Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument

Yariv Brauner

University of Florida Levin College of Law
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INTRODUCTION

The beautiful, serene Kyoto hosted on June 30, 2016 the inaugural meeting of the first international tax forum, named the Inclusive

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Framework.[1] Eighty-two countries' representatives met in the ancient Japanese Imperial city known for its *feng shui* to overcome the aftermath of the public and media discontent with the international tax regime following the global financial crisis of 2008.[2] The original response to this discontent was led by the Organization for Economic Co-operation and Development (OECD) in the form of the Base Erosion and Profit Shifting (BEPS) project.[3] The leadership role of the OECD in the project was seemingly natural because the OECD had been the caretaker of the international tax regime and its most dominant entity since the end of World War II.[4] The OECD crafted the "soft law" regime without legitimacy, and naturally with the interests of its own members (and its own institutional interests) in mind.[5] It faced little resistance prior to the turn of the millennium,[6] yet inherent technical deficiencies in the

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[1] See the dedicated OECD site: https://www.oecd.org/tax/beps/first-meeting-of-the-new-inclusive-framework-to-tackle-base-erosion-and-profit-shifting-marks-a-new-era-in-international-tax-co-operation.htm.

[2] Initially, the tax planning schemes of the largest technology corporations such as Apple, Microsoft, and Google were exposed. See, e.g., Charles Duhigg & David Kocieniewski, How Apple Sidesteps Billions in Taxes, N.Y. TIMES (Apr. 28, 2012), http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-lowtax-states-and-nations.html? _r=O; Jesse Drucker, Google Revenues Sheltered in No Tax Bermuda Soar to $10 Billion, BLOOMBERG (Dec. 10, 2012), http://www. bloomberg.com/news/2012-12-1 O/google-revenues-sheltered-in-no-tax-bermuda-soarto-10-billion.html; Richard Waters, Microsoft's Foreign Tax Planning Under Scrutiny, FINANCIAL TIMES (June 7, 2011), http://www.ft.com/cms/s/2/0880cd54-90al-1 le0-9531-00144feab49a.html#axzz2sl7hvlaz. Soon thereafter, however, it became clear that the phenomenon is more widespread. See, e.g., Edward D. Kleinbard, Through a Latte, Darkly: Starbucks 's Stateless Income Planning, 139 TAX NOTES 1515 (June 24, 2013)) (demonstrating that not only high-tech multinationals have been engaged in aggressive tax planning of the sort that led to the public discontent with the international tax regime).

[3] Based on the political will fed by the public and media discontent. The politicians of the G20 organization urged the OECD to react and appointed it as their envoy for the reaction. See, G20, G20 Leaders Declaration, at 1 48, G20 at Los Cabos, Mexico (June 18-19, 2012), https://www.g20.org/sites/default/files/g20 _resources/library/G20 _ Leaders_ Declaration_ Final_ Los_ Cabos.pdf. The OECD responded with the launching document for the BEPS project: OECD, Addressing Base Erosion and Profit Shifting (2013), followed by an action plan: OECD, Action Plan on Base Erosion and Profit Shifting (2013).

4 See, e.g., Nana Ama Sarfo, How the OECD Became the World's Tax Leader (Forbes, Aug. 11, 2020) https://www.forbes.com/sites/taxnotes/2020/08/11/how-the-oecd-became-the-worlds-tax-leader/?sh=397fca866289; Arthur J. Cockfield, The Rise of The OECD as Informal 'World Tax Organization' Through National Responses to E-Commerce Tax Challenges, 8 Yale J.L. & Tech (2006), 139.

5 See, e.g., Allison Christians, Hard Law & Soft Law in International Taxation, 25 Wis. Int'l L. J., 325 (2007); Yariv Brauner, The Klaus Vogel Lecture 2019: The True Nature of Tax Treaties 74(1) Bull. Int'l Tax. 28 (2020).

[6] Its dominance over the international tax regime is now well-known. See, e.g., Michael Lang et al., eds., The Impact of the UN and OECD Model Conventions on Bilateral Tax Treaties (2012); and Elliott Ash & Omri Marian, The Making of International Tax Law: Empirical Evidence from Tax Treaties Text, 24 Fla. Tax Rev. 151 (2020).

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international tax regime,[7] geopolitical changes,[8] and globalization[9] presented serious challenges to its dominance.[10]

The G20 organization[11] was recruited therefore by the OECD to build up the political power behind the BEPS project.[12] The project resulted in few substantive changes to the norms of the international tax regime,[13] yet it has dramatically altered the tax compliance environment faced by multinational enterprises (MNE).[14] More importantly, it succeeded in preserving the dominant position of the OECD over the international tax regime.[15] The focus of the global tax discourse has shifted to fighting what has been perceived as abusive tax planning by MNE,[16] obscuring that the fundamental problems that triggered the BEPS project and the critique of the actions of the OECD as the caretaker of the international

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[7] Most notably the challenges of taxing electronic commerce, sophisticated financial instruments, and the effective application of the transfer pricing rules (especially to transactions in intangibles and services).

[8] Primarily the ascent of the BRICS countries and decline in power of OECD members. See, e.g., Yariv Brauner & Pasquale Pistone, Eds., The BRICS and the Emergence of International Tax Coordination (IBFD, 2015).

[9] Which caused the elimination of currency controls and facilitated cheap transportation and communication that changed the global markets for which the norm of the international tax regime had been tailored.

[10] See, e.g., Brauner, The Klaus Vogel Lecture 2019, *supra* note 5.

[11] An informal organization of the largest world economies, similar to the OECD in its lack of relevant legitimacy. Its legitimacy had been questioned even beyond its actions in the tax world. See, e.g., Peter H. Henley & Niels M. Blokker, The Group of 20: A Short Legal Anatomy from the Perspective of International Institutional Law, 14 Melbourne J. Int'l L. 1 (2013); and Kern Alexander et. Al., The Legitimacy of the G20 - A Critique Under International Law (April 14, 2014). Available at SSRN: https://ssrn.com/abstract=2431164.

[12] And not for the first time. The OECD called upon the G20 for political support before BEPS when it found that its old soft law-based coercion techniques could not produce the expected results. Most notably, the failure of the so-called Harmful Tax Competition project resulted in the G20 backed Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum), which, similarly to the inclusive framework now, is an open membership forum yet one that completely relies on the OECD for agenda, administration and support. See OECD, Harmful Tax Competition: An Emerging Global Issue (1998); The Global Forum website: http://www.oecd.org/tax/transparency/; and Allison Christians, Sovereignty, Taxation, and the Social Contract, 81 Minn. J. Int'l L. (2009) (reviewing and critically assessing the process). For a more recent analysis of the OECD's use of such "forums," See Allison Christians & Laurens van Apeldoorn, The OECD Inclusive Framework, 72 Bull. Int'l Tax. 226 (2018).

[13] See, e.g., Yariv Brauner, Treaties in the Aftermath of BEPS, 41 Brook. Int'l L. Rev. 973 (2016) (demonstrating that BEPS introduced only few changes to the substance of the international tax norms, leaving the division of tax bases among nations essentially intact).

[14] See, e.g., Paul Lankhorst & Harmen van Dam, Post-BEPS Tax Advisory and Tax Structuring from a Tax Practitioner's View 10 Erasmus L. Rev. 60 (2017). Some have even viewed this change as a meaningful transformation of the international tax regime. See, e.g., Ruth Mason, The Transformation of International Tax, 114 AM. J. INT'L L. 353 (2020). This view ignores however the minimality of change in the substantive norms and in the politics of the international tax regime, the latter point being the subject of inquiry of this article.

[15] See, e.g., Brauner, The Klaus Vogel Lecture 2019, supra note 5.

[16] See, e.g., Yariv Brauner, What the BEPS…? 16 Fla. Tax Rev. 55 (2014).

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tax regime have not been resolved.

The BEPS countries (members of the OECD and the G20 organizations) quickly realized however that their desired focus on aggressive tax planning required cooperation with countries beyond their exclusive membership.[17] The BEPS project's outcomes included therefore three mechanisms to recruit more countries for the effort:[18] Country-by-Country reporting,[19] the multilateral instrument (MLI),[20] and the Inclusive Framework.[21]

Country-by-Country reporting (CbCR) is perhaps the single most significant doctrinal achievement of the BEPS project. An idea that had been initiated by civil society and had been opposed by the dominant OECD countries, but at the same time viewed by tax experts as inevitable.[22] It required MNE to report relevant tax information about their global operations, broken down to single countries, which made "stateless income"[23] (i.e., income not reported as associated with any single jurisdiction) problematic for these MNE, and put pressure on politicians to effectively tax the entire global income of these enterprises. Naturally, the reporting was intended to include operations in *all* countries, and for the most part to be available to all countries' tax authorities even though the original report is filed with the home jurisdiction.[24] Nominally, the report is confidential and available only to the relevant tax authorities, and only for the purposes of "risk assessment," i.e., to assist them in making a decision to audit or not to audit the taxpayer,[25] yet it is highly doubtful that that would be the case in reality.[26] In any event, CbCR could not work without the involvement

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[17] See Addressing Base Erosion and Profit Shifting, supra note 3.

[18] At the conclusion of the BEPS project the OECD published final reports for the 15 action items. See https://www.oecd.org/ctp/beps-2015-final-reports.htm.

[19] See OECD, Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report (2015).

[20] See OECD, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 -2015 Final Report (2015).

[21] Although not part of the BEPS agenda the framework was naturally a direct consequence of the BEPS project, being established to implement its mandates and recommendations. See supra note 1.

[22] The tax authorities in many OECD countries took the position that they already have all the required information and resisted the pressure to make the Country-by-Country reports public. Nonetheless, eventually this measure became the most quickly adopted BEPS measure. For its civil society origins, see, e.g., Richard Murphy (on behalf of the Association for Accountancy and Business Affairs), A Proposed International Accounting Standard Reporting Turnover and Tax by Location (2003), available at http://visar.csustan.edu/aaba/ProposedAccstd.pdf.

[23] Using the term coined by Edward Kleinbard, Stateless Income, 11 Fla. Tax Rev. 699 (2011).

[24] See Action 13 Final Report, supra note 19.

[25] See https://www.oecd.org/tax/beps/beps-actions/action13/ (the OECD's Country by Country Reporting dedicated website).

[26] See, e.g., Brauner, What the BEPS…? Supra note 16, 106.

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of essentially all countries, because it should include information about the global operations of MNE broken down by countries (all countries), and therefore it is *de facto* a harmonized universal measure.

The MLI is another product of the BEPS project. The original BEPS action plan included Action Item 15 which goal was to develop a multilateral instrument (a treaty) to implement the (then future) BEPS recommendations through a single, swift amendment of all relevant tax treaties.[27] The idea was that effective reform could not tolerate regular renegotiations of all relevant tax treaties, a process that might have taken years and would have likely faced many practical and political difficulties that would make the entire project irrelevant.[28] Although the MLI was established to implement the BEPS recommendation, it included provisions that permitted it to potentially expand beyond its narrow original charge and have arguably made it the first multilateral tax treaty.[29]

Finally, the Inclusive Framework, although not a direct product of the BEPS project, was effectively its consequence.[30] Similarly to the MLI, it was established to implement the BEPS agenda and to advance it where it had not achieved finality in terms of recommendations or dictates.[31] Its mandate was wider than that of the MLI because the MLI was limited to treaty changes and therefore to tax treaty provisions. Further, the Inclusive Framework could more naturally venture to areas where no consensus had been achieved during the BEPS project, most notably the solution for the challenges presented by the digital economy.[32] The Inclusive Framework's wide, essentially open, agenda and its stated inclusivity, both in nominal terms (all countries were invited to join) and in substantive terms (its effect goes beyond tax treaties and therefore may be relevant also for countries with few or no treaties), allegedly made it the most universal international tax forum, with 2/3 of the world's countries as members.

Nonetheless, the BEPS origins of the Inclusive Framework, its

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[27] See BEPS Action Plan, supra note 3.
[28] Id.
[29] See Yariv Brauner, McBEPS: The MLI - The First Multilateral Tax Treaty That Has Never Been, 46 Intertax 6 (2018) (arguing that the inclusion of provisions that permit amendments and additions to the MLI, the instrument's open duration, and the establishment of a decision-making forum signal that the MLI is not merely a device for one-time treaty amendment, but rather a foundation for a future international tax organization).
[30] See Inclusive Framework website, supra note 1.
[31] Id.
[32] A key BEPS issue that nonetheless could not be advanced beyond a very preliminary report during the BEPS project. See OECD, Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report (2015).

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reliance on the OECD, its limited actual agenda, and various administrative features have raised questions about the authenticity of the inclusivity of this framework.[33] A key difficulty in raising (and responding to) these questions is the lack of a clear measure of inclusivity. Different people may differ in their views of what may be sufficient inclusivity. It is not even clear what the OECD meant by inclusivity "on an equal footing" when it produced the framework.[34] In a recent article, Christians and van Apeldoorn explored the meaning of this phrase, generally supporting the notion of more inclusivity in the international tax regime on various grounds, yet criticizing the opacity of the abovementioned processes that according to them hinders the inclusivity processes from reaching their potential.[35] This Article generally accepts Christians and van Apeldoorn's arguments and normative stance,[36] but takes the next step, not only highlighting and protesting the obscurity of the goals set by the OECD, but examining the claim of inclusivity based on a variety of indicators and available data that together portray a clearer picture of this new institution. This methodology is dictated by the opacity of the OECD and its processes: the unclear (and undeclared) reasons for the OECD's call for inclusivity on equal footing, and the consequential lack of a pinpoint measures of success (and therefore of accountability) in achieving this goal in the Inclusive Framework.[37] The Article concludes that based on these

[33] See, e.g., Irma J. Mosquera Valderrama, Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative, 72 Bull. Int'l Tax. 3 (2018); Ivan Ozai, Institutional and Structural Legitimacy Deficits in the International Tax Regime, 12 World Tax J. 53 (2020) Linda Brosens & Jasper Bossuyt, Legitimacy in International Tax Law-Making: Can the OECD Remain the Guardian of Open Tax Norms? 12 World Tax J. 313 (2020); Christians & van Apeldoorn, supra note 12.

[34] But, the term has been consistently part of the Inclusive Framework's purpose statements throughout its existence. See Inclusive Framework website, supra note 1; and Christians & van Apeldoorn, supra note 12, 226.

[35] See Christians & van Apeldoorn, supra note 12.

[36] Which is also supported by the U.N. Sustainable Development Goals and the Addis Abba Agenda. See
Addis Ababa Action Agenda of the Third International Conference on Financing for Development (UN 2015), available at https://sustain-abledevelopment.un.org/content/documents/2051AAAA_Outcome. pdf. Christians & van Apeldoorn explain that inclusivity in the sense of equal participation increases the chances of all (including poorer) countries to advance interests of their citizens on matters that affect their lives; it potentially enables fairer distribution of the benefits and burden of international cooperation; it provides recognition to all nations as equal; and it establishes at least a perception of fairness and hence supports the legitimacy of the outcome of the negotiations. They further explain that different philosophers (mainly cosmopolitanists v. statists) may give different weight to these benefits of inclusivity, yet some of these benefits would appeal to all major schools of thought. See, Id., 226-227.

[37] See, e.g., Id., 228

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reasonable indications a claim for genuine, meaningful inclusivity of the framework is exaggerated and leaves much to be desired. The direct implication of such shortcoming is that the legitimacy that the OECD has been pursuing for the post-BEPS international tax regime, and the corresponding cooperation it has been seeking from the developing world are unlikely to materialize soon.

The rest of the Article proceeds as follows: Part I examines the MLI and its contribution to the inclusivity of the international tax regime; Parts II and III similarly analyze the inclusivity of CbCR and the Inclusive Framework, respectively; Part IV concludes, exploring the implications of this Article's findings for the future of the international tax regime.

I. THE MULTILATERAL INSTRUMENT (MLI)

The concept of a multilateral tax treaty has been on the international tax policy agenda for a long time,[38] yet, until the conclusion of the MLI, the idea had not materialized.[39] The initial idea for an MLI appeared in the BEPS Action Plan's Action 15.[40] The original work on BEPS Action 15 focused on the feasibility of such instrument, based on public international law and precedents from other areas of international law.[41] This work produced a report, concluding that an MLI is desirable and feasible.[42] The report was approved by the OECD's Committee on Fiscal Affairs (CFA) in June 2014. The OECD then proceeded to constitute an ad-hoc group (MLI Group) to work on the MLI's drafting. This action was based on a mandate approved by the CFA and endorsed by the G20 in February 2015.[43] The mandate stated that all countries may participate in the MLI group and that participation did not require later signature.[44] The final Action 15 report was released in 2015 together with the other final BEPS report, and included mainly the mandate and the 2014

[38] See, e.g., Michael Lang, ed., Multilateral Tax Treaties (Kluwer L. Intl., 1998).
[39] Past multi-country tax treaties were narrow-scoped and therefore better viewed as networks of bilateral tax treaties. See, e.g., the "Nordic Convention," the Convention Between the Nordic Countries for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital (1996). Other multilateral treaties with tax related context do not contain substantive tax norms. See, e.g., the 1988 Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (in force since 1995).
[40] See supra note 20.
[41] Id.
[42] OECD, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties (2014).
[43] OECD, Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS (2015).
[44] Id.

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report.[45] It further included a toolbox for future implementation of an MLI with measures that for the most part were eventually adopted by the MLI.[46] The final report further conceived the creation of the Inclusive Framework in 2016.[47]

The MLI group started working on June 5, 2015, with a deadline of December 31, 2016. The language of the instrument (treaty) was negotiated in the MLI group that included close to a hundred countries with little public exposure. A discussion draft was released on May 31, 2016[48] for public consultation (scheduled for July 7, 2016 at the OECD), yet the draft was very short and did not include the proposed treaty language. Comments were invited "solely on technical issues of implementation and on issues related to the development of a MAP arbitration provision, rather than on the scope of the provisions to be covered in the multilateral instrument or on the substance of the underlying BEPS outputs."[49] Only a month was given to the public to submit its comments prior to the meeting. A large number of comments was received, but none received from non-BEPS countries.[50] Almost instantly, on November 24, 2016 the OECD announced that the MLI group has concluded its work on the MLI.[51] On December 31, 2016 the text of the MLI was opened for signature, and on August 17, 2017 a celebratory signing ceremony was held at the OECD after 71 countries had signed on the MLI.[52] The MLI entered into force on July 1, 2018, and as of July 22, 2020 it has 94 signatories and had been ratified by 49 of them.[53]

In terms of scope the MLI is first and foremost a device for the implementation of the BEPS agreements, but it is not a straightforward application of these agreements, because it includes provisions that gained no consensus during the negotiation of these agreements. Note, however, that the MLI does not include content beyond that established

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[45] Action 15 -2015 Final Report, supra note 20.
[46] Id., annex A.
[47] Id. at 3.
[48] See https://www.oecd.org/ctp/treaties/BEPS-Discussion-draft-Multilateral-Instrument.pdf.
[49] Id. at 1.
[50] See https://www.oecd.org/ctp/treaties/public-comments-received-discussion-draft-Development-of-MLI-to-Implement-Tax-Treaty-related-BEPS-Measures.pdf.
[51] See https://www.oecd.org/tax/treaties/countries-adopt-multilateral-convention-to-close-tax-treaty-loopholes-and-improve-functioning-of-international-tax-system.htm.
[52] See https://www.oecd.org/tax/beps/ground-breaking-multilateral-beps-convention-will-close-tax-treaty-loopholes.htm.
[53] Updated information on signatories and entry into force is available at https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

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for the BEPS project by the OECD.[54] This content was eventually complemented by corresponding changes to the OECD Model, in its 2017 version.[55] The OECD Model is an OECD-only document that effectively served as the basis for the MLI. The MLI includes four groups of provisions: the BEPS minimum standards that all countries (BEPS and Inclusive Framework countries) are bound by;[56] other BEPS recommendations and practices that may impact tax treaties, which countries may or may not adopt;[57] an opt-in mandatory tax treaty arbitration regime;[58] and administrative provisions.[59] Not unlike the BEPS project, one should find it difficult to extract a coherent policy thread in the MLI that can explain the choices made beyond, perhaps, the institutional interests of the OECD (to maintain its dominance over the international tax regime).

The scope and history of the MLI are important for its interpretation, because, as a treaty, it is subject to the norms of interpretation provided by the Vienna Convention on the Law of Treaties (VCLT),[60] which relies, beyond the language, on the context, object, and purpose of a treaty.[61] Interestingly, despite the supposedly closed list of BEPS provisions it includes, the MLI was left open for future expansion and amendments, not necessarily limited to the scope of the BEPS project.[62] Moreover, the MLI potentially establishes an international tax forum: the "conference of parties" that may be difficult to assemble and release from the hold of the OECD, still not impossibly so; more interestingly, it is distinguished from and has no ties to the Inclusive Framework.[63] Finally, despite the strong association of the MLI with the BEPS project and the OECD, it does not have a termed duration which one would expect if it were established solely for the implementation of the BEPS agreements.

The slight freedom of the MLI from BEPS does not apply to its operations, however, because it is limited to tax treaty provisions. Its sole effect is to amend treaties using the *later in time* cannon of

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[54] Non-BEPS countries were invited to join the MLI group on an "equal footing," yet they were not permitted to introduce new content to it beyond the BEPS items introduced by the OECD.
[55] OECD, Model Tax Convention on Income and on Capital: Condensed Version 2017 (Paris: OECD Publishing, 2017)
[56] MLI Articles 6, 7, 16 (note that not all four minimum standards relate to treaty provisions).
[57] MLI Articles 3-5, 8-15, 17
[58] MLI Part VI (Articles 18-26).
[59] MLI Articles 1, 2, 27-39.
[60] United Nations, Vienna Convention on the Law of Treaties, 1969, available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en [Accessed 12 September 2019].
[61] VCLT Art.31(1).
[62] See, e.g., Brauner, McBeps, supra note 29.
[63] See MLI Article 31.

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interpretation.[64] It is not equipped to resolve issues that treaties themselves could not or do not resolve. Moreover, the MLI maintain the traditional character of treaties that are based on the concept of consent. The MLI applies therefore only to tax treaties submitted to it by both parties and only to the extent that both parties chose the same MLI amendment to apply to their treaties.[65] Such control of the parties is limited however in at least three ways: (1) the OECD maintains control over the administration of the MLI, having appointed itself as the depositary of the treaty,[66] and maintaining its administrative support and financing throughout the project; (2) beyond limiting the agenda, the OECD designed the MLI to allow only a closed, set list of permitted reservations among which the parties may choose;[67] and (3) the MLI refers back to the (amended) bilateral tax treaties for interpretation purposes, and only disputes over the interpretation or implementation of the MLI itself would reach the conference of parties, maintaining the dominance of the OECD over tax treaty interpretation worldwide (through the OECD Model and Commentary).[68]

A. *Is the MLI Inclusive?*

The MLI is perhaps the most transparent among the three regimes that this Article observes. Once in effect, its outcomes became public by nature since their purpose was to swiftly amend tax treaties in force. Yet, the negotiations and power applied behind the scenes of the negotiations were not easily observable. This Part attempts however to expose some of their implications through publicly available information.

1. Setting the Agenda

It is not difficult to observe how the OECD dominated the MLI from its inception. It wrote all the initial reports and preparatory materials, including its constitutive mandate, leaving them for the G20 to endorse after the fact.[69] All other countries were invited to join the MLI group

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[64] Or (in Latin): *lex posterior derogat (legi) priori.*
[65] Indeed, despite the large number of signatories and the fact that they include the most extensive treaty users in the world the OECD estimates that only approximately 300 treaties out of around ten times that amount would in effect be amended by the MLI at the time of the writing of this article. See, OECD, OECD/G20 Inclusive Framework on BEPS: Progress Report (July 2019-July 2020), 3. This number will surely grow in the near future, yet it is controlled by the parties.
[66] MLI Article 39.
[67] MLI Article 28.
[68] See, e.g., Yariv Brauner, Tax Treaty Negotiations: Myth and Reality (unpublished manuscript, 2020).
[69] See supra note 20.

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only after the agenda and the architecture were set. The chair of the ad hoc group was a British official who formerly worked for the OECD.[70] The group, like the rest of the BEPS project actions, was completely dependent on the OECD and its secretariat who hosted the group and supported it financially and otherwise.

The intensive timeline and the opacity of the proceedings, both preliminarily dictated by the OECD, resulted in little participation by non-BEPS countries.[71] There are no indications of comments or significant doctrinal contributions by any such countries in the construction of the MLI. Private, informal discussions with delegates from various countries, OECD and non-OECD Members, confirm this point.

Most importantly, both the measures to be included in the MLI and the methodology for its implementation were essentially given, almost dictated, to the group by the BEPS project, the former through the various BEPS final reports and the latter through Annex A of the Action 15 final report.[72] Interestingly, one could observe some misalignment between the content of the MLI and the final recommendations included in the final BEPS report. Such misalignment should not however point to a freedom of the MLI from OECD control but rather the opposite. One cannot avoid the conclusion that the MLI served some dominant OECD Members or perhaps officials as a second round to push forward issues that could not win sufficient support during the BEPS project.[73]

A more transparent matter that demonstrates the political forces behind the architecture of the MLI was the matter of mandatory treaty arbitration proposed by the OECD back in 2007 with little traction among members except for the United States.[74] The United States made arbitration a key priority during BEPS, with little success,[75] and effectively made it a condition for its participation in the MLI group, again with partial success[76] that contributed to the decision of the United

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[70] Mr. Mike Williams. We do know that two of the three vice-chairs were from non-BEPS countries (Morocco and the Philippines). The third was from China.

[71] See, e.g., D.P. Sengupta, BEPS on an Equal Footing – Be on Your Guard! TaxIndiaInternational.com (July 28, 2016) (emphasizing the role of differences of resources among participants in light of the rushed agenda and the institutional setting).

[72] See supra note 20.

[73] See, e.g., Brauner, McBeps, supra note 29.

[74] See OECD, Improving the Resolution of Tax Treaty Disputes (2007), http://www.oecd.org/ctp/dispute/38055311.pdf.

[75] It had not made it to the final report. See, OECD, Making Dispute Resolution Mechanisms More Effective, Action 14—2015 Final Report.

[76] See, Yariv Brauner, United States Report, in IFA, Assessing BEPS: Origins, Standards, and Responses, Topic I of the 2017 Annual IFA Congress, Rio De Janeiro, Brazil, IFA Cahiers de Droit Fiscal International, Vol. 102A (2017).

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States not to sign onto the MLI.[77] Despite that decision and the obvious wide rejection of mandatory treaty arbitration by MLI group participants it found a place in the treaty, albeit in a "step child" format.[78]

2. Original Movers

The original MLI signatories included four distinct groups: (1) 35 OECD Members, and Costa Rica, a candidate member at the time[79] (Estonia signed 29/06/2018, and the United States never joined the MLI), out of which 32 have also ratified it by July 1, 2021; (2) 12 out of 15 G20 and E.U. Member (and candidate) States that are not OECD Members but are effectively committed to BEPS in a similar manner, out of which 7 have also ratified it by 2021;[80] (3) ; 9 developing countries, out of which only Georgia has ratified the MLI by 2021; (4) 14 countries that are known as offshore tax planning centers, out of which 10 have also ratified it by 2021. These numbers make the dominance of BEPS countries (the first two groups) obvious in this context.

Note that being a first mover on the MLI has advantages and disadvantages. First movers establish the conference of parties and control the treaty once it comes into effect, having power, as such over those countries that had yet to sign. In reality, solicitation for new signatories has been left for the OECD, with no public indication for any position taken by the original adopters about later additions. Further, first movers also "reveal their cards," especially because most of these countries included essentially all of their treaties in their submission to the MLI and are therefore theoretically exposed to effectively unilateral decisions by later movers over the content of the tax treaties between them and over the decision to include or not certain treaties as covered agreements.[81]

3. Joiners

One hardly notices however that later MLI signatories took advantage of their potential strategic advantage. These include only Estonia in the first group of countries (OECD Members); 3 non-OECD BEPS countries, out of which Albania and Saudi Arabia ratified the MLI by 2021;[82] 18

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[77] Id.
[78] See supra note 57.
[79] Costa Rica has since become the 38th member of the OECD (May 25, 2021).
[80] Brazil, a G20 country, and Montenegro, a candidate country for E.U. membership have also never signed the MLI.
[81] See more in Brauner, McBeps, *supra* note 29.
[82] The other country is E.U. candidate member North Macedonia.

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additional developing countries, out of which only 5 have ratified the MLI by 2020;[83] and 4 additional offshore centers, none of which has since ratified the MLI.[84] The total numbers of MLI signatories accumulate to an impressive amount, yet almost all of the new signatories are relatively weak, developing countries that, first, have not hurried to ratify the MLI, and, second, are unlikely to be able to take advantage of their late mover position described above.

4. Covered Tax Agreements

An important feature of the MLI is its elective nature. Countries are free to include any portion of their treaty network in their list of commitments, and only these may eventually become "covered tax agreements" and potentially amended by the MLI.[85] A review of the positions taken by the MLI signatories reveal significant differences among states in this regard.[86]

The majority of signatories have subjected all or almost all of their tax treaties to the MLI. Many have even submitted tax treaties not yet in effect. There were 62, exactly two-thirds of the 93 signatories that have submitted at least 90% of their treaties in effect to the MLI depositary (the OECD secretariat). And, 15 countries submitted between 70% and 90% of their treaties. The ratio of BEPS countries among these 77 better-compliant is only slightly higher than their overall ratio among the MLI signatories; additionally, there is a strong correlation between better-compliance (in terms of submission of treaties to the MLI) and a weaker position within the BEPS countries group. Moreover, almost all of the countries that submitted all of their treaties to the MLI depositary are weak developing countries or tax havens. The rest of the signatories, with less than 70% submission rate include powerful and highly sophisticated countries, such as Austria, Belgium, the Czech Republic, France, Germany, Indonesia, Japan, Norway, and Switzerland ("beating" all other countries with a 12% rate of submission). Other countries included in this group are Georgia and Tunisia, both with a middle-sized treaty

[83] These are Kazakhstan, Oman, Qatar, Ukraine and the UAE.
[84] Mauritius was counted among the first movers since it joined the MLI one month after the original signature ceremony under significant OECD pressure. See, e.g., Stephanie Soong Johnston, Saint-Amans Laments Mauritius and U.S. Absence from MLI Signing, Tax Notes Today Int'l (June 8, 2017), followed by the announcement on July 5, 2017 that Mauritius will sign the MLI.
[85] MLI, Articles 1 & 2.
[86] See OECD, MLI positions matrix, available at https://www.oecd.org/tax/treaties/mli-database-matrix-options-and-reservations.htm.

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network, and the UK Islands of Guernsey, Isle of Man, Jersey, all with a limited treaty network.

The picture portrayed by these data is quite clear: some countries had been better prepared prior to their joining of the MLI than others, and for the most part the better prepared were the stronger economies and other most sophisticated countries in terms of tax treaty negotiations. Even more striking is the finding that all later adopters of the MLI submitted essentially their entire treaty network to the MLI depositary, which reinforces the conclusion made above that their relative (political or economic) weakness prevented them from enjoying the potential benefits of late joiners of the multilateral treaty.[87]

The key observation here is not that countries submitting larger portions of their treaty networks were necessarily wrong or less sophisticated in their choices, but unavoidably these choices indicate a significant difference between the more and less powerful countries in their preparation for the submission of their MLI positions. This indication is consistent with other indications to the same effect, for instance the reservations made by countries on the MLI, explored next.

5. Reservations

Analysis of the different MLI country positions is an important source of information about the degree of equality among the signatories of the MLI. The key hypothesis of this Article is that different levels of economic and political power, of resources, and of tax treaty experience and sophistication widen the gaps among countries party to the MLI rather than decimate it. Private conversations and analysis of tax treaty negotiations beyond the MLI supported the construction of this hypothesis. The basic story was that some countries have done their "homework," while others accepted the dish served to them by the OECD without sufficient analysis.

A review of the countries' positions on the MLI generally support this hypothesis, yet careful analysis requires a nuanced perspective. First, the MLI includes three very different types of provisions: the BEPS minimum standards, other BEPS measures, and a chapter on treaty arbitration. This section focuses on the second group of measures since the minimum standards, being as such, provide some flexibility but not the option to reserve on the entire provision, leaving little space for discretion and therefore little space for analysis and preparation. The

[87] The lowest number among these countries belong to Estonia that is likely the most sophisticated treaty negotiators among this group, and even Estonia submitted more than 90% of its network to the MLI Depositary.

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arbitration chapter is a separate add-on to the MLI, known to have been added at the pressure of the United States and some OECD personas, perhaps with a hope that the United States would eventually join the MLI.[88] There had been strong resistance among non-OECD (and some OECD) countries to arbitration in the BEPS project and little hope that a large number of MLI signatories would join it, indeed leaving it as a step-child of the MLI, not opted into by most.

The majority of MLI provisions were however drafted with clear and limited (a closed list)[89] options for reservations, including an option to reserve on the entire provisions. Signatories were provided the option to completely reserve in this manner on eleven MLI provisions. This design feature created a logical incentive to reserve on all of these provisions. Indeed, nineteen countries (sixteen of them were among the 2017, initial or almost initial, signatories) did so, and another eleven made ten reservations. At the same time, twenty-nine countries made few (three or less) or no (five countries, all among the original signatories) complete reservations. One may argue that these stark differences simply reflect different positions of different countries on the said measures. This Article argues that straightforward interests cannot explain this diversity. It further argues that strategic reasons should have compelled countries to make more rather than fewer reservations even with respect to provisions that match their interests. Consequently, only politics and different levels of preparation can explain the found diversity of country responses.

Take for example the most powerful countries in the group. Canada made eight reservations, France, Germany, and China six, and the United Kingdom five. Countries known for their commitment to the way of the OECD made few reservations (Chile – 3, Colombia – 2, Denmark – 0, Israel – 2, Japan – 3, Mexico - 1, Netherlands – 2, New Zealand – 0, Norway – 2, Spain – 3). The group of countries with the most reservations included European and other OECD countries that are not as dominant as the abovementioned but with sufficient tax treaty negotiation experience, such as Switzerland, Sweden, Korea, Greece, and Finland, countries known for their offshore regimes,[90] such as Panama, Monaco, Mauritius, Jersey and Guernsey, and countries with little experience with tax treaties and hence little past participation in the international tax regime, such as Oman, the UAE, Qatar, and Belize. Only an in-depth questioning of the

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[88] See IFA 2017 United States report, supra note 76.

[89] MLI Article 28. See also Ricardo Garcia Anton, Untangling the Role of Reservations in the OECD Multilateral Instrument: The OECD Legal Hybrids, 71 Bull. Int'l Tax. 544 (2017).

[90] Often called "tax havens." The discussion of tax havens and the appropriateness of that designation is beyond the scope of this article.

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country officials could reveal the true picture of the different countries positions on the MLI, be that as it may the above numbers raise the suspicion that over half of the signatories made strategic choices rather than deeply educated elections in this regard.

The above study can be complemented with a slightly different counting of countries' MLI positions. The MLI provided several options for reservations, beyond the option to reserve on the entire provision. A counting of the number of positions taken by MLI countries provides additional texture and nuance to the above counting of pure reservations. For simplicity purposes, the Article counts each position taken (an x, A, B or C on the OECD chart of country positions) as a single position. Countries taking 20 or more positions include: Canada, Germany, Italy, Luxembourg, Malta, Mauritius, Singapore, and Sweden, and countries with the fewest positions (7 or fewer), include: Albania, Armenia, Burkina Faso, Cameroon, Colombia, Cote d'Ivoire, Fiji, Gabon, Israel, Jamaica, Kazakhstan, Nigeria, The Slovak Republic and Tunisia. Again, there could be country-specific interests that explain some of this diversity, yet it is unlikely to explain its entirety. Note also that not only the economically stronger and more sophisticated (in tax treaty negotiation terms) countries made larger numbers of reservations but also countries known for their offshore regimes, countries that naturally have more at stake so far as taxation is concerned, all have well more than ten positions on the MLI.

In conclusion, the MLI positions of signatory countries reveal significant differences among countries, which is consistent with the hypothesis made by this Article. One should however be cautious not to draw too strong a conclusion from this analysis alone, because, as mentioned, some of the differences should be attributed to different interests of the countries involved, and some to politics, as further explored elsewhere in this Article.[91] For this reason, this Article refrained from drawing statistical inference from the data. It simply concludes that the level of preparation among MLI signatories greatly varied, and for the most part this reality advantaged the more economically powerful and more (tax) experienced countries. At the time of the writing of this Article over 300 treaties have already been effectively amended by the MLI. Unsurprising, and consistent with the above conclusion only a small portion of these treaties are concluded by one or more non-BEPS countries.[92]

[91] Infra part IV.
[92] Approximately 20%.

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6. Issues of Substance

Not only the power to set the agenda, but also the agenda itself impacts the measure of equality within the MLI. Others have already protested the substantive issues on the set agenda for the Inclusive Framework included primarily BEPS implementation topics that concerned the developed world,[93] not including any of the issues presented to the BEPS project by developing countries, not even issues that giants such as China and India promoted.[94] Conversely, the MLI included elements designed to please choice countries despite a majority opposition within the BEPS project, most notably the mandatory arbitration part, which primary advocate had been the United States that would not become part of the MLI.[95]

7. The Future of the MLI

The bright spot in terms of equality in the MLI is its structural features that allow the instrument to operate as an open-ended, "living" multilateral tax treaty beyond the BEPS fixes it already includes. One may and should question the appropriateness of expanding the MLI beyond its unquestionable original purpose (same BEPS fixes), arguing that perhaps expanding inherently contradicts with the original consent to the MLI that had been the basis for its conclusion. However, the MLI clearly provides for opportunities to expand and amend it with no explicit limitations on the scope of such changes.[96] Moreover, the MLI establishes a forum for the management of the treaty (the conference of parties) with procedural guidance for its operation. The power of this forum is limited because the MLI provides that interpretation of the tax treaties as amended by the MLI would *not* be subject to the conference of parties,[97] nevertheless, such limitation does not necessarily apply to future expansion of the MLI.

If accepted, this view of the MLI opens the door to a multilateral tax forum (and treaty) with no preliminary procedural bias in favor of the more powerful countries. The naming of the OECD as the depositary gives it significant power, but such power is arguably limited to the BEPS positions of the signatories.[98] The parties may also change the function

[93] See supra note 33.
[94] Issues such as the taxation of indirect transfers and the role of locational savings in arm's length price determinations.
[95] See supra Part I.A.1.
[96] MLI Articles 30 & 33.
[97] MLI Article 32(1).
[98] MLI Article 39.

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or even the identity of the depositary. It is difficult to argue that these opportunities are likely to change the power balance within the international tax regime. For the first time, however, the MLI makes it possible and concrete.

II. COUNTRY-BY-COUNTRY REPORTING

Country-by-Country Reporting (CbCR) was adopted by the BEPS project in Action 13.[99] An idea that came up from civil society and resisted by tax authorities and the OECD for some time, perhaps due to pressure applied by MNE, could not have been ignored if one were truly concerned about BEPS. To facilitate coordination in the battle against inappropriate international tax planning, countries needed more than anything a complete picture of the structure and operations of MNE. Such complete picture was denied by the traditional international tax regime and its tax competition-based scheme. The existing paradigm divided income to domestic and foreign source income, rarely dividing foreign source income further, attributing it to specific jurisdictions.[100] Even more importantly, the strong and unnecessary adherence to the separate corporate personality fiction was essentially universal, helping to obscure the location of real operations.[101] CbCR was invented to correct this fault and provide as complete a picture as possible to tax authorities in their alleged battle against BEPS. Eventually it was adopted by the BEPS project as a minimum standard that all BEPS and Inclusive Framework countries are committed to implement in their respective domestic laws.

The first Inclusive Framework report[102] reported that 30 countries had fully implemented CbCR and another 20 countries were close to follow their steps, among which were 35 OECD Member States, 7 non-OECD G20 countries, and other countries, most of which were offshore

[99] See supra note 19.
[100] Some foreign tax credits regimes provided for per-country limitations, yet such regimes are not common, especially following the increasing mobility of investment since the last part of the 20th century. See, e.g., Karen V. Kole, The Status of United States International Taxation: Another Fine Mess We've Gotten Ourselves Into, 9 Nw. J. Int'l L. & Bus. 49 (1988-1989), 56 (describing the U.S. experience with per-country foreign tax credit limitation).
[101] For some of the implications of this fiction, see, e.g., Yariv Brauner, The Non-Sense Tax: A Reply to New Corporate Income Tax Advocacy, 2008 Mich. St. L. Rev. 591. Of course, the entire BEPS project acknowledges the fiction, targeted at corporations that nominally operate in low tax jurisdictions but actually participate in the economies of many more countries, reaping profits without taxation. See e.g., examples in supra note 2.
[102] OECD, Inclusive Framework on BEPS: Progress Report (July 2016-June 2017).

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centers.[103] Also, it reported that 64 countries signed the multilateral agreement to operationalize the exchange of the reports.[104]

The second Inclusive Framework report reported 90 countries fully implementing CbCR, with an additional 15 close to achieving compliance.[105] The report further details various initiatives to support countries in the implementation of the regime but also to monitor their compliance with it.[106]

A. *How Inclusive is CbCR?*

There should be little doubt that CbCR is generally beneficial to developing countries, because without it they were practically dependent on the questionable efficacy of the exchange of information by the (typically developed) residence jurisdictions.[107] Despite this advantage and the reported success of the CbCR initiative there are a few features that limit the inclusivity of the regime. First, the BEPS project provided for a threshold of EUR 750m, which means that only the largest MNE have been subject to CbCR. The threshold was explained as a balancing act against the compliance and administrative costs involved with such reporting. None of the preparatory works considered the impact on smaller, poorer source countries that need the same information from smaller MNE. The redistributive implications (lacking a better term) of the threshold were not taken into account.[108]

Second, the scope of the CbCR was considerably reduced between the Action 13 interim report and the final report that was eventually implemented by the various forums and countries. It is well-known that the lobby of large MNE in concert with the United States delegates to the BEPS project insisted on these changes based on unsubstantiated arguments that the expanded form would unnecessarily disclose commercial secrets, making the entire regime nonviable.[109] The reduced

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[103] The precise definition of tax havens and similar groupings is beyond the scope of this article, yet the article separately identifies jurisdictions which tax regimes is closely associated with unique regimes accommodating offshore investment to distinguish them from other developing countries that are more often associated with hosting real foreign investment within their jurisdiction.

[104] First Inclusive Framework Progress Report, supra note 102, 8. For the agreement, see The Multilateral Competent Authority Agreement, available at https://www.oecd.org/tax/beps/country-by-country-exchange-relationships.htm.

[105] See Second Inclusive Framework Progress Report, supra note 65, 26.

[106] Primarily using the typical peer-review mechanism. See, Id.

[107] Note however that the resources gap and capacity issues make the benefits to richer countries likely larger than whatever benefits the poorer countries enjoy.

[108] Other political considerations clearly were considered. Most notably the potential argument by the United States that this threshold made the regime effectively anti-American MNE regime.

[109] See, e.g., IFA 2017 United States report, supra note 76.

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amount of information primarily impacts the market or source countries since the MNE residence countries had already had access to the entire tax relevant information of these taxpayers. The poorer countries are naturally harmed the most by this unavailability of potentially tax relevant information.

Third, CbCR was designed to be confidential (provided to the headquarter (residence) jurisdiction that would exchange it with all other relevant (source) jurisdictions, and these must keep it confidential). I, together with others, have argued that CbCR should be publicly available and that they are unlikely to be kept secret even if designed to be so.[110] Leaking and the ability of essentially all tax authorities to demand these reports (that they know the taxpayer had prepared) in an audit make the confidentiality requirement awkward at best. Making the report public would help monitor BEPS more than any other measure since these reports would be subject to public, media and independent experts' scrutiny. In addition, making it public would reduce the costs for the poorer jurisdictions to obtain the much-needed information, and protect them from ailments such as corruption, political pressure, and even failure due to a lack of expertise (because they could be aided by outside scrutiny).

Fourth, many jurisdictions have already committed to automatically exchange the CbCR, but there are others that would do so only on bilateral bases, which should clearly disadvantage the weaker jurisdictions.[111] Most notably, the United States, where the most MNE are headquartered, had already announced that it would not freely exchange these reports.[112]

Fifth, another condition imposed on CbCR is that it is to be used solely for risk assessment purposes, which effectively means that the items reported should not be directly used for tax calculations and imposition. What is more natural for a small, poor jurisdiction than take the amounts reported as related to its jurisdiction and apply formulary taxation to it? This is exactly what the OECD was trying to prevent with this condition, consistent with its longtime opposition to formulary taxation. But, the recent developments in the context of taxation of the

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[110] See, e.g., Alex Cobham, Investors demand OECD tax transparency, Tax Justice Network website (March 19, 2020): https://www.taxjustice.net/2020/03/19/investors-demand-oecd-tax-transparency/.

[111] See, e.g., Alex Cobham, Developing Countries' Access to CbCR: Guess Who's (not) Coming to OECD Dinner? Tax Justice Network website (May 5, 2017): https://www.taxjustice.net/2017/05/05/developing-countries-access-to-cbcr-guess-whos-not-coming-oecd-dinner/.

[112] See, dedicated IRS website: https://www.irs.gov/businesses/country-by-country-reporting-jurisdiction-status-table.

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digital economy have led to the OECD effectively supporting formulary taxation of difficult to tax (under the current rules) activities. It is difficult to understand, normatively, why would the OECD resist formulary taxation by source or market economy beyond the digital context (the OECD led the non-ringfencing "the digital economy is the economy" campaign)?[113] The condition is also practically problematic, because it would be impossible to enforce. It is difficult to see how a "fruits of the poisonous tree" argument could help taxpayers against violating tax authorities. The problem is that poorer, weaker countries will likely be in a disadvantage in comparison to richer countries if they wished to use such tactic. Anticipating this problem, and especially providing a simple solution along these lines (consistent with the digital economy Pillar one Secretariat proposal), at least as an option, would make more sense and likely be perceived as fairer.

III. THE INCLUSIVE FRAMEWORK

A. *Origins and Design*

The Inclusive Framework was established in June 2016. It was conceived by the BEPS Action 15 final report published in the prior year based on the understanding that the BEPS reforms, and most importantly the MLI, could only be effective if implemented on a universal basis, not only by the BEPS countries.[114] Officially, the Inclusive Framework was established in response to a September 2015 call by the G20 finance ministers to do so.[115] The OECD proposed an "architecture" for the framework, endorsed by the same ministerial body, and the first meeting took place in Kyoto in June 2016.[116] In its first year approximately 100 countries joined the Inclusive Framework, committing to implement the BEPS package (as published in October 2015 by the OECD), but also committing to "finalise the remaining technical work to address BEPS challenges," i.e., to continue the work not completed by the BEPS project.[117]

The first Inclusive Framework report summarized the work done

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[113] Indeed, the OECD has recently been promoting exactly that in the context of the taxation of the digital economy work under the so-called unified approach and the "Pillar One" proposal. See https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint-beba0634-en.htm.

[114] See Action 15 Final Report, supra note 20.

[115] First Inclusive Framework Progress Report, supra note 100, at 4.

[116] Id.

[117] Id.

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throughout the framework's first year of operation.[118] The report included information on the implementation by the members of the framework of the BEPS four minimum standards, other (non-minimum standard) treaty provisions via the MLI, and other non-treaty BEPS measures[119] and action items. The latter included the recruitment of non-BEPS countries to tangential initiatives, such as the MLI,[120] the "OECD-led procurement of a Common Transmission System" (CRS),[121] and the Mutual Administrative Assistance Convention.[122] The first report further included an agenda for the future, primarily the establishment of a peer review mechanism to police the implementation of the BEPS measures and for progress on the two most notable omissions of BEPS: the taxation of the digital economy, an issue that generated merely a report within the BEPS project, and transfer pricing, which produced only little more than that.[123] Notably, the agenda of the Inclusive Framework was mainly a BEPS agenda, yet it included gestures made to the developing parties that joined the framework with a promise of "equal footing." First, several issues known to have concerned developing countries were identified with a promise to develop "toolkits" for their (and other BEPS issues') address.[124] These included: best practices for the use of tax incentives, application of the transfer pricing rules with little or no comparables, special rules for the extractive industries, and the taxation of indirect transfers of shares. Second, the project promised help to developing countries with mentoring, training, and capacity building.[125]

The following two years did not enjoy progress reports, only in July 2020 a second progress report was published with respect to the period July 2019 - July 2020.[126] This report similarly included a progress report on the implementation of the various BEPS measures, yet, its first section emphasized the inclusivity of the framework, noting the large membership (137 at the time), its diversity, and the capacity building and mentorship support provided to developing countries.[127] The slow pace of "progress" of developing countries was noted, yet the solution

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[118] Id. at 5-20.
[119] Such as domestic law changes, both those agreed upon as recommended by the BEPS agreements (e.g., hybrid mismatches rules, or interest deductibility rules), and those not agreed upon yet still pushed through to the inclusive framework by the OECD (e.g., CFC rules). Id. at 14-15.
[120] Id. at 8.
[121] Id. at 10.
[122] See, Id. at 9.
[123] Id. at 22-26.
[124] Id. at 26-27.
[125] Id. at 28-29.
[126] See, Second Inclusive Framework Progress Report, supra note 64.
[127] Id. at 6-9.

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suggested was to do more of the same.[128] In terms of the issues of concern for developing countries, a toolkit on the taxation of indirect assets transfers was released in June 2020, and the report stated that a similar toolkit for effective transfer pricing documentation (Transfer Pricing Toolkit) was in development.[129] That toolkit was eventually released by the Platform for Collaboration on Tax (PCT), not the Inclusive Framework, on January 19, 2021.[130] The key part of the second report was included as Annex B: a commitment to reach a consensus based agreement on the taxation of the digital economy, based on the OECD's secretariat "unified approach" proposal.[131] The annex also included a strict timeline (completion by the end of 2020)[132] and responsibilities (all under the leadership of OECD working parties).[133]

The Inclusive Framework was originally chaired by the Japanese representative, Vice-Minister Asakawa, who chaired the plenary stage for the Inclusive Framework.[134] But, Mr. Asakawa was replaced in 2016 by the German representative, Mr. Kreienbaum,[135] who has chaired the framework throughout its existence.[136] A few non-BEPS countries representatives were also a part of the steering group, nominally in their personal capacity despite their being representatives of their respective governments (a mechanism copied from the UN expert committee).[137]

B. *Inclusivity*

Naturally, the examination of the degree of inclusivity of the Inclusive Framework is at the core of this Article. Among the three tested regimes the Inclusive Framework was the least restricted, being nominally open to all nations and not dependent on the treaty network or

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[128] Id. at 9.
[129] Id. at 8
[130] The Platform for Collaboration on Tax, Practical Toolkit to Support the Successful Implementation by Developing Countries of Effective Transfer Pricing Documentation Requirements (Jan. 19, 2021), available at http://www.oecd.org/tax/practical-toolkit-to-support-the-successful-implementation-by-developing-countries-of-effective-transfer-pricing-documentation-requirements.htm.
[131] OECD, *Secretariat Proposal for a "Unified Approach" under Pillar One,* Public Consultation Document 9 Oct. 2019 – 12 Nov. 2019 (OECD Publishing, Oct. 2019); and OECD, *Global Anti-Base Erosion Proposal ("GloBE") – Pillar Two,* Public Consultation Document 8 Nov. 2019 – 2 Dec. 2019 (OECD Publishing, Nov.2019).
[132] This deadline was not meant, and the OECD currently aims to complete the project by the end of 2021.
[133] See, Second Inclusive Framework Progress Report, supra note 64, 54-55.
[134] See supra note 1.
[135] See, First Inclusive Framework Progress Report, supra note 100, 33.
[136] See, https://www.oecd.org/tax/beps/steering-group-of-the-inclusive-framework-on-beps.pdf.
[137] See, e.g., Id.

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the economic position of candidate members. It also purported to address concerns of members other than the most developed countries and to give such countries genuine voice and influence over the product of the framework. This section examines the efficacy of this alleged inclusivity.

1. Setting the Agenda

Similarly to the MLI, although in a somewhat less formal manner, the agenda of the Inclusive Framework was set by the BEPS project prior to the formation of the framework. According to the African Tax Administration Forum (ATAF) it "could be likened to a dinner table where the menu was set and prepared by OECD countries with the ensuing dishes being available for eating as is to all countries, including developing countries, irrespective of their tastes and preferences."[138] The Inclusive Framework was convened not to tackle base erosion and profit shifting, but rather to implement the BEPS agreements and the issues of concern to the OECD as an institution and to BEPS countries in that context; the concerns of other countries were not on the agenda.[139]

The Inclusive Framework addressed these concerns in three ways. First, it acknowledged several issues of concerns of developing countries, out of which by 2020 only the indirect assets transfer issue was discussed and developed into a toolkit, a sort of "best practice" manual.[140] Note that indirect assets transfer was a matter of interest also for developed countries since the most dominant non-OECD countries, China and India, insisted on taxing these transactions despite their inability to make their regulation part of the BEPS package. Other toolkits were promised but the timeline for their completion is uncertain and not publicly available.[141]

Second, the Inclusive Framework arranged for regional meetings outside Paris, directed at the needs of developing countries.

Finally, the Inclusive Framework promised assistance and advice to developing countries in the context of capacity building, training, and mentorship. There is no denial of the need for capacity building in many

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[138] ATAF, The Place of Africa in the Shift Towards Global Tax Governance: Can the Taxation of the Digitalised Economy be an Opportunity for More Inclusivity, African Tax Administration Forum (2019), 6, available at https://irp-cdn.multiscreensite.com/a521d626/files/uploaded/ATAF%20PAPER%5B1%5D.pdf.

[139] See, e.g., Id., 9-10.

[140] See Second Inclusive Framework Progress Report, supra note 64, 8. For the toolkit, see http://www.oecd.org/tax/taxation-of-offshore-indirect-transfers.htm. Note that even this toolkit is available only through scrolling-down on the Platform for Collaboration on Tax (PCT), not the Inclusive Framework website.

[141] See First Inclusive Framework Progress Report, supra note 100, 26-27.

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developing countries, and various organizations, including the OECD have been involved in it over the years. Yet, naturally, these activities do not reflect an "equal footing" in the decision-making process, it is inherently hierarchical. Moreover, the matter of western expertise in tax matters coming to the assistance of underdeveloped countries has been (at the least) controversial over the years.[142] But, most importantly, it is not clear why these activities should take place under the Inclusive Framework. In this context one cannot help suspecting that it is part of the complex peer pressure applied to developing countries to conform with the line dictated by the OECD and the BEPS project.

2. The Freedom to Join the Framework

Perhaps the most insidious chapter in this story of the Inclusive Framework, the mass joining of jurisdictions known to have offshore regimes (often called tax havens)[143] puts to question the inclusivity of the Inclusive Framework. The most powerful claim of the OECD in support of a legitimacy for the framework, and in many ways the reason for its establishment, has been its openness for all countries and the equality of status of all members.[144] The most sound critique of the OECD as the caretaker of the international tax regime over the years has been its exclusiveness.[145] The OECD first dealt with this critique by opening some of its meetings to select non-member observers that could voice their positions yet had no vote, and therefore little impact on the material changes in the regime.[146] The geopolitical changes over the turn of the

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[142] See, e.g., Miranda Stewart and Sunita Jogarajan, The International Monetary Fund and Tax Reform (2004). U of Melbourne Legal Studies Research Paper No. 75, Available at SSRN: https://ssrn.com/abstract=556684.

[143] See supra note 101.

[144] Hence the "Equal Footing" language. See supra note 1.

[145] See, e.g., Peter Essers, The 2013 Annual Klaus Vogel Lecture: International Tax Justice between Machiavelli and Habermas, 68 Bull. Int'l Tax. 54 (2014)(Arguing that the most significant problem of the international tax regime is its democratic deficits, and making proposals to correct them). The other, related, important criticism about its illegitimacy as an international standard-setter has only surfaced recently, during the BEPS and post-BEPS era. See, e.g., Output Legitimacy Deficits and the Inclusive Framework, supra note 33; Sissie Fung, The Questionable Legitimacy of the OECD/G20 BEPS Project, 2017 Erasmus L. Rev. 76.

[146] This process was initiated by the OECD's Committee on Fiscal Affairs decision in 1991 to accept input in such observation status from a few non-member countries (24 countries originally, a few of which had since joined the OECD as members). Meeting with such non-member countries began in 1996, followed by a conference on the direction of the international tax regime hosted in 1996 by Mexico. See Richard Vann, Ed., Tax Treaties: Linkages between OECD Member Countries and Dynamic Non-Member Economies (OECD, 1996).The OECD started publishing positions of some non-member countries on the OECD Model and Commentaries in the 2013 version of the OECD Model Convention, and has continued to so to date.

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Millennium, and especially the ascent of the BRICS countries,[147] put further pressure on the OECD, forcing it to pair with the G20 in the BEPS project to maintain its dominance over the international tax regime. Yet, the logic of BEPS required universal implementation.[148] One of the key original insights of BEPS was that the interdependence of the world economies had made it impossible for any country to independently craft successful tax policies.[149] This insight led to the creation of the MLI and the Inclusive Framework that purportedly gave voice to all countries in the process of international tax policymaking.[150]

Such voice, minor as it may be, was a first in the world of international taxation.[151] It naturally serves as a shield against critique of the process, such as that made by this Article. The wide holes in this shield must however be acknowledged and none are larger than the compelling of jurisdictions to join the framework under the threat of inclusion in the European so-called black and grey listings.[152]

In 2016 the E.U. Commission began to review over ninety (non-member) jurisdictions for their compliance with "international standards" and adherence to the BEPS minimum standards.[153] By the end of 2017,[154] the European Union released a "grey list" of non-compliant but cooperative jurisdictions,[155] and a "black list" of non-cooperative

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[147] See, e.g., Brauner & Pistone, supra note 7.

[148] See OECD, Addressing Base Erosion and Profit Shifting (2013), available at http://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm.

[149] Id. See also Brauner, What the BEPS…? Supra note 16.

[150] For the origins of the MLI, See *supra* section I.

[151] Even the UN tax project had not provided equivalent voice.

[152] For a detailed background of these E.U. actions see, e.g., Vinod Kalloe, EU Tax Haven Blacklist – Is the European Union Policing the Whole World? European Tax.

[153] This exercise began in 2015, when the Commission compiled a list of problematic jurisdictions based similar lists compiled by E.U. member states. This exercise was criticized as unsystematic and eventually led to the compilation of a scorecard for non-E.U. jurisdictions in an attempt to assess the risk they posed to international tax governance (and as such to E.U. interests). See Id., and https://ec.europa.eu/taxation_customs/sites/taxation/files/2016-09-15_scoreboard-indicators.pdf. Based on this scorecard and a decision to exclude some jurisdictions designated as least-developed by the UN, the Commission started the review process for over ninety jurisdictions. See https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/.

[154] Council Conclusion of December 5, 2017, available at https://data.consilium.europa.eu/doc/document/ST-15429-2017-INIT/en/pdf.

[155] Including 47 jurisdictions: Curaçao, Hong Kong, New Caledonia, Oman, Qatar, Taiwan, Bosnia and Herzegovina, Cabo Verde, Fiji, Jordan, Montenegro, Serbia, Swaziland, Turkey, Vietnam, Albania, Botswana, Macedonia, Jamaica, Jordan, Maldives, Morocco, Peru, Swaziland, Thailand, Andorra, Armenia, Aruba, Belize, Cook Islands, Liechtenstein, Mauritius, Saint Vincent and the Grenadines, San Marino, Seychelles, Switzerland, Uruguay, Malaysia, Labuan Island, Bermuda, Cayman Islands, Guernsey, Isle of Man, Jersey, Vanuatu, Faroe Islands, Greenland, Nauru, Niue.

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jurisdictions.[156] The latter were then exposed to countermeasures articulated as "defensive measures."[157] The lists were updated over time and republished on March 12, 2019,[158] and later on February 18, 2020.[159] The review was based on indicators fashioned after BEPS and other OECD (including Global Forum) measures.[160]

There is little independent research of this process but one study demonstrated that "countries selected into the process were substantially more likely to join the Inclusive Framework."[161] Collin found that the E.U. review and listing process increased the probability of Inclusive Framework membership by approximately 30% for selected jurisdictions, translating into an increase in total membership by around 15% or approximately 17 jurisdictions.[162] This study does not prove causation,[163] however, it strongly supports an hypothesis that many non-BEPS jurisdictions joined the Inclusive Framework and the MLI under E.U. coercion.[164] Collin further concluded that the E.U. review and listing has made the Inclusive Framework only slightly more representative of poorer countries and those who "potentially contribute to global profit shifting."[165] If one were to divide the current 137 Inclusive Framework membership into four groups, they would find the 44 BEPS jurisdictions,

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[156] Including 17 jurisdictions: American Samoa, Bahrain, Barbados, Grenada, Guam, Republic of Korea, Macau, Marshall Islands, Mongolia, Namibia, Palau, Panama, St. Lucia, Samoa, Trinidad & Tobago, Tunisia, UAE.

[157] See supra note 149.

[158] See https://data.consilium.europa.eu/doc/document/ST-7441-2019-INIT/en/pdf. The new blacklist dropped Bahrain, Grenada, R. of Korea, Macau, Mongolia, Namibia, Palau, Panama, St. Lucia, and Tunisia, and added Aruba, Belize, Bermuda, Dominica, Fiji, Oman, US Virgin Islands and Vanuatu. The grey list was almost halved.

[159] See https://data.consilium.europa.eu/doc/document/ST-6129-2020-INIT/en/pdf. This blacklist dropped Aruba, Barbados, Belize, Bermuda, Dominica, Marshall Islands, Tunisia, added the Cayman Islands and Seychelles, and reintroduced Panama and Palau. The grey list was decimated to fourteen jurisdictions.

[160] See *supra* note 60.

[161] See Mathew Collin, Does the threat of being blacklisted change behavior? Regression discontinuity evidence from the E.U.'s tax haven listing process, Brookings Global Economy & Development Working Paper 139 (June 2020), 9.

[162] Id., 4. This study is particularly reliable for the purposes of this article since it supported the E.U. review and listing as beneficial for global governance, bringing more jurisdictions under the scrutiny of BEPS, which was viewed axiomatically as desirable. See, e.g., Id.

[163] Stating further limitations of both the study itself and the E.U. processes. The latter possibly led to reduced impact of the E.U. measures on some countries. See, Id., 29-33 (but, see Aija Rusina, Name and Shame? Evidence from the European Union Tax Haven Blacklist, Int'l Tax and Pub. Fin. (Online, March 28, 2020), recording significant impact of the listing on firms using havens). This article however is focused only on those countries that joined the inclusive framework under the gun of E.U. threats, regardless of these threats' eventual effectiveness.

[164] For similar conclusions, see Martin Hearson, Corporate Tax Negotiations at the OECD: What's at Stake for Developing Countries in 2020? ICTD Summary Brief No. 20 (Feb. 2020), 4; ATAF, The Place of Africa, *supra* note 112, 20.

[165] See Collin, *supra* note 157, 4.

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a few middle-income economies, approximately 40 low-income economies, and approximately 40 offshore jurisdictions.[166] The primary impact of the E.U. review and listing was naturally on the latter group, which explain the small impact it had, according to Collin, on the average income of the framework's members.[167] More importantly, however, is the impact of the E.U. review and listing on the number of so-called developing countries within the Inclusive Framework. The most recent Inclusive Framework report boasts that the framework includes 66 developing countries as members. This number includes many havens and other countries that had likely been coerced into membership. If one were to exclude these the portion of developing countries in the framework would go down from around a half to under a third, looking much less impressive. Moreover, it is difficult to assess the totality of the impact of the E.U. action on the membership of the Inclusive Framework because it is reasonable to assume that developing (and other) countries were influenced by the E.U. action and were therefore nudged to join the Inclusive Framework quicker than they would otherwise.

Finally, the E.U. review and listing infused further unfairness into the construction of the Inclusive Framework by treating differently jurisdictions based on politics rather than pure economic and legal indicators. European and other BEPS jurisdictions were not scrutinized in this process despite having similar features to some of the listed jurisdictions, and even known havens were treated unequally.[168] One may counter these arguments with a claim that the E.U. used whatever power it had to reduce BEPS, and it did so rather successfully. Responding to such an argument is beyond the scope of this Article that merely claims that the picture portrayed about the inclusivity of the Inclusive Framework is skewed.

3. The Resources Gap

Equal footing in theory does not translate to equal footing in practice, especially when some countries always have feet on the ground and others do not. The Inclusive Framework regularly meets in Paris and the timetable for its decision-making is undoubtedly ambitious.[169] This Article understands the necessity of OECD support and the unlikelihood

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[166] For the membership list dated Dec. 2019, see https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf.

[167] Tax havens are by no means rich countries, yet they are also not among the poorest countries.

[168] Tax Justice Network, Eu Blacklists UK's Crown Jewel Tax Haven While Letting Other Tax Havens Off the Hook. Tax Justice Network Technical report (2020) (exposing the puzzling refrain from adding Jersey and Guernsey to the list of scrutinized jurisdictions).

[169] See also Sengupta, supra note 71.

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of an international meeting not supported by the OECD or its richest members. The consequence however is increased pressure on non-European countries, and especially poor countries that find it difficult to withstand the costs of regular representation in these meetings.[170]

There are various dimensions to the resources gap among countries. Poorer countries often have fewer and lesser-trained tax experts. They send delegates to fewer meetings, they send fewer delegates, and often they send delegates that find it difficult to confront the more powerful delegates of the richer countries.[171] Even experienced, well-trained delegates find themselves in an inferior position when they do not attend all meetings.[172] This imbalance is further exacerbated by the comity and even friendship among the richer countries' delegates who usually have long standing acquaintance and working relationship from OECD and other meetings.[173] It is not surprising therefore that poor countries delegates feel that they are subject to organized peer-pressure by well-orchestrated OECD officials and countries delegates.[174]

The resource gap is further exacerbated by the very ambitious agenda that may be viewed as necessary but put an enormous pressure on the poorer countries that are already in a disadvantage. The pressure to move the agenda forward is understandable but note that it is self-created; most of the deadlines are set by the OECD and the G20 themselves. Moreover, the compressed timeline does not seem to produce better and quicker results. A good example for this is the digital economy challenge that is still in limbo more than eight years after the launch of the BEPS project. The challenge has seen many deadlines throughout these years, yet beyond the production of reports, often not consistent with each other, the resolution of the challenge has not developed from one deadline to another. One cannot avoid the impression that the project wishes to show "something" that it can call a consensus regardless of the likely efficacy of the said solution.[175]

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[170] See, e.g., ATAF, The Place of Africa, supra note 135, 12; Sengupta, supra note 71. The costs of these meetings are more burdensome of course for poorer countries comparing to their richer counterparties. See, e.g., Fung, supra note 141, 78.

[171] Id.

[172] Id.

[173] See Brauner, Survey (2021, manuscript with the author).

[174] See, e.g., ATAF, The Place of Africa, supra note 135, 12.

[175] Indeed, in June 2021 the Inclusive Framework supported an agreement by the G7 organization (the organization representing the richest countries in the world), which was then endorsed by the OECD and the G20 organizations despite notable differences between such agreement and the agenda discussed during the last two years within the Inclusive Framework – that based on the OECD Secretariat's unified proposal. This agreement did not include a detailed solution and hence cannot be analyzed in depth, yet what is clear is that a large (and poorer) majority of

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4. Gather, divide, and conquer: The Production of the Inclusive Framework So Far

The actions of the Inclusive Framework in its almost five years of operation provide further evidence about its inclusivity. In this context the dominance of the OECD over the process manifests itself most bluntly. The Inclusive Framework does not have a dedicated institutional website, with all references made to the OECD's BEPS dedicated website.[176] The perceived logic behind this presentation may be that the purpose of the framework is to implement the BEPS agenda, yet as mentioned above, the post-BEPS agenda of the OECD goes beyond the original BEPS agreements. In the guise of international cooperation, the OECD dictates its agenda, including items on which no agreement has been reached in the multilateral for a of BEPS (OECD & G20) or of the Inclusive Framework. A classic example for this strategy of the OECD is the transfer pricing toolkit released in early 2021.[177]

The transfer pricing toolkit was presented by the Inclusive Framework as a developing countries' support project.[178] Transfer pricing was presented by the Inclusive Framework reports as a matter of concern for developing countries, an item that they had had an interest in resolving.[179] But, this concern was, and surely still is, about the difficulty of finding reliable comparables for arm's length analysis in developing countries, some of which have undeveloped, small, opaque or unstable markets that make the reliance on local comparables particularly difficult. The produced transfer pricing toolkit focuses on transfer pricing documentation, and especially the CbCR, which is a BEPS agenda item (Action 13) to which developing countries, or the Inclusive Framework had no input. They may benefit from CbCR but only tangentially, it being a primary concern for the most developed countries.[180] The main concern of developing countries related to transfer pricing has not yet been addressed.

Moreover, the transfer pricing toolkit was published by the PCT, a marriage of the OECD with the International Monetary Fund (IMF), the

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Inclusive Framework membership had no part in the design and negotiation of such agreement, and that it cannot seriously evaluate it before the exact details are revealed. Nonetheless, the OECD pushed the framework to declare support, likely due to the desire of the organization to appease the United States after years of no effective participation of the latter in the BEPS project. For more on this development, see Yariv Brauner, Editorial, Intertax (forthcoming 2021).

[176] See https://www.oecd.org/tax/beps/.

[177] See, supra note 128.

[178] See, supra note 127.

[179] See, supra note 122.

[180] See, supra Part II.

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World Bank, and the United Nations, four international organizations with interest in international taxation. This should be a strange combination for developing countries, because the IMF and (although to a lesser extent) the World Bank have long been perceived as the instruments of western oppression through the traditional market conditionalities they impose on such countries upon lending.[181] The U.N.'s work on tax matters important for developing countries is more credible, yet its tax operation dwarfs by that of the OECD. Realistically, one finds it difficult to identify the contribution of the United Nations to this toolkit. The expropriation of the toolkit from the Inclusive Framework is particularly telling, the OECD again making sure it promotes its agenda where it can control it. There is no indication why the Inclusive Framework has been precluded from the creation of the toolkit. Perhaps the urgency of the matter for the OECD required a more convenient and faster acting forum, yet the content of the toolkit hints otherwise. The toolkit is a practical elaboration of BEPS Action 13, with no innovations or tailormade solutions to make implementation simpler for developing countries beyond the provision of ready-made legislation, forms, and procedures that conform with OECD BEPS dictate. The non-OECD Members of the Inclusive Framework did not have a voice in the drafting of the Transfer Pricing Toolkit, and indeed its content pays no heed to their unique difficulties in this context.

The two other toolkits produced by the PCT suffer from similar problems, although they could be viewed as more helpful than the Transfer Pricing Toolkit. The Treaty Negotiation Toolkit, coming out in 2021 is a version of the U.N. Manual for treaty negotiations between developed and developing countries, a matter of interest for developing countries yet not one raised in the Inclusive Framework context.[182] The Indirect Transfer of Assets Toolkit[183] did respond to a concern of developing countries, yet it kept the focus on the part of the issue already addressed by the OECD Model, the indirect transfer of immobile assets, which is a matter of concern to all countries, including, or even particularly, OECD Members, ignoring the "hot potato" of indirect transfer of shares, on which there is no international agreement due to the

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[181] The discussion of the truth beyond such perception is beyond the scope of this article, yet one could hardly ignore it. See, e.g., Stewart & Jogarajan, The International Monetary Fund and Tax Reform, supra note 142.

[182] The 2019 version of the manual is available at https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-03/manual-bilateral-tax-treaties-update-2019.pdf.

[183] PCT, The Taxation of Offshore Indirect Transfers— A Toolkit (2020), available at https://www.tax-platform.org/sites/pct/files/publications/PCT_Toolkit_The_Taxation_of_Offshore_Indirect_Transfers.pdf.

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inherent conflict it presents between the interests of the largest MNE and developing countries.[184]

Once the issues of concern for developing countries had been reassigned to the PCT where they were not represented, the Inclusive Framework followed a distinct OECD-led agenda of (1) monitoring the implementation of the BEPS agenda through mechanisms of peer review and reporting and (2) reaching a deal over the difficulty of taxing the digital economy. The problems with the former have been exposed throughout this Article. The lack of input by developing countries in setting the agenda and the mechanisms for its implementation are manifest. Some of the measures, such as better dispute resolution and transparence may be helpful for the non-OECD Members of the Inclusive Framework, but they could hardly be viewed as a consequence of an inclusive, global effort "on an equal footing."

The work on the digital economy suffers from the same problems. Its prominence on the Inclusive Framework agenda and its importance for the future of the international tax regime require however further discussion of its potential impact on developing countries. The BEPS project, inviting the G20 to support the OECD agenda, and later the Inclusive Framework, inviting the rest of the world to join in the implementation of the BEPS agenda, responded to the threat to the dominance of the OECD over the international tax regime.[185] Most importantly, the ascent of the emerging economies, led by the BRICS countries, allowed them to demand change of the division of tax bases between residence and source countries in favor of more source taxation. Not less important however was the need to deliver, and declare success, and even the OECD understood early on that the interdependence of countries in the global economy necessitates coordination beyond the OECD.[186] The digital economy presented a uniquely ominous threat because the primary political trigger that forced the OECD into the BEPS project was the exposure of the low tax payments by the largest digital MNE, especially in source or market economies.[187] The work on the

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[184] The most notorious example for this conflict is the famous Vodafone case in India. For a precis of the status of that saga see, e.g., Nikos Lavranos, Vodafone v India award: risky business of retroactive taxation (Thomson Reuters Arbitration Blog, Dec. 21, 2020), available at http://arbitrationblog.practicallaw.com/vodafone-v-india-award-risky-business-of-retroactive-taxation/.

[185] For more on that process see, e.g., See, e.g., The Klaus Vogel Lecture 2019, *supra* note 5.

[186] See, supra note 146.

[187] The difficulty of devising appropriate source rules for income generated by the digital economy led to increased use of the alternative term "market economies" in reference to countries where digital companies generate their income but do not have physical presence and hence are able to pay little or no tax therein.

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digital economy went through various phases with many different proposals, still, at the present the OECD Secretariat's proposal is "on the table" and seems to be considered seriously by many countries, although it is unclear at the time of the writing of this Article whether consensus will be reached. Three comments are due with respect to this proposal: (1) its roots are in the OECD Secretariat's "unified approach" and not an open deliberation and negotiation among the members of the Inclusive Framework; (2) it partly addresses the key issue by assigning "new" taxing rights to market economies via the Pillar One proposal and a formulary mechanism.[188] This potential benefit to developing countries is countered however by Pillar Two and its proposal for minimum tax on the worldwide income of MNE imposed by the residence countries (of these MNE),[189] essentially all of which are among the most powerful members of the OECD; and (3) even the OECD's impact assessment demonstrates that the winners of the project are likely the residence countries,[190] with independent assessment demonstrating an even deeper bias and complexity.[191]

The high complexity of the proposal should naturally be more costly for the less sophisticated tax authorities and taxpayers, with the burden falling disproportionately on developing countries. Note as well that the feasibility of the OECD Secretariat's proposal depended on the support of the more powerful OECD countries, support that it has only recently garnered based on an amended version of the proposal dictated by the United States and the G7 organization.[192] This obvious dictate by the richest countries, agreed upon outside the Inclusive Framework, is a

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[188] See, OECD Secretariat Proposal, supra note 131. See also https://www.oecd.org/tax/beps/beps-actions/action1/.

[189] Id.

[190] See, OECD, Tax Challenges Arising from Digitalisation – Economic Impact Assessment (October 12, 2020), available at https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-economic-impact-assessment-0e3cc2d4-en.htm.

[191] See, e.g., Lorraine Eden, Leap of Faith: the Economic Impact Assessment of the Pillar One and Pillar Two Blueprints, 49 Tax Mgm't Int'l J. 591 (2020); and Lorraine Eden, Winners and Losers: the OECD's Economic Impact Assessment of Pillar One, 49 Tax Mgm't Int'l J. 597 (2020).

[192] See G7, G7 Finance Ministers and Central Bank Governors Communiqué (June 5, 2021), available at https://www.g7uk.org/g7-finance-ministers-and-central-bank-governors-communique/ (the declaration by the G7 organization that it accepts the proposal by the United States for a global minimum tax of 15% and amendments to the OECD Secretariat's unified proposal in exchange for the elimination of all DSTs). For the original United States proposal, see https://home.treasury.gov/news/press-releases/jy0189. Finally, only three weeks later the OECD releases a statement on behalf of the Inclusive Framework, accepting the G7 agreement with minor changes. See https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.htm.

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glaring example for the weakness of framework and the lack of voice for the poorer members of the framework in this process. But, even the support of the rich countries is incomplete, since the E.U. proceeds to promote its DST Directive despite the obligation to eliminate interim measures embedded in the agreement presented by the G7.[193] Moreover, the hope of getting a genuine agreement depends on all countries eliminating their DST, against the current trend of unilateral adoption of DST[194] by many, not only developing countries.[195]

DSTs are obviously bad for MNE, especially when they are not uniform or predictable, and therefore create an incentive for the richest countries to join forces and agree on an alternative. The OECD builds on its proposal seemingly being the sole outstanding alternative, on the promise that its proposal includes a condition of abolishing all DSTs, and on the lack of an alternative forum for global discussion of international tax matters. In any event, what is clear by now is that the digital economy tax project is not a collaborative effort of a truly Inclusive Framework that discusses the relevant issues on equal footing and negotiates an optimal solution for all of its members. The voice of developing countries and their interests are not apparent in this primary project of the Inclusive Framework.[196]

In conclusion, the actions of the Inclusive Framework during the first almost five years of its existence demonstrate that the impact of countries beyond the OECD Members within the framework has been at best minimal, further supporting the other, more procedural indications about the weak inclusivity of the Inclusive Framework.

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[193] See, e.g., Elodie Lamer, Growing Unease in EU Over Global Tax Deal's Next Steps (Tax Notes Today Int'l, July 12, 2021).

[194] This is a common name used for a variety of taxes adopted by countries frustrated by their inability to tax the digital giants due to a lack of physical presence. These taxes are essentially low-rate turnover taxes that guarantee some income collection at source without complex calculations associated with profits taxation. Moreover, being assessed on the turnover, these taxes are claimed to not be subject to tax treaties and the normal rules of the international tax regime. Similar results could have been achieved via the more traditional device of withholding taxes, yet such avenue required some level of international coordination or agreement and the OECD made sure to squash it despite the original acknowledgment of its feasibility. For a concrete proposal of a withholding based solution for the problem of taxing the digital economy see, e.g., Andres Baez Moreno and Yariv Brauner, Taxing the Digital Economy Post-BEPS… Seriously (with), 58 Colum. Trans. L. J. 121 (2019).

[195] See, e.g., the Tax Foundation website dedicated to DSTs: https://taxfoundation.org/digital-services-tax/; or Avalara' global tracker of DSTs, available at https://www.avalara.com/vatlive/en/vat-news/digital-services-tax-dst-global-tracker.html. See also Elke Asen, What European OECD Countries Are Doing About Digital Services Taxes (Tax Foundation, March 25, 2021), available at https://taxfoundation.org/digital-tax-europe-2020/.

[196] Private discussions with delegates to the inclusive framework strongly confirm this conclusion. They report that if at all the only voices of developing countries heard in the forum are of the most powerful of them, all of which are anyways also members of the G20 organization.

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IV. CONCLUSION: INCLUSIVITY AND THE INTERNATIONAL TAX REGIME

This Article demonstrates that the most salient initiatives to promote inclusivity within the international tax regime (CbCR, the MLI, and the Inclusive Framework) have at best done little to increase the meaningful participation of non-OECD countries in the regime, and at worst been disingenuous. A normative analysis of the processes described in the Article or of the international tax regime in general is beyond the scope of this Article.[197] It is useful however to explain the reasons for the described developments: why would the world's richest and largest economies purport to include but not genuinely include the lesser countries in the global effort to reform the international tax regime? A corresponding question is why the latter countries would participate in these initiatives where they evidently have been given little influence. The international tax scholarly discourse has long struggled with the more general form of these questions, grappling with the merits of cooperation and competition for the regime.[198] The primary goal of this Article however is to expose the analyzed inclusivity initiatives, and therefore the Article limits itself to their explanation, leaving the wider policy implications for another time.

One cannot doubt the importance of inclusivity to the international tax regime in the BEPS era; otherwise, the OECD and its dominant members would not seek the cooperation of the rest of the world in the post-BEPS effort. The problem with inclusivity is that it is difficult to evaluate in abstract. The normative case for inclusivity (already made by others)[199] has not been sounded during the BEPS project; instead, inclusivity initiatives seem to have been viewed as unavoidable, imperative for the success of the project, primarily based on the understanding of the interdependence of the world economies and their

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[197] See, supra note 35 for a discussion of the moral case for inclusivity.

[198] See, e.g., Tsilly Dagan, Tsilly Dagan, International Tax Policy: Between Competition and Cooperation (Cambridge University Press, 2018) (arguing against global cooperation on tax matters and in favor of tax competition mainly based on the cartelistic power that the richest countries can assert over other countries in a centralized institution); Reuven S. Avi-Yonah, Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State 113 Harv. L. Rev. 1573. (2000) (arguing that tax competition hurts both developing and developed countries, and therefore supporting cooperation as the only path for improvement for all); and Brauner, The Klaus Vogel Lecture 2019, supra note 5 (arguing that the power of the rich countries over the market makes cooperation superior to tax competition, giving all countries at least a chance for progress and influence over the norms of the international tax regime).

[199] See, supra note 35.

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tax policies.[200] Despite such imperative, the bases of the international tax regime and its core properties have not changed during the BEPS project. International cooperation did not lead to a formal international tax organization where all nations would be on equal footing. It similarly stopped short of endeavoring to create supranational tax norms, alternatively choosing to preserve the "soft" nature of international tax law.[201] And, the richest nations and *their* organization (the OECD) prevailed in essentially all issues resolved by the BEPS project.

The analysis in this Article demonstrates that it is not sufficient to declare that the discussed post-BEPS institutions would be inclusive; what matters is the degree of inclusivity and the implications for the different players (mainly the nation states). Since calibrating inclusivity is difficult,[202] one could use simpler frameworks to explain its implications. One such framework, highly influential in explaining organizations (including international organizations) is Albert Hirschman's famous exit and voice framework.[203]

A. *The International Tax Regime*

The fundamental structure of the international tax regime has not been altered since its inception in the first part of the Twentieth Century. The regime comprises of over 3000 bilateral tax treaties, with no supranational norms or a formal international organization governing

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[200] See OECD, Addressing Base Erosion and Profit Shifting (OECD Publishing, 2013), available at: http://dx.doi.org/10.1787
/9789264192744-en.

[201] See Brauner, The Klaus Vogel Lecture 2019, supra note 5, for critique of the OECD's soft law approach.

[202] Although it is less so when, as in the case of the initiatives described in this article inclusivity meant almost nothing for the non-BEPS countries.

[203] Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (Harvard University Press, 1970). Hirschman's framework has not been used often in international tax scholarship, although recently more attention has been paid to it. See, e.g., Tarcísio Diniz Magalhães, International Tax Law Between Loyalty, Exit, and Voice 44 Dal. L. J. 49 (2021). The framework has been more prominently used in international law scholarship dealing with very similar issues. See, e.g., Eyal Benvenisti, Exit and Voice in the Age of Globalization 98 Mich. L. Rev. 167 (1999)(applying the framework to global market failures, explaining that collective action failed under the Westphalian paradigm, and calling for a different perspective: the transnational conflict paradigm to resolve such failures); Joost Pauwelyn, The Transformation of World Trade 104 Mich. L. Rev. (2005)(applying the framework to WTO law); Joseph H. H. Weiler, The Constitution of Europe: "Do the New Clothes Have an Emperor?" (Cambridge University Press, 1999) (applying the framework to explain processes in the constitution of the European Union).

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it.[204] Its evolution and stability are a consequence of the *de facto* leadership of the OECD, which, since the mid- Twentieth century, has dominated the regime by the maintenance of the OECD Model tax treaty that became the template for most tax treaties in force.[205] Conflicts over the appropriate balance between the interests of the developed and developing worlds that had taken place prior to World War II, although unresolved, have faded away until the end of the Twentieth Century. During that period tax treaties had increasingly converged around the OECD Model. No alternative existed, and even when the U.N. Model was published in 1980 as a supposed alternative, it was limited to negotiations between developed and developing countries, and, more importantly, its language was itself based on that of the OECD Model. U.N. Model deviations from the OECD Model have been limited to slightly increased source taxation, never challenging the fundamental deal struck by the Model or its basic architecture. Since then, at least until 2017, the U.N. Model language has been further converging with that of the OECD Model.

The dominance of the OECD over the international tax regime manifested itself far beyond the language of tax treaties. Since 1977 the OECD has been publishing Model Commentaries to the OECD Model convention. Despite an on-going debate over the legal status of such Commentaries,[206] its *de facto* dominance over tax treaty law around the world is undisputed. Courts have relied on the commentaries to interpret treaties for the simple reason that no alternative existed.[207] They have become so powerful that some have even considered whether they could be viewed as customary law.[208]

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[204] See, for example, Reuven S. Avi-Yonah, Commentary, 53 Tax L. Rev. 167, 169 (1999). The original acknowledgment of the existence of a treaty-based international tax regime was Reuven S. Avi-Yonah, The Structure of International Taxation: A Proposal for Simplification, 74 Tex. L. Rev. 1301 (1996).

[205] As documented by in Ash & Marian, supra note 6; Lang et al. eds., The Impact of the UN and OECD Model Conventions on Bilateral Tax Treaties, supra note 6; and Yariv Brauner, Tax Treaty Negotiations: Myth and Reality, ITAXS (IBFD, forthcoming 2021).

[206] See, e.g., Hugh Ault, The Role of the OECD Commentaries in the Interpretation of Tax Treaties, 22 Intertax, 144 (1994); Klaus Vogel, The Influence of the OECD Commentaries on Tax Treaty Interpretation, 54 Bull. Intl. Fiscal Docn. 12 (2000); Peter Wattel & Otto Marres, The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties, 43 Eur. Taxn. 7 (2003); Michael Lang & Florian Brugger, The Role of the OECD Commentary in Tax Treaty Interpretation, 23 Austrl. Tax Forum, 95 (2008); and Sjoerd Douma et al. eds., The Legal Status of the OECD Commentaries (IBFD, 2008).

[207] Id. UN Model commentaries have not presented an alternative to the OECD Model commentaries.

[208] See, e.g., Reuven S. Avi-Yonah, Double Tax Treaties: An Introduction, U. Mich. L. Sch. (3 Dec. 2007), available at SSRN: https://ssrn.com/abstract=1048441; and Reuven S. Avi-Yonah,

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Toward the end of the Twentieth Century the OECD realized that it would be difficult for it to continue and promote the interests of its members without the cooperation of the rest of the world. It therefore began opening its meetings to a few non-member countries, granting them observation status.[209] This status allowed these countries to participate in the discussions, albeit with no voting or other decision-making powers, and eventually also to publish non-comital, non-binding *positions*. These positions were published in the full versions of the OECD Model and Commentaries after the OECD Members' so-called reservations on the various Model articles.

Granting such nominal voice to few important developing countries strengthened the hold of the OECD over the international tax regime, because, at least for a while, it quelled the demand of developing countries for voice and prevented them from forming alternative international tax organizations.

Dramatic geopolitical changes in the turn of the Millennium significantly reduced the global power of OECD Members, especially in face of the ascent of the so-called BRICS countries. That, in addition to the intensifying globalization forced the OECD to develop mechanisms for more intensive cooperation with non-member countries, this time not in order to expand the influence and control of the OECD and its members over the international tax regime but to ensure its survival as an important influence over the regime. Developing countries effectively rebelled against the original deal struck among developed countries in the beginning of the Twentieth Century and served as the backbone for the international tax regime ever since; they demanded more source taxation.[210]

This dramatic architectural change started with the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum).[211] The exchange of tax information has always been considered a key mechanism for the success of the international tax regime.[212] For

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Does Customary International Tax Law Exist?, in Yariv Brauner, Ed., Research Handbook on International Taxation (Edward Elgar, 2019).

[209] See supra note 143.

[210] For more on the part of the BRICS countries in the events leading to BEPS, see Brauner & Pistone, supra note 8. Note, however, that this analysis demonstrated also the limitations on the ability of the BRICS to cooperate and pull their forces together in resistance of the OECD. They eventually chose to join the BEPS project and attempted to influence it from within.

[211] See https://www.oecd.org/tax/transparency/.

[212] It dates to the League of Nations tax work. See League of Nations, Double Taxation and Tax Evasion: Report Presented by the Committee of Technical Experts on Double Taxation and Tax Evasion (1927) (The original tax treaty Model); Technical Experts to the Financial Committee of

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the most part, it had been the sole cooperative measure in the regime, a mechanism that required parties to effectively communicate with each other.[213] Information is important for all tax authorities, but it is particularly important for rich countries, because such countries are typically the residence countries of international investors and certainly the residence of most multinational enterprises. Tax-relevant information about foreign investment is naturally expensive to obtain and all rich countries must obtain that information since they tax their residents (to one extent or another) on their worldwide income. Smaller, less developed countries' interest in the exchange of information was much smaller, since they primarily tax investment within their jurisdiction, making the compliance with the requirement to exchange tax information with treaty partners a cost concern rather than revenue gain opportunity for them, and hence their cooperation with the interested countries via bilateral tax treaties had not been satisfactory for the latter. This was the impetus for the Global Forum, yet it required a lever to convince uninterested countries to participate. This was done by nominally making the Global Forum a joint venture of the OECD and the G20 organization that included some large developing countries, and by making membership in the forum open to all. The BEPS project followed this precedent when the OECD nominally cooperated with the G20 organization during the project and opened membership during the implementation phase (only after the sealing of all norm-making agreements) to all in the form of the Inclusive Framework.

B. *Exit and Voice in International Taxation*

These developments fall almost naturally into the Hirschman paradigm, which roots are in the study of failure or decline of organizations.[214] He described the behavior of unsatisfied players in (declining) organizations as a mix of interdependent options: they may "exit," finding better alternatives, or exercise "voice" in an attempt to fix the failures and reverse the decline. Hirschman adds that in certain

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the League of Nations, Double Taxation and Tax Evasion: Report and Resolutions submitted by the Technical Experts to the Financial Committee of the League of Nations (1925) (the report that led to the drafting and publication of a tax treaty model); and Sunita Jogarajan, Double Taxation and the League of Nations (Cambridge University Press, 2018) (documenting the origins of the modern international tax regime).

[213] The MAP, the treaty dispute resolution mechanism naturally made a similar requirement, yet its soft, voluntary nature made much lower demands on the parties. All other measures in tax treaties are obligations that effectively call for unilateral action of one treaty partner without active cooperation or even communication with the other treaty partner.

[214] See Hirschman, supra note 203.

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circumstances "loyalty" to an organization plays a role as well, so players may decide not to exit even if they lack sufficient voice and simply hope that the organization improves anyway. The best example for this circumstance is citizens in a Nation State where patriotism dictates a high level of loyalty and often a low chance of exit. The key interplay and the main focus of Hirschman's paradigm is however between exit and voice.

Using this paradigm, it is easy to simplistically explain the current state of the international tax regime. The decline of the OECD and the threat to its dominance over the international tax regime, traced to the lack of voice of non-OECD countries, and OECD concerns about potential exit of important countries from the regime, led to the grant of voice in different manners (noting *positions* of important non-OECD Members, participation in the Global Forum and the establishment of the Inclusive Framework). It is still an open question, however, whether these moves provided sufficient voice for these countries to prevent their exit. This Article has answered the question in the probable negative.

A more careful analysis of the regime under Hirschman's framework must begin with the question of exit. Exit is most simply exercised on the market, when consumers are unhappy with a product and consequently switch to another, thereby disciplining the firm that produces the original product. This market depiction of economic behavior is less obvious in the context of the international tax regime because simple exit away from the regime is not so easy and cheap as that of a consumer on the market. No country is obliged to enter tax treaties or abide by the basic premises of the international tax regime. Every country however is limited in terms of tax policy because of the interdependence of the world economies so long as it is not a truly closed economy. Upon exit, a country may lose many of the benefits of the rule convergence manifested in the international tax regime. Finally, other economic and political pressures may make such exit very costly.[215] In reality, therefore, few countries can consider complete exit from the international tax regime. The main reason for that is not only the cost but also the lack of an alternative. To date, developing countries have found it difficult to cooperate and counteract the power of the OECD, and even the U.N. has never stepped up to the plate and counterbalance the power of the OECD over the

[215] A few examples among many are: countries join the OECD, for example, for a variety of reasons, tax being probably at the bottom of the list of such reasons, yet joining such organization requires them if effect to also adopt the tax agenda of the OECD. E.U. Member States find themselves in a similar situation when the central institutions of the Union strongly support the BEPS project. Finally, as documented above, many countries joined the inclusive framework under the threat to be otherwise blacklisted by the E.U. See supra notes 149-164 and the accompanying text.

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regime. Some hope might have arisen with the ascent of the BRICS countries, yet the diversity among them and the power of China over other developing countries prevented so far the organization of an alternative to the OECD.[216] The opposite occurred when the BRICS generally joined the OECD in BEPS through the G20 organization.

The lack of simple exit did not mean that an exit opportunity in the Hirschmanian sense did not exist. Hirschman's discussion of exit was really a discussion of exit as an option for players involved with an organization and the potential for discipline of the organization due to the threat of exit. A country may present a similar threat not only by forming an alternative organization or threatening to do so, but also by not conforming to the norms of the organization. The best example for such behavior is the adoption of digital service and similar taxes (DSTs)[217] post-BEPS in response to the inability of BEPS and the Inclusive Framework to reach an agreed solution to the taxation of the digital economy problem. For the most part, these taxes were enacted as *interim measures,*[218] signaling to the OECD and the rest of the world that they do not present a complete exit from the regime, yet such taxes bluntly violated basic international tax norms, most notably the widespread agreement to eliminate double taxation. This threat of exit indeed disciplined the regime, and the progress made toward consensus on the matter should largely be attributed to it.[219]

The adoption of DSTs may also be viewed as an exercise of voice, or discontent with the international tax regime. There is no doubt that source or market economies (where digital firms operate without physical presence) were displeased with their share of the tax base of digital firms under the current norms of the international tax regime, voicing their unhappiness and demanding change, eventually leading to the BEPS project. Nonetheless, these complaints had not been answered by the BEPS project. Only the active adoption of DSTs pushed the regime

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[216] See Brauner & Pistone, supra note 8.
[217] For simplicity this article uses the term DST for all unilateral measures to tax the digital economy, such as the British and Australian diverted profit taxes, the Indian equalization levy, the French DST, the Hungarian advertisement tax, etc. For more on DSTs, see, e.g., CRS, Section 301 Investigations: Foreign Digital Services Taxes (DSTs) (March 1, 2021), available at: https://crsreports.congress.gov/product/pdf/IF/IF11564; and Elke Asen, What European OECD Countries are Doing about Digital Services Taxes, Tax Foundation (March 25, 2021), available at: https://taxfoundation.org/digital-tax-europe-2020/.
[218] See, e.g., Asen, Id.
[219] All recent proposals explicitly condition agreement on the elimination of all DSTs. See, e.g., OECD/G20, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (July 1, 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-july-2021.pdf.

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towards concrete changes. Voice in the Hirschmanian sense, the use of political power within an organization to affect change, had little effect. This is not surprising because the interests of the market economies were not fully represented as most of them are not OECD Members, and the few developing countries that were part of the BEPS project (G20 Members) were all large economies which interests may be somewhat different from the rest of the developing world and in any event have not been effective during the BEPS project, achieving *none* of their goals.[220]

To sum up, the lack of formal voice in the OECD-dominated international tax regime ensured that no progress was made during the BEPS project, and only the threat and execution of exit forced the regime to consider reform. Thus, the OECD agreed to open the regime to all countries via the device of the Inclusive Framework (and the other parallel initiatives discussed above). Alas, this Article demonstrates that the voice formally given to countries that joined the Inclusive Framework had been minimal at best and hence ineffective.

Developing countries (usually referred to as source or market economies in this context) have achieved very little in the process, and most, if not all the benefits of the current norms are likely to go to the richest countries and the OECD as an organization. The political move to grant nominal voice without actual influence to market economies has perhaps averted the political crisis that the challenge of taxing the digital economy has posed, yet, this Article doubts that it would avert the economic or market response of the losers in whatever settlement is reached by the Inclusive Framework. Only political pressure by the OECD, the United States, and Europe could explain the agreement of so many market economies to the U.S. proposal that materialized into the G7 Statement and eventually the Inclusive Framework agreement on the taxation of the digital economy.[221] Once they realize that the agreement grants them little additional revenue while denying their right to use unilateral measures to rectify the situation, they will undoubtedly revert to the use of deviations from the norms of the regime and exit threats of the same kind.

The unwillingness of the OECD[222] and its richest members to divide

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[220] See supra note 92.

[221] See Statement on a Two-Pillar Solution, supra note 211.

[222] Which in fact presented a much more reasonable proposal to the benefit of market economies in its secretariat's unified proposal. See OECD, Secretariat Proposal for a 'Unified Approach' Under Pillar One, Public Consultation Document 9 Oct. 2019–12 Nov. 2019 (OECD Publishing, Oct. 2019). This proposal was complemented by: OECD, Global Anti-Base Erosion Proposal ('GloBE') – Pillar Two, Public Consultation Document 8 Nov. 2019–2 Dec. 2019 (OECD Publishing Nov. 2019).

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the global tax base in a manner more acceptable for source or market economies does not make the problem go away. Developing countries have gained in the process a very weak voice at best, while purportedly giving up their right to exit. This Article does not deal with predictions, but it is difficult to expect that such an agreement would be satisfactory to developing countries. At risk is the stability of the international tax regime and the many benefits that it provides to all stakeholders.

Finally, note that the role of "loyalty" in the Hirschmanian sense, the commitment to an organization for reasons such as patriotism despite a failure by the organization, should play little role in the context of the international tax regime. Nonetheless, many countries have joined the MLI and the Inclusive Framework, and even the digital economy taxation agreement with what seems like minimal homework. A form of loyalty may explain such behavior by some countries (such as recent and eager entrants into the OECD), but it could not explain the agreement of other developing countries to cooperate against self-interest. Hubris due to the grant of nominal voice and the lack of alternatives, supported by the power of coercion (via blacklisting, for example) must explain these countries' agreement. One should wonder however whether these are sufficient to preserve the stability of the international tax regime.

C. *Conclusion: The Way Forward*

Two primary challenges engaged the international tax discourse in the last decade: insufficient taxation at source and ineffective taxation of MNE. The latter was the sole concern of the richest countries, where MNE reside. Other countries had both concerns in mind, but only geopolitical changes with the turn of the Millennium made it possible for them to challenge the core preference of the OECD-led regime for residence taxation. The consequent BEPS project was supposed to deal with both concerns yet *de facto* promoted mainly the interests of the developed countries and the OECD. The lack of alternatives to the OECD-led regime channeled the discontent of developing countries to both exit threats in the form of deviations from the norms of the regime and expressions of displeasure through informal voice increasingly given to them in an attempt to quell their discontent. When that did not work, the OECD reframed the international tax regime with supposedly inclusive organizations, most notably the Inclusive Framework. Such formal voice has not resulted in real political power to impact and reform the norms of the regime in a manner that would take into account the interests of the developing world. The problem of unacceptable division of tax bases remains, perhaps exacerbated post the Global Financial

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Crisis and the Covid-19 Pandemic. Therefore, unless developed countries will be able to coerce the rest of the world to somehow accept this situation, discontent is likely to persist, threatening the stability of the international tax regime and its significant achievements.

Hirschman's exit and voice framework is helpful in understanding the processes that led to the current situation. It is also informative about possible ways out of it. Assuming that simple loyalty is unlikely to play a major role in the problem, exit and voice are the only paths available for resolution. This Article warns that the voice given to developing country in the post-BEPS institutions is insufficient and hence unlikely to solve the problem, which, absent change, leaves only exit as an option. Exit could take the form of an alternative international tax organization, but also the form of the less costly deviations from the norms of the regime, deviations that if numerous and significant may lead to its dismantling, pointing back to change in the form of meaningful voice as the only option for constructive progress.

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