

A UN Tax Convention?

EXPLORING THE MERITS AND FEASIBILITY
OF A NEW INTERNATIONAL CONVENTION
ON TAX AND FINANCIAL TRANSPARENCY



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ABOUT

The Norwegian Academy of International Law (NAIL) is a politically independent research association founded with a mission to promote the development of and respect for international law. NAIL is made up of a network of researchers and analysts with backgrounds from political science, international law, and international relations. NAIL has a particular expertise in treaty law, international political processes, peace agreements, law relating to situations of armed conflict, arms and disarmament, and protection of human rights.

COVER

Vianden Castle in Luxembourg (Photo: Frans Berkelaar/Wikimedia Commons). Luxembourg is ranked among the top global tax havens by the Tax Justice Network (see <https://taxjustice.net/country-profiles/luxembourg/>).

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SUMMARY

Every year, billions of US dollars in government revenue are lost through corporate tax avoidance, profit shifting, and other tax-related illicit financial flows. This is an issue of transboundary concern, undermining States' fiscal independence and hampering the prospects for achieving the Sustainable Development Goals. At the heart of the matter is the deliberate use, by certain jurisdictions, of low or zero tax-rates and financial secrecy to attract capital and profits.

Considerable progress has been achieved over the past decade, including under the OECD/G20 Inclusive Framework on BEPS. However, ongoing efforts have raised a number of questions regarding the effectiveness and fairness of the rules that have been introduced, as well as the legitimacy and accountability of the way in which these rules have been developed. In response, a growing number of States, civil society actors, and decision-makers have concluded that it is time for a new approach, and that this should take the form of a new international convention on tax and financial transparency. Such a convention would address—in an open, inclusive, and comprehensive manner—tax-related aspects of illicit financial flows.

This report considers the merits and feasibility of such a convention, outlining the conditions for, and key steps in, a diplomatic process towards its adoption. It concludes that a new international convention, if well-conceived and developed, could constitute an achievable and meaningful tool in the international community's efforts to tackle tax-related illicit financial flows. To get a negotiation process started, however, the proponents of this proposal may need to develop a clearer common understanding of the rationale for a new convention, its role and purpose, and the added value of its substantive content.

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Acronyms

BEPS	Base erosion and profit shifting
FCTC	Framework Convention on Tobacco Control
G20	Group of Twenty (19 countries and the EU)
G7	Group of Seven
GDP	Gross Domestic Product
LMIC	Low- and Middle-Income Countries
MAC	1988 Convention on Mutual Administrative Assistance in Tax Matters
MLI	2016 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
MNE	Multinational enterprise
OECD	Organisation for Economic Co-operation and Development
UN	United Nations
UNCLOS	1982 UN Convention on the Law of the Sea
UNFCCC	1992 UN Framework Convention on Climate Change
VCLT	1969 Vienna Convention on the Law of Treaties
WHA	World Health Assembly
WTO	World Trade Organization

1

Growing calls for a new approach

Worldwide, nearly half a trillion US dollars of government revenue is lost every year through corporate tax avoidance, profit shifting, and other tax-related illicit financial flows (IFF).¹ Corporate tax abuse constitutes the largest share of the losses (60–70 per cent), while the rest is lost through “tax evasion by wealthy individuals”.² The problem is of such a scale that it threatens to undermine the fiscal independence and control of States. It is a global, transboundary issue, whereby “the revenue base of one nation erodes at the expense of the revenue base or economic activity of a competing nation”³. An effective response therefore requires international cooperation.

1.1 FOR HAVEN’S SAKE

At the heart of the matter are two problem drivers: (i) the shifting of capital and profits to jurisdictions⁴ with low or zero tax-rates, and (ii) the widespread use of financial

secrecy to obscure transactions and ownership. The two problem drivers are both results of deliberate government policies. In the absence of an effective global governance framework, certain jurisdictions—colloquially referred to as *tax-havens*—have been able to make their fortunes by luring in and/or hiding value created in other countries.

As a result, “governments lose substantial corporate tax revenue because [...] aggressive international tax planning [...] artificially shift[s] profits to locations where they are subject to non-taxation or reduced taxation”.⁵ Combined with extensive use of financial secrecy regulations, including “exemption from the obligations to register and published beneficial ownership, to preserve accounting documentation and to audit”,⁶ this produces an unhealthy misalignment between economic activity and taxing rights. It also serves as a catalyst

¹ GATJ/PSI/TJN (2021), “The State of Tax Justice 2021”, Global Alliance for Tax Justice/Tax Justice Network/Public Services International, November 2021. Available from <https://taxjustice.net/reports/the-state-of-tax-justice-2021/>.

² GATJ/PSI/TJN (2021), “The State of Tax Justice 2021”.

³ Gregory, N. (2012), “Lax Tax: The Threat of Secrecy Jurisdictions and What the International Community Should Do about It”, *Transnational Law & Contemporary Problems* 20, no. 3 (Winter 2012): 859–894, p. 886.

⁴ The term ‘jurisdiction’ is broader than ‘States’ or ‘countries’ and is used to refer to any geographical area with a political structure authorized to introduce

legislation (e.g., the state of Delaware, which is part of the United States, or Cayman Islands, which is an overseas territory of United Kingdom).

⁵ The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (shortened MLI), preambular paragraph 1. See <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beeps.htm>.

⁶ Tollan, H. (2016), “An International Convention on Financial Transparency”, chapter 10 in Pogge and Mehta (eds.), *Global Tax Fairness*, Oxford University Press, p. 239.

for the concealment of criminal profits and ill-gotten gains.

In an effort to halt further erosion of their tax bases and prevent profits from shifting to tax havens, other countries have, over the years, responded by lowering their own tax rates, and/or introducing financial secrecy regulation. This has triggered a negative spiral of harmful tax competition—a race to the bottom. As “[c]ountries compete to attract economic activity”,⁷ the total global tax base is gradually reduced, which is part of the reason why the average global statutory corporate tax rate fell by half between 1985 and 2018, from 49 per cent to 24 per cent.⁸

|| *Harmful tax competition is a text-book example of an international cooperation problem, where individual rationality is at odds with collective rationality*

⁷ Devereux, M. P., & Vella, J. (2014), “Are We Heading towards a Corporate Tax System Fit for the 21st Century?”, *Fiscal Studies*, 35(4), 449–475, p. 452. Available at <http://www.jstor.org/stable/24440324>.

⁸ Tørslov, T., Wier, L., and Zucman, G. (2022), “The Missing Profits of Nations”, Working Paper. Available from <https://gabriel-zucman.eu/missingprofits/>.

⁹ The OECD published a seminal report on the issue of harmful tax competition in 1998. Available at <https://www.oecd.org/ctp/harmful/1904176.pdf>.

¹⁰ The first bilateral tax treaty was concluded at the end of the 19th century, in 1899, between the Kingdom of

Harmful tax competition is a text-book example of an international cooperation problem, where individual rationality is at odds with collective rationality. The specific acts and practices that cause the loss in government revenue (aggressive tax planning, shifting of profits, concealment of ownership structures) are predominantly undertaken by companies and wealthy individuals. It is governments, however, that make such act and practices possible. And, ultimately, only governments can develop and implement effective solutions to tackle this problem.

1.2 NOT ALL BLEAK

The good news is that the international community is acutely aware of the challenges posed by harmful tax competition. The need for international cooperation and legally binding agreements to address the issue is widely accepted.⁹ In fact, the history of international treaty-making on tax and financial transparency is more than a century old.¹⁰ “Due to the diversity of the tax systems” back then,¹¹ however, it was concluded that bilateral treaties, rather than multilateral ones, should form the backbone of the international legal setup. As a result, there are more than 3,500 bilateral tax agreements in existence today.¹² And not unlike the system of bilateral *trade* agreements—famously described by Jagdish

Prussia and the Austro-Hungarian Empire. United Nations, *International Tax Agreements*, vol. III: World Guide to International Tax Agreements 18431951 (1951), p. 343. See also Jogarajan, S. (2018), “Double Taxation and the League of Nations”, *Cambridge Tax Law Series*, Cambridge University Press, doi:10.1017/9781108368865.002.

¹¹ Jogarajan, S. (2018), p. 191–192.

¹² See, for instance, <https://www.oecd.org/gov/regulatory-policy/taxtreaties-modeltaxconvention.htm>.

Bhagwati as resembling a spaghetti bowl¹³—this has created a rather messy situation.

Alongside the web of bilateral treaties, there are some multilateral instruments on tax-related issues in place. The two most important of these treaties were both negotiated under the auspices of the Organisation for Economic Co-operation and Development (OECD).¹⁴ The 1988 Convention on Mutual Administrative Assistance in Tax Matters (MAC) aims to tackle tax evasion and avoidance, with exchange of information between tax authorities as a key pillar. Since the convention was amended (by protocol) in 2010, “any State which is not a member of the Council of Europe or of the OECD may request to be invited to sign and ratify”.¹⁵ Currently, the agreement covers nearly 150 participating jurisdictions.¹⁶

The 2016 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), is focused on tackling harmful tax competition and on ensuring that “profits

are taxed where substantive economic activities generating the profits are carried out and where value is created”.¹⁷ The convention builds on the OECD/G20 Base Erosion and Profit Shifting (BEPS) project, and aims, in short, to transpose the results from that process into bilateral tax treaties.¹⁸ The MLI currently has close to 100 States parties.¹⁹

In addition, certain aspects of financial secrecy are dealt with in other multilateral treaties, notably the United Nations Convention against Corruption (UNCAC)²⁰ and the United Nations Convention against Transnational Organized Crime (UNTOC).²¹ However, these conventions do not aim to regulate tax-related illicit financial flows specifically.²²

Finally, a third multilateral convention on tax-related issues is currently considered. In 2021, members of the OECD/G20 Inclusive Framework on BEPS²³ agreed—in the form of a statement—to a so-called two-pillar solution to tackle “tax challenges arising from the digitalisation of the economy”.²⁴ To

¹³ Bhagwati, J. (1991), *The World Trading System at Risk*, Princeton University Press, Princeton, NJ.

¹⁴ For an overview, see <https://guides.ll.georgetown.edu/c.php?g=363487&p=4817002#Selected%20Multilateral%20Treaties>.

¹⁵ The Convention on Mutual Administrative Assistance in Tax Matters (1988, amended by protocol in 2010, shortened MAC), Article VIII(5). The 2010 Protocol is available at https://www.oecd.org/ctp/exchange-of-tax-information/2010_Protocol_Amending_the_Convention.pdf.

¹⁶ See <https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm>.

¹⁷ MLI, preambular paragraph 4.

¹⁸ For more information on the OECD/G20 BEPS Project, see <https://www.oecd.org/tax/beps/>.

¹⁹ See <https://www.oecd.org/tax/treaties/beps-ml-signatories-and-parties.pdf>.

²⁰ See <https://www.unodc.org/unodc/en/treaties/CAC/>.

²¹ See <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>.

²² Ryding, T. M. (2022), “Proposal for a United Nations Convention on Tax”, Eurodad/Global Alliance for Tax

Justice, p. 5. Available from https://www.eurodad.org/un_tax_convention.

²³ The OECD/G20 Inclusive Framework on BEPS is a forum that brings together over 135 countries and jurisdictions to collaborate on the “implementation of 15 measures to tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment.” (see <https://www.oecd.org/tax/beps/about/>). It was set up in 2016 to ensure that “interested countries and jurisdictions, including developing economies, can participate on an equal footing in the development of standards on BEPS related issues” (see <https://www.oecd.org/tax/beps/flyer-inclusive-framework-on-beps.pdf>).

²⁴ OECD (2021), “Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy”, 8 October 2021. Available from <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm>. Note that in the “Detailed Implementation Plan” annexed to the statement, it is indicated that yet another convention may be considered, under Pillar 2: “As part of the work on the implementation framework, IF members will consider the merits and possible content of a multilateral convention

implement the first pillar, which deals with the allocation of taxing rights,²⁵ the statement indicates that a multilateral convention would be developed. The text of new convention was to be negotiated by a subsidiary body of the OECD²⁶ called the Task Force on the Digital Economy, and completed by early 2022, “with the objective of enabling it to enter into force and effect in 2023 once a critical mass of jurisdictions as defined by the MLC have ratified it.”²⁷ This timeline seems to have been overly optimistic, however. In May 2022, the OECD acknowledged that the new convention would not come into force before 2024, at the earliest. Some have also begun to doubt whether the “OECD-brokered agreement [...] will ever be implemented”.²⁸

Despite the recent hiccups in the implementation of the two-pillar solution, the overall progress made over the past two decades when it comes to international tax cooperation is encouraging. When the Tax Justice Network (TJN) was set up in 2003, calls for automatic exchange of financial information, beneficial ownership transparency, and country-by-country reporting (labelled the ‘ABC of tax transparency’) were “originally written off as entirely unrealistic and utopian”.²⁹ Two

in order to further ensure co-ordination and consistent implementation of the GloBE rules.”

²⁵ Pillar One has been viewed as an important step towards a system of unitary taxation for multinational corporations. See, for instance, <https://taxjustice.net/2019/11/21/a-historic-day-for-unitary-taxation/>.

²⁶ In 2017, the Task Force on the Digital Economy was created a subsidiary body of the Inclusive Framework on BEPS.

²⁷ OECD (2021), “Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy”, p. 6.

²⁸ See <https://www.theguardian.com/business/2022/may/24/historic-global-tax-deal-on-multinationals-delayed-until-2024>.

²⁹ Cobham, A. (2022), “Taxing for a New Social Contract”, *Finance & Development*, IMF, March 2022. Available at

decades later, the 20 largest economies in the world support all three measures.

Since the G20 declared, in 2009, that “[t]he era of banking secrecy is over”,³⁰ the international community has taken significant steps to tackle tax evasion and avoidance, and to curb harmful tax competition. Catalysed by the work of an international body called the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum),³¹ harmonized standards on exchange of information have been implemented in jurisdictions across the world. This has led to a “sharp rise the volume of information exchanged” between tax authorities (initially on request, but since 2017 also automatically).³² As part of the harmonized standards on exchange of information, considerable progress has also been made to ensure “availability and accessibility of beneficial ownership information”.³³ Similarly, important steps have been taken on country-by-country reporting. Pursuant to the minimum standard introduced under Action 13 of the OECD/G20 BEPS Project, over 100 jurisdictions now require large multinational enterprises (MNEs) to report revenues for “each tax jurisdiction in which

<https://www.imf.org/en/Publications/fandd/issues/2022/03/Taxing-for-a-new-social-contract-Cobham>.

³⁰ G20 Communique: London Summit — Leaders’ statement from 2 April 2009. Available at https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf.

³¹ The Global Forum consists of 165 members and is, according to the OECD, “the leading international body working on the implementation of global transparency and exchange of information standards around the world.” The Global Forum was originally set up in 2000 and restructured in 2009. See <https://www.oecd.org/tax/transparency/>.

³² OECD (2019), “Transparency and Exchange of Information for Tax Purposes—Multilateral Co-operation Changing the World”, 10th Anniversary Report, p. 3. Available at <https://www.oecd.org/tax/transparency/global-forum-10-years-report.pdf>.

³³ Ibid.

they do business”.³⁴ In practice, this means that “almost all MNEs with consolidated group revenue at or above the EUR 750 million threshold” are covered.³⁵

1.3 GOVERNANCE GAPS

While much has been achieved over the past decade, the progress made under the auspices of the OECD has also raised a series of questions regarding the effectiveness and fairness of the rules that have been put in place, and regarding the legitimacy and accountability in the process that brought them into being. It has been pointed out that international tax rules, including the latest proposals from the OECD, do not adequately require the taxation of multinational companies where their economic activity takes place. Moreover, “the rules still do not prevent the anonymous ownership of assets and income streams, which is central to every case of individual tax abuse and, more widely, to almost every corruption case and every illicit financial flow.”³⁶

Furthermore, the rules developed under the OECD-led process have been criticized for favouring the world’s largest economies. According to one estimate, Pillar Two of the Inclusive Framework proposal “grants almost all revenue to a handful of rich countries”, while the “net impact [of Pillar One] on developing countries could be

negative”.³⁷ During the negotiations on the two-pillar solution, the OECD Secretariat reportedly “ignored the negotiation positions of both the African Tax Administration Forum (ATAF) and the Group of 24 representing a range of countries in the global South.”³⁸

Unsurprisingly, therefore, developing countries such as Kenya, Nigeria, Pakistan and Sri Lanka subsequently refused to sign on.³⁹ Instead of addressing the “structural economic challenge of [multinational enterprise] tax avoidance” for low- and middle-income countries (LMICs), the two-pillar solution “ended up becoming a narrowly constructed vehicle to enhance domestic resource mobilization in G7 countries, and if implemented, may actually further erode LMICs’ revenue base.”⁴⁰

Perhaps the most damning critique of the OECD-led efforts has focused on their lack of legitimacy and accountability. Even if the multilateral conventions (MAC and MLI) have been opened up to participation by non-OECD countries, and although the forums where the issues are being negotiated (Global Forum, Inclusive Framework) have become more inclusive, the control of the process—and of the Secretariat—remains in the firm grip of the OECD members. This is in stark contrast to virtually any other global issue—from climate change to international security, global health, or international trade. The

³⁴ See <https://www.oecd.org/tax/beps/beps-actions/action13/>.

³⁵ OECD (2021), “OECD/G20 Inclusive Framework on BEPS: Progress Report July 2020–September 2021”. Available from <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2020-september-2021.htm>.

³⁶ Cobham, A. (2022), “Taxing for a New Social Contract”.

³⁷ Oxfam (2021), “The effect of the OECD’s Pillar 1 proposal on developing countries – An impact assessment”, October 2021. Available at https://www.oxfamireland.org/sites/default/files/pillar_1_impact_assessment_-_04.10.21_final.pdf.

³⁸ See <https://financialtransparency.org/global-south-countries-will-main-losers-oecd-minimum-global-minimum-tax-deal-risking-undermining-covid-19-vaccination-recovery-efforts/>.

³⁹ See, for instance, <https://qz.com/africa/2082754/why-kenya-and-nigeria-havent-agreed-to-global-corporate-tax-deal/>.

⁴⁰ McCarthy, J. (2022), “A bad deal for development – Assessing the impacts of the new inclusive framework tax deal on low- and middle-income countries”, Brookings Global Working Paper #174, May 2022. Available at https://www.brookings.edu/wp-content/uploads/2022/05/Tax-and-Bad-Deal-for-Development_Final.pdf.

lack of legitimacy and accountability is further exacerbated by the fact that the OECD operates largely behind closed doors, without public scrutiny, and on the basis of consensus (which gives the least cooperative States a veto over the final outcome).⁴¹

Since the late 1990s, there has been something of a battle for supremacy between the OECD and the United Nations over the role as the principal forum for developing global tax rules. So far, the OECD has largely held the upper hand in this battle. In part, the OECD has done so by liaising closely with the G7 and G20, but in part also because it has accommodated, however imperfectly, calls for inclusiveness and participation. With the restructuring of the Global Forum in 2009, and the creation of the Inclusive Framework on Base Erosion and Profit Shifting in 2016, which is open to all jurisdictions,⁴² the OECD took some of the sting out of the criticism levelled against it.

The remaining problem, however, is that “the OECD as an institution was not designed to” act as the global arbiter of international tax cooperation.⁴³

Participation in the Inclusive Framework remains far from universal, even if more than 90 per cent of world GDP is nominally represented. Moreover, the accountability and the legitimacy of the OECD as a forum for multilateral decision-making continues to be highly disputed. Given its opaque working methods and consensus-based

⁴¹ For a discussion on the legitimacy of the OECD/G20 BEPS Project, see Fung, S. (2017), “The Questionable Legitimacy of the OECD/G20 BEPS Project”, *Erasmus Law Review*, Issue 2 2017. Available at https://www.elevenjournals.com/tijdschrift/ELR/2017/2/ELR_2017_010_002/fullscreen.

⁴² With certain caveats, such as the acceptance of the earlier BEPS package. This is not uncommon in international law, however. When States join a previously negotiated treaty, they have to accept the package, and if the treaty is a framework convention, they would normally have to join the framework convention first in order to join any protocols.

decision-making, it is perhaps not surprising that the OECD-led process is struggling to develop an effective and equitable global response. The question is whether there is reason to believe this will change.

1.4 IN SEARCH OF A NEW APPROACH

Recently, a growing number of countries, civil society actors, and decision-makers seem to have concluded that it is time for a new approach.⁴⁴ In May 2019, Senegal, on behalf of the Africa Group, called for the development of a separate international convention on tax, which would assist in tackling all aspects of IFF, including “illicit flows emanating from tax avoidance, trade misinvoicing, profit shifting, and other illegal commercial activities, especially those of multinational enterprises “.⁴⁵

In *The State of Tax Justice 2020* report, the call for a separate convention was framed, perhaps for the first time, as a “UN Tax Convention”:

Ultimately, these challenges make clear the need for global governance – a **UN tax convention** to ensure a global and genuinely representative forum to set consistent, multilateral standards for corporate taxation, for the necessary tax cooperation between governments, and to

⁴³ Gregory, N. (2012), “Lax Tax: The Threat of Secrecy Jurisdictions and What the International Community Should Do about It”, p. 881.

⁴⁴ For a discussion on the limitations of the OECD’s BEPS process, and the need for a more systemic approach, see, for instance, Devereux, M. P., & Vella, J. (2014), “Are We Heading towards a Corporate Tax System Fit for the 21st Century?”, *Fiscal Studies*, 35(4), 449–475. <http://www.jstor.org/stable/24440324>.

⁴⁵ See UN Web TV: <https://media.un.org/en/asset/k10/k10cs0zsar> (from 02:49:30).

deliver comprehensive, multilateral tax transparency - the 'ABC', in full.⁴⁶

The option of a UN Tax Convention was also mentioned in a UN report in 2020,⁴⁷ and then included as one of the recommendations in the report of the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (FACTI) panel in 2021.⁴⁸ More recently, in May 2022, the Conference of African Ministers of Finance, Planning and Economic Development called upon “the United Nations to begin negotiations under its auspices on an international convention on tax matters, with the participation of all States members and relevant stakeholders, aimed at eliminating base erosion, profit shifting, tax evasion, including of capital gains tax, and other tax abuses.”⁴⁹

Most of these calls and recommendations have been limited to general points on why the new treaty is needed and what it might regulate. Though more detailed analysis of

the rationale and possible shape of this new instrument is also beginning to emerge.⁵⁰

Direct opposition to the proposal has so far been limited. However, it may be expected that several countries, in particular some of the OECD members, will be sceptical of the proposal, given that such a convention would challenge the supremacy of the OECD in the development of international tax rules. This reluctance may, of course, fade if it becomes clear that the OECD-led process will not lead to meaningful change.

Depending on how the proposal for a separate convention on tax and financial transparency is framed, however, it is also possible that some OECD-members will come to view it as a positive reinforcement of efforts undertaken in the OECD and elsewhere. After all, global supremacy of a particular forum on a particular issue should not be a goal in itself. What matters is the ability of the international community to tackle an issue of shared concern.

⁴⁶ Tax Justice Network (2020), “The State of Tax Justice 2020”, p. 11. Available from <https://taxjustice.net/reports/the-state-of-tax-justice-2020/>. See also <https://taxjustice.net/2021/08/02/the-past-present-and-future-of-tax-justice-network/>. Original emphasis.

⁴⁷ United Nations (2020), “Financing for Development in the Era of COVID-19 and Beyond: Menu of Options for the Consideration of Heads of State and Government - Part II”, September 2020, p. 124. Available from <https://www.un.org/en/coronavirus/financing-development>.

⁴⁸ United Nations (2021), “Financial Integrity for Sustainable Development: Final Report of the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda”, New York: United Nations, February 2021. Available from <https://www.factipanel.org/reports>. The FACTI Panel’s recommendation was also noted in a report by the World Economic Forum in June 2021 (World Economic Forum (2021), “Building Back Broader:

Policy Pathways for an Economic Transformation”, Community Paper, June 2021, p. 11. Available from <https://www.weforum.org/whitepapers/building-back-broader-policy-pathways-for-an-economic-transformation>).

⁴⁹ United Nations (2022), “Report of the Conference of African Ministers of Finance, Planning and Economic Development on its work during the fifty-fourth session of the Economic Commission for Africa”, United Nations Official Document E/ECA/CM/54/6, Res. 990, Para. 6 (pp. 25–26). Available at https://www.uneca.org/sites/default/files/com/2022/E_ECA_CM_54_6_E.pdf.

⁵⁰ See, for instance, Chowdhary, A. M. and Picciotto, S. (2021), “Streamlining the Architecture of International Tax through a UN Framework Convention on Tax Cooperation”, Tax Cooperation Policy Brief, No. 21, November 2021. Available from <https://www.southcentre.int/tax-cooperation-policy-brief-21-november-2021/>. See also Ryding, T. M. (2022), “Proposal for a United Nations Convention on Tax”.

2

Nuts and bolts of international conventions

The term ‘convention’ does not have a specific definition under international law, but it is generally understood as an “international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.⁵¹ As such, a convention is legally equivalent to a ‘treaty’.⁵²

2.1 PURPOSE AND KEY ELEMENTS

Politically, multilateral conventions can be understood as diplomatic tools developed for the purpose of tackling issues of transboundary concern. Often, new conventions are developed to deal with a collective action problem, whereby “the uncoordinated actions of each player may not result in the best outcome”.⁵³ In these cases, the key function of multilateral conventions is to ensure that States act in a

coordinated manner to resolve an issue of concern. In other words, the convention should establish a common standard of action.

The rules that make up the standard of action constitute the core provisions of a convention. As an example, the core provisions of the Treaty on the Prohibition of Nuclear Weapons (TPNW) are contained in Article 1 of that treaty, which spells out all the acts that States parties are prohibited from undertaking under any circumstances (including development, testing, and production of nuclear weapons).⁵⁴ For other conventions, the core provisions can be more elaborate and stretch over multiple articles. The UN Convention on the Law of the Sea (UNCLOS),⁵⁵ with a total of 320 articles, plus nine annexes, is a case in point. Still, the purpose of the core provisions remains the same: to spell out a set of rules that States parties are required to abide by.

⁵¹ 1969 Vienna Convention on the Law of Treaties (VCLT), Article 2(1)(a). United Nations, Treaty Series, vol. 1155, p. 331. Available from https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁵² Note that, as the quote indicates, the term used to describe a legal instrument does not have any particular legal bearing. It could be called a compact, a covenant, a charter, a protocol, an agreement, or a pact. What matters is the content of the agreement, and the manner in which it has been adopted

⁵³ Brown G. W., McLean, I., and McMillan A. (2018), *A Concise Oxford Dictionary of Politics and International*

Relations (4 ed.), Oxford University Press Print Publication.

⁵⁴ 2017 Treaty on the Prohibition of Nuclear Weapons. Available from https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-9&chapter=26&clang=_en.

⁵⁵ 1982 United Nations Convention on the Law of the Sea, United Nations, Treaty Series, vol. 1833, p. 3. Available from https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

In addition to establishing a common standard of action, most conventions include a set of supporting provisions. The purpose of these provisions is to promote and facilitate the implementation of the core provisions. This could include requirements to submit annual reports or to identify national focal points, as well as the creation of institutional structures and other collective arrangements aimed at supporting the implementation and gradual strengthening of the regime. Together, the core provisions and the supporting provisions can be said to constitute the convention's operative elements.

Finally, most conventions contain a set of guiding elements (in the beginning), and a set of functional elements (towards the end). The role of the guiding elements—including the preamble, and possibly separate articulations of the convention's scope and objective—is to formulate a shared understanding of the issue of concern, including its causes and effects, and the role of the convention in addressing it. The role of the functional elements is to clarify any legal or technical aspects, for instance regarding entry-into-force, depositary, or languages.

Taken together, this points to three key functions of multilateral conventions:

- 1) To articulate of a shared understanding of an issue of transboundary concern;
- 2) To formulate a common standard of action that, if faithfully implemented, would provide a meaningful contribution towards tackling the issue of concern; and
- 3) To establish the institutional structures and other collective arrangements

needed to facilitate the achievement of the convention's objective.

Most conventions serve a combination of these three functions, but the emphasis varies. The UN Charter, for instance, contains a long list of rules, but also set up the United Nations as an intergovernmental organization. Conventions such as the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) or the 2008 Convention on Cluster Munitions (CCM) mainly serve the first two functions, with little attention to institutional structures.⁵⁶ By contrast, the 1995 Agreement Establishing the World Trade Organization (WTO) and 1946 Constitution of the World Health Organization (WHO) are examples of conventions whose main purpose is to set up a multilateral institution.

2.2 BINDING FORCE

In principle, whether an agreement between States is considered legally binding or not is a question of intent; it is legally binding if the parties meant for it to be legally binding. Such intent is not always simple to deduce, however, and in practice, the legal character of an international agreement is determined by the process through which it is negotiated, adopted, and brought into force. Legally binding agreements would normally specify how and when the agreement enters into force, which would typically require a certain number of States to express their consent to be bound by it. In accordance with the procedures outlined in the Vienna Convention on the Law of Treaties (VCLT), such consent is generally expressed through signature and (subsequent) ratification, or

⁵⁶ For an overview of disarmament treaties, including the NPT and the CCM, see <https://treaties.unoda.org>.

by depositing and instrument of accession (or acceptance/approval).⁵⁷

In general, legally binding agreements represent a deeper level of commitment than non-binding (or political) agreements. In part, this is because the threshold for approval is higher. For most countries, ratification of a new convention requires consent by the legislative branch (parliaments). While this may prove challenging in some jurisdictions (with the USA as a prime example),⁵⁸ it also has several benefits. For one, it makes the process more democratic and open to public scrutiny. Secondly, it makes the decision to join and comply with the new convention more credible and less vulnerable to changes in the executive branch. As such, conventions and treaties are often more predictable, robust, and reliable than political declarations, agreed outcome documents, or voluntary frameworks. Third, involvement of the legislative branch can also have benefits during the implementation of the agreement, in particular if new national legislation is required. Legally binding agreements also become part of public international law, which means that States parties have a general obligation to comply with them, in good faith.⁵⁹

That said, the fact that an international agreement is legally binding does not necessarily make it effective. On the

contrary, there are multiple examples of legally binding agreements that have failed to deliver meaningful results. In part, this can be explained by the simple fact that some international issues are more difficult to deal with than others (be it climate change, biodiversity loss, or nuclear disarmament). But to some extent, is also a question of treaty design—that is, the *content* of the agreements. If the convention text does not clearly spell out what States are required to do (or refrain from doing) to tackle the issue of concern, it makes little difference if the wrapping is legally binding.⁶⁰

|| *In general, legally binding agreements represent a deeper level of commitment than non-binding (or political) agreements*

2.3 PARTICIPATION

Treaties are entered into between sovereign States, and most multilateral treaties have open memberships, which means that, in principle, all States are eligible to join.⁶¹ This

⁵⁷ Most treaties, as well as the VCLT, list four options for expressing consent to be bound by the treaty: "ratification", "acceptance", "approval", and "accession". The most common is for States to sign the treaty first, and then subsequently ratify it. States that join the treaty at a later date would normally join through accession.

⁵⁸ In the United States, international treaties require the advice and consent of two-thirds of the Senate (though in practice, things are a bit more complicated. See, for instance, https://constitution.congress.gov/browse/essay/artII-S2-C2-1/ALDE_00012952/).

⁵⁹ The principle of *pacta sunt servanda* (agreements shall be kept) is enshrined in Article 26 of the VCLT.

⁶⁰ For a discussion on the role of mandatory and non-mandatory elements in treaties, see Bodansky, D. (2015), "Legally binding versus non-legally binding instruments", Chapter 11 in Barrett, Carraro and de Melo (eds.), *Towards a Workable and Effective Climate Regime*, CEPR Press. Available from <https://voxeu.org/content/towards-workable-and-effective-climate-regime>.

⁶¹ In practice, however, this is not always straightforward. The first problem is that there is no proper definition of a State under international law. The closest is a provision in the 1933 Montevideo Convention, which

means that unless the convention text explicitly states otherwise, a convention negotiated under the auspices of the United Nations would be open to participation by all 193 UN Member States, plus the two permanent Observer States (Holy See and Palestine), as well as Niue and Cook Islands (a grand total of 197). For the MLI (which was negotiated under the auspices of the OECD), it is explicitly stated that Guernsey, Isle of Man, and Jersey are eligible to become parties, in addition to “all States”.⁶² Of course, the actual number of States parties to a given convention can vary considerably, from just a few dozen to nearly all UN Member States. Very few conventions have so-called universal participation; there is nearly always one or more States that, for various reasons, remain outside.

Note that a multilateral convention governs relations only between those States that have formally agreed to be bound it (referred to as ‘States Parties’). It does not, therefore, have any legal force for States that have not expressed such consent. Moreover, it has, in most cases, no direct bearing on other international agreements. This means that a new international convention on tax and financial transparency, if negotiated and adopted in accordance with the procedures stipulated in the VCLT, would not have any authority over the UN system, which is governed by the UN Charter (another legally binding agreement). Simply put, a new convention on tax matters—even if it is

lists four criteria (Article 1, see <https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml>). And quite often, there will be discussions about the participation of certain jurisdictions. To a large extent, the answer will depend on who you ask, and where you sit. Though for treaties negotiated under the auspices of the United Nations, and for which the Secretary General of the UN is the depositary, the convention would normally be open to participation by “States that are Members of the United Nations or members of the specialized agencies, or Parties to the Statute of the International Court of Justice.” (See United Nations, “Summary of Practice of

called a UN Tax Convention, and even if the decision to start negotiations is made by the UN General Assembly—would not have the prerogative to establish new UN organs. Accordingly, when the African Group stated, in 2019, that the new convention would serve as the backbone for their “envisaged upgraded international tax committee”, it is important to stress that the new convention would not have that authority. A decision to upgrade the UN tax committee from an expert group to an intergovernmental body under the United Nations (subsidiary organ) would have to be taken by the UN General Assembly.⁶³

This does not mean, of course, that a new intergovernmental tax body could not be established under the new convention. As noted above, most conventions include provisions for setting up a governing body for the new regime.⁶⁴ Such a governing body could be mandated by the convention to take decisions on certain issues and have the flexibility to set up subsidiary bodies. As an example, the Conference of the Parties to the UNFCCC acts as the highest decision-making body for that convention (but it is not a UN body). A more elaborate version is the Constitution of the World Health Organization (WHO), which set up the World Health Assembly (WHA) as its governing body and mandated it to develop international rules within its scope of

the Secretary-General as Depositary of Multilateral Treaties”, United Nations Official Document ST/LEG/7/Rev.I, pp. 22–23.)

⁶² MLI, Article 27. Other jurisdictions may also become parties, provided that all other parties agree. Note that the depositary for the MLI is the Secretary-General of OECD, not the UN.

⁶³ See Charter of the United Nations, Article 22. Available from <https://www.un.org/en/about-us/un-charter>.

⁶⁴ Terms vary, but examples include Conference of the Parties (COP), Meeting of States Parties (MSP), Meeting of Parties (MOP).

application (international health).⁶⁵ The WHA is also tasked with overseeing the implementation of the International Health Regulations, and to develop new legally binding agreements. That is, for instance, how the Framework Convention on Tobacco Control (FCTC) was established.⁶⁶

2.4 REGIME STRUCTURE

There is no fixed formula for how to structure a treaty or a legal regime. Some treaties are called ‘framework conventions’ and would typically have one or more ‘protocols’ added as supplementary agreements. Other treaties are designed as standalone agreements, with all substantive elements included in one single instrument. Both types could also have annexes attached.

But even if a treaty is called a framework convention, there is no guarantee that it will have any protocols. Conversely, treaties that are not called framework conventions can also have protocols. The Convention on Biodiversity (CBD), for instance, has two protocols, but does not have the term ‘framework convention’ in its title.⁶⁷ And the UNFCCC—which has both ‘United Nations’ and ‘Framework Convention’ in its title—has a supplementary agreement that is not called a protocol (Paris Agreement). And then there are framework conventions with only

one protocol,⁶⁸ which suggests that it might have been better to just negotiate a standalone instrument, thereby avoiding the need for two ratification processes. To complicate things even further, protocols can also be used to amend standalone agreements, instead of acting as supplementary agreements—as was done with the Convention on Mutual Administrative Assistance in Tax Matters in 2010.⁶⁹

Every convention, or regime,⁷⁰ is designed to achieve a certain objective, which is why the question of structuring is often left open until it has become clear what the regime is meant to achieve, and how. Form normally follows function. In general, however, there are two main tools that negotiators can make use of in order to add flexibility to a legal instrument: protocols and annexes. Each of these come with a set of advantages and disadvantages.

Protocols (or other legal instruments serving the same function) can be useful in situations where the issue at hand has a broad thematic scope, and where there is scientific uncertainty around the scale, causes and effects of the problem, or disagreement about the most appropriate regulatory response. If, however, the issue at hand is relatively narrow in scope, technically complex, and likely to require regular adjustments, annexes can serve a

⁶⁵ See <https://www.who.int/about/governance/constitution>.

⁶⁶ For a procedural history of FCTC, see <https://legal.un.org/avl/ha/whofctc/whofctc.html>.

⁶⁷ For more on the CBD, see <https://www.cbd.int>.

⁶⁸ Examples include the Vienna Convention for the Protection of the Ozone Layer (which is designed as a framework convention even if it is not called that), with its Montreal Protocol, and the Framework Convention on Tobacco Control.

⁶⁹ Another example is the international convention on the prevention of pollution from ships (MARPOL), which was adopted in 1973, and amended by protocol in 1978. It has since been referred to as MARPOL73/78.

⁷⁰ The term ‘regime’ is used here to describe an international governance structure set up to tackle a given issue, regardless of the legal architecture. In international relations theory, the term ‘regime’ is usually defined as “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations” (Krasner, S. (1983), *International Regimes*, Ithaca, NY: Cornell University Press, p. 2). The term ‘lineage’ is sometimes used to describe the same, but with a more legal focus (see for instance Mitchell et al. (2020), “What We Know (and Could Know) About International Environmental Agreements”, *Global Environmental Politics* 20:1, February 2020, https://doi.org/10.1162/glep_a_00544).

useful function. But annexes can, of course, also be used simply to keep things tidy.

2.5 PHASES OF TREATY-MAKING

The process of setting up a new international legally binding instrument normally moves through several phases. The first of these could be labelled an ‘idea phase’, which is where efforts to develop a new international convention on tax and financial transparency appear to find themselves.

Step one: The idea phase

All multilateral treaty-making processes start with an idea, which may or may not take the form of a specific proposal. And this idea is usually developed on the basis of a simple recognition: that a given issue is of transboundary concern and requires international coordination and/or cooperation. Sometimes an idea can catch on quickly, and, with sufficient support, it can be carried into the next phase within a matter of months. Quite often, however, the idea-shaping phase can last for years, or even decades. The idea of banning nuclear weapons, for instance, is nearly as old as the weapons themselves. Yet it was not until a decade ago that this idea was moulded into something that gave it sufficient traction. In this first phase, it is not necessarily clear what this new instrument should do, what it should focus on, and how it would work.

Step two: The examination phase

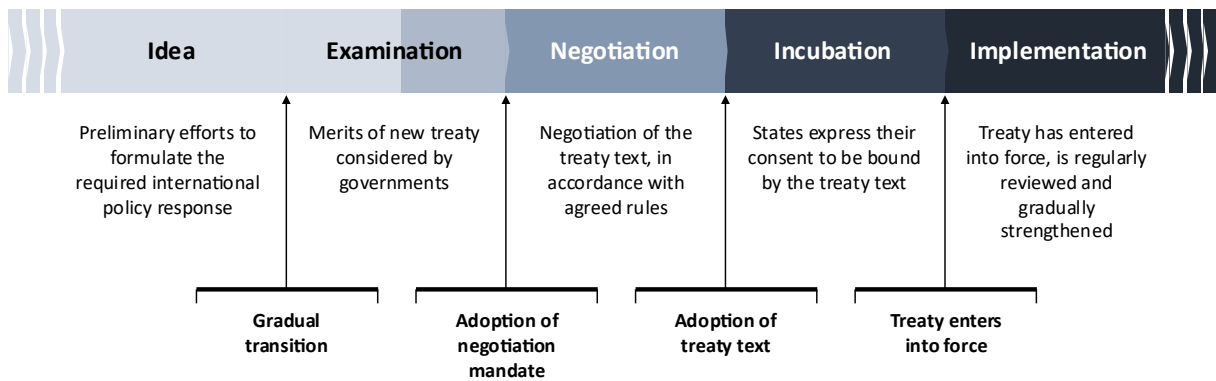
When (or if) the idea of a new treaty begins to catch on and find its way into established forums, a more structured consideration of its merits can begin. This phase is exploratory in character, rather than preparatory, and it is often characterized by uncertainty about the direction of travel. It is not yet clear—either for States or civil society—whether the multilateral

discussions will result in the negotiation of a new legal instrument or whether the discussions will at some point fizzle out (or perhaps stabilize in the form of a regularized discussion forum). During this phase, States tend to be focused on improving their understanding of the problem and of how it could be solved.

|| *Sometimes an idea can catch on quickly. Quite often, however, the idea-shaping phase can last for years, or even decades.*

In practice, the examination phase typically involves a set of resolutions aimed at giving the discussions a direction. These resolutions could, for instance, be adopted at the UN General Assembly, at the World Health Assembly or at the UN Environment Assembly. It is also possible to establish ad-hoc processes, outside established forums. Once a forum is chosen, however, the issue tends to stay in that forum, unless a group of States decides that a change of venue or procedural rules is required in order to move the agenda forward. In terms of operative decisions, the resolutions adopted during the pre-negotiation phase can range from simply recognizing that there might be a problem, to setting up a subsidiary body to discuss how to deal with it. The latter often takes the form of a so-called open-ended

Phases of Treaty-making



working group (OEWG),⁷¹ a group of governmental experts (GGE), or similar entities.

Step three: The negotiation phase

The transition to the negotiation phase takes place when a mandate for negotiations is adopted, and States get ready to negotiate on the actual text of the new convention.

Usually, the decision to start negotiations is taken in the multilateral forum where the issue has (mainly) been discussed, be it the UN General Assembly, the UN Environment Assembly, the World Health Assembly, or in the Assembly of the International Maritime Organization. Decisions to start negotiations on protocols are normally taken by the parties to an existing convention, at a conference of the parties. However, States can also choose to adopt negotiation mandates outside of established arenas. This has been done on several occasions in the past. The decision to start negotiations on the Convention on Cluster Munitions, for instance, was taken at an ad-hoc conference in Oslo, Norway, in 2006.⁷²

In some instances, States may opt to include a deadline for the negotiations in the mandate, a point in time by which the convention text should be finalized. This timeline is included in order to avoid unnecessary delays, but also to add a sense of urgency. For example, when the UN General Assembly adopted the mandate for negotiations on the UN Framework Convention on Climate Change (UNFCCC) in December 1990, it recommended that the negotiations be “completed prior to the United Nations Conference on Environment and Development in June 1992 and opened for signature during the Conference”.⁷³ That recommendation was followed, and 18 months after the mandate was adopted, the convention was ready for signature.

Step four: The incubation phase

The negotiation phase ends when the text of the new convention is formally adopted. The rules of procedure for adoption can vary, and they are decided by each negotiating conference, but the general rule, as codified in the VCLT is that multilateral treaties should be adopted by a two-thirds

⁷¹ Note that ‘open-ended’ does not refer to time (as in never-ending), but rather to the membership of the group. Open-ended working groups are generally open to all UN Member States.

⁷² See <https://www.clusterconvention.org/documents-from-the-process-on-cluster-munitions/>.

⁷³ United Nations General Assembly resolution 45/212, para. 7.

majority.⁷⁴ Regardless of how the decision on the treaty text is made, however, the life of the treaty now enters a new phase, which can be termed an incubation phase. This phase begins with the adoption of the treaty text and ends with the entry-into force of the new legal instrument, which is when the new treaty becomes legally binding for all the States that have deposited their instruments of ratification (or equivalent).⁷⁵

The requirements for entry-into-force are specified by each convention. For the Minamata Convention on Mercury, as an example, the treaty text stipulates that it shall enter into force on the ninetieth day after the deposit of the fiftieth instrument of ratification.⁷⁶ That happened in August 2017, nearly four years after the treaty was adopted. Depending on how long it takes before the required number of ratification

instruments is deposited, the incubation phase can last for quite some time.⁷⁷ For the UN Convention on the Law of the Seas (UNCLOS), for instance, it took 12 years (adopted in 1982, entered into force in 1994).⁷⁸

Step five: The implementation phase

The fifth and final phase in the establishment of a new legally binding international agreement is the implementation phase. This is when the legal obligations take effect, reporting and compliance mechanisms are activated, when secretariats are set up, and when meetings of States parties (or conferences of the parties, COPs) are convened at regular intervals. For most conventions the implementation phase continues indefinitely (unless they specify otherwise),⁷⁹ with gradual strengthening over time.

Making a new convention effective

While any convention will have to be tailored to the subject matter it seeks to address, it is possible, based on past practice, to identify a set of general success criteria for the development of effective treaties:

1. Make the agreement legally binding
2. Include provisions containing specific rules, standards, and requirements
3. Include a mechanism for the gradual strengthening of the treaty
4. Include provisions to promote compliance and participation
5. Avoid least-common-denominator outcomes

⁷⁴ See VCLT, Article 9.

⁷⁵ As described in Article 11 of the VCLT, "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

⁷⁶ 2013 Minamata Convention on Mercury, Article 31. Available from <https://www.mercuryconvention.org/en>.

⁷⁷ Some treaties also have entry-into-force requirements that go beyond a specific number of ratifications. For instance, the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (adopted in 2009) also requires that the States parties

make up a minimum of 40 per cent of the world's merchant shipping by tonnage, and that the "combined maximum annual ship recycling volume ...constitutes not less than 3 per cent of the gross tonnage of the combined merchant shipping".

⁷⁸ Other treaties have waited even longer. The Comprehensive Test-Ban Treaty (CTBT) was adopted in 1996 but has yet to enter into force.

⁷⁹ The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) is an example of a treaty that was set to expire after 25 years. At the end of that period (1995), States parties had to actively decide to extend the treaty indefinitely.

3

The road to a possible new convention on tax and financial transparency

The success of any convention is, in brief, a function of its design, on the one hand, and the modalities of the process that brings it into being, on the other. The key challenge in any treaty-making effort is to mobilize support amongst a critical mass of States for a specific treaty proposal. Such a proposal requires a credible narrative, first, of how a treaty can be achieved and, second, of how it would provide a meaningful contribution towards resolving the issue of concern. These questions are co-dependent: To mobilize a critical mass of States in favour of the idea of a new convention, a credible account of how the treaty may lead to tangible legal, political, behavioural, and/or discursive change would normally be required. At the same time, to effect that change, States need to be convinced that the treaty can in fact be put in place.

If the call for a new international convention on tax and financial transparency is to move from an idea-phase to a more formal examination phase and eventual negotiations, proponents would likely need

to find convincing answers to three key questions:

- 1) How can the issue be framed in a way that both highlights existing gaps and creates a sense of urgency?
- 2) How should the policy objective be articulated in order to provide a credible political narrative for its achievement?

How can the political dynamic be changed in a way that allows momentum to build?

3.1 FRAMING THE ISSUE AND CREATING A SENSE OF URGENCY

A diplomatic process towards an international convention should, as a starting point, focus on the development of a shared understanding of the nature of the problem at hand (see section 2.1). In several past treaty-making processes, identifying, marshalling, and disseminating evidence that demonstrates the negative transboundary effects of existing laws, policies, and practices has been a first, essential step.⁸⁰ There is already a significant

⁸⁰ Examples include the processes led by the International Campaign to Ban Landmines (ICBL), the Coalition for the International Criminal Court (ICC), Child Soldiers International (CSI), Framework Convention Alliance (FCA), the International Campaign to Abolish Nuclear Weapons (ICAN), International Campaign Against

Enforced Disappearances (ICAEID), Control Arms, the Campaign to Stop Killer Robots, the Global Coalition to Protect Education from Attack (GCPEA), and the International Network on Explosive Weapons (INEW).

body of evidence of the negative effects of illicit financial flows, financial secrecy, tax avoidance, and profit shifting. Yet, this evidence does not yet appear to have translated into a politically relevant understanding amongst a critical mass of States of how the issue should be framed, or of its main causes and effects. Nor does it appear in any significant way to have challenged the sector-focused view of international tax governance, as a technical issue that is best dealt with by the good offices of the OECD or the UN Tax Committee.

In many past treaty-making processes, government agencies, international organizations, civil society actors, researchers, and dedicated individuals have played an important role in collecting and framing evidence in ways that have questioned the terms of an existing international debate; injected a sense of urgency into policy debates; and challenged “privileged” views of the appropriateness of existing laws, policies, and processes. This has been done by using available evidence to shift the burden of proof onto those who argue that existing laws, policies, and processes are sufficient—the defenders of *status quo*.

In some cases, these reframing activities have created productive feedback loops between evidence and research, on the one hand, and laws, policies, and practices, on the other.⁸¹ These efforts have also been catalysed by the inclusion of a broad spectrum of civil society actors, from human rights organizations to religious groups and

⁸¹ Borrie J., and Caughley, T. (eds) (2013), *Viewing nuclear weapons through a humanitarian lens*, Geneva: UNIDIR, 2013. Available from <https://unidir.org/publication/viewing-nuclear-weapons-through-humanitarian-lens>.

⁸² As noted by the FACTI panel, “there is still no intergovernmentally agreed universal definition of IFFs”,

labour unions—each bringing their own perspectives and arguments for why change is needed, and urgent. Such evidence-based feedback loops have significantly expanded States’ political scope of action by shifting the focus of an international debate from a question of what is politically feasible, given the power dynamics and rules of procedures of established arenas, towards a focus on what must be done to address an unacceptable situation.

If efforts to establish a new international convention on tax and financial transparency are to succeed, it would be important to take further steps towards the development of a shared understanding of the issue of concern (what exactly is the problem that the new treaty would resolve?). Moreover, there is a need to demonstrate the urgency of the issue (why should this be prioritized now?). Currently, some civil society actors use the term UN Tax Convention in their calls for a new legal instrument, but is tax the right framing? Would the convention deal with all sorts of tax matters, or would it mainly deal with certain transboundary aspects of it, such as harmful tax competition? If so, would the term harmful tax competition capture both tax and financial secrecy? And is the term illicit financial flows something that fits in this framing, or is that too broad?⁸² Finding good answers to these kinds of questions will likely be critical in order to build momentum and mobilize support around the idea.

in part due to disagreement about the inclusion of non-illegal activities. See United Nations (2021), “Report of the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda”, p. 7.

3.2 ARTICULATING A CONVINCING POLICY OBJECTIVE

The mobilization of States, civil society organizations, international organizations, researchers, and dedicated individuals in favour of the call for a new convention on tax and financial transparency requires a clear and convincing policy objective (often referred to as a ‘call’ or ‘ask’ by civil society organizations) and a credible narrative for its achievement. Articulating the policy objective is a delicate task. If the objective is overly detailed, it may inadvertently make efforts to mobilize support for the broader political narrative more difficult (too much pre-cooked text risks leading the discussions into quarrels over minute legal detail). Conversely, if the objective is too vague, it may lose political relevance by being too easy for States to agree with. The policy objective should present States and other stakeholders with a clear, binary choice; are you for it or against it? And given that the primary purpose of international law is to resolve issues of common concern, the case should primarily be built around the need to tackle the transboundary aspects of the problem. Finally, it is important that the policy objective is closely linked to the framing of the problem.

Ultimately, States will not bother to negotiate a new treaty that is not perceived as meaningful. It has to be worth the effort, which means that the case for developing it needs to be convincing. Currently, the case for a new international convention on tax and financial transparency seems to rest on the following key points:

- 1) harmful tax competition represents a collective action problem that requires a comprehensive, legitimate, long-term, and legally binding international response.

- 2) existing international regulation is inadequate, and ongoing club-driven efforts are unlikely to produce meaningful, equitable and sustainable results (due to antiquated working methods, a piecemeal approach, and lack of legitimacy and accountability),
- 3) a new comprehensive international convention on tax and financial transparency would be able to bring all the necessary pieces together: a long-term commitment to tackling the problem, specific and enforceable common rules, and a robust institutional framework to support implementation and facilitate gradual strengthening of the regime.

|| *If the objective is overly detailed, it may inadvertently make efforts to mobilize support for the broader political narrative more difficult*

It is worth bearing in mind that there is already broad agreement about the need for international cooperation to address cross-border tax issues. The call for a new convention is not in itself controversial (as noted in the first chapter, discussions under the OECD-led process are also expected to lead to the adoption of a new convention). This indicates that the main arguments for a new convention would revolve around the second and third functions that conventions normally serve (as outlined in chapter 2): the formulation of a *common standard of action*

and the *institutional structures and other collective arrangements* needed to facilitate the achievement of the convention's objective.

To what extent would a separate international convention on tax and financial transparency produce more effective and equitable global rules? The criticism levelled against the two-pillar solution on BEPS indicates that there is considerable room for improvement, and that the common global rules should be designed in a way that benefits a larger group of countries, including low- and middle-income countries. To make it convincing, however, it needs to be made very clear how an alternative or additional set of rules would produce better results on aggregate.

It is often noted that the current international tax rules are fragmented, and that a key role for the new convention would be to bring it all together. While this seems sensible, *per se*, it is not obvious how such a coming-together of existing rules would be done in practice. Would the new convention subsume the MAC and the MLI, and then incorporate other BEPS-relevant measures as appropriate? Or would it rather aim to introduce a more general type of obligations or principles, for instance concerning exchange of information?

It has been suggested that conventions such as the UNFCCC or the FCTC may serve as useful sources of inspiration for the development of a new legally binding instrument on tax cooperation.⁸³ Both of

these conventions include elements that, to some extent, would be relevant to transpose to the issue of tax and financial transparency. At the same time, there are also major differences between the tax issue and those of climate change and tobacco control, in particular when it comes to the nature of the problems and the underlying dynamics. Climate change is a highly complex issue, both in regulatory terms and in cooperative terms. And it is extremely transboundary (there is no 'domestic' CO₂). Tobacco control is at the opposite end of the spectrum, with few transboundary externalities, and is an issue that is quite simple to regulate domestically, with very little risk of free riding (smoking policies in country A have very limited impact on the effectiveness of smoking policies in country B). Finally, it is also worth noting that neither the UNFCCC nor the FCTC have proven particularly effective in solving the problem they were set out to tackle.⁸⁴

In the search for relevant examples to draw inspiration from, it therefore seems sensible to widen the lens, and to look for cases where the underlying problem structure is more comparable to that of the illicit financial flows and harmful tax competition. One option could be to consider the relevance of the international governance framework for trade in goods and services, which bears closer resemblance to the tax issue, and which also has a similar reciprocity-based regulatory dynamic. In the words of Nick Gregory:

Many of the problems present in trade competition are similar to the problems

⁸³ Chowdhary, A. M. and Picciotto, S. (2021), "Streamlining the Architecture of International Tax through a UN Framework Convention on Tax Cooperation".

⁸⁴ See e.g., Andresen, S. (2013), "International Regime Effectiveness", Chapter 18 in Robert Falkner (ed.), *The Handbook of Global Climate and Environment Policy*,

2013, John Wiley & Sons, Ltd.; Hoffman et al. (2019), "Impact of the WHO Framework Convention on Tobacco Control on global cigarette consumption: quasi-experimental evaluations using interrupted time series analysis and in-sample forecast event modelling", *BMJ*, 2019, doi:10.1136/bmj.l2287.

present in modern tax competition and banking secrecy, namely that the revenue base of one nation erodes at the expense of the revenue base or economic activity of a competing nation.⁸⁵

If that analogy is accepted, what is arguably needed in the area of tax and banking secrecy is something akin to the General Agreement on Tariffs and Trade,⁸⁶ underpinned by an inclusive, open and legitimate international institution, which would serve the role that WTO does on trade.

Could the OECD serve that function? In principle, but it would require a fundamental restructuring of the membership and architecture of the institution.⁸⁷ The OECD would have to be transformed from a “club of mostly rich countries”,⁸⁸ into a multilateral institution open to all members of the UN and its specialized agencies, and with corresponding decision-making procedures and working modalities. This would in practice require a renegotiation of the 1960 Convention which established the OECD.⁸⁹ For the current OECD members, this represents a rather difficult choice: Would they prefer to keep the OECD more or less as it is, and let it develop organically, as it has done over the past six decades? Or are they prepared to let go of the control they currently have (each member has a veto on decisions in the Council), and allow the

⁸⁵ Gregory, N. (2012), “Lax Tax: The Threat of Secrecy Jurisdictions and What the International Community Should Do about It”, p. 886.

⁸⁶ See https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.

⁸⁷ The OECD was established through the Convention on the Organisation for Economic Co-operation and Development, adopted in Paris in 1960. The forerunner of the OECD, the Organisation for European Economic Co-operation (OEEC), was set up after World War II. For more information, see <https://www.oecd.org/60-years/>. For the text of the Convention, see

OECD to be reshaped into a global multilateral institution?

|| *There is a need for a comprehensive, multilateral response to the issue of tax competition and financial secrecy, something the OECD is just not set up to deliver*

Over the past two decades, the OECD has, on its own initiative, taken on the role as the leading global institution on the issue of international tax policy and financial transparency. In the short term, this may continue to produce some results, nudging the world in a direction of more openness, exchange of information, and less harmful tax practices. In the long run, however, the critique levelled against the OECD when it comes to legitimacy, transparency, and inclusiveness is unlikely to go away. There is a need for a comprehensive, multilateral response to the issue of tax competition and

<https://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm>.

⁸⁸ The Economist (2017), “What is the OECD?”, Available at <https://www.economist.com/the-economist-explains/2017/07/05/what-is-the-oecd>.

⁸⁹ The 1960 Convention does open for the expansion of the membership (Colombia joined in 2020, Costa Rica in 2021. For a full list of members, see <https://www.oecd.org/about/document/ratification-oecd-convention.htm>), but new members must be invited by the Council, and a decision requires unanimity (Article 16).

financial secrecy, something the OECD is just not set up to deliver.

3.3 CHANGING THE DYNAMICS

It is not uncommon that international issues with a long history become stuck, with fixed positions and a particular political dynamic (or lack of it). When positions become entrenched, it might be necessary to shift the dynamic, either by changing the topic, changing the people, or changing the venue. One way to achieve this could be to move discussions from one diplomatic hub (e.g., the UN in New York) to another diplomatic hub (e.g., the UN in Geneva). Often, however, treaty-making processes overcome the problem of entrenchment by organizing *ad hoc* capital-based conferences hosted and chaired by one or more States in favour of a new approach.

To succeed, a process towards a new convention appears to require more cross-regional cooperation amongst supporting States and new arenas for intergovernmental discussions. Currently, the dynamics appear to be marked by a standstill, in which the G77 calls for the UN to be the main forum for developing global tax rules, while OECD countries prefer to keep tax questions under the auspices of the

OECD. To break out of this standstill, interested States could seek support from civil society actors and other stakeholders in developing a new cross-regional leadership group—a core group—and organize a series of *ad hoc* conferences outside existing arenas to explore the rationale for and option of a new treaty.

Building new solutions to global issues of concern requires critical engagement with existing international arenas, instruments, groups, and proposals. Challenging lowest common denominator approaches centred on achieving full consensus amongst States has in the past been a key aspect of the planning and implementation of successful treaty-making processes. Instead of aiming for universal support for a specific treaty proposal, diplomatic campaigns have often aimed to garner support amongst a critical mass of States; that is, a group of States sufficiently large and diverse to make opposing States politically unable to simply ignore the proposal. The diversity of the supporting States is a crucial factor in addressing global, transboundary issues of concern. Often, therefore, treaty-making processes are led by a carefully constructed cross-regional group of States,⁹⁰ in which States from different regions work to generate further support within established regional groups.

⁹⁰ Sometimes referred to as a 'core group', or as a 'likeminded group'.

4

Conclusion

Worldwide, nearly half a trillion US dollars of government revenue is lost every year. Not by accident, but as a result of deliberate use, by certain jurisdictions, of low or zero tax-rates to attract capital and profits. Combined with extensive use of financial secrecy regulation, this has produced a negative spiral of harmful tax competition—a race to the bottom. It is a text-book example of an international cooperation problem, where individual rationality is at odds with collective rationality.

Even if significant progress has been made in certain areas, notably under the auspices of the OECD and with the backing of the G20, the piecemeal approach, the lack of legitimacy and accountability, and OECD's antiquated working methods indicate that a sustainable, long-term solution to this problem will require something different.

The shortcomings and inherent limitations of the current club-driven efforts have led a growing number of States and other stakeholders to call for the start of negotiations on a new international convention on tax matters—a UN Tax Convention. Such a convention, it is argued, would “ensure a global and genuinely representative forum to set consistent, multilateral standards for corporate taxation, for the necessary tax cooperation between governments, and to deliver

comprehensive, multilateral tax transparency [...] in full.”⁹¹

|| *The lack of legitimacy and accountability, and OECD's antiquated working methods, indicate that a sustainable, long-term solution to this problem will require something different*

The key challenge in any treaty-making effort is to mobilize support amongst a critical mass of States for a specific treaty proposal. And that requires a convincing case. Ultimately, States will not bother to negotiate a convention that is not perceived as meaningful. To build that case, proponents may benefit from structuring their efforts along three main tracks: i) the framing of the issue, ii) the formulation of the policy objective, and iii) the political dynamic.

⁹¹ GATJ/PSI/TJN (2020), “The State of Tax Justice 2020”, p. 11. Available from <https://taxjustice.net/reports/the-state-of-tax-justice-2020/>. See also

<https://taxjustice.net/2021/08/02/the-past-present-and-future-of-tax-justice-network/>. Original emphasis.

As things stand, the most challenging task for the proponents of a new convention is to develop a clear and convincing policy objective. What exactly is this new convention supposed to do? What role would it serve? And how likely is it that this new convention would yield significantly better results than what the current trajectory could be expected to deliver?

To some extent, the answer to those questions may lie in the formulation of more effective and equitable policy proposals. But in principle, there is nothing that prevents governments from channelling such proposals into existing structures such as the Global Forum or the Inclusive Framework, which would do little to change the underlying procedural dynamic. This suggests that the most convincing aspects of the proposal for a new convention on tax and financial transparency are to be found elsewhere: not in the nitty-gritties of specific policy measures, but in the process through which they are developed. Is the OECD the most appropriate forum for dealing with global tax issues? Or is there merit in considering the establishment of something new?

In the words of Nick Gregory, it seems odd that, “although bilateral tax treaties between countries are common and regional agreements are beginning to form, there is currently no universal organization for cooperation on tax issues.”⁹²

|| *There is currently no universal organization for cooperation on tax issues*

⁹² Gregory, N. (2012), "Lax Tax: The Threat of Secrecy Jurisdictions and What the International Community Should Do about It", p. 886.

