenia); since 2022 accession discussions have been held with Argentina, Brazil, Bulgaria, Croatia, Peru and Romania; see "OECD and Enlargement", available here.

4 Aspirant member countries can send observers to the working parties of the CFA where the technical work on standards is done; an expression of views questioning OECD orthodoxy can be reported through high-level channels, resulting in instructions to the delegate to toe the OECD line (personal communication).

ve OECD approach rather than simplified methods more suited to their circumstances. Brazil also signed a tax treaty with the United Kingdom in November 2022, which entails a significant shift in its tax treaty policy towards acceptance of the residence principle. If ratified, the treaty would end its right to tax at source income from fees for technical services, following Colombia, which accepted a similar treaty with the UK in 2017.[5]

Fundamental Flaws of the OECD's Approach

Paradoxically, these attempts to export OECD tax standards took place at the same time that their fundamental flaws were becoming increasingly apparent, even to OECD countries themselves. The OECD's emphasis on residence-based taxation had led to an increasing systematisation of tax avoidance by TNCs, enabling them to create intermediary entities tax-resident in countries with favourable tax regimes, to which high levels of income could be attributed. In parallel, financial liberalisation made it much easier for the wealthy also to exploit the offshore financial secrecy and tax haven system for both tax avoidance and outright evasion.

It was in this period of the export of OECD tax standards that tax avoidance by TNCs exploded. Data show that global corporate tax revenue losses from the shifting of profits to tax havens grew from below 2% in 1990-5 to nearly 10% of global tax revenue collected in 2020 (EUTO, 2023, p. 9).

An initiative led by France and Germany, with a political impetus from the G7 leaders, led to the OECD report on Harmful Tax Competition (OECD, 1998), analysing the problems of both preferential tax regimes and bank and financial secrecy in havens. This brought a change towards strengthening cooperation, particularly on exchange of tax information. However, for a decade it remained on a modest scale, aimed at expanding bilateral exchange of information, mainly on request.

Finally, a major shift occurred, due to political pressures, following the great financial crash of 2008-9 and the ensuing fiscal crises. Needing wider support, the G7 extended political coordination on financial and tax matters to the G20. This gave the work of the OECD's technical experts much stronger political impetus, culminating in the St Petersburg Declaration on Tax of 2013.

The wind of change was especially forceful for tax transparency. In its communiqué of 2009, the G20 proclaimed that "the era of bank secrecy is over", and its 2013 Tax Declaration gave the OECD a mandate to establish a new single global standard for automatic exchange of information by February 2014. This was carried out through the Global Forum, revamped in 2010 with a major revision to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the MAC).[6] The MAC itself is a free-standing multilateral convention, with its own Coordinating Body, but stated to be "under the aegis" of the OECD (article 24.3). It provides the primary legal foundation for the work of the Global Forum, which has no formal legal institutional basis.[7]

The G20's Declaration in 2013 also gave political support to a more discreet project launched earlier by the OECD's CFA, to tackle what was described obscurely as 'base erosion and profit shifting', though the acronym BEPS soon became ubiquitous. The G20 Declaration of 2013 gave the project the wide mandate to reform international tax rules to ensure that multinational enterprises (MNEs) could be taxed "where economic activities occur, and value is created". In practice, the BEPS Action Plan mainly cobbled together technical issues already on the CFA's work agenda. The key exception was the call from the G20 for greater corporate transparency, "including through a common template for companies to report to tax administrations on their worldwide allocation of profits and tax". This reflected the strong political pressures from civil society for country-by-country reporting (CbCR) by TNCs (Tax Justice Network, 2008).

The CbCR concept ran counter to the OECD's approach of focusing only on individual members of each corporate group and treating transactions between them as if they were between independent entities acting at 'arm's length'. The initial draft proposal from the OECD experts accordingly provided only for a standard format for documenting transfer pricing, but civil society pressures contributed to the eventual addition of a template for CbCRs (BMG, 2014). This has been a game-changer: by providing tax administrations for the first time with an overview of TNCs as a whole, it refocussed their attention to the allocation of the global profits of TNCs. Regrettably, OECD countries have resisted pressures to make CbCRs public, so they have remained restricted to tax administrations, mainly of developed countries.

Although the outcomes of the first phase of the BEPS project in 2015 mainly patched up the existing fundamentally flawed international tax rules, work continued on the central issue of 'addressing the tax challenges of the digitalised economy'. The G20 opened up participation to all states through the Inclusive Framework on BEPS, although this was conditional on their acceptance of the mi-

5 Even a single treaty can have wide effects, as TNCs commonly route their transactions through affiliates in conduit countries or 'investment hubs', to take advantage of favourable treaty provisions, in ways that can be difficult to prevent through provisions against treaty abuse. Also, a beneficial provision can be generalised due to 'most-favoured-nation' (MFN) clauses in other treaties; for example, Colombia's concession to the UK on fees for technical services had to be extended to Canada, Czechia, Portugal and Mexico, due to MFN clauses with them (see the announcement here).

6 This was a dramatic turnaround for OECD countries, many of which for most of the 20th century had staunchly defended financial secrecy and rejected any obligation for countries to cooperate to prevent tax evasion or avoidance. Provisions for administrative cooperation were part of the League of Nations international tax negotiations in the 1920s, but at the insistence of Switzerland, backed by the UK, they were split off into a separate model convention on mutual assistance (Jogarajan, 2018, pp. 30-31), which was little used. The OECD model tax convention focused on the prevention of double taxation and included only a modest provision for exchange of information. This was interpreted restrictively by many countries: notably, the UK until the end of the 20th century refused requests for tax assistance unless there was a UK tax interest. The first multilateral convention on mutual administrative assistance in tax matters was negotiated through the Council of Europe, in conjunction with the OECD, in 1988. It was strenuously opposed, by both the notorious secrecy jurisdictions such as Switzerland and the business lobby, so that several key states (Australia, Germany and the UK) immediately refused to sign, and it was ratified by only a handful of states. The United States did ratify, though excluding its provisions on assistance in collection; it has not yet ratified the amended version of 2010; the text is here, and a table of adherents to both versions is available here.

7 The full name is the Global Forum on Transparency and Exchange of Information (GFTEoI); it is different from the OECD's seventeen other global forums, since it has its own membership and rules, see here. The GFTEoI claims to have 171 members, but this includes non-state jurisdictions; while 147 sovereign states have joined the MAC, although six of these (including the US) have not adopted the amended version of 2010.

nimum commitments agreed in phase 1. There were also enormous obstacles to their effective participation, particularly lack of capacity to grapple with the increasingly complex issues presented in highly technical documents.

An Opening for a Paradigm Shift

Despite this, the most significant contribution in the second phase of the BEPS project came from the Group of Twenty-four (G24) developing countries (G24, 2019). This directly addressed the two central challenges to existing rules that had been identified as resulting from digitalisation (OECD, 2018), and proposed a new taxable nexus based on 'significant economic presence', combined with allocation of profits using a formulaic approach. This clearly signalled the need for a paradigm shift in the taxation of TNCs, towards treating them in accordance with the economic reality that they operate as unitary enterprises, and apportioning their global profits for tax purposes on the basis of factors reflecting their real activities in each country. This was clearly in line with the G20 mandate of 2013 that taxing rights should be aligned with the substance of economic activities.

This approach has now been accepted in principle, together with the adoption of detailed technical standards that would enable its adoption, in the Two Pillar Proposals that emerged from the Inclusive Framework (BMG 2023). In practice, however, Pillar One would create an additional set of rules, applicable only to around 100 of the biggest and most profitable TNCs, allocating only a small share of their profits for taxation, based on sales. It would retain the existing defective arm's length principle for all other purposes, so greatly adding to the complexity of the system. Furthermore, its implementation depends on a multilateral convention, the final text of which is still not agreed at this time of writing, and would require ratification by a significant number of states, including the United States, which would be unprecedented.

This shows that the BEPS process has reached its limits. Its diagnosis of the tax implications of digitalisation clearly demonstrated the need to shift to a new paradigm for taxing TNCs, with a tax nexus based on significant economic presence, and an apportionment of global profits. Proposals for the adoption of this approach were advanced particularly by developing countries. Yet the resulting package of proposals would largely retain the existing rules, greatly increase the complexity of the system, and remain unfair for developing countries that are mainly capital-importing.

The initiative to create a new global tax framework launched in 2023, and its wide support among non-OECD countries seems clearly linked with their frustration and dissatisfaction at these outcomes. Many engaged in good faith with the process, on what they were assured would be an equal footing, while others stood aside due to concern about the nature of the forum and their limitations of capacity. Although the initiative for a new global framework was initially led by African countries, it has been supported by many others, including non-OECD G20 countries, whose views are now likely to be decisive. As the OECD-led process is now coming to the end of its road, the time is right for a fresh initiative. This would not start from zero, but build on what has been achieved, while also learning from mistakes made.

B. The Content of a Framework Convention

The UNSG report suggests that the Framework Convention itself should include the objectives, key principles, and governance arrangements for tax cooperation, while detailed Protocols governing specific issues could be adopted, either as part of the process or through subsequent negotiations in a plenary body established by the Framework.

The balance between inclusivity and effectiveness can be dealt with differently in the Framework Convention itself from any Protocols. Inclusivity is a primary aim for the overall framework, since "efforts in international tax cooperation should be universal in approach and scope" (UNGA, 2023a). More detailed regimes to govern specific issues should prioritise effectiveness. While for some such regimes a minimum of effectiveness may need the participation of a significant number of states, others can operate on a bottom-up basis, creating cooperation between willing states that can gather momentum and spread more widely. Regimes can also be established through agreements taking a wide variety of forms, ranging from guidelines to formal international treaties, and need not necessarily be designated as Protocols.

The desire for maximum inclusivity for the Framework Convention should not result in such a dilution of the obligations it contains as to make them meaningless. If we again consider the example of climate change, the UNFCCC does much more than merely creating an institutional framework (Sands, 1992). It includes a clear formulation of its objectives as well as principles outlining the approach and methods to be adopted for achieving them, although they are not spelled out in detail. It is clearly essential that participating states make some minimum commitments to principles for tax cooperation if the body is to be effective.

This will no doubt mean that there will be opposition in many countries from those who reject the very notion of tax cooperation and favour unbridled tax competition. This could prevent participation by even some important states. The US in particular is notorious for its difficulties in joining multilateral organisations, partly due to high constitutional hurdles for the ratification of treaties.[8] In the tax field,

8 The US has failed to join many conventions which had wide support both internationally and within the US, notably the UN Convention on the Law of the Sea (168 members), the Convention on Biological Diversity (196), the Additional Protocols to the Geneva Convention (for the humanitarian laws of war, 174, 169), the Arms Trade Treaty (110), the Comprehensive Nuclear Test-Ban Treaty (170), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 189), the Mine Ban Treaty (164), the Rome Statute of the International Criminal Court (123), the Stockholm Convention on Persistent Organic Pollutants (185), and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 171): see Wahal, 2022. The US constitution sets the high requirement of obtaining the advice and consent of the Senate by two-thirds majority for the ratification of treaties, but in practice this procedure has not been applied to all international agreements. The US joined the UNFCCC by ratification with the advice and consent of the Senate; however, it signed but did not ratify the Kyoto Protocol, because President Bush refused to send it to the Senate. The Paris Agreement of 2015 was not called a Protocol and was designed to be approved by the US under presidential powers (although this was controversial); this enabled the US to join under Obama in 2016, but it left in 2020 under Trump, rejoining in 2021 under Biden. Trade agreements have generally been approved through Acts of Congress by simple majority, which enabled the US to join the World Trade Organization in 1994; but it has forced suspension of the WTO's Appellate Body since 2020 by refusing to cooperate with appointments. It has been argued

the US has not ratified the 2010 Protocol of the Mutual Assistance Convention (MAC), although it ratified the original convention of 1988 as early as 1991, enabling it to join the OECD's Global Forum on Transparency and Exchange of Information in Tax Matters. However, it has not joined the multilateral Competent Authority Agreements developed under the MAC, either for the automatic exchange of financial account information or for country-by-country reports, preferring to operate through bilateral agreements. Similarly, it did not ratify the Multilateral Instrument for the Implementation of Treaty-Related BEPS measures (MLI), preferring to amend its treaties bilaterally. In all these cases, diplomatic language has been used to veil the failure of the US to comply fully with agreed global tax standards.

The deep US ambivalence to multilateralism poses problems for many global governance arrangements, not only tax cooperation; some kind of accommodation can no doubt be found, but compromise should not be allowed to damage the integrity of the framework. Other G7 countries, as well as European Union (EU) members, are unlikely to maintain a unified opposition, particularly as the initiative gathers momentum and receives increasing support, including from a significant number of OECD members and 'partners'. Attention should therefore shift towards designing effective provisions.

1. Objectives and Principles

The UNSG report stresses that foundational to international tax cooperation should be the principle of sovereign equality of all Member States, enshrined in Article 2(1) of the UN Charter. This means that states should pledge to both *respect* and *support* each other's national sovereignty in tax matters. Effective sovereignty is undermined if states pursue beggar-thy-neighbour policies that undermine the ability or power of other states to formulate effective tax systems. An important achievement in recent years is the consensus that has emerged of the need to end the harmful practices of offering tax preferences and secrecy regimes to TNCs and the wealthy that enable them to avoid other countries' taxes. Thus, a central aim should be "to support countries in exercising their taxing rights, mobilizing resources to invest in the Sustainable Development Goals and climate action and promoting fiscal policies that are aligned with the Sustainable Development Goals" (UNSG, 2023, para. 11).

The overall objectives of the FCITC could therefore be formulated in broad and general terms, borrowing from the language of the Agenda for Sustainable Development (UNGA, 2015):

to promote international cooperation and coordination in tax matters and support countries in developing and implementing tax systems that promote human dignity, equality and prosperity; protect the planet from degradation including through sustainable consumption and production; foster peaceful, just and inclusive societies, focused in particular on the needs of the poorest and most vulnerable, and with the participation of all countries, all stakeholders and all people.

that there is a good case in principle for using this procedure for tax treaties (Kysar, 2013), but this has not been the practice, so it seems politically and legally impossible. However, a framework convention on tax would be very different from a treaty directly governing tax, so US adherence could perhaps be approved by only a simple majority of the Congress, if that could be secured.

The methods for achieving these general objectives should be formulated in the convention's Principles. These should spell out that while all countries have the basic right to determine their own tax systems, in an interdependent world they must also refrain from undermining the tax systems of others, through cooperation and coordination. This does not require harmonisation of tax systems, since each country's circumstances are different, and they can remain free to decide the details of their own taxes. In fact, mutual support and coordination are essential for the effective exercise of a country's freedom and right to tax.

The principles should be based on concepts that have developed in practice, and can be seen to have wide support. However, it is important to formulate them carefully, to avoid as far as possible limitations that experience has shown can make them ineffective. This is particularly important because the recent much wider and deeper political debates around tax have significantly changed perceptions of even basic principles. The formulation of the principles should therefore reflect this improved understanding of the necessary foundations of effective cooperation in tax matters.

Mutual Assistance

A primary principle is for countries to provide mutual assistance in both the assessment and collection of taxes. It is important to now spell out this principle formally, since for much of the 20th century it remained contentious. Although the report of government experts proposing tax conventions to the League of Nations in 1928 included provisions for mutual assistance, these were drafted very cautiously to avoid the appearance of 'an organised system of fiscal inquisition' (League of Nations, 1928, p. 26). Hence, they were founded on the principle of reciprocity, but formulated and interpreted restrictively, so that countries would only be obliged to assist others to the extent permitted in their domestic laws. This allowed countries to assert that they had no obligation to assist others in the collection of their taxes. Although broader provisions for mutual administrative assistance were included in the MAC in 1988, for twenty years it was ratified by only a half-dozen states.

Since the 1990s there has been a progressive transformation of perspective, so that a much higher standard of mutual assistance has now been established. This includes the obligation on countries to use their powers to assist others even if they have no domestic tax interest.[9] It is now also accepted that this includes more specific obligations aimed at preventing illicit financial flows and the evasion and avoidance of taxes, both to obtain and to supply information,[10] and to comply with international standards of transparency in the ownership of assets. This is essential to underpin the systems that have been established for the automatic exchange of financial information, and for country-by-country reports. The statement of a clear obligation for countries to cooperate and assist each other in all tax matters should be basic to the FCITC.

These assistance obligations should be accompanied by a recognition of both the rights and duties of taxpayers.

9 This was made clear by the addition of paragraph 4 to article 26 of the OECD model tax convention in 2005, also inserted in the UN model in 2011.
10 This phrase was inserted in 2011 in the UN model convention, article 26.1.

Taxation and Human Rights

The protection of human rights is widely accepted, but the formulation of those rights is often contested. This can be clearly seen in relation to tax, where there are two broad perspectives. One emphasises the protection of the individual rights of taxpayers in relation to the state's imposition and collection of taxes (e.g. Kokott *et al.*, 2021), while the other starts from the importance of taxation to enable states to "respect, protect and fulfil" their human rights obligations, including combating discrimination and inequality, defeating poverty and ensuring adequate public services (e.g. Sepúlveda Carmona, 2014). These opposing perspectives can come into sharp conflict: notably the concept of the right to private property may be used to block tax policy measures such as taxation of wealth or of excess corporate profits or gains, and strong protections of the right to privacy could render ineffective transparency and exchange of information standards essential for preventing tax evasion and avoidance. The formulation of any general principle that could command wide support needs to reconcile these perspectives.

At the minimum, any statement of taxpayer rights should also refer to their duties, although they are not always linked in human rights discourses. This should include the obligation to cooperate in legitimate tax administration processes. An explicit duty to pay tax has been included in many national constitutions, as well as in the Declaration of Human Rights adopted by the Organization of American States in 1948; and some have argued that it should be considered the implicit counterpart of statements of rights.[11] A one-sided emphasis on taxpayer rights can be used to impede legitimate taxation practices.

For example, it is generally considered important for states to maintain the confidentiality of information on specific taxpayers, including both individuals (to protect privacy) as well as corporations and other legal persons (to protect commercial confidentiality). However, this should be counterbalanced by a duty on taxpayers to supply information relevant to tax assessment and collection.

While countries participating in international arrangements for exchange of information should comply with obligations to respect confidentiality, the safeguarding standards should be agreed in a transparent and inclusive process. Allegations regarding the inability of some states to apply adequate protections have too often been used to restrict access to information especially by weaker states. Confidentiality protection standards should not be such as to defeat the objectives of supplying relevant information to another country. For example, in some states (such as Germany) taxpayer protection has been seen as requiring notification of the taxpayer before information is supplied, which obviously enables illicit funds to be moved out of reach.

The duty for all citizens to cooperate in tax administration should apply most strictly to tax advisers, many of whom have acted as enablers of tax evasion and avoidance, for example by systematically devising and marketing avoidance schemes. Many have abused professional confidentiality rules to cloak such arrangements in secrecy. Strict regulation of enablers also protects taxpayers, who are often the main victims of such schemes. An important task for the FCITC should be to establish and supervise a system of public registers of the beneficial ownership of assets, which is essential to prevent not only tax evasion and avoidance, but also money-laundering and illicit financial flows. The entrenchment in the framework convention of an individual right such as privacy could be used to block this important public policy objective that is essential to the broader achievement of human rights for all.

11 See Barrett, 2023, who found 87 national constitutions that include a duty to pay tax.

Transparency and Accountability

At the same time, there should be principles for transparency and publication of information and data to ensure the legitimacy of taxation through effective public participation. This should apply widely to the whole process of budgeting, including the formulation, assessment and collection of taxes, as well as processes for controlling expenditure.

Such principles have been formulated by the Global Initiative for Fiscal Transparency (GIFT, 2012; GIFT, 2022), and endorsed by the UN General Assembly (UNGA, 2013). These principles could be distilled into a single broad principle for transparency and accountability in all aspects of the governance of fiscal policy.

The Single Tax Principle and Unitary Taxation of TNCs

International tax cooperation should ensure that individuals and businesses are taxed on their income or profits *at least once* and *only once*. This was termed the 'single tax principle' by Reuven Avi-Yonah (Avi-Yonah, 2007). He and others have pointed out that this entails not only the prevention of double taxation, which has been the overriding objective of international tax rules especially from the OECD perspective, but also the prevention of double non-taxation, which has emerged more clearly only with the BEPS project and the involvement of a wider range of countries (Mason, 2020).

Avi-Yonah linked this with the 'benefits' principle, which specifies that 'active' business income should be taxed primarily in the country from which it derives (the source), while 'passive' investment income should be taxed primarily in the country of residence of the investor. He argues that these principles should be uncontroversial, since they date back to the report of the four Economists to the League of Nations, and are embodied in all tax treaties.[12]

The single tax principle has excited much academic debate, particularly in relation to its application to TNCs (see e.g. Wheeler, 2018). Critics point out how the prevention of 'double taxation' has always been elusive in practice (Schoueri and Galdino, 2018). What specialists in international tax and tax treaties generally overlook is that the single tax principle refers to the income of *the same person or entity*. The reason that the single tax principle has proved unattainable in relation to TNCs is that they have not been taxed

12 Avi-Yonah goes so far as to claim that these principles are so generally accepted that they can be regarded as customary international law, which is harder to justify. However, wide acceptance provides a good basis for including these principles in a multilateral convention aiming at universal inclusiveness, which in turn can solidify the view that they express customary international law, as occurred in relation to the law of the sea.

as single unitary enterprises on their global profits, in accordance with the economic reality. The various national tax authorities have focused on the particular subsidiaries or branches resident or doing business in their jurisdiction. However, to counteract profit-shifting they had the power to adjust the accounts of related entities within the same corporate group, which was recognised in tax treaties. TNC complaints generally concern 'economic' double taxation, due to inconsistencies in the use of these powers by different tax authorities in relation to *different entities* within the corporate group. Paradoxically, the continued efforts of the OECD to refine methodologies for these adjustments ('transfer pricing' rules) have only exacerbated these conflicts, because they have increasingly entrenched the fundamentally flawed 'arm's length' principle. TNC tax advisers have continued to champion this approach, which provokes disputes and conflicts rather than certainty, because of the opportunities it provides for planning tax avoidance.

There is now a strong case that both elements of the single tax principle should be regarded as foundational to international tax. This means that TNCs should be taxed as unitary enterprises, by allocating their business income for taxation among countries using factors that reflect their real activities in each country. This is the only effective way to ensure that the income of these powerful global entities is taxed once and only once, and that tax on active business income is paid where that business takes place. This principle has already been suggested in the G20's mandate in 2013 for the BEPS project that TNCs should be taxed "where economic activities occur", which was echoed in the Secretary-General's call for an international tax system that can "ensure that taxes are paid where economic activity occurs" (UNSG, 2023, para. 12). TNCs themselves should welcome unitary taxation, as the only effective way to ensure fairness, certainty and predictability, as well as greatly reducing their burdens of compliance. There would certainly be resistance from the legions of tax advisers who have invested so much in mastering the complexities of 'transfer pricing', but they should have little difficulty in finding better avenues for their expertise.

In fact, it can be seen that the long discussions and negotiations in the BEPS project have resulted in the acceptance of the principle of unitary taxation, as well as the formulation of the detailed technical standards needed to apply it, as pointed out in section A.2 above. These are: a new taxable nexus test based on sales in a country; a standard for determining the consolidated profits of a corporate group for tax purposes; and detailed rules defining and quantifying the factors reflecting real activities in a country: sales revenue by source, employee numbers and remuneration costs, and the value of physical assets. Indeed, the transition to unitary taxation can be said to be already under way (Picciotto and Kadet, 2022). What is now needed is a political impetus to maintain the momentum towards this paradigm shift, and ensure the effective and coordinated implementation of these new standards worldwide.

2. Governance Structures

The creation of a global tax framework would itself be an enormous step towards strengthening tax cooperation and coordination, simply by enabling the organisation of regular meetings under the auspices of a public international organisation designed to be inclusive. The conceptualisation and commonly received understandings of international tax rules have historically been shaped in arenas which have been non-inclusive in a variety of ways.

Chief among these has been technicisation, as specialists have treated tax as apolitical while shrouding the issues in highly obscure technical jargon. This has detached such technical work from public scrutiny and political accountability, as public debates on tax have been generally poorly informed, while tax policy formulation becomes opaque. The dominant participants, especially in the shaping of business and international tax, have been the legions of corporate tax advisers, whose specialist knowledge means that they are at the centre of the formulation, interpretation and application of tax rules. The significant reconceptualization of approaches to international tax in recent years owes much to the more active involvement of a wider range of civil society movements, driven by shifts in public opinion towards tax, especially since the great financial crash of 2008.

For these reasons, the governance structures of the FCITC should be strongly based on transparency and public participation. While tax inevitably entails a degree of specialist knowledge, its legitimacy relies on political support and accountability. The creation of a global body will give tax the much higher public visibility it deserves, and requires its deliberations to be organised so as to demystify and de-technicise the issues debated as much as possible, so that the policies involved can be properly debated.

This also means facilitating fruitful interactions between different specialisms. Tax policy involves a blend of disciplinary perspectives, including economics, politics, law, and accounting. A major defect of present arrangements is that the formulation of international tax standards, notably the model conventions, is discussed purely in technical legal terms, largely in isolation from any evidence or analysis of economic impact. Economic analyses, on the other hand, produce quantitative prognostications that can be overly persuasive, despite being often founded on imperfect understanding and uncertainty. There is a strong case therefore for ensuring that the new global framework should bring together a wide range of expert analysis of public finance and taxation, particularly from the perspective of sustainable development. It could also draw on and coordinate more closely with the extensive research on tax and related issues of bodies within the UN system, notably the United Nations Trade and Development (UNCTAD,) the United Nations Development Programme (UNDP), the International Monetary Fund (IMF) and the World Bank Group, which until now have been only loosely linked to the OECD through the Platform for Collaboration on Tax, as well as the UN Office on Drugs and Crime in relation to illicit financial flows.

The apex body of a framework convention is usually a Conference of Parties (COP), the meetings of which generally involve a much wider gathering of specialists, stakeholders and civil society. The FCITC should also establish some key subsidiary bodies, as well as giving the COP the power to create new ones as needed. An important subsidiary body should be a Council on Tax Administration, which could bring together revenue authorities around the world and coordinate work on a range of issues. This could pick up from the OECD's Forum on Tax Administration, while giving this work a global perspective. This Council could in turn have its own secondary subsidiary bodies, in particular one to focus on tax treaty issues, which has historically been the main work of the UN Committee of Tax Experts, as well as others dealing with primarily technical tax administration issues, such as managing the exchange of information.

Other primary subsidiary bodies should be set up to focus on key policy areas, particularly wealth and property taxation, business and corporate taxation, indirect taxes, and tax and the environment. These are all issues for which international cooperation and coordination is essential to ensure that national taxation powers can be effective, due to what economists describe as 'spillovers'. The putatively 'global' bodies that have been established by the OECD fall short of the standards needed for inclusive and effective tax cooperation, as pointed out in the Secretary-General's report. The OECD could certainly continue to coordinate work for its own members on topics such as VAT and carbon taxes, but the responsibility for formulating truly global approaches to these issues would be taken over by the FCITC's primary subsidiary bodies. This would resolve the issue of organisational duplication.

As regards the BEPS project and the Inclusive Framework, the OECD secretariat could continue to deal with the legacy issues of monitoring and administering implementation of the measures agreed in both the first and second phases, for those states that have adopted them. However, the creation of the FCITC would enable the development of a fresh approach to international corporate taxation, which could build on while going beyond what could be achieved through the OECD-led process.

3. Protocols and Other Subsidiary Instruments

Experience shows that it is both unnecessary and undesirable for states to restrict their sovereign powers over taxation through treaties governing substantive tax regimes. Treaties create a straitjacket for national governments, while at the same time offering loopholes that can be exploited by internationally mobile capital, due to the interactions of different treaties and national laws, and the scope for interpretation of legal language (Picciotto, 2021b). As many commentators have shown, it is a myth that treaties are necessary to prevent 'double taxation', since national laws generally provide for tax credits and exemptions in respect of foreign income, regardless of treaties. Leading academic analysts agree that arrangements for administrative coordination and cooperation are much more important for dealing with the frictions created by the interactions of tax systems (Avery Jones, 1999; Dagan, 2000; Brooks and Krever, 2015; Rosenbloom, 2024). The model tax conventions have been largely inadequate in this respect, as they included only provisions for consultations between 'competent authorities' to resolve treaty interpretation issues, and minimal provisions for exchange of information, although these have been strengthened in the past 20 years.

This was the reason for the negotiation of the MAC, which is now ratified by 147 states. The MAC is a free-standing multilateral convention, with its own Coordinating Body, which operates "under the aegis of the OECD" and can "act as a forum for the study of new methods and procedures to increase international co-operation in tax matters" (article 24.3). There seems to be no reason why the Coordinating Body should not decide to bring the MAC under the umbrella of an FCITC, as a Protocol, bring its administration under the Secretariat to be established under the FCITC. This would in effect mean the merger into the FCITC of the Global Forum, which is organisationally independent of the OECD. Once established under a truly global framework, the provisions for cooperation in the MAC should be further strengthened either by its revision or by a supplementary Protocol.

A second instrument that should be considered for addition as a Protocol is the Fast Track Instrument already under development by the UN Tax Committee (UNTC, 2024). Once the text is finalised by the Committee, it would need approval by the UN Economic and Social Council (ECOSOC) to become a UN multilateral tax treaty. Its aim is to streamline the adoption into existing tax treaties of key provisions of the UN model. These would mainly be provisions protecting source taxation, especially those adopted in the recent years by the Committee: taxation of capital gains relating to natural resources and offshore indirect transfers; fees for technical services; income from automated digital services; the Subject to Tax Rule (a broader alternative to the one in Pillar Two); capital gains from immoveable property; pension funds and arbitration. These provisions would strengthen the protection of the right to tax at source profits derived from activities in the country where they are performed, particularly from services. This would respond to the request in the General Assembly resolution that priority should be given in the development of protocols to the taxation of income from cross-border services (UNGA 2023a, para. 6e). The FTI has the potential to transform the UN model into a de facto global standard, which would be boosted by its inclusion as a Protocol.

Aside from these two, I suggest that it would not be appropriate to adopt any other existing instruments as either protocols or other agreements under the framework. In particular, the model 'double taxation' conventions should be regarded as a legacy of the past that needs rethinking (Ahmed, 2022). Attempting to negotiate anything new would be too time-consuming, and delay agreement on the framework convention itself. Once established, the FCITC should prioritise work on new approaches to international tax.

Conclusions

The creation of a global framework organisation for tax should be seen in a longer sweep of historical attempts to strengthen international cooperation and coordination in an area that is central to human well-being. Taxation is at the intersection between the economic activity essential to satisfying human needs while ensuring environmental sustainability and the political decision-making required for collective provision of public goods, including stable and effective fiscal systems, reliable energy, water and sanitation, healthcare, education, arts and culture, and infrastructure. Taxation is both the lifeblood of governments and a key form of accountability to their citizens, but both are undermined without effective international cooperation and coordination.

The need for international tax cooperation has been understood for over a century, yet the forms it has taken up to now have been limited and fundamentally flawed. They have enabled and even encouraged tax evasion and avoidance by the super-rich and the powerful large corporations, damaging the legitimacy of taxation, weakening the capacity of all states, and exacerbating inequalities both within and between states. The recent period has been one of major crises: a global financial crash, worldwide evidence of oncoming environmental catastrophes, a viral pandemic revealing the weaknesses and inequalities of healthcare around the world.

It is in response to these existential challenges that widespread political pressures have created this unprecedented and unlikely impetus for global cooperation, even in a period of heightened geopolitical conflicts. The challenges facing the current negotiations for an FCITC therefore cannot be underestimated. They also offer an opportunity for politicians, civil society, business leaders, and tax specialists to work together responsibly and constructively to create an inclusive and effective framework for this crucial sphere of global governance.

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