

The New U.N. Framework Convention: Plurilateralism Could Be a Key to Success

by Peter Hongler and Simon Habich

Reprinted from *Tax Notes International*, April 22, 2024, p. 491

The New U.N. Framework Convention: Plurilateralism Could Be a Key to Success

by Peter Hongler and Simon Habich



Peter Hongler



Simon Habich

Peter Hongler is a professor of tax law at the University of St. Gallen in Switzerland. Simon Habich is a PhD student at the University of St. Gallen.

In this article, Hongler and Habich explain that upcoming U.N. negotiations should look to establish the institutional groundwork for a more credible evolution of the international tax system, recognizing that a global consensus may not be imperative across all tax-related domains, and instead should strive for global inclusivity.

Copyright 2024 Peter Hongler and
Simon Habich.
All rights reserved.

Introduction

International tax governance is at a crossroads. The U.N. General Assembly in late 2023 mandated an ad hoc body to develop a new framework convention on tax matters.¹ Meanwhile, the OECD remains in a strong position for steering

¹ See G.A. Res. 78/230, para. 3 (Dec. 22, 2023).

international tax policy. However, with recent votes in the U.N. Economic and Financial Committee, and subsequently in the General Assembly, a majority of U.N. members seem dissatisfied with the current governance structure.²

This article addresses the cause of the dissatisfaction, shows a possible solution, and highlights pitfalls to avoid when implementing a new international tax policy governance structure. The second section analyzes the motives behind the recent votes, while the third section pays closer attention to current structures in the international trade regime that can provide beneficial insights from experience with the current structure. The fourth section discusses recommendations for the upcoming framework convention.

The U.N. Mandate

On November 22, 2023, the U.N. Economic and Financial Committee adopted the resolution “promotion of inclusive and effective international tax cooperation at the United Nations.” One hundred and twenty-five countries voted “yes” to the resolution, while 48 voted “no” and nine abstained.³ The December 23, 2023,

² It is unclear whether and how the U.N. initiative will change the governance structure. For an outline of different reasons why any outcome is possible, see Rasmus Corlin Christensen, “Between Revolution and Rhetoric: The UN Vote and the Future of International Tax Cooperation,” 1 *Bull. Int'l Tax'n* 2, 5 (2024).

³ See U.N., Recorded Vote on Economic and Social Council draft Res. A/C.2/78/L.18/Rev.1 (Nov. 22, 2023).

General Assembly vote on the resolution returned 111 “yes” votes, 46 “no,” and 10 abstentions.⁴

The no-voting countries to a large extent are OECD members.⁵ The resolution itself states the objective to “make [international tax cooperation] fully inclusive and more effective.” In fact, it has been highlighted on multiple occasions that the current international tax regime favors industrialized countries while neglecting the needs and voices of developing countries.⁶ In more detail, the following arguments have been brought forward against the current regime over the past years:

First, the judicial side of the international tax regime is poor. If we compare the international tax regime with a constitutional-based government structure in transformation, we see strong legislative elements, some executive elements, but few judicial elements.⁷ For instance, the OECD inclusive framework acts to some degree as both a quasi-legislature and an executive body assessing whether states are following international standards. The latter happens through a so-called peer review process during which reviewers judge whether states are fully, partially, or not at all compliant with certain standards.⁸ The quasi-

legislative functions happen through the publication of soft law instruments that are partly enforced through coercive measures.

Second, many scholars (and states) have complained that international negotiations are neither inclusive nor carried out on an equal footing.⁹ There is therefore room for improvement regarding how rules are made within the international tax regime and the governing structure’s inclusivity.

Third, the international tax regime is not fair to developing and least-developed countries. The rules are mainly designed by the OECD, OECD member states, and OECD-affiliated organizations, which therefore favor the developed world.¹⁰ Also, the legitimacy of such a strong position for the OECD is questionable.¹¹ The current system of thousands of double tax treaties is based on the principle of reciprocity. However, it is questionable whether a reciprocal allocation of taxing rights between economically unequal countries can be fair.¹²

Fourth, the international tax regime cannot adapt to new societal developments. For instance, the digitalization or globalization of value chains requires significant changes to the international tax regime. So far, the regime has not been successfully aligned with these developments.¹³ A key problem is that most tax treaties still require a physical presence for the creation of a permanent establishment as a minimum threshold to enable

⁴Most of the changes are because of countries voting “yes” in the committee and not voting in the General Assembly, or vice versa. Georgia voted “no” in the committee and did not vote in the General Assembly, South Sudan voted “yes” and then abstained, and Switzerland’s vote was according to our information erroneously recorded as “yes”. See U.N., “Promotion of Inclusive and Effective International Tax Cooperation at the United Nations: Resolution/Adopted by the General Assembly,” A/RES/78/230 (Dec. 22, 2023).

⁵Of the 48 “no” votes in the committee, 30 came from OECD members, and another three from accession candidates; see U.N., *supra* note 3.

⁶Yariv Brauner, “A UN Dawn for the International Tax Regime,” 52 *Intertax* 100, 101 (2024); Peter Hongler, *Justice in International Tax Law* 120 (2019); Tarcisio Diniz Magalhães, “What Is Really Wrong With Global Tax Governance and How to Properly Fix It,” 10 *World Tax J.* 499, 508-512 (2018); Jan Wouters and Katrien Meuwissen, “Global Tax Governance: Work in Progress?” in *Human Rights and Taxation in Europe and the World* (2011); Lee A. Sheppard, “Twilight of the International Consensus: How Multinationals Squandered Their Tax Privileges,” 44 *Washington U. J. L. Pol’y* 61, 62 (2014); Tsilly Dagan, *International Tax Policy* 205 (2017); Sergio A. Rocha, “International Fiscal Imperialism and the ‘Principle’ of the Permanent Establishment,” 68 *Bull. Int’l Tax’n* 83, 84 (2014).

⁷Hongler, *supra* note 6, at 260-263.

⁸As an example, see the action 5 peer review of the base erosion and profit-shifting project: OECD/G20, “Harmful Tax Practices — 2021 Peer Review Reports on the Exchange of Information on Tax Rulings, Inclusive Framework on BEPS: Action 5” (2022). A very intriguing example demonstrating the effect of the peer review process is the compliance ratings of countries compared with the standard of exchange of information on request. Here the categories are (i) compliant, (ii) largely compliant, (iii) partially compliant, and (iv) noncompliant. The status of each country can be accessed at the OECD website.

⁹See, e.g., Allison Christians and Laurens van Apeldoorn, “The OECD Inclusive Framework,” 72 *Bull. Int’l Tax’n* 226, 231 (2018); Ivan Ozai, “Institutional and Structural Legitimacy Deficits in the International Tax Regime,” 12 *World Tax J.* 53, 55 (2020). However, several of the current concerns regarding the governance structure cannot be solved through a new framework convention — for instance, the difference in negotiation capacities. For more details, see Christensen, *supra* note 2, at 2, 5.

¹⁰See, *inter alia*, U.N. Secretary General, “Promotion of Inclusive and Effective International Tax Cooperation at the United Nations,” U.N. Doc. A/78/235, at para. 47-50 (July 25, 2023). It is also argued that there is a first mover advantage for developed states because new countries joining the international tax regime through signing tax treaties must follow the existing regime that favors developed countries (see with further references Ozai, *supra* note 9, at 65-68).

¹¹Brauner, *supra* note 6, at 100, 101.

¹²See Brian Arnold, “Reciprocity as a Fundamental Principle of Tax Treaties: Meaningless Platitude, Misguided Policy or Practical Guideline?” 76 *Bull. Int’l Tax’n* 123 et seq. (2022).

¹³Although the development of the pillar 1 agreement reflects progress, the current taxing rights allocation rules are not yet fit for a digitalized and globalized economy. Still, the OECD itself provides a very comprehensive analysis of the necessity of changing the current international tax regime: See OECD/G20, “Addressing the Tax Challenges of the Digital Economy” (2015).

corporate income taxation in source and market states.

The question thus becomes, can the U.N. create a new regime to mitigate these problems?

Is WTO Governance a Role Model?

As the U.N. develops a new framework convention in tax matters, it can find inspiration in other areas in which similar institutional structures exist. There are many examples of regimes that contain a framework convention that could serve as a source for inspiration.¹⁴ In the following we will focus on the strengths and weaknesses of the WTO.

Weaknesses of the WTO regime can be seen in the judicial dysfunctionalities of its appellate body and by the fact that many trade liberalization projects are blocked.¹⁵ Nevertheless, some structural design elements can be sources of inspiration for U.N. negotiations.

In general, the WTO follows a single-undertaking approach, meaning that the introduction or amendment of an agreement must be accepted unanimously.¹⁶ These changes become binding on all WTO members. However, the WTO also uses so-called plurilateral agreements to encourage progress in a specific area. Plurilateral agreements can be concluded by any subset of WTO members on sector-specific issues.¹⁷ This is important because a subset of countries could develop a new international agreement in tax matters while remaining within the old framework agreement. Changing the framework agreement should require consensus, but the tax regime can also develop through agreements among a subset of countries. There should, however, be a link between new tax

agreements¹⁸ and the new framework agreement. We will call these agreements, concluded by a subset of member countries, plurilateral agreements.¹⁹

Of course, WTO member states are free to conclude agreements outside the WTO umbrella, but using the WTO and the mechanism of plurilateral agreements offers benefits like the services of the WTO secretariat, its dispute settlement mechanism, and taking advantage of the institution generally. Further, and contrary to the single-undertaking approach, no WTO-wide consensus is necessary to reach an agreement that can accelerate or even enable the process of creating a broader regime.²⁰ Parties to a plurilateral agreement enjoy relative autonomy when negotiating and drafting.²¹ Besides the technical regulations regarding sector-specific trade, the areas of choice include whether to use the dispute settlement mechanism provided by the WTO, the criteria for agreement accession and withdrawal, and how and to what extent amendments are possible.²²

Under the WTO umbrella, multiple types of plurilateral agreements exist. Those under Article II.3 WTO are considered closed, meaning that the benefits are only extended to the closed group of participating countries.²³ Open agreements, on the other hand, often referred to as critical mass agreements, extend agreement benefits to all

¹⁸We understand tax treaties in a broad manner: bilateral or multilateral double tax treaties, cross-border mutual assistance agreements, agreements for the reduction of harmful tax regimes, nondiscrimination agreements (e.g., the free movement agreement between Switzerland and the EU), the Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule (opened for signature Oct. 2, 2023), the Multilateral Convention to Implement Amount A of Pillar One, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, etc.

¹⁹For the specific case of WTO plurilaterals, see Hoekman and Mavroidis, "WTO 'à la Carte' or 'Menu du Jour'? Assessing the Case for More Plurilateral Agreements," 26 *Eur. J. Int'l L.* 320, 325 (2015).

²⁰Rudolf Adlung and Hamid Mamdouh, "Plurilateral Trade Agreements: An Escape Route for the WTO?" 52 *J. World Trade* 85, 92 (2018).

²¹Hoekman and Mavroidis, *supra* note 19, at 319, 325.

²²Chang-fa Lo, "A Milder but Effective WTO Reform — Possible Plurilateral FTAS and Plurilateral DSU Within the WTO," 14 *Asian J. WTO & Int'l Health L. & Pol'y* 332, 339 (2019).

²³Robert Basedow, "The WTO and the Rise of Plurilateralism — What Lessons Can We Learn From the European Union's Experience With Differentiated Integration?" 21 *J. Int'l Econ. L.* 411, 416 (2018); Axel Berger et al., "Improving Key Functions of the World Trade Organization: Fostering Open Plurilaterals, Regime Management, and Decision-Making," Task Force 1 Policy Brief for T20 Saudi Arabia 2020, at 5 (2020).

¹⁴See, e.g., International Centre for Settlement of Investment Disputes, "Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" (Oct. 14, 1966); U.N., "United Nations Convention on the Law of the Sea" (Nov. 16, 1994); or International Bank for Reconstruction and Development, "Articles of Agreement" (Dec. 27, 1945).

¹⁵See Bernard M. Hoekman and Petros C. Mavroidis, "Burning Down the House? The Appellate Body in the Centre of the WTO Crisis," Robert Schuman Centre for Advanced Studies, Global Governance Programme Working Paper No. RSCAS 2019/56 (2019).

¹⁶For the single-undertaking approach and the negotiation process, see WTO, "How the Negotiations Are Organized," (last visited Mar. 20, 2024).

¹⁷For a short overview of plurilaterals in WTO history, see WTO, "Plurilaterals: of Minority Interest," (last visited Mar. 20, 2024).

WTO members, following the most favored nation principle, even if they are not participants in the plurilateral agreement.²⁴ A last category is formed by preferential trade agreements.²⁵

The WTO serves as an umbrella for plurilateral agreements without regulating their technical content.²⁶ The organization facilitates the agreements by offering a basic framework, services of the secretariat, and dispute settlement mechanism.²⁷ The new framework convention in tax matters should adopt this model, facilitating development of the international tax regime among a subset of member countries.

Recommendations

The following recommendations for a possible new framework convention on taxation are based on the weaknesses of the current international tax regime and the opportunities of plurilateralism in the international trade regime.

A new framework convention should enable consensus among the largest possible number of countries — that is, reaching agreement on the lowest common denominator by as many states as possible. We believe conflicts of interest can be avoided by eschewing far-reaching substantive solutions when developing a new consensus for a new framework convention. What is needed instead is a framework in which further solutions can be found not through global consensus but by coalitions of the willing in various tax-related areas (for example, mutual assistance, allocation of taxing rights, or nondiscriminatory policies). In more detail, the U.N. framework convention should, in our opinion, include these points:

- First, the framework should foresee how bilateral or multilateral treaties in tax matters are developed (how negotiations for a new treaty are opened, who can participate, how the formal process works, who oversees the negotiations, etc.).

- Second, the framework should foresee that some agreements linked to the new framework convention could be open for a nonreciprocal application (special and differential treatment) for developing — or at least the least developed — countries. Of course, this is a famous feature of the WTO system, but it could also be an effective tool for some (but not all) tax-related agreements. Nonreciprocal applications, however, require a clear institutional setting. For instance, some mutual assistance agreements could be applied in a nonreciprocal manner (automatic exchange of information) and by linking it to the framework convention, the institutional setting would allow an effective nonreciprocal application.
- Third, the framework needs a dispute resolution mechanism. Judicial control would be limited to interstate disputes — whether states fulfill their obligations under tax-related treaties subject to oversight. Of course, the details of a dispute settlement mechanism would still need to be developed. As mentioned, states are free to agree that a mechanism is applicable to some but not all tax-related treaties signed under the auspices of the new framework. This is a key element. The international tax regime is imbalanced because it has rather strong global quasi-legislative and -executive bodies, but the judicial element is to a large extent missing. For example, to refer to a very recent example the OECD — through a rather opaque process — will decide whether countries really implement a qualified domestic top-up tax for pillar 2 purposes and whether a qualified refundable tax credit is indeed qualified.

For tax agreements²⁸ signed in the past or in the future, it is possible to link them through a framework convention embracing all three elements. This would achieve a more robust international tax regime that would not only be considered legitimate, but sufficiently dynamic to react to societal progress. The latter is achieved

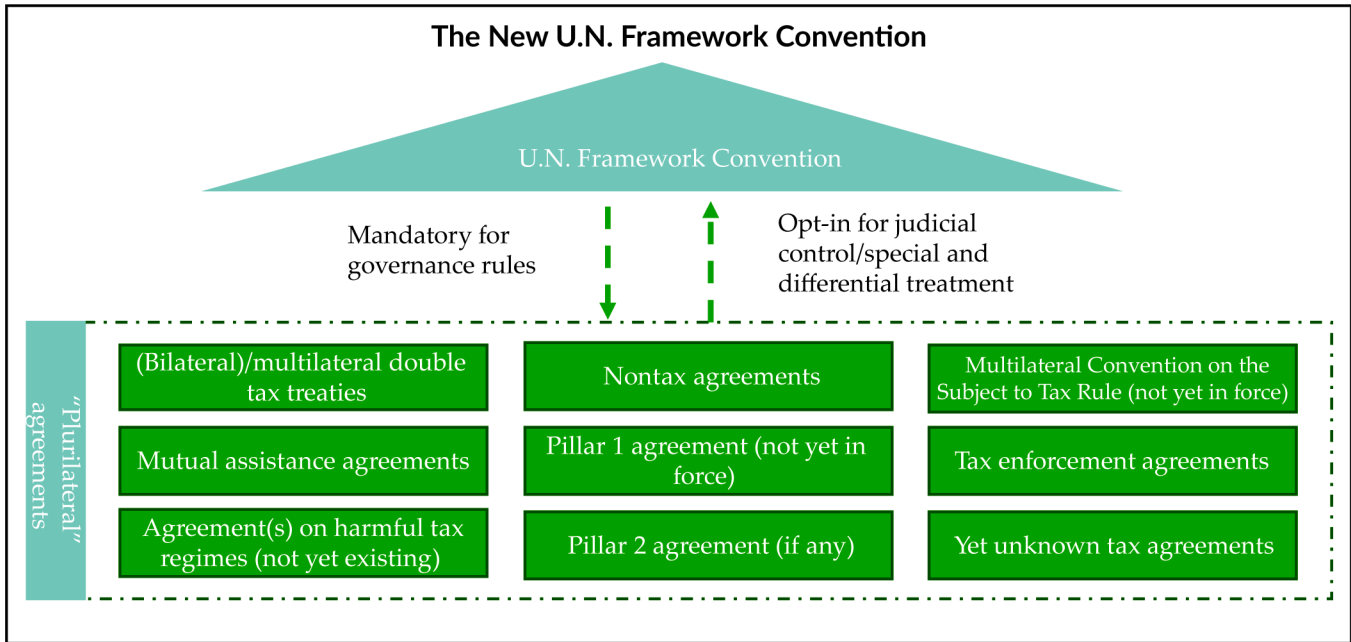
²⁴ Gary Winslett, “Critical Mass Agreements: The Proven Template for Trade Liberalization in the WTO,” 17 *World Trade Rev.* 405, 406-407 (2018); Basedow, *supra* note 23, at 411, 417.

²⁵ Hoekman and Mavroidis, “Embracing Diversity: Plurilateral Agreements and the Trading System,” 14 *World Trade Rev.* 101, 104-105 (2015); Basedow, *supra* note 23, at 411, 417.

²⁶ Hoekman and Mavroidis, *supra* note 19, at 319, 325.

²⁷ Chang-fa Lo, *supra* note 22, at 332, 338 (2019).

²⁸ See *supra* note 18.



through enabling new treaties among a subset of the members of the framework convention. The structure could look like that shown in the figure.

Conclusion

It seems challenging, if not impossible, to achieve multilateral consensus in substantive tax matters. However, we do not see that a global consensus on substantive issues like the allocation of taxing rights is indeed necessary and normatively justified. Nevertheless, there is a need for enhanced cooperation among coalitions of the willing, as long as the enhanced cooperation contains fair and legitimate terms. A new framework convention at the level of the U.N. should therefore aim not towards a strong and comprehensive commitment by countries, but instead enable fair and legitimate cooperation among willing parties.

The current discussion about the content of the framework convention presents a unique opportunity to create a formalized system with governance structures that allow for:

- transparent development of new tax treaties;
- a dynamic environment able to react to societal changes;
- the optional use of an intact judicial control system; and
- the possibility of considering the interest of developing and least-developed countries.

We showed that creating a framework convention and linking it to existing and future tax treaties through a plurilateral mechanism could indeed solve many of the current weaknesses of the international tax regime while at the same time not endangering the current process of finding an agreement for a more legitimate institutional governing structure. ■