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# Plea for a Meta Regime! (and why the UN should be the governing body)

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# 1. Introduction

It has been argued by many scholars, NGOs, and policy makers that the current international tax law-making process is not really inclusive and that states are not treated on an equal footing. This is also demonstrated by the current institutional battle between the OECD and the UN as it is a sign that many states oppose the current *Realpolitik* within the Inclusive Framework. Thankfully, the UN has pointed out various reform proposals. The current debate, however, follows the implicit need for a global institution (either the UN or the OECD) which will be competent to develop the international tax regime in a harmonized manner.[1]

However, in the following I argue that instead of focusing on the design of a global institution with an inclusive, transparent and quasi-democratic decision-making process, the focus should be on the design of a relatively weak but sufficiently robust institutional meta regime at a global level. [2] Inclusiveness and transparency can still be upheld as we will see in the following but a (strong) quasi-democratic international institution is not necessary and will not be feasible in the next years anyways. The present approach is in line with option two of a framework convention on international tax

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cooperation as outlined in the UN report on the promotion of inclusive and effective international tax cooperation.[3]

Before the creation of a new regime or a new framework agreement, the parties should be clear about the objectives. Personally, I believe that the main two goals of a new meta regime should be: (i) enable fiscal self-determination (incl. fighting tax evasion and illicit financial flows) and (ii) creating a sufficiently robust and fair framework for further cooperation.

The new meta regime does not require a strong global body but it requires that states agree on an institutional structure that allows the international tax regime to develop in a more fragmented but Darwinian manner. This means that the regime should enable successful tax-related agreements to expand to new jurisdictions in a structured form. Of course, the meta regime naturally demands an institutional home – be it the UN, the Inclusive Framework, the OECD or a new institution to be founded. If we take the WTO as a role model for such question, strong reasons favor the UN or some sub-body of the UN as the governing body of such new regime.

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# 2. How the meta regime could be structured

As it was mentioned, the primary goals of such new meta regime would be to ensure that states are able to tax what happens in their territory (fiscal self determination) and that tax evasion and illicit financial flows are fought in an organized form. Moreover, if states want to cooperate more intensively such cooperation should follow fair terms.

A core element is, therefore, that there is a common level of transparency between the participating states to ensure that states have sufficient information to understand what income is realized within their territories and by its members. The Convention on Mutual Administrative Assistance in Tax Matters could potentially serve as the the lowest common denominator for such purpose and as an essential founding document of a new regime.[4]

Moreover, such a meta regime should provide for a sufficiently robust and legalized institutional setting so that states could agree on further reaching agreements and the regime should ensure that the development of these potentially further reaching agreements follows fair terms. Therefore, agreements such as multilateral or

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bilateral double tax treaties or topical tax treaties such as a country-by-country reporting agreement could be signed by coalitions of the willing (for a list of treaties to be regulated by the meta regime see section 3).

However, importantly all tax-related treaties between the members of the meta regime would be regulated by the meta regime. This sounds rather abstract and requires further explanation. "Regulated" would mean that it would become clear under what circumstances a country can become a member of any of these agreements and whether some benefits could be granted to developing countries or to the least developed countries without reciprocal obligations. Even how treaties are negotiated needs to be defined by the meta regime so that all states can potentially participate from the beginning.

But also, and this is the key element, states can agree that a certain tax agreement or some provisions of some tax agreements shall be subject to judicial control (and not just a peer-review process as it is currently the case). Such judicial control would be part of the meta regime – at least the option to subject a treaty or a provision to an inter-state judicial body.

To sum up, the following three treaty related measures are a necessary part of a new meta

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regime besides a minimum level of transparency between all the parties of the meta regime:

- The meta regime should foresee how bi- or multilateral treaties in tax matters are developed (i.e. how are negotiations for a new treaty opened, who can participate, how does the formal process work, who is in charge of the negotiations, etc.)
- The meta regime should foresee that some agreements could be open for a non-reciprocal application for developing or at least for the least developed countries. Of course, this is a famous feature of the WTO system but could also be an effective tool for some (but not all!) tax related agreements.[5] Such non-reciprocal application, however, requires a clear institutional setting.
- The meta regime needs a dispute resolution mechanism. Such judicial control would be limited to inter-state disputes – e.g., whether states fulfill their obligations under tax-related treaties subjected to such control. Of course the details of such a dispute settlement mechanism would still need to be developed. And as mentioned states are free to agree that such mechanism is applicable to some but not all tax-related treaties which are under the auspice of such new meta regime. This last element is the key element. Currently, the international tax regime is

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- November 2023
- October 2023
- September 2023
- July 2023
- June 2023
- May 2023
- March 2023
- February 2023
- November 2022
- October 2022
- September 2022
- August 2022
- July 2022
- June 2022
- May 2022
- April 2022
- March 2022
- January 2022
- November 2021
- October 2021
- August 2021
- July 2021
- June 2021
- April 2021
- February 2021
- December 2020
- November 2020
- October 2020

imbalanced as it has (already) rather strong global quasi-legislative and executive bodies, however, the judicial element is to a large extent missing.[6]

# 3. Which treaties could be under the auspices of the new meta regime

In order to demonstrate the magnitude of the potential meta regime, I will list potential agreements that could be made part of such institutionalized meta regime:

- Bilateral or multilateral double tax treaties.
- Cross-border mutual assistance agreements beyond the necessary element of cross-border transparency (e.g., agreements on joint audits, spontaneous exchange of information, etc.). Of course, some of these rules are part of the Convention on Mutual Administrative Assistance in Tax Matters but might not yet be binding for all participating countries.
- Reduction of harmful tax regimes following the rationale of Action 5 and the 1998 report through an international binding instrument.
- Reduction of harmful personal income tax regimes through an international binding instrument.


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- March 2020
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- December 2019
- November 2019
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- September 2019
- July 2019
- June 2019
- May 2019
- April 2019
- March 2019
- February 2019
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- November 2018
- October 2018
- September 2018
- August 2018
- July 2018
- June 2018
- May 2018
- April 2018
- March 2018
- February 2018

- Non-discrimination agreements containing all or parts of the fundamental freedoms within the EU. As an example, the free-movement agreement between Switzerland and the EU contains a free movement of workers provision with a significant impact on the tax systems. This could also be expanded through specific treaties between other countries.
- Implementation agreement of Pillar 1.
- Implementation agreement of Pillar 2[7].
- Implementation agreement of the subject-to-tax-rule under Pillar 2.
- The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI).
- States might even agree at a regional level to apply a formulary apportionment system in the sense of BEFIT within the EU.
- States could agree on an arbitration convention for tax matters.
- States could agree on further reaching enforcement agreements beyond Art. 27 of the OECD MC.

Considering the variety of existing but also potential future tax-related treaties, it becomes obvious that the system would benefit from being institutionalized. However, as I argued such institutionalization does not require a strong central body with a quasi-democratic setting. Only a meta regime is necessary. So all of the

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above agreements are not to be understood as global agreements but states should be free to join them in case they consider the terms to be beneficial or in case non-participation would be disadvantageous for them.

With respect to all of these agreements, states could opt that a whole agreement or at least some provisions are subject to a dispute settlement mechanism within the meta regime. The meta regime would not make the dispute settlement mechanism mandatory but at least it would provide for the option to apply such a mechanism to any tax-related agreements.

# 4. Conclusion

I believe that a meta regime would have significant advantages compared to the current governance structure of the international tax regime. The following are the essential elements:

1. Cross-border transparency as a prerequisite so that states can ensure fiscal self-determination, fight tax evasion and illicit financial flows. The Convention on Mutual Administrative Assistance in Tax Matters could serve as the underlying document.
2. The meta regime needs to provide rules on how treaties in the tax area (incl. bilateral tax

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treaties) are negotiated and signed. The process should be transparent but states should at the same time not be forced to participate or sign any of the further reaching treaties.

3. The meta regime needs to enable that some agreements are applicable in non-reciprocal form for developing countries or at least for the least developed countries and the institutional setting should provide for the necessary framework.
4. An inter-state judicial body should be created and states can agree that a tax-related agreement as a whole or at least some provisions can be subject to such dispute settlement mechanism.

I strongly believe that designing such meta regime through a framework agreement as indicated in the UN report could provide for an effective tool so that the international tax regime can develop in a Darwinian form. The latter means that states will automatically agree on further reaching agreements in case these are advantageous or that not signing would have adverse effects for their jurisdiction.

At the same time the meta regime does not require a strong commitment and it is less likely that it will fail in the current environment of

strong political opposition at the global level. Finally, we should also learn from the experience in other fields such as the trade or investment law regimes. Especially the trade law regime has proven to be rather (probably too) static since its rather strong multilateral base seems challenging to change. Personally, I believe the new governance structure should be static enough to create stability but it should also be sufficiently dynamic to react to new developments. The rudimentary regime presented here should fulfill both of these requirements.

[1] The UN itself, however, highlights that its role of the UN could follow different paths depending on which way is chosen (see https://financing.desa.un.org/sites/default/files/2023-08/2314628E.pdf ). The question of whether there should be more or less binding instruments at an international level is, however, disputed – see e.g. Lucinda Cadzow, Martin Hearson, Frederik Heitmüller, Katharina Kuhn, Okanga Okanga and Tovony Randriamanalina, Inclusive and Effective International Tax Cooperation: Views From the Global South, ICTD Working Paper 172, p. 12 et seq.

[2] The use of the term is loosely inspired by the Dani Rodrik & Stephen Walt, How to Construct a

New Global Order, Working Paper.

[3] https://financing.desa.un.org/sites/default/files/2023-08/2314628E.pdf, para. 55 et seq.

[4] The non-ratification by the United States is, of course, a key obstacle.

[5] An example would be the non-reciprocal automatic exchange of information following the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information.

[6] For details see Peter Hongler, Justice in International Tax Law, IBFD 2019, p. 244 et seq. Available open access: BW_JUSTICE_INTERNATIONAL_TAX_LAW_v5.indd (unisg.ch).

[7] The OECD does not see a need to sign such an implementation agreement. However, the current implementation chaos could have been avoided by the use of multilateral agreements to implement the QDMTT, the IIR and the UTPR.

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