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United Nations: Will it Take the Road ‘Less Traveled’ in International Taxation?

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We are amid what promises to be a significant moment in international tax law. Recently, an **ad hoc committee of experts held extensive meetings in New York** to draft the terms of reference for future work on international tax cooperation. The work responds to the UN General Assembly Resolution 78/230 passed in December 2023 which steers the path for UN to work towards a fully inclusive and effective international tax cooperation. The UN General Assembly Resolution was prompted by a resolution tabled by the representative of Nigeria on behalf of the African Group of countries.

While this sets the context for the work underway, one may wonder why any of this is significant. A brief background is useful. International tax law primarily

consists of bilateral tax treaties which are based on the model developed by the Organisation for Economic Cooperation and Development (OECD). OECD is a club of developed countries. Hence, it is no surprise that the model allocates taxing rights in favour of developed countries. Non-OECD member countries and civil society organizations have been calling out the inequities. This led to OECD spearheading a wave of reforms, including the pillar one and pillar two proposals. OECD's pillar one proposes new allocation rules that would allow market countries (where the consumer is located) a limited taxing right with respect to business income of multinational enterprises with a revenue greater than EUR 20 billion. Hitherto, market countries did not have any such right. Pillar two involves a set of rules implementing a global minimum corporate tax for global multinational enterprise groups with a turnover exceeding EUR 750 million. However, the proposed solutions still tend to favour developed countries.

One must add though that this is not the first time the UN is working on international taxation. The UN had developed its own treaty model meant to be a template for a developing country entering into a treaty with a developed country. However, it was only an incremental improvement over the earlier OECD model. Over the years, a UN Tax Committee set up expert subcommittees to examine several issues such as the tax consequences of a digitalized economy. Recommendations from the the subcommittees have been incorporated in the UN treaty model.

So, what is different this time around? This ad hoc committee is intergovernmental and led by the UN Member States. The work of the ad hoc committee is expected to translate into a UN Framework Convention on International Tax Cooperation, a first of its kind in international tax law. Given that the demands of any one country or even a few countries can only do so much, this mandate of the UN holds the promise of giving a larger voice to the non-OECD member countries.

Substantive Elements: What Will the UN Work On?

The meetings in New York reveal the complicated task at hand on choosing the agenda points. The USA recommends that the UN must stick to its own expertise—advising countries on domestic resource mobilization and capacity building. Some countries argue that domestic resource mobilization includes questioning whether the international taxation regime is fair.

Austria has submitted that the UN's work must align with sustainable development goals (SDGs). Does this mean imposing taxes that further (or even fund) particular SDGs? As climate action is one of the goals, does this contemplate environmental taxation? France explicitly hints at this very idea by citing that the UN has earned legitimacy on the topic of environmental taxation given the prior work of international regulatory bodies (such as the International Maritime Organization and the International Civil Aviation Organization) under its aegis which would allow the UN to leverage existing synergies. Not so subtly referring thus to the lack of the UN's legitimacy on other matters.

Some Member States choose to bring focus to issues of relevance to them. The Bahamas argues for safeguarding the privacy of taxpayers while Spain asks for the exact opposite (intensifying efforts on intergovernmental exchange of information). Jamaica and the Bahamas would like to include an agenda item on the European Union's blacklist of non-cooperative tax jurisdictions.

The input statement of the European Union (EU) points to the elephant in the room. The EU cautions that the UN must not duplicate the OECD's work. In no uncertain terms, the EU indicates that the UN must avoid '*inconsistent and competing lines of work*'. This is diametrically opposite to Kenya's submission that OECD's international policies must be reviewed by the UN.

Confrontation or Collaboration? Consolidation or Fragmentation?

Given this background, the UN may choose to confront *or* collaborate.

The former may threaten the very consensus attempted to be built and thus may be thought to be the less travelled path. If the UN confronts the OECD by including an item on which both have already worked, there may be a range of outcomes.

To explain this better, an example involving the digital economy is taken. Say, company A incorporated in country A sets up an online search engine. The engine is used by user B in country B. User B pays subscription fees to company A. As per the UN treaty model, country B is allowed to tax the payment for automated digital services on a gross basis. This is unlike the OECD's pillar one proposal that allocates a limited taxing right to market jurisdictions such as country B only in respect of companies that earn a global turnover over EUR 20 billion. Even if the threshold is met, country B can only

tax a part of any profits in excess of 10 percent of revenue (termed as residual or non-routine profits) earned by company A.

Given the divergent approaches, if the OECD and the UN go head-on, there may either be consolidation (elevating prior UN subcommittee expert recommendations to one backed by the intergovernmental body) *or* fragmentation (if earlier recommendations do not hold water because of the involvement and vote of the global north now). Hence, an equally important question is whether the UN should duplicate its own past work.

Instead, if the UN wishes to collaborate, it may cede ground to the OECD. The UN may pick completely different topics that have hitherto not been on the OECD agenda or only work on the carveouts within pillar one. However, such a stance would mean that the OECD would continue to reap its first-mover advantage entrenching its hegemony. Professor *Dagan* of Oxford University has called this the lock-in effect—a phenomenon wherein the uptake of a subsequent standard may be prevented even if superior, merely because an earlier standard is so deeply embedded in the system.

The Road Ahead

The UN thus finds itself at a critical crossroads. The dilemma of the UN reminds me of the famous lines from Robert Frost's *The Road Not Taken*—'Two roads diverged in a wood, and I—I took the one less traveled by, And that has made all the difference'. Only time will tell if the UN will end up taking the path less travelled and if it was worthwhile, at the end of it all.

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