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Rethinking Taxing Rights

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Abstract: *the debate around the allocation of taxing rights between developed and developing jurisdictions has been stuck in the same place for the past 100 years. Pillar 1 of the OECD/G20 IF has the merit of reopening this debate, but the compromise reached so far may turn out not to be acceptable to all stakeholders. This article reviews the consequences of failing to reach an agreement and underscores the relevance of pursuing a timely alternative under the novel prospect of an UN Framework Convention.*

1. Introduction

International tax is currently undergoing a process of deep change. Modern business models made the current structures obsolete to allocate taxing rights. In particular, physical presence is no longer a reliable proxy for integration into a country's economy. Recognizing the need for updating the current rules, the OECD/G20 Inclusive Framework (IF) on Base Erosion and Profit Shifting (BEPS) reached a momentous political agreement on a "Two Pillar Solution to the challenges of the digital economy".[3]

While both pillars represent important changes to the international tax landscape, Amount A of Pillar 1 (or in the present article simply Pillar 1)[4] would be the one designed to contemplate the demands of source (mostly developing) jurisdictions. Indeed, the second pillar involves a Global Minimum Tax that would reduce the incentive for taxpayers to engage in BEPS (including by using low tax jurisdictions). In turn, the first pillar would reopen the debate around taxing rights, re-allocating a portion of the income of very large and profitable MNEs to the market jurisdiction. Nevertheless, the reallocation proposed under Pillar 1 is only partial, as it is meant to overlay the current system which uses functions, assets and risks (FAR) to determine where value is created (ultimately privileging the supply over demand factors).

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[3] See OECD/G20 Inclusive Framework on BEPS, *'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy'* (2021). Available at <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> (accessed June 26, 2024).

[4] Pillar 1 also includes an Amount B aimed at simplifying current transfer pricing rules. This will not be further discussed in this contribution.

The implementation of this political agreement has been less than straightforward. Developing countries feel that the process did not promote their effective participation, so that the outcomes do not seem suitable to address their needs. This is particularly visible in the high complexity of both Pillars, which challenges the capacity constraints of developing countries; the revenue thresholds used to scope-in taxpayers, which may be regarded as too high (i.e. too narrow); and the continuous delays and loss of political support for Pillar 1.

This dissatisfaction of developing countries sparked discussions at the United Nations (UN) around inclusive and effective tax cooperation. The current plan, as approved by the General Assembly, is to develop a Framework Convention on international tax cooperation. The exact scope of the work is currently being designed.

This may be a once in a generation chance to reform the international tax framework, including the sensitive topic of allocation of taxing rights. While the UN work should avoid duplication of what has already been achieved in other fora, the potential failure of Pillar 1 could lead to an entrenchment of unilateral solutions that are harmful to globalization and economic growth (in particular Digital Service Taxes, DSTs, typically not creditable in the residence State). Thus, an alternative and more broadly supported solution at the UN could be important to achieve a consensus solution that contemplates also the voices of developing countries.

In this article, we revisit the position of developing countries around the allocation of taxing rights and discuss how the digitalization of the economy shifted the goalposts to their disadvantage. We further discuss the solution proposed by the IF and what is at stake as the proposal reaches its final stages. Finally, we review the current initiative of the UN and indicate the importance it may have for the future stability of international tax.

2. Developing countries and the allocation of taxing rights

When boiled down to the core, international taxation is about determining in which jurisdiction(s) a certain item of income should be taxed: the jurisdiction where the taxpayer is resident (the residence State), or the jurisdiction that originates the income (the source State). In principle, both types of claims have traditionally been supported with convincing (legal and economic) arguments, but their concomitant exercise could lead to double or even multiple taxation (e.g. in case multiple residences and/or multiple sources can be claimed). The determination of the source or origin of income, for instance, can be quite controversial: beyond the traditional binomial source of production vs. source of payment debate, market jurisdictions claim that the former may not be accurately defined taking into consideration the supply side (functions, assets and risks), since the demand side (market) plays a role on value creation. Accordingly, the very same product/service may reach different prices (valuation) depending on the market it is offered. All these different perspectives lead to manifold possibilities of double taxation.

Considering that double taxation could create significant barriers for cross-border trade and investments, it is not surprising that the avoidance of double taxation is an objective shared across the board. However, exactly how double taxation should be avoided - i.e. to which jurisdiction taxing rights should be allocated - is nothing but controversial.

Put simply, the debate historically led to the formation of two blocks. Developed countries, mostly capital exporters, favored residence taxation claims; while developing countries, mostly capital importers, favored source taxation claims. This split is visible in the differences between the bilateral tax treaty Model Conventions of the OECD and UN: the latter is based on the OECD Model Convention but incorporates some changes that reflect the interests of developing countries.

Recently, however, this relatively stable stalemate was pushed to the brink of collapse by the digitalization of the economy. Businesses increasingly managed to operate in market

jurisdictions digitally - which, according to the historical (and still current) framework, could give rise to exclusive residence taxation of business profits. This ran counter to the interests of both developed and developing countries. The reduction of importance of physical presence to participate in a country's economy in effect increases the scope for exclusive residence based taxation, thus eroding the tax base of source jurisdictions. At the same time, traditional residence jurisdictions also faced challenges with the shifting of mobile assets (that drive the value of digital business models) to low tax jurisdictions.

Against this backdrop, the IF took upon itself to develop a solution around two pillars. The issue of shifting tax residency to low tax jurisdictions would be tackled by Pillar 2, which would create a Global Minimum Tax of 15%. This would withdraw the incentive for taxpayers to move to low tax jurisdictions, since there would be a cap on tax optimization. The issue of source jurisdictions would be addressed by Pillar 1, which would allocate a portion of the income of very large and profitable MNEs to the market jurisdiction.

This proposal, now known as Amount A of Pillar 1, has the merit of reopening the debate around the allocation of taxing rights - a debate that had been stuck in roughly the same place for the past 100 years. However, the solution proposed seems to be losing support from all sides, both from the developed and developing world - which raises the question about the possible ways forward.

3. Pillar 1 - a tentative solution

3.1. Pillar 1 merits and challenges

Pillar 1 takes an innovative approach to reallocate taxing rights: it proposes that 25% of an MNE's "excess profits" should be reallocated to "market jurisdictions". This is innovative not only because it no longer relies on physical presence, but also because (i) the allocation is based on a formula rather than on what independent parties would have contracted; (ii) it is based on the profits of the MNE as a whole, rather than on the profits of the various separate legal entities; (iii) it is only levied on "excess profits" rather than on the overall profits; (iv) it allegedly benefits "market jurisdictions" rather than considering all countries that contribute to value creation (e.g. manufacturing jurisdictions) - and certainly other elements that escape this brief overview.

Even though the proposal initially received unprecedented support, criticism has been mounting ever since. Indeed, in October 2021, (the tax administrations of) over 135 jurisdictions supported the IF Statement sketching the broad strokes of the proposal. However, the repeated delays and the start of a parallel process in the UN signal fractures in the agreement.

To start with, the scope of the rules seems too narrow - covering only MNEs with turnover over EUR 20 billion; and applying profits in excess of 10% of revenue. As of 2021, this covers only around 100 MNEs globally,[5] about half of which are based in the US.[6] Moreover, the proposed text of the Multilateral Convention on Pillar 1 (MLC) requires, as a condition for entry into force,

[5] Samuel Delpeuch, Tibor Hanappi, Felix Hugger, Pierce O'Reilly, and David Whyman, *'Update to the economic impact assessment of pillar one'* (2023), OECD Taxation Working Papers No 66, paras. 27, 101. Available at <https://www.oecd.org/tax/update-to-the-economic-impact-assessment-of-pillar-one-7c35a55c-en.htm> (visited June 26, 2024)

[6] Joint Committee on Taxation, *'Background and Analysis of the Taxation of Multinational Enterprises and the Potential Reallocation of Taxing Rights under the OECD's Pillar One'* (2024), JCX-7-24, p. 46. Available at <https://www.jct.gov/publications/2024/jcx-7-24/> (accessed June 26, 2024).

ratification by jurisdictions that headquarter at least 60% of in-scope MNEs.[7] Effectively, this means that the MLC can only come into effect if the US ratifies it,[8] which gives it particularly large scope to influence the negotiations. Additionally, the expected tax revenue gains, in the best case scenario, are of up to 3% of CIT.[9] This amount may not be able to significantly move the needle. In fact, recent estimates suggest that the tax revenues generated by DSTs could surpass those raised by Pillar 1.[10]

By contrast to the low expected revenues, the further negotiations and detailing of the rules revealed a degree of complexity beyond measure. For example, the exercise of determining the market jurisdictions from which revenues stem led to the need for detailed and complex industry specific sourcing rules.[11] Another example are the instances of interaction with the current systems of (separate entity) corporate taxation: to avoid double taxation, separate entities would need to provide credit for taxes paid by the MNE as a whole, requiring further formulaic allocation rules.[12] Additionally, taxing rights already allocated to market jurisdictions would reduce the taxing rights allocated under Pillar 1 to avoid double counting, again requiring novel formulaic (and arguably arbitrary) approaches.[13] As with other formulaic solutions, this will be a political solution with limited economic grounding. This brings the uncomfortable perception that the market as a value creation element has not been taken seriously.

Finally, Pillar 1 does not address the concerns of all developing countries. While it does propose a reallocation of some taxing rights to market jurisdictions in response to the outdated reliance on physical presence, other important issues remain - most notably the narrow scope and high complexity of Pillar 1 (in contrast to capacity constraints); but including also other possible concerns, such as the limited amount of taxing rights attributed to manufacturing (labor)

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[7] OECD, *'The Multilateral Convention to Implement Amount A of Pillar One'* (2023). Available at <https://www.oecd.org/tax/beps/multilateral-convention-amount-A-pillar-one-overview.pdf> (accessed June 26, 2024).

[8] See the point system of article 48 and Annex I of the proposed MLC: OECD, The Multilateral Convention to Implement Amount A of Pillar One (2023). Available at <https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.pdf> (accessed June 26, 2024).

[9] Samuel Delpeuch, Tibor Hanappi, Felix Hugger, Pierce O'Reilly, and David Whyman, *'Update to the economic impact assessment of pillar one'* (2023), OECD Taxation Working Papers No 66, paras. 27, 101. Available at <https://www.oecd.org/tax/update-to-the-economic-impact-assessment-of-pillar-one-7c35a55c-en.htm> (visited June 26, 2024).

[10] Vladimir Starkov and Alexis Jin,*'A Toss Up? Comparing Tax Revenues from the Amount A and Digital Service Tax Regimes for Developing Countries'* (2024), South Centre Research Paper No. 199. Available at <https://www.southcentre.int/research-paper-199-10-june-2024/> (accessed June 26, 2024).

[11] See article 7 (Sourcing Principles for Categories of Adjusted Revenues) of the proposed MLC: OECD, The Multilateral Convention to Implement Amount A of Pillar One (2023). Available at <https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.pdf> (accessed June 26, 2024).

[12] See in particular article 11 (Allocation of the Obligation to Eliminate Double Taxation with Respect to the Amount A Relief Amount) of the proposed MLC: OECD, The Multilateral Convention to Implement Amount A of Pillar One (2023). Available at <https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.pdf> (accessed June 26, 2024).

[13] See in particular article 5 (Allocation of Profit Associated with Revenues in the Market) of the proposed MLC: OECD, The Multilateral Convention to Implement Amount A of Pillar One (2023). Available at <https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.pdf> (accessed June 26, 2024).

jurisdictions under the current system.[14] Once again, the approach proposed by Pillar 1 seems too narrow a reconsideration of taxing rights.

3.2. Consequences of failing to pursue Pillar 1

Perhaps unsurprisingly, the Pillar 1 approach developed by tax administrations received significant resistance from legislatures - in particular of the US, where members of the US Congress went as far as requesting the country's OECD funding to be denied.[15] Considering this country's significance for the entry into force of the Pillar 1 MLC (see above), this raises the possibility that the project may not be successfully implemented.

A key consequence of failing to enact Pillar 1 would be that jurisdictions could move on to enact DSTs on an unilateral basis. Indeed, the multiplication of DSTs is behind the initial impetus of Pillar 1. At the time the negotiations started, countries agreed to standstill the enactment of new DSTs.[16] If current negotiations fail, such a commitment would no longer prevent countries from adopting such measures.

The main concern with DSTs is that they are levied on revenues (i.e. on a gross basis). This means that the tax is not proportional to profitability, and would burden the most taxpayers that are less profitable. Moreover, this tax may not be creditable against other (income) taxes, meaning that they may have a cascading effect (multiple taxation). Finally, DSTs are not neutral, in the sense that they are levied only over "digital" services, which are treated less favorably than other non-digital alternatives. Overall, therefore, DSTs may create unintended economic distortions that may hamper trade and investment flows.[17]

4. Moving forward under the UN?

4.1. A UN Framework Convention on international tax cooperation

As mentioned, in December 2023 the UN General Assembly has adopted the resolution "Promotion of inclusive and effective international tax cooperation at the United Nations".[18] The proposal was originally tabled by the African Group and can be attributed to a dissatisfaction

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[14] On the relevance of manufacturing jurisdictions, see Allison Christians, *'Taxing According to Value Creation'* (2018), Tax Notes International Vol. 90. Available at <https://ssrn.com/abstract=3230370> (accessed June 26, 2024).

[15] Adrian Smith et al, 'Letter to Chairman Mario Diaz-Balart and Ranking Member Barbara Lee' (March 24 2023). Available at <https://www.taxnotes.com/tax-notes-today-federal/corporate-taxation/gop-lawmakers-recommend-against-oecd-funding/2023/03/28/7g8jh> (accessed June 26, 2024).

[16] See OECD/G20 Inclusive Framework on BEPS, *'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy'* (2021). Available at <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> (accessed June 26, 2024). See also extension of the standstill commitment in OECD/G20 Inclusive Framework on BEPS, *'Outcome Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy'* (2023). Available at <https://www.oecd.org/tax/beps/outcome-statement-on-the-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2023.pdf> (accessed June 26, 2024).

[17] See OECD/G20 Inclusive Framework on BEPS, *'Tax Challenges Arising from Digitalisation – Economic Impact Assessment'* (2020), OECD Publishing, paras. 401 to 404. Available at <https://doi.org/10.1787/0e3cc2d4-en> (accessed June 26, 2024).

[18] UN General Assembly, *'Resolution 78/230 - Promotion of inclusive and effective international tax cooperation at the United Nations'* (December 22, 2023). Available at <https://financing.desa.un.org/sites/default/files/2024-01/A.RES_.78.230_English.pdf> (accessed June 26, 2024).

with the process of negotiation at the OECD/G20 IF. An earlier report of the UN Secretary General underscores that, despite the high technical qualities of the OECD/G20 IF work, the outputs of that forum are in effect “not implemented by developing countries”. Developing countries would “consider that the guidance does not respond to their more immediate needs and priorities, and instead draws resources away from such issues, and/or that they are not capable of implementing it as a result of their tax administration capacities”.[19]

Against this backdrop, the UN General Assembly has decided to draft a legally binding Framework Convention on international tax cooperation. Framework conventions are instruments known to cover general issues, such as key principles and “institutional provisions for creating a plenary forum for discussion”.[20] This general structure would facilitate the negotiation and adoption of protocols, which would complement the framework convention with more specific regulatory aspects.

A significant advantage of a Framework Convention is that slicing the approval of substantive issues per protocol adds flexibility. Countries that are party to the Framework Convention have “the ability to opt-in and opt-out [of protocols] on the basis of their priorities and capacities” - though protocols are only available to members of the framework convention.[21] While it is true that the negotiation of protocols can be challenging, the existence of a forum for discussions under the Framework Convention may expedite and facilitate the process.

Currently, the UN Framework Convention is under negotiation. The first version of its terms of reference suggests the ambition of submitting a final draft of the Framework Convention and early protocols for consideration of the General Assembly at its 81st session (September 2026).[22]

4.2. Rethinking the allocation of taxing rights under the UN Framework Convention

The terms of reference currently under negotiation include, as one of the principles of the Framework Convention, to “ensure fairness in allocation of taxing rights under the international tax system that contributes to achieving sustainable development”.[23] It seems, therefore, that the UN has the ambition of addressing this historical dilemma.

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[19] UN Secretary General, *‘Report A/78/235 - Promotion of inclusive and effective international tax cooperation at the United Nations’* (July 26, 2023), para. 41. Available at <https://financing.desa.un.org/sites/default/files/2023-08/2314628E.pdf> (accessed June 26, 2024).

[20] UN Secretary General, *‘Report A/78/235 - Promotion of inclusive and effective international tax cooperation at the United Nations’* (July 26, 2023), para. 55. Available at <https://financing.desa.un.org/sites/default/files/2023-08/2314628E.pdf> (accessed June 26, 2024).

[21] Nele Matz-Lück, *‘Framework Conventions as Regulatory Tools’* (2009), Goettingen Journal of International Law, Vol. 1, No. 3, p. 452. Available at <https://ssrn.com/abstract=1535892> (accessed June 26, 2024).

[22] Ad Hoc Committee to Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation, *‘Zero Draft Terms of Reference’* (June 7, 2024). Available at <https://financing.desa.un.org/sites/default/files/2024-06/Zero%20draft%20ToR%207%20June%202024.pdf> (accessed June 26, 2024). See also Will Morris et al, ‘UN releases draft Terms of Reference for negotiating a Framework Convention on International Tax Cooperation’ (2024), PwC Tax Policy Alert. Available at <https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-un-releases-draft-tor-for-negotiating-a-framework-convention.pdf> (accessed June 26, 2024).

[23] Ad Hoc Committee to Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation, *‘Zero Draft Terms of Reference’* (June 7, 2024). Available at

It is worth being realistic about the challenges of the endeavor. At a very high level, two such challenges stand out. First, tax treaties have so far addressed the allocation of taxing rights on a bilateral basis. Doing so on a multilateral basis would provide less flexibility for negotiations to accommodate the specific preferences of the various jurisdictions. Second, there is no template or standard approach to solve the issue. While there is agreement that the longstanding approach of the OECD and UN Model Conventions needs to be replaced, there is no clarity about the alternatives that should be considered.

These substantive challenges are only increased by the time pressure represented by unilateral action. As mentioned, the failure to adopt Pillar 1 could spark the multiplication of DSTs, which would have harmful economic effects. Thus, a solution for the allocation of taxing rights under the UN Framework Convention would ideally be reached in time to prevent the need for unilateral approaches - or at least would incorporate a standstill commitment similar to that achieved under Pillar 1.

At a more granular level, many different approaches have been raised by tax literature over the years. For instance, it would be possible to improve the current system by addressing developing country transfer pricing challenges;[24] some claim to be possible to overhaul the transfer pricing system by relying on formulary apportionment[25] (irrespective of the obvious arbitrary outcome);[26] or it would even be possible to replace the international tax system by a destination based cash-flow tax.[27]

What those approaches have in common is the need to coordinate the solution at a multilateral level. But especially in view of the need for celerity, another potential path could involve a hybrid of unilateral and multilateral rules: countries would be free to exercise their taxing rights however they wish, provided they comply with certain multilaterally agreed guardrails.

Even today, there are already discussions about the need for double tax treaties to prevent double taxation.[28] As a matter of fact, most jurisdictions already eliminate double taxation through unilateral credits or exemptions - which could ease the multilateral negotiation of guardrails in this respect. Given that, the main concerns to be addressed would be the degree of presence in a jurisdiction that would be enough to trigger source taxation; and the degree to

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<https://financing.desa.un.org/sites/default/files/2024-06/Zero%20draft%20ToR%207%20June%202024.pdf> (accessed June 26, 2024).

[24] UN, *'Practical Manual on Transfer Pricing for Developing Countries'* (2021). Available at <https://desapublications.un.org/publications/united-nations-practical-manual-transfer-pricing-developing-countries> (accessed June 26, 2024).

[25] Reuven Avi-Yonah and Ilan Benshalom, *'Formulary Apportionment – Myths and Prospects: Promoting Better International Tax Policies by Utilizing the Misunderstood and Under-Theorized Formulary Alternative'* (2011), World Tax Journal Vol. 3 No. 3. Available at <https://research.ibfd.org/#/doc?url=/document/wtj_2011_03_int_1> (accessed June 26, 2024).

[26] See Luís Eduardo Schoueri, *'Arm's Length: Beyond the Guidelines of the OECD'* (2015), Bulletin for International Taxation Vol. 69 No. 12. Available at <https://research.ibfd.org/#/doc?url=/document/bit_2015_12_int_2> (accessed June 26, 2024).

[27] Alan Auerbach, Michael Devereux, Michael Keen, and John Vella, *'Destination-Based Cash Flow Taxation'* (2017), Oxford Legal Studies Research Paper No. 14. Available at <https://ssrn.com/abstract=2908158> (accessed June 26, 2024).

[28] See for instance Sebastien Leduc and Geerten Michielse, *'Are Tax Treaties Worth it for Developing Economies?'*, in Corporate Income Taxes under Pressure: why Reform is Needed and How it Could be Designed (eds. Mooij, Klemm and Perry), IMF (2021). Available at <https://doi.org/10.5089/9781513511771.071> (accessed June 27, 2024).

which withholding taxes may be levied. In principle, it could be possible to design guardrails to both issues.

Withholding taxes can be controversial because, similarly to DSTs, they also apply on a gross basis. In this respect, the UN itself - this time under it Committee of Experts on international cooperation in tax matters - already proposed a pragmatic approach in the recent article 12-B of its Model Convention: in case a jurisdiction levies gross withholding taxes, it should also offer taxpayers the option of being taxed on a net basis, following the rules that would have applied in case the taxpayer were subject to the regular tax system of that jurisdiction (net basis). The idea is not without precedent - a similar approach can be found in the tax treaty between the UK-Gambia dated from 1980.[29] In addition to reducing the scope for gross taxation, this approach also lifts the pressure from the definition of the threshold of presence in a jurisdiction that triggers source taxation - after all, taxpayers may actually elect to be taxed on a net basis. As a drawback, article 12-B applies a formulaic allocation of 30% of the relevant income to the source jurisdiction, leading to a rough justice exercise that may be, while practical, arbitrary.

This is just an example of a guardrail that could, with adjustments, be incorporated into a potential protocol to the UN Framework Convention. It would have the advantage of offering flexibility for jurisdictions to design their preferences, while providing comfort to all stakeholders that certain standards will be followed (in this case, the possibility of net taxation). Of course there are many other possibilities that, with time, could be explored. Instead of seeking to exhaust them, this article seeks to illustrate that, given the time constraints and the other priorities that the UN Framework Convention will be confronted with, perhaps the choice of a pragmatic approach could address immediate concerns and hold the space for future discussions of a truly multilateral approach negotiated under new and improved procedures at the UN.

5. Conclusion

The recent OECD/G20 IF efforts around Pillars 1 and 2 reopened the debate around the core rules of international tax to an extent that would have been unimaginable just a few years ago. In particular, Pillar 1 has the merit of reopening the question around the allocation of taxing rights to developing jurisdictions - a matter of utmost importance for the pursuit of sustainable development goals, but that had seen little to no progress over the last 100 years. However, developing and developed jurisdictions alike have been showing signs of discontent with the compromise reached so far.

The kick-off of a Framework Convention on international tax cooperation at the UN could represent a new opportunity to rethink the allocation of taxing rights in a way that is acceptable to all parties involved. The work already done by the OECD/G20 IF should be leveraged, but in this particular regard the pursuit of novel approaches may be required.

Given the time constraints and the many priorities of the UN work, this contribution raises the possibility of an interim approach that provides guardrails to unilateral solutions. In particular, the principles of article 12-B of the UN-MC could be leveraged to create a possibility of net source taxation even in the absence of physical presence. This would go a long way to avoid the harmful impacts of DSTs while offering developing countries a framework to activate their source taxing rights. This would also provide time for a truly multilateral approach to be negotiated under the UN Framework Convention.

[29] See article 14 (fees for technical services) of the 1980 double tax treaty between Gambia and the United Kingdom.