FINDING THE LOST SHEEP: ANALYZING THE DISCONNECT BETWEEN INTERNATIONAL TAX COOPERATION AND ITS OUGHT-TO-BE GOALS AND HOW TO FIX IT

by

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To my wife, Mariam, and my children, Amir and Aleena, for their sacrifice and patience in accommodating my partial absence while working on this project.

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ABSTRACT

The thesis introduces a new perspective on the challenges faced by low-and-middle-income countries (LMICs) in the international tax regime (ITR). It argues that the fundamental challenge for LMICs is the disconnection of the ITR from the broader mandate of the League of Nations, which is the enabling institution for the ITR. The actors who designed the ITR completely ignored the connection between the ITR and the League's peacemaking mandate. The thesis not only provides compelling reasons why the actors should have considered the relationship between the ITR and peacemaking but also shows that the ITR is indeed connected to global peace and security. It further argues that global peace is only achievable by addressing issues affecting the stability and functionality of countries needed to promote global peace. Countries should be able to ensure their continued existence (sustainability) and ability to provide for the basic needs of their citizens (human rights) before they can be expected to promote global peace. Therefore, the thesis proposes that the ITR should be redesigned to consider global peace, stability, and functionality (referred to as the global stability variables) of the participating countries. It also proposes a network of actors that can drive these objectives. Proposing this ecosystem of actors becomes essential to this work, having found that the disconnect between the ITR and peacemaking was caused by the sensemaking of the actors involved in the ITR. For LMICs to benefit from the ITR, the actors designing the ITR must consider the global stability variables. The contention of the LMICs against the two-pillar solution developed by the OECD to address the consequences of the digitalized economy is proof that inclusivity, lack of expertise, and reliance on foreign aid, among others, are not the only problems of the LMICs. Though the thesis argues from the perspective of the LMICs, its solution is mutually beneficial to both LMICs and high-income countries. The proposal offers an alternative approach to the current ITR and can potentially solve global problems, including food scarcity, climate change financing, and housing crises. Given the concerns around the OECD's two pillars, this thesis argues that the stakeholders should pause on all these pillars and consider the forgotten pillar of peacemaking in the ITR.

LIST OF ABBREVIATIONS USED

ATAF – African Tax Administration Forum

AU – African Union

BEPS – Base Erosion and Profit Shifting

CEEC – Committee of European Economic Cooperation

CSM – Critical Sensemaking Theory

DRM – Domestic Revenue Mobilization

DST – Digital Service Tax

DTA – Double Taxation Agreement

EU – European Union

G7 – Group of 7 Countries

G20 – Group of 20 Countries

G24 – Intergovernmental Group of 24

GDP – Gross Domestic Product

ECSC – European Coal and Steal Community

HICs – High-Income Countries

HMRC – Her Majesty's Revenue and Customs

ICC – International Chamber of Commerce

ICCC- International Congress of Chambers of Commerce

IMF – International Monetary Fund

ITR – International Tax Regime

League – League of Nations

LMICs – Low-and-Middle Income Countries

MLI – Multilateral Instrument

MSDH – Marketing and Distribution Safe Harbour

OECD – Organization for Economic Cooperation and Development

OEEC – Organization for European Economic Co-operation

PE – Permanent Establishment

PTC – Platform for Tax Cooperation

SEP – Significant Economic Presence

TFDE – Task Force on Digital Economy

TWAIL – Third World Approach to International Law

UNESCO – UN Economic and Social Council

UN – UN

WBG – World Bank Group

WTO – World Trade Organization

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Chapter One: Introduction

Unbundling the International Tax Problems

> He told them this parable. "Which of you men, if you had one hundred sheep, and lost one of them, wouldn't leave the ninety-nine in the wilderness, and go after the one that was lost, until he found it? When he has found it, he carries it on his shoulders, rejoicing. When he comes home, he calls together his friends, his family and his neighbors, saying to them, 'Rejoice with me, for I have found my sheep which was lost!' I tell you that even so there will be more joy in heaven over one sinner who repents, than over ninety-nine righteous people who need no repentance."[1]

1.0 General Introduction

This chapter gives a general overview of the thesis. It argues that the more fundamental problem of the low-and-middle-income countries (LMICs) in participating in international tax cooperation is that the international taxation regime (ITR) has been disconnected from its ought-to-be goals since the inception of the regime. It starts by conceptualizing the ITR as a product of negotiations among sovereign states and explains the critical issues in the negotiation process that produce the regime.[2] It argues that the fundamental problem affecting the interests of the LMICs

[1]Holy Bible, Luke 15: 3-7. The Biblical quote underscores the importance of a part of a whole object and how the absence of that part can make the whole object meaningless. As the shepherd suffered from his missing sheep, the international tax suffered from realizing its ought-to-be objectives. As the shepherd was not carried away that he had ninety-nine out of a hundred sheep and that the missing sheep was negligible, the advocates for meaningful reforms for international taxation should find the reason, no matter how negligible it may appear, why the present regime is not yielding desirable results for the low- and middle-income countries (LMICs). This thesis, therefore, finds that the lost sheep in the international tax cooperation is its failure to use its instrumentality to promote global peace.

[2] International taxation regime, in this context, generally differs from international taxation. International taxation simply means how countries use unilateral approaches to impose taxes on incomes that are connected to them. The connection could result from the residence of individuals and corporate entities. Under the residence category, countries impose taxes on incomes earned by their residents irrespective of where the incomes are earned. The connection could also be established by incomes earned by foreigners within countries' jurisdictions - this is known as the source category. Countries can use their domestic tax systems to impose taxes on either of the two categories. On the other hand, the international taxation regime results from cooperative efforts among countries on tax problems – the result could be either bilateral or multilateral. The regime is formed when countries adopt a standardized and common approach through formal agreements (known as tax treaties) to tax incomes of cross-border investments.

is in the negotiation process leading to the ITR.[3] The problem goes beyond concerns about including the LMICs in all stages of the ITR negotiation process. It is much more about the actors' understanding and perspectives of the international tax problems and their approaches to addressing them. The early international tax actors' perception of international tax problems made them disconnect the regime from its normative goals.

The purpose of this groundwork –the conceptualization of the ITR as a product of negotiation - is to link my thesis to one of the four issues I identify as components of the ITR negotiation process. I argue that one of these four issues is missing in the current ITR, and that issue has not been sufficiently addressed by the existing scholarship, to the best of my knowledge. The absence of this component is akin to the Biblical parable of the lost sheep. As academics and policymakers, we must find and reunite this lost sheep with the others to achieve the real global agenda of the ITR. The contention of the LMICs concerning fairness and justice of the ITR can be satisfactorily addressed only if the ITR is redesigned to realize its ought-to-be-goals, which are discussed in this thesis. This chapter, therefore, discusses a framework for a truly international negotiation process mutually beneficial to all participating countries (countries are used interchangeably with states in this thesis), particularly the LMICs.

The main objective of the thesis is to address the normative question: 'What should the goals of international tax cooperation be'? The thesis argues that the goals should be connected to peacemaking, the core mandate of the League of Nations ('the League'), on which platform the ITR was established.[4] A simple response to a potential question of 'why international taxation

[3] The LMICs, as used in this thesis, include countries that are primarily capital-importing countries. It does not include countries that serve as both capital-exporting and capital-importing jurisdictions. The LMICs are described as net capital-importing countries because they substantially depend on foreign investments.

[4] See Covenant of the League (signed 28 June 1919). The preamble of the Covenant clearly states that the aim of the League of Nations was to promote international cooperation and realize global peace and security. The League of Nations sought to achieve these two objectives through, among other means, the establishment of international law that can be used to regulate the conduct of governments.

should consider peacemaking and security' is: 'Why did the League intervene in international taxation if it is not connected to its mandate?'. The League was not established as an international taxation institution, and none of its objectives speaks directly to international tax. However, this does not mean that its objectives are not related to international tax – it is impossible to comply with Article 23(e) of the Covenant of the League without considering the impact of taxation on international trade. The Article provides for the 'equitable treatment for the commerce of all members'[5] without considering the impact of international tax on cross-border commercial activities of the member states.

Despite the connection between international tax and the League, the question of how the ITR framework can promote peacemaking did not come up in the negotiation process at the League. Even the state actors and the experts involved in the negotiation process did not consider this fundamental question.[6] Considering the impact and influence of the actors' understanding and perspective of a problem, the thesis addresses a supplementary question of 'who should be the rightful actors for international taxation' that can work together to realize the desirable goals – to link the ITR to peacemaking. To guarantee the implementation of the works of the rightful actors, assuming the negotiation is undertaken according to the desirable goals, the thesis addresses another supplementary question of 'how we can protect the outcome of negotiations of the rightful actors.'

In summary, the thesis addresses the central question of 'what should be the goals of international tax,' and by extension, the additional questions of 'who should be the actors' and

[5] *Ibid*.

[6] The focus was more on addressing the competing interests between the source country and the residence country and how taxing rights can be allocated to these two jurisdictions. See Kim Brooks & Krever, Richard, "The Troubling Role of Tax Treaties" in Geerten M. M. Michielse & Victor Thuronyi, eds., *Tax Design Issues Worldwide, Series on International Taxation*, Volume 51 (Alphen aan den Rijn: Kluwer Law International, 2015), 159 at 163.

'how to protect the process and the outcome.' The thesis examines and proposes the normative framework of these questions in chapter one. Using the historical method, the thesis examines the normative framework in the three monumental phases of the ITR in the remaining chapters. The first phase is what I describe as the crystallization period, where efforts to create ITR were solidified through the League. I describe the second phase as the stabilization phase, which is the twilight of the League and the emergence of the Organization for Economic Co-operation and Development (OECD) as the new economic order for global tax governance. The last phase is described as the contemporary phase –the period where the OECD community was expanded to include non-OECD states to address contemporary issues in international tax. The historical analysis aims to show that the international tax actors have never considered the relationship between international tax and the promotion of global peace.

1.1 International Tax Regime As A Product of Negotiation

The ITR is a product of bargaining, negotiations, cooperation and compromise among participating states. Unlike the domestic tax system, where constituted authorities impose and administer taxes, the absence of a world government or a world taxing authority requires independent states to agree on a common path to taxation of cross-border investments and ensure that incomes from those cross-border investments are not taxed more than once.[7] While the participating states must have unity of purpose and understanding of the common international taxation problem, their approaches to solving the common problem may differ. The participating

[7] Taxing incomes on international business activities more than once is known as double taxation. The double taxation is believed to discourage flows of international investments and consequently affect the growth of economies of where the investor is located (known as the residence country) and where the income is earned (known as the source country). Considering the autonomy of countries and the international impact of double international taxation, unilateral responses to such problems may not be as effective as international tax cooperation. See Michael J. Graetz & Michael M. O'Hear, "The Original Intent of U.S. International Taxation" (1997) 46:5 Duke LJ 1021 at 1023; Reuven S. Avi-Yonah, "Structure of International Taxation: A Proposal for Simplification " (1996) 74:6 Tax L Rev 1301 at 1303; Yariv Brauner, "An ITR in Crystallization" (2003) 56:2 Tax L Rev259 at 260; and Victor Thuronyi, "International Tax Cooperation and a Multilateral Treaty" (2001)26:4 Brook J Int'l L 1641.

states resort to negotiations and bargains - and sometimes influences and diplomatic pressure - to resolve this common problem. The outcome of the process is a compromise of the participating states or their representatives, as each of them would have foregone an option as consideration for acceptance of another option or in the spirit of mutual cooperation.[8]

There are at least four critical components in the ITR negotiation process. First, the common problem to be addressed through cooperative efforts. Participating countries must have unity of purpose and understanding of this common problem. The unity of purpose drives states' cooperation and commitment – cooperation cannot be realized if the issues on the international agenda do not constitute common problems for the participating countries. The success of cooperative efforts on the double taxation agreement (DTA) from the 1920s to 1940s was connected to the unity of purpose and understanding among the participating states.[9] Paying tax in

[8] The position of the 1925 Committee of Experts on the taxation of dividends is an example of how the spirit of compromise influenced the committee's discussions. The Financial Committee of the League of Nations established a committee of government officials from seven countries (known as technical experts) to work on practical solutions to the double taxation problem. The practical solution was to complement the report of the four Economists who had earlier been established in 1922. The committee of technical experts eventually agreed that taxation of investment incomes on shares and bonds – that is, the dividends and the interests – should be different from taxation of business income. Before this resolution, the representative of Italy and chairman of the committee, Canny D'Aroma, had suggested that dividend incomes and business profits should be taxed the same way. His suggestion had the support of Great Britain's representative, Thompson, with a qualification that the rule should not apply to the general income tax. Other representatives also expressed their reservations about D'Aroma's proposal. Interestingly, D'Aroma, who had earlier proposed the same tax treatment for dividends and business profits, later proposed that dividends and business profits should be taxed differently. His last proposal was adopted and contained in the 1925 report. See Sunita Jogarajan, Double Taxation and the League, (United Kingdom: Cambridge University Press, 2018) 47 -48. Ke Chin Wang, "International Double Taxation of Income: Relief Through International Agreement 1921-1945" (1945) 59:1 Harv L Rev 73 at 82 – 83.

[9] Each participating country had a fair share of the double taxation problem before establishing the League. They understood the problem and the significance of resolving the problem. For example, one of Great Britain's experiences with the double taxation problem happened in the 19th century. The residents of Great Britain petitioned the House of Commons in 1861 on double taxation they suffered in Great Britain and India due to India's income tax. The protesters requested that Great Britain exempt all taxes paid to India on incomes arising in India from British taxation. In 1920, the British Income Tax Commission recommended that only cooperative efforts leading to reciprocal agreement could address the double taxation problem. The Commission states as follows:

> We are of the opinion that no satisfactory change from the present condition could be made unless reciprocal arrangements were effected between the government of the United Kingdom and the government of each foreign state where an income tax is in force and that it would only be practicable to arrive at such arrangement by means of a series of conferences, possibly under the auspices of the League, such as we have been happy to hold with the representatives of the governments of the Dominions. These considerations, among others, have led us to the conclusion that in the present circumstances we cannot recommend any

more than one jurisdiction on a single income (known as double taxation) was generally agreed to be a disincentive to cross-border investments and inimical to states' economic growth. The unity of understanding that double taxation was a common evil facilitated the mutual purpose of designing a framework that eliminates double taxation. I acknowledge that the unity of purpose does not mean that states would have the same motivation and approach to those problems.

The second component is the actors that are involved in the negotiation process. This is where the issue of inclusion and voice representation of some key actors can be debated. ITR is a broad area where multiple actors participate and provide insights on the best approach to address common problems. Both state and non-state actors are involved in regime formation. These actors can be principally reduced to three. The states are the first and primary actors because taxation is an inherent part of their sovereignty that has been used over the years to protect their boundaries and provide public goods to their domestic constituents.[10] When the state actors come together to pursue common goals, they leverage an international institution, just like the League, to facilitate the cooperative efforts.[11] Multinationals are the second category of actors. The multinationals'

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change in the existing situation as to double taxation of the same income by the United Kingdom and the Government of a foreign state.

See Clyde J. Crobaugh "International Comity in Taxation" (1923) 8:9 Bull Intl Taxation 260 at 262-265. The position of Great Britain was in addition to its legislation to eliminate double taxation in providing relief to its taxpayers on foreign taxes. Great Britain's legislation on the elimination of double taxation was applauded by the Fiscal Committee of the League in its report on the second session of the committee. See League, Fiscal Committee Report to the Council on the Work of the Second Session of the Committee (dated May 22nd to 23rd, 1930) Document No C. 340 M. 140 1930 II.

[10] The League is itself constituted by states. The commissioning of the four economists by the Fiscal Committee, a sub-entity of the League of Nations, is the action of the states. The four economists – Professors Gijsbert Bruins, Senator Luigi Einaudi, Edwin Seligman and Sir Josiah Stamp – were to provide a normative framework, but technical experts were appointed in 1925 to consider the practicability of the approach. Technical experts of 1925 were representatives and revenue officers in some participating countries. Sunita Jogarajan, Double Taxation and the League, (United Kingdom: Cambridge University Press, 2018) 18 – 26.

[11] Arguably, this category is the most important and influential actor. Apart from providing a platform for the negotiations, the presumption that the institution has the required expertise and resources on the subject matter might encourage states to defer to the institution's opinions. The institution has been one of the strategic means the developed countries use to diffuse their standards to other jurisdictions to comply with international standards. The international institution – from the League to the OECD - has been the centurion of international taxation since the last century.

involvement in the ITR predates the involvement of the League. Represented by the International Chamber of Commerce (ICC), the business community identified the problem of double taxation before establishing the League.[12] They also participated throughout the negotiation process and proceedings leading to the conclusion of the League's work on the DTA. The third category is the public interest groups, which include but are not limited to civil society groups and non-governmental organizations. In chapter two, I discuss these categories of actors, their influence, and how to restructure them to achieve a fair international taxation negotiation process.

The third component is the final outcome of the ITR negotiation process. The inaugural negotiations on the DTA in the 1920s and the 1940s led to the DTA model, which the League finalized at its London conference in 1946.[13] This model adopts a bilateral approach to the elimination of double taxation. The model is an influential soft law that guides how interested states can structure their bilateral tax treaties.[14] The 1946 model left behind by the League after its

[12] *Ibid* at 85. The other organized private sectors that participated in harmonization of double taxation problem before the intervention of the League are the International Intermediary Institute and the Committee for the Advancement of International Law.

[13] Before the 1946 model, the committee of government technical experts had prepared a model treaty in 1928 and another model in 1943. Both the 1943 and the 1946 models were an improvement on the 1928 model. The 1943 model was prepared at the Mexico conference, which was attended by the majority of capital-importing countries, and these countries leveraged the absence of capital-exporting countries at the conference to draft the model, giving stronger taxing rights to the source countries. The capital-exporting countries engrossed in the war activities during the 1943 conference attended the London conference and redesigned another model that gave stronger taxing rights to the residence countries. The 1946 model was used by the OECD as the groundwork for its treaty model. See League, the Fiscal Committee, Report on the Work of the Tenth Session of the Committee, Document No C.37 M. 37 1946. II. A (Geneva: League, 1946) at 6 – 8.

[14] Allison Christians "Hard Law, Soft Law and International Institutions" (2007) 25 Wis Intl L.J. at 330; Lasiński-Sulecki, Krzysztof. "OECD Guidelines. Between Soft-Law and Hard-Law in Transfer Pricing Matters." (2014) 17:1 Comparative L Rev at 79. The OECD's and the UN's tax treaty models are also examples of soft law. In addition to the tax treaty model, the OECD and the UN issue guidelines from time to time, which could greatly influence bilateral tax treaties. One such additional guideline is the OECD's guideline on Harmful Tax Practices. Allison Christians' argument that the OECD's guideline on Harmful Tax Practices is best described as a 'soft law' is supported by the literature on international law. Such guideline lacks the features of international customary law because there is no *opinio juri*s and cannot also be classified as a treaty because it is not signed by states. Understanding the politics of how the soft law develops and migrates into the traditional hard law is as important as the law itself; as Allison Christians puts it, '…but it seems important to seek clarity in identifying and defining the principle we use to explain what roles actors in international and transnational can do, and ought to play in the formation of tax law'. Reuven S. Avi-Yonah is of the opinion that the agreed and consistent practices of international taxation, which the states have an obligation to comply with, are customary international tax laws. The practices include the single tax principle, benefit principle, and transfer pricing that informed states' domestic legislation. See Reuven S. Avi-Yonah,

exit from the international arena in April 1946 was inherited by the OECD upon its assumption to fill the vacuum created by the exit of the League.[15] The OECD modelled its tax treaty model of 1963 and its subsequent amendments on the League's 1946 DTA model.[16] The 1946 model consequently impacted the UN model because the OECD's 1963 model served as a primer and reference to the UN treaty model of 1980.[17] It, therefore, implies that the perspectives, preferences and overriding objectives of the actors involved in designing the 1946 DTA model will continue to impact the present ITR significantly.

The fourth and last component is how the actors construe the double taxation problem and what sense they made from their approaches to address it. In other words, what is their

International Tax as International Law: An Analysis of the ITR, (Cambridge: Cambridge University Press, 2007) at 3-5. This classification is valid because they have not been written down or codified. The status of those practices changes to either a treaty or a soft law when they are reduced into writing. This is because international customary law is an unwritten rule, sometimes referred to as tacit agreement, which the states recognize as legally binding. The legal bindingness of the custom is described as *opinio juris*. Another related concept is usage or comity, known as *comitas gentium*, which is when states coincidentally abide by a rule in their inter-sate dealings without recognizing them as legally binding. The difference between comity and customs, as sources of international law, is the recognition – usage is not recognized, while customs are recognized by states which follow them in relating with each other. See I.I. Lukashuk, (1969) Sources of Present-day International Law in Grigory Tunkin, ed, *Contemporary International Law* (Moscow: Progress Publishers, 1969) at 164 – 165; William L. Tung, (1968) *International Law in an Organizing World*, (New York: Thomas Y. Crowell Company, 1968) at 11-13; Thomas R. Van Dervort, International Law and Organization, (London: Sage Publications Inc. 1998) at 70-71

[15] The OECD originally started as a regional institution limited to the European region under the name of Organization for European Economic Co-operation ('OEEC') but expanded its outreach beyond Europe and became the OECD in 1961. The US Secretary of State, George Marshall is a major influence on establishing the OECD's predecessor, OEEC. George Marshall stated at Harvard University on 5 June 1947 that US policy 'should be the revival of a working economy on the world so as to permit the emergence of political and social conditions in which free institutions can exist.' In response to the US readiness to assist Europe in the post-war crisis, European countries met in Paris on 3 July 1947 to draw up an economic recovery plan for transmission to George Marshall. A Committee on European Economic Cooperation was created at the meeting to manage the initial phase of the recovery plan. The Committee evolved into a permanent body known as OECD in April 1948. See Robert Wolfe, "From Reconstructing Europe to Constructing Globalization: The OECD in Historical Perspective" in Mahon Rianne & McBride Stephen, eds, *The OECD and Transnational Governance* (UBC Press, 2008) at 25 – 35.

[16] The UN was meant to succeed the League – the League actually transferred its assets, including its rich library, to the UN. However, the UN did not immediately assume the works of the League on ITR. When the UN came to continue this role in 1969, the OEEC-OECD had 'covered the field.' The OEED started the succession work through its fiscal committee, established in 1956. The OEEC fiscal committee was guided by the League's 1946 model in its deliberation on eliminating double tax treaties. In 1961, the OECD inherited the OEEC's fiscal committee's improvement on the League's 1946 model. The OECD's tax treaty model of 1963 is a collection of previous works of the League and the OEEC – this is why the OECD model is pro-residence. The UN released its model its treaty model in 1980. See Martin Hearson, *Imposing Standards: The North-South Dimension to Global Tax Politics* (London: Cornell University Press, 2021) 42 – 44.

[17] *Ibid*.

understanding of the international tax problem? Their knowledge of the problem will define their approaches to addressing the problem. Was the double taxation problem construed narrowly to tax issues alone or broadly to include other matters connected to the problems of the participating states? The question of how policymakers' understanding of the international tax problem influenced their approach to designing the current regime is an important area we need to reflect on. Another question that requires attention is the relationship between the impacts of the policymaker's understanding of the ITR and the complaints of the LMICs about the regime. These areas have not received much attention in tax scholarship and policy discussions. I argue that this overlooked issue is the most important because it determines the dimensions of the ITR negotiations, the agenda setting and the substantive conclusion of the negotiations. Even when the political actors are willing to make compromises or exert influences, the way the problem is construed and the sensemaking of the actors will guide what to forego, what to insist on and what should be described as a 'no-go area' that cannot be sacrificed in the name of compromise. My thesis examines this last component and how it affects the LMICs' participation in the ITR.

1.2 The Fundamental Problem of the LMICs, the Proposed Solution, and the Purpose of the Thesis

The concerns and contentions on making international tax architecture much fairer have become recurring issues in tax policy debates and academic discourses. The concerns and contentions have always been between the high-income countries (HICs) and the LMICs, and those contentions started from the early days of the negotiation process that led to the DTA regime.[18] The most remarkable of those contentions is whether the DTA model should give stronger taxing rights to the source countries, the countries where foreign companies earn incomes,

[18] Ke Chin Wang, "International Double Taxation of Income: Relief Through International Agreement 1921-1945" (1945) 59:1 Harv L Rev 73 at 97.

or the residence countries, the countries where the foreign companies are headquartered or registered.[19] The LMICs, which are primarily capital-importing countries, prefer a model that gives stronger taxing rights to the source countries, while the HICs, which are primarily capital-exporting countries, prefer a model that gives stronger taxing rights to the residence countries.[20] The 1946 DTA model, and consequently the current ITR built on it, give stronger taxing rights to the residence countries as the HICs dominated and continue to dominate the negotiations, the discussions and the designing of international taxation.[21]

As earlier argued, the contentions flowed through the works of the League and later the OECD tax treaty model because the OECD's inaugural works on the tax treaty model were based on the legacies of the League of the Nations.[22] Considering the fact that the UN premised its works on the tax treaty model on the OECD's works, the UN's work on the DTA is totally not free from those contentions even though it seeks to strike a balance between the developed countries and the developing countries.[23] Since the existing bilateral tax treaties are either modelled on the OECD

[19] The source countries can be described as host countries and residence countries home countries.

[20] Ke Chin Wang, "International Double Taxation of Income: Relief Through International Agreement, *supra* note 18. As earlier argued, the Mexico model was favoured by the capital-importing countries because it was pro-source, while the pro-residence London model was favoured by the capital-exporting countries. Both groups demonstrated their preferences when they had the opportunity to do so, but the capital-exporting countries emerged as the winners of the game. The capital-exporting countries were resolute in pursuing a pro-residence approach to international taxation as that is the only way to guarantee maximum tax revenue. Ke Chin Wang reported official statements of some of the United States officials on this point. The first one is the letter of Andrew Mellon, the US Treasury Secretary, to Hon. Willis C. Hawley, which states that '(e)xperience has shown that taxation at residence is not only the most practical, from an administrative viewpoint, but it is also the only place at which a highly progressive tax, such as our own, can be successfully levied." Mr. Mellon gave elaborate of his view in his statement before the House Committee on Way and Means that "(o)ur withholding provisions and our collection at source (despite unusually good administration of these provisions of our tax laws) do not work effectively as regards interest and dividends paid to foreign taxpayers. Under the proposed bill **[A** Bill to Reduce International Double Taxation, H. R. io65], we would give up a tax we do not collect successfully for a tax we know we can collect. In addition, taxation at residence represents the sound principle of taxing interest. Where a tax on interest is collected at source, it frequently must be home by the debtor".

[21] See Kim Brooks & Krever Richard, The Troubling Role of Tax Treaties, *supra* note 6 at 163.

[22] Sol Picciotto, "Is the International tax System Fit For Purpose, Especially for Developing Countries" (2013) ICTD Working Paper 13.

[23] Stanley S. Surrey "UN Group of Experts and the Guideline for Tax Treaties Between Developed and Developing Countries (1978) 19:1 Harv Intl L.J 1 at 6. The UN Tax Committee's early works were based on the OECD Model draft of 1963 and 1977. The most recent UN model for tax treaties copiously and obviously refers to the OECD works. This is an admission from the UN of the OECD's leading role in international taxation.

model or the UN model, the current ITR does not prioritize the tax revenue needs of the LMICs. The LMICs' struggle to get a better tax regime has not yielded substantive results, probably due to their weaker political and economic statuses.

One of the reasons that is often cited for LMICs' challenge is the non-inclusion of most of them in the negotiation process that birthed the DTA regime, as many of the LMICs were not yet sovereign nations when the DTA regime was designed.[24] The non-inclusion denied the LIMCs an opportunity to provide input into the DTA design, and the LMICs who were involved in the League's early works were outwitted by the HICs with their influence. The implication of the non-inclusion is that the DTA regime cannot yield substantial benefits to the LMICs.[25] The DTA regime was designed when a significant number of the LMICs were still colonies under the imperial

[24] Hearson, Imposing Standards: The North-South Dimension to Global Tax Politics, *supra* note 16 at 35. The few LMICs, such as the Latin American countries, involved in the negotiation process were outwitted by the HICs.

[25] The IMF 2014 report states that developing countries that are primarily capital importers lose substantial revenue from tax treaties and incur significant treaty negotiation costs. It advises developing countries to critically evaluate the cost and benefit analysis of signing a tax treaty. Instead of signing tax treaties, the IMF proposes that developing countries adopt domestic approaches to define and capture sourced incomes and sign agreements on mutual administrative assistance with strategic countries. These domestic approaches, if implemented effectively, could potentially lead to a more balanced and beneficial tax system. The IMF report states as follows:

> A critical decision for any primarily capital-importing country is whether it can achieve more by signing a treaty than it can simply through its own domestic law. The reciprocal benefits that a treaty could provide to such a country may actually be of relatively little value, except perhaps for the EOI aspects—but those can in principle be achieved through a TIEA or by signing the Convention on Mutual Administrative Assistance. And key provisions regarding, for instance, WHT rates and the PE definition, can be provided in domestic law. Treaties are, moreover, inherently discriminatory as between partners and others. The main or even only advantage that a BTT can offer may then be one of signaling, acting as a strong commitment device for the tax assurances given to foreign investors. But that in turn may become less needed as countries build up a credibility in tax policy making, they may not have had some years back. Some would simply advise developing countries not to sign BTTs, and at a minimum, to include some form of LOB clause if they do, while also providing for LOB in domestic law. What is clear is that countries should not enter treaties lightly—all too often this has been done largely as a political gesture—but with close and well-advised attention to the risks that may be created.

See IMF, IMF Policy Paper, *Spillover in International Corporate Taxation*, (IMF, 2014) 25 – 27. Another recent study published in 2020 confirms that the majority of LMICs are losing substantial tax revenues to the tax treaties signed with HICs. The DTA that does not guarantee flow of cross-border investments is unfortunately reducing the tax base of source countries because it generally, among its other restrictive provisions, offers lower rate of dividend and interest that the domestic rates. See Petr Janský & Miroslav Palanský, "Tax Treaties Worldwide: Estimating Elasticities and Revenue Foregone" (2020) 1 Rev Intl Economics at 16-24.

governments of some of the HICs. Some of the HICs signed tax treaties on behalf of LMICs in their positions as their colonial masters and constituted authorities.[26] Upon independence, the LMICs find it hard to renegotiate those colonial tax treaties with their erstwhile colonial masters.[27]

The intricacies of the digitalized economy necessitated the need to revisit some issues around the allocation of taxing powers and ancillary issues in the DTA regime. One of the DTA issues affected by the digitalized economy is how to measure and capture foreign business activities in the source countries for tax purposes. The DTA regime was designed within the standards of the international business model of that era – the international business model that relies heavily on physical presence and activities in the source countries. The physical presence integral to the then international business model is no longer applicable in the digitalized economy.[28] Under the DTA regime, foreign business activities in the source countries must reach a particular threshold before the source countries can impose taxes on active business incomes arising from those activities. The threshold, known as permanent establishment (PE), is premised on physical activities and does not contemplate that foreign business activities could be carried out through means other than physical activities.[29] The digitalized economy now enables foreign

[26] Hearson, Imposing Standards: The North-South Dimension to Global Tax Politics, *supra* note 16 at 112 – 113. For example, the first tax treaty between Nigeria and the United Kingdom was signed before 1960, when Nigeria was still a colony of the United Kingdom. Such tax treaty would be one-sided and skewed to realize part of the economic objectives of the colonialization agenda. It is, therefore, not surprising that Nigeria requested renegotiation of the treaty in 1963, three years after it had become an independent country. Also, see Martin Hearson, "The UK's Tax Treaties with Developing Countries During the 1970s" in Harris Peter & de Cogan Dominic, eds, *Studies in the History of tax Laws 8* (UK: Hart Publishing, 2017) at 13.

[27] *Ibid*.

[28] The digital-enabled companies do not need to cross any border before they can penetrate foreign markets. For example, Meta's second quarter financial result shows how revenues from advertising continue to drive Meta's business platforms, which are carried on through Facebook, WhatsApp, Instagram, Messengers and other services. Approximate 98% of Meta's revenue for the second quarter came from advertising - out of total revenue of $28,580, advertising generated $28,152; other revenue $218; and reality lab $452 (all figures in a million). The views that generate the visibility and content that Meta sells to its advertising customers are generated by users who are dispersed across countries in which Meta may not be physically present. See Press Release, Meta Reports Second Quarter 2022 Results online: https://investor.fb.com/investor-news/press-release-details/2022/Meta-Reports-Second-Quarter-2022-Results/default.aspx

[29] Both the OECD and the UN Models define PE in tangible terms. It is either a physical structure (fixed base through which business activities are carried on), the physical presence of people (dependent agent who takes commercial

companies to carry out business activities in source countries without the need to be physically present. Countries, therefore, stand the risk of losing tax revenues as the PE that triggers the exercise of taxing rights under the DTA regime has been rendered ineffectual by the digitalized economy.[30]

To address the tax problem of the digitalized economy, the G20, through the OECD's structure, established a large forum in 2016 for international taxation cooperation among countries.[31] The forum's mandate is to address issues that affect or limit countries' capacities to generate tax revenues from incomes arising from international businesses. The forum, known as the Base Erosion and Profit Shifting (BEPS) Inclusive Framework, presently has 142 members from both the HICs and the LIMCs.[32] Significant numbers of LMICs are involved in the BEPS Inclusive Framework, and some occupy strategic positions, such as co-chair and co-deputy chair of the forum.[33] One of the outcomes of the negotiation process in the BEPS Inclusive Framework

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decisions on behalf of the multinational), or physical activities, such as construction or turn-key projects that last for a considerable period. PE is defined in terms of the business model during which the concept was developed.

[30] The enabling effects of the digitalized economy in operating in the source countries without being physically present and other issues that allow multinationals to shift their incomes to favourable tax regimes are described by the OECD as base erosion and profit shifting (BEPS). The OECD identifies these issues as harmful to both countries and taxpayers and sets out the initial framework to address these issues with the support of the G20 in 2013. See OECD, *Action Plan on Base Erosion and Profit Shifting* (Paris: OECD Publishing, 2013) 7 – 10.

[31] The establishment of this forum has some interesting political dynamics discussed in another chapter of this thesis. I deliberately argue that the forum was established by the G20 because the G20 was the main influence in the formation and the designing of the mandate of the forum. The G20/OECD started working on BEPS in 2013, but this forum was created in 2016, years after the plan and the cooperation agenda had been designed. The 2015 Addis Ababa Action Agenda inclusive growth and cooperation triggered the establishment of this forum. See UN, UN Department of Economic and Social Affairs, *Addis Ababa Action Agenda of the Third International Conference on Financing for Development,* (New York: UN, 2015); G20, *G20 Finance Minister and Central Bank Governors Communiqué, Ankara* (5 September 2015) online: www.g20.utoronto.ca/2015/150905-finance.html; G20, *G20 Leaders' Communiqué, Antalya, Turkey* (16 November 2015) online: www.g20.utoronto.ca/2015/151116-communique.html.

[32] The inclusion of non-OECD/G20 countries in the Inclusive Framework thus gives it, at least to some extent, a much wider scope of coverage and input legitimacy. See Ruth Mason, "The Transformation of International Tax" (2020) 114:3 AJIL at 364 – 368.

[33] OECD, *"Developing Countries and the OECD/G20 Inclusive Framework on BEPS: OECD Report for the G20 Finance Ministers and Central Bank Governors"* (Paris: OECD, 2021) online: <www.oecd.org/tax/beps/developing-countries-and-the-oecd-g20-inclusive-framework-on-beps.htm> The developing countries and non-financial centres constitute 34% of the Inclusive Framework; OECD/G20 countries are 33% and other that do not fall in the previous categories are 33%. Regarding regional representation, Africa has 19%, Western and Eastern Europe has 21%, Asia Pacific has 15% and America (Latin America, North America and the Caribbean) has 24%. See page 17. One of the deputy chairs of the Steering Group is from a developing country –

resulted in a new regime, known as the two-pillar solution, which addresses the tax consequences of the digitalized economy.[34] The BEPS Inclusive Framework released the two-pillar solution in October 2021[35] and continues to work on it to make it a multilateral convention that will be signed and domesticated by all participating states.[36]

My point in giving a brief background on the BEPS Inclusive Framework is that the two-pillar solution regime should reflect the interests of the LMICs because they are involved in the negotiations that resulted in the new regime. The argument of non-inclusion and voice representation, as made against the DTA regime, might not be raised by the LMICs. However, it is surprising that many of the LMICs oppose allocating taxing rights in the two-pillar solution. The G24, the South Centre, Nigeria and Kenya are key in vocalizing the complaints. Rather than saying that their inputs and suggestions were not considered in designing the framework, the fulcrum of

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Nigeria. See OECD, *Composition of the Steering Group of the OECD/G20 Inclusive Framework on BEPS online*: (April 2022) <www.oecd.org/tax/beps/steering-group-of-the-inclusive-framework-on-beps.pdf>. Jamaica's representative was appointed in March 2022 as co-chair of the forum. OECD, Press Release, Jamaica's Marlene Nembhard-Parker appointed Co-chair of OECD/G20 Inclusive Framework on BEPS (2 March 2022) online: https://www.oecd.org/fr/fiscalite/beps/jamaica-s-marlene-nembhard-parker-appointed-co-chair-of-oecd-g20-inclusive-framework-on-beps.htm. It is interesting to have two women at the helm of affairs in the largest international tax organization. In another account, it has been reported that the inclusion in the forum does not really add any value for the LMICs. Based on their empirical data of their interview of 48 negotiators, policy makers and stakeholders in the Inclusive Framework, the authors are of the view that the expansion of the IF has made little difference and majority of the lower-income countries attending the meeting are silent participants. See Christensen Rasmus Corlin, Hearson Martin & Randriamanalina Tovony "At the Table, Off the Menu? Assessing the Participation of Lower-income Countries in Global Tax Negotiations" International Centre for Tax and Development, ICTD Working Paper No 115 online: <https://research.cbs.dk/files/75596172/rasmus_corlin_christensen_et_al_at_the_table_off_the_menu_publishersversion.pdf>

[34] Irene Ovonji-Odida, Veronica Grondona & Abdul Muheet Chowdhary, "Two Pillar Solution for Taxing the Digitalized Economy: Policy Implications and Guidance for Global South" (2022) South Centre Research Paper 161.

[35] *Ibid*.

[36] OECD, OECD/G20 Base Erosion and Profit Shifting Project, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (8 October 2021) online: <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> OECD, Public Consultation Document, *Pillar One – Amount A: Draft Model Rules for Nexus and Revenue Sourcing,* (February 2022) online: <www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-nexus-revenue-sourcing.pdf>. See also OECD, Public Consultation Document, *Pillar One – Amount A Draft Model Rules for tax Base Determinations* (February 2022) online: <www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-tax-base-determinations.pdf>

the complaints is that the two-pillar solution does not protect the interests of the LMICs.[37] In another form of demonstration of discomfort with the ongoing process in the BEPS Inclusive Framework, the African Group, through Nigeria's representative in the UN, sponsored a resolution in November 2022 to choose the UN as the main centre of international tax cooperation for effective inclusiveness.[38] Though the resolution was approved by consensus, it is doubtful if the UN could implement it considering the weight of countries that had entered reservations on the resolution.[39] Countries like the United States and the United Kingdom supported the resolution but

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[37] See OECD, *Tax Challenges Arising From Digitalization: Comments Received on the Progress Report on Amount A of Pillar One* (25 August 2022) online: <www.oecd.org/tax/beps/public-comments-received-on-the-progress-report-on-amount-a-of-pillar-one.htm> . The G24, the South-Centre, Nigeria, and Kenya frown at the commitment in the proposed multilateral convention designed for Amount A to not enact Digital Service Tax (DST) as part of the terms of Amount A. The commitment also extends to other national measures similar to the DSTs that impose taxes on market-based criteria, are ring-fenced to foreign and foreign-owned businesses and are placed outside the income system, outside the treaty obligations. DST is an approach to taxing incomes from the digitalized economy, where tax is imposed on the gross value of digital goods and services. The DST approach differs from the Two Pillar regime, and the HICs believe it is inimical to implement it successfully. The LMICs, on the other hand, prefer to retain their sovereignty to determine whether DST should be introduced in their domestic tax regimes in future. The clear issue is that the DST offers more tax protection to the LMICs than the Two Pillar regime. Signing the proposed multilateral convention on Amount A will prevent the LMICs from exploring the DST option in future. The G24, the South-Centre, Nigeria, and Kenya also raised some other issues in the Progress Report that are in stark contrast with the October statement. These issues include the following: exclusion of reinsurance and asset management from Amount A, policy disallowed expenses, consideration of non-controlling interest, complexity of the framework, and the rule on loss-carry forward. G24 specifically raises concerns on impartiality and conflict of interest that may arise from engaging independent experts in the tax certainty process and resolving disputes on the allocation of Amount. The G24's concern applies not only to the tax certainty but the entire gamut of the Two Pillar regime.

[38] UN, General Assembly, 77th Session, 2nd Meeting, UN Doc A/C.2/77/L.11/Rev. 1. Resolution 2 and 3 are reproduced below:

> 2. Decides to begin intergovernmental discussions in New York at UN Headquarters on ways to strengthen the inclusiveness and effectiveness of international tax cooperation through the evaluation of additional options, including the possibility of developing an international tax cooperation framework or instrument that is developed and agreed upon through a UN intergovernmental process, taking into full consideration existing international and multilateral arrangements.
> 3. Requests the Secretary-General to prepare a report analysing all relevant international legal instruments, other documents and recommendations that address international tax cooperation, considering, inter alia, avoidance of double taxation model agreements and treaties, tax transparency and exchange of information agreements, mutual administrative assistance conventions, multilateral legal instruments, the work of the Committee of Experts on International Cooperation in Tax Matters, the work of the Organisation for Economic Co-operation and Development/Group of 20 Inclusive Framework on Base Erosion and Profit Shifting and other forms of international cooperation, as well as outlining potential next steps, such as the establishment of a Member State-led, open-ended ad hoc intergovernmental committee to recommend actions on the options for strengthening the inclusiveness and effectiveness of international tax cooperation;

[39] Mark Bou Mansour, "Live Blog: UN Vote On New Tax Leadership Role" Tax Justice Network (22 November 2022) online: <https://taxjustice.net/2022/11/22/🔴-live-blog-un-vote-on-new-tax-leadership-role/>. The following

expressed reservations that the proposed UN-led inclusive cooperation might undermine the overwhelming progress made by the OECD Inclusive Framework.

Non-inclusion in the international tax negotiation process is not the only fundamental problem. The negotiation process is still lacking in one respect – that is, how the international tax framework can protect the interests of participating states. I explain this point in detail in the subsequent paragraph. It is worth saying here that failure of the negotiation process to consider this point can defeat the purpose of inclusion, even if the LMICs are included at the agenda-setting stage of the negotiation. The LMICs will continually be in disadvantageous positions until the 'lost sheep' is integrated into the international tax cooperation. Even when the LMICs are not fully included in the negotiation process but the tax cooperation process prioritizes the ought-to-be-goals, the LMICs may still get a fairer share of the tax cooperation. I explain the missing point in the next paragraph.

1.2.1 What is the Fundamental Problem?

The problem is that the agenda of global tax cooperation has generally been construed narrowly to tax and economic issues only.[40] Tax cooperation has never been undertaken broadly

countries supported with reservation: Andorra, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Micronesia, Monaco, Montenegro, Netherlands, New Zealand, North Macedonia, Panama, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, South Korea, Spain, Suriname, Sweden, Switzerland, Ukraine, United Kingdom and United States.

[40]Jogarajan, *Double Taxation and the League* supra note 10 at 19. We can see this from the first step taken by the League of Nations Financial Committee. The Financial Committee commissioned four Economists – Professors Gijsbert Bruins, Senator Luigi Einaudi, Edwin Seligman and Sir Joseph Stamp – to assess the economic consequences of double taxation and how to address them. The terms of reference to the four Economists are strictly narrowed to tax and economic issues. The question of how the subject matter can impact the broad agenda of the League of restoring global peace was not put to the Economists. It could be argued that the issues assigned to the Economists are proper considering the members' skills – the Economists could not have been asked to proffer advice on restoring global peace. The Economists could still be engaged to look at the economic impact of global peace. If economic resources could trigger war, economic packages should be able to promote peace. The terms of reference to the Economists are as follows:

> (1) What are the economic consequences of double taxation from the point of view:
> (*a*) of the equitable distribution of burdens;

to consider how the tax and economic issues are connected to the promotion of global peace, which is the main mandate of the League. The cooperation also does not consider how the tax issues are connected to the existence (or the stability) and the functionality of the participating states. The cooperation outcome would have addressed many concerns around the allocation of taxing rights between the residence countries and the source countries if the international tax problem was broadly construed. The broad construction would have impacted issues that would be placed on the agenda, the composition of members of advisory committees to be engaged in, and the scope of inclusion.

The broad construction of international tax problems is realizable only if the actors' perspectives on international tax cooperation can be redirected toward the underlying objectives of international tax cooperation.[41] This takes us back to the arguments on the four possible components in the ITR negotiations. The fourth component is that the existing scholarship has not extensively examined how actors make sense of their approaches to international taxation

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(*b*) of interference with economic intercourse and with the free flow of capital?
To what extent are these consequences similar in the different types of cases commonly described as double taxation?
(2) Can any general principles be formulated as the basis for an international convention to remove the evil consequences of double taxation, or should conventions be made between particular countries, limited to their own immediate requirements? In the latter alternative, can such particular conventions be so framed as to be capable ultimately of being embodied in a general convention?
(3) Are the principles of existing arrangements for avoiding, double taxation, either between independent nations (*e.g*., the Rome Convention) or between the component portions of a federal State, capable of application to a new international convention?
(4) Can a remedy be found, or to what extent can a remedy be found, in an amendment of the taxation system of each individual country, independently of any international agreement?
(5) To what extent should the conventions on the subject of double taxation establish an international control to prevent fraudulent claims?

[41] *Ibid* at 22 -29. Narrowing international taxation matters to tax and economic issues in the DTA regime was due to the actors' personalities. The four Economists engaged in 1922 and the technical experts engaged in 1925 and 1927 were economics and tax experts. The Economists were academics who had taught economics at various levels. The 1925 experts were revenue officers in their respective countries – and by their official roles, their perspectives of tax from their background knowledge of their national tax systems would have influenced their approaches to international taxation.

problems and how that affects the interests of the LMICs. Does the narrow or broad construction of international taxation problems make sense to them? Obviously, the narrow approach to tax and economic issues only made sense to the actors involved in the design of the DTA and the two-pillar solution regimes.

The possible objection to my argument is why international tax policymakers should consider promoting global peace. Why should they construe international taxation problems broadly outside the scope of tax and economic issues when the participants in the negotiation process are independent and capable of addressing other issues connected to their existence and functionality? This objection does not consider the context within which the ITR was established. The ITR was established through the League, an international institution with a broad agenda to restore and maintain global peace and security.[42] The preamble of the Covenant of the League is clear on this agenda.[43]

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[42] Ruth Henig argues that there are important objectives the League was established to achieve. First, it was meant to be an international forum where all state actors meet regularly to find solutions to imminent war arising from the conflict before it was out of control. Second, it was designed to promote disarmament and prevent private control of gun trading. There was a common belief that great possession of weapons by private individuals could lead to war. Third, it was to operate as a community where its state members could guarantee each other's territorial sovereignty and protect them from external aggression. These objectives are apparent from the covenants of the League. These key objectives would have prevented the Second World War if they had been successfully implemented. My argument is that the discussions on the DTA in that period should have been connected to these objectives. See Ruth Henig, *The Peace That Never Was: A History of the League* (London: Haus Publishing, 2019); Ruth B. Henig, *The League* (USA: Harper & Row Publishers, 1973). Though the League was unable to sustain global peace and prevent another war, the League's failure in this regard should not affect matters, such as the DTA, that were substantively negotiated in the formative years of the League. For further reading on the failure of the League, see Susan Pedersen, "Back to the League" (2007) 112:4 American Historical Rev 1091 at 1093; See also Felipe R. R. Matsushima, "The Fall of the League" (2022) 9:1 J Innovation & Soc Science Research 96 at 98-101.

[43] It provides as follows:

> The High Contracting Parties
> In order to promote international co-operation and to achieve international peace and security:
> by the acceptance of obligations not to resort to war;
> by the prescription of open, just and honourable relations between nations;
> by the firm establishment of the understandings of international law as the actual rule of conduct among Governments;
> and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealing of organised peoples with one another
> Agree to this Covenant of the League.

If peace means the absence of war, global peace is impossible without considering issues that could trigger war. Economic factors or instability have been identified as one of the major factors that could trigger war, and this economic factor is also connected to the existence and functionality of states.[44] This, thus, puts the actors under the obligation to consider how the DTA regime bolsters or threatens the existence and the functionality of states that will use the DTA as a guide to negotiate their bilateral tax treaties. Troubled states with no assurance of their continued existence and ability to provide basic needs to their citizens will obviously be incapable of promoting global peace. The acceptance of the League to provide its platform for establishing the DTA regime signals that international tax cooperation has or should have a significant role in achieving the broad agenda of promoting global peace.[45]

The compelling reason international taxation actors should construe international tax problems within the broad agenda of the League is that all efforts towards addressing the international tax problems did not yield results until the establishment of the League.[46] Developed

[44] In most cases, economic reasons motivate people to go to war because their existence and the enjoyment of existence depend on economic factors. Glenn Frank identifies four economic rights for which people have fought and will continue to fight. The four economic rights are the right of transit, the right of investment, the right of migration and the right of trade. See Glenn Frank, "The League and Economic Internationalism" in Stephen Pierce Duggan, ed, *The League: The Principle and the Practice* (Boston: the Atlantic Monthly Press, 1919)184 at 186-188. Each of these economic rights directly impacts the existence and functionality of countries.

[45] See Martin Hill, *The Economic and Financial Organization of the League* (New York: Kraus Reprint, 1972) 34. In acknowledgement of the link between the basic four economic rights and the realization of peace, Article 23(e) of the Covenants of the League guarantees freedom of these economic rights and equitable treatment of commerce. Considering the shared belief that double taxation is a barrier to international taxation, the provision on the protection of trade and commerce rights will cover ITR. The provision on 'equitable treatment for the commerce of all Members' arguably means equitable sharing of taxing rights between jurisdictions with competing claims to the same income. Article 23(e) provides as follows:

> Subject to and in accordance with the provision of international Conventions existing or hereafter to be agreed upon, the Members of the League:
> e. will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the region devastated during the war of 1914-18 shall be borne in mind.

[46] Allison Christians, "Networks, Norms and National Tax Policy" (2010) 9:1 Wash U Glo Stud L Rev 1 at 7. The conflicting approaches of the United States and Britain on how to address double taxation could not be resolved until global cooperation was initiated by the ICC and later given full attention by the League. The United States had

countries, such as the United States and the United Kingdom, had their respective domestic taxation systems that addressed the tax consequences of international investments, but those systems did not yield the desirable result that effectively addressed the double taxation problem.[47] The ICC also made considerable efforts to address double taxation, which did not yield the intended result as the ICC lacked the necessary political support to function as a coordinating institution on matters affecting sovereign states.[48] A cluster of countries signed a handful of tax treaties, but there was no substantive international central regime to coordinate the administration of those treaties.[49] The 1921 Rome Convention, which sought to create a central coordinating forum as a multilateral framework missing in the early bilateral tax treaties, did not earn international status, and its effect did not go beyond its region.[50]

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preferred a framework that guaranteed the primary taxing right of the source country on foreign-sourced income, while Britain advocated that primary taxing right should be vested in the residence country. The respective preferences of these nations reflected their trade patterns of that era. The United States was a large market for British investors, and a regime that recognized the primary taxing rights of the source country would allow the United States to have a fair share of the profits earned within its territory. Britain was the hub of large investors, and it could fully exercise its worldwide taxing rights on profits earned by its residents on foreign investments under a system that recognizes the primary taxing right of the residence country. Other countries' approaches to the same issue were designed along these two divergent views. The outcome of the works of the League upholds the primary taxing right of the source country except in the international shipping business, which retains the primary taxing right of the residence country. See also Reuven S. Avi-Yonah, "Who Invented the Single Tax Principle: An Essay on the History of U.S. Treaty Policy" (2014) 59:2 NY L Sch L Rev 305 at 309

[47] *Ibid*.

[48] Jogarajan, Double Taxation and the League, *supra* note 10 at 87. The ICC resolution of 1920 to the League was an appeal to the governments of affected countries to agree to prevent double taxation. If the ICC had the political power to establish a central forum that would coordinate the cooperative efforts on eliminating double taxation, it would not require the League's intervention. In addition to its resolution, the ICC participated in the League's activities. Even after the exit of the League, the ICC forwarded a similar resolution to the OECD when the latter assumed the role of central forum coordinating international taxation cooperation.

[49] The 1899 treaty between Austro-Hungary and Prussia is generally believed to be the first comprehensive tax treaty on double taxation. Before 1899, there was a tax treaty between Great Britain and Switzerland (Canton of Vaud) in 1872, but the tax treaty was limited to the avoidance of double taxation with respect to death duties. See Sunita Jogarajan, "The Conclusion and Termination of the First Double Taxation Treaty" (2012) BTR 283; J. Herndon, Relief from International Income Taxation: the Development of International Reciprocity for the Prevention of Double Income Taxation (Chicago: Callaghan & Co, 1932), 15-17; Sunita Jogarajan, "Prelude to the International Tax Treaty Network: 1815-1914 early Tax Treaties and the Condition for Action" (2011) 31:4 Oxford J Legal Studies 679 at 680-682

[50] The convention was concluded in Rome on 13 June 1921 by the succession states of Austria and Hungary. It is the first multilateral tax treaty but its scope was limited to the succession states of Austria and Hungary. The terms of reference of the League to the four economists acknowledges the Rome Convention and requests the economists to

The focus of all these efforts, particularly those efforts from the United States and the United Kingdom, was narrowed to taxation issues and how the countries could maximize their tax revenues.[51] The intervention of the League is a success story – it achieved what the national tax systems could not have achieved by coordinating and standardizing the approach towards resolving the double taxation problem. The international taxation actors, who incidentally are the same people involved in the design of the national tax systems, should not have been strictly tax-centric, as they were before the League, in appreciation and admission of the successful intervention of the League to remedy their previous failed attempts.

The perspective on international taxation problems was strictly tax and economic-centric because of the personalities and perspectives of the actors involved in the design of the international tax framework. The actors who were involved in the designing and administration of the national tax systems of their respective countries were also involved in the design of the ITR. The technical experts subsequently engaged by the League were revenue officials or tax advisors of different countries.[52] For example, Professor Thomas Sewall Adams, whose influential opinion and role shaped the United States' credit method of relieving foreign tax paid by its multinationals,

consider the convention's application to the double taxation problems. See Clyde J. Crobaugh, "International Comity in Taxation supra note 9 260 at 265.

[51] Christians, Networks, Norms and National Tax Policy, *supra* note 46.

[52] Jogarajan, Double Taxation and the League, *supra* note 10 at 26, 98 – 103. The first set of technical experts engaged by the League to provide a practical approach to the double taxation problem were from seven European countries – Belgium, Czechoslovakia, France, Great Britain, Italy, the Netherlands and Switzerland. The seven technical experts authored the 1925 report, which, among other things, requested the inclusion of other countries in the committee. Based on this request, the number of members of the technical experts was increased from seven to thirteen in 1927 - representatives of Germany, the United States, Poland, Japan, Venezuela, and Argentina were added to the committee. Thomas Sewall Adams, who had been playing a crucial role through the ICC as a member of its double taxation committee, was chosen to represent the United States in the newly enlarged technical experts. Except for the representatives of Venezuela and Poland who were academics, all the members in the 1925 and 1927 technical experts were revenue officers in their home countries' governments – they were either in the taxation unit, the finance unit or the central banks of their home countries. TS Adams could not be classified as one of the academics on the committee, like Feo from Venezuela, a professor of finance, and Zaleski from Poland, a professor of political economy. It seems that the appointment of TS Adams to represent the United States was not connected to his academic activities but because of his role as an economic advisor to the United States Treasury and the development of the United States international taxation system.

was among the technical experts who produced the 1928 model tax treaty.[53] The perspectives of these actors about their countries' tax system's policies, which are to maximize tax revenues for public spending, influenced their thinking, ideas and sensemaking process about the international tax problems.

The action of the HICs at the London conference in 1946, reversing the LMICs' earlier approach to advancing the international tax consensus, is a clear case where the influential actors did not consider the broad agenda of promoting global peace in their deliberations. To set the context, in the previous 1943 conference in Mexico, the LMICs, who were the major attendees of that conference, adopted a tax treaty model which gave stronger taxing rights to the source country.[54] The adoption of a pro-source country tax treaty model was to protect the tax bases of the LMICs as net capital importing countries – the model enables the LMICs to effectively impose taxes on incomes arising from companies' business activities in their jurisdictions.[55] Upon returning from the Second World War, the HICs reversed the LMICs' decision and changed the tax treaty model to another one that gave stronger taxing rights to the residence countries.[56] The pro-residence tax treaty model favours the HICs as the capital-exporting countries. One such

[53] Michael J. Graetz & Michael M. O'Hear, "The Original Intent of U.S. International Taxation" (1997) 46:5 Duke LJ 1021 at 1066. TS Adams' influential role in the international taxation regime did not start when he was engaged by the League as a technical expert in 1927. Considering the fact he was a member of the ICC's double taxation committee, whose work predates intervention of the League, and the committee's recommendation formed the basis of the ICC's 1920 resolution to the League and its participation throughout the League's activities, TS Adams has an indelible mark in the history of international taxation regime.

[54] Kim Brooks & Krever, Richard, "The Troubling Role of Tax Treaties, *supra* note 6.

[55] League, Fiscal Committee, *Report on the Work of the Tenth Session of the Committee, League (Document C.37 M.37. 1946. II. A)* at 18. One of the means adopted by the LMIC to achieve this was the exclusion of the clause on the permanent establishment. By comparison, Article IV(I) of the Mexico Model provides 'Income from any industrial, commercial or agricultural business and any other gainful activity shall be taxable only in the State where the business or activity is carried out'. The pre-condition of the permanent establishment was deliberately left out. However, Article IV of the London Model provides the opposite. It states: 'Income derived from any industrial, commercial or agricultural enterprise and any other gainful occupation shall be taxable in the State where the taxpayer has a permanent establishment' (Emphasis Added).

[56] *Ibid*.

benefit is that it reduces foreign tax liabilities of their multinationals and consequently the tax credit or exemption those multinationals can claim from the HICs.

The conclusions at the 1943 and the 1946 conferences show the respective preferences of the LMICs and the HICs. The HICs could protect and consolidate their preferences because of their influence. The LMICs that succumbed to the greater influence at the 1946 conference could have reacted to the HICs' decision if they were of equal influence. In contrast to war situations, where warring parties display an arsenal of military skills and equipment, peacemaking should be about compromise, protection and accommodation of the weaker parties by the stronger parties.[57] Rather than adopting a totally different approach, the HICs should have accommodated the LMICs' preference to promote global peace, for which the League was established.

In addition to considering the League's mandate of promoting peace, the actors involved in the design of the ITR should be conscious of issues connected to the participating states' existence and functionality. It is known that there is an inseparable relationship between taxation and modern statehood.[58] Among others, states rely on taxation as a major source of revenue to

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[57] Edwards Aaron, *Strategy in War and Peace: A Critical Introduction*. (Edinburgh: Edinburgh University Press, 2017) at 158. The author's explanation of how actors use force in war situations in the realization of their objectives clearly described the HICs' attitude in the 1946 conference. Relying on Michael Howard's phraseology, Aaron argues that some states will continue to seek more power and influence because they see other states as their competitors. This attitude of quest for survival may be justifiable during the war situation, but it is definitely contrary to the objectives of peacemaking. The HICs' action was a war-like approach and their attitude is what Aaron describes as 'the quest for the further accumulation of power and glory'. Aaron states as follows:

> In Michael Howard's phraseology, the predominance of the use of force in the. International system is directly attributable to two factors: (1) the instability of the actors themselves and (2) the function of the state as a guardian of certain value system. In the case of the former, war is regarded as a rational way of obtaining an object, while in the latter it is the state that must safeguard its political community from attack. If we consider the first point on the instability between the actors (both state and non-state), it is obvious that power relations and differentials mean that there will always be those who perceive themselves to be in constant competition with others. For Realists, this is reducible to the quest for the further accumulation of power and glory. Consequently, states, as the primary political units in the international system, will always be predisposed to moving to consolidate their power while preserving the balance that may ensure their survival in the face of challenges.

[58] Rudolf Goldscheid "A Sociological Approach to Problems of Public Finance" in Richard A Musgrave & Alan T. Peacock, eds, *Classics in the Theory of Public Finance* (London: Palgrave Macmillan, 1958) 202.

protect their territories and provide common fiscal needs, which are the purposes of their establishment.[59] It is even said that a state's tax revenue and fiscal profile is the state itself as 'taxes not only helped to create state' but also 'to form it.'[60] The actors should, therefore, ask whether an approach to be adopted to allocate taxing rights between the residence and the source countries can guarantee the existence and the functionality of the participating states. The HICs obviously failed to consider this question in the 1946 London conference and their previous engagements. The decision of the HICs to adopt a pro-residence tax treaty model had no regard for the continued existence and functionality of the LMICs in the same forum.[61]

The historical development of the ITR shows that the actors' perspectives on international tax problems are never broad enough to consider the larger important issues. The disconnect of global tax cooperation from its ought-to-be goal started in the era of the League, despite its large membership and broad agenda. The restrictive perspective affects the subsequent works after the League up to the present two-pillar solution regime. The implication of this running restrictive and harmful actors' perspectives is that the precarious situation of the LMICs will remain the same until the actors' perspectives are addressed.

1.2.2 What is the Solution?

This thesis argues that the fundamental problem can be addressed by looking at the international taxation problem broadly. Our perspectives about international taxation problems should consider other issues connected to the participating states' existence and functionality. The approach to international taxation should be different from domestic taxation's narrow approach,

[59] *Ibid*.
[60] Joseph A. Schumpeter, "The Economics and Sociology of Capitalism – the Crisis of the Tax State" in Jurgen G Backhaus, ed, *Navies and State Formation: The Schumpeter Hypothesis Revisited and Reflected* (Germany: LIT Verlag, 2004) 21 at 33
[61] The question should have been whether the LMICs could generate from pro-residence tax treaty model effective tax revenues to meet their demands of protecting their territories and providing welfare for citizens.

which primarily focuses on generating maximum revenue for regulatory purposes and realizing states' welfare agenda.

This thesis further argues that the ITR should be undertaken within the broader context of the following issues: a. human rights; b. sustainability, and c. global peace. The actors should consider the relationship between the allocation of taxing rights and each of these issues in setting the agenda for international cooperation and designing a multilateral framework. These three issues are described in this thesis as the Global Stability Variables as a working definition or description and not for any standard meaning. The Global Stability Variables simply argue that actors should address tax problems in a manner that promotes global peace. Since individual states that constitute the global community[62] cannot promote global peace when endangered, the thesis argues further that the actors must consider issues affecting the existence and functionality of participating states. The sustainability component of the Global Stability Variable addresses issues that guarantee the existence and continued existence of states, while the human rights component focuses on the ability of states to protect the basic rights of their domestic constituents. I explain this framework further in section 1.5 of this thesis.

1.2.3 Purpose of the Thesis

We live in an increasingly integrated world. The world is gradually becoming a compact cluster of states with the advent of the digitalized economy.[63] As the digitalized economy propels international trade,[64] it creates challenges for states in capturing incomes arising from those

[62] Akira Iriye, *Global Community: The Role of International Organizations in the Making of the Contemporary World* (California: University of California Press, 2002) at 9.
[63] Goloventchik, G. G. "Digital Economy As A New Stage of Globalization" (2018) 1 Digital Transformation, Kosogor, S. "On the Transition to a Digital Economy in the Context of Integration and Globalization." In *IOP Conference Series: Earth and Environmental Science*, (2019) 274:1,
[64] Ikrom Ahmedov. "The Impact of Digital Economy on International Trade." (2020) 5:4 European J Bus Management Research, Simon Abendin & Duan Pingfang, "International Trade and Economic Growth in Africa: The Role of the Digital Economy." (2021) 9:1 Cogent Economics & Finance

trades[65] and adopting an international taxation framework that neither inhibits international trade nor limits the effective tax revenues of states.[66] The fluid nature of the digitalized economy and its multilateral tax consequences is a pointer that there will always be a need for cooperative efforts among states – as a unilateral approach cannot adequately address overlapping tax issues arising from digitalized businesses.[67] Considering the LMICs' challenges in the current international tax, as earlier argued, the LMICs cannot maximize their revenue potential in the digitalized economy by using the existing framework.

It is, therefore, important to review the perspectives of the participating states and other actors involved in international tax cooperation. The underlying goal of reviewing the perspectives and tailoring them towards the global stability variables is to protect the interests of the LMICs without undermining the tax needs of the HICs. The DTA regime, its relics and its impacts on subsequent works on international taxation, particularly the two-pillar solution, show that international taxation is on the brink of a tax justice crisis. Changing actors' perspectives will redirect the ITR to its normative goals.

1.3 Resolving the Contention between Tax Cooperation and Tax Competition through the Global Stability Variables

The contention between the advocates of tax cooperation and the advocates of tax competition is simply about which of the two approaches can produce optimal benefits for states. The apparent failure of the cooperative tax regime to advance the interests of the weaker states in the forum invoked the tax competition's argument that states can be better off by implementing

[65] Kevin Barefoot et al, "Defining and Measuring the Digital Economy." US Department of Commerce Bureau of Economic Analysis, Washington, DC 15 (2018): 210, Erik Brynjolfsson & Avinash Collis. "How Should We Measure the Digital Economy." (2019) 97:6 Harvard Bus Rev 140-148.
[66] Marcel Olbert & Spengel Christoph, "International Taxation in the Digital Economy: Challenge Accepted?." (2017)3 World Tax J., Assaf Harpaz, "Taxation of the Digital Economy: Adapting a Twentieth-century Tax System to a Twenty-first Century Economy." (2021) 46 Yale J. Int'l L.57.
[67] *Ibid*

unilateral tax systems (for example, by enacting their own digital tax regimes rather than working on a collaborative solution).[68] A summary account of tax cooperation and competition is necessary before delving into how this thesis' argument can resolve the contention.

According to the proponents of tax cooperation, the integrated economy and its multilateral tax consequences justify the need for tax cooperation among states.[69] Tax cooperation seeks to harmonize tax rules (or at least coordinate them) and, in extreme cases, tax rates and adopts a standardized tax system that applies in the same manner in all cooperating states.[70] The main benefits of tax cooperation are certainty and efficiency. Taxpayers are certain that the same tax rules will apply to their incomes irrespective of where their businesses are located.[71] The certainty reduces the potential for tax arbitrage and other abusive tax practices, as there will be no difference in tax rules for taxpayers to leverage to design a grand scale of tax planning to reduce tax liabilities. As participating states exchange information and adopt mutual assistance, tax cooperation yields efficiency benefits by potentially reducing or avoiding unnecessary compliance and enforcement costs.[72]

The proponents of tax cooperation are not advocating for the total elimination of tax competition. Considering the sovereignty and the democracy goals of nations, the proponents of

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[68] Tsilly Dagan, *International Tax Policy: Between Competition and Cooperation* (United Kingdom: Cambridge University Press, 2018) 166-184.

[69] Yariv Brauner, "An ITR in Crystallization" (2003) 56:2 Tax L Rev 259 at 264; Hugh J. Ault, "The Importance of International Cooperation in Forging Tax Policy" (2001) 26:4 Brook J Int'l L 1693.The digitalized economy has expanded and continue to expand the frontiers of the globalization. A unilateral approach to taxation is gradually fading out as the world itself is losing its the geographical boundaries to intricacies of the digitalized economy.

[70] *Ibid* at 263. Brauner argues that harmonizing tax rates may not be feasible given its complication and uncertainty of the net benefit to states. The harmonization of rules, adopted in the gradual form, is flexible and workable because some existing rules are close to harmonization – they are being practiced in the same manner in multiple countries.

[71] *Ibid*.

[72] Kim Brooks' list of four benefits of tax cooperation can still be classified under certainty and efficiency. The benefit of tax cooperation in first reducing barriers to international businesses and second, reducing fiscal externalities can come under efficiency. The third benefit of reducing tax abusive arrangements and the fourth benefit of reducing compliance and administration can be grouped under certainty. See Kim Brooks, "The Potentials of Multilateral Tax Treaties" in Michael Lang et al, eds, in *Tax Treaties: Building Bridges Between Law and Economics* (IBFD Publications) 211 at 215 – 216.

tax cooperation rather want the tax competition to be limited in some instances.[73] Reuven S. Avi-Yonah, a professor of international taxation, argues that the tax competition policy of a country that reflects its voters' preference and applies to all taxpayers – domestic and foreign – is beneficial and should be permitted.[74] Tax competition policy, which is usually effected by a reduction of tax rates that applies to or is designed to attract foreign investors, is harmful and should be regulated.[75] Therefore, cooperation efforts should be directed towards addressing the second classification of tax competition policy because of its negative effect on states' welfare. As multinationals are relocating investments to another jurisdiction because of its harmful tax competition policy, it affects the state from which the capital is relocated and limits its ability to achieve its welfare agenda through a collection of tax revenue.

Avi-Yonah argues that tax cooperation better protects the interests of developing countries than tax competition – such as the reduction of tax rates and tax incentives - if they can attract investments other than tax preferential regimes.[76] As an example, two developing countries that compete against each other because of their revenue needs may eventually incur nil benefit because their expected revenues from taxing businesses associated with the foreign investment – such as taxing the employees or the suppliers of the foreign investment – may be equal to or less than the

[73] Reuven S. Avi-Yonah, "Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State" (2000) 113:7 Harv L Rev 1573 at 1626. The OECD's description of its works to curb harmful tax competition confirms that some forms of tax competition are desirable for realizing countries' preferences, and there should not be any reason for international cooperation to regulate them.

[74] *Ibid* at 1629. Avi-Yonah argues that the enactment of tax cut legislation in 1981 in the United States reflected voters' preferences. Ronald Reagan was elected in 1980 based on his promise to reduce government size and to cut taxes. The legislation was to deliver on his promises to the electorate – which was the democracy goal of that time. It is immaterial that the legislation was abused, particularly by foreign taxpayers, and it had a negative effect on the European countries. The United States was obligated to its voters and not the European region.

[75] *Ibid* at 1631. The second example is also from the United States history. In 1984, the United States enacted a portfolio interest exemption law, which specifically targeted foreigners and had no impact on the government's size. This tax incentive legislation did not go through Congress scrutiny and, therefore, lacks voters' preference. The enactment substantially negatively impacted the Latin American countries – they lost $300 billion in capital flight.

[76] *Ibid* at 1646.

tax revenues foregone from the preferential tax regime.[77] The foreign investments may not even carry on active businesses in developing countries, and the expected associated businesses will not arise. Eliminating harmful tax competition, therefore, does good to both developing countries competing against each other. The consequence of Avi-Yonah's argument is that developing countries should attract investment through other means, such as investments in infrastructure or human capital. I argue that the LMICs should subscribe to tax cooperation based on the global stability variables because they do not have sufficient infrastructure and human capital to attract foreign investments.

On the other hand, the proponents of tax competition premise their arguments on how states can use their sovereignty rights to design their tax affairs within acceptable standards.[78] Sovereignty arguments suggest that states should be allowed to design their tax systems according to their preferences, national interests and domestic needs. States can thus design tax regimes with tax incentives for foreign investments or a strict regime that does not incentivize foreign investments. Any international regime that seeks to influence how states design their tax systems erodes the state's sovereignty and national interest. This is the main argument of the United States government under the George Bush administration when it disapproved of the OECD's work on harmful tax regimes.[79]

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[77] *Ibid*. Avi-Yonah argues that '(c) competition limited to foreign investment is feasible but still hurts both countries by costing them revenues, especially if the incentives cancel each other out. In this case, it would be in both countries' interests to eliminate competition if a cooperative could be found'. The question then is, what if no beneficial cooperative is available? Will that not justify the need for the developing countries to embark on competition, even if they eventually lose tax revenue from that policy?

[78] Diane Ring, "Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation" (2009) 9:5 Fla Tax Rev 555 at 561-563. See also, Philipp Genschel & Peter Schwarz "Tax Competition: A Literature Review" (2011)9 Socio-Economic Review 339 at 340-341; Michael Keen & Kai A. Konrad, International Tax Competition and Coordination, Max Plank Institute for Tax Law and Public Finance Working Paper 2012-06 at 6

[79] *Ibid* at 567-568. The United States' strong opposition to the OECD's efforts on tax transparency was a major factor in the failure of the OECD's harmful tax competition. United States threatened to cut its funding to the OECD if it failed to heed its advice on implementing information exchange. The US's opposition to the harmful tax project was championed by the Centre for Freedom and Prosperity, registered in 2000 to challenge the project. CFP lobbied the

It is doubtful if the tax competition policy can benefit the LMICs. If the LMICs adopt a strict tax policy that has no incentives for foreign investments, they may not be able to attract the foreign investments that are necessary to grow their economies, such as investments in the extractive industries and the real estate sector.[80] For example, the LMICs in the African region are really endowed with untapped resources but lack the financial capacity and technological advancement to explore and develop these resources into valuable international assets.[81] There is a need to attract foreign investments, and a strict tax policy will run contrary to the interests of foreign investors. The LMICs will also be disadvantageous if they are too generous with the

US Congress, claiming that the project is harmful to countries, including the US, because the US is itself a tax haven, and most US citizens benefit from other tax havens. The Bush administration took a final position on it in 2001. The United States Treasury Secretary, Paul O'Neil, stated that 'the United States does not support efforts to dictate to any country what its own tax rates or systems should be, and will not participate in any initiative to harmonize world tax systems. The harmonization project also suffered resistance in the EU because there was no unanimous vote for its adoption (unlike other issues, taxation requires unanimous voting in the EU). The EU's rejection of tax base harmonization reflects the diverse interests of member states. Low-tax countries, such as the UK and Ireland, believe that the harmonization will force them to tinker with their tax rate, which is seen as the attraction of business. High-tax countries, such as Denmark, Sweden and Finland (Nordic states), believe it would affect their social welfare and force them to reduce their tax rate. See also Denny, Charlotte, "OECD to Defy Bush over Tax Haven" Guardian, 12 May, available at <www.guardian.co.uk/business/2001/may/12/7 >.

[80] Investment in the extractive industries will tap into the large untapped deposit of natural resources, while investment in real estate will address the increasing population in the region.

[81] By the account of the UN Environment Programme (UNEP), the African region has the largest reserves of cobalt, diamond, platinum and uranium. It also has 40% of the world's gold. This is in addition to other natural resources that are in large commercial quantities. See <www.unep.org/regions/africa/our-work-africa#:~:text=The%20continent%20has%2040%20percent,internal%20renewable%20fresh%20water%20source>. African Development Bank, African Natural Resources *Centre, Catalyzing Growth and Development Through Effective Natural Resources Management* (Côte d'Ivoire: African Development Bank, 2016). These resources cannot be efficiently exploited on the strength of the African region alone. The 2022 UN World Investment Report observes that a significant part of the African region's foreign direct investment (FDI) is into the extractive industries. For example, Nigeria's FDI rose to $ 4.8 billion mainly because of a resurgence in oil investment and gas expansion. The FDI in Egypt decreased by 12% because of the decline in investment in the extractive industries. The FDI in Ghana rose by 39% because of the investment in its extractive industries. There are similar trends in investments in other parts or the region. These data establish foreign business interests in the region's extractive industries, and a beneficial tax regime, among others, can be used to stimulate interests and attract more investment interests. See UN, UN Conference on Trade and Development, *World Investment Report 2022: International tax Reforms and Sustainable Investment*, (New York: UN Publications, 2022) 12 -15.

incentive-based tax regime to attract foreign investments because the incentives can be exploited by the multinationals and result in nil benefits for the LMICs.[82]

As argued by Avi-Yonah, tax cooperation offers better tax protection to the LMICs. The HICs can still adopt a tax competition policy as they have other means to attract foreign investment. For example, the booming economy of the United States, its skilled workforce, and the infrastructure alone would have motivated foreigners to invest in its portfolio business even without the tax incentive regime of the 1984 portfolio interest exemption law.[83] The LMICs with no such comparable developments are better protected to cooperate with other countries. The cooperative regime has unfortunately not yielded the desired results for the LMICs. As an example of the cooperative regime, the DTA regime has not yielded results for the LMICs that are better than tax competition.[84] As a result, the LMICs have been advised to be cautious when signing tax treaties to avoid signing away their tax revenues.[85]

The LMICs face the dilemma of choice – neither the tax competition nor the tax cooperation policy effectively protects their interest under the present regime. As earlier argued, the nature of the digitalized economy makes tax cooperation policy a perfect choice – arguably, there is no other perfect choice because the digitalized economy is extremely fluid. As argued in this thesis, the notion of global stability variables can protect the interests of the LMICs in the cooperative regime. Since both the advocates of tax competition and tax cooperation are interested

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[82] See Maria R. Andersen, Benjamin R. Kett, & Erik Von Uexkull, "Corporate Tax Incentives and FDI in Developing Countries" in World Bank Global Investment Competitiveness Report 2017/2018 (Washington: World Bank,) 74 at 79-80

[83] Avi-Yonah, "Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State, *supra* note 73.

[84] The bilateral tax treaties, which are modelled on the DTA regime, have been described as a myth as there is no convincing proof that double taxation occurs in the absence of such bilateral tax treaties. See Tsilly Dagan, "The Tax Treaties Myth" (2000) 32:4 NYU J Int'l L & Pol 939 at 945.

[85] Sébastien Leduc & Geerten Michielse, "Are Tax Treaties Worth It for Developing Economies" in Ruud A. de Mooij, Alexander D Klemm & Victoria J Perry, eds, *Corporate Income Taxes Under Pressure: Why Reform is Needed and How It Could be Designed* (Washington: International Monetary Fund, 2021) 123 at 170.

in the overall interest of the states, the global stability variable appears to be the best approach to protect that national interest. The dichotomy between the two approaches will, therefore, fade away – and the cooperative regime that is based on the global stability variables will become acceptable to the proponents of tax competition and tax cooperation.

1.4 The Global Stability Variables and the Global Tax Governance

It may be argued that some scholarly and policy works have identified the connection between some of the variables in my thesis and international taxation cooperation. One such work is the UN's work on how tax policies should support and strengthen domestic resource mobilization to realize sustainable development goals.[86] A recent collection of articles edited by Philip Alston and Nikki Reisch identifies the connection between taxation and human rights, and the authors argue that tax avoidance goes beyond loss of money to include human rights abuses.[87] I am unaware of any academic work linking international taxation to global peace or, more specifically, considering whether the DTA regime fosters the relationship between international taxation and global peace.

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[86] UN Committee of Experts on International Cooperation in Tax Matters, *The Role of Taxation and Domestic Resource Mobilization in the Implementation of the Sustainable Development Goals*, 17th Session, E/C. 18/2018/CRP. 19. The Committee identifies four areas which can provide linkages between the SDG and international taxation. The four areas are international tax cooperation, challenges and opportunities of the digitalized economy, tax exemption of official development assistance projects, and taxation and gender equality. Oladiwura Eyitayo-Oyesode recently examines how tax treaties of selected African countries cannot generate sufficient revenues to realize the social development goals. See Oladiwura Ayeyemi Eyitayo-Oyesode, *Fostering Implementation of the United Station Sustainable Development Goals in Africa: Prospect of Revenue Generation Under the Tax Treaties Signed by Nigeria Tanzania and Botswana* (PhD Thesis, Dalhousie University, 2022) [Unpublished]. See also Irma J. Mosquera Valderrama, Dries Lesage & Wouter Lips, "Tax and Development: The Link Between International Taxation, the Base Erosion Profit Shifting Project and the 2030 Sustainable Development Agenda" (2018) UN University Institute on Comparative Regional Integration Studies, Working Paper Series W-2018/4.

[87] *Tax, Inequality and Human Rights*, eds, Philip Alston & Nikki Reisch, (New York: Oxford University Press, 2019). The comment of Winnie Byanyima, Executive Director of Oxfam International, at the World Economic Forum in January 2018 succinctly shows the connection between tax and human rights. The comment reads thus: "Tax avoidance isn't just about euros, yens, and dollars: it's about human rights. It's about people who are denied services to help them lift themselves out of poverty because of tax avoidance". See Nikki Reisch, "Taxation and Human Rights: Mapping the Landscape" in *Tax, Inequality and Human Rights*, eds, Philip Alston & Nikki Reisch, (New York: Oxford University Press, 2019) 33.

The closest policy recommendation that focuses on the connection between international tax and global peace is the UN SDG 16, which seeks the promotion of peaceful and inclusive societies and the establishment of strong, inclusive institutions.[88] To implement SDG 16 and the other goals, the UN recommends domestic resource mobilization, enhanced tax and revenue collection and mobilization of additional financial resources to the developing countries.[89] The combined reading of SDGs 16 and 17 implies that peaceful and inclusive societies can be promoted and realized through the instrumentality of tax, specifically through enhanced collection of tax revenues. The recent statement of the director of the UN Financing for Sustainable Development Office reiterates the need to design tax policy to realize peace, justice and strong institutions.[90] While these SDGs show the connection between tax and peace, they do not explain how actors can construe international tax problems as issues that promote peace or trigger war. The UN did not even raise the connection between tax and global peace in its agenda when it started working on taxation of the digitalized economy at the 15th session meeting of the UN Tax Committee in

[88] UN, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1.
[89] *Ibid*.
[90] The statement of the Director, Financing for Sustainable Development Office at the 24th Session of the Committee of Experts on International Cooperation in Tax Matters held on 12 April 2022 enjoins the Tax Committee to work on how tax policy can contribute to the realization of the SDG 16, which is peace, justice and strong institutions. It appears the approach the Committee is expected to adopt to realize peace is through building strong institutions. This approach is different from this thesis, which argues that global peace through taxation can only be realized if the actors' perspectives of international tax problems are broad enough to consider issues affecting the participating states' existence and functionality. See UN Department of Economic and Social Affairs, Statement by Mr. Navid Hanif, Director, Financing for Sustainable Development Office available at<www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2022-04/Tax%20and%20SDGs_NH%20remarks_2022-04-11_for%20posting.pdf>. The statement of the Director, Financing for Sustainable Development Office is reproduced below:

> In this 24th session you are carrying this commitment forward by further identifying the ways that Committee guidance can help developing countries overcome the challenges and issues in implementing the SDGs. Let me share just a few examples in the session thus far.
> Building greater certainty for all stakeholders in tax systems by aligning tax, trade and investment policy objectives will contribute to SDG 16 (Peace, Justice and Strong Institutions), in terms of helping develop effective, accountable, and transparent.

October 2017.[91] The UN could have framed the agenda as follows: to debate how to tax income arising from the digitalized economy in a way that contributes to peace, justice and strong institutions.

However, this thesis' contention is that the global stability variables should be considered in the bargaining process and negotiations of international taxation policies. The inclusion of the global stability variables in the negotiation process can only be possible if the actors' perspectives on the international taxation problem are broad enough to consider issues affecting the participating states' existence and functionality. The broad perspectives will encourage the actors to include the variables in the agenda, and the inclusion will consequently impact and prioritize the variables in the negotiation and the substantive output. The League's and the OECD's works apparently failed to include these variables in their agenda, and the consequence of such failure is the seemingly unending contention between the Global North and the Global South.

To succeed in this new framework, the global stability variables should be included during the agenda-setting phase of the bargaining process because that is the most important stage of any international agreement. The agenda weaves all interests into workable strands and influences how those strands will be developed into implementable frameworks. It involves narrowing the problems and evaluating the best option to approach the problems, considering the possible

[91] UN Committee of Experts on International Cooperation in Tax Matters, *The Digitalized Economy: Selected Issues of Potential Relevance to Developing Countries*, 17th Session, E/C. 18/2017/6. The agenda focused on improving tax revenue collection from business activities of the digitalized economy. The concluding part of the note read as follows:

> (t)he proliferation of a variety of uncoordinated measures implemented within the existing framework is unlikely to provide a long-term satisfactory solution to the challenges to the tax system presented by digitalization.16For this reason, it is important to have an open debate regarding the options available for countries to deal with taxation of the digital economy in a treaty context, using a pre-defined framework that would increase governments' tax collection abilities while also being beneficial for business and the taxpayer

barriers to cooperation.[92] In the event of competing interests or conflicting approaches, the collective belief in the global stability variables will persuade the actors not to adopt a beggar-thy-neighbour policy.

Failure to include the global stability variables in the agenda will have a negative impact on the outcome, and any attempt to address the outcome after the formation of the regime is chasing shadows. To explain this further, I divide activities leading to the ITR into two stages and explain how the agenda connects and influences the two stages. The first stage is identifying and harmonizing tax problems, while the second stage is identifying the forum for tax cooperation.[93] The agendas are designed in the course of identifying the problem by whomever is present in the first stage. The members' understanding and perspectives will constitute the convergence agenda.

Without any framework, such as what is being proposed in this thesis, the interests of states participating in the first stage greatly influence the perspectives and, consequently, the agenda. The agenda-setting then determines how the forum is identified in the second stage. The forum is

[92] Oran R. Young, *Creating Regimes: Arctic Accords and International Governance* (London: Cornell University Press, 1998) at 7 - 9. Oran describes this as agenda formation, the first regime formation stage. Janice Gross Stein describes it as a prenegotiation phase. See Janice Gross Stein, "Getting to the Table: The Process of International Prenegotiation" (1988) 44:2 Int'l J 231 at 232. This period is often described in international relations as prenegotiation or negotiation about negotiation. The prenegotiation and negotiation process often overlap, and the same issues may be discussed in those stages. The prenegotiation itself is divided into five stages. Understanding these five stages explains why some countries derive first-time benefits from their early involvement in a process. The stages are problem identification, the search for options, the commitment to negotiation, the agreement to negotiate and setting the parameters. See also Brian W. Tomlin, "The Stages of Prenegotiation: the Decision to Negotiate North American Free Trade" (1988) 44:2 Int'l J 254 at 258 – 262; I. William Zartman, "Prenegotiation: Phases and Function" (1988) 44:2 Int'l J 237. Both Oran Young and Janice Stein agree on the influence of this stage on the entire reform process. The actors of this stage transmute to permanent members of the forum under which the negotiation is carried out. Since the setting is part of issues determined at this stage, the key actors may either choose an existing forum in which they are all members or establish a new forum if the existing forum cannot enable such discussion.

[93] The two stages provide phases for Diane Ring's four-factor framework for evaluating and predicting any ITR. Ring argues that the four-factor framework – membership, agenda, structure and output - is an evaluative tool to measure the interest and direction of a regime. She uses this framework to examine the role and influence of the OECD and the International Chamber of Commerce in including mandatory arbitration provisions in tax treaties and developing harmful tax practices policy. See Diane Ring, "Who is Making International Tax Policy: International Organization as Power Players in a High Stakes World" (2010) 33:3 Fordham Int'l LJ 649 at 678. The first two factors – membership and agenda – feature in the first stage, while the remaining factors – structure and output – can be grouped under the second stage.

carefully selected. The competency of that forum is important to the state actors at this stage and its ability to provide an enabling environment where the actors can realize their agenda.[94] Any contention to ensure the work of such a forum to consider issues affecting the participating states' existence and functionality at the second stage is a futile exercise that cannot yield any reform. The reason is simple – such an attempt is like asking people to exhume what had been secretly buried for covert reasons.

The two-pillar solution is a perfect example to explain the interplay between the two stages I have identified in the preceding paragraphs. Since agenda setting is an evolutionary process from problem identification, the developed countries had the opportunity to identify the tax challenges of the digitalized economy and subsequently harmonize and put them on the international agenda through their controlled institutions - the G7 and the G20.[95] The agenda set at this stage is expected to reflect the perspectives and interests of those who designed it.[96] The agenda then informed the

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[94] Thomas Rixen, *The Political Economy of International Tax Governance* (UK: Palgrave Macmillan, 2008) 16-17. This is often referred to as rational choice institutionalism in international relations. Since countries are the key actors in global tax cooperation, they strategically choose institutions that can help them realize the gains of their cooperation. The choice of the institution is strategic, and the outcome of that choice is predictable.

[95] The G20 plays a visible role in the Two Pillar process, but historical development and relationship between the G20 and the G20 suggests that the G20 is not independent of the G7. Most of the issues in the Two Pillars are also discussed in the G7; in some cases, some ideas, such as minimum tax, emanated from the G7. See Wei Cui, "New Puzzles in International Tax Agreement" (draft paper October 2021 available on https://ssrn.com/abstract=3877854) at 4. On a general note, the historical development of these institutions confirms that the G7 will continue to influence the G20 indirectly. The G7 started with four countries – United States, Germany, France, and Britain – on March 25, 1973. It was named after the Library Group, adopting the name of the White House Library, where they had their inaugural meeting. Japan was added in September of that year, and it became a group of five countries. Canada was added to the group in 1976 to balance the North American representation in view of the inclusion of Italy by France. With the inclusion of Canada and Italy, it became a group of seven countries in 1976. These countries remain the nucleus of the G7 and determine its expansion and relationship with other institutions. They determined the inclusion of Russia in the G8 in 1997 and its existence. The G7 influenced the formation of the G20 in December 1998 to operate at the level of finance ministers and central bank governors. The G8 summits in 2005 and 2007, where five developing countries – India, China, South Africa, Brazil and Mexico, were invited, marked the beginning of consideration of moving the G20 meetings to the leaders' level. This was eventually done in 2008, a major response to the global financial crisis. See Smith Gordon, *G7 to G8 to G20: Evolution in Global Governance* (Waterloo, Ontario: Centre for International Governance Innovation, 2011) 4-6; Andrew Baker, *The Group of Seven: Finance Ministries, Central Banks and Global Finance Governance* (London: Routledge, 2006) at 2.

[96] Etel Solingen, "Of Dominoes and Firewalls: The Domestic, Regional, and Global Politics of International Diffusion" (2012) 56, International Studies Quarterly 631 at 632. Solingen argues that analysis of a phenomenon and how it diffuses and affects the globe is incomplete without understanding how these political agents work and interact with other ingredients of international diffusion – the other ingredients are the initial stimulus (new event such as the

choice of another forum to coordinate the global negotiations since the G7 and the G20 do not have the necessary resources and structures to coordinate global cooperation.

Unlike the era of the League, where the League was the only viable institution to undertake international tax cooperation, the G7 and the G20 had the option of using either the OECD or the UN as the appropriate forum. The choice of the OECD was not only because of its competencies but also because it could deliver on their expectations and protect interests embedded in the agenda designed in the stage of identification and harmonization. So, the agenda formed before the OECD was introduced in the two-pillar process continues to dominate the contours of the regime.[97] In addition to its general influence on global economic matters, the involvement of the G7 at the early stage allowed it to integrate its perspectives in the agenda formation of the two-pillar and continues to enable it to oversee and influence the regime.[98]

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digital disruption in this context); the medium, which is the structure used by the political agents to spread the information about the stimulus; and the outcome, which is the output of the change. The author states as follows: "Improved analysis of diffusion can benefit from systematic attention to the initial stimulus; the medium through which information about the stimuli may/may not travel to a given destination; the political un/affected by the stimulus' positive or negative externalities and their roles in aiding or blocking the stimulus' journey to other destinations; and outcomes that enable discrimination among grades of diffusion and resulting equilibria".

[97] Young Creating Regimes, *supra* note 92 at 10. The formative stage is arguably the most important and influential in all the three stages of regime formation. Oral R. Young divides the regime process into three stages: agenda formation, negotiation, and operationalization. In acknowledgement of the superior benefits of the formative stage, Young states as follows: '(o)ne more range of concerns that deserve consideration under the heading of agenda formation come into focus with the movement toward the negotiation stage at the international level. These involve pragmatic matters, like the identification of players to be invited to participate, the setting in which negotiations will occur, the timing of the first round of negotiation, and remaining conceptual questions, like breadth or narrowness of the items to be considered by the negotiators'.

[98] For example, the idea of 15% as the global minimum tax rate in Pillar Two first ensued in the G7 meeting and was later adopted by the G20 and the OECD. The G7 finance ministers and central bank governors agreed at its meeting held on 28 May 2021 to commit to a 15% global minimum tax. It was also agreed that market countries should have taxing rights on a fixed percentage of profits of the largest and most profitable multinationals. The part of the resolution that bothers on applying the Two Pillars to selected companies is another signal of how G7's interests are implemented in the Two Pillars. When the G7 communiqué was released, the Two Pillar's scope was limited to automated digital service and consumer-facing businesses. The scope was later extended to the largest and most profitable companies, arguably to defer to the G7's interests. See G7, *G7 Finance Ministers and Central Bank Governors Communique*, (5 June 2021) online: <home.treasury.gov/news/press-releases/jy0215> The communique is dated 5 June 2021, but the meeting was held on 28 May 2021. Paragraph 16 of the communiqué speaks directly to the Two Pillar. The choice of international organizations at the meeting is curious. A more inclusive organization like the UN Tax Committee was not at the meeting where issues that bother what it was simultaneously working on were discussed, while less inclusive organizations like the OECD, IMF, and the World Bank were in attendance. From the communique's wording, it seems like G7 is willing to agree on the global tax deal if the deal accommodates the stated terms – the minimum tax, broader

1.5 Global Stability Variables and International Taxation Cooperation

It is undisputed that taxation is an integral part of a state's sovereignty and one of the bases of its existence and functionality. Social contract theory posits a contract between a state and its citizenry under which the state has an obligation to provide certain services to the citizenry in consideration of the citizenry's transfer of authority and resources.[99] These services are often described as public goods and are supplied in a manner that is impossible to exclude anybody from benefitting from them.[100] The state's ability to deliver on its undertakings under the social contract can be bolstered or constrained by its tax policies. Economists pay greater attention to and indeed agree that there is a relationship between the provision of these public goods and states' tax policies. In acknowledgment of how tax policies can sustain states' obligations to their citizenry, the economists advise states to tailor their tax policies towards realizing the welfare agenda.[101]

While states must provide public goods at the national level, the entity that provides the required public goods at the international level differs from one school of thought to another. The realists argue that the international public goods should be provided by the hegemon whose leadership and responsibility coordinates the global cooperation.[102] On the other hand, the

scope of application and the cut-off rate of taxable profits. Another example of a regime that was greatly influenced by the G7 is the automatic exchange of information between tax authorities is another project of the G7 that was implemented by the G20 through the OECD. Though the idea was championed by civil society activist, it was adopted by the G7 in 2013 and the OECD developed it into a multilateral framework. See G8 Lough Ernes Leaders Communiqué (18 June 2013) online www.g8.utoronto.ca/summit/2013lougherne/lough-erne-communique.html>

[99] Michel Rosenfeld, "Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory" (1985) 70:4 Iowa L Rev 769 at 850 – 860. David G. Ritchie, "Contributions to the History of Social Contract Theory" (1891) 6:4 Political Science Quarterly 656.

[100] John G. Head & Carl S. Shoup, "Public Goods, Private Goods and Ambiguous Goods" (1969) 79:315 Economic J 567-572; Richard A. Musgrave, *The Theory of Public Finance* (New York: McGraw Hill, 1959) 8-10.

[101] Robin Boadway & Michael Keen, "Public Goods, Self-Selection and Optimal Income Taxation" (1993) 34:3 Intl Economic Rev 463-478; Thomas Gaube, "Financing Public Goods with Income Taxation: provision Rules vs. Provision Level" (2005) 12 Intl Tax & Public Finance 319-334; Toshiki Tamai, "Public Goods Provision, Redistributive Taxation, and Wealth Accumulation" (2010) 94 J Public Economics 1067-1072.

[102] Charles P. Kindleberger, "International Public Goods without International Government" (1986) 76:1 American Economic Rev 1 at 8. Global peace is the primary and most important of the international public goods. They are also defined to include fixed exchange rates and freedom of the sea in economics.

neoliberalist argues that institutions are better placed to provide international public goods.[103] There is a consensus on the provision of international public goods irrespective of the divergent opinions on who should be responsible for providing the common goods.[104] The neo-liberalist and institutionalist approach that the institution should provide public goods seems suitable for international taxation, as institutions play key roles in the coordination of affairs of the ITRs.[105] Such institutions will have to be expanded to include actors that can realize the actualization of the global stability variables.

The gap in international taxation is that the relationship between the ability of states to provide public goods and the design of allocation of taxing rights has never been emphasized like it has been given due attention in the provision of public goods at the national level. The form of emphasis may not be the same with the national public goods, but at least the international taxation negotiation process should ask whether the allocation of taxing rights would enable the participating states to discharge their part of the obligations under the social contract. If such a relationship were considered in the DTA regime, the influential actors who designed the regime would have prioritized two things. First, the regime would have been designed to promote global peace, which is the main objective of the League. Second, the underlying objective in the allocation

[103] *Ibid*. The neo-liberalists are also described as the institutionalist. The realist may argue further that existence of institutions and its successful operation depend on the hegemon who is interested in the institution. In essence, the hegemon's dispositions and perspectives on global issues are more influential than the institution, according to the realist. Charles Kindleberger argue that the role of the US Treasury was instrumental to the successful establishment of the Bretton Woods institutions.

[104] The divergent views between the realists and the institutionalist are of less importance to my argument. The global stability variables can be realized regardless of whether the hegemon or the institution is on the side of production of the common goods. The hegemon may, however, influence the direction and dimension of the international public goods, and the resultant effect of this may defeat the fundamental principle of non-excludability of the public goods.

[105] Diane Ring, "International Tax Relations: Theory and Implications" (2007) 60:2 Tax L Rev 83 at 147-148. The views of both the realists and the neo-liberalists are influenced by the epistemic community, which is explained by the cognitive theory. The cognitive theory agrees that countries are involved in the bargaining process to pursue self-interest and reciprocal benefit. It, however, emphasizes that both neorealist and neoliberalist theories ignore a fundamental point – that is, how the countries' behaviours and perspectives are influenced by the epistemic community.

of taxing rights would have been to enable the states to get a fair tax revenue that would assist them in providing national public goods and not entirely deny them the taxing rights.[106]

The global stability variables are what the economists describe as public goods.[107] The global peace component falls under international public goods, while the sustainability and human rights components are under national public goods. The ultimate goal of my thesis is that international tax cooperation should be designed to realize global peace and stability through interdependent global stability variables. In the order of priority, sustainability is the most important of the variables as it forms the premise for realizing the remaining variables. Sustainability is simply about how global tax governance should protect the continued existence of participating states. The human rights component focuses on how the states can protect the inalienable rights and provide basic needs to their communities through their tax revenue shares of the global pie. The states must first protect their continued existence before they can shift attention to the citizens. States, as components of the global community, can only contribute towards the realization of global peace after their continued existence and the welfare of their citizens are guaranteed. I now explain these components of global stability variables and how they should be included in the international taxation negotiation process.

1.5.1 International Taxation and Sustainability

The argument is that global tax governance should be construed broadly to consider issues connected to the participating states' existence and functionality. The global stability variables are structured around these two components – the participating states' existence and functionality.

[106] There is no gainsaying that the DTA regime does not protect tax bases of the LMICs. The LMICs have been advised to consider signing tax treaties carefully as they may sign away their tax revenues.
[107] John G. Head, "Public Goods and Multi-level Government" in *Public Finance, Planning and Economic Development: Essays in Honour of Ursula Hick*s, ed, Wilfred L. David (New York, St. Martins Press, 1973) 20 at 21-23.

Sustainability addresses the existence of states and factors that can bolster or threaten their continued existence. The existence of states should first be guaranteed before they can discharge their obligations under the social contract. The underlying objective of international taxation negotiations should be how to design taxing rights that will enable participating states to generate sufficient tax revenues to meet their existential financial needs. The broad question the actors should ask is how we design an international taxation framework to enable the participating states, particularly the LMICs, to earn tax revenues for their sustainability financing needs effectively.

My sustainability analysis is limited to climate and environmental issues, as both relate directly to the existence and continued existence of participating states. The purpose here is to discuss how states can earn sufficient tax revenues to meet the financial needs necessary to achieve their climate and environmental goals. The description of the earth as 'mother earth' underscores the shared belief that the earth and its natural occurrences existed before states and, in the same vein, can consume or guarantee the continued existence of states.[108] The earth and its natural occurrences are self-sustainable without human interventions, but human existence depends on his ability to withstand and adapt to the natural consequences of the mother earth.[109] State, as the

[108] The Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Report affirms that natural occurrences such as floods, drought, cyclones, heat waves and fire can have a negative impact on the ecosystems and, consequently, the people who need to conserve the ecosystem for their sustainability. Natural disasters such as hurricanes and floods can cause the extinction of organisms and communities. The extreme events of the occurrences may cause forced migration as a way of adapting to the climate hazards. It is worrisome that the past trends of those events cannot provide reliable data on future trends - and this implies that additional negative effects that can be caused by extreme natural events cannot be conceived. See Camile Parmesan et al, "Terrestrial Freshwater Ecosystems and Their Services" in H.O. Portner et al, eds, *Climate Change 2022: Impacts, Adaptation and Vulnerability Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2022) 197 at 208 – 219. See also Gueladio Cissé et al., "Health, Wellbeing, and the Changing Structure of Communities" in H.-O. Pörtner et al., eds, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2022) 1041 at 1128.

[109] The devasting impact of floods causing death and displacement of people provides a good example to justify the need for people to adapt to these occurrences. The flood caused the death of almost two thousand people and the displacement of about two million people in Nigeria and South Africa between January and October 2022. See *Debt, Climate Finance and Vulnerability: A Brief on Debt and Climate Vulnerable Countries in Africa* (November 2022) published by Afronomics.

representation of a community of people with shared beliefs and values, must strengthen their 'resilience and adaptive capacity to climate-related hazards and natural disasters.'[110]

For example, it has been estimated that 51 African countries will need about USD579 billion between 2021 and 2030 for their adaptation mechanism for the ever-increasing climate hazards.[111] Tax revenue from domestic and international businesses is a sustainable source of finance for governments to meet their climate financing needs.[112] International tax frameworks that limit states' capacity to earn tax revenue on business activities carried on within its jurisdiction will impact the ability of that state to provide adaptation and mitigation measures for climate-related hazards. Therefore, such an international tax structure threatens the existence or continued existence of states, particularly the LMICs, which may not have alternative sources of revenues for climate financing needs.

The interesting point about climate-related hazards is that their effects can overlap and transcend beyond the original country that first experienced the hazard to other distant countries. As an example, the hazard of global warming is not limited to a specific region. It may start in a particular location, but collective human efforts to mitigate and adapt may not limit the spread of the hazard to other locations.[113] It is a grave error for people in location X to stay aloof when such a hazard starts in a far distant location Y on the erroneous belief that the problem is that of location

[110] Goal 13 of the UN Sustainable Development Gaols. See UN, Transforming Our World: The 2030 Agenda for Sustainable Development, UN Document No A/RES/70?1

[111] See *Debt, Climate Finance and Vulnerability: A Brief on Debt and Climate Vulnerable Countries in Africa* (November 2022) published by Afronomics at 2.

[112] Reports on climate financing in Africa affirm that African governments spend a significant amount of their budgets on climate adaptation and other sources from local and international agencies. For example, 41 African countries contribute 20% of their adaptation needs. See Morgan Richmond et al., *Financial Innovation for Climate Adaptation in Africa* (Global Center on Adaptation, 2021) 8. The combined values from the governments' contribution level and other flows from local and international are still insufficient for the African countries' climate finance needs. First, the government's contribution level could be increased by increasing its revenue-earning capacities through tax policy.

[113] Brian O'Neill et al, "Key Risks Across Sectors and Regions" in H.-O. Pörtner et al, eds, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2022) 2411 at 2504.

Y. The problem in location Y may directly or indirectly impact location X. People can migrate from a climate-ridden location to another location, and such migration may burden the welfare of the new location.[114] The collective response to address the problem when it is still at the lowest level in location X will result in a global benefit.

The instrumentality of international tax can be used to address climate-related hazards rather than encouraging developed countries to donate to developing countries.[115] If there is a compelling need to assist the developing countries, the assistance should complement what the donee countries could have achieved on their self-sustained efforts. Donations may not be really helpful to the LMICs as the donations enable the donor countries, which are most likely to be the HICs, to influence some of the economic policies of the LMICs. Donations should be welcomed where they are truly needed, such as in emergencies and not where the LMICs have alternative sources to achieve the objective for which the donations are made.

The underlying presumption of any international arrangements is that parties to such arrangements are, first of all, self-existing.[116] The international arrangements only seek to design

[114] See also Gueladio Cissé, et al, "Health, Wellbeing, and the Changing Structure of Communities" in H.-O. Pörtner et al, eds, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2022) 1041 at 1128. The World Bank had estimated in 2018 that there would be more than 143 million migrants from Latin America, Sub-Saharan Africa and Southeast Asia by 2050. See John Podesta, The Climate Crisis, Migration and Refugees (Global Economy and Development, 2019) 2 (online) <www.brookings.edu/wp-content/uploads/2019/07/Brookings_Blum_2019_climate.pdf>

[115] There is an existing arrangement under which the developed countries are expected to donate financial resources to the developing countries to assist the developing countries in their adaptation and mitigation efforts. The arrangement is traceable to Article 11 of the UN Framework Convention on Climate Change and Article 9 of the Paris Agreement. Under this arrangement, some developed countries are committed to donating huge sums to assist developing countries in all climate-related hazards. See UN, *UN Framework Convention on Climate Change*, 9 May 1992, FCC/INFORMAL?84 GE.05-62220 (E) 200705; *UN Paris Agreement*, 12 December 2015; Michael Jakob et al, "Climate Finance for Developing Country: Blessing or Curse" (2015) 7:1 Climate & Development 1 at 2-3.

[116] The preamble of an international agreement traditionally gives background information about its signatories. One of the background facts is to mention, whether by direct express or by implied statement, that the signatories to the agreement are independent and sovereign on their own. The presumption of independence does not mean that participating states are equal to one another in all respects. For example, the art of the preamble of the UN Paris Agreement on climate change reads, "Reaffirming the principle of sovereignty of States in international cooperation to address climate change."

a global ecosystem where the independent entities can relate with one another. The validity of any international arrangement, therefore, depends on the validity of this presumption. The international character of any international arrangement will be questionable if the parties to it are not self-existing or they cease to be self-existent after the agreement. Any international tax arrangement that allocates taxing rights without considering how the allocation can impact the existence or continued existence of the parties runs contrary to the real meaning of 'international' in the arrangement. Consideration of factors affecting the existence of participating states in international tax cooperation should be part of the broad meaning of international tax problems to retain its international character.[117]

Considering the UN's robust work on climate and environmental issues, it is expected that the UN should have considered in its international tax policies how tax structure can be tailored to states' climate and existential needs. The UN can be excused for the failure to consider this approach it its model tax treaty because it had not started the robust work on the climate and environmental issues when its tax treaty model was first designed. This excuse cannot, however, avail the UN with respect to its recent work on taxing the digitalized economy, which is contained in Article 12B. The UN had consolidated its works on climate issues in notable frameworks, such as the UN Framework Convention on Climate Change, the Paris Agreement and the Intergovernmental Panel on Climate Change, before it started working on the tax consequences of the digitalized economy.[118]

[117] Assuming the Two Pillar is eventually signed by the 142 countries negotiating the instrument. The preamble of the multilateral convention will mention the states that are signatories of it. For the OECD to retain the number of participating states in this instrument, the design of the framework should contemplate two things: first, the individual states will need to finance their climate expenditure from their tax structure to preserve its existence, and two, the existence of those states will validate the number of the signatories and fairness of the framework to the existential needs of its signatories.

[118] The Intergovernmental Panel on Climate Change ('IPCC') was established in 1988. The IPCC was established to provide scientific reports and technical advice on the impact of climate and how countries can adapt and mitigate these effects. The composition of the IPCC from 195 countries and a broad spectrum of experts makes its reports reliable.

1.5.2 International Taxation and Human Rights

The human rights component of the global stability variables focuses on the functionality of the participating states to their citizens. The functionality of states should be considered after issues affecting their existence have been incorporated into the negotiation process. Human rights encapsulate all rights that support the continued enjoyment of life, liberty and security of the person for people who voluntarily surrender their authority to an elected sovereign to govern their affairs.[119] International tax frameworks should ensure that states can be well positioned to guarantee all human rights provisions of the UN Universal Declaration of Human Rights for their people from whom they derive legitimate authority. The underlying objective of the negotiation process should be that the allocation of taxing rights should not deny states the means of protecting the fundamental rights of their people.[120] In this regard, the question the actors should ask is

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See About the IPCC online at <www.ipcc.ch/about/>. The UN Framework Convention on Climate Change was signed in 1992, and the Paris Agreement was executed in 2015. The UN's work on tax consequences of the digitalized economy started at its 15th session in 2017. Its report encapsulates the challenges of the digital economy and issues to delegate to a special committee. The inaugural report shows its deep understanding of the problem and the need to adopt a cooperative approach towards finding enduring solutions. However, the UN has not integrated its prior work on climate issues into the digital tax framework. See Committee of Experts on International Cooperation in Tax Matters, Tax Challenges in the Digitalized Economy: Selected Issue for Possible Committee Consideration (15th Session, 17-20 October 2017) online: <www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-04/15STM_CRP22_-Digital-Economy.pdf>

[119] The 2015 report of the UN Human Rights Council on extreme poverty and human rights describes tax policies as human rights policies because states' human rights obligations can be achieved through their tax policies. Though the UN report focuses on national tax policies, the alignment of tax policies to human rights policies applies to international tax policies since international tax arrangements will eventually become part of national tax law after the ratification of the tax treaty. Apart from this, it appears that the basis for the UN's statement is that the revenue earned by states can be used to promote human rights concerns. Since the objective of states in either formulating a robust national tax policy or participating in international cooperation is to enhance their revenue-earning capacity, the UN's statement should apply to international tax policy. See. Philip Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, UNHRC, 29th Session, A/HRC/29/31, paragraph 53. Oliver De Schutter argues that tax policies are human rights policies for three reasons. First, states can invest resources generated from a tax on infrastructure that addresses human rights needs. Second, can effectively reduce inequality by redistributing the wealth (tax) collected from the rich to the poor. Third, tax policies can make states more accountable to those who elect them. The accountability must reflect on what to tax and how the tax revenues are spent. See. Olivier De Schutter, "Taxing for the Realization of Economic, Social and Cultural Rights" in Philip Alston & Nikki Reisch, eds, *Tax, Inequality and Human Rights* (United States: Oxford University Press, 2019) 59

[120] Christians are of the view that the current international tax framework does not sufficiently support human rights. She is, however, optimistic that the OECD minimum standard on treaty abuse could be a potential avenue to use tax instruments to realize the human rights agenda. Since treaty abuse is any form of tax planning contrary to the treaty partners' intention, Allison argues that human rights activists could launch advocacy against any tax planning that

whether their approach to resolving international tax problems will enable the participating states to earn sufficient tax revenues for their human rights needs.

International taxation instrumentality can be used to promote these human rights in at least two ways. First, the international tax framework should consider the economic inequalities of tax treaty partners in allocating taxing rights between them. The framework should adopt a 'fit-for-situation', where the economic situations of tax treaty partners determine the applicable standards and measures, instead of a 'fit-for-all' approach that tends to assume that economic indices of all jurisdictions will always be the same. The fit-for-situation approach envisaged in this context is similar to Canada's differential styles of negotiation of tax treaties with the LMICs and the HIC, respectively, as noted by Kim Brooks.[121] The insensitive assumption of a 'fit-for-all' approach

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results in tax loss and consequently affects human rights. The challenge with this approach is that the opinion suggested by Christians is not direct and may not yield desirable results. It seems the approach can only be used in the event of tax planning not conceived by the treaty. Assuming there is a clear case of tax planning that is contrary to the applicable tax treaty, the action against such planning will first be established on the basis that it is contrary to the terms of the treaty partners and not because the tax planning can result in the denial of human rights. If the actors had considered a human rights consequence of the tax treaties, they would have addressed other activities that can result in tax loss and consequently occasion human rights denial, such as restrictive provisions in tax treaties. Allison Christians, "The Search for Human Right in Tax" in Philip Alston & Nikki Reisch, eds, *Tax, Inequality and Human Rights* (United States: Oxford University Press, 2019) 116 at 126.

[121] Canada's approach to international taxation is a perfect example of how consideration of the economic statuses of treaty partners impacts the treaty's terms. Relying on Canada's tax treaties between 1988 and 2010, Kim Brooks finds that Canada tends to be generous by using the UN model when negotiating tax treaties with low-income countries. In some cases, Canada's concession to the low-income countries is even more than the recommendation of the UN. To allow the low-income countries to get sufficient tax revenue from the tax treaty, Canada agrees to a lower threshold for the permanent establishment and allows the source country to get a higher withholding tax rate on passive income. Canada, however, adopts the OECD model, which is less generous than the UN model, where negotiating with an equally developed country. For example, in tax treaties with ten low-income countries, a construction or assembly project will constitute a permanent establishment in a source country if it is carried on within six months. This is contrary to the OECD's standard of twelve months. In some other treaties, Canada agreed to a shorter period of three months. Kim Brooks, "Canada's Evolving Tax Treaty Policy toward Low-Income Countries" in Arthur J. Cockfield, ed, *Globalization and its Tax Discontents: Tax Policy and International In*vestment (Toronto: University of Toronto Press, 2010)) 189. Canada has not departed from this approach in its post-2010 era. Canada's tax treaties with Israel and Madagascar, both in 2016, reflect the deliberate concession to lower the threshold of PE for low-income countries and maintain the OECD standard for high-income countries. See Convention Between Canada and the Republic of Madagascar for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed on 24 November 2016 (10 March 2021) online at https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties/country/madagascar-convention-2016.html. The period of activities of a building site, construction or installation project is reduced to six months. The definition of permanent establishment also includes the UN standard of collecting insurance premiums. Also, see the Convention between the Government of Canada and the Government of the State of Israel for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed on 21 September 2016 (10 March 2022) online:

may rob the states, particularly the LMICs, of revenues to provide for their communities and, consequently, the people of their entitlement to human rights.

International shipping and air transport taxation under Article 8 of the OECD and the UN models is an ideal example of how a 'fit-for-all' can result in significant tax loss and consequent denial of human rights. Article 8 is a 'sui generis' tax provision that does not depend on PE in allocating taxing rights between the residence and the source jurisdictions. The Article grants exclusive taxing rights to the residence jurisdiction of the international transport companies without considering a situation where companies from the source jurisdiction may not have reciprocal businesses in the other jurisdiction.[122] By way of illustration, resident companies of country X engaging in international transport business in country Y are exempted from paying taxes to country Y on their activities in country Y. Country X, being the residence country of the transport companies, has the exclusive right to impose tax on incomes of those companies. The UN's alternative Article 8B, which allows source countries to impose tax on transport activities that are more than casual, is only used by a handful of countries.[123]

The approach of Article 8 may be mutually beneficial if both jurisdictions have reciprocal businesses in the international transport sector, which does not necessarily need to be equal to each other in all respects. Using the previous illustration, as country X is collecting taxes on incomes made by its resident transport companies from their activities in country Y, resident transport companies of country Y doing business in country X will be paying taxes on their activities in

https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties/country/israel-convention-2016.html. The activity's period is limited to twelve months, and there is no provision for collection of insurance premiums.

[122] Bob Michel & Tatiana Falcão, "Taxing Profits from International Maritime Shipping in Africa: Past, Present and Future of the UN Model (Alternative B)" (2021) ICTD Working Paper 133; Lang, Daniel. "Taxation of International Aviation: A Canadian Perspective" (1992) 40:4 CTJ; Maisto Guglielmo, "The History of Article 8 of the OECD Model Treaty on Taxation of Shipping and Air Transport" (2003) 31:6/7 Intertax 232. Article 8 of both the OECD and the UN are similar in all respects. The Article provides that 'profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State'.

[123] Bob Michel, *supra* note 122 at 25 -27.

country X to country Y. The result will show what each country would have lost in granting tax exemptions to the incomes made.

Article 8 produces different results if the tax treaty is between the HICs and the LMICs. The HICs, which may have robust international transport businesses, stand to gain more from this Article at the expense of LMICs, which may not have reciprocal transport businesses in the HICs.[124] Considering the stimulating role of the international shipping sector in global trade, the LMICs in strategic locations will continue to be exploited by multinationals, which can, because of the investment opportunities in the LMICs, lobby their home countries to negotiate tax treaties with the LMICs in strategic location.

The 1977 tax treaty between Italy and Nigeria is a good example of exploiting the LMICs in strategic locations. Under this tax treaty exclusive to international transport, Italian companies operating in Nigeria's maritime and aviation sectors are exempted from Nigerian taxes.[125] Similar tax exemption is also available for Nigerian companies operating in Italy. To date, Nigeria has not exploited this provision but Italy is maximizing the tax exemption of the treaty. Grimaldi Lines,

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[124] Again, Canada offers another exemplary model in this Article that can bridge the gap between unequal countries. For example, Canada's tax treaty with Nigeria has the usual exclusive taxing right by the residence country, but it allows Nigeria to impose taxes in cases where Nigeria's business entities have no reciprocal businesses in Canada. In that case, Nigeria will still get a fair share of Canada's multinationals' incomes earned in Nigeria rather than losing everything to Canada. Article 8(2) tax treaty between Canada and Nigeria provides as follows:

> Notwithstanding the provisions of paragraph 1 of this Article, where no enterprise of a Contracting State has, in a year, derived earnings in the other Contracting State from the operation of aircraft in international traffic, earnings derived in that year in the first-mentioned State by a resident of the other State from the operation of aircraft in international traffic may be taxed in the first-mentioned State but the tax so charged shall not exceed the lesser of:
>
> a. one per cent of such earnings, and
>
> b. the lowest amount of Nigerian tax that would have been imposed on such earnings if they had been derived by a resident of any third State in which no enterprise of the first-mentioned State had derived earnings from the operation of aircraft in international traffic in that year.

See *Agreement between the Government of Canada and the Government of the Federal Republic of Nigeria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With respect to Taxes on Income and on Capital Gain*, 4 August 1992, E102399 -CTS 1999 No. 48

[125] See Article 3 of the *Agreement between the Federal Military Government of the Federal Republic of Nigeria and the Government of the Republic of Italy for the Avoidance of Double Taxation on the Income Arising from the Business of Operating Aircraft or Ships*, 22 February 1977, (entered into force 1 January 1978).

an Italian company with a presence in over 25 countries and one of the largest shipping companies in the world, is a big player in Nigeria's maritime sector.[126] Apart from the regular carriage of goods, Grimaldi Line also participates through its subsidiaries in related areas like port facilities management and logistics.[127] While the subsidiaries are recognized as Nigerian companies by their registration and therefore taxed in Nigeria accordingly, the incomes allocated to the parent company and characterized as shipping incomes will be exempted from tax in Nigeria.

The second way human rights' needs can be enhanced in international taxation is to try as much as possible to avoid a malleable framework that multinationals can easily exploit in the name of tax planning. Multinationals are profit-driven and can, in pursuit of this motive, exploit loopholes in the tax framework to earn more tax savings. In designing the framework, the actors should be conscious of the considerable skills of multinationals and their ability to circumspect rules in their tax planning strategies.[128] The framework should, therefore, be watertight and protect the tax bases of countries, especially poor countries with relatively few resources to monitor the activities of multinationals. Allison Christians, professor of international tax, reports how the United Kingdom Parliament considered but rejected the Double Taxation Treaties (Developing Countries) Bill, which sought to compel the United Kingdom to consider how their tax treaties with the developing countries could impact the poverty (which is part of human rights) level of the

[126] See <www.grimaldi.napoli.it/en/filiale_grimaldi_lines.html>

[127] The Nigeria subsidiary is Port and Terminal and Services Nig Ltd. The subsidiary operates under a concession agreement with the Government of Nigeria in 2005 as the manager of the Lagos seaport, which is Nigeria biggest seaport. See <www.ptml-nigeria.com/index.html.>

[128] It was even argued that multinationals appear to understand the international business terrain, which the government seeks to regulate through taxation, better than the government. The multinationals had traversed the terrain before the intervention of the government. For example, the Vestley Brother's multinational company structured its food business in the UK and Argentina between 1919 and 1921 to minimize its tax liabilities. It did this by creating an international structure that grants ownership of assets to intermediary entities. See Sol Picciotto, "Technocracy in the Era of Twitter: Between Intergovernmentalism and Supranational Technocratic Politics in Global Tax Governance" (2022) 16 Regulation & Governance 634 at 639.

developing countries.[129] The rejected Bill confirms that some HICs are conscious of the negative impact of their tax treaties on the welfare of the LMICs.

1.5.3 International Taxation and Global Peace

The last component of global stability variables focuses on the functionality of states in the global community. States, as constituents of the global community, should strive to ensure stability and peace of the community.[130] In the order of priority, the existence and sustainability of states should be preserved first, followed by states' functionality to their citizens, and lastly, states' functionality to the global community. States will fail to deliver on their obligations to global peace if they cannot preserve their existence and deliver basic amenities to their people. I am aware that the concept of peace can be subject to different interpretations; the peace I refer to in this thesis is the peace within the context of the works of the League –clearly the absence of violence.[131] The actors should ask whether the approach to resolving international tax problems will promote or prevent peace.

It is surprising that the negotiation process leading to the DTA regime did not consider the need for global peace and its relationship with the ITR. The League's main objective was to address post-World War reconstruction efforts and promote global peace. The League's decision to coordinate the first-ever global tax governance after unilateral and uncoordinated efforts had not yielded results strongly indicates that the instrumentality of international taxation could be used to achieve the League's objective of promoting global peace.

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[129] Christians, "The Search for Human Rights in Tax," supra note 120 at 126. The Netherlands and Ireland adopted similar approaches to evaluating the impact of their international tax systems on poorer nations.
[130] Akira Iriye, *Global Community: The Role of International Organizations in the Making of the Contemporary World, supra* note 62.
[131] Nils Petter Gleditsch, Jonas Nordkvelle & Håvard Strand, "Peace Research – Just the Study of War?" (2014) 51:2 J Peace and Research 145 at 148 -149.

Two events in the history of international taxation buttress the argument that global tax governance can promote global peace, and its failure to promote peace may trigger war. The first event, which occurred shortly before the commencement of the OECD's works on the BEPS, is the outcome of the investigations conducted by the United States and the United Kingdom on tax evasion of multinationals. In 2012, the Committee of Public Account of the British House of Commons discovered from their investigation that Starbucks, Google and Apple had not been paying correct taxes on the incomes earned in the United Kingdom.[132] Out of the three companies, Starbucks' alleged tax evasion attracted large public attention. The committee discovered that Starbucks had claimed operating losses on its business for fourteen years out of its fifteen-year business period.[133] Out of almost $ 5 billion in sales made in the United Kingdom, Starbucks had only paid a meagre sum of $13.76m as corporate taxes for the entire period of fifteen years.[134]

Upon becoming aware of the magnitude of the tax evasion by Starbucks, the people of the United Kingdom demonstrated their disapproval by boycotting Starbucks products for two months.[135] The negative reaction was almost becoming violent with the attempt to take over some of Starbucks' branches and convert them into homeless shelters.[136] The possibility that the boycott and the attempted violence could result in an imminent global disquiet cannot be ruled out. If the attempted takeover of Starbucks' branches was eventually carried out in the United Kingdom, the United Kingdom companies operating in the United States may also be destroyed as a reprisal attack. The takeaway from the people's reaction to the alleged tax evasion is that the people understood that tax evasion directly impacts their welfare, especially when the United Kingdom

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[132] Ruth Mason, The Transformation of International Tax, *supra* note 32 at 364 - 366.
[133] *Ibid*
[134] *Ibid*
[135] Anthony Faiola, "For Starbucks in Britain, A Skinny Tax Bill" The Washington Post, (6 December 2012) online: <www.washingtonpost.com/world/for-starbucks-in-britain-a-skinny-tax-bill/2012/12/06/646ba86a-3f09-11e2-8a5c-473797be602c_story.html>
[136] *Ibid*.

was still coping with the consequences of the 2008 global financial crisis[137]. To reduce the increasing effect of the boycott and the protest, Starbucks estimated to pay $16 million in taxes in 2013 and 2014 – an amount which was much higher than the total amount of taxes it had paid over the last fifteen years.[138]

The likely question a probing mind will ask is, what is the connection between the violence against Starbucks and international tax? The truth is that Starbucks was able to undertake the tax planning because of the design of the international tax framework, which allows multinationals to set up subsidiaries or branches in various locations and take benefit of bilateral tax treaties that may exist between countries where the multinationals' businesses are located. The allegation was that Starbucks was diverting its profits from the United Kingdom, where the tax rate is around 24%, to a low tax jurisdiction to maximize profits.[139] Starbucks diverted its profits earned in the United Kingdom by paying royalties to another unit within its group. It also paid more than 20% premium to another subsidiary in Amsterdam, which was in charge of roasting its coffee beans.[140] Some of these outward payments, for example, royalties, are either not taxed or very low in the source country where there is a bilateral tax treaty between the residence and the source countries.[141]

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[137] *Ibid*.
[138] *Ibid*.
[139] *Ibid*. Similar to Starbucks' tax evasion were alleged tax practices of Google and Amazon in the United Kingdom. See also Ruth Mason, The Transformation of International Tax, *supra* note 32 at 364 - 366.
[140] *Ibid*.
[141] By Article 12 of the bilateral tax treaty between the United Kingdom and the Netherlands, royalty arising in the United Kingdom and due to a beneficial owner in the Netherlands is exclusively taxed in the Netherlands. The royalty payment made by Starbucks to another subsidiary in the Netherlands is exempted from taxation in the United Kingdom. The United Kingdom can only adjust the royalty payment under Article 12(4) if the payment is not at arm's length – that is, the payment exceeds what an independent enterprise in the same or similar condition would have paid in that circumstance. See UK/Netherlands Double Taxation Convention and Protocol (26 September 2008), entered into force 25 December 2010.

The second event was in 2019 when France introduced its 3% DST, which substantially affected the United States giant technology companies, such as Facebook and Google.[142] The United States considered France's DST discriminatory against its products and threatened to sanction France.[143] The United States President openly criticized the French government on social media platforms (X, formerly known as Twitter), describing a fellow president as foolish.[144] France had to use diplomatic means to address the imminent tariff war and threat from the United States, and both countries agreed to defer to the OECD-led cooperative efforts on digital tax.[145] The threat of sanctions and possible retaliation could generate another trade tension and economic war between the countries. Considering the economic sizes of the two countries, the spillover effect of such a trade war could affect other parts of the global community. The OECD acknowledges in its 2020 economic impact assessment on the two-pillar solution that the contention between France and the United States could threaten the relationship between the two countries and possibly the global community.[146]

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142 Wei Cui, "The Digital Services Tax on the Verge of Implementation" (2019) 67:4 CanTax J 1135 at 1147.

143 Jacob Framuk, "Trump Says He Might Put 'Tariffs' on French Wine In Response to Digital Tax" CNBC, (26 July 2019) online: https://www.cnbc.com/2019/07/26/trump-threatens-french-wine-after-france-passes-digital-tax.html

144 See Donald J. Trump (@realDonaldTrump), 26 July 2019, online: <twitter.com/realDonaldTrump/status/1154791664625606657> President Donald Trump's tweet reads as follows: "France just put a digital tax on our great American technology companies. If anybody taxes them, it should be their home Country, the USA. We will announce a substantial reciprocal action on Macron's foolishness shortly. I've always said American wine is better than French wine!"

145 'Macron and Trump Declare Truce in Digital Tax Dispute", Reuters, 20 January 2020, online: <www.reuters.com/article/us-france-usa-tax-idUSKBN1ZJ24D

146 See OECD, OECD/G20 Base Erosion and Profit Shifting Project, *Tax Challenges Arising from Digitalisation – Economic Impact Assessment* (Paris: OECD, 2020) at 11, 184-187. The OECD claims that the imminent trade war could reduce global GDP by over 1%. The OECD argues that the need to avert the imminent trade war is one of the reasons why countries should support its collaborative efforts to address the tax consequences of the digitalized economy. While agreeing that possible retaliation and counterretaliation of sanctions arising from France's digital service tax could lead to a trade war, Wei Cui argues that the trade war was only between the United States and the rest of the world. The OECD's intervention is just to get the 'buy in' of the United States, and not really because of the interest of the global community. See Wei Cui, "New Puzzles in International Agreements," available on SSRN online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3877854>

The negotiation process driven by the realization of global peace will result in a tax framework that allocates satisfactory taxing rights among jurisdictions. The outcome of international tax negotiation has never been scientific. It has always been a compromise where a jurisdiction concedes a taxing right, expecting other gains it can get from the framework. The compromise can foster global peace provided the conceding jurisdiction eventually realizes the expected gains. The compromise will amount to coercion if the framework is not promising to the conceding jurisdiction, as is the case of the LMICs. The LMICs' participation in such a regime, even when the regime does not maximize its revenue needs, could be a result of diplomatic coercion and pressure – and this situation cannot exist forever. The continued participation is like sitting on a powder keg – the LMICs may revolt against the regime when they have the means to do so, and the revolution may destabilize global peace.

1.6 Implementation of the Global Stability Variables

Integration of the global stability variables into the international taxation negotiation process rests on two factors. First, the actors involved in the process must reflect these variables. International tax is greatly influenced by the actors who set the agenda and design the framework. These actors include experts, institutions, non-governmental organizations and the international business community. The first step in realizing the global stability variables is to carefully select these actors and expand their scope so the negotiation process can be undertaken in a broad manner. I discuss in detail in chapter five the normative framework for the composition of the actors that can promote global stability variables.

Second, the outcome of the negotiation process should be a multilateral framework achieved through consensus of the participating states. It is not in the best interest of the LMICs to design a model subject to further bilateral negotiation. The purpose of the global stability variables may be lost in the subsequent bilateral negotiation of the model, particularly if it is

between the HICs and the LMICs. The HICs may utilize other means to subtly coerce the LMICs to agree on what does not guarantee the variables. I also discuss how to achieve consensus among actors in chapter five.

1.7 Research Methodology and Theory

1.7.1 Research Methodology

International tax is historical – the historical development is both evolutionary and revolutionary.[147] The historical nature of the discourse makes historical methodology a perfect choice for my analysis.[148] I pierce the veil of the history of international tax to find the disconnect, the time of the disconnect and what probably caused the disconnect. As rightly argued by Jim Philips, professor of legal history, historical analysis of a concept tells us about the contextual factors which impact the concept and its development.[149] It also explains how that concept is connected to the society within which it was developed.[150] I explain in the previous sections that the ought-to-be-goals of international tax should be how to sustain global peace, and the only justification – and indeed, unarguably – is that the League of Nations created and sustained the ITR. Until we can situate the ITR within the context of the broader mandate of the League, the ITR will continue to create tensions between the Global North and the Global South. I also argue that the actors' narrow perspectives of the international tax problem occasioned the disconnect.[151]

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[147] Sunita Jogarajan, "Tax in History: The 100th Anniversary of International Institutions and International Taxation." (2020) 48:10 *Intertax*, Reuven S. Avi-Yonah, "All of a piece throughout: The Four Ages of US International Taxation." (2005) 25 *Va. Tax Rev.* 313.

[148] Lorenzo Bosi & Herbert Reiter. "Historical Methodologies." (2014) Methodological Practices In Social Movement Research 117-43.

[149] Jim Philips, "Why Legal History Matters" (2010) 41 Victoria U Wellington L. Rev 293 at 295

[150] *Ibid*. Philips further argues that historical analysis enhances our ability to find enduring solutions to problems by understanding the past—how the problem actually started and what the state of affairs was like before the problem.

[151] *Ibid*. Jim argues that the development of a subject or concept is always connected to its society – and that implies that the society has an impact on what will later be regarded as the normative framework of that. The society which Jim refers to here is constituted by actors, and the perspectives of the influential ones among the actors would likely have more impact on the concept. This is the exact case of the actors of international tax.

I divide the historical development of the ITR into three phases. The first phase is the crystallization period of the ITR. This period starts from the time immediately before the League's creation to the League's exit from the international tax landscape. As earlier argued, some HICs, like the United Kingdom and the United States, had their respective approaches to international tax. The approach was limited to how foreign taxes paid by their multinationals could be addressed to avoid double taxation and discrimination against their residents who wished to invest abroad. The two countries acknowledged the need to support their citizens' foreign business undertakings through either the credit system or the exemption method. The approaches did not, however, address the double taxation properly until the League was established. The intervention of the League was the springboard for the crystallization of efforts, such as those made by the United Kingdom and the United States. I examine this phase in detail in chapter two.

The second phase is described as the stabilization phase. The period started with the exit of the League in 1946 and the emergence of the OECD as the new international economic order. The major feature of this era was that the OECD, an exclusive institution with a limited scope strictly on economic matters, replaced the League. The OECD inherited and improved on the legacy of the League to design another tax treaty model in 1963. The 1963 model is being amended many times and the 2007 tax treaty model is the latest version of the OECD model. This period is carved out to analyze how the global stability variables were also abandoned in that era. This is examined in chapter three of the thesis.

We are now in the third phase of the ITR, which started in 2016 with the creation of the BEPS Inclusive Framework. I describe this phase as the contemporary phase. The major feature of this phase is that the exclusive OECD community is a bit expanded to include non-OECD states in the deliberation of international tax problems. The present phase is revolutionary as it seeks to

respond to the challenges caused by the digitalized economy. Evaluation of this phase is to examine whether the actors involved in international tax have broadened their perspectives to incorporate into their negotiations issues that affect the participating states' existence and functionality. Like how the first and second phases produced the DTA and the OECD models, respectively, this phase produced the two-pillar framework. This thesis evaluates in chapter four how the OECD's two-pillar solution also misses the opportunity of using the large forum of actors in the Inclusive Framework to apply the global stability variables in policymaking. Though this thesis' analysis is limited to the two-pillar solution, it is important to note that the actors that designed the UN's alternative approach under Article 12B did not consider the global stability variables in the deliberations.

I explore these three phases of the historical development to explain what is lacking in the ITR negotiation process. I argue that the negotiation process in all three phases has been tax-centric without considering issues connected to the participating states. The historical methodology helps to affirm that the negotiation process has been on a wrong trajectory from the beginning of the ITR. I also employ historical analysis to find a linkage between international taxation and the promotion of global peace. I observed in the previous sections how the fabric of international tax enabled Starbucks to minimize its tax liabilities in the United Kingdom and the consequences of that tax planning. I allude to the imminent trade war between the United States and France, triggered by the latter's DST. These historical facts may be a prelude to truth and reconciliation that is much needed for effective international tax reform. I discuss in detail this moment of truth and reconciliation in chapter five.

The historical analysis is incomplete without analyzing the relevant official documents, reports, soft laws and other written instruments made in each of the three phases. So, I use the

doctrinal method to complement my historical analysis. From the descriptive component of the doctrinal method, I conceptualize international taxation as a product of negotiations among independent states and identify the link between the negotiation process and my thesis.[152] I examine relevant statutes, documents, reports, and treaties. I employ the prescriptive component of the doctrinal method to suggest the best course of action – that is, the actors should broaden their perspectives of international tax problems to issues that affect the existence and functionality of the participating states.[153] Lastly, under the justification component, I employ the doctrinal method to argue that the current ITR does not fit into the broad mandate of the League of promoting global peace.[154] This is where doctrinal methodology is employed to provide insights to the analysis. Both historical and doctrinal methodologies are complementary to each other in this thesis.

1.7.2 Research Theoretical Framework

I encountered the Critical Sensemaking (CSM) Theory while finding a theory to advance my argument. The management discipline often uses the CSM theory to study organizational changes and how actors respond to and make sense of those changes.[155] The functions and purposes of the theory, however, made it relevant to studies on international tax, particularly when the studies focus on how actors think that their approaches to problems make sense, the rules and the formative context involved in the actors' sensemaking process to a particular phenomenon.[156] Instead of focusing on the outcome of a process, the CSM theory focuses on the process leading

[152] Jan M Smits, *What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research*, (2015) Maastricht European Private Law Institute, Working Paper No 2015/06 at 8
[153] *Ibid* at 10.
[154] *Ibid* at 11
[155] Jean Helm Mills, Amy Thurlow & Albert J. Mills, "Making Sense of Sensemaking: The Critical Sense Making Approach" (2010) 5:2 Qualitative Research in Organizations & Management: An International J. 182
[156] *Ibid.*

to the outcome as that process provides more explanations of the influences and the power dynamics that shape the outcome.[157]

I argue in this thesis that the faulty negotiation process is the major problem of the ITR. Since my focus is on the process, the CSM theory seems to be perfect to advance my argument on how the narrowed perspectives of the early actors of international tax shaped the ITR. I also use the CSM theory to provide a framework for the global stability variables in a manner that makes sense to all the participating states. I argue that there will be a fairer tax regime if the sensemaking process of actors involved in the negotiation process is exercised within the contours of or influenced by the global stability variables.

What is the CSM Theory?

The CSM theory is coined from two distinct but interrelated theories – sense-making and critical theories.[158] Jean Helms Mills and his colleagues trace the development of the CSM theory from when it was still a 'sensemaking theory' to when critical theory was added to it to explain how powerful actors dominate and shape a change process and consequently determine the outcome.[159] The sensemaking theory was developed by Karl E. Weick in his influential book titled Sensemaking in Organization published in 1995.[160] The main claim of the sensemaking theory is that in responding to organizational shocks, people tend to act in a way that makes sense and is plausible to them.[161] Weick argues that seven interrelated properties influence people's

[157] *Ibid*.
[158] Christopher M Hartt, "The Non-corporeal Actant As A Link Between Actor-Network Theory and Critical Sensemaking" (PhD Dissertation submitted to Saint Mary University, 2013) at 20.
[159] Jean Helm Mills, Amy Thurlow & Albert J. Mills, "Making Sense of Sensemaking, *supra* note 155 at 186.
[160] Karl E. Weick, *Sensemaking in Organizations* (London: Sage Publications, 1995)
[161] *Ibid* at 20. Weick distinguishes between his sensemaking theory and interpretative action, which is often mistakenly taken to be the same as sensemaking. The distinction is that sensemaking affects how people interpret the problem confronting them. He uses examples of how a juror's view of a problem is impacted by his previous experience. The juror tends to be influenced by how the previous problem was resolved in the name of being consistent. Weick argues as follows:

sensemaking exercise.[162] The CSM theory shares some attributes with the discursive institutionalism theory in political science in that they both acknowledge that the background and identity of actors shape their reasoning and ideas.[163] The discursive institutionalism talks about how institutional actors use the power of their ideas and discursion to create and sustain institutions.[164] The ideas are strategic focal points of interest that change narratives, while discourse concerns how the ideas are presented to other actors and the public.[165] Discursive institutionalists argue that the success of ideas, in terms of their acceptance and adoption, depends on how those ideas are represented.[166] That is where ideas interface with the discourse. I prefer the CSM theory because its seven properties provide me with sufficient toolkits to explain the major thrust of this thesis.

I need to explain how the critical theory is incorporated into the sensemaking theory before explaining each of the seven sensemaking properties and how they relate to my argument on the negotiation process of the ITR. The critical theory was added later to provide a comprehensive account of other factors influencing the seven properties.[167] Weick's analysis of the sensemaking theory assumes that the sense-making process occurs naturally without considering the unequal distribution of power among the actors involved in the process.[168] Critical theory incorporates into

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> The key distinction is that sensemaking is about the way people generate what they interpret. Jury deliberations, for example, result in a verdict. Once jurors have that verdict in hand, they look back to construct a plausible account of how they got there. During their deliberation, they do the same thing, albeit in miniature. Deliberating primarily develops the meaning of prior deliberating rather than subsequent deliberating. Jurors literally deliberate to discover what they are talking about and what constitutes evidence. They look for meaningful consistencies in what has been said, and then revise those consistencies. Authoring and interpretation are interwoven. The concept of sensemaking highlights the action, activity, and creating that lays down the traces that are interpreted and then reinterpreted.

[162] *Ibid* at 17.
[163] Vivien A. Schmidt, "Discursive Institutionalism: The Explanatory Power of Ideas and Discourse" (2008) Annual Rev Political Science 303 at 314
[164] *Ibid*
[165] *Ibid* at 307
[166] *Ibid*
[167] Jean Helm Mills, Amy Thurlow & Albert J. Mills, "Making Sense of Sensemaking, *supra* note 154 at 187.
[168] *Ibid*.

the seven properties three different but related factors (jointly called critical theory). The first factor is the influence of social elements and formative contexts on the sense-making process.[169] The second factor is how organizational established rules of behaviour subtly define what is sensible to actors.[170] The last factor is the possibility of the influence of knowledge and language on the actors.[171] These three contextual factors explain the power interplay between individuals' sensemaking exercise and some influential actors.

The critical element of the CSM theory, which focuses on dominion and influences, is similar to some critical theories in law, such as feminism or the Third World Approaches to International Law (TWAIL). From this perspective, I incorporate elements of TWAIL into the critical component of the CSM theory in making a case that influential actors from the HICs should not generalize or impose their sensemaking activity without considering whether that approach also makes sense to the LMICs.[172] I explain in the subsequent paragraph how the CSM theory relates to, and is a perfect choice for, my analysis of the negotiation process in international tax.

The fundamental requirement is that a shock or a sudden event triggers the application of the CSM theory.[173] In this sense, the shock is the occurrence of a non-routine event that may challenge a status quo. The CSM theory studies how people think a particular approach is a sensible and reasonable response to that shock.[174] I argue in the preceding paragraphs that the

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[169] *Ibid*.
[170] *Ibid*.
[171] *Ibid*.
[172] See Makau Mutua, "What is TWAIL" [2000] 94 Am Soc'y Int'l L Proc 31 at 36 – 38; Obiora Chinedu Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10:4 Int'l Comm L Rev 371 at 376; Jalia Kangave, "'Taxing' TWAIL: A Preliminary Inquiry into TWAIL's Application to the Taxation of Foreign Direct Investment" (2008) 10:4 Int'l Comm L Rev 389 at 395 – 397; E. Tendayi Achiume & Devon W. Carbado, "Critical Race Theory Meets Third World Approaches to International Law" (2021) 67:6 UCLA L Rev 1462 at 1466.
[173] Xiaoli Lu, "Managing Uncertainty in Crisis Sensemaking: A Core Challenge for Public Leadership" in Xiaoli Lu, ed, *Managing Uncertainty in Crisis Exploring the Impact of Institutionalization on Organizational Sensemaking* (Singapore: Springer, 2017) 1 at 9-10
[174] Jean Helm Mills, Amy Thurlow & Albert J. Mills, "Making Sense of Sensemaking, *supra* note 154 at 186.

historical development of the ITR can be divided into three phases. The sudden or non-routine event occurs in all the phases. In the first phase, using the example of the United States, the effect of double taxation was not considered in the income tax when it was first implemented in 1913 because it was not a major concern to American taxpayers who have investments abroad.[175] The need to consider the effect of double taxation arose when the income tax, which Americans with foreign business undertakings would pay to the American government in addition to their foreign tax liabilities, significantly increased. The government felt the need to consider the effect of the double taxation in the 1919 Revenue Act (the foreign tax credit was originally drafted as part of the 1918 Revenue Act, passed by the House in 1918, but became law in 1919 when the Senate completed the process in February 1919).[176] The United States' approach in the 1919 Revenue Act was a domestic response.

The differential approaches to the characterization and taxation of business incomes in different countries limited the efficiency of the relief methods. For example, it was not envisaged under the 1919 Revenue Act that the Americans would pay foreign taxes higher than what they would have paid if the investments had been situated locally.[177] It would not be reasonable for the United States to provide credits for the higher taxes as that would result in tax revenue loss beyond necessary. It was also impossible for the United States to determine the tax rate of other countries due to sovereignty barriers. The United States had to limit the tax credit that American corporations could claim on their foreign tax liabilities.[178] The point is that the limitless tax credit under the

[175] Graetz & O'Hear, The Original Intent of U.S. International Taxation, *supra* note 53 at 1045.
[176] *Ibid* at 1047.
[177] *Ibid*. at 1054. The tax rate in the United States was relatively higher and because of this the tax rate in other countries was not apparent. The United Started to feel the impact of the higher tax rate of other countries when its tax rate was reduced in 1921.
[178] *Ibid* at 1055. TS Adams' justification of the need to limit the tax credit explains that the United States risks losing substantial revenue if the 1918 limitless tax credit is not reviewed. He argues:

1919 Revenue Act was no longer efficient, given the potential abuse and the negative impact on the United States economy. This is the shock of the first phase, which necessitated the need to seek an alternative global approach to the incidence of double taxation.

The shock in the second phase is the need to stabilize the ITR after the League's exit.[179] The exit created a vacuum of legal order,[180] and the UN, which was supposed to succeed the League, could not continue in the leadership role. The OECD intervened, and the issue before it was how to stabilize the regime.

The tax consequences of the digitalized economy are the shock in the third phase. The intricacies of the digitalized economy challenge the DTA and the OECD models designed to respond to the shock in the first and the second phases. The DTA regime was built on the premise that active business investment in the source country would have to be through physical structures or physical presence. It is now possible for digital-enabled businesses to undertake active businesses in the source countries without maintaining a physical presence. Just like how the limitation of the 1919 tax credit method was causing the United States significant revenue losses, the effect of the digitalized economy is eroding the tax base of source countries. Source countries can no longer exercise their taxing rights because the new business mode is not recognized under the DTA regime.

Having explained the shock in international tax as the foundation of the CSM theory, I proceed to explain how the seven properties of the CSM theory relate to international tax.

> [The unlimited FTC] is subject to this …rather grave abuse: If the foreign taxes are higher than our rate of taxes, that credit may wipe out taxes which fairly belong to this country**....** [W]e know of instances where big corporations whose income was derived largely from this country have had their tax wiped out, so far as this country is concerned because the English tax rates are three times as high as ours.

[179] Jane Mumby, *Dismantling the League of Nations: The Quiet Death of an International Organization*, 1945-8 (London: Bloomsbury Academic, 2024).

[180] Martin Hill, *Economic and Financial Organization of the League of Nations* (Washington: Carnegie Endowment for International Peace, 1946)

1.7.2.1 Identity construction

The sensemaking component of the CSM theory is about how an individual or an actor makes sense of his approaches to the shock.[181] The perspectives and background of the actor could affect how he makes sense of an issue or what is sensible to him. The identity construction is the most important property, affecting the remaining six properties.[182] Under the identity construction, the actor asks himself the questions of 'who are we' and 'how we do things'.[183] The response to this question shapes the actor's reasoning. For example, if an actor is from a royalty background, where part of their distinctive culture is not crying in public, irrespective of the situation. Such an actor must first identify himself when faced with a saddening situation that warrants crying. The response to the preliminary questions will dictate him not to cry even when others are crying. The failure to cry does not mean that the actor is not empathetic to the saddening situation, but his present action is a reasonable response because of 'who he is'.

The critical element of the theory states that individuals could be influenced by the broader context of their social environment and the organizational constraints within which they operate.[184] This implies that the individuals may not independently exercise their sensemaking activities. What makes sense to a person may actually be the reflection of some other externalities beyond themselves. This is where organizational influences and the rules made by powerful actors dominate the sensemaking activities. Jean Helms Mills and his colleagues give an example of how the perception of a good employee' could be influenced by the organizational rules that define a good employee.'[185] In that circumstance, the actor's perception of a good employee is not his

[181] Mills, Thurlow & Mills, "Making Sense of Sensemaking, *supra* note 155 at 186.
[182] *Ibid.*
[183] *Ibid*
[184] *Ibid* at 187.
[185] *Ibid* at 188.

independent view, and the actors might not be able to express their independent view, assuming it is different from the organizational rules, because of the organizational structural constraints.

It is arguable that the actors in the beginning of the first phase of the ITR independently carried out their sensemaking activities on some issues. If there had been any influence in that phase, the influence would have been domestic factors, which do not really have a strong bearing on international tax. TS Adams independently carried out his sensemaking activities of providing an approach to double taxation.[186] He was even unsure that Congress would accept his tax credit proposal at a time when the United States needed to finance its war activities.[187] The Congress was also independent in accepting TS Adams' proposal.[188]

The critical component of the CSM theory was apparent in the later part of the phase. Influential actors greatly influenced the sensemaking of the less powerful actors in the deliberations of approaches to the shock of that phase. The substitution of the 1943 Mexico Model with the 1946 London Model is an ideal example of the interference of sensemaking activities.[189] The inclusion of the PE clause in a tax treaty does not make sense to the developing countries, and it was consequently excluded from the 1943 Model.[190] The sensemaking activity at this level was independent. It seemed the developing countries had asked themselves the questions of 'who we are' and 'how we protect our tax bases.' It also seemed that the responses to these preliminary questions were 'we are capital importing countries' and 'expansion of tax base is in our best

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[186] Graetz & O'Hear, The Original Intent of U.S. International Taxation, *supra* note 53 at 1046.
[187] TS Adams was quoted to have said the following:

> In the midst of the war, when the financial burden upon the United States was greater than it had ever been, I proposed to the Congress that we should recognize the equities **. . .** by including in the federal income tax the so-called credit for foreign taxes paid ....I had no notion **...** that it would ever receive serious consideration.

[188] *Ibid*.
[189] Nikki J Teo, Nikki, *The United Nations in Global Tax Coordination: Hidden History and Politics*. (Cambridge: Cambridge University Press, 2023)
[190] Philip C. Moore, "The Permanent Establishment Concept in Tax Treaties: Old Bottles for New Wine" (1981) 6:2 Queen's LJ 482 at 494-495.

interest'.[191] Considering the impact of the PE in limiting the source countries' taxing rights, the developing countries excluded it from the 1943 Model. They could independently exercise their sensemaking activities because the developed countries were absent at the Mexico conference, where the 1943 Model was drafted.

When the developed countries returned from war in 1946, they clearly interfered with the sensemaking activities of the developing countries. The developed countries redrafted the model at the London conference in 1946, which was also attended by the developing countries, and the PE clause was returned to the treaty.[192] The interference with the sensemaking activities was neither from the organizational rules nor the language. It was a case of powerful actors directing the sensemaking of less powerful actors. I explain this further in chapter two of the thesis.

1.7.2.2 Retrospective

This property explains that sensemaking is a comparative process. The individual making sense compares a current situation with past events. How a similar event had been addressed in the past may likely appear reasonable to the actor in the current situation.[193] Like other properties, the critical component argues that this can also be influenced within the formative context and the discourse.[194] The formative context looks at how dominant values within an organization can affect sensemaking, while the discourse is about how texts can be understood from the social practice from which they emerge.[195] Under the discourse effect, the societal perception of a term can affect what sense can be made from it. Jean Helms Mills and his colleagues give an example of how sensemaking of employment of female managers could be influenced in the 21st century when

[191] *Ibid*
[192] Honey Lynn Goldberg, "Conventions for the Elimination of International Double Taxation: Toward a Developing Country Model." (1983) 15 Law & Pol'y Int'l Bus 833.
[193] Mills, Thurlow & Mills, "Making Sense of Sensemaking, *supra* note 155 at 186.
[194] *Ibid.*
[195] *Ibid*

there was a well-established discourse on feminism and how it would have been fifty years before when there was no such well-established discourse on feminism.[196]

In understanding the current situation through past experiences, the actors in international tax could be influenced by the dominant societal values and the well-established discourses on past situations. The United States and the United Kingdom had addressed the double tax problem in a way that suited 'who they were'.[197] Double taxation is not novel to them. The perception of these countries in negotiating the DTA regime in the second phase would be greatly impacted by their previous approach to double taxation in their respective national tax laws. The previous experience with the DTA regime will also affect the sensemaking exercise in the third phase of the historical development of international tax. The discussions on the allocation of taxing rights under the two-pillar are constrained by the dominant societal values and the well-established discourses on issues like using a PE threshold to determine when the source country can exercise its taxing rights. These dominant values and well-established discourse are legacies of the developed countries' experience in the first phase of international tax. This is why my thesis argues that including the LMICs in the negotiation process is not enough, but there is a need to broaden the thinking process of participants to include the global stability variables in the negotiation.

1.7.2.3 Focus on Cues

This property explains that an individual focuses on some cues and ignores other cues while exercising sensemaking activities.[198] This implies that there could be a couple of cues among which the individual can choose in finding a particular approach meaningful. It allows for the exercise of discretion, which can, in turn, be influenced by powerful actors. The dominant factors

[196] *Ibid at 185*
[197] Graetz & O'Hear, The Original Intent of U.S. International Taxation, *supra* note 53 at 1046.
[198] Mills, Thurlow & Mills, "Making Sense of Sensemaking, *supra* note 155 at 186.

can influence the individual to focus on certain cues at the expense of others, not because the cues in focus are the best option for the situation but because those cues satisfy the interest of the powerful actors.[199] Relating to the substitution of the 1943 treaty model with the 1946 treaty model, the developed countries could have influenced the developing countries to abandon their cues – of exclusion of the PE clause – and focus on the treaty model that has a PE clause as the basis of taxing active business income in the source country.

1.7.2.4 Plausibility rather than Accuracy

Individuals making sense is driven by plausibility rather than accuracy.[200] An actor looks for cues that make his decision plausible even though the decision may be wrong and inaccurate.[201] After the actor has decided under the identity construction and retrospective, he looks for cues to justify his decision – to make it reasonable to him. The focus on the cue is strictly to make a case that a particular action (or decision) is more meaningful than others. An example of this is available in the ongoing negotiation of the two-pillar framework. The OECD has decided to limit the application of the two-pillar to multinationals with global revenues exceeding EUR 20 billion. It then justified the decision that limiting the scope to large and most profitable companies in the initial stage of the two-pillar is better. The OECD extracted cues to justify this approach, but this does not necessarily mean the decision is appropriate. I explain this decision's impacts and (in)accuracy in chapter four of this thesis.

1.7.2.5 Enactive of the environment

This property explains that sensemaking is influenced by the environment within which the sensemaker operates.[202] The sensemaker might have created the environment through his past

[199] *Ibid.*
[200] *Ibid.*
[201] *Ibid.*
[202] *Ibid.*

experiences.[203] The environment determines the kind of cues to extract to justify the decision. The dominant societal values and the well-established discourses of that environment may be a barrier to rational analysis. The sensemaker could be influenced to believe that the dominant values of the environment are the proper cues to make the decision plausible. This raises the question of the appropriate forum for international tax negotiation. Should the UN be rated over the OECD because of the former's larger membership? Either of these forums may not yield beneficial outcomes for the LMICs until the global stability variables are incorporated into the process. So, it is a question of forums and what the actors in that environment think about international tax problems.

1.7.2.6 Social interactions

This property explains how social interactions with others influence sensemaking. In a well-established society, that society's rules, routines, symbols and language affect sensemaking.[204] Jean Helms Mills and his colleagues give an example of how rules and descriptions of the British House of Commons members as 'honourable' influenced how the members made sense of events around them.[205] Given the impact of social interaction on sensemaking, it is possible for actors who design the rules or promote dominant values to introduce routines that shape the sensemaking of participants in that society. The OECD's long years of promoting global tax governance have enabled it to design some standards that unconsciously influence the sensemaking of actors using its platform. The OECD organizes a variety of events through which its views are introduced to non-OECD members. The pro-OECD routine and rules

[203] *Ibid.*
[204] *Ibid.*
[205] *Ibid.*

influence discussions on global tax issues and, expectedly, the outcome of such deliberation reflects the OECD's interests.

1.7.2.7 Ongoing

The last property describes the continuing nature of sensemaking.[206] Though sensemaking is triggered after a sudden event, how this sudden event is addressed will constitute cues to address another sensemaking exercise. This underscores the importance of addressing a problem properly when it first occurs. Any inaccuracy in the approach to the problem will continue to affect subsequent issues, as the actors will want to draw cues from that inaccurate approach. The challenge of the LMICs in the current international tax framework directly resulted from how the double tax problem was addressed in the first phase. The second phase took cues from the first phase, and both phases constituted cues for the third phase.

1.8 Contribution to the Existing Literature

I argue in the previous sections that the existing scholarship has not focused on how actors in the international tax can shape their perspectives toward the global stability variables. In addition to this argument, I examine in this section how my thesis complements the existing scholarship.

The Musgraves' influential analysis on inter-nation equity is a good starting point in addressing the challenges of the LMICs.[207] The Musgraves, both economics professors with a special interest in public finance, were interested in closing the gap between the HICs and the LMICs by developing the inter-nation equity theory, which has become an important criterion for evaluating any international tax policy. The Musgraves' analysis focuses on how tax treaty

[206] *Ibid*.
[207] Richard A. Musgrave & Peggy Musgrave 'Inter-Nation Equity' in Richard M. Bird & John G. Head (eds) *Modern Fiscal Issues: Essays in Honour of Carl S. Shoup*. (Toronto [Ont.]: University of Toronto Press, 1972) 63

partners should negotiate the DTA model and not how the DTA model was processed in the first place. The Musgraves' objective of protecting the LMICs' interests may not be realizable as the DTA model allows the HICs to deploy their influences during negotiation with the LICs.

The distributional consideration is the most important approach to review the international tax framework of the three approaches suggested by the Musgraves to address inter-nation equity in both the single-source and multi-source countries.[208] With respect to the single source country, where the entire value chain of operation of a firm occurs in one country, the distributional consideration recommends that taxation of sourced income should be used as a tool of international redistribution of global welfare in favour of the LMICs. To achieve the redistribution of global welfare, the Musgraves argue that progressive tax rates should be applied inversely based on the per-capital income of both the HICs and the LMICs. The Musgraves recommend that the progressive rate be uniform and apply to all capital-importing countries; and not based on reciprocity or equal rate.[209]

In the second instance of a multi-source country, where production activities cut across many countries, the Musgraves argue that the country where capital comes from should get the highest profit allocation while the countries where payroll and sales are allocated get a proportion of profit. The Musgraves argue that the allocation of profit by this formula should consider distributional considerations that favour the LMICs. The Musgraves then recommend taxation at

[208] *Ibid* at 72-73. The other two approaches are the benefit approach and the national rental approach. The benefit approach is when taxation is based on the public goods and values consumed by the company. The Musgraves admit this approach is not realistic in the real world because taxation is based on profit. The national rental approach is when the source country should be able to tax gains made within its territory. The tax rate should be independent of the domestic tax system and below the domestic tax rate. The Musgraves do not suggest a rate under the national approach or the extent to which the rate should depart from the domestic tax system.
[209] *Ibid*

the international level to realize a scheme of profit allocation that prioritizes the re-distribution of global welfare.[210]

The Musgraves are conscious of the difficult task of evaluating and implementing the distributional considerations and, as such, do not state any hard and fast rules in that regard. By reserving how the distributional consideration can be achieved to international negotiation and debate, the Musgraves made their inter-nation equity theory problematic.[211] This allows the HICs to determine the fate of the so-called distributional consideration.[212] As rightly noted by Kim

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[210] *Ibid* at 84. The Musgraves states: 'Applied to the international setting, which involves the finance of central government expenditure, the benefit component tends to be less important. The permanent establishment approach is hardly satisfactory. Implementing a bonafide separate accounting approach is exceedingly difficult, and the dividing line between what does and what does not constitute a separate establishment is arbitrary. The use of a complex apportionment formula, on the other hand, requires multiple returns and is hardly feasible in the absence of international administration. Ultimately, the only satisfactory solution (in line with the conclusions of the preceding section) would be the taxation of such income on an international basis with the subsequent allocation of proceeds on an apportionment basis among the participating countries, making allowance for distributional considerations. This is especially called for, given the multinational corporation's rapid growth.

[211] Alex Easson identifies this problem and provides another framework that may yield positive results for the LICs. Easson argues that Musgraves' inter-nation equity theory can reform international tax if implemented within a four-factor framework. He recommends that efforts on tax reforms should (1) not result in a great change in total tax yield, (2) not require major re-negotiation of existing tax treaties, (3) not be complex to draft and apply, and (4) be capable of being implemented unilaterally. Arthur J. Cockfield 'Taxing Foreign Direct Investment in a Non-cooperative Setting: Contributions by Alex Easson in in *Globalization and its tax Discontents: Tax Policy and International Investment* Arthur J. Cockfield, ed, (Toronto: University of Toronto Press, 2010) 18 at 19. These factors, particularly the last two factors on the simplicity of the framework and the ability of states to implement the framework unilaterally, are of great importance to the LICs. The problem with Easson's framework is that the outcome of the process cannot be different from the present regime until the perspectives and thinking processes of actors are tailored toward the global stability variables.

[212] Diane Ring examines the relationship between inter-nation equity theory and tax competition policy and submits that tax competition should be re-considered to promote inter-nation equity - that is, more distribution to the LICs. In the attempts to provide a framework for her argument, she first uses cosmopolitan theory to provide normative analysis. The cosmopolitan theory emphasizes the unity of humanity as a single moral community where individuals are required to be treated equally to determine duties and claims of distributive justice. She admits that the cosmopolitan theory cannot provide a normative framework because of sovereignty barriers. Inter-nation equity can only fit in the cosmopolitan theory if it is collapsed into inter-individual equity, but this is not possible because there can't be a global state or world government. Ring concludes that the Inter-nation equity claim should be pursued in the modern sovereign states in three ways. First, through charity narrative, inter-nation equity can still yield benefits, though the charity narrative is weak. Second, human right argument should be linked to fundamental rights of the residents of the developing countries. Third, national self-interest - the developing countries appreciate that the competition policy does not offer any benefit to them and therefore change it. See Diane Ring, "Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation" (2009) 9:5 Fla Tax Rev 555 at 583 – 591. In view of the fast pace of integration of the world economy, it is not realistic that the LICs can assert their national; self-interest without the concurrence of the HICs. Linking human right to the inter-nation equity is possible when it is integrated into the negotiation process, as argued by this thesis. The argument on charity is weak, as admitted by Ring, and it cannot provide the needed development for the LICs.

Brooks, the Musgraves' suggestion, particularly the progressive rates, has been neglected because the states have no political will to ensure that the rates are adopted in tax treaties.[213] This thesis, therefore, provides a framework for how international negotiations can realize the distributional consideration. The global stability variables can influence actors in international taxation to prioritize the re-distribution of global welfare in international taxation.

Steve Dean, a professor of law with a focus on international taxation, argues that the DTA regime appears problematic if it is evaluated with the framework of the Philosopher King notion.[214] In the context of international taxation, the Philosopher King states that nations should embark on global tax cooperation to promote global welfare. Dean argues that the participating nations in international taxation cooperation do not pursue this global welfare.[215] The HICs are rather interested in economic efficiency – to maximize the benefit of their international taxation policies.[216] A probing mind will be tempted to ask for the rationale for retaining the DTA regime if it does not prioritize global welfare. The probable reason for the continued use of the DTA regime is that it promotes the interests of the powerful actors, who are always the winners of the cooperation game.

Dean believes that the DTA regime still has some successes despite the fact that it does not guarantee the promotion of global welfare from the perspective of the LMICs. He is interested in providing alternative arguments for the success of the DTA regime. He argues that the DTA regime is successful if evaluated within Hathaway's integrated theory. The integrated theory was originally used to provide justification for government decisions in domestic policies. Dean,

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[213] Kim Brooks 'Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Value' in *Tax Reforms in the 21st Century: A Volume in Memory of Richard Musgrave* (John G. Head & Richard Krever eds) 2009 471 at 493.
[214] Steven A. Dean, "Philosopher Kings and International Tax: A New Approach to Tax Havens, Tax Flight, and International Tax Cooperation" (2006) 58:5 Hastings LJ 911.
[215] *Ibid* at 918-919
[216] *Ibid*

however, applies it to international taxation. By Dean's application of the integrated theory to international taxation, the decision of countries to participate in international taxation can be affected by four factors.[217] The first and second factors are based on enforcement of the agreement – which are known as domestic and transnational legal enforcement. DTA regime provides a tax treaty which makes the enforcement effective. The nations interested in having a framework that can be enforced will be motivated to sign a tax treaty because the tax treaty is hard law.

The third and fourth factors are domestic and transnational collateral consequences. These factors explain how responses from the constituents of a country may encourage the country to embrace the DTA regime. Under the domestic collateral consequence, the taxpayers who stand to gain from the tax treaty benefits can lobby their home governments to initiate tax treaty negotiation.[218] The multinational companies often adopt this approach and play a significant role in drafting the tax treaty. The transnational collateral consequence includes being recognized as a good member of the international community.[219] According to Dean, the failure of the DTA regime to promote global welfare should not be seen as a reason for the failure of the regime, as countries may be motivated by any of the factors of Hathaway's integrated theory.

The takeaway from Dean's analysis is that the DTA regime does not prioritize promoting global welfare. The integrated theory only answers the question of 'why' but does not guarantee that the factors that propel countries' involvement in the DTA regime will promote global welfare.

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[217] *Ibid* at 950.

[218] *Ibid*. The author uses the example of the free trade agreement to explain how responses from constituents from the domestic landscape can propel the decision to sign a trade agreement. For example, the domestic collateral consequences could include a negative response from local businesses that will be protected from foreign competition, positive reasons from businesses that will benefit from an unfettered foreign market or a positive response from the public from the general reduction in prices of goods.

[219] Hearson provides empirical data that Zambia had signed tax treaties to attain global prestige, albeit without considering the treaty's impact on its economic agenda. For example, Zambia's negotiation of a tax treaty with the United Kingdom was done in a manner suggesting that Zambia did not have a proper understanding of the treaty. See Hearson, *supra* note 18 at 122 – 125.

If the integrated theory factors are narrowed to tax issues alone, without considering the broad issues of the global stability variables, the resultant effect will still be harmful to the LMICs.

Tsilly Dagan, a professor of international taxation at the University of Oxford, examines whether global tax cooperation obligates participating states to promote justice to all states, particularly to the LMICs.[220] Dagan argues that global tax cooperation that does not guarantee the abilities of the participating states to deliver distributive justice to their domestic constituents is unjust and illegitimate.[221] Dagan's argument is provoked by states' inability to promote their citizens' collective will due to tax competition and globalization.[222] The fading coercive power of states necessitates the need to participate in global tax cooperation, but unfortunately, the cooperation does not resolve the problem.[223] For example, Dagan argues that the OECD/G20 cooperative efforts under the BEPS Inclusive Framework are limited and do not focus on

[220] Tsilly Dagan, "International Tax and Global Justice" (2017) 18:1 Theoretical Inquiries in Law 1 at 33. Unfortunately, there is no obligation on participating states to promote and distribute justice in the course of discussion. It is assumed that the participating states must perform justice to their domestic constituents.

[221] Since tax competition erodes the fiscal sovereignty of countries; cooperation is favoured because it is believed that it will restore fiscal self-determination and, consequently, the ability to distribute justice. See Laurens van Apeldoorn, "BEPS, Tax Sovereignty and Global Justice" (2018) 21:4 Critical Rev Intl Social & Political Philosophy 478 at 485.

[222] *Ibid* at 14 – 18. Dagan identifies two factors limiting the state's coercive power to promote their citizens' welfare. First, increased mobility of capital and residents. States have become players in the tax market shopping for capital and residents by adopting attractive tax policies. While searching for the required investors, states may keep their tax rates low to retain their existing residents and attract more. The low tax rates result in low tax revenue and consequently affect their distributive justice duties to their citizens. Second, sophisticated taxpayers can design tax planning scheme which takes advantage of the differing tax rules of various states and exploit tax policies of multiple countries. The consequent effect is that states whose beneficial tax policies had been utilized by sophisticated payers will not be able to deliver distributive justice at optimal levels because their tax revenues would have been reduced due to the tax planning scheme of taxpayers. The market and the globalization factors then threaten distributive justice. See also Tsilly Dagan, "The Global Market for Tax and Legal Rules" (2017) 21:1 Fla Tax Rev148 at 151

[223] *Ibid* at 28 – 30. Dagan examines two options that can result from the cooperation. The first option is a multilateral regime leading to the emergence of a global state, but it is impossible to have a global state or world government in view of the sovereignty barriers. If emergence of a global state was possible, the world government would have seamlessly provided the global distributive justice, according to the advocates of cosmopolitan theory. The second option is the multilateral regime that empowers participating sovereign countries to promote domestic distributive justice. The second option is also problematic because it does not satisfactorily address distributive justice or address it as a matter of charitable plea.

distributive justice but on improving states' ability to collect tax revenues in the wake of increased tax competition.[224]

This thesis shares Dagan's view on the need for states to cooperate to realize distributive justice, which is not sufficiently addressed in the DTA regime, and the ongoing work on the two-pillar solution.[225] Dagan, however, does not provide a framework on how the negotiation process can actualize the much-needed global tax cooperation for justice. This thesis provides a framework for Dagan's argument that '(a) multilateral regime established through cooperation is just, I contend, if and only if it improves (or at least does not worsen) the welfare of the least-well off constituents in all the cooperating states'.[226] The welfare of the LMICs, which Dagan describes as the 'least-well off constituents', can only be guaranteed if the actors involved in the design of the international tax framework can embrace the notion of the global stability variables.

As part of addressing the limitation of the DTA regime, Victor Thuronyi, the former lead counsel of the International Monetary Fund with notable scholarship in international tax, argues that a multilateral framework is much needed for international taxation.[227] The DTA limitations include failure to accommodate the multilateral business structure of multinationals beyond the jurisdictions of treaty partners, problems of interpretation and amendment, and treaty shopping. He proposes three conditions that can facilitate a multilateral tax regime that can coordinate

[224] *Ibid* at 25.
[225] Dagan argues in another paper that the DTA regime could have been the proper way to achieve standardization of international taxation, but the regime lacks the basic ingredients for realizing standardization. The DTA regime is characterized by cartel building, where the originators of the regime derive some benefit above those who joined the network at a later stage and a lock-in effect that makes it hard for countries to exit the network even when the network is not beneficial to them. See Tsilly Dagan, "Tax Treaties as a Network Product" (2016) 41:3 Brook J Int'l L 1081. Considering the enormous benefit of standardization of international taxation in addressing tax competition and harmonizing and facilitating a regime that reduces tax arbitrage potentials, standardization is needed as the economy is becoming increasingly integrated. Dagan's expectation that the BEPS Inclusive Framework can provide alternative means for standardization is also unrealistic until the notion of global stability variables is included in the negotiation process.
[226] Dagan, International Tax and Global Justice, *supra* note 220 at 26.
[227] Victor Thuronyi, "International Tax Cooperation and a Multilateral Treaty" (2001) 26**:**4 Brook J Intl 1641-1661

divergent issues and interests on topical tax issues.[228] He argues that contrary to the conventional belief that the multilateral regime is not feasible, consideration of the three factors holds good promise for realizing the multilateral framework. First, the cooperation forum should be large enough to accommodate more members. He excludes the OECD from possible forums because of its limited membership. Second, the decisions should be taken on what he describes as super majority votes – that is, the majority of the total votes and the majority of votes from countries with substantial economies. Third, the staff structure of the forum should be spread among member countries.

Thuronyi's proposed multilateral regime suits a multidimensional economy like the digitalized economy. The two-pillar is tending towards Thuronyi's proposal except that the two-pillar lacks the three conditions stipulated by Thuronyi for successful implementation of his proposal. There are two basic areas in which this thesis can complement Thuronyi's proposal. First, the purpose of the multilateral framework may be lost if the actors do not tailor their perspectives of international tax problems towards global stability variables. It appears the intention of Thuronyi is that the international tax framework should be able to capture the multilateral consequences of international business so that no income can escape taxation by legitimate countries. Without a guiding framework, such as what this thesis is advancing, the actors can eventually design a multilateral framework that is malleable to multinationals. Second, reaching a conclusion through majority votes or super-majority votes is exposing the LMICs to another maltreatment by the HICs. The second level of majority votes of countries with substantial economies is like a license to the HICs to veto any resolution according to their wishes. This thesis argues that a consensus-based approach will better produce mutually beneficial outcomes.

[228] *Ibid*. See also Diane M. Ring, "Prospects for a Multilateral Tax Treaty" (2001) 26:4 Brook J Intl 1699 - 1709.

Related to this multilateral framework is the question of whether there is a need for regional cooperative efforts and multilateral regimes. Regional cooperative efforts are welcome, but the purpose should not be to create another parallel regime to the ITR. The aim of this thesis is to suggest a well-diversified and balanced international tax forum, but it does not discount the value of regional cooperative efforts. The regional cooperative efforts can be used to form a block to negotiate in the central forum of tax governance effectively. In her study of the multilateral tax treaties of the Caribbean community, Kim Brooks argues that such a bold attempt from that region could be a means to an end.[229] Regional cooperation could encourage other countries to acknowledge the need to pursue international tax cooperation that addresses the core problems of the participating states. cooperative efforts can be used to form a block to negotiate at the centre.

1.9 Thesis Outline

This chapter examines the fundamental problem affecting the LMICs in international taxation. It argues that international taxation has disconnected from its ought-to-be goals due to the actors' perspectives of international taxation problems. It also proposes an alternative framework to international taxation negotiation: global stability variables. It examines the proposed concept of global stability variables and how they should be incorporated into international negotiations.

Having argued what should be the normative gaols in this chapter, I proceed to show that the ITR has never pursued these gaols despite the compelling reasons to do so. I examine this point in the three phases of international tax – the crystallization, the stabilization and the contemporary phases. Chapter two is committed to the crystallization phase. It examines how the actors of that period failed to consider the global stability variables in policymaking. Using the example of a few

[229] Brooks, The Potentials of Multilateral Tax Treaties, supra note 72 at 236.

developed countries, chapter two finds out that the actors made sense from how their respective countries' tax-centric approaches to international tax problems in both their national laws and tax treaties signed before the creation of the League. The same strictly economic approaches and maximization of tax revenues were adopted without considering whether those approaches resonated with the mandate of the League.

Chapter three examines the stabilization phase, during which the OECD emerged as the new legal economic order for global tax governance. The chapter finds that the problem of failing to consider the global stability variables was exacerbated in this era due to the OECD's involvement in global tax governance. As an exclusive economic institution, the OECD was committed to its mandate of economic growth of its member states. This mandate significantly impacted international tax in that period, resulting in a framework that did not work well for the LMICs.

Chapter four examines how the actors in the contemporary phase also failed to consider the global stability variables despite the seemingly inclusive nature of the BEPS Inclusive Framework. Chapter five concludes with a call for an ideal international tax system promoting global stability variables. It calls for a moment of truth and reconciliation and proposes a network of actors that should design the next phase of the ITR.

Chapter Two: The Crystallization Phase of the International Tax Regime

2.0 Introduction

This chapter examines how the actors in the first phase, which I describe as the crystallization period of the ITR, failed to consider the global stability variables in policymaking. The period under review is described as the crystallization phase because the efforts to create a regime that properly addresses the consequences of double taxation were solidified and crystallized in this phase. As argued in Chapter One, there were unilateral responses to the double taxation problem by some developed countries, such as the United Kingdom and the United States, but those responses did not yield optimal results for them. The ICC had also made some efforts to put the problem of double taxation on the international agenda, but there was no state-based international institution that would give the necessary political will to implement the ICC's ideas.[230] The handful of bilateral tax treaties executed before the League's establishment and the 1921 Rome Convention did not reach the threshold of global acceptance to form ITR.[231] As great as all these ideas were, the absence of a coordinating unit at the center discounted their values and ability to create the ITR.

One would have thought that the states should have considered the possibility of establishing an international institution since the main reason for the limited coverage of their ideas was the absence of a state-based international institution. The idea of an international institution was not new at the time. The United Kingdom, the United States (and some other developed states

[230] Diane Ring, "Who Is Making International Tax Policy: International Organizations As Power Players In A High Stakes World." *Fordham Int'l LJ* 33 (2009): 649.

[231] 1921 Rome Convention is the first multilateral tax treaty signed by successor states of Austria-Hungary except Czechoslovakia. See Sunita Jogarajan, 'The Origins of the ITR' in Yariv Brauner, ed, *Research Handbook on International Taxation* (United Kingdom: Elgar Publishing, 2020)13; Dejan Popović & Svetislav V. Kostić, 'Tax in History: Rome Double Tax Convention: The First Multilateral Treaty for the Purpose of Avoiding Double Taxation' (2022)50:8/9 Intertax 635.

which integrated international tax rules in their domestic tax system) and the ICC made conscious efforts to address double taxation. International institutions, such as the Central Commission for Navigation of the Rhine (established in 1815) and the International Bureau of Weigh and Measures (established in 1875), had existed then.[232] Like the scientific explanation of the evaporation process, those great ideas remained like water droplets and ice crystals waiting to form clouds until the establishment of the League in 1919.

This phase started with the establishment of the League in 1919 and ended with the drafting of the double tax convention model in 1946. The League exited the international regulatory space after the 1946 convention, which resulted in another phase of international tax, as examined in chapter three. The medium or vehicle used to create ITR in this first phase has two distinctive qualities. First, the League is not strictly an economic institution – its economic intervention was part of its broader mandate that unites economic and non-economic factors.[233] Second, the League was a relatively inclusive institution with a large membership and broad objectives. These two qualities distinguish this phase from the other two phases I examine in the remaining chapters and directly impact the negotiation process and outcomes in each phase.

The purpose of this chapter is to take the argument in chapter one further – to show that the global stability variables are missing in the policymaking of the first phase of the ITR. I have provided in Chapter One justification for my normative framework of the global stability variables.

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[232] UN, Historical Background, online: <www.ungeneva.org/en/library-archives/league-of-nations/background#:~:text=Although%20the%20first%20international%20organizations,Measures%20(1875)%2C%20and%20the> (accessed on 3 April 2023). Other examples are the Universal Postal Union, established in 1874 to oversee the administration of international postal exchanges; the International Union for the Protection of Industrial Property, established in 1883 to guarantee legal protection of industrial property rights, such as patents, trademarks, of its member states; International Sugar Convention established in 1920; and International Institute of Agriculture established in 1905. See Martin Hill, *The Economic and Financial Organizations of the League*, (New York: Kraus Reprint Co., 1972) 11-13.

[233] Ibid. See also Mervat Fayez Hatem, *The Political Economy of International Political Organizations: the League and the UN* (PhD Thesis, University of Michigan, 1982) [published]

Using the critical sensemaking theory, I argue that the sensemaking process of the actors in international tax is why ITR has repeatedly failed to consider the global stability variables. This chapter examines the actors and how their sensemaking processes and approaches impacted the outcome of the framework designed in this phase, albeit contrary to what should have been the underlying objectives.

2.1 Prelude to the International Tax Regime

The prelude relates to interventions of some states' domestic tax systems and a handful of tax treaties that were put in place to address the double taxation problem. Analysis of intervention in the domestic tax system is limited to the United States and the United Kingdom's domestic approaches to double taxation before 1919. The underlying objectives of these states and their actors in designing those frameworks provide the basis for the argument of how the same actors made sense of their contributions to international tax when they were invited by the League to design ITR. This prelude also explains the 'shock' and non-routine events of that period that pushed the actors to find another way of resolving the double taxation problem. The Critical Sensemaking (CSM) analysis of this phase is incomplete without first showing the shock of that moment and what informed the sensemaking process of the actors.

2.1.1 United States

A brief historical account of the development of income tax in the United States is necessary to unravel its underlying objectives in introducing income tax. Since income tax is a tax imposed on the profits of enterprises - whether the profits are earned in the source or the residence countries – analysis of the United States' approach to international tax is incomplete without linking it to the general income tax. The United States introduced income tax for the first time in

July 1861 to finance its civil war against the rebellious actions of its Southern states.[234] The tax was imposed on the worldwide incomes of residents of the United States.[235] The 1861 Act was replaced a year after by the 1862 Act - for the same reason of financing the civil war – and the 1862 Act was later amended in 1864.[236] The 1864 Act was meant to expire in 1870 with the hope that the Civil War would not last beyond that terminal date. The Civil War, however, ended in 1865, and there were arguments to either repeal the 1864 Act earlier or reduce the rate.[237]

The 1864 Act was terminated in 1872, two years beyond its stated expiry period, because the United Congress decided to retain it because of the large deficit experienced in 1870.[238] Another income tax was enacted in 1894, but the 1894 Act was challenged in court and declared unconstitutional in the popular case of Pollock v Farmers' Loan & Trust Co.[239] There was another attempt to reintroduce income tax in 1909, but this time, it was described as a corporate excise tax to avoid the consequences of the judgment of Pollock's case.[240] The constitutionality of the 1909 corporate excise tax was unsuccessfully challenged in the case of Flint v Stone Tracy Co.[241] The court distinguished corporate excise tax from the income tax declared invalid in Pollock's case – it was held that corporate excise tax is a tax imposed for carrying on business on corporate form and not on the taxpayer's net income.[242]

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[234] Berhard Grossfeld & James D. Bryce, "A Brief Comparative History of the Origins of the Income Tax in Great Britain, Germany and the United States" (1983) 2 Am J Tax Pol'y 211 at 237.
[235] *Ibid* at 238. It is a 3% percent on 'annual income of every person residing in the United States, whether such income is derived from any kind of property or from any profession, trade, employment or vocation carried on in the United States or elsewhere or from any source whatever'.
[236] *Ibid* at 240.
[237] *Ibid*.
[238] *Ibid*
[239] *Ibid* at 243.
[240] *Ibid* at 246 - 248
[241] Ibid
[242] *Ibid* at 249

The struggle to establish an enduring income tax regime continued until the Constitution was finally amended in 1913 – which is known as the Sixteenth Amendment - to bring income tax within the purview of the United States Constitution.[243] The Sixteenth Amendment allows Congress to impose income tax without apportionment to the states, which gives Congress preference over the states.[244] Pursuant to the new Constitutional provision, Congress enacted income tax as Section II of the Tariff Act of 1913 – this is also known as the 1913 Revenue Act.[245] Paragraph A of Section II gives a general landscape of the international aspect of income tax in the United States. It imposes a 1 percent tax on the net income of both its citizens – wherever they reside – and non-resident entities doing business in the United States. This implies that citizens of the United States doing business abroad are subject to domestic tax in the United States in addition to their foreign tax liabilities. This is where the problem of double taxation could arise. Paragraph A of Section II provides as:

> That there shall be levied, assessed and collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided, and a like tax shall be assessed, levied, collected and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by person residing elsewhere.[246]

The preamble of the Tariff Act 1913 clearly states that the income tax's underlying objective is 'to provide revenue for the Government.'[247] There is nothing wrong with this

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[243] Raymond G. Brown, "The Sixteenth Amendment to the United States Constitution" (1920) 54:6 Am L Rev 843.
[244] *Ibid*. The Sixteenth Amendment reads in part: 'The Congress shall have power to lay and collect and taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to nay census or enumeration'.
[245] Grossfeld & Bryce, "A Brief Comparative History of the Origins of the Income Tax in Great Britain, Germany and the United States, *supra* note 234 at 250.
[246] The Tariff Act of 1913, Pub L No 16, s. II, Stat 1 (1913)
[247] *Ibid*

objective; all nations will pursue the same objective in their income tax systems. Even when states are granting tax reliefs – in terms of tax reduction - to taxpayers, the long-term objective will still be revenue maximization. The tax reliefs are mechanisms to keep the taxpayers going concerns so they can continue doing business paying taxes. In the long run, states get back, possibly in multiples, whatever they had sacrificed in the name of tax relief. The same analysis applies to when the United States started to consider incidences of double taxation on its citizens in 1919. The foreign tax credit –a form of relief – adopted by the United States was never to forego the objective of revenue maximization. As the foreign tax credit provided relief to Americans, the United States also realized other economic objectives and earned revenues through that mechanism. Though the 1913 Revenue Act introduced an international aspect of the United States income tax, it was in the Revenue Act of 1919 that the United States substantially intervened in international tax to address the problem of double taxation.

From the influential paper of Michael J. Graetz & Michael M. O'Hear, it is clear that three economic reasons drove the United States' intervention in international taxation in the first phase. First, the tax credit approach in the 1919 Revenue Act was to provide relief to Americans who, in addition to their foreign tax liabilities, were also subject to the high tax rate in the United States.[248] There was an incidence of double taxation before the enactment of the 1919 Revenue Act, but it was not a major concern to Americans because the domestic tax rate was relatively low.[249] Between 1913, when the income tax was first constitutionally guaranteed in the United States, and 1919, the top marginal tax rate had increased to about 70 percent.[250] The increase in the top tax marginal

[248] Graetz & O'Hear, The Original Intent of U.S. International Taxation, *supra* note 53 at 1043.
[249] *Ibid at 1045.*
[250] *Ibid*. increase in the tax rate was to raise funds to finance world war. The significant increase in the tax rate may also offer explanation why the United States preferred the credit method unlike the Great Britain that used the exemption method. The exemption method might not have provided significant tax relief to the American in view of their excessive income tax liabilities.

rate, thus, necessitated the relief for Americans who had foreign business undertakings to avoid invidious discrimination against them.

The second reason was to promote the United States' foreign trade and export market.[251] The United States needed to enhance its competitiveness in foreign markets, and the tax credit method was seen as an appropriate mechanism to achieve that. In the words of Mitchel B. Carrol, the United States simply told its citizens '…go abroad and trade. If you must pay tax on your earnings in foreign countries, show me your tax bill, and I will give you relief.'...[252] The third reason is related to the promotion of foreign trade but is more connected to the repayment of debts owed to the United States. Some European governments had owed the United States about $11 billion from wartime loans provided by the United States.[253] The United States had two options with respect to this loan. The United States could either forgive this debt or insist on repayment. Repayment of the debt seemed appropriate to the United States at that time, and, therefore, there was a need for these European governments to access American Dollars to repay the debts. Foreign trade and export markets were adopted to access the American Dollars.[254]

The understanding of the actors who designed the United States income tax regime about the consequences of double taxation and how to relieve it remained unchanged as they started working with the League. For example, T.S. Adams played a significant role in designing the United States income tax regime. He conceived and drafted the 1919 Revenue Act, which introduced the foreign tax credit system as the best way to address double taxation.[255] His view about double taxation was that it was a case of discrimination against a taxpayer who invested

[251] *Ibid* at 1049.
[252] *Ibid* at 1050.
[253] *Ibid* at 1051.
[254] Ibid at 1053. In addition to the Revenue Act, the United States also enacted Edge Act, which promoted the development of chartered banks through which private capital are channeled to Europe.
[255] *Ibid*

abroad.[256] Because of this conviction, TS Adams stated that the country of residence must provide credit for foreign tax paid by its nationals.[257]

The relief on foreign tax liabilities – whether through the exemption or the credit methods – seems to be appropriate for countries, which have nationals with foreign business undertakings. The method relieves multinational companies of foreign tax liabilities and guarantees the economic prosperity of the residence country, just like in the case of the United States. It would also be of great value to the LMICs if multinational companies pay their full taxes in source countries and the residence countries of the multinational companies provide foreign tax reliefs, as argued by TS Adams. To maximize this benefit for the LMICs, tax sparing should be discouraged in tax treaties between developed and developing countries. Tax sparing is when residence countries provide foreign tax credits for taxes that are supposed to be paid on incomes earned in source countries, but the income has been exempted from by the source countries.[258] The residence countries treat the spared tax as being paid in the source countries and consequently provide credits for the spared taxes. This is disincentive to the source countries as the source countries will be signing away their tax revenues. While making a case for foreign tax relief, the actors should have also argued, for the benefit of weaker countries in the interest of global stability variables, that on no occasion should the multinationals be exempted from tax in source countries.

2.1.2 United Kingdom (is used interchangeably with Great Britain)

The historical development of income in the United Kingdom shares the same attributes with the United States – income taxes in both states were introduced to protect sovereignty and

[256] *Ibid* at 1048.
[257] *Ibid*.
[258] Kim Brooks, "Tax Sparing: A Needed Incentive for Foreign Investment in Low-Income Countries or an Unnecessary Revenue Sacrifice" (2009) 34:2 Queen's LJ 505 at 511; Jinyan Li, “Improving Inter-nation Equity through Territorial and Tax Sparing” in Arthur J Cockfield, ed, *Globalization and Its Discontents: Tax Policy and International Investments* (Toronto: University of Toronto Press, 2010) 128-129; Deborah Toaze, “Tax Sparing: Good Intentions, Unintended Results” (2001) 49:4 Can Tax J 879 at 880-881.

boundaries. Financing the war between Great Britain and France that started in 1793 was a major public expenditure of Great Britain.[259] As of 1797, the war financing had almost exhausted the Government's resources, and there was a need to consider an alternative approach to generate revenue. The then Prime Minister William Pitt proposed the idea of Triple Assessment, which was subsequently enacted into the Aid and Contribution Act in 1798.[260] The Triple Assessment is the principle that expenditure taxes of prior years should be multiplied or tripled in the assessment year so that more revenue could be generated to finance the war.[261]

A substantive income tax was enacted in 1799 – which was also based on the idea of the Prime Minister William. Pitt – when the 1798 Aid and Contribution Act did not generate the expected revenue.[262] The war between Great Britain and France ended on March 25, 1802, with the execution of the Treaty of Amiens. The income tax was consequently repealed on April 5, 1802, since the purpose – financing the Great Britain war with France – for which it was enacted was no longer required.[263] The war between Great Britain and France started again on May 18, 1803.[264] The need to finance the war consequently became a priority for the Government and the Income tax was reintroduced on August 1, 1803. The title of the Income Tax Act clearly links the income tax law to the war – which is why the tax is described as a war tax.[265] Like the income tax of 1799, the 1803 income tax was repealed on March 18, 1816, after the war between Great Britain and France ended.[266]

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[259] Grossfeld & Bryce, "A Brief Comparative History of the Origins of the Income Tax in Great Britain, Germany and the United States, *supra* note 234 at 213.
[260] *Ibid*
[261] *Ibid*
[262] *Ibid* at 214.
[263] *Ibid* at 218.
[264] *Ibid* at 219.
[265] *Ibid*. The title of the Act reads as follows: 'An Act for granting his Majesty until the first day of May next after the Ratification of a Definitive Treaty of Peace, a Contribution on the Profit arising from Property, Possessions, Trades and Offices'.
[266] *Ibid* at 221.

The income tax was again reintroduced in 1842, but it was not to finance war activities like its predecessors.[267] It was meant to address the country's deficit budget and poor economic situation. The income tax was designed to operate for three years as a temporary measure, but it became the basis of the present tax system despite several public objections.[268] For analysis of how the income tax resulted in double taxation, let us examine the Finance Act of 1914, a major improvement of the tax system in the United Kingdom since 1842. In addition to the existing income tax, the 1914 Act imposes additional income, known as super-tax, on individuals' incomes 'from all sources.' Of major concern is section 5 of the 1914 Act, which imposes tax on full incomes earned in foreign countries without consideration of whether or not that income has earlier been taxed in the source country. The income tax was imposed on the foreign earned incomes whether or not the incomes were brought to the United Kingdom. The residents of the United Kingdom suffered the incidence of double taxation arising from this section. The section provides:

> Income tax in respect of income arising from securities, stocks, shares, or rents in any place out of the United Kingdom shall, notwithstanding anything in the rules under the fourth and fifth case in section one hundred of the Income Tax Act, 1842, be computed on the full amount of the income, whether the income has been or will be received in the United Kingdom or not, subject in the case of income not received in the United Kingdom to the same deductions and allowances as if it had been so received and to the deduction (where such a deduction cannot be made under any other provision of the Income Tax Acts) of any sum which shall have been paid in respect of income tax in the place where the income shall have arisen, and to a deduction on account of any annual interest or any annuity or other annual payment payable out of the income to a person not resident in the United Kingdom; and the provisions of the Income Tax Acts (including those relating to returns) shall apply accordingly.[269]

The issue of double taxation came up before the Royal Commission, which was set up in 1919 to consider reforms to the United Kingdom's income tax system. The Royal Commission recommended limited reliefs to double taxation suffered by the residents of the United Kingdom

[267] *Ibid*
[268] *Ibid* 221 – 223.
[269] Finance Act 1914, Geo .5, c. 10, s. 5

and those doing business in the dominions of the United Kingdom.[270] The dominions are colonies or jurisdictions under the imperial government of the United Kingdom, such as Canada, New Zealand and Australia. The relationship between these colonies and the colonial master – the United Kingdom – encouraged some residents of the United Kingdom to undertake business exploration in these dominions. The Royal Commission suggested that the income tax rate of the dominions should be deducted from the income tax rate of the United Kingdom, but the deductible income tax rate should not exceed half of the United Kingdom income tax rate.[271] The Royal Commission advised that the dominions should provide additional relief if the deduction did not provide sufficient relief.[272]

The Royal Commission, however, refused to recommend reliefs to double taxation with respect to tax liabilities suffered by residents of the United Kingdom in foreign countries.[273] The Royal Commission was advised to draw lessons from the United States' double taxation relief system, which offered tax credits for every foreign tax liability suffered by its citizens.[274] It was also argued before the Commission that failure to compensate for double taxation properly could result in business relocation from the United Kingdom to another jurisdiction.[275] The Commission believed double taxation reliefs in this circumstance would be contrary to the principle of 'ability to pay' and create inequities between two British taxpayers with equal incomes. The Commission argued further that the two taxpayers would be entitled to the same privileges by their residence but would end up paying different taxes just because one of them had paid foreign tax.

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[270] Alzada Comstock, "British Income Tax Reform' (1920) 10:3 American Economic Rev 488 at 500.
[271] *Ibid* at 501
[272] *Ibid*.
[273] *Ibid* at 502. The Commission concludes: 'In the present circumstances, we cannot recommend any change in the existing situation as to the double taxation of the same income by the United Kingdom government and by the government of a foreign state'.
[274] *Ibid*. The American foreign tax credit was introduced by the Revenue Act 1918, which is discussed in the previous paragraphs.
[275] *Ibid* at 502. This argument was made by Sir Archibald Williamson.

The common factor in the historical development of income tax in the United States and the United Kingdom was that their income taxes were introduced as measures to generate revenue to finance public expenditure –financing either war or deficit budget. The two states adopted aggressive measures in revenue collection in the sense that they prioritized their revenue objectives over the incidences of double taxation. In the case of the United States, the double taxation relief was introduced because it believed the approach would drive its foreign economic mission and consequently generate revenues for it in the long term. The United Kingdom, which did not have a similar foreign economic mission – or not as much as that of the United States - did not make any sense in providing double taxation relief in respect of foreign countries. The limited relief provided for double taxation arising from dominions is connected to its revenue drive because there is an existing political and economic relationship between the United Kingdom and the dominion from which additional revenue or economic benefits may accrue to the United Kingdom.

2.1.3 International Perspective on Double Taxation

Like the domestic approach to double taxation, international tax agreements on double taxation or tax administration cooperation were also motivated by economic and revenue considerations. The 1899 tax treaty between the Austro-Hungarian Empire and Prussia is the first comprehensive tax treaty on the prevention of double taxation. Before this time, Belgium and France signed a tax cooperation agreement in 1843, similar to the tax information exchange agreement usually signed by states instead of a substantiative tax treaty.[276] The 1843 agreement did not allocate taxing rights between Belgium and France but was put in place to enable the sharing of information that would enhance the administration of the respective domestic tax

[276] An example of such agreement is the tax Information Exchange Agreement between Canada and Grenada, which was signed on July 14, 2017, but came into force on June 21, 2018. See https://www.canada.ca/en/department-finance/programs/tax-policy/tax-information-exchange-agreements/jurisdiction/grenada-agreement-2017.html (accessed on April 7, 2023)

systems of the treaty partners.[277] Belgium signed similar tax cooperation agreements with the Netherlands and Luxembourg in 1845.[278] In 1907, France and Great Britain signed a tax cooperation agreement to prevent fraud concerning succession duties. The 1907 agreement was no less than information sharing, but the information was with respect to succession duties and movable properties of the deceased – to enable the treaty partners to be able to administer the succession duties effectively.[279]

The historical relationship of the treaty partners is worth considering to show that the pioneer tax treaty of 1899 was purely for economic reasons. Austria and Prussia were originally part of the German Empire until war broke out between them in 1866, and Austria was defeated and expelled from the German Empire.[280] With the exit of Austria, Prussia became dominant in the German Empire. Austria partnered with Hungary to form a new nation known as Austro-Hungary. The rivalry between Austria and Prussia ended with the exit of Austria from the German Empire, and the two nations formed the Dual Alliance.[281] The Dual Alliance became the Triple Alliance when Italy joined the relationship of Prussia and Austro-Hungary in 1882.[282] The key objective of the Dual Alliance and the Triple Alliance was to promote the economic advancement of the members. In furtherance of this objective, the three nations signed separate trade treaties on 6 December 1891. The 1899 tax treaty was a part of the larger economic objectives of the Triple Alliance, just like the trade treaty of 1891.[283] The tax treaty was based on the principle of reciprocity, which makes tax and commercial privileges equally available to treaty partners.

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[277] Sunita Jogarajan, 'Prelude to the International Tax Treaty Network: 1815-1914 early tax Treaties and the Conditions for Action (2011) 31:4 Oxford J Leg Stud 679 at 687.
[278] *Ibid*.
[279] *Ibid* at 689
[280] *Ibid* at 691
[281] *Ibid*
[282] *Ibid*
[283] *Ibid*

The 1907 treaty between France and Great Britain was ostensibly for revenue reasons. After the defeat of France by Prussia in the war from 1870 to 1871, France was required to pay Prussia five billion gold francs in five years.[284] The 1907 treaty was part of France's strategic moves to increase revenue generation to settle the war payment obligation.[285] The same reason applies to the 1843 agreement between Belgium and France on one hand and the 1845 agreement between Belgium and the Netherlands. The scope of these agreements might be limited to the exchange of tax information; the underlying objective is that the information would result in revenue. The information would enable the treaty partners to identify taxable incomes and entities that could have been concealed from the states without such a treaty.

2.2 International Institution as a Springboard for Coordination of Efforts to Resolve International Tax Problems

With the increased cross-border movement of capital and industrial revolution, double taxation became a problem affecting many states. The approaches of the United States and the United Kingdom could not provide adequate measures because of differences in various domestic tax systems. I argued earlier that the United States Revenue Act (the law that grants the foreign tax credit) was later amended because foreign tax liabilities suffered by the United States nationals were higher than what they could have paid under the domestic tax. The differences in domestic tax systems could also be the characterization of income and principles of ascertainment of taxable profits. It could also be a method of double tax relief – for example, the United States adopted the tax credit method while the United Kingdom preferred the deduction method (though it is much limited to tax liabilities from its dominions).

[284] *Ibid* at 693.
[285] *Ibid*.

The international tax agreements that could have been used, given the apparent limits of the domestic tax systems, have limited coverage short of what could form an ITR. The 1899 tax treaty and other tax treaties modelled on the 1899 treaty were used by a cluster of states with political and territorial ties.[286] These treaties were common in states that were hitherto part of the German Empire or at different times had a relationship with the German Empire. It is even said that the 1899 tax treaty was modelled on the German income tax law of 1870, enacted to address double taxation in the North German Confederation.[287] Twenty-two states formed the North German Confederation, with Prussia as the dominant and most powerful state among them. The economic relationship among the states within the confederation, where a resident of one state might be earning income in another state, and such income was taxed more than once, put the confederation under pressure to address the double taxation. The law was eventually made in 1870, initially applicable to the North German Confederation, but was later made applicable to the entire Germany in 1871 after Prussia defeated France.[288] Given this limitation, there was a need for an international institution to facilitate the standardization of common international tax principles.

I explain in the next section the justification for international institutions in international taxation and the power dynamics in such institutions. I proceed with a general overview of the role of international and then narrow it down to the significance of international institutions in international taxation. The purpose is to emphasize the significant role played by the League in promoting international tax cooperation for creating and sustaining the ITR.[289] If the states' efforts

[286] *Ibid.* There was another tax treaty between Austro-Hungary and Liechtenstein in 1901. Between 1903 and 1913 Austro-Hungary signed tax treaties with the following German states: Saxony, Bavaria, Württemberg, Baden and Hesse. Another treaty between Prussia and Switzerland was concluded in 1910. See p.692.
[287] *Ibid* at 695 -697.
[288] *Ibid*
[289] Hugh J. Ault, "The Importance of International Cooperation in Forging Tax Policy" (2001) 26:4 Brook J Int'l L 1693.

on international tax problems before the League fall short of ITR,[290] and that limitation was addressed by the League, the states are compelled to link their policymaking to the broad mandate of the League.

2.3 Justification for An Intergovernmental or An International Institution

Generally, economic interdependence and integration among states necessitated establishing a global system, where a central system coordinates economic activities to achieve some agreed global standards and rules.[291] The growing trend of this integration of production across national boundaries is commonly described as globalization, and negotiation of issues around globalization as global governance.[292] It is a web of frameworks – rules, procedures, policy instruments, financing, and norms - that addresses global problems, common interests, shared values and goals beyond individual states' capacity or can better be addressed through collective efforts.[293] Global governance does not, however, imply world government – it is just a new norm that naturally evolves from cross-border activities and the transit of people.[294] While it is impossible to have a world government in one entity, the increasing global economic trends

[290] Dagan, Tax Treaties as a Network Product, *supra* note 225.

[291] Carayannis Elias G., Pirzadeh Ali & Popescu Denisa, *Institutional Learning and Knowledge Transfer across Epistemic Communities: New Tools of Global Governance* (Innovation, Technology, and Knowledge Management; 13). (New York: Springer Science Business Media, LLC, 2012) p.1; Baccaro, Lucio & Mele Valentina. (2011). "For Lack Of Anything Better? International Organizations and Global Corporate Codes" (2011) 89:2 Public Administration 451 at 470.

[292] International Monetary Fund, *World Economic Outlook* (USA: International Monetary Fund, 1997). International Monetary Fund defines globalization as the 'growing economic interdependence of countries worldwide through increasing volume and variety of cross border transactions in goods and services, free international capital flows, and more rapid and widespread diffusion of technology'. Another globalism concept was coined as a response or resistance to globalization. The difference between the two concepts is that globalism is premised on consensus, solidarity and commonalities, while globalization is based on diversity. The detailed analysis of these concepts is beyond the scope of this paper. For details on arguments around these two, see Richard Stahler-Sholk, "Globalization and Social Movements Resistance: The Zapatista Rebellion in Chiapas, Mexico" (2001) 23:4 New Political Science 493

[293] Deborah D. Avant, Martha Finnemore, & Susan K. Sell, *Who Governs the Globe*? (New York: Cambridge University Press, 2010) at 1

[294] Carayannis., Ali & Denisa, *Institutional Learning and Knowledge Transfer across Epistemic Communities: New Tools of Global Governance*, *supra* note 291 at.2

suggest that states can no longer exert absolute sovereignty on their boundaries. The supposed physical boundaries over which states may wish to exert Westphalian authority no longer exist as all territories are now connected to one another with common interests – the interests may sometimes be economical, political, religious or professional.

Renates Mayntz, an emeritus professor with a research interest in transnational structure and global governance, examines the concept of globalization from political and economic perspectives.[295] Maytnz argues that economic globalization involves cross-border business activities of multinational corporations, while political globalization is the actual global governance involving multiple actors from states and non-governmental organizations.[296] Mayntz's analysis shows global governance is the point of convergence between the political and the economic actors in global issues. Both actors play key roles in designing new international norms. The economic actors do not play visible roles in the inter-governments' deliberations but they do advance their interests through their relevant political actors.[297] Rather than using enforceable rules commonly associated with the national government, the political actors use instruments of deliberations, negotiations and persuasions to advance the interest of their economic actors and to actualize international cooperation and consensus on global economic matters.[298]

The role of international institutions took another dimension in the 1960s – the era during which some low-income states became politically independent. According to Akira Iriye, professor of international history at Harvard University, international institution's activities in that period

[295] Renates Mayntz, "Global Structures: Markets, Organizations, Networks – and Communities" in Djelic, Marie-Laure & Sigrid Quack, eds, *Transnational Communities: Shaping Global Economic Governance*. (Cambridge: Cambridge University Press, 2010). p 37
[296] *Ibid*
[297] *Ibid*
[298] *Ibid*

focused on providing developmental assistance to the newly independent states.[299] This is why the UN declared the 1960s as a decade of development.[300] In furtherance of its commitment to promote development projects in developing countries, the UN organized its first conference on trade and development in 1964 through its special purpose organ, the UN Conference on Trade and Development (UNCTAD).[301] The OECD was established during this period to coordinate foreign aid programmes of its richer members from Europe, North America and Oceania.[302] Foreign assistance was usually viewed as part of the Cold War strategy, but after the Cold War, it was (and still is) described as a motive to eliminate the wide gap between the rich and poor nations in order to attain a stable world order.[303]

In explaining the notion of power in the context of the global system, Carayannis Elias, a professor of science and entrepreneurship, and his colleagues argue that the monopolistic role of states in the use of power and force to influence certain behaviour is no longer justifiable in this era of economic integration – an era that places emphasis on means of production rather than means of destruction.[304] The emergence of non-state actors, such as religious movements that

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[299] Iriye, *Global Community: The Role of International Organization in the Making of the Contemporary World, supra* note 62 at 104 -105

[300] *Ibid*.

[301] *Ibid*. According o the account of the UNCTAD, the conference was held in Geneva in 1964 at the request of the developing countries which are concerned about their place in international trade. On the same of the first conference, group of seventy-seven (G77) was created to voice their concern sin the programmes of the UNCTAD. The G77 now has 131 members. See UNCTAD History at https://unctad.org/about/history#:~:text=The%20first%20United%20Nations%20Conference,held%20in%20Geneva%20in%201964. See also About the Group of 77, online: http://www.g77.org/doc/

[302] *Ibid* at 105

[303] *Ibid* p. 106. The theory economic development popularized by W.W. Rostow believed that the development projects were used to promote the underlying objectives of the Cold War between the United States and the Soviet Union in proxy countries.

[304] Carayannis, Ali & Denisa, *Institutional Learning and Knowledge Transfer across Epistemic Communities: New Tools of Global Governance*, *supra* note 291 at 32. I agree with the author's criticism of several theories of power – the theories have been proved irrelevant by the realities of the world we now live in. There is no consensus in theories of power. Capability, in terms of military influence, is what constitutes power, according to Kenneth Waltz, while capacity alone does not translate to power in the view of Stanley Hoffman. Both Joseph Nye and Klaus Knorr adopt dual approaches to explain power. Joseph Nye divides power into hard and soft power, while Klaus Knorr puts as coercive and non-coercive. Hard and coercive power is the capability, and soft and noncoercive power is the ability to persuade or attract people. See pages 27 – 31.

wielded so much influence beyond their primary borders at different times, is proof of declining states' influential roles.[305] Because of its central role in coordinating and harnessing global economic activities – the new source of power - interconnected networks and institutions evolved as the biggest power broker and 'hegemon'.[306] Carayannis and his colleagues submit that power should be defined as something that 'emanates from a loosely woven web of interconnected actors and institutions whose interests sustain existing conditions while allowing certain forms of discontent and resistance to emerge'.[307]

States are motivated by the realities of globalization to sacrifice part of their sovereignty for greater global economic benefits and to attract foreign investments.[308] The sacrifice from the state does not totally diminish that state's existence but enables it to achieve through transnational governance what it could not achieve on its own.[309] There is neither a supreme nor a central power, but a community of states that makes respective states coordinate parts of the larger community. The community occurs globally and fosters common specific goals that transcend the reach of its coordinating parts.[310] To function properly, the community requires a multilateral framework that supersedes national interests and is more beneficial than unliteral actions by states.[311] The modern world of exclusive, territorial and Westphalian state sovereignty that started in 1648 was replaced

[305] *Ibid* at 31. The Christianity's dominance of the European culture and politics for over 1500 years, and strong Islam presence and leadership role in European countries, such as Spain, Portugal, France and Sicily are instances of when non-state actors held sway in the world power.
[306] Charles Kindleberger, *The World I Depression: 1929 – 1939*, (London: The Penguin Press, 1973). The word 'hegemon' is borrowed from Charles Kindleberger's 'Hegemonic Stability' theory, which states that the international economy requires a powerful person (Hegemon) to stabilize it. Charles argues that the stock crash of 1929 would have been avoided if there had been a world hegemon that would coordinate international affairs.
[307] Carayannis, Ali & Denisa, *Institutional Learning and Knowledge Transfer across Epistemic Communities: New Tools of Global Governance*, *supra* note 291.
[308] Peter Dietsch, "Rethinking Sovereignty in International Fiscal Policy" (2011) Rev Intl Studies 37 2107 at 2109 3
[309] Djelic, Marie-Laure, & Sigrid Quack, "Transnational Communities and Governance" in Djelic, Marie-Laure, & Sigrid Quack, eds, *Transnational Communities: Shaping Global Economic Governance*. (Cambridge: Cambridge University Press, 2010) at 13 - 15
[310] Carayannis, Ali & Denisa, *Institutional Learning and Knowledge Transfer across Epistemic Communities: New Tools of Global Governance*, *supra* note 291 at 68-69.
[311] *Ibid* at 73

with a non-exclusive international community.[312] It is practically impossible to delegate the power to govern the desired non-exclusive international community to one of the states. The fear that such a state's self or national interest may defeat the purpose of the global community justifies the creation of international institutions.

International institutions are established to assume the new role of coordinating deliberations and negotiations among states for onward domestication into respective national laws and policies.[313] Since the establishment of the first modern international institution, the Central Commission for the Navigation of the Rhine, by the Congress of Vienna in 1815 and the Superior Council of Health in 1838, the international community has appreciated the importance of pooling resources together to advance a common good under an entity that draws its authority and legitimacy from the states.[314] The emergence of international institutions as part of the global system is a new narrative in world politics. Institutions, therefore, become platforms through which competing interests can be pursued and indirectly sold to other states. Advanced states can act through international institutions rather than forcefully imposing economic terms on weaker states. The weaker states will be willing to comply with those terms to meet global standards.

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[312] John Kirton et al. "Introduction, Arguments and Conclusion" in Marina Larinova et al., eds, (2010). *Making Global Economic Governance Effective: Hard and Soft Law Institutions in a Crowded World* (1st ed. Global finance series). (Farnham: Routledge, 2010) at 3

[313] Oran Young, *International Governance: Protecting the Environment in a Stateless Society*, (Ithaca: Cornell University Press, 1994) at 15

[314]Iriye, *Global Community: The Role of International Organizations in the Making of the Contemporary World supra* 62 at 10-11. The emphasis on these institutions does not suggest they are the earliest. Some institutions were established before 1815 but are regarded as early modern institutions. Some of these institutions are considered international, even though most only operate within the European region. The globalization factor also birthed international alliances in non-governmental activities. As a result of this, notable international NGOs were established. Young Women's Christians Associations, International Olympic Committee (both were established in 1894); and International Red Cross (established in 1864).
The Bretton Woods institutions, established in the twentieth century, are the most influential institutions in the world. The International Monetary Fund (IMF), the International Bank for Reconciliation and Development (IBRD), and the World Bank were established in 1944. The General Agreement on Tariffs and Trade (GATT) was established in 1947 and became the World Trade Organization in 1995 (see pages 12 – 17).

Both political science professors, Robert W. Cox and Harold Jacobson classify international institutions into forum and service institutions.[315] The forum organization, such as the OECD, provides a platform for deliberation on global issues among states, while the service organization, such as the World Health Organization, is established to discharge certain services.[316] The forum institutions set the agenda, facilitate discussions, promote cooperation among states and provide common goods for the benefit of their members. On the other hand, the service organizations discharge specific services mandated by its members. The service could be implementing the agreed policies designed at the forum level. Some institutions, such as the OECD and the UN, share the attributes of forum and service organizations. The OECD's work on global tax governance combines forum and service activities. It is a forum organization that provides an enabling platform for deliberation and shares some attributes of a service organization for monitoring members' compliance with the agreed standards.

The states' declining power in government and the radical shift to global governance visibly dominated by the institutions were necessitated by a few reasons: globalization, privatization, technological advancement and the end of the Cold War.[317] Technological advancement and globalization are more relevant to the discourse of this thesis. Globalization and technology are the major impetus for the intervention of institutions in international taxation. In the 1920s, the intervention of international institutions in international taxation was motivated by globalization. The intervention facilitated the growth of cross-border investments in countries brought together by globalization.[318] However, in the present era, globalization and technology,

[315] Robert W. Cox & Harold K. Jacobson (1973), "The Framework for Inquiry". In Cox W. Robert & Harold K. Jacobson, eds, The *Anatomy of Influence: Decision Making in International Organization*, (Yale University, 1973)
[316] *Ibid*
[317] Iriye, *Global Community: The Role of International Organizations in the Making of the Contemporary World supra* 62 at 3
[318] Souza de Man, Fernando, *Taxation of Services in Treaties Between Developed and Developing Countries*. (Amsterdam: IBFD Publication, 2017)

or globalization entrenched by technology, necessitate the need for states to act through international institutions.

The consequential result of the diminishing state's power is the relative influence of the international institutions on the state's policies and legislation. John Mearsheimer, professor of political science, believes that the institution's influence is minimal on the state's behaviour.[319] On the contrary, Amitav Acharya, professor of international relations, believes that the influence is substantial, having a greater effect on states' sovereignty and behaviour.[320] Acharya's view is supported by the UN's position that the time of states' 'absolute and exclusive sovereignty has passed' and the theory of absolute sovereignty 'was never matched by reality'.[321] The two opposing views acknowledge the international institution's influence on states; they only differ on the degree and the extent of that influence. The influence of international institutions may be minimal in other areas of international interests; it has a monumental effect in international taxation.

International taxation is an area where international institutions significantly influence states' tax policies through their soft laws. For example, most bilateral tax treaties are modelled after the OECD's tax treaty model. When the tax treaty is domesticated, it takes priority over national tax law in some jurisdictions, such as Canada. In applying the tax treaties, states also defer to the OECD's commentary or additional guidance on the tax treaty model. The OECD's transfer pricing guideline is a source of authority for states in determining the attribution of profits between

[319] Mearsheimer John, "The False Promise of International Institutions" (1995)19:3 International Security 5-49
[320] Acharya, A., "Multilateralism, Sovereignty and Normative Change in World Politics" in E. Newman, R. Thakur & J. Tirman, eds, *Multilateralism Under Challenge? Power, International Order and Structural Ch*ange (Tokyo: UN University Press, 2006) 95 - 118
[321] UN, 47th Session, UN Document A/47/277 – S/24111 (1992). The statement is credited to the UN Secretary General, Boutros-Ghali in his 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping. Report of the Secretary-General Pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992.

associated enterprises. The UN tax treaty model has the same degree of influence when used as the basis for negotiating bilateral tax treaties.

The global financial crisis appears to have some effects on international institutions' influence on states' sovereignty. While addressing the financial crisis, states often begin to reassert their sovereignty regarding financial regulation and immigrant restriction to generate more revenue through taxation and other means.[322] The spillover of the reassertion of sovereignty is several unilateral measures taken by states to legislate on digital transactions in contrast to the OECD's collaborative work.[323] It implies that unless an effective international institution is in place, states may be tempted to withdraw their authority from the institution and assert their sovereignty.

2.3.1 The Implication of Delegation of Authority to International Institutions

The delegation theory in political science justifies the states' decision to cede powers and functions to international institutions to achieve global cooperation.[324] The direct consequence of delegating to the institution is that the states will have limited roles. Only a small quantum of activities will be reserved for states and their representatives, such as negotiating and signing

[322] Michael G. Schechter, "System Change, International Organizations, and the Evolution of Multilateralism" in Muldoon, J., ed, *The New Dynamics of Multilateralism: Diplomacy, International Organizations, and Global Governance*. (Boulder, CO: Westview Press, 2011) at 38

[323] France and the United Kingdom enacted digital service tax laws (DST). Canada is at the advanced stage of implementing its proposed DST. Kenya and Nigeria are the major developing countries with DSTs in place, except that Nigeria's approach is not titled DST, but its substance is not different from DST. Generally, DST is a tax levied on the revenue of digital transactions consumed in other jurisdictions. It is contrary to the OECD's approach, which uses a formulary apportionment of the global profit of multinationals to all the market jurisdictions. The OECD has advised states to suspend the DST to pave the way for its efforts. The states that had these DSTs argue that the DSTs are interim measures pending the conclusion of the OECD's works.

[324] Darren G. Hawkins et al. *Delegation and Agency in International Organizations* (Cambridge: Cambridge University Press, 2006) at 7 -15. The delegation theory recognizes three possible outcomes in inter-state affairs: Unilateralism – a situation where a state acts unilaterally through its domestic laws and institutions to deal with global issues; International Cooperation – which requires convergence of states to adjust a policy but implementation of that policy is carried out through domestic instruments of respective states, and Delegation – this is where international institutions are appointed by states to implement policies that are adjusted or made by the states. Bilateral tax treaties fall under the category of International Cooperation, while the ongoing digital tax proposal by the OECD shares the features of both Delegation and International Cooperation. The OECD's works on the digital tax challenges share the feature of International Cooperation: the proposals must be domesticated in national laws before they can become operational. The aspect of the work that requires the establishment of a centre that addresses issues around the certainty of tax liability and apportionment of profit, which is likely to be the OECD itself, shares the Delegation feature.

treaties or enforcing the institution's policies through domestic laws and policies. The justification is premised on the benefits states will likely get from the institutions. The benefits of the delegation are summarised as follows: expertise, policy externalities, collective decision-making, dispute resolution, and credibility.[325]

Expertise gain is the most striking reason states will be willing to cede their powers to institutions. Institutions can use the expertise advantage to convince member states to have similar ideas about what rules should govern their mutual relationship and ensure everybody plays by the game's rules.[326] The knowledge can be transferred to domestic institutions of member states in the name of having common standards. The effect of the knowledge transfer to domestic institutions is that the traditional distinction between domestic and international policies becomes blurry.[327] The expertise, often regarded as technocracy, confers a competitive advantage to trained experts to actively participate in various states' political and economic decision processes. It automatically makes them strategic stakeholders in the affairs of states even though there is no relationship with such states except that they belong to the institutional community.

States' reliance on experts' opinions in formulating policies for their national sustainable development is justified on two grounds. First, the expert's opinion is assumed to be scientific and rational because it is based on data that are scientifically obtained and interpreted without bias. The objectivity assumption is regarded as a value that is likely to persuade a state to subscribe to the institution's expert opinion. Second, the international recognition and goodwill of the expert will ascribe credibility and legitimacy to policies based on that opinion.[328]

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[325] *Ibid*
[326] Carayannis, Ali & Denisa, *Institutional Learning and Knowledge Transfer across Epistemic Communities: New Tools of Global Governance*, *supra* note 291.at 124.
[327] *Ibid*
[328] *Ibid*

The assumption of objectivity and credibility may not always be correct, and the likelihood that the expert opinion can be tainted with bias in favour of some states cannot be easily dismissed. Socio-economic realities changed inter-state relationships from the traditional view of state-centrism characterized by absolute sovereignty to a loose web arrangement of interconnected networks. The manner in which de facto control is exercised by a state over another state might have changed because of the establishment of international institutions, but the natural motive and desire for dominance inherent in human beings cannot change. Marina Larinova, professor of political science, finds that the G8 has an influence on some international institutions such as the OECD and the UN.[329] She argues that the G8 preferred to use these institutions to govern and promote its agenda.[330] Though her findings are based on empirical analysis of the G8's programmes and policies from 1998 to 2007 on security, development, energy and health, it might be assumed that the G8 will exert a similar influence on the same institutions concerning international taxation.

In that circumstance, the supremacy struggle among states will be shifted to global governance, and states may employ expert opinion to achieve dominance and advance a capitalist agenda. It is easy to utilize the expert opinion to promote a few states' agenda if the expertise of those states is relatively higher than that of the other participating states. In that circumstance, the tool of expertise may achieve what numerical strength cannot achieve for a group of states with the highest number in a community. As an example, the number of developing countries in the BEPS Inclusive Framework exceeds the number of developed countries, but the dominance does not translate to strength for them in terms of both political and technical capacities. The OECD's

[329]Marina Larinova, "The New Partnership between Multilateral Organizations and the G8" in Marina Larionova et al., eds, *Making Global Economic Governance Effective: Hard and Soft Law Institutions in a Crowded World* (1st ed. Global Finance Series). (Farnham: Routledge, 2010) at 60
[330] *Ibid*

advice to the G20 to provide technical assistance to the developing countries confirms the vulnerability of the developing countries to accept whatever terms suggested to them as the best practices. This, therefore, provides an opportunity for the OECD states to persuade the developing countries to accept their opinions and standards as the best practices. The developing countries will be helpless in that circumstance to provide a counterapproach and be constrained to accept those standards.

International taxation is a special regime with relatively fewer experts. The role and opinions of these experts in the design and development of international taxation principles were too significant to be glossed over. Even when the states nominate the experts to a global representative body, they still exercise their influential opinions, though with deference to their states' agenda in some cases.[331] For example, the personal view of Percy Thompson, Great Britain's representative in the League, affected the committee's objective to achieve consensus on some of its works. The proposed consensus was delayed until Great Britain replaced him with a liberal person, Gerald Canny, who eventually worked to achieve the consensus report in 1927.[332]

The business community also has a pool of experts whose work on double taxation predates the establishment of the League. Represented by the International Chamber of Commerce ('ICC'), the business community had engaged its experts, among whom was Thomas Adams, to address

[331] Jogarajan, *Double Taxation and the League*, *supra* note 10 at 22-30. Sunita comprehensively explains how the Financial Committee of the League conferred wide discretion on the technical experts in their debates on tax evasion and double taxation. There were neither terms of reference nor guiding principles other than the goal of the state to generate more revenue. Revenue generation was the states' key objective, which was the reason behind the 1925 technical experts' meeting theme – tax evasion. The theme influenced the constitution of the technical experts – the experts were chosen from countries that either had treaties on tax evasion (Belgium, France and Britain) or were likely to be interested in the theme (Italy, Netherlands, and Switzerland). Double taxation was not contemplated in the constitution of the experts until Czechoslovakia requested the Secretary General of the League to add its treaty negotiator to the technical experts. The technical experts were guided by their expertise, spirit of compromise, and the state's need for revenue.

[332] *Ibid*

the problem of double taxation.[333] Relying on its experts, the ICC forwarded its resolution – which gives practical insights into the problem of double taxation - to the League of Nations shortly after the latter was established. The ICC's resolutions were among the factors that triggered the League's work on double taxation, and some of its practical advice and insights were considered by the League's technical experts.[334]

The secretariat of an international institution is another expert community of civil servants that asserts influence on the works of the institutions and their member states. For example, the OECD's secretariat significantly affects the organization's process and outcome. The member states sometimes adopt its proposed ideas. While designing the Two Pillar framework, the BEPS Inclusive Framework proposed in January 2019 that the initial agenda on the tax consequences of the digitalized economy be reduced into two areas – which later became the Two Pillars.[335] It suggested user participation, marketing intangibles and significant economic presence and encouraged participating countries to adopt a unified approach.[336] The Secretariat proposed a unified approach to pillar one – the pillar that defines new nexus and allocates multinationals' profit to market jurisdictions.[337] The unified approach divides the multinational companies' profits into Amounts A and B to design allocation rules for each.[338] The Inclusive Framework approved

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[333] *Ibid*.
[334] *Ibid* at 87 -89. The ICC's influence work on the League's work was limited to double taxation, and the other leg of the report – tax evasion – was within the exclusive preserve of states.
[335] OECD, OECD/G20, *Addressing the Tax Challenges of the Digitalization of the Economy – Policy Note (23 January 2019*) online:<www.oecd.org/tax/beps/policy-note-beps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf > The idea was subsequently developed into the present Two Pillars, where Pillar One creates new taxing rights and the Pillar Two ensures effective taxation by allowing a jurisdiction to impose additional tax where the taxable entity underpays its tax on its subsidiary.
[336] *Ibid* at 11. It also considers using modified residual profit split method and fractional apportionment for allocation of the multinational profit among eligible countries.
[337] OECD, *Secretariat Proposal for a "Unified Approach" Under Pillar One, (9 October 2019 – 12 November 2019)* online: <www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf>
[338] Under Amount A, a percentage of multinationals' residual profit is allocated to market jurisdictions that meet the new nexus requirements. Amount B is the multinationals' profit from their in-country marketing and distribution activities, and that profit will be allocated by the existing transfer pricing rules. Amount C relates to effective dispute

the unified approach in its January 2020 report as the basis of negotiation among its members, and the Secretariat's unified approach is still reflected in the progress work of the Two Pillar.[339]

The delegation theory recognizes five control mechanisms through which the potential influence of the institution can be curtailed.[340] First, the institution's activities can be controlled through well-detailed rules that do not confer wider discretion on the institution.[341] Second, regular monitoring of the institutions and the demand for periodic reporting of its activities can constrain an institution's power scope. The monitoring and reporting requirements help the states identify and address risk areas early before other extraneous factors complicate them.[342] Third, states can carefully select institutions likely to support their interest.[343] The selection control mechanism is available to states before the institutions are appointed, and the states may be guided by the institution's profile and antecedence in the selection procedure.[344] It appears the third option can only be used when states consider which existing institutions can be used to pursue common goals.

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resolution on the proposal element, including other profits that exceed the baseline marketing and distribution activities in the market jurisdictions. Amount C has, however, been abandoned in the progress work on the Two Pillar.

[339] OECD, OECD/G20 Base Erosion and Profit Shifting Project, *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalization of the Economy*, (January 2020) online: www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework- on-beps-january-2020.pdf

[340] Darren G. Hawkins, *et al. Delegation and Agency in International Organizations supra* note 324 at 27.

[341] *Ibid*

[342] *Ibid*. at 28

[343] Abraham L. Newman, "International Organization Control under the Conditions of Dual Delegation: A Trans governmental Politics Approach" in Deborah D. Avant et al. l, eds, *Who Governs the Globe*? (New York: Cambridge University Press, 2010) at 131. According to the instrumental theories, states may appoint committees within the institutions to monitor and report on the activities of the institutions. The internal committees are described as 'police patrols'. This control mechanism may, however, fail due to socialization with officers of the institutions. The monitoring committee will likely adapt their preferences to the institutions in the long run. The police patrol can only work effectively when its interests align with the interests of the states. The police patrol's interest can either be with the Institution or states and in some cases, the patrol will have interests that neither supports the state nor the institution. Abraham examines an instance where a state delegates to an international institution and another state's agency. This is known as the agency above and below. In this circumstance, the monitoring is in two folds – states will need to monitor the international institution and its internal agency because of the possibility of alignment of interest between institutions and the domestic agency.

[344] *Ibid*

Fourth, the states can set up units within the institutions' organizational framework solely to check and correct likely deviations of the institution.[345] The fifth and most powerful mechanism is monetary sanction.[346] It is expected that the participating states will fund the delegated institutions' activities and, considering their economic inequality, there cannot be equal contribution among them. The highest donor states can leverage their higher contributions to the institutions to define and influence the outcome of the institution. This most potent control of monetary sanction mechanism is not available for low-income countries.

The control mechanisms are not ultimate and immune from maneuvering by the institutions. The institutions can devise responsive means to relax or break the limitations imposed by states through any of the control mechanisms.[347] Both high-income and low-income countries are susceptible to the strategies the institutions can use to expand their autonomy. Four strategies commonly used by the institutions in this regard are interpretation of the likely rules or instructions before the delegation, re-interpretation of the clear rules of engagement after the delegation, the possibility of the institutions' permeability to third parties, and efforts to buffer state monitoring.[348]

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[345] *Ibid* p. 30
[346] *Ibid*.
[347] *Ibid*
[348] *Ibid* 205 - 212. The authors explain how institutions can use interpretative and re-interpretative opportunities to interpret ambiguous or complex provisions of the rules - made by states as control measures – to make them more autonomous. In a few such instances, the interpretations are purposively given to increase states' monitoring costs or divide the states. The high monitoring cost will likely discourage the states from using their resources to monitor the activities of the institutions. The interpretation that caused a split among the states will not make the states act in a collective manner. The institutions will use this opportunity of the split to exert their independent views that may be contrary to the states' collective position. With respect to permeability, the authors analyze how external parties that are neither states nor institutions – described by the authors as non-principal - can access the institutions and influence some of their outcomes. The access may be in terms of providing financial support to the institution or contributing to some of the working documents of the institutions. The non-principal and the institutions can utilize the permeability, but the institutions use the permeability to limit the states' control measures. Buffering strategy is the institution's resistance measure to the states' monitoring exercise. Buffering can be realized through a dualism or ceremonialism approach. The dualism approach is where the institution simultaneously adopts overt and covert positions in dealing with the states. The covert position represents what the institution stands for, while the overt position is what the institution projects to the public because it pleases the public. While the institution is overtly projecting itself to the states as an entity that promotes its interest, the interest can equally covertly promote its interest, which may be contrary to the state's interest. The ceremonialism refers to limited or satisficing reporting by the institution. The institution reports what pleases the states without giving a detailed account of its activities.

However, this justification should not be hastily acknowledged without considering whether the LMICs can employ any recognized control mechanisms to ensure that the outcome of the delegation and the deliberation at that forum will protect their interests. While there are compelling reasons to establish an international institution where the state actors can promote global stability variables, the implications of delegating authority to that institution are concerning.[349]

2.4 The League as a Springboard for the International Tax Regime

The much-needed international institution to address double taxation came through an unexpected means. It is unclear whether states contemplated the establishment of a global institution for international tax before the start of the First World War. States could not have been expected to take any step to establish such a regime between the interregnum period of 1914 and 1918 when the First World War was ravaging the international community. The end of the First World War came with an opportunity to establish the League of Nations as a peace-making institution and to avoid possible world war thereafter. State and non-state actors – such as the International Chamber of Commerce (ICC), utilized the opportunity to put the double taxation problem on the international agenda through the League. It is concerning that actors who adopted the platform of the League to establish ITR – because they believed that the problem was within its scope – failed to ask the question of how their recommendations connected to the broad mandate of the League of Nations.

[349] Randall W. Stone, "Institutions, Power and Interdependence" in Helen V. Milner & Andrew Moravcsik, eds, *Power, Interdependence and Nonstate Actors in World Politics* (Princeton: Princeton University Press, 2009) 34.

In line with the CSM theory, there must be a 'shock' or a 'sudden event' before the actor can undertake the sensemaking process. The 'shock' or 'sudden event' of this phase – the crystallization phase - was how to establish a global regime to address double taxation. The problem of double taxation was not new then, but the fact that previous attempts, as argued earlier, to address the problem did not yield optimal results still made the problem new. Moreover, since post-first World War efforts would increase international trade, multidimensional double taxation should be expected to arise from the enhanced global trade. The strongest part of the 'shock' was the need for a manual or soft law that guides states on designing bilateral tax treaties. This soft law's main importance was ensuring that states adopt a common path to solve common problems. This soft law was never in place before the League. All the tax treaties and agreements signed before the League were not designed as soft law or guidance, even though some principles – such as permanent establishment, source, residence and reciprocity - in those treaties are adopted in the current network of bilateral tax treaties.

The 'shock' is a condition precedent to undertake critical sensemaking analysis of the actors involved in this phase. This thesis' claim is that considering the context in which ITR was created, global stability variables should be integrated by the actors in the international tax framework. The actors ignore global stability variables because of their sensemaking process in each of the three phases of the ITR I have identified. Having explained the 'shock' of this phase, I identify the actors in this phase and how their sensemaking process ignored global stability variables in creating the ITR.

2.4.1 International Tax Actors

By way of a working definition, actors in this context refer to individuals and their committees. Using the Financial Committee of the League as an example, the actors are the

committee as a distinct body and the members of that committee. The actors of this phase are into three categories: the state actors, the experts and professionals, and the business actors. The actors in each category were influenced by 'who they are' and 'how they do things' –their identity construction - in addressing the double taxation problem. The identity construction of these actors diverted their focus from the broad mandate of the League.

2.4.1.1 The Financial Committee of the League

The Financial Committee is part of the Provisional Economic and Financial Committee, created by the Council of the League in October 1920 on the recommendation of the International Financial Conference.[350] Based on the resolution of the Council in February 1920 to convene an international conference that is specifically committed to the study of the global financial crisis and how to fix it, the International Financial Conference was established for that purpose.[351] The conference was held in Brussels from 24 September 1920 to 8 October 1920. The International Financial Conference recommended the establishment of the Commission on International Trade and Credit, among other committees dedicated to different economic problems.[352] The Conference further recommended, as part of solutions to problems of international trade and credit, that progress should be made on an international understanding that ensures payment of taxes and avoids double taxation.[353] The Provisional Economic and Financial Committee was created based on the recommendation of the International Financial Conference. The committee was divided into the Economic Committee and the Financial Committee. The Economic Committee focused on

[350] Martin Hill, *The Economic and Financial Organization of the League*, (Washington: Carnegie Endowment for International Peace, 1946) 21.
[351] *Ibid*
[352] League, International Financial Conference, *Report of the Conference*, (London: League, 1920) 26. The other committees are the Commission on Public Finance, the Commission on Currency and Exchange, the Commission on International Trade
[353] *Ibid*. The Conference states: 'an international understanding which, while ensuring due payment by every one of his full share of taxation, would avoid the imposition of double taxation which is it presents an obstacle to the placing of investments abroad.'

economic matters generally, while the Financial Committee examined the financial crisis, which included but was not limited to taxation. The works of the League on international taxation were discharged through the Financial Committee.

The Financial Committee comprises ten members, just like its sister Economic Committee.[354] Four of these ten members were from the four great powers – Great Britain, France, Italy and Japan - which also occupied the permanent seats in the Council of the League of Nations.[355] At least each representative from Latin America, Scandinavia, Eastern Europe, and the British Dominion.[356] The Committee was later expanded to include members from smaller countries.[357] These members were appointed in their personal capacities – as persons with the required skills to collaborate with other members in finding solutions to the financial crisis – and not as representatives of their countries. Going by the case study of Great Britain –a member of the Financial Committee -, the approach to double taxation before 1919 was strictly economic. Even if the member of the Financial Committee from Great Britain was not the country's official representative, his contribution would not be different from Great Britain's taxation system and its remedy to double taxation.

The loss of focus from the broader mandate of the League started with the Financial Committee. While considering the best approach to fix the economic and final crisis for the world, the International Financial Conference emphasizes the significance of peace as the main driver of economic growth.[358] It states that man's work is the basis of production, and the production consequences serve as a primer to economic prosperity.[359] The best approach to increase economic

[354] Hill, *The Economic and Financial Organization of the League*, *supra* note 350 at 21.
[355] *Ibid*
[356] *Ibid*
[357] *Ibid.*
[358] League, International Financial Conference, *Report of the Conference*, supra note 352 at 6-7.
[359] *Ibid.*

prosperity is to increase production through increased man's work.[360] The main factor that guarantees man's work is peace, which is not usually emphasized as a financial factor. The Conference, therefore, advises states to prioritize conditions that enable peace, and economic prosperity will naturally flow from that. The Conference states as follows:

> First and foremost the world needs peace. The Conference affirms most emphatically that the first condition for the world's recovery is the restoration of real peace, the conclusion of the war which are still being waged and the assured maintenance of peace for the future. The continuance of the atmosphere of war and of preparation for war is fatal to the development of that mutual trust which is essential to the resumption of normal trading relations. The world must resolve the rivalries and animosities which have been the inevitable legacy of the struggle by which Europe has been torn…
>
> If the first condition of recovery is peace between the countries of the world, the next is peace between each of them and the establishment of conditions which will allay the social arrest that is at present impeding and reducing production and which will restore social content and with it the will and the desire to work.[361]

Whether or not it is stated in the instrument of creation of the Financial Committee, the recommendation of the International Conference should be the guiding framework for the Financial Committee. Had this recommendation been considered by the Financial Committee, the questions submitted to the four economists they engaged to advise them on how to address double taxation would have been framed differently. The questions would have been what principle of double taxation can create 'conditions which will allay the social arrest' and 'which will restore social content and with it the will and the desire to work'. Rather than considering this recommendation, the identity construction (their background and roles as employees of different states) of the members of the Financial Committee made them to think that double taxation - in the context they were operating – was strictly an economic problem. Even if it is adjudged to be an economic problem, the International Financial Conference has recommended that economic

[360] *Ibid*
[361] *Ibid.*

problems cannot be fixed in isolation of conditions that guarantee peace.[362] The Financial Committee derailed from its intended course by submitting the following questions to the four economists:[363]

> (1) What are the economic consequences of double taxation from the point of view:
> (*a*) of the equitable distribution of burdens;
> (*b*) of interference with economic intercourse and with the free flow of capital?
>
> To what extent are these consequences similar in the different types of cases commonly described as double taxation?
>
> (2) Can any general principles be formulated as the basis for an international convention to remove the evil consequences of double taxation, or should conventions be made between particular countries, limited to their own immediate requirements? In the latter alternative, can such particular conventions be so framed as to be capable ultimately of being embodied in a general convention?
>
> (3) Are the principles of existing arrangements for avoiding, double taxation, either between independent nations (*e.g.*, the Rome Convention) or between the component portions of a federal State, capable of application to a new international convention?
>
> (4) Can a remedy be found, or to what extent can a remedy be found, in an amendment of the taxation system of each individual country, independently of any international agreement?
>
> (5) To what extent should the conventions on the subject of double taxation establish an international control to prevent fraudulent claims?

The rationale behind conceptualizing the double taxation problem as strictly an economic problem in terms of reference to the four economists becomes clear when we consider the background of the main actors in the Financial Committee that spearheaded the drafting of those terms. At the first joint session of the Financial Committee held between November and December 1920, the Committee resolved that Mr. Avenol (France's representative) and Mr. Blackett (Great Britain's representative) should write a report on the history of double taxation in their respective

[362] *Ibid*
[363] League, Economic and Financial Report by the Experts on Double Taxation, *Report on Double Taxation Submitted by the Experts on Double Taxation*, (April 5, 1923) Document E.F.S. 73. F.19

countries and recommend to the Committee the appropriate procedure for dealing with double taxation.[364] Mr. Avenol was a financial inspector in the French Government while Mr. Blackett was working with the H.M Treasury, the official revenue collection agency of Great Britain. The Financial Committee also instructed Mr. Avenol and Mr. Blackett at its fourth session held in May 1921 to draft the terms of reference to the four economists.[365] The sub-committee on double taxation established by the Financial Committee in February 1922 comprised Mr. Avenol, Mr. Hawtrey (who replaced Mr. Blackett as Great Britain's representative) and Mr. Bianchini (Italy's representative).[366]

As previously examined, the rationale behind the introduction of income tax in Great Britain is purely economic – it is intended to realize the maximum revenue possible to finance its public expenditure. France's historical development of income tax is similar to Great Britain's. Income tax was introduced in France in 1710 to finance its post-war expenses.[367] The war-related expenses arising during and immediately after the defeat of Malplaquet and the extravagance of Louis XIV resulted in a revenue deficit for France.[368] The royal decree of 10 October 1710 introduced income tax to address the deficit.[369] The income tax was abolished in August 1727 after the end of the war. The income tax was re-introduced at two different times – on 17 November 1733 and October 1744 – to finance the war.[370] The rationale for income tax is also economic in France – like the case study of Great Britain, income tax was introduced to finance public

[364] Jogarajan, Double Taxation and the League, *supra* note 10 at 257.
[365] *Ibid* at 259
[366] *Ibid* at 260
[367] H. Parker Willis, 'Income Taxation in France' (1895) 4:1 J Political Economy 37 at 38.
[368] *Ibid*
[369] *Ibid*
[370] *Ibid*

expenditure and the sovereignty of the government. The economic reason continues to influence its tax system (both domestic and international) to date.[371]

Mr. Avenol and Mr. Blackett could not have considered non-economic factors, such as conditions that enable peace, when they were requested to recommend possible ways to deal with double taxation. At this stage, the two gentlemen would have constructed their identities by asking themselves 'who are we' and 'How do we do things.' Considering their background, the possible answer to who we are is that 'we are revenue officers working for effective tax revenue generation for our countries.' The possible response to how we do things would be: 'We have dealt with this kind of international tax problem before in our countries.' Even if there were other options they could consider, their domestic approaches to double taxation would only make sense to them. The approach influenced the drafting of the terms of reference and their subsequent works on double taxation.

One side of the argument is to say that the terms of reference of the Financial Committee constrained the four economists. It is also arguable that the economists should have contextualized their recommendations within the mandate of the League – they can even rely on the recommendation of the International Financial Conference to do this. There is a blanket statement in paragraph 2 of the terms, which the economist can also utilize to go beyond the economic assessment of double taxation. Paragraph 2 of the terms of reference states that 'can any general principles be formulated as the basis for an international convention to remove the evil consequences of double taxation' and could be used as justification if the economists connected the economic analysis to peace consideration. The reality is that the economists could not have been expected to recommend anything other than economic analysis. The economists' report is a

[371] Francene M. Augustyn, "A Primer for Incorporating under the Income Tax Laws of France, Germany, or the United Kingdom" (1985) 7:2 Nw J Int'l L & Bus 267 at 312.

wholly economic consideration of several options to address double taxation.[372] Also, the economist were academics and their report might not totally reflect the practical reality. This might be why the Financial Committee appointed government officials to balance the economists' report by providing practical inputs to the problem of double taxation.

2.4.1.2 The Technical Experts

The Finance Committee resolved at its seventh session held in June 1922 that problems of tax evasion and double taxation would be taken together.[373] It was further resolved that six countries, estimated to have significant interests in tax evasion, should be consulted on the appropriate approach to deal with tax evasion. The six countries are Great Britain, France, Belgium, Italy, Netherlands and Switzerland. Czechoslovakia was later added as the seventh country. The Committee had another resolution at its eighth session held in September 1922 that the seven countries consulted should each send one representative to the 1925 conference where issues of double taxation and tax evasion were scheduled to be discussed.[374] The representatives of these seven countries constituted the technical experts whose works became the defining standards in international tax.

The technical experts were drawn from the pool of civil services of the seven countries. They held management posts in the revenue collection agencies of these countries, and by virtue

[372] W. H. Coates, 'League Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp' (1924) 87:1 J Royal Statistical Society 99 – 102; W.B. Cowcher, 'League: Economic and Financial Commission (1923) 33:132 Economic J 566 – 579; Sunita Jogarajan, 'Stamp Seligman and the Drafting of the 1923 Experts' Report on Double Taxation' (2013) 5:3 World tax J 368-392. The Economists' report, which was published in March 1923, is divided into three. The first part provides a normative analysis of economic consequences of double taxation and its impact on international mobility of capital. The second part examines the general theories of taxation and concludes that doctrine of economic allegiance is the most appropriate method of taxation. The third part examines four methods of relieving double taxation: a. the United States' style of foreign tax credit, b. exemption method, c. division of allocation of taxing rights between the source and the residence countries, and d. classification of incomes into different categories and division of taxing rights on each of the categories of income.

[373] Jogarajan, Double Taxation and the League, *supra* note 10 at 261.

[374] *Ibid* at 262.

of that, they were expected to possess practical knowledge of the problem of double taxation and tax evasion.[375] The preliminary note in the 1925 report of the technical committee alludes to the notion that the 'real' contribution could only be made by the officials of the participating states. It also emphasizes that there might not be any solution to the double taxation without a forum of government officials. The note states as follows:

> (i)n order to arrive at any real solution of these two important questions, It was essential to obtain the opinion of the representatives of certain Governments. Still better results might be anticipated if a meeting of these representatives were convened in order to discuss the possibility of an agreement to enable common action to be taken upon certain points, and to permit the drawing up of schemes, bilateral agreements and other arrangements concerning double taxation and the evasion of taxation.[376]

The experts submitted their report in February 1925 to the Financial Committee after having five sessions of robust discussions.[377] The 1925 Report gives a clear picture of how those experts' sensemaking process departed from the League's mandate by exclusively focusing on revenue consideration. Mr. Léon-Dufour, who acted as secretary to both the Financial Committee and the technical experts, told the technical experts that the underlying objective and expectation of states was that the recommendation of the experts should increase their revenue generation.[378] The experts, thus, started on the wrong notion that double taxation and tax evasion could only be addressed through economic and revenue means.

In realizing the revenue consideration and objectives of their principals – the states-the experts adopted the four economists' report, which I have argued that it is a departure from the

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[375] *Ibid* at 26. The representatives of Belgium, France, Italy and Netherlands were director-general of direct tax of their respective countries. The representative of Czechoslovakia was head of department of ministry of finance, Britain's representative was the deputy chairman of Board of inland revenue and the representative of Switzerland was the director federal taxation.

[376] See League, Technical Experts to the Financial Committee, *Double Taxation and Tax Evasion: Report and Solutions Submitted by the Technical Experts to the Financial Committee*, UN Doc F. 212 (1925) at 3.

[377] *Ibid*

[378] Jogarajan, Double Taxation and the League, *supra* note 10 at 28.

mandate of the League, as a 'solid foundation' of their work.[379] From the perspective of the existing domestic tax system of relieving double taxation, the experts considered the tax systems of Belgium, the Netherlands, Switzerland and the United States.[380] They also considered the first comprehensive tax treaty between the Austro-Hungarian Empire and Prussia and the 1921 Rome Convention signed by Austria, Hungary, Italy, Poland, the Kingdom of Serbs, Croats, Slovenes and Romania. [381] I have examined the tax systems of the United States and the United Kingdom to prove that all these documents are revenue driven. Considering that these documents are the basis of the experts' reasoning, there is no need to go through the entire 1925 Report to conclude that the experts did not make any sense in using an international tax framework to promote global peace.[382]

The forum of technical experts was expanded to include an additional six countries at the eighteenth session of the Financial Committee held on 4 – 8 June 1925.[383] The experts were required to draft tax treaties based on the 1925 report. These experts are referred to as the 1927 experts because their draft tax treaty was submitted to the Financial Committee in 1927. It is a major concern that the additional experts were constrained to work with the 1925 report. If these additional experts had been interested in incorporating the mandate of the League in the tax

[379]League, Technical Experts to the Financial Committee, *Double Taxation and Tax Evasion: Report and Solutions Submitted by the Technical Experts to the Financial Committee* at 11. The Report states: 'we were thus in possession of the views of certain committees of experts and the opinion of the commercial and industrial world as represented by the International Chamber of Commerce, and we had the report of the four economists as a solid foundation for our work'.

[380] *Ibid*.

[381] *Ibid*.

[382] *Ibid* at 12. The Report states:

> Our discussions were based, first, on the whole of the theoretical work referred to above; Secondly, on the suggestions put forward by the Institute of International Law and by the International Chamber of Commerce; and, finally, on existing laws and conventions. It was indeed far from easy to fit all this information into a single general scheme. It was even very difficult to ascertain any general tendencies in this mass of rather disconnected plans, ideas and facts. After long discussion, we finally arrived at agreement on certain fundamental points.

[383] *Ibid* at 264. The countries are United States, Germany, Poland, Japan, Argentina and Venezuela.

framework, the formative context of the 1925 Report would have limited their identity constructions to the contours of the 1925 Report. So, adding the new experts did not salvage the policy deficit in the works of the Financial Committee.

The additional experts were from countries that are known for using tax mechanisms aggressively for revenue purposes. Two additional experts are also known to be revenue-centric in their contributions to their respective national tax systems. Professor T.S. Adams represented the United States, while Professor Herbert Dorn (at a time professor of economics at the University of Delaware) represented Germany.[384] I have previously examined the influential works of T.S. Adams on the United States tax system, particularly his work on the Revenue Act of 1918, which introduced the foreign tax credit. Just like T.S. Adams, Herbert Dorn was Germany's forerunner of international tax law.[385] Considering the impact of Germany's income tax law on the first comprehensive tax treaty and its clear position on revenue consideration – as examined previously – Herbert Dorn would obviously support that the treaty should prioritize revenue over other non-economic factors.

The forum of the 1927 Experts was expanded to include additional representatives from other countries (the expanded forum is known as the '1928 Experts'). The 1928 experts finalized the reports prepared by the 1927 Experts (known as the '1927 Report'). Regarding whether the two reports consider the global stability variables, there is no difference between the 1927 Report

[384] Herbert Dorn, 'Germany in Latin America' (1955) 28:163 Current History 168-176. This article referred to him as a professor at the University of Delaware. There is no doubt it is the same Herbert Dorn under consideration because his description in this article also acknowledges that he was a member of the financial committee of the League. It seems the publisher meant to say he was one of the technical experts on the financial committee. There was no German representative on the financial committee as of 1925 when Herbert Dorn was appointed to the forum of technical experts.

[385] Christoph Bräunig, *Herbert Dorn (1887-1957): Pioneer and Forerunner of International Tax Law* (Mohr Siebeck, 2016). The other experts were working as revenue and finance officers of their respective countries except the representatives of Venezuela and Poland. Mr. Feo, representing Venezuela, was a professor of finance at the University of Caracas. Mr. Zaleski, representing Poland, was a professor of political economy at the University of Posen.

and the 1928 Report. The 1928 Report became the substantive work of the League of Nations and serves as the primer to the subsequent works on international tax.[386]

2.4.1.3 The Business Actors

The business community's contribution through its organized International Chambers of Commerce (ICC) to the development of international tax is too obvious to be ignored. Founded in 1919 after the First World War, the ICC set out to promote global peace by entrenching commercial ties among states and consequently ensuring the prosperity of those states.[387] The ICC's strategy of using cordial international economic relations as a springboard for the promotion of global peace is traceable to its predecessor, the International Congress of Chambers of Commerce ('ICCC'), an international forum where business leaders meet biennially to discuss how businesses can foster international relations.[388] The ICCC is an umbrella organization that brought together representatives of chambers of commerce of different countries and government officials, and to give continuity to its work it agreed to create a permanent committee from these representative.[389] The ICCC affirms at its fifth congress in Boston in 1912 its strong commitment to equitable treatment of global issues and prevention of war.[390] It also restated this commitment

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[386] Mitchell B. Carroll 'International Double Taxation' in Harriet Eager Davis, ed, *Pioneers in World Order* (New York: Columbia University Press, 1944) 171 at 172.

[387] It is believed that prosperous states are less likely to go to war. See International Chamber of Commerce, Our Mission, History and Values online: https://iccwbo.org/about-icc-2/our-mission-history-and-values/#:~:text=ICC%20was%20founded%20in%201919,spirit%20of%20hope%20and%20cooperation. (accessed on 13 April 2023).

[388] See Fifth International Congress of Chambers of Commerce and Commercial and Industrial Associations, September and October 1912 (Boston: Boston Chambers of Commerce, 1912) at 23. The first biennial session was held in Liège, in 1905. It was subsequently held in Milan (1906), Prague (1908), London (1910), Boston (1912) and Paris (1914).

[389] Ibid at 5, 9. The decision create the permanent committee was made in the first biennial session in 1905 in Liège, Belgium.

[390] Ibid at 23. The Congress resolves as follows:

> The Congress affirms its desire to see convened as soon as possible official international conferences, assuring between nations the existence of arbitral jurisdiction in the widest sense of the term and of a nature to assure an equitable solution of all international controversies, either between individuals of different states, or between the states themselves.
>
> The Congress declares its adherence to the principle of a combination when and where possible to endeavor to prevent the atrocities of war.

in its subsequent congress in Paris in 1914 but could not implement it due to the First World War outbreak.[391]

The ICC succeeded the ICCC and inherited its legacy of promoting peace through international trade relations.[392] The ICC prides itself as a merchant of peace and adopts the slogan 'world peace through world trade.'[393] The ICC's activity in international tax raises the question of whether the ICC's commitment to and understanding of peace is not extended to taxation. The preliminary question before this is the ICC's understanding of the relationship between peace and trade. Is it to use trade as a means of realization of peace or to promote trade through peace? If trade is to be used as a means of promoting peace, then the business merchants might need to be less capitalists – by prioritizing social objectives of suing for peace over profit maximization. Considering the fact the business is about maximization of profit, it is doubtful if business leaders can ever prioritize any other objective above profit maximization.

The ICC's understanding is likely to be the promotion of trade through peace – as trading activities can only be optimally undertaken in times of peace.[394] The closing remarks of the United States' 27th President, William Howard Taft, at the fifth congress of the ICCC in Boston in 1912 tacitly support my argument. President Taft remarks that efforts to keep off war result from selfish motives to trade.[395] So, this makes trade the end goal, while advocacy for peace is the means

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[391] George Ridgeway, *Merchants of Peace: Twenty Years of Business Diplomacy through the International Chamber of Commerce 1919-1938* (Columbia: Columbia University Press, 1938) at 15. The Congress that the object of its permanent committee shall be to 'facilitate the commercial intercourse of nations, to secure harmony of action on all international questions affecting commerce and industry, and to promote peace, progress and cordial relations between the countries and their citizens'.

[392] John H. Fahey 'the International Chamber of Commerce' (1921) 94 Annals American Academy of Political & Social Science 126

[393] Dominic Kelly, 'The International Chamber of Commerce' (2005) 10:2 New Political Economy 259 at 261.

[394] This argument excludes arms trade, which is bargained – or even bargained faster and larger – during war.

[395] 'International Congress of Chambers of Commerce. Its Impressive Declarations for International Peace' (1912) 74:10 Advocate of Peace 245 at 246. President Taft states as follows:

> I wish only to speak of another subject, not the influence upon this country by the coming of these delegates and these chambers of commerce, but the influence upon the world of their coming here to meet us and our meeting them. You come here for trade – and trade is peace. And if trade had no other good thing connected

through which that goal can be realized. There is actually nothing wrong with this approach, provided the businesses are conducted in a manner that does not affect the pecuniary interests – in terms of levies and taxes payable on carrying on businesses – of the host states.

It is indisputable that the ICC believes there is a relationship between peace and trade regardless of whether or not trade is the means for achieving peace. The relationship between trade and peace is emphasized in the ICC's reports, as earlier examined. It seems the ICC does not believe that there is such a relationship between taxation and peace. Unlike its reports on trade, the ICC's works on international taxation in this phase do not explicitly link taxation to peace. The ICC's 1920 resolution on double taxation is just a clarion call to governments of allied countries to work together to 'prevent individuals or companies from being compelled to pay tax on the same income in more than one country'.[396] The ICC's request to the governments of allied countries does not state how connected the problem of double taxation is to its course of achieving world peace through world trade.

The ICC's 1921 resolution in London acknowledges that double taxation imposes 'heavy burden on international trade' but does not consider it further to see if that burden can also impact peace since there is relationship between trade and peace.[397] The 1921 resolution, among other things, advocates for equal treatment of taxpayers – whether citizens or foreigners – by both the residence and the source countries.[398] The resolution on equal treatment of taxpayers is commendable, as that guarantees movement of capital and fairness to taxpayers. The ICC, however, ignores considering equal (or equitable) treatment of taxing states. Inequitable tax

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with it, the motive, the selfish motive in love of trade that keeps off war in order that trade may continue, is a sufficient thing to keep up trade for.

[396] John Herndon, *Relief from International Income Taxation: The Development of international Reciprocity for the Prevention of Double Income Taxation* (Chicago: Callaghan and Company, 1932) at 20. This is the ICC's first intervention in international tax.

[397] Jogarajan, Double Taxation and the League, *supra* note 10 at 274. Jogarajan reproduced the resolution in the book.

[398] *Ibid*

treatment of taxing states may affect the prosperity of those states and consequently lead to war. It appears the ICC's resolution assumes reciprocity between residence and source states. Reciprocity means that as residents of State A are doing business in State B, residents of State B are equally doing business in State A. In that case, both states suffer no loss if they accord equal treatment to taxpayers – whatever they lose from exempting incomes earned within their jurisdiction from tax can be regained from taxing foreign incomes of their residents who are also exempted from taxation in foreign countries. Reciprocity can, however, have adverse effects on a developing country, which may not have comparable economic activities to the other country with a legitimate tax claim on the same income. If the notion that prosperous states are less likely to go to war is correct, its opposite is also correct.[399]

The ICC's subsequent resolutions in 1922, 1923, 1924, 1925 and 1927 are similar to its 1921 resolution in the sense that they all focus on the economic dimension of double taxation without considering how the recommendations fit into the broader mandate of the League despite its self-acclaimed title of merchants of peace.[400] The reason for this narrow approach is also based on the sensemaking of actors through which the ICC was operating. As an example, the United States' representatives in the ICC were very active in drafting the 1920 resolution, and that is the reason why that resolution was modelled on the United States' approach to double taxation.[401] The popular T.S. Adams, who had considerable influence on the United States foreign tax credit system and represented the United States in the 1927 League Technical Experts, was an influential member of the ICC's double taxation committee.[402]

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[399] Bruce Russett, "Prosperity and Peace: Presidential Address" (1983) 27:4 Intl Studies Quarterly 381.
[400] *Ibid* at 276 – 286.
[401] Herndon, *Relief from International Income Taxation: The Development of international Reciprocity for the Prevention of Double Income Taxation supra* note 396 at 20.
[402] Graetz & O'Hear, The Original Intent of U.S. International Taxation, *supra* note 53 at 1066.

The ICC also got suggestions and ideas from its national chambers of commerce. When such national chambers of commerce were requested to recommend solutions to double taxation, the national chambers of commerce suggested what was obtainable – and reasonable – in their respective countries. For example, the ICC requested its national committees in various countries to recommend how to implement its 1921 resolution.[403] For this purpose, the United States Chamber of Commerce set up a subcommittee, which was headed by the same T.S. Adams. As expected, the recommendations of the United States' chamber of commerce mirrored the United States' style of taxing foreign incomes.[404] Various national chambers of commerce also submitted their recommendations, reflecting their respective countries' practices. The ICC weaved all these recommendations and placed them on its deliberations agenda at the 1923 Rome Congress.[405]

The 1923 Rome Congress shed more light on how national chambers of commerce of the ICC recommended their countries' standards as what should be adopted by the ICC. At the Rome Congress, the United States Chambers of Commerce supported source-based taxation, which gives primary taxing rights to the jurisdictions where incomes are earned.[406] On the other hand, the United Kingdom's Chamber of Commerce recommended residence-based taxation, which gives primary taxing rights to jurisdictions where the taxpayers reside.[407] The United States preferred source-based taxation primarily because it supported its objective of making its currency available

[403] *Ibid* at 1068.
[404] *Ibid* at 1069. The subcommittee advises the ICC to 1. adopt the United States' style of foreign tax credit system of alleviating double taxation, 2. grant exclusive taxing right of international shipping incomes to a country that has registry of the ship or where effective control of the shipping company is exercised, 3. reasonably apportion income from sales of manufactured goods abroad between countries of manufacture and sale. The recommendation on exclusive residence taxation of international shipping incomes is similar to the ICC's 1923 resolution (see resolution II).
[405] *Ibid* at 1069.
[406] *Ibid* at 1072.
[407] *Ibid*.

to its foreign debtors through international businessmen.[408] Since the source-based taxation would be in favour of foreign countries, those countries would be more receptive and attractive to foreign businesses. As foreign markets were attracting American businesses, the United States would increase its international balance of payment and international economic dominance. The United Kingdom preferred residence-based taxation because it was a major net capital exporter.[409] It would gain more by having primary taxing rights on the incomes of its foreign businesses. Both the United States and the United Kingdom were major capital exporters of that era, but the United States favoured source-based taxation because of economic conditions that were not available to the United Kingdom.

2.5 Conclusion

Clearly, the disconnect from the mandate of the League first occurred in the crystallization phase of the ITR. This chapter examines a historical analysis of how double taxation was addressed at the state level and the limits of the state's efforts to address the problem optimally. Given the apparent limits of unilateral responses,[410] the states that ought to have conceived the idea of forming an international regime to address the problem seemed helpless until the League was established in 1919. Double taxation was put on the agenda of the League of Nations as part of the global economic problems. In order to effectively address the problem, the League entrusted the

[408] *Ibid*. The other reasons are a. Adams' conviction that source-based taxation is the best means to implement the benefit principle of taxation (this principle states that a jurisdiction is entitled to impose a tax on incomes earned in its jurisdiction because the taxpayers have benefitted from the resources provided by that jurisdiction), and b. Adam wanted to use source-based taxation to persuade debtor states to agree to the international agreement needed to solidify the ICC's resolutions. The availability of the currency would enable the European states that were indebted to the United States to repay their debts. I have examined this economic objective in analyzing the United States domestic tax system to international tax.

[409] *Ibid*. Net capital-importing countries like France and Italy opposed residence-based taxation. The Rome Congress was meant to adopt the resolution, but due to the controversy among the national chambers of commerce, the resolution was approved, and the matter was sent to the International Double Taxation Committee of the ICC.

[410] David B. Oliver, "The Tax Treaties and the Market-State" (2003) 56:4 Tax L Rev 587.

mandate to the Financial Committee, which was constituted by state actors who had hitherto attempted to use domestic response to address double taxation.

Designing an international approach to the double taxation problem was a non-routine and 'shock' event to these actors, as their previous attempts were domestic and limited to their respective countries. The actors undertook identity construction analysis of themselves by asking 'who we are' and 'how do we do things'. The outcome of this analysis impacted their reasoning and diverted their attention from the mandate of the League. These actors adopted the reasoning of their domestic tax system to address double taxation – which was tax and economic-centric - as the only reasonable approach to solving the double taxation problem at the international level. The ICC, which prides itself on being a merchant of peace, unbelievably ignores to consider how its recommendation can impact the peace which it claims to promote.

Out of the seven properties of Critical Sensemaking (CSM), identity construction was the dominant factor of this phase of international tax. According to Jean Helms Mills and his colleagues, identity construction is the most important property of the seven properties.[411] The second property of retrospective was also applicable, but it was not as dominant as identity construction. Retrospective states that sensemaking is a comparative process through which an actor makes sense of how a similar event had been addressed in the past.[412] The actors would have thought that the problem of double taxation in the context of the League was the same as the double taxation they had dealt with in their domestic income tax laws. So, they thought it would make sense to learn from how they had addressed the problem in the past without considering the unique feature of the environment of the League. Ordinarily, according to the CSM theory, a sensemaker

[411] Mills, Thurlow & Mills, "Making Sense of Sensemaking: The Critical Sense-Making Approach" supra note 155.
[412] *Ibid* at 186.

should be influenced by the environment where it operates.[413] The environment of the League – that is, its mandate of promoting peace – should have redefined the sensemaking process. The CSM theory, however, explains that the sensemaker might have created the environment through his past experiences.[414] Rather than working within the environment of the League of Nations, the actors were influenced by the environment they had created from their past experiences of resolving the problem.[415]

As argued in Chapter One, this thesis does not suggest how the substantive tax framework should be drafted. It only focuses on how the actors' sensemaking process disconnected from the League of Nations mandate. The thesis then argues that international tax actors should conceptualize the international tax problem as a problem affecting the participating states' existence and functionality, considering the League's role in creating the enduring ITR. This chapter only examines how the actors' understanding and perspective of the international tax problem led them to ignore global stability variables while drafting the 1927 and the 1928 model conventions. It does not analyze this model, but it is predictable that since the global stability variables is conspicuously missing in the sensemaking process, the model convention, which is the outcome of the process, will not acknowledge global stability variables.

The 1927 draft model convention was further discussed and revised by the 1928 technical experts.[416] The outcome of those discussions is the 1928 model convention, which is not substantially different from the 1927 model convention in the sense it also strictly focused on

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[413] *Ibid* at 185.
[414] *Ibid*
[415] This is similar to the argument in other literature that the structures (the institutions) and the agents (the actors) are inextricably interwoven. The relationship between the structure and the agents makes either of them to influence the other. For further readings on this see: Wilfred Dolfsma & Rudi Verburg, "Structure, Agency and the Roles of Values in Processes of Institutional Change" (2008) 42:4 J Economic Issues 1031; Colin Hay & Daniel Wincott, "Structure, Agency, and Historical Institutionalism" (1998) 46:5 Political Studies 951.
[416] Jogarajan, Double Taxation and the League, *supra* note 10 at 231-241.

economic and tax matters. While working on the 1927 model convention, the 1928 experts did not raise any issue concerning global stability variables.[417] The 1928 model was revised by the Fiscal Committee of the League in June 1940 and July 1943, when majority of capital exporting states were occupied with the second world war.[418] The revised model is what is known as the Mexico Model, which gives stronger taxing right to the source countries, and is preferred by the capital importing countries.[419] The 1943 Model was subsequently revised in 1946 in London, which was drafted at the Somerset House, London, to give primary taxing right to the residence countries.[420] The 1946 model is the last model drafted by the League before it exited the international regulatory landscape.[421] In both the 1943 and the 1946 revisions, the actors' deliberations were strictly on economic considerations of double taxation.[422] It is concerning that the opportunity of peacemaking of the League was not extended to ITR.

[417] *Ibid*. The draft conventions proposed by T.S. Adams and Dorn and Borduge are additional revisions provided by the 1928 experts to the 1927 report.
[418] League, Fiscal Committee, Report on the Work of the Tenth Session of the Committee (Geneva: League, 1946)
[419] *Ibid* at 7.
[420] Stephen Daly & Martin Hearson, "Global Britain: Influencing tax Policy" (2023) 34: Kings LJ 170
[421] *Ibid* at 8.
[422] *Ibid* at 8-13.

Chapter Three: The Stabilization Phase of the International Tax Regime

3.0 Introduction

This chapter explains how the actors designing the ITR in its second phase failed to consider the global stability variables in policymaking. Chapter two examines the first phase – the crystallization phase. It explained how the actors involved in the first phase erroneously conceptualized the international tax problems as the same problems they had addressed before ITR was established through the League. The effect of this erroneous conceptualization was the reason why the actors of that period failed to consider what I argue to be the normative goals of the ITR. This chapter explains that this fundamental problem extended beyond the crystallization phase and formed part of what was inherited by the succeeding phase – the stabilization phase. This chapter also explores how the problem created in the crystallization phase was exacerbated in the stabilization phase of the ITR.

I describe the second phase of ITR as the stabilization phase because the instability and the vacuum crisis created by the exit of the League in the international tax regulatory landscape were resolved with the emergence of the Organization for Economic Cooperation and Development ('OECD') and its predecessor.[423] The need for a coordinating institution for general global economic governance cannot be overemphasized.[424] The enduring success of the ITR from 1920 to 1946 was because of the platform provided by the League. The stabilization phase started with the exit of the League in 1946 and ended in the period of the emergence of another forum of global tax governance, which was created in 2016.[425] The question of how to stabilize the ITR after the

[423] For further reading on the fall and the failure of the League to live up to its expectations, see Jari Eloranta, "Why Did the League Fail?" (2011) 5 Cliometrica 27.
[424] Mayntz, Global Structures: Market, Organizations, Networks – and Communities? in Marie-Luare Djelic & Sigrid Quack, eds, *Transnational Communities: Shaping Global Economic Governance supra note 309* at 37
[425] The new forum is known as the Base Erosion and Profit Shifting Inclusive Framework that was created in 2016 by the G20 and the OECD. The sensemaking activities of this new forum are examined in chapter four of the thesis.

exit of the League was a major 'shock' and a non-routine event of this phase. The shock triggered the sensemaking activities of the actors of this era. The actors in this context refer to the respective state actors, including but not limited to their representatives, who are engaged by the OECD and its predecessor to address the non-routine problem of stabilizing the ITR.

The UN was supposed to be a direct progeny of the League and consequently inherit its legacies on international tax and other areas.[426] The journey to the creation of the UN started during the lifetime of the League. Twenty-six states signed the Declaration of the UN in January 1942. The Declaration endorsed the Atlantic Charter,[427] beginning the journey.[428] The declaration was followed by a formal commitment at the Moscow conference in October 1943 to establish a general international organization based on the principle of sovereign equality of all peace-loving states.[429] The UN was finally established on 24 October 1945 with ratification of twenty-nine states.[430] As of April 1946, when the League had its Assembly meeting, the UN was already waiting to take the baton from the League.[431]

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[426] Russel S. Sobel, "The League Covenant and the UN Charter" (1994) 5:2 Constitutional Political Economy 173.

[427] The Atlantic Charter is the agreement signed by the United States and Great Britain on 14 August 1941, under which both states agreed on how to assist each other during the Second World War and how to establish a new international system after the war. While a part of the agreement that bothered on solidarity support between the two states was limited to these states, the other part that envisaged a post-war international system had a greater impact beyond the two states that signed the agreement. The agreement served as an inspiration to rethink how to create another international system since the League had failed to achieve the main objection of preventing another war. For further reading on how the Charter impacted lots of international issues, such as demand for self-government and independence, human right see Marika Sherwood, "Diplomatic Platitudes: The Atlantic Charter, the UN and Colonial Independence" (1996) 15:2 Immigrant & Minorities 135; Edward A. Laing, "The Contribution of the Atlantic Charter to Human Rights and Humanitarian Universalism" (1989) 26:1 Willamette L. Rev 113; Elizabeth Borgward, "When You State a Moral Principle, You Are Stuck With It: The Atlantic Charter as a Human Right Instrument" (2006) 46:3 Va J Int'l 501; Bonny Ibhawoh, "Testing the Atlantic Charter: Linking Anti-colonialism Self-determination and Human Rights" (2014) 18:7 Int'l J Human Rights 842.

[428] M. Patrick Cottrell, *The Evolution and Legitimacy of International Security Inst*itutions (New York: Cambridge University Press, 2016) 86.

[429] *Ibid*

[430] *Ibid*

[431] *Ibid* at 65. This is why Lord Robert Cecil proclaimed, 'the League is dead; long live the UN'.

As expected, the UN continued with the works of the League on international tax but its intervention was short-lived.[432] According to Michael Lennard, the Chief of International Tax Cooperation at the UN Financing for Development Office, the UN stopped working on international tax in 1954.[433] There was no substantial improvement on the legacy of the League until the Organization for European Economic Cooperation (the 'OEEC') intervened in international tax as the new legal order by its recommendation of 25 February 1955.[434] By the time the UN returned in 1967 to reclaim its leadership role in global tax governance, the OECD, the successor of the OEEC, had produced its first tax treaty model (in 1963).[435] The OECD's new leadership role did not deter the UN, and in 1980, it produced its version of the tax treaty model, which aimed to strike a fairer balance between the competing interests of developed and developing countries.[436]

Considering that the UN tax treaty model came later and used the OECD's model as its reference point, I limit my major analysis of this phase to the OECD's works on international

[432] UN Economic and Social Council set up the Fiscal Commission on 1 October 1946 to study the general field of public finance and advise it on addressing issues arising from the study. See UN, *UN Model Double Tax Convention Between Developed and Developing Countrie*s (New York: UN, 1980) 8.

[433] Michael Lennard, 'The Purpose and Current Status of the UN Tax Work' (January/February 2008) Asia-Pacific Tax Bulletin 23.

[434] *Ibid*. This is the OEEC's first major intervention on double taxation.

[435] *Ibid*. The 1967 resolution of the UN is a departure from the works of the League. The UN emphasizes that the tax treaty to be proposed must protect the revenue interests of both developing and developed countries. This is the first time such consideration would come up in the historical development of international tax. This clause would have impacted the sensemaking of the actors in drafting the model. It would have also redirected ITR to the mandate of the League of Nations. This intervention is, however, ill-timed as the OECD has become the acceptable legal order when the United Nations re-entered. The 1967 resolution was adopted through the UN Economic and Social Council and states as follows:

> to set up an ad hoc working group consisting of experts and tax administrators nominated by governments but acting in their personal capacity, ... with the task of exploring, in consultation with interested international agencies, ways and means for facilitating the conclusion of tax treaties between developed and developing countries, including the formulation, as appropriate, of possible guidelines and techniques for use in such tax treaties which would be acceptable to both groups of countries and would fully safeguard their respective revenue interests.

[436] *Ibid.*

tax.[437] The reference to the UN's work on international tax, particularly its SDGs programme, which appears to be similar to the global stability variables, in the later part of this chapter is simply to underline that the intervention of the UN did not fix the monumental failure of the stabilization phase, as inherited from the crystallization phase. Both phases of the ITR departed from the global stability variables despite the seeming commitment of the UN to the SDGs.

The OECD's work carried on the legacy of the League. Two years after the UN Fiscal Commission dissolved in 1956, the OEEC created its Fiscal Committee.[438] The OEEC Fiscal Committee improved on the League model and produced its first model in 1963 through the OECD, and the model was later amended in 1977.[439] Even when the UN re-entered the regulatory space in 1967, it took it thirteen years to publish its tax treaty model. The OECD has covered many miles and successfully diffused its policies and standards beyond its member states. This might be why the OECD's tax treaty model is commonly used in the network of bilateral tax treaties.[440] This also justifies my preference to focus more on the OECD's work in evaluating this phase's sensemaking of international tax actors.

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[437] The UN acknowledged the OECD's work in this regard but stated it is not bound by it. However, it would be hard for the UN to achieve its objective of striking a balance between developed and developing countries using the OECD mode. The reason is that the OECD never considered this point in drafting its treaty – it focused more on benefits accruing to its member states, which are all developed countries. Part of the introduction to the UN 1980 model convention states as follows:

> It may be recalled that in preparing the aforementioned guidelines, the Group of Experts had decided to use the OECD Model Convention as its main reference text in order to take advantage of the accumulated technical expertise embodied in that Convention and the commentary thereon and also for reasons of practical convenience stemming from the fact that the Convention was being used by OECD member countries in the negotiation of tax treaties not only with each other but also with developing countries However, it was fully understood that there was no presumption of correctness to be accorded to the OECD Model Convention and that the decisions of the Group were in no way required to be governed by the OECD text.

[438] *Ibid.*

[439] *Ibid*

[440] Arthur J. Cockfield, "Shaping International Tax Law and Policy in Challenging Times"(2018) 54:2 Stan J Int'l L 223 at 227.

3.1 From the OEEC to the OECD: A Transition without Substantial Change of Objective

There is not much difference between the OEEC and the OECD in that they both seek to realize the same objectives. The only difference between the two institutions is the scope of their membership – the OEEC was initially designed for European states at the early stage, but its membership was later expanded to include non-European states.[441] The OEEC became the OECD in 1961 when non-European states, such as the United States and Canada, joined its community.[442] As earlier argued, the OEEC immediately improved on the works of the League and then transferred the work to the OECD. It was easy for the OECD to start where the OEEC stopped. The underlying objective of these institutions is a major influence on the identity constructions of their actors and their approaches to international tax problems.

Lincoln Gordon, a professor of international economic relations at Harvard Business School, who was also involved in the process of establishment of the OEEC, traces the origin of the OEEC to the influential address delivered by Mr. George Marshall, the United States Secretary of State, at the Harvard University on 5 June 1947, after the Second World War.[443] The Second World War had devastating effects on the economy of Europe, which had moved from prosperity to austerity. Mr. George Marshall's statement, later ascribed to his last name and described as the Marshall Plan, is the United States foreign aid policy to revive the economy of Europe (the

[441] Matthieu Leimgruber & Matthias Schmelzer, "Introduction: Writing Histories of the OECD" in Matthieu Leimgruber & Matthias Schmelzer, eds, *The OECD and the International Political Economy Since 1948* (Switzerland: Palgrave Macmillan, 2017) 1.
[442] *Ibid*.
[443] Lincoln Gordon, "The Organization for European Economic Cooperation" (1956) 10:1 Int'l Organization 1 at 2. See also Robert Wolfe, "From Reconstructing Europe to Constructing Globalization: The OECD in Historical Perspective" in Mahon Rianne & McBride Stephen, eds, *The OECD and Transnational Governance* (UBC Press, 2008) at 25 – 35. Mr. George Marshall stated that US policy 'should be the revival of a working economy on the world so as to permit the emergence of political and social conditions in which free institutions can exist'. In response to the US readiness to assist Europe in the post-war crisis, European countries met in Paris on 3 July 1947 to draw up an economic recovery plan for transmission to George Marshall. A Committee on European Economic Cooperation was created at the meeting to manage the initial phase of the recovery plan. The Committee evolved into a permanent body known as OEEC in April 1948.

economic assistance is known as the European Recovery Program).[444] The Marshall Plan required the European states to work together on how they would implement the economic assistance of the United States.[445] In response to this request, the European states set up a sixteen-member Committee of European Economic Cooperation ('CEEC') to consider the appropriate means of implementing the United States' economic assistance.[446] The CEEC submitted its report to the United States in September 1947, and that report operationalized activities of the OEEC.[447] The CEEC officially became the OEEC on 16 April 1948.[448]

What could be the United States' interest in the European Recovery Program? Sidney Stuart Alexander, a professor of economics at the Massachusetts Institute of Technology, argues that there are three reasons for the United States' intervention.[449] First, the intervention furthered the United States' charity and foreign assistance policy.[450] Alexander notes that the European Recovery Program was not the first of the United States' foreign aid programme. Before the European Recovery Program, the United States had previously spent almost $20 billion on various international assistance projects.[451] Second, the United States was interested in preserving the democracy and social values of Europe.[452] Alexander further argues that the United States' decision to preserve the values of Europe is in recognition of its historical link with Europe – that is, the majority of its people are from Europe and what consequently constituted the American

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[444] *Ibid.*
[445] *Ibid*
[446] *Ibid*
[447] Alexander Böhmer, "Organisation for Economic Cooperation and Development" in Christian Tietje & Alan Brouder, eds, *Handbook of Transnational Economic Governance Regimes* (Leiden: Martinus Publishers, 2010) 227 at 228. The CEEC eventually became the OEEC.
[448] Leimgruber Matthieu & Matthias Schmelzer "From the Marshal Plan to Global Governance: Historical Transformation of the OEEC/OECD, 1948 to Present" in Leimgruber Matthieu & Matthias Schmelzer, eds, *The OECD and the International Political Economy Since 1948* (Cham: Palgrave Macmillan, 2017) 23.
[449] Sidney S. Alexander, *Marshall Plan* (Washington: National Planning Association, 1948) 8.
[450] *Ibid*
[451] *Ibid* at 7.
[452] *Ibid* at 8

cultures were borrowed or inherited from Europe.[453] The United States' self-interest was the third reason. The United States believed that Europe's political instability and threat could also affect its peace and economic prosperity.[454] So, the economic assistance to Europe has an indirect effect on preserving the United States' prosperity and peace.

The motive of the United States seems to go beyond these three reasons. Sidney Alexander admits in his book that the United States was the most productive state of that time.[455] He also confirms that the productivity of the European states had drastically reduced to the point that their productions could not satisfy their local demands, let alone the export demand.[456] It was possible that the United States would have identified the huge opportunity created by the production deficit in Europe. By providing economic assistance, the United States had technically endeared itself to Europe as a potential importer of goods that were in need by the European market. Europe would, therefore, prefer the United States as its trade partner to any other potential state producer and importer. This would increase the United States' international balance of payment and spread (and dominance) of its currency. This does not, however, mean that the three reasons Sidney Alexander gave are invalid. The reasons are valid, but the opportunity arising from the potential international export to Europe might be the overriding objective.

The United States' decision to be an observer and later an associate member of the OEEC is proof that the Marshall Plan goes beyond the three reasons articulated by Sidney Alexander.[457] The European states could have independently managed the economic assistance they received from the United States. The United States' continued close contact with the OEEC negated the

[453] *Ibid*
[454] *Ibid* at 14
[455] *Ibid* at 8
[456] *Ibid* at 15
[457] Leimgruber Matthieu & Matthias Schmelzer "From the Marshal Plan to Global Governance: Historical Transformation of the OEEC/OECD, 1948 to Present *supra* note 448 at 30. Both the United States and Canada were observers in 1948 when the OEEC was created, and they later became associated members in 1950.

idea that the Marshall Plan was not to dictate to Europe how to revive its economy. The United States was carefully keen on the activities of the OEEC – it might not be able to intervene directly because decisions of the OEEC were meant to be taken unanimously by its members, but it had other means to protect its interest within the OEEC.[458] For example, France and the other five members of the OEEC disagreed with the other members on regulating common external tariffs. Consequently, the six states created the European Coal and Steel Community (the 'ECSC') on 18 April 1951.[459] With the tacit support of the United States, the ECSC established the European Community Market in 1956 to realize its aim of having common external tariffs.[460] With France as a member of the ECSC and Britain's non-affiliation to the ECSC, the OEEC began to experience an internal crisis between the two blocs led by France and Britain, respectively.[461] The United States' support for the activities of France, and by extension the ECSC, in the OEEC was ostensibly to protect its interests in Europe.[462]

As the OEEC was unable to manage its internal crisis arising from the two blocs, the idea of replacing the OEEC with a more effective organization was suggested by states.[463] The United States was, again, the leading voice for the establishment of a more global outlook that would have it and Canada as full members.[464] Unlike the era of the OEEC, the economic motive of the United States behind establishing the OECD was much clearer. The United States was interested in

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[458] *Ibid*.
[459] *Ibid* at 31- 32. The other five states are Germany, Belgium, Luxembourg, Netherland and Italy. The agreement among these states was to promote exchange of raw materials needed by the steel industry to enhance its post-war productivity.
[460] *Ibid*
[461] Robert Wolfe, "From Reconstructing Europe to Constructing Globalization: The OECD in Historical Perspective" in Rianne Mahon & Stephen McBride, eds, *The OECD and Transnational Governance supra note 443.* 25 at 26-27.
[462] Leimgruber Matthieu & Matthias Schmelzer "From the Marshal Plan to Global Governance: Historical Transformation of the OEEC/OECD, 1948 to Present *supra* note 448 19 at 30. The aim of the United States and France was to make the OEEC a supranational, but Britain, Sweden, and Switzerland preferred to have it as an intergovernmental institution that had no sovereign authority over the states.
[463] *Ibid* at 34.
[464] *Ibid*

reviving its balance of payments, which was in bad shape due to the deficit of its economy in the 1950s and strengthening its influence over its trade partners in Europe by ensuring that its dollars continued to be an internationally acceptable mode of payment.[465] The other states that formed the OECD had varying economic interests similar to the United States. This is evident in the OECD's convention that its aim is to 'achieve the highest sustainable economic growth'. The OECD was eventually established on 30 September 1961.[466]

Matthias Schmelzer, a professor of economic history, rightly describes the transition process of the OEEC to the OECD as 'creative adaptation to changing circumstances'.[467] Two things are constant in the adaptation to changing circumstances. First, the primary objective of both the OEEC and the OECD is the promotion of the economic interests of a few countries. Second, the dominant actor, whose interest was sought to be prioritized through these two institutions, is the United States. With these two common points, the transition from the OEEC to the OECD was without any substantial change of objective. Understanding the underlying economic objective of these institutions gives a clear picture of how their actors made sense of their approaches to international tax problems when they stepped in to fill the vacuum crisis created by the exit of the League.

3.2 International Tax Regime within the Closed and Economic Institutions

Global tax governance leadership shifted during the stabilization phase from the more broad and inclusive institution of the League to the closed and economic institutions of the OEEC

[465] *Ibid* at 35.
[466] Richard Woodward, "The Organization for Economic Cooperation and Development" (2004) 9:1 New Political Economy 113 at 114; Timothy Bainbridge, "A Brief History of the OECD" (2000) OECD Observer 111; Matthias Schmelzer, "A Club of the Rich to Help the Poor? The OECD, "Development" and the Hegemony of Donor Countries" in M. Frey, Kunkel S., & Unger C.R., eds, *International Organizations and Development*, 1945-1990 (London: Palgrave Macmillan, 2014) 171
[467] Matthias Schmelzer, *The Hegemony of Growth: The OECD and the Making of the Economic Growth Paradigm* (Cambridge, UK: Cambridge University Press, 2016) 38

and the OECD.[468] The OEEC intervened when the UN could not proceed with the legacy of the League as expected. The OEEC started the work and later passed the torch to the OECD in 1961 when it was established to replace the OEEC. The OEEC's intervention followed the ICC's recommendation to consider the problem of double taxation as one of its priorities. While it may not be totally correct to argue that the OEEC's intervention in international tax was influenced by the ICC, it is on record that the OEEC acknowledged the ICC's early intervention and continued significant contribution to providing solutions to double taxation.[469] The ICC had even published another comprehensive report on double taxation in March 1955, before the OEEC's fiscal commission started working on double taxation.[470]

The identity construction – who they are and how they do things - of the OEEC member states was clear. According to the CSM theory, identity construction (the background, roles, environment experience and a host of other factors related to the personality of actors) plays an influential role in defining the approach actors adopt in resolving a problem. Their approach to policymaking was about the promotion of their economic interest through the OEEC platform. Just like in the crystallization phase, the identity construction impacted how the OEEC member states addressed the international tax problem. The ICC's recommendation to the OEEC to consider the

[468] The closed and economic agenda of the OEEC is contained in its enabling constitution known as the Convention for European Economic Cooperation, signed on 16 April 1948 (the 'Convention'). The 28-article Convention is divided into three parts. The first part sets out its general obligation, the second part explains its aims, and the last part focuses on issues like ratification of the Convention and withdrawal of membership. Article 11 (which falls in the second part) states that the OEEC's aim is to realize a sound European economy through cooperation among its members. To do this, it resolves implementing the European Recovery Programmer designed by the United States as the main task and subsequently executing agreements with other relevant states. The Luxembourg Centre for Contemporary and Digital History has the digitalized version of the Convention. See <www.cvce.eu/en/obj/convention_for_european_economic_cooperation_paris_16_april_1948-en-769de8b7-fe5a-452c-b418-09b068bd748d.html> (accessed on 6 May 2023)

[469] The early intervention is similar to the role it played during the era of the League.

[470] See the Luxembourg Digital History, *supra* note 39. See Organization for European Economic Co-operation, Letter from the International Chamber of Commerce Relating to the Recommendation of the Council Concerning Double Taxation, Document Number C (55) 81. By the 24th of March 1955 letter to the OEEC, the ICC informed the OEEC of its latest publication on avoiding double taxation.

London draft as a model for bilateral tax treaties for the OEEC countries was suitable for the identity construction of the OEEC member states.[471] As argued in Chapter Two, the London model was the last tax treaty model designed by the League in 1946. The London model was a pro-residence treaty. Since many European states (also the OEEC member states) are major exporters in international trade, the London model would promote their economic interests.

The OEEC eventually established its Fiscal Committee on the 19th of March 1956 to address the problem of double taxation and related issues. The OEEC had earlier noted the dissolution of the UN Fiscal Commission in 1954 and considered the need to have another forum of experts on taxation.[472] The OEEC's consideration of the dissolution of the UN Fiscal Commission suggests that the OEEC might not have established its Fiscal Committee if the UN Fiscal Commission had continued with the work of the League Nations. The resulting effect of the establishment of the OEEC Fiscal Committee is that its works on international tax focused more on the interests of the European region and its allied states, such as the United States and Canada, which are historically part of the process that established the OEEC. The terms of reference of the OEEC Fiscal Committee were strictly focused on economic matters.[473] The Fiscal Committee

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[471] *Ibid*. See Organization for European Economic Co-operation, *Double Taxation in Europe: Resolution adopted by the Executive Committee of the International Chamber of Commerce*, Document Number C (54) 294. The ICC resolves as follows:

> In the interest of the development of intra-European trade and investments, to which double taxation remains a serious obstacle, and in view of the close bonds uniting the countries pf the OEEC, and a fortiori the 'Six', the International Chamber of Commerce urges the Council of the O.E.E.C. to recommend all OE.E.C. Governments:
>
> a. to conclude as rapidly as possible with all other O.E.E.C. Governments bilateral treaties for the avoidance of double taxation based on the Model Bilateral Convention for the Prevention of the Double Taxation of Income and Property of the League (London Draft).

[472] See Organization for European Economic Co-operation, *Creation of a Committee of Experts on Taxation*, Document C (55) 180.

[473] See Organization for European Economic Co-operation, *Resolution of the Council Creating a Fiscal Committee*, Document Number C (56) 49. The OEEC resolution states, in part, as follows:

> Taking into account the Double Taxation Agreements entered into by the Member countries, the Fiscal Committee shall seek to determine and make concrete proposals to the Council on principles to be applied by them in order to avoid double taxation. The study shall cover the following questions:

could not have been expected to consider non-economic matters or how its work would promote global stability variables, as that would be contrary to their identity construction.

The OEEC Fiscal Committee comprised senior tax and revenue experts of the OEEC member states.[474] For example, Mr. van de Tempel, the Netherlands representative and the Fiscal Committee chairman, was the Director of Fiscal Affairs of the Netherlands's Ministry of Finance.[475] The other members of the Committee held similar positions in their respective countries.[476] The reasonable conclusion about these members is that their background as revenue officers and the approaches of their principals to international tax problems would greatly impact how they implemented the task assigned to them by the OEEC council. The member states that the members of the Fiscal Committee represented had previously addressed international tax problems in purely economic terms. The OEEC member states, such as the United Kingdom and the United States, whose approaches to international tax problems were examined in previous chapters, were represented in the OEEC Fiscal Committee. The approach of these states to international tax problems was about the maximization of tax revenue for the states and the limitation of the possibility of tax exploitation and abuse by taxpayers.

The OEEC Fiscal Committee became the mechanism to promote a vision of the international tax order between 1956 and 1961. Its work was largely impacted by its terms of

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A. in the field of direct taxation:
(a) which taxes on income, capital, estates and inheritances should be included in Double Taxation Agreements;
(b) Which methods should apply in such Agreements, especially as regards:
-apportionment of profits between the Head Office of an undertaking, its permanent establishments and its subsidiary companies;
-taxation of investments income either directly or by deduction at source; and
-taxation of royalties and similar payments.

[474] The following member states were represented in the Fiscal Committee: Netherlands, Belgium, Denmark, France, Germany, Greece, Ireland, Luxembourg, Italy, Portugal, Sweden, Switzerland, Turkey, United Kingdom, United States and Canada. Some states had more than one representative in the Committee. See Organization for European Economic Cooperation, *Fiscal Committee*, Document No FC/M (56)1.
[475] *Ibid*
[476] *Ibid.*

reference (which explains who the OEEC members are and how they do things) contained in the resolution of the 19th of March 1956. The OEEC Fiscal Committee issued four different reports representing various work milestones achieved through its different working parties.[477] The first report that was issued on the 22nd of May 1958 contained draft clauses and commentaries on the scope of a tax treaty, the permanent establishment, the residence of taxpayers and the prevention of discrimination.[478] The second report, published on the 18th of June 1959, contained clauses on taxation of income in international transport (shipping and airline), dependent and independent personal services, immovable property, and taxation of capital.[479] The third and the fourth reports were issued on the 13th of July 1960 and the 19th of June 1961, respectively.[480]

The OECD was established in 1960 but the OEEC Fiscal Committee continued to be an arm of the newly established institution.[481] This was possible because the representatives of the United States and Canada were already part of the OEEC Fiscal Committee although the United States and Canada were not official member states of the OEEC.[482] Since the motive of changing from the OEEC to the OECD was to expand the scope of the institution to include non-European states, such as the United States and Canada in the first instance, and not to change the objectives

[477] The OEEC initially created five working parties with at least two representatives from member countries constituting each of the working parties. Each working party is assigned to address a clause in tax treaties. For example, Working Party No. 1 is charged with addressing the concept of permanent establishment. See Organization for European Economic Co-operation, *Fiscal Committee: List of Working Parties,* Document Number TFD/FC/2.
[478] Organization for European Economic Co-operation, *Report of the Fiscal Committee on its Activities*, Document Number C (58) 118.
[479] Organization for European Economic Co-operation, *Second Report by the Fiscal Committee to the Council*, Document Number C (59) 147
[480] The third report contained other clauses, such as the allocation of profit between the permanent establishment and associated enterprises See Organization for European Economic Co-operation, *Third Report of the Fiscal Committee to the Council*, Document Number C (60) 157. The final report contained clauses on taxation of passive income (dividend, interest and royalty), methods for avoidance of double taxation and mutual agreement procedure. See Organization for European Economic Co-operation, *Fourth Report of the Fiscal Committee*, Document Number C (61) 97.
[481] Adrian A. Kragen, "Double Income Taxation Treaties: The O.E.C.D. Draft" (1964) 52:2Calif L Rev 306 at 308.
[482] Organization for European Economic Co-operation, *List of Delegates to the Fiscal Committee*, Document Number TFD/DI/29.

of the institutions substantially, there was no need to tinker with the membership of the OEEC Fiscal Committee.[483] The OECD's 1963 double taxation convention was a compendium of the four reports issued by the OEEC Fiscal Committee between 1958 and 1961.[484]

There is a striking similarity between the League's London Model and the OECD 1963 Model. Both tax treaty models give the residence/capital-exporting countries stronger taxing rights. This is not surprising as the majority of influential members of the Committee that drafted the London Model by the League were also part of the OEEC/OECD Fiscal Committee. The London Model was influenced by the European states. These states saw good reasons and made sense to adopt the approaches they had previously used to address the problem of double taxation before the establishment of these institutions.

While the actors' approaches in the crystallization phase could be criticized for their failure to consider the broad mandate of the League, it seems unfair to extend the criticism to the OEEC and the OECD. The OECD was established to promote the economic interests of a closed community of states with common interests. The fact that the OEEC/OECD built on the legacy of the League does not compel the OEEC/OECD to consider the global stability variables in its policymaking process. The OEEC/OECD would have opted for another treaty design if the legacy of the League did not align with its economic interest.

There should not be a problem if a regional economic community designs a tax instrument for its members, provided the tax instrument is used among the member states of that community.

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[483] See the OECD Press Release, *Fourth Report of the Fiscal Committee of the O.E.E.C.: Avoiding Double Taxation Obstacle to the Development of International Economic Relations*, OECD/Press/A (61)7.

[484] Adrian A. Kragen, Double Income Taxation Treaties: The O.E.C.D. Draft, *supra* note 481. See also Organization for Economic Co-operation and Development, *Report of the Fiscal Committee on the Draft Convention for the Avoidance of Double Taxation with respect to Taxes on Income and Capital among the Member Countries of the OECD*, Document Number C (63)87.

The Andean Group, a community of like-mind states (Bolivia, Chile, Ecuador, Columbia, and Peru), designed a multilateral tax treaty model known as Decision 40 of 1971 for its members with the objective that the model could be used among the Andean member states or with non-Andean states.[485] Other examples of regional tax treaties include the Caribbean Community tax treaty, the Nordic Tax Treaty, the Association of Southeast Asia Nations (ASEAN) tax treaty model, and one of the latest such treaties is the East African Double Taxation Agreement.[486]

There will, however, be contention and conflict of interest if an otherwise intra-instrument is used outside the community for which it was designed. The OEEC/OECD did not seem to have intended to design its treaty model for non-OECD countries. All four reports of the OEEC and the final model released by the OECD in 1963 focus on the OECD member states.[487] The focus was also on the double tax agreements that were signed between the OECD member states and not with non-members.[488] The underlying objective was to achieve the economic recovery programme as contained in the Marshall Plan.

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[485] Klaus Vogel, *Klaus Vogel on Double Taxation Convention* (Deventer, Netherlands: Kluwer Law and Taxation Publishers, 1991) at 10; Irma Mosquera, "The History of Double Tax Conventions: National Report Columbia (2008) available at SSRN.

[486] Kim Brooks, "The Potential of Multilateral tax Treaties" in Michael Land et at, eds, *Tax Treaties: Building Bridges between Law and Economics*, *supra* note 72; Kiyoshi Nakayama, *How to Design a Regional Tax Treaty and Tax Treaty Policy Framework in a Developing Country* (Washington: International Monetary Fund, 2021); Martin Hearson, Tax Treaties in Sub-Sahara Africa: A Critical Review (Kenya: Ta Justice Network, 2015).

[487] OECD, 1963 *Draft Double Tax Convention on Income and Capital,* Document Number C (63) 87 at p 9. The OECD states, in part, as follows:

> The elimination of double taxation between all Member countries of the O.E.C.D. is therefore necessary in order to complete in this particular filed the work undertaken since 1948 by the O.E.E.C and subsequently by the OECD for the liberalisation of trade, current invisible operations, and movement of capital and manpower, and the action of other international or regional organizations in the same related fields. It is, in particular, of vital importance to clarify, standardise and guarantee the fiscal situation of taxpayers in each Member country, who are engaged in commercial, industrial or financial activities in the other Member countries, through the application by all Member countries of common solutions to identical cases of double taxation.

[488] *Ibid* at 22 – 24. The number of the double tax agreements between the OECD member states had increased from twenty as of 1939 to eighty-five as of March 1963.

The question is whether the use of the OECD model in the negotiation of treaties is exclusive to the OECD states. The answer is in the negative. A survey of concluded tax treaties in the world conducted by Sebastien Drevet and Victor Thuronyi in 2009 shows that the OECD states (30 member states as of 2009) had an average of 72 tax treaties each.[489] According to the survey, the top three states with the highest number of tax treaties are OECD states – France (116 treaties), the United Kingdom (108 treaties) and Canada (90 treaties).[490] By 2014, the average number of tax treaties signed by the OECD states (the number of member states had increased to 34 as of 2014) was 75 treaties each.[491] A recent survey conducted in 2020 shows that the United Kingdom has the highest number of tax treaties (with 130 tax treaties), followed by France (122 treaties) and lastly by Italy (100 treaties).[492] The survey does not state how many of these treaties are between OECD and non-OECD states, but from the statistics, the United Kingdom could not have signed the entire one hundred and thirty tax treaties with the OECD states. Assuming the United Kingdom had tax treaties with each of the OECD member states, it means it signed the remaining ninety-two tax treaties with non-OECD states.[493] Also, the survey does not state whether the OECD treaty model was used in all the treaties between OECD and non-OECD states. However, there is consensus that most of over 3,000 tax treaties in force are modelled on the OECD treaty model.[494]

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[489] Sebastien Drevet & Victor Thuronyi, "The Tax Treaty Network of the U.N. Member States" (2009) 54TaxNotes Int'l 783 at 785.

[490] *Ibid*

[491] Kimberley Brooks & Richard Krever, "The Troubling Role of Tax Treaties" (July 1, 2015). in Geerten M. M. Michielse & Victor Thuronyi, (eds.), *Tax Design Issues Worldwide, Series on International Taxation*, Volume 51 (Alphen aan den Rijn: Kluwer Law International, 2015), 159 at 160

[492] A. Kristina Zvinys, "Tax Treaty Network of European Countries" (2020) Tax Foundation: available online: https://taxfoundation.org/data/all/eu/tax-treaties-european-tax-treaty-network-2020/ (accessed on 13 September 2020).

[493] Ninety-two was computed by deducting thirty-eight (which represent number of the OECD member states) from one hundred and thirty tax treaties signed by the United Kingdom.

[494] For further details on the world tax treaties in force, see International Centre for Tax & Development, *Datasets: The Tax Treaties Explorer*, online: <www.ictd.ac/dataset/tax-treaties-explorer/> On the point that the OECD model serves as the basis for the majority of the tax treaties in force see: Allison D. Christians, "Tax Treaties for Investment and Aid to Sub-Saharan Africa – A Case Study" (2005) 71:2 Brook L Rev 639 at 653; Martin Hearson, Measuring tax Treaty Negotiation Outcome: the ActionAid Tax Treaties Dataset, (2016) ICTD Working Paper 47 at 10. Hearson

Two situations could have arisen when any OECD state was negotiating a tax treaty with a non-OECD state. The first situation is where the non-OECD state or its region did not have any framework for guidance on tax treaty negotiation. The second situation is where the non-OECD state or its region had a model tax treaty designed to protect the region, such as that of the Andean Group earlier mentioned. In the first situation, it would be easy for the OECD states to suggest or subtly impose the OECD model for the negotiation. Without an alternative framework or expertise that matches the OECD state, the non-OECD state would be constrained to adopt the OECD model. This is the case of the majority of the African and the Asian states, which were still colonies during the phases of crystallization and stabilization of international tax or one of the phases. For example, Zambia's policy objective of tax treaty negotiation was that the conclusion of tax treaties would earn it global prestige in the international community.[495] Its treaty partners must have persuaded Zambia that the adoption of the OECD model was the only way to express its compliance with international standards and guarantee foreign investments.[496] Zambia became an independent state on 24 October 1964, after the OECD had even completed its first treaty model, and there was no African tax treaty model it could use to negotiate bilateral tax treaties. The same situation applies to Nigeria, which even signed a tax treaty with its colonial master – the United Kingdom – when it was still a colony.[497]

relies on the survey conducted by researchers at the International Bureau for Fiscal Documentation n 2013 on tax treaties negotiated from 1997 to 2013. The outcome of the research shows that in OECD provisions are predominant in tax treaties between the OECD and the non-OECD states.

[495] Martin Hearson, *Imposing Standards: The North-South Dimension to Global Tax Politics supra* note 16 at 121.

[496] *Ibid* at 122. Hearson explains how Zambia allowed the other treaty partners to write the tax treaty without any review. Zambia's official was quoted to state as follows in respect of Zambia's treaty with Ireland: 'The fact is that most of the times, we let the other side write the agreement….. we were all very raw in those days and we also had our likes and dislikes. We liked Ireland because of its history of conflict with the UK and because many Irish in Northern Rhodesia were sympathetic to us during the period of apartheid".

[497] *Ibid* at 112.

The case study of the Andean Group fits into the second situation. The Andean Group adopted its tax treaty model in 1971 as a counter-response to the OECD model.[498] The Andean model gives stronger taxing rights to the source countries against the OECD Model, favouring the residence countries.[499] The Andean model was, however, short-lived because the treaty partners of the Andean member states preferred to use the OECD model.[500] In this situation, the OECD states would have prevailed on the Andean member states to ignore their standards and embrace the OECD standards.[501] This position is similar to the vulnerable positions of the Latin American countries in the negotiation of the two models (the Mexico and the London models) by the League.[502] Despite their inclusion in the forum of actors in the crystallization phase of international tax, the influential actors of that phase were able to prevail on them as it was in the replacement of the Mexico treaty model with the London treaty model.[503]

Another example of this situation is the case study of the negotiation of a tax treaty between Brazil and the United Kingdom. Brazil had its own approach to taxation of royalty income, which is different from the OECD's approach, but the United Kingdom prevailed on Brazil to adopt the OECD standards in their treaty.[504] Unlike the first situation, the Andean members and other states in that comparable situation, such as Brazil, would have succumbed to the pressure of the OECD states not because they did not have alternatives but because of the power asymmetry between them and the OECD states. Interestingly, Brazil did not succumb to the United States, another OECD state, when the latter attempted to impose the OECD standard on the tax treaty negotiation

[498] Klaus Vogel, *Klaus Vogel on Double Taxation Convention, supra* note 485.
[499] *Ibid*.
[500] Eduardo Baistrocchi, "The Use and Interpretation of Tax Treaties in the Emerging World: Theory and Implications" (2008) 4 British Tax Review 352 at 372 – 373.
[501] *Ibid*.
[502] Doron Narotzki, "Tax Treaty Models - Past, Present, and a Suggested Future" (2016) 50:3 Akron L Rev 383 at 385 – 386.
[503] *Ibid*
[504] Martin Hearson, *Imposing Standards: The North-South Dimension to Global Tax Politics, supra* note 16.

between the two states.[505] The United States had wanted Brazil to drop its preference for stronger source taxing rights on passive income (interest, royalty and dividend) for the United States policy that eliminated withholding tax on royalty and interest and relatively reduced the withholding tax rate on dividends.[506] The disagreement between the United States and Brazil on the extent of the source country's taxing right on passive income is one of the reasons why there has not been any tax treaty between the two states.[507]

It is important to note that it is not in all situations that OECD states insist on the OECD model when negotiating with non-OECD states. Canada's tax treaty policy is a good example to explain the situation when the OECD states embrace the UN models when negotiating treaties with developing countries.[508] Canada is inclined to cede source stronger taxing rights (in accordance with the UN model) to developing countries and insist on residence stronger taxing rights (in accordance with the OECD model) when negotiating with developed countries.[509]

In both situations, that is where non-OECD states have a tax treaty model and where they do not have any model as a guiding framework, the OECD states were in breach of their own rules. The OECD model was designed as part of the mechanism to realize the Marshall Plan – to rebuild the European economy. It does not seem that the OEEC/OECD envisaged that its treaty model would be used outside the OECD community.[510] The 1977 amended model, which is not directly related to the Marshall Plan, seems to suggest that the use of the model should be restricted to the

[505] Richard Mitchell, "United States-Brazil Bilateral Income Tax Treaty Negotiations" (1997) 21:1 Hastings Int'l & Comp L Rev 209 at 228
[506] *Ibid*
[507] *Ibid.*
[508] Alexander J Easson, "The Evolution of Canada's Tax Treaty Policy since the Royal Commission on Taxation" (1998) 26:3 Osgoode Hall LJ 495 at 512.
[509] Kim Brooks, "Canada's Evolving Tax Treaty Policy toward Low-Income Countries" in Arthur J. Cockfield, ed, *Globalization and the Impact of Tax on International Investments*, *supra* note 121.
[510] Jeffrey Owens & Mary Bennet, "OECD Model Tax Convention: Why it Works" (2008) 269 OECD Observer.

OECD community.[511] It even advises the member states to consider a multilateral tax treaty that is premised on the 1977 model. Though there may not be any legal basis to invalidate the use of the OECD tax treaty outside the OECD community, there is a need for further reflection on whether the proliferation of the OECD tax treaty model outside the OECD community is appropriate considering the fact the model restricts taxing right of source countries, which are not part of the OECD community. The conclusion of the explanatory note of the 1977 model provides as follows:

> The Committee on Fiscal Affairs suggests that the Council of the OECD may wish to
>
> 1. recommend Member countries to pursue their efforts to conclude bilateral conventions for the avoidance of double taxation with respect to taxes on income and on capital with those Member countries with which they have not yet entered into such conventions and to revise those of the existing convention between them which may no longer be in keeping with present-day needs;
> 2. recommend Member countries, when concluding new bilateral conventions or revising existing bilateral conventions between them, to conform to the Model Convention, as interpreted by the Commentaries thereto and having regard to the reservations and derogation to the Model Convention, which are contained in the present report;
> 3. recommend that Member countries, which consider it appropriate, examine the feasibility of concluding among themselves multilateral conventions based upon the Model Convention;
> 4. request Member countries to notify the organisation of the text of any new or revised double taxation convention concluded with each other and, where appropriate, the reasons why the provision of the Model Convention have not been adopted in such convention.[512]

Another point on the validity of the use of the OECD treaty goes back to the basis of the establishment of the OEEC/OECD. The Marshall Plan appears to be a temporary programme because it was meant for the recovery of the European economy after the Second World War.[513]

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[511] OECD, *Model Double Taxation Convention on Income and on Capital* (Paris: OECD, 1977)
[512] *Ibid* at 17.
[513] C.C.S. Newton, "The Sterling Crisis of 1947 and the British Response to the Marshall Plan" (1984) 37:3 Economic History Review 391. The Marshall Plan and the European Recovery Act enacted by the United States Congress prove

Once the economy was restored, the ongoing need for a subsidy tool like a preferential tax treaty was less clear. The intention could not have been that the Europe would indefinitely be experiencing the worse economic situations it had after the Second World War. The question is whether the European economy has recovered. Are there economic indicators to measure the recovery? There may not be straightforward responses to these questions, but what is unarguable is that the European economy has exceedingly improved when the present economy is compared to the post-Second World War economy. If that is considered a substantial recovery of the economy, all the policy documents designed to actualize that recovery, such as the OECD tax treaty model, will need to be reviewed to meet the present period's demand and economic reality.

3.2.1 Analysis of the Critical Sensemaking of the OEEC/OECD Activities

As pointed out in chapter one of the thesis, Critical Sensemaking (CSM) explains how an actor makes sense of his approach to addressing a non-routine problem.[514] The CSM does this explanation through its seven properties – 'identity construction', 'retrospective', 'focus on cues', 'plausibility rather than accuracy', 'enactive of the environment', 'social interaction', and

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that the United States' intervention in easing the economy of the Europe is temporary. Sec 102 of the European Recovery Act states as follows:

> Recognizing the intimate economic and other relationships between the United States and the nations of Europe and recognizing that disruption following in the wake of war is not contained by national frontiers, the Congress finds that the existing situation in Europe endangers the establishment of a lasting peace, the general welfare and national interest of the United States, and the attainment of the objectives of the UN. The restoration or maintenance in European countries of principles of individual liberty, free institutions, and genuine independence rests largely upon the establishment of sound economic conditions, stable international economic relationships, and the achievement by the countries of Europe of a healthy economy independent of extraordinary outside assistance. The accomplishment of these objectives calls for a plan of European recovery, open to all such nations which cooperate in such plan, based upon a strong production effort, the expansion of foreign trade, the creation and maintenance of internal financial stability, and the development of economic cooperation, including all possible steps to establish and maintain equitable rates of exchange and to bring about the progressive elimination of trade barriers. Mindful of the advantages the United States has enjoyed through the existence of a large domestic market with no internal trade barriers and believing that similar advantages can accrue to the countries of Europe, it is declared to be the policy of the people of the United States to encourage these ...

[514] Mills, Thurlow & Mills, "Making Sense of Sensemaking: The Critical Sense-Making Approach" *supra* note 155.

'ongoing'.[515] The identity construction – which explains how the actor relies on 'who he is' and 'how he does things' when addressing a problem - is the most important of all the seven properties. CSM acknowledges that another actor or external factors can influence the actor's sensemaking process in each of these seven properties.[516] In that case, the actor's approach to the problem may not truly reflect his position, and that approach will not solve his problem.

It is explained also in chapter one that a shock or a sudden event triggers application of CSM theory.[517] The shock is a non-routine event or problem to which the actor seeks solutions. The main shock of this phase was how to design a new international tax framework after the exit of the League. The shock also considers designing an international tax framework that will aid the economic recovery of Europe and protect the interest of the OECD community. The main shock extended to the other part of the global community when the OECD states started to negotiate tax treaties with non-OECD states.

I have previously argued that the OEEC/OECD tax treaty model is the true reflection of the identity construction of the OEEC/OECD states. Prioritizing European economic interest in the OECD treaty model aligns with the underlying objectives of the institution and the understanding of the parties that established the institution. Properly constructing their identities informed them to design the tax treaty to substantially mirror the League London model in the sense that the OECD model also favours stronger taxing rights to the residence countries.

It seems the OECD state actors did not have any bias against the source countries in designing a pro-residence model – they were more concerned about their region than any other

[515] *Ibid*.
[516] *Ibid*
[517] *Ibid*.

region.[518] A pro-residence model is likely to encourage large production and exportation, as the state would want to take advantage of the pro-residence tax framework. Since the pro-residence treaty model enables the residence states to get a fair share of the global incomes of their resident companies doing business abroad – through the stronger taxing right, each of the OECD states would formulate policies that facilitate large production and exportation. As the European states were becoming part of the international trade network within and beyond the European region, Europe would quickly achieve its economic recovery target. However, a pro-source model may be a disincentive to regional economic growth. If the source countries are given stronger taxing rights, they might be comfortable with tax revenues on sourced incomes within their jurisdictions without thinking outside the box to earn more gross national incomes.

Interestingly, the OEEC/OECD states who designed the OECD model are the majority of the actors who championed the substitution of the Mexico model with the London model. The 1943 Mexico conference was largely attended by the developing countries while the developed countries were engaged in the Second World War.[519] The majority of the developed countries of that era were in Europe, while the Latin American region had the majority of the developing countries. By 1946, the European states had returned from the war and replaced the Mexico pro-source model with the London pro-residence model.[520] Criticism of the sensemaking process of

[518] Alexander J. Easson, "The Evolution of Canada's tax Treaty Policy Since the Royal Commission on Taxation" *supra* note 508 at 513.

[519] The Mexico conference was attended by officials of the following states: Mexico, Peru, Bolivia, Ecuador, Columbia, Venezuela, Chile, Argentina, Uruguay, the United States, and Canada. Apart from the United States and Canada, the remaining attendees were Latin American countries. See League, Fiscal Committee Second Regional Conference in Mexico, Report on the Work of the Conference, Document No C. 1774 – N 3(5) 43- 45.

[520] Mitchell B. Carroll, "International Tax Law" (1968) 2:4 International Lawyer 692 at 708. On the account of Mitchell B. Carroll, who replaced T.S. Adams as the representative of the United States in the League Fiscal Committee, the Latin American Countries first attended the session of the Fiscal Committee at the Mexico conference of 1943. They had the opportunity to revise the 1928 convention to protect their interest. One such revision excludes a permanent establishment clause in the tax treaty as the basis for taxing sourced incomes in the source countries. The London conference of 1946 was attended by full members of the Fiscal Committee, and they revised the Mexico model.

the European states in the crystallization phase of international tax is valid because it was in stark contrast with the objective of the League. However, the sensemaking process of these same actors in drafting the OECD model is justifiable. It is justifiable in the stabilization phase because the mandate of the institution, through which the OECD model was drafted, was purely economic. Therefore, to think that solutions to international tax problems should be economic is in line with the mandate of the OECD. This is different from the crystallization phase, where the mandate of the League was to promote global peace. I need to quickly state here that my justification of the OECD states' sensemaking process is not extended to the use and the proliferation of that OECD tax treaty model outside the OECD region.

The CSM operates in a different dimension in the stabilization phase of international tax. Unlike the crystallization phase, where the identity construction had a prominent impact in explaining the actors' approach, some other properties of the CSM are useful in explaining how actors shaped the contours of international tax in the stabilization phase. Let us start with the identity construction. I have earlier depicted two possible situations in adopting the OECD tax treaty model in negotiating bilateral tax treaties with non-OECD states. In the first situation, the non-OECD states with no framework on guidance on tax treaty negotiation might not have proper identity construction on who they are and how they do things (since they might not have previously addressed the issue of double taxation). Using the case study of the majority of the African states, none of them would have had the experience of international tax problems because none of their resident companies were doing business abroad at that time.[521] It would, therefore, be possible for

[521] As an example, the initial tax treaty between the United Kingdom and Nigeria was when the latter was still a colony of the former. At this time, there was no Nigerian company with business undertaking abroad. Rather, the companies of foreign countries, particularly the colonialists, were operating in Nigeria. These companies are regarded as vehicles for expanding the economic interests of capitalist countries. See Robert L. Tignor, "The Business Firm in Africa" (2007) 81:1 Bus History Rev 87 at 92.

the OECD states to interfere with the identity construction of these states. The OECD states would have taken advantage of the situation of these states by telling them that the OECD model is the best global standard.

Scholars may describe this as one of the instances of influence and power asymmetry between the OECD and non-OECD states.[522] The non-OECD states, particularly the LMICs, had less experience and capacity to consider the appropriateness of the OECD model for them. The OECD should, however, be conscious that the OECD tax treaty model was designed to be used within the European region for the purpose of European economic recovery. The model was designed on the assumption of reciprocity – that is, resident companies of both the treaty partners have foreign undertakings in both jurisdictions, and both treaty partners will be comfortable in conceding stronger taxing rights to residence countries.[523] Since the assumption does not apply to non-OECD states, particularly developing countries, the OECD states should display a sense of good faith by allowing the non-OECD states to decide if they were nevertheless willing to sign treaties based on the OECD model after explaining the consequences of the OECD model to them. The OECD states acted in their self-interest. They also should have known that their sensemaking process of drafting the OECD model should not apply in that circumstance as their treaty partners are not part of the broad objective of the OECD.

There is a clear contest between two identities construction in the second situation of using the OECD tax treaty model with non-OECD states. Both the OECD states and non-OECD states have their respective tax treaty models, which explain who they are and how they do (or should

[522] Martin Hearson, "When Do Developing Countries Negotiate Away their Corporate Tax Base" (2018)30 J Intl Development 232; Thomas Rixen, *The Political Economy of International Tax Governance* (New York: Palgrave Macmillan, 2008); Philip Genshel & Thomas Rixen, "Settling and Unsettling the Transnational Legal Order of International Taxation" in Terrence C. Halliday & Gregory Shaffer, eds, Transnational Legal Orders (New York: Cambridge University Press, 2015) 154.
[523] Alexander J. Easson, "The Evolution of Canada's tax Treaty Policy Since the Royal Commission on Taxation" *supra* note 508.

do) things. The critical theory component of CSM theory acknowledges that stronger actors can determine how weaker parties identify themselves. The Andean Group is a good example to explain how the identities of weaker parties could be influenced. The Andean Group intentionally designed its model to oppose the OECD model. Both models represent the true identities of distinct groups of states, but during the negotiation of bilateral tax treaties, the identity construction of the Andean states was made to give way to the identity construction of the OECD states. States' contractual freedom and sovereignty are assumed when negotiating treaties.[524] Execution of treaties, therefore, signals the true intention of treaty partners. For the Andean states to have later accepted the OECD's model in tax treaty negotiation, it means that they had been influenced to think that OECD identity construction is the most plausible approach.[525]

Retrospective: This is another property of CSM theory that explains the OEEC/OECD sensemaking activities.[526] This property states that an actor can make sense judging from his past events that appear similar to the current situation. He will then adopt the approach used to resolve the past event for the current event, believing that the approach is most appropriate[527]. The probable reason the OECD states insisted on the OECD tax treaty model while negotiating with non-OECD states was that they assumed that the issues addressed by the OECD model were similar to those in the treaties under negotiation. It is correct that there are some similarities between the two negotiations (the OECD model and the actual bilateral tax treaties with non-OECD states). They both seek to address overlapping and competing claims arising from taxation

[524] Catherine Brölmann, "International Organizations and Treaties: Contractual Freedom and Institutional Constraint" in Jan Klabbers & Asa Wallendahi, eds, *Research Handbook on the Law of International Organizations* (Cheltenham, UK: Edward Elgar, 2011) 285 at 292.
[525] The case study of the tax treaty between Brazil and the United Kingdom is another example that explains the contest between two identities' construction. Though Brazil did not have any tax treaty negotiation guidance, it already had a domestic approach to taxation of royalty. The United Kingdom, however, insisted that its approach (which is also the OECD approach) should be adopted in the tax treaty between the two states.
[526] Mills, Thurlow & Mills, "Making Sense of Sensemaking: The Critical Sense-Making Approach" *supra* note 155.
[527] *Ibid*.

of cross-border businesses. The difference in the underlying assumptions of the two documents impaired the correctness of the sensemaking of the OECD states. The OECD model assumes reciprocity between treaty partners, but this does not apply to non-OECD states because they are net capital-importing countries.

Focus on Cues: The explanation offered by this property is similar to my previous argument on the contest between two identities' construction. This property states that an actor is often induced to focus on some cues at the expense of some other cues.[528] This implies that an actor might have a range of options to choose from but may be influenced to stick to a particular option. This property fits into the second situation where the OECD states negotiate with non-OECD states with a different tax treaty negotiation, such as the Andean Group. The options that would have been available to the OECD states would be to either use the OECD model, defer to the Andean model or strike a balance between the two opposing models. The insistence on the OECD model was because it protects the interests of the OECD states, and it is a true reflection of their identity construction. The OECD states were able to impose their model because of their eco-political power.

Plausibility rather than accuracy: The insistence on the OECD model does not make the model superior to any other model. Also, it does not imply that the decision to use the model is even correct. This property – plausibility rather than accuracy - explains that an actor looks for cues in support of his identity construction – to make it plausible to others (particularly the other treaty partner in this context).[529] The actor is not bothered about the correctness of his decision to resolve a problem in a particular way but is interested in justifying that decision. The OECD states would have first decided what they wanted (the favourable tax regime for their multinational

[528] *Ibid*.
[529] *Ibid*.

companies) and then suggested the OECD model to the other treaty partners as the international standards. The description of the OECD as an international standard is to provide a shield for their covert interests. The OECD model might also appear as international standards to the non-OECD states especially when there is no other matching opposing model.

3.3 The UN and its Impact in the Stabilization Phase of the International Tax Regime

The UN was primarily created to succeed and inherit the legacies of the League.[530] These legacies include the rich work on international tax that culminated in the Mexico and the London treaty models. The UN carried out its works on international tax through the Fiscal Commission, which was created by the UN Economic and Social Council in October 1946.[531] Several proposals were made to the Fiscal Commission on the revision of the double taxation agreement designed by the League. One such proposal was how to reconcile the competing interests between the Mexico and the London models.[532] The attitude of member states (by not responding to the questionnaire given to them to obtain their views) showed that the conflict between the two models was irreconcilable.[533]

Between 1946 and 1954, the UN Fiscal Commission had four sessions, but those sessions did not culminate in the publication of a revised treaty model.[534] The task of reconciling the conflict between the Mexico and the London models was still preliminary when the Fiscal Commission

[530] Durward Sandifer, "Progress in the Establishment of the UN Organization" (1945) Section of Intl Comparative Law 15.
[531] Nathan T. Gordon, "The Second Session of the UN Fiscal Commission" (1949)2:2 National TJ 166 at 167. The UN created several organs through which it acted as the new international legal order. One such organization is the Economic and Social Council, which focuses on public finance and related issues. The Economic and Social Council created the Fiscal Commission to advise it on international tax, among other things.
[532] *Ibid* at 171. The other suggestions are creating an international tribunal to settle tax disputes arising from tax treaties (this suggestion was rejected because the treaty had a clause on mutual agreement procedure) and expanding the scope of the tax treaty to include social security tax.
[533] *Ibid*
[534] The first session was held in May 1947; the second session January 1949; the third session May 1951 and the fourth and last session April- May 1953. The commission was dissolved in August 1954.

was dissolved in 1954.[535] The OEEC intervened in international tax in 1956, two years after the dissolution of the UN Fiscal Commission, and the intervention has an enduring impact on international tax. Since the UN's intervention in international tax between 1946 and 1954 did not result in a treaty model, this period (1946 - 1954) seems to be a wasted period that further exacerbated the case of the ITR.

The period could have been used to reconcile the conflicts between the London and the Mexico models. The resolution would have addressed the concerns of the developing countries from the Latin American region. The Latin American countries did not participate in the drafting of the 1928 model by the League Committee of Technical Experts.[536] The Latin American countries leveraged their presence at the Mexico conference to revise the 1928 model to suit their purpose, but their revision was set aside by the European states at the London conference.[537] The London Conference was the last session of the League on ITR, and as such, the League did not have the opportunity to resolve this conference before its exit.[538] The UN missed the opportunity to address the problem that the League was unable to address. The resolution of the problem might have redirected the affairs of the ITR toward global stability variables.

The UN revived its interest in ITR in 1967 by creating an entirely new forum of experts known as the Ad hoc Group of Experts on Tax Treaties between Developed and Developing countries (Group of Experts).[539] In setting up the Group of Experts, the UN acknowledges that the existing double taxation convention at that time (which was most likely to be the OECD model,

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[535] Nikki J Teo, *The United Nations in Global Tax Coordination: Hidden History and Politics* (United Kingdom: Cambridge University Press, 2023) at 10. Teo relies on the report and observation of Professor Maxime Chrétien, who was a consultant to the fiscal division of the Fiscal Commission.

[536] Alexander J. Easson, "The Evolution of Canada's Tax Treaty Policy Since the Royal Commission on Taxation" *supra* note 508.

[537] *Ibid*.

[538] *Ibid*.

[539] Stanley S. Surrey, "UN Group of Experts and the Guidelines for Tax Treaties between Developed and Developing Countries, *supra* note 23.

though the UN did not expressly mention it) did not provide the results needed by developing countries for their development.[540] The Group of Experts' main task was to develop a tax treaty model mutually beneficial to both developed and developing countries, specifically to protect the respective revenue needs of both countries.[541] In substance, the task given to the Group of Experts was to revive the unfinished business of the UN Fiscal Committee. The Fiscal Committee was requested to reconcile the Mexico and the London models but the committee could not finish the business before its dissolution in 1954. The resulting effect was that states continued to use the OECD model, which was built on the London model for reasons I have previously adduced in this chapter. The challenges faced by developing countries from this OECD model were noted by the resolution of the UN Economic and Social Council, which states as follows:

> Noting with interest the Secretary General's report prepared in response to the above-mentioned resolution which pointed out that "the traditional tax conventions have not commended themselves to developing countries" and concluded that "it is important to search for a more appropriate treaty pattern". [542]

The above terms of reference should be a pointer to the members of the Group of Experts on their identity construction. At least the terms of reference would define the first component of identity construction (who they were) but might not determine the second component (how they do things). There might be a contest between the construction of two identities in the Group of

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[540] UN, UN Economic and Social Council, *Tax Treaties between Developed and Developing Countries Forty-third Session*, Document Number E/4429

[541] *Ibid*. The resolution sates as follows:

> Requests the Secretary-General to set up an ad hoc working group of experts and tax administrators nominated by Governments, but acting in their personal capacity, both from developed and developing countries and adequately representing different regions and tax systems, with the task of exploring, in consultation with interested international agencies, ways and means for facilitating the conclusion of tax treaties, which would be acceptable to groups of countries and would fully safeguard their respective revenue interests. (emphasis added).

[542] *Ibid*

Experts because members from developed and developing countries constituted the forum.[543] Members from developed countries might be tempted to suggest the OECD model as 'how we do things', while members from developing countries might oppose the suggestion. The remarks of the UN Secretary-General, endorsed by the United Economic and Social Council, is an express instruction to the Group of Experts that the 'search for a more appropriate treaty pattern' should not consider the existing conventions of that time because those conventions 'have not commended themselves to developing countries'.[544]

The UN published its tax treaty model in 1980, seventeen years after the OECD had sustained its leadership in international tax by publishing its first treaty model.[545] It is not clear why it took so long to reappear in the international tax regulatory landscape. But the reason for its re-appearance might be its understanding that history will not be kind to it if it fails to complete and improve on the legacy of the League. The OECD had even amended its first treaty in 1977.[546] The UN treaty model balances the competing interests between the source and the residence countries. One such mechanism adopted by the model is the expansion of what should constitute a permanent establishment (level of business activity that triggers the taxing right of a source country) in a tax treaty.[547] The expansion would afford the source countries to exercise more taxing rights on incomes derived from their jurisdiction since the permanent establishment triggers the taxing rights of source countries.[548]

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[543] *Ibid*.
[544] *Ibid*.
[545] UN, *UN Model Double Taxation Convention between Developed and Developing Countries* (New York: UN, 1980).
[546] Stanley S. Surrey, "UN Group of Experts and the Guidelines for Tax Treaties between Developed and Developing Countries, *supra* note 23 at 7.
[547] *Ibid*. For example, a building construction or installation project can only constitute a permanent establishment in the OECD model if it lasts more than twelve months. However, in the UN model, such activity can constitute a permanent establishment if it lasts more than six months. This implies that it takes less time for a source country to exercise its taxing right on the business activities of a foreign company within its jurisdiction.
[548] *Ibid* at 12 – 14.

The UN treaty model of 1980 was close to achieving what should be the normative goals of international tax, as argued in Chapter One. It started well by prioritizing the protection of the respective revenues of both treaty partners. The UN rightly framed the terms of reference for the Group of Experts and noted the mischief it wanted the Group of Experts to address. The mischief was that the traditional conventions of that time did not consider the interests of the developing countries. Including experts from developing countries in the Group of Experts also proves that the UN started on the right footing.[549]

However, some fundamental omissions committed by the UN affected how the actors exercised their sensemaking activities. The UN acknowledged that the traditional double tax conventions were unsuitable for developing countries but failed to investigate why before asking the Group of Experts to design another one. It would be wrong for the UN or anyone to conclude that those conventions were not fit for developing countries primarily because they were designed by the OEEC/OEED. This conclusion is wrong because the OEEC/OECD built its work on the legacy of the League. If there was anything wrong with the OECD model, the problem was inherited from the League. The OEEC/OECD could have made it worse because of its bias toward the European economic recovery, but the League cannot be excused from the criticism of the OECD model. If the UN had carefully investigated why those conventions did not protect the interest of the developing countries, it would have found out that the competing interests between developed and developing countries that resulted in Mexico and the London models was because

[549] The number of experts was originally twenty, but it was increased to twenty-five in 1980 by the UN resolution of 28 April 1980. The 1980 resolution also changed the name of the Group of Experts to 'Ad hoc Group of Experts on International Cooperation in Tax Matters'. The Group was renamed Committee of Experts on International Cooperation in Tax Matters in November 20024. Developing countries have fifteen representatives, while developed countries have ten representatives. See UN, Department of Economic and Social Affairs, *Committee of Experts on International Cooperation in Tax Matters: Terms of Reference*, online: <www.un.org/esa/ffd/tax-committee/about-committee-tax-experts.html>

the actors that were involved in the process of negotiating and drafting the two models departed from the mandate of the League.[550]

The UN should also consider further why its defunct Fiscal Commission was unable to reconcile the Mexico and the London models before it was dissolved. The results of these preliminary studies would inform the UN approach to more appropriate terms of reference to the Group of Experts. CSM analysis would have indicated to the UN that actors in the crystallization phase of ITR were greatly influenced by some of the properties of CSM. It would also be noted further that unless the sensemaking process is considered in terms of reference, the outcome of the works of the Group of Experts might not be different from the League of Nations and the defunct Fiscal Commission.

Another omission is that the 'terms of reference' to the Group of Experts were drafted to allow the influential actors to determine the contours of the negotiations. The 'terms of reference' states that the experts should explore 'ways and means for facilitating the conclusion of tax treaties, which would be acceptable to groups of countries and would fully safeguard their respective revenue interests'. This expression appears to be an open-ended statement that accommodates all sorts of interpretations.[551] What ways? What means will make developed countries consider the peculiar circumstances of developing countries? As the successor of the League and which is expected to know what transpired between developed and developing countries in the era of the League Nations, the 'terms of reference' should have been drafted as a close-ended statement

[550] Furter investigation will also reveal that the problem even started from the beginning of the process that led to the drafting of the 1928 model, which serves as the basis of the Mexico and the London models.

[551] We can get a sense of this from the 1980 UN model. The model admits that many clauses were copied from the OECD model. The probable reason for this was that the actors in the Group of Experts believed in the correctness of part of the OECD model. It may appear that this approach is not wrong because of the actors involved in drafting the OECD model. On a deeper look, consideration of the underlying objectives of those actors should make the UN Group of Experts whether the OECD provisions would be fit for developing countries. For the UN's admission that it reproduces the OECD's provisions in its model, see UN, *UN Model Double Taxation Convention between Developed and Developing Countries* at 11.

specifically stating what they should do and that would prevent a repeat of the supremacy battle of 1946.

The inclusion of developing countries in the Group of Experts was not enough to realize the objective of safeguarding the respective revenues of both developed and developing countries. Developing countries were also involved in the negotiations coordinated by the League and yet were dominated by developed countries in the London model. Considering the possibility of the use of influence by developed countries, the UN should have been specific on what would make its work acceptable to both groups of countries. Notwithstanding that there are provisions in the UN model that protect the revenue interest of the developing countries, such as the expansion of the permanent establishment clause,[552] the UN has not achieved its objectives of making its model acceptable to the Global North and the Global South. Most treaties in force are not modelled on the UN model, which suggests that developed countries have not accepted the UN's work even though they participated in it.

The latest updated version of the 1980 model of the UN was published in 2021.[553] The UN has consistently focused on striking a balance between the source principle (preferred by developing countries) and the residence principle (preferred by developed countries). Despite my criticism of the UN model – particularly with respect to its fundamental omission at the preliminary stage of the process, the model is close to, but not exactly, the realization of the global stability variables. The main problem affecting its ability to realize this objective is that its work is

[552] Stanley S. Surrey, "UN Group of Experts and the Guidelines for Tax Treaties between Developed and Developing Countries, *supra* note 23 at 7.
[553] UN, *Model Double Taxation Convention Between Developed and Developing Countries 2021* (New York: UN, 2021). This latest version addresses developing countries' concerns on contemporary issues, such as how to protect their tax bases in automated digital services.

occupying a second fiddle role to the OECD work. The OECD's prominence greatly influences the sensemaking process of international tax actors involved in the UN.

3.3.1 The UN Sustainable Development Goals and the Global Stability Variables

In 2015, the UN launched its seventeen Sustainable Development Goals (SDGs) project to address global socio-economic issues affecting people.[554] All the seventeen SDGs seek to achieve what I described as the global stability variables. Goal 16 on Peace, Justice and Strong Institutions can fit into the promotion of global peace, while Goal 13 is on the same terms as my analysis of the sustainability of states. The remaining Goals align with the functionality of states. Considering that the UN adopted the SDGs in the stabilization phase of international tax, it is important to evaluate if the UN has leveraged the SDGs to redirect international tax affairs to the normative goals – the realization of global stability variables.

The starting point for this analysis is to ask the question of whether the UN connects its work on the SDGs to international tax. The 2015 Addis Ababa Action Agenda on Financing for Development prioritizes domestic resource mobilization (DRM) in realizing the SDGs.[555] It states that 'mobilization and effective use of domestic resources …are central to our common pursuit of sustainable development'.[556] Since taxation is a major source of states' domestic resources and revenues, the DRM appears to be the most efficient mechanism through which the UN can use

[554] The SDGs were introduced as the replacement for the Millennium Development Goals, which expired in 2015. See Conor M. Savoy, *Taxes and Development: The Promises of Domestic Resource Mobilization* (New York: Rowman & Littlefield, 2014) 2 – 3. The SDGs were launched at the 2015 Addis Ababa Action Agenda on Financing for Development. Concerns on domestic resource mobilization, which focuses on how states can rely on their internally generated resources to achieve the stated goals, were raised about the efficiency of the millennium development goals. Therefore, it is no surprise that issues around domestic resource mobilization were considered in framing the SDGs in 2015. See Raul Felix Junquera-Varela et al., *Strengthening Domestic Resource Mobilization: Moving From Theory to Practice in Low-and-middle Income Countries* (Washington: The World Bank, 2017).
[555] *Ibid*.
[556] *Ibid*.

international tax principles to achieve the SDGs. Interestingly, the SDGs are products of the UN, which should make integrating international tax principles into the SDGs a seamless process.

The UN believes that effective taxation, as part of the DRMs, can achieve the SDGs. In 2018, it boldly stated the strong relationship between international taxation and the SDGs.[557] It urges its tax committee to identify and strengthen the relationship between international taxation and the SDGs.[558] The problem with the UN's approach on this point is that its statement does not demonstrate that the SDGs (related to the global stability variables) are the normative goals of international taxation. The statement reads as follows:

> (a) What are priority linkages between the programme of work of the UN Tax Committee and the commitments of the Addis Agenda and 2030 Agenda related to taxation as a source of DRM?
> (b) How can the UN Tax Committee strengthen these linkages?
> (c) How can the UN Tax Committee raise the awareness about the relevance of international tax issues for the 2030 Agenda?
> (d) How can the UN Tax Committee ensure that its work takes into consideration the different needs of countries at different levels of development and in different situations, and that it caters to different levels of capacity of tax officials?[559]

Assuming this 2018 statement demonstrates the UN's conviction that the SDGs are the normative goals of international tax, it was too late for the conviction to have any significant effect on the ITR. The conviction was pronounced over thirty-five years after the UN treaty model was designed. It would be hard for the conviction to change the critical sensemaking process of the actors who design and promote the UN's objectives.

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[557] UN, Committee of Experts on International Cooperation in Tax Matters, *The Role of Taxation and Domestic Resource Mobilization in the Implementation of the Sustainable Development Goals*, Seventeenth Session, Document Number E/C. 18/2018/CRP.19
[558] *Ibid*.
[559] *Ibid*. For the UN's further work on this point, see the UN Committee of Experts on International Cooperation in Tax Matters, *Follow-up Notes on the Role of Taxation and Domestic Resource Mobilization in Achieving Sustainable Development Goals*, Eighteenth Session, Document Number E/C. 18/2019/2.

This is evident when the UN was designing its framework on digital tax, which is contained in Article 12B. Drafting of Article 12B started in 2017 and should have reflected the UN' conviction on the relationship between the SDGs and international taxation.[560] The mandate given to the specialized committee to work on Article 12B was not connected to the SDGs.[561] The specialized committee was mandated to draft Article 12B in a way that would assist the developing countries.[562] Even if the objective was connected to the SDGs, the actors involved in designing Article 12B did not demonstrate there was such a relationship. The actors acted as if there was a contest between developed and developing countries in which developed countries were expected to assist developing countries.[563] This might be the reason why some developed countries refused to concede on certain provisions of Article 12B.[564] If developed countries insist on their reservations about Article 12B in the course of negotiation of a substantive tax treaty, most of the pro-source countries' provisions in the Article will be lost.[565]

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[560] UN Economic and Social Council, Committee of Experts on International Cooperation in Tax Matters, the Digitalized Economy: Selected Issues of Potential Relevance to Developing Countries, Document Number E/C.18/2017/6 online: <www.superperfect.com/document/note-secretariat-digitalized-economy-selected-issues-potential-relevance-developing.>

[561] UN Department of Economic and Social Affairs, *Subcommittee on Taxation of the Digitalized and Globalized Economy*, online: https://financing.desa.un.org/subcommittee-taxation-digitalized-and-globalized-economy. The mandate is stated as follows: 'to identify priority taxation issues related to the digitalized and globalized economy where the committee may most usefully assist developing countries in differing situations'.

[562] *Ibid*.

[563] This understanding might arise from the mandate which suggests that Article 12B should be drafted to assist developing countries.

[564] UN Department of Economic and Social Affairs, *Article 12B of the UN Model Tax Convention as agreed by the Committee at its 22nd Session*, online: https://financing.desa.un.org/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session>. For example, see paragraphs 8 – 15 of the Commentary on Article 12B, which explain reservations of developed countries. The commentary does not expressly state that members with reservations are from developed countries. It only states that a large minority of the members of the UN Tax Committee. Considering the committee's composition, the number of developing countries exceeds that of developed countries. It, therefore, means that the reference to the large minority in the commentary refers to developed countries.

[565] *Ibid*. Article 12B is incorporated into the UN tax treaty model, which may be used as guidance for negotiating a substantive treaty. The model may be modified or adopted, but there is no obligation that treaty partners should adopt the provisions of the model. Paragraph 16 of the Commentary of Article 12B allows the dissenting members (developed countries) to exclude Article 12B when negotiating tax treaties. It states, 'in summary, countries sharing these concerns may wish not to include Article 12B in their bilateral tax treaties'.

3.4 Conclusion

This chapter has provided sufficient materials to prove that the stabilization phase of the ITR does not consider the global stability variables. One of the key developments of this era was the emergence of the OEEC/OECD as a new international tax order that replaced the League. The OEEC/OECD was not initially set up to coordinate international tax cooperation and would not have properly done so if the UN Fiscal Committee had been able to sustain the legacy of the League of Nations. The departure from the global stability variables, which happened at the early stage of the crystallization phase, was exacerbated in the stabilization phase because the OEEC/OECD was strictly an economic institution. So, consideration of non-economic factors emphasized by the global stability variables was never envisaged by the OEEC/OECD.

The OEEC/OECD's intervention in international tax cooperation was part of its broader mandate of reviving the European economy. The OECD tax treaty model was also designed to achieve this purpose. This chapter argues that designing the OECD tax treaty model as a pro-residence country is valid as that will help the region recover economically. The model should, therefore, be used among the OECD member states without any criticism. The criticism against the OECD model becomes valid when the model is being used with non-OECD states. It is argued that using such a model by any OECD state with non-OECD states is deceptive and fraudulent because the OECD states should know that the model is designed only for the OECD community. This alone should trigger a truth and reconciliation process from the developed countries (who are, interestingly, the OECD states).

This phase of international taxation also features the renewed interest of the UN in international taxation. The UN had previously but briefly worked on international tax through its Fiscal Committee. The Fiscal Committee was dissolved in 1954 before achieving any significant contribution to international tax. By the time the UN renewed its interest in international tax, the

OEEC/OECD had covered the field and produced some work that has influenced the work of the UN. By 1980 when the UN released its first treaty model, the OECD had amended its first model that was released in 1963. The objective of the UN was close to achieving the global stability variables even though it was not expressly stated that the objective was for the realization of the global stability variables. The UN was, however, unable to achieve this objective because it omitted to undertake certain fundamental inquiries before embarking on the reforms of international tax. One of such omissions is its failure to investigate why the existing tax conventions of that time, which it sought to correct, were not committed to developing countries' interests. The result is that the UN could only make modest contributions to the regime as its treaty model was not as widely accepted as the OECD model. This implies that the ITR continued to experience the departure from the global stability variables in the stabilization phase despite the existence of the UN.

The UN SDGs programme that started in 2015 resonates well with the global stability variables. The UN emphasizes that the DRMs will play a central role in the realization of the SDGs. It would be expected that since taxation is an integral part of the DRMs, international tax principles would be redesigned to align with the SDGs. The first barrier to the realization of this expectation is that the UN position on the relationship between the SDGs and international taxation (as part of the DRMs) does not state that the SDGs are the normative goals of international tax. If the UN had stated this, it might have positively impacted its subsequent work on Article 12B, which started after the launch of the SDGs programme. Another barrier is that the UN intervention in linking international tax to the SDGs was late in time and, as such, could not change the narratives of the ITR.

Chapter Four: The Contemporary Phase of the International Tax Regime

4.0 Introduction

The opportunity to design an international tax system that considers the broad mandate of the League for Promotion of Global Peace – and, by extension, the existence and the functionality of states, which I describe as the global stability variables - was also missed in the contemporary phase. The unique feature of this phase is its seeming inclusion of historically excluded actors – the non-OECD states and the LMICs - in the process of reforming the ITR. This phase experienced the birth of a new governance forum known as the Base Erosion and Profit Shifting (BEPS) Inclusive Framework, the membership of which includes both developing and developed states, only some of which are members of the OECD.[566] The seeming inclusivity of the BEPS Inclusive Framework was a marked change from the barriers to entry for non-OECD states in the stabilization phase. The OECD states were the only actors involved in the formulation of the OECD tax treaty model and other OECD-based soft law instruments, such as the harmful tax competition guideline in the stabilization phase.[567] The establishment of the BEPS Inclusive Framework seems to be an opportunity to return the ITR to its broad and inclusive nature of the crystallization phase. This chapter explains how this so-called inclusivity of the BEPS Inclusive Framework does not fix the monumental failure of the ITR to consider its connection to the broad mandate of the League.

In chapter three, I explain how the sensemaking of the OECD states influenced their approach to international tax problems. Even though the OECD states relied on the legacy of the

[566] Allison Christians & Laurens van Apeldoorn "The OECD Inclusive Framework" (2018) Bulleting Int'l Tax; Allison Christians, "BEPS and the New International Tax Order," Brigham Young University Law Review 2016, no. 6 (2016): 1603-1648; Mosquera Valderrama IJ. Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative (2018) 72:3 Bulletin Intl Tax.
[567] Joann M. Weiner & Hugh J, Ault, "The OECD's Report on Harmful Tax Competition" (1998) 51:3 Natl Tax J.

League, the 'identity' construction of these states did not make them to consider how their work on international taxation could be connected to the mandate of the League. The OECD is an economic institution, and its works on international taxation were consequently considered within the economic parameters of its member states. I also explained how the OECD states diffused the OECD tax treaty model beyond the OECD community and noted that the model is the basis of most bilateral treaties. What the OECD states have done in the contemporary phase is to preserve their legacy and prevent erosion of that legacy in spite of the inclusion of other non-OECD states in the Inclusive Framework.

The influential OECD states were able to prevent the erosion of the OECD's legacy on the international tax system in this current phase in four ways. First, they leveraged their early intervention in harmonizing and framing contemporary tax problems to determine how the aggregated problems are addressed. The major step taken by the influential OECD states in this regard is to strategically choose the OECD as a forum to coordinate global tax cooperation on those problems despite the existence of other institutions that are more inclusive than the OECD. Second, complexity in the multiple layers of actors co-existing in the Inclusive Framework is another opportunity to preserve the OECD's dominant values. The influential OECD states leverage the complexity of layers of actors to interfere with the activities of the BEPS Inclusive Framework. As further explained in this chapter, there are at least four layers of actors – the G7, the G20, the OECD, and the Inclusive Framework itself. What is projected to the public is that the Inclusive Framework is the only forum or the main forum, that coordinates the works of this contemporary phase. This chapter explains how the OECD states oversee the activities of the Inclusive Framework through the institutions of the G7, the G20 and the OECD. They also rely on

these institutions to ensure that the works of the Inclusive Framework do not derogate from the OECD legacies.

Third, complexity in the operational structures adopted to work or assist the Inclusive Framework in resolving those problems. The operations are structured in a way that the Inclusive Framework does not have control over the key segments of the operations. The key segments of the operations are controlled by the OECD. Lack of control of the operations is evident in the complaints of some members of the Inclusive Framework – specifically, the developing countries – that one of the progress reports released by the OECD is different from the resolution of the Inclusive Framework. Lastly, the constraints in the agenda-setting process and how those agendas are hard to review. The agenda of global tax cooperation has been designed around the values and legacies of the OECD since the inception of the process. Each of these four ways is separately examined in this chapter to explain how non-OECD states, particularly developing countries, were unable to undertake their true identity construction in the Inclusive Framework.

The CSM theory appreciates that in some cases, an actor may be unable to identify 'who he is' and 'how he does his thing' due to some dominant values and organization powers that operate as constraints to sensemaking. In that circumstance, the sensemaking of that actor is the implementation of a 'script that has already been written by some other actors', and the outcome of that sensemaking process will not reflect the interest of that actor. This chapter contextualizes these theoretical underpinnings within the contemporary phase. In justifying the argument that the OECD and its influential member states constrain the sensemaking of other actors in the Inclusive Framework, this chapter examines the responses of developing countries and other institutions, such as the UN and the IMF, to the work of the Inclusive Framework. The responses show that if

these actors had been allowed to make sense of their options and approaches to contemporary problems, they would have suggested options that differed from the Inclusive Framework's output.

The contemporary phase started with the establishment of the BEPS Inclusive Framework in 2016 and continues to the present.[568] The task of this phase for the OECD has been identified as reviewing the ITR in a manner that addresses the modern tax avoidance and evasion strategies of multinational companies.[569] The proposed reforms seek to ensure that profits arising from cross-border businesses are taxed in the jurisdictions where they are made.[570] The BEPS Inclusive Framework chronicles the desirable international tax reform in fifteen action plans.[571]

I have analyzed in the previous chapters that cooperation efforts in the crystallization and the phases of ITR are the DTA and the OECD model, respectively. In the contemporary phase, the substantive outcome is the digital tax framework, which proposes new rules for the digitalized economy's tax consequences. The digital tax framework is contained in the first action plan of the fifteen action plans. Since the previous chapters examine how the actors made sense of their approaches to designing the outcomes of each of the eras, this chapter examines the first action plan out of the fifteen action plans, which is the outcome of the contemporary phase. It also explains how the BEPS Inclusive Framework actors inherited the ITR problem created in the two preceding phases of the regime. The first action plan is addressing the tax challenges of the digitalized economy.[572] To address the problem of the first action plan, the BEPS Inclusive

[568] Shu-Yi Oei, "World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership" (2022) 47:2 Yale J Int'l L 199 at 200.
[569] OECD, *Addressing Base Erosion and Profit Shifting*, (Paris: OECD, 2013) 47.
[570] Ibid
[571] OECD, Action Plan on Base Erosion and Profit Shifting (Paris: OECD, 2013) 29. Action 1 – Tax Challenges of the Digitalized Economy. Action 2 – Neutralizing the effects of hybrid and mismatch arrangement. Action 3 – Controlled Foreign Company. Action 4 - Limitation on interest deduction. Action 5 – Harmful Tax Practices. Action 6 – Prevention of Tax Treaty Abuse. Action 7 – Permanent Establishment Status. Action 8 -10 – Transfer Pricing. Action 11 – BEPS Data Analysis. Action 12 – Mandatory Disclosure Rules. Action 13 - Country-by-Country Reporting. Action 14 – Mutual Agreement Procedure. Action 15 – Multilateral Instrument.
[572] Ibid.

Framework has recommended two proposals: first, a multilateral global digital tax instrument, which provides, among other things, a new allocation of taxing rights between the residence and the source countries (known as Pillar One), and second, the Global Anti-Base Erosion model rules (GLoBE), which provides for a minimum tax that should be paid by multinational companies to jurisdictions where they operate (known as Pillar Two).[573] The two proposals are collectively described as the two-pillar solution in this work.

The first action plan appears to be the most or one of the most significant action plans for a few reasons. First, it is the only action plan that revises the core bases of the conventional double taxation agreement. Those bases include the definition of a new permanent establishment (PE) clause that triggers the taxing rights of source countries and the allocation of taxing rights between the residence and source countries.[574] Second, it cuts across the other action plans. For example, action plans 8 – 10 on transfer pricing are connected to Amount B of Pillar One, which focuses on a simplified approach to transfer pricing in the digitalized economy.[575]

The BEPS Inclusive Framework appears to the public to be the main forum of actors of this phase. The OECD presents to the public the works milestones it published with respect to the developments on the two-pillar solution that the two-pillar solution was made by the BEPS Inclusive Framework is the drafter and designer of those works.[576] This chapter debunks this claim by showing that there are other institutional actors that co-exist with actors in the Inclusive Framework. This chapter identifies and explains the roles played by these other actors, such as the

[573] Noonan Chris & Victoria Plekhanova. "Compliance Challenges of the BEPS Two-Pillar Solution." (2022) British Tax REv *British Tax Review* (2022).
[574] *Ibid*
[575] Reuven Avi-Yonah, Young Ran (Christine) Kim & Karen Sam, "A New Framework for Digital Taxation" (2022) 63 Har Intl LJ 279.
[576] As an example, the OECD's report on GLoBE rules states that "(t)his document was approved by the OECD/G20 Inclusive Framework on BEPS on 14 December 2021 and prepared for publication by the OECD Secretariat". See OECD, Inclusive Framework on BEPS, *Tax Challenges Arising from the Digitalization of the Economy – Global Anti-Base Erosion Model Rules* (Paris: OECD, 2021) at 2.

G7, the G20 and the OECD, and how their involvements impacted the sensemaking activities of the actors in the BEPS Inclusive Framework. It analyzes how the involvement of these influential actors in the work of the BEPS Inclusive Framework entrenches the economic interests of the OECD states and disguises the work of the BEPS Inclusive Framework as the product of the international tax community.

Just like the stabilization phase, the OECD and its members, collectively and individually, also play the leading role in establishing the most substantial regime of this phase. They identified the tax problems of the digitalized economy and designed a roadmap and blueprint to their solutions. They subsequently established the BEPS Inclusive Framework to work on the roadmap and blueprint. Unlike the crystallization phase, the OECD relied on the political support of the G20 to be able to play the leadership role of global tax governance in this phase.[577] The combined interests of the OECD, the G20 and the G7, and their member states, culminated into the formative context and the social rules that impacted the actors' true identity construction in the BEPS Inclusive Framework.

What confirms the above argument, as detailed in this chapter, is that the actors from developing countries in the BEPS Inclusive Framework are also part of the UN Tax Committee, which equally addresses the tax challenges of the digitalized economy.[578] The differential approaches adopted by the BEPS Inclusive Framework and the UN Tax Committee on the same

[577] Allison Christians, "Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20" (2010) 5:19 Nw. JL & Soc. Pol'y.

[578] For example, Nigeria, Zambia and Jamaica have cross membership of both the BEPS Inclusive Framework and the UN tax Committee. See OECD, Members of the OECD/G20 Inclusive Framework on BEPS, online: https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>; UN, Secretary-General Appoints 25 Members to UN Committee of Experts on International Cooperation in Tax Matters for 2021-2025 Terms, online : https://www.ciat.org/secretary-general-appoints-25-members-to-united-nations-committee-of-experts-on-international-cooperation-in-tax-matters-for-2021-2025-term/?lang=en> Rasmus Christensen, Martin Hearson & Tovony Randriamanalina, (2020) "At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations" (2020) ICTD Working Paper 115.

issue is proof that the respective formative context and the social rules of the UN Tax Committee and the OECD BEPS Inclusive Framework impacted how the actors from developing countries identify themselves. The actors from developing countries were able to undertake a true identity construction of themselves in the UN Tax Committee because Article 12B, designed by the UN Tax Committee, is tailored towards the needs of the developing countries.[579] It is only a true construction of 'who the developing countries are and how they do things' that can result in an output that protects their interests.

4.1 Reflections on the Historical Developments of the Tax Challenges of the Digitalized and Globalized Economy

The CSM theory emphasizes how the formative context and the social environment in which actors operate can impact their sensemaking.[580] By the formative context, the CSM alludes to the influence of some dominant values and assumptions on the sensemaking activities of actors.[581] These dominant values and assumptions can evolve to become the acceptable standards of the operating social environment and consequently crystallize into organizational rules and powers.[582] The combined effects of the dominant values and the organizational powers and rules is that they subtly dictate to actors how they should carry out their sensemaking process. One of the properties of the CSM theory is that sensemaking is enactive of its environment.[583] This means that the sensemaking process can be restrained or defined by the environment previously created

[579] In appointing the members of the UN Tax Committee, the UN deliberately appointed more members from developing countries so the outcome could reflect the interests of developing countries. The commentary on Article 12B shows that the majority of the members of the Committee support Article 12B, and the minority (the developed countries) expressed their reservations on the applicability of provisions of Article 12B. See Article 12B of the UN Model Tax Convention, as agreed by the Committee at its 22nd Session, online: https://financing.desa.un.org/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session

[580] Mills, Thurlow & Mills, "Making Sense of Sensemaking: The Critical Sense-Making Approach" *supra* note 155.

[581] *Ibid*

[582] *Ibid*

[583] *Ibid.*

by the actors themselves.[584] The historical account of the tax problems of the digitalized economy gives a clear picture of how the dominant value and assumption of the early and influential actors shaped the sensemaking of the other actors in the BEPS Inclusive Framework. It also explains how the closed economic institutions (and environment) of the OECD, which was created by influential actors, shaped the sensemaking of the actors to ignore the non-economic component of international tax cooperation.

The chronicles of events leading to the design of the two-pillar solution started with identifying and harmonizing the digital tax problems by states that first became politically attentive to those problems.[585] Since the digitalized economy evolved in the 1990s in the United States and later in other developed states, these states experienced digital and global tax challenges before developing states.[586] The developed states thus had the opportunity to define what should be the objectives of the global tax cooperation on these problems before actors from developing states were included in the process.

The basic tax challenge of the digitalized economy is that the new economy enables foreign businesses to carry on business activities in the source countries without maintaining a physical presence in those source countries.[587] For source countries to exercise their taxing rights on active

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[584] *Ibid.*

[585] Even after the agenda had been set in 2015 by the release of Action One, the affected countries' responses were still uncoordinated, probably due to the absence of any workable solution. The unilateral responses of these countries motivated the OECD to speed up its work. The European Commission proposed a 3% digital service tax in 2018. Spain, Austria, New Zealand, Italy and the Czech Republic planned to follow the same path. France proposed its digital service tax in 2019. See Allison Christians & Tarcisio Dinis Meghalhaes, "A New Global Tax Deal for the Digital Age" (2019) 67:4 Can Tax J 1153 at 1158.

[586] Though the computer was invented in the 1940s, the commercialization of computer activities became prominent in the 1990s. It is regarded as a digital economy not because it is separable from the conventional economy but because it can aid and support the growth of traditional businesses. For example, the conventional way of selling newspapers is by manually distributing the newspapers. The same distribution can now be done electronically in the digitalized economy in a greater volume and less time. For further reading on the digitalized economy, see Edward J. Malecki & Bruno Moriset, *The Digital Economy: Business Organization, Production Processes, and Regional Developments* (New York: Routledge, 2008) at 3.

[587] Richard Doernberg & Luc Hinnekens, *Electronic Commerce and international Taxation*, (London: Kluwer Law International, 1999) 14.

business income of multinational companies operating within their jurisdictions, physical presence is required.[588] The problem of doing business without physical presence was considered in the United States two prominent cases that address out-of-state businesses conducted through mail orders. Though those cases are not strictly on digital tax challenges, they share a common problem of doing business in a jurisdiction without a physical presence.

The first case is National Bellas Hass v Department of Revenue, which was decided in 1967.[589] National Bellas Hass was a Delaware company that was selling products to Illinois residents by sending its catalogue and advertising flyers through the mail. Bellas Hass challenged Illinois' use tax collection scheme, which required Bellas Hass to collect and remit use tax from its customers who were residents of Illinois.[590] Bellas Hass' argument was based on the point that it maintained no physical presence in Illinois and that physical presence was required under the Due Process and the Commerce Clause of the United States Constitution to create a nexus between the taxing state and the vendor.[591] The Court affirmed the position of Bellas Hass and held that in the absence of the physical presence of an out-of-state vendor in a taxing state, such a taxing state could not compel the vendor to collect and remit use tax.[592]

The second case is Quill v North Dakota, which was decided in 1992.[593] Quill was a Delaware company with no physical presence in North Dakota. In an action similar to Bellas Hass on collection of use tax by vendors, Quill relied on the Due Process and the Commerce Clause to

[588] *Ibid*
[589] Pamela M. Krill, "Quill Corp. v. North Dakota: Tax Nexus under the Due Process and Commerce Clauses No Longer the Same" (1993) 1993:5 Wis L Rev 1405 at 1413.
[590] *Ibid*. For ease of use, tax administration, various states in the United States enacted laws that delegate the power to collect and remit the tax to the vendors.
[591] *Ibid*. For further reading on the Commerce Clause and Due Process see pages 1410 – 1412.
[592] See also Kathryn Kisska-Schulze, "The Future of E-mail Taxation in the Wake of the Expiration of the Internet Tax Freedom Act" (2014) 51:2 Am Bus LJ 315.
[593] David C. Powell, "Internet Taxation and U.S. Intergovernmental Relations: From Quill to the Present", (2000) 30:1-2 J Federalism 39 at 41.

absolve itself of any liability. The common conclusion in both cases is that physical presence is the only factor that could create a nexus with the taxing state. The attempt by the North Dakota Supreme Court to ingeniously use the economic presence to determine the nexus of Quill in Dakota was set aside by the United States Supreme Court.[594] The United States Supreme Court was of the view that it is only Congress could amend the Due Process and the Commerce Clause to include any other test, apart from the physical presence test, to measure nexus with the taxing state.[595]

Recognizing the significant impact this jurisprudence could have on doing business on the Internet, the United States enacted the Internet Tax Freedom Act (the 'Act') in 1998.[596] Since doing business on the internet enables the vendor to connect with its customers in other states without maintaining a physical presence in those states, the vendor can rely on Quill and Bellas Haas to refuse collection and remittance of use tax. This would eventually result in a substantial loss of tax revenue to states in the United States. The Act establishes the U.S Advisory on Electronic Commission, among other things, as a forum to deliberate the best approach to address the tax challenges.[597] It was clear that the unilateral efforts of a state would not be enough to address the challenges because of the unique features of the digitalized economy. Digital disruption easily permeates multiple jurisdictions without any restriction. The Act, therefore, provides a moratorium for taxation on internet access to enable stakeholders to collaborate on effective solutions.

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[594] Pamela M. Krill, "Quill Corp. v. North Dakota: Tax Nexus under the Due Process and Commerce Clauses No Longer the Same, *supra* note 589 at 1422.
[595] *Ibid*.
[596] Joseph R. Feehan, "Surfing around the Sales Tax Byte: The Internet Tax Freedom Act, Sales Tax Jurisdiction and the Role of Congress" (2002) 12:2 Alb LJ Sci & Tech 619 at 625
[597] *Ibid*. See also Matthew G. McLaughlin, "The Internet Tax Freedom Act: The Congress Takes a Byte Out of the Net" (1998) 48:1 Cath U L Rev 209.

The challenges that seemed to be limited to the United States were fast growing beyond that country, and they began attracting the international community's attention. The simultaneous efforts of the United Kingdom and the United States exposed the ability of the multinationals to harness the potential of the digitalized economy and globalization to design a grand scale of tax avoidance and profit-shifting strategies. Through its Senate's committees, the United States queried the tax planning and strategies of companies like Apple, Microsoft and Hewlett Packard, which had resulted in paying low taxes on local and foreign operations to the coffers of the United States.[598] The United Kingdom, through its House of Commons, also interrogated Amazon, Starbucks and Google on low taxes paid to the state despite their large scale of businesses in the United Kingdom.[599] The common conclusion among the affected countries was that the multinational companies were not paying their fair share of taxes in the countries where they operated. Harmonizing these problems triggered a new phase of multilateral cooperation described as base erosion and profit shifting by the OECD.

These developed states are members of the G7, an international institution that has been described as the main structure and from which the G20 was created as its extension.[600] Therefore, it was easy for these developed states to bring in their existing umbrella associations – the G7 and the G20 – to coordinate the global efforts to address the multinational companies' base-eroding and profit-shifting strategies. There is not much difference between the G7 and the G20 in terms of dominion because the substantial political and economic powers lie with the fewer countries

[598] Mason, "The Transformation of International Tax, *supra* note 32. These multinational companies' corporate tax avoidance strategies were also aided by favourable tax regimes and administrative rulings from foreign market jurisdictions, such as the Netherlands, Luxembourg, and Ireland.
[599] *Ibid*. Starbucks claimed it had not made profits for fourteen years out of its fifteen years of operations in the United Kingdom.
[600] Allison Christians, "Taxation in a time of Crisis: Policy Leadership from the OECD to the G20 *supra*, note 577.

that dominate both institutions.[601] The G7 is always visible in the trajectory of the two-pillar solution; the transmission of direction has been from the G7 to the OECD, while the G20 occupies an intermediary role that transmits the G7's ideas to the OECD. As an example, the idea of minimum tax in Pillar Two first emanated from the G7 before its adoption by the G20/OECD.[602] The OECD's Secretariat then developed the idea of minimum tax into a workable framework as part of Pillar Two for adoption by members of the BEPS Inclusive Framework.

These states had the 'first in time' benefits of harmonizing the problem and weaving all the dimensions of the tax problems of the digitalized and globalized economy into strands that suit their economic purposes.[603] The experiences of these states about how their multinational corporations actively exploit the digitalized economy for tax avoidance purposes defined how they crafted the problems for international tax cooperation. The problems were conceptualized as if they were domestic tax issues, where competing interests exist between the taxpayers and the tax

[601] Smith Gordon, *G7 to G8 to G20: Evolution in Global Governance* (Waterloo, Ontario: Centre for International Governance Innovation, 2011) 4-6. The historical development of these institutions confirms that the G7 will continue to influence the G20 indirectly. The G7 started with a group of four countries – United States, Germany, France, and Britain – on March 25, 1973. It was named after the Library Group, adopting the name of the White House Library, where they had their inaugural meeting. Japan was added in September of that year, and it became a group of five countries. Canada was added to the group in 1976 to balance the North American representation in view of the inclusion of Italy by France. With the inclusion of Canada and Italy, it became a group of seven countries in 1976. These countries remain the nucleus of the G7 and determine its expansion and relationship with other institutions. They determined the inclusion of Russia in the G8 in 1997 and its exit. The G7 influenced the formation of the G20 in December 1998 to operate at the level of finance ministers and central bank governors. The G8 summits in 2005 and 2007, where five developing countries – India, China, South Africa, Brazil, and Mexico- were invited, marked the beginning of consideration for moving the G20 meetings to the leaders' level. This was eventually done in 2008, and it was a major response to the global financial crisis.

[602] Wei Cui, "New Puzzles in International Tax Agreement" (2021) 75:2 TL Rev 201.

[603] Etel Solingen describes political or social agents that influence international diffusion. See Etel Solingen, "Of Dominoes and Firewalls: The Domestic, Regional, and Global Politics of International Diffusion" (2012) 56, International Studies Quarterly 631 at 632. Solingen argues that analysis of a phenomenon and how it diffuses and affects the globe is incomplete without understanding how these political agents work and interact with other ingredients of international diffusion – the other ingredients are the initial stimulus (new events such as the digital disruption in this context); the medium, which is the structure used by the political agents to spread the information about the stimulus; and the outcome, which is the output of the change. The author states as follows: "Improved analysis of diffusion can benefit from systematic attention to the initial stimulus; the medium through which information about the stimuli may /may not travel to a given destination; the political un/affected by the stimulus' positive or negative externalities and their roles in aiding or blocking the stimulus' journey to other destinations; and outcomes that enable discrimination among grades of diffusion and resulting equilibria."

authorities. The tax authorities seek to maximize their tax returns while taxpayers try to reduce tax liabilities. The tax authorities of high-income states seeking to resolve the emerging and rapidly incrementing challenges maintained their mindset of maximizing tax revenues in seeking solutions to those problems. They neglected to re-consider whether this mindset was still appropriate once developing states were included in the BEPS Inclusive Framework.

One of the benefits of being part of the initial community that identifies a problem is participating in the selection of the forum that coordinates the cooperation needed to resolve the problem. The early actors may choose a purpose-established forum or resort to an existing forum. The choice of the forum is informed by the agenda they had set and only the forum that can deliver their expectation is likely to be chosen.[604] The League was the only option available to states in the crystallization phase. The states were, therefore, constrained to adopt the League of Nations as the forum for global tax cooperation. In the stabilization phase, the states that identified and harmonized the tax problems created the purposive institution of the OECD to coordinate their cooperative efforts. The OECD enjoyed the monopoly of the forum before the emergence of the UN, and states had to work with the OECD as a result of this monopoly.[605]

The OECD ceased to enjoy the forum monopoly in 1968 when the United Nations Group of Experts between Developed and Developing Countries was established.[606] The co-existence of both the OECD and the UN in the stabilization and the contemporary phases provides sufficient particulars to evaluate how the early actors operationalized the rational choice institutionalism

[604] Rixen "The Political Economy", *supra* note 94. The forum is described as an entity that depends on countries and an object of their strategic choices.
[605] Diane "International Tax Relations, *supra* note 105 at 121-122.
[606] UN, Department of Economic and Social Affairs, *Committee of Experts on International Cooperation in Tax Matters*, available online: <www.un.org/esa/ffd/tax-committee/about-committee-tax-experts.html#:~:text=The%20Ad%20Hoc%20Group%20of%20Experts%20on%20Tax%20Treaties%20between,Cooperation%20and%20the%20United%20Nations>.

theory.[607] Rational choice theory posits that actors strategically and purposively choose an institution that can help with the realization of their objectives.[608] If a forum is strategically chosen based on its suitability to the agenda set by the founding actors, the outcome of the process coordinated by that forum can be predicted. An average man can easily predict that while the process may appear to benefit all participating states, the final outcome will prioritize the interest of the founding actors.

It may be argued that the choice of the OECD by the developed economies in the stabilization phase on certain issues of international tax is justifiable because the OECD had covered the ground before the emergence of the UN. Working with the OECD in that circumstance would guarantee consistency, certainty, and predictability. The argument may be correct in respect of international tax issues like transparency, exchange of information, and mutual assistance, because those initiatives are premised on the long-standing OECD's model tax treaty.

The choice of a forum for the BEPS issues, however, changes the parameter of this argument. The G20 had multiple choices in 2013 but preferred the OECD forum for obvious, predictable reasons.[609] The UN was a forum that was also worth the G20's consideration at that time and there was no proof that the OECD understood the digitalized economy and its tax challenges better than the UN.[610] The 2013 era differed from 1960-1968, when the OECD enjoyed

[607] Rixen "The Political Economy", *supra* note 58.
[608] *Ibid.*
[609] Allison "Taxation in a Time of Crisis, *supra* note 577 at 40. Christians' conclusion that the inclusive outlook of the G20 can only offer developing countries, which are members of the G20, a peripheral role in the policymaking is corroborated by choice of the forum. The choice of the OECD restrains the real participation of the twelve countries that were added at the discretion of G7/8 to make the G20. The description of G20 as an inclusive entity appears to be misleading.
[610] The OECD's previous work on the taxation of electronic commerce is insufficient to establish its supremacy over other institutions. Key issues such as an alternative approach to permanent establishment did not feature in those previous works. Also, these OECD works are its initiatives, while the Two-pillar solution is the G20's initiative—the OECD's task is to develop the initiative within the parameters set by the G20. The G20 should have demonstrated its neutrality and leadership in choosing the forum.

a monopoly in global tax governance. Another option the G20 could have considered was to set up a special hybrid forum that drew its members from both the OECD, the UN and other related institutions such as the World Bank Group and the International Monetary Fund.

Initial discussions in the chosen forum will include issues around the formation of a regime that the forum seeks to actualize.[611] In light of the previous argument, the states that can influence the choice of the forum because of their first-mover advantage can seamlessly influence the regime formation because the regime is a subset of the forum. The question is whether the two-pillar solution is a regime within the context of international relations. I explain this in detail in the next section. If the answer to this question is in the affirmative, it will be valid to conclude that the G20's dominant values and social context are not only limited to the choice of the OECD as the forum but also to the contents of the two-pillar solution.

4.1.1 Is the two-pillar solution a Regime?

According to Stephen Krasner, a regime is 'implicit or explicit principles, norms, rule and decision-making procedure around which actors converge in a given area of international relation'.[612] Any activity of an international institution can be measured within the context of these four components to determine whether it is a regime. The 'principles' component is countries shared beliefs about a phenomenon.[613] Within the context of taxation, the phenomenon must be of a kind that affects countries' tax revenue or economic growth. It was easy to form a regime on double taxation because countries had a mutual belief that it was harmful to taxpayers and tax

[611] Stein, "Getting to the Table: The Process of International Prenegotiation, *supra* note 230. This is what is called as prenegotiation or negotiation of negotiation.
[612] Stephen Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables" in Stephen Krasner (ed), *International Regimes* (New York: Cornell University Press, 1983) at 3. See also Young Margaret, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012) at 6
[613] *Ibid*.

authorities.[614] It was harmful to taxpayers because the liability of paying tax twice on a single income has a negative impact on profitability. It was harmful to countries because it discouraged cross-border investments, which impetus for economic growth. In the same vein, countries believe that the digitalized economy enables multinational companies to design base-eroding strategies and operate in multiple countries simultaneously without maintaining a physical presence in those countries. The resultant effect of this is a significant loss of tax revenue and, consequently, the inability of countries to discharge their social and welfare duties to their citizens. The countries' consensus on this point satisfies the requirement of a regime's 'principles' component.

Norms are what should be the standard approach to address the phenomenon adjudged to be harmful.[615] Since the fundamental issue eroded by the digitalized economy is the physical presence of multinational companies in source countries, Pillar One provides an alternative mechanism to measure the presence of business in the source countries. It provides a significant economic presence concept that is based on three conjunctive conditions: global turnover, local turnover, and profitability ratio. A source country can only apply Pillar One to tax the allocable income of a multinational company if that multinational company's global income reaches a particular threshold (global turnover test);[616] the revenue traceable to that source country reaches a specified threshold (the local turnover test),[617] and the multinational companies' profitability ratio is at a specified rate (the profitability test).[618]

The rule is the framework that prevents multinational companies from using the interaction of traditional taxing approaches with the economics of a digitalized economy to reduce the tax

[614] Diane "International Tax Relations", *supra* note 105 at 116.
[615] Krasner, Structural Causes and Regime Consequences: Regimes as Intervening Variables, supra note 612.
[616] OECD October 2021, *supra* note 15. The global threshold test is that the multinational's global turnover must be over EUR 20 billion or its USD equivalent.
[617] Ibid. The revenue threshold that must be traced to source jurisdiction is EUR 1 billion for a bigger jurisdiction and EUR 250,000 for a smaller jurisdiction. A smaller jurisdiction is defined as one with a GDP lower than 40 billion.
[618] The profitability must be above 10%. The profitability is computed by dividing profit before tax by the revenue.

they pay to the relevant jurisdictions. Since revenue is the measure of multinationals' presence in the source country, the OECD has released draft model rules on identifying and tracing the revenues to a particular jurisdiction.[619] It also provides for computation and adjustment of multinationals financial statements. The adjusted net profit is the basis for the computation of residual profit, a part of which is allocated to market jurisdiction.[620] There are also anti-avoidance provisions that seek to ensure that multinationals are not effectively taxed below the minimum rate of 15%.[621]

The two-pillar solution also satisfies the 'decision-making procedure' requirement. It provides for how decisions with respect to the ascertainment of revenues allocable to market jurisdiction are concluded among the participatory countries. It contains tax certainty provisions which enable information exchange and early tax dispute management.[622] The two-pillar solution is arguably a regime within the context of international relations in the light of this analysis. The implication of the regime status of the two-pillar solution makes it susceptible to influence because it is part of the forum that was chosen for strategic outcomes. From the definition of Krasner, an institution includes a regime. In fact, the regime is part of what the institution will use to advance and implement its mandate. If the OECD states are strategic in choosing the forum of the OECD as the platform of this contemporary phase, it then means that those states have a significant influence on the two-pillar solution because it is part of the forum and institution.

The developed states are economically driven in their efforts to address the tax challenges of the digitalized economy. The problematization of the challenges, choice of the forum and

[619] OECD, *Pillar One – Amount A: Draft Model Rules for Nexus and Revenue Sourcing* (Paris: OECD, 2022).
[620] OECD, *Pillar One – Amount A: Draft Model Rules for Tax Base Determinations* (Paris: OECD, 2022)
[621] OECD, Base Erosion and Profit Shifting Project, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 335. The anti-avoidance provisions are contained in Pillar Two, which comprises the Global anti-base Erosion (GloBE) rules and the Subject Tax Rule.
[622] *Ibid*.

formation of the regime of the two-pillar solution reflect their economic desires. All these had been perfected before the BEPS Inclusive Framework was eventually created in 2016. The developing states, particularly LMICs, started to join the forum in 2016. The question, then, is how those new actors would contend with the formative context and the organizational power entrenched by the early actors in the operating environment. This is a case of the LMICs who joined the regime of the two-pillar solution after the identification of the problem and choice of the forum.[623] Diane Ring, a professor of international taxation, summarizes the kind of challenges the LMICs may have in these circumstances as follows:

> When states gather to evaluate a problem and seek to establish a regime, they are likely to approach the problem from their own perspective. As a result, participation in the initial formation of the regime can be critical to shaping the debate and its lasting consequences. The "staying power" of regimes, exacerbates this "first mover" problem. If an organization (or set of states) makes the first move at resolving an issue (even if that agreement fails to reflect the interests of all possible participants), then the regime, once established, may have a life of its own that effectively constrains the ability of a second-generation agreement from gaining the same degree of prominence.[624]

4.2 Complexity in the Constitution of the Actors in the BEPS Inclusive Framework

Another challenge to the true identity construction of non-OECD states, particularly the LMICs, in the Inclusive Framework is the complexity of layers of actors, which consequently affects the independence of the Inclusive Framework. Inclusive Framework may appear to be a single institution, but in reality, it is a 'double-decker or even multiple-decker' forum that has other fora operating within it. This implies that the sensemaking of actors in the Inclusive Framework is not only subject to the internal constraints of that environment but also to other external factors of

[623] Valderrama, Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative supra, note 566 at 2. The author describes the circumstances as input legitimacy deficits because the seeming inclusion of developing countries in the Inclusive Framework does not confer on them the power to tinker with issues harmonized and reduced into BEPS Action by the G20/OECD and OECD accession countries.
[624] Ring "International Tax Relations", *supra* note 105 at 151.

other institutions operating in the Inclusive Framework. The multiplicity of institutions also raises the question of who really owns (who drafted and produced) the two-pillar solution. This question is complicated and providing answers to the question is equally problematic. Analysis of the four layers of membership in the process leading to the two-pillar solution provides guidance in forming a considered opinion about the question.

4.2.1 Group of Seven Countries (G7)

The first layer is the group of seven countries (G7), whose membership includes the states that constituted the initial community that identified and harmonized the digital tax problem. The G7 is a group of seven countries that seeks to promote the welfare of its member countries while coordinating global economic policies.[625] The G7 has a limited but influential role in the two-pillar solution. Its members' involvement in the phase of identification and harmonization of tax problems makes the G7 influential in terms of directing affairs of the two-pillar solution through the G20.

The G7's influence on global financial and economic governance is not new. It is a great concern that despite its large influence, the G7 has an unrepresentative, exclusive membership.[626] Since taxation is an intrinsic part of the global economy, and almost every part of the economy is becoming digitalized, the G7's influence in the two-pillar solution should be predictable. There may be competing influences and interests among the G7 members, but that will not restrain the

[625] The membership structure of G7 has never remained constant. It started as a group of six countries in 1975 and became a group of seven countries in 1976 with the admission of Canada. Russia was admitted in 1998, making it a group of eight countries. It reverted to a group of seven countries in 2014 when Russia was suspended because of its annexation of Ukraine's Crimea region. The possibility of becoming a group of eight countries again or more cannot be ruled out. See Council on Foreign Relations, *Where is the G7 Headed?* online: <www.cfr.org/backgrounder/where-g7 headed?gclid=Cj0KCQjwgO2XBhCaARIsANrW2X1RDqsG9111yMdpiSSs_BvkDrp1klphSByLAMtQgYO8DLU3 KcjRuaQaAvAcEALw_wcB>

[626] Andrew Baker, *The Group of Seven: Finance Ministries, Central Banks and Global Finance Governance* (London: Routledge, 2006) at 2

G7 from prioritizing its members' collective interests over other interests.[627] The recent remark of some US Republican senators that the two-pillar solution offers more benefits to the United Kingdom, another G7 member, is an example of how the G7 members may have internal conflict, but the conflict cannot work against their collective interest.[628] Adopting the minimum tax rate of 15% by the BEPS Inclusive Framework in the two-pillar solution is one of the ways through which the G7 is involved in the work of the Inclusive Framework. The idea of minimum tax was first discussed at the G7 meeting on 28 May 2021 and was later suggested to the BEPS Inclusive Framework through the G20.[629]

4.2.2 Group of Twenty Countries (G20)

The second membership layer is the G20, a group of twenty countries involving developed and emerging economies. The G20 takes pride in its strategic global economic role – the cumulative economic productions of its members are more than 80% of the world GDP; its members control 75% of the international trade; and their combined population is 60% of the world population.[630] The G20 was able to assume the global economic and political leadership roles because of their substantial economic heft. Its emergence in 1999 as a forum for finance ministers and central bank governors and its elevation to the forum of heads of government in 2008 were propitious to address different financial crises.[631] In acknowledgment of the G20's leadership

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[627] *Ibid* at 7. There are two views on the internal diplomacy within the G7. The first view states that the United States can influence the activities of the G7, which shows that there is inequality among the members. The second view debunks the inequality impression, and that all members operate on equal status.

[628] "Finance Republicans Say OECD Agreement Threatens U.S. Tax Base" News Release dated February 16, 2022, (2 March 2022), online: <www.taxnotes.com/tax-notes-today-international/corporate-taxation/finance-republicans-say-oecd-agreement-threatens-us-tax-base/2022/02/18/7d6jq>. See also, Lee A. Sheppard, "Pillar 2 and QMDTT" (2022), Tax Notes Int'l, 105 at 759 – 764.

[629] G7, *G7 Finance Ministers and Central Bank Governors Communique*, (5 June 2021) online: <home.treasury.gov/news/press-releases/jy0215>

[630] G20, *About the G20*, online: <g20.org/about-the-g20/>.

[631] Mark Beeson & Stephen Bell, "The G-20 and International Economic Governance: Hegemony, Collectivism, or Both" (2009) 15:1 Global Governance 67. The G20 was established in 1999 to respond to the financial crisis of the East Asia of 1997 - 1998. It was then operating at the ministers' level. The forum was, however, elevated to forum of heads of states in 2008 to respond to the global financial l crisis.

status, the OECD and other key international organizations deployed their resources to partner with the G20 in 2008 to address the global financial crisis.[632] The OECD's relationship with the G20 is pronounced with respect to global tax governance that culminated in the two-pillar solution.

The key distinction between the G7 and the G20 in terms of membership is that the former is exclusive to developed economies while the latter has a few numbers of emerging economies. The G20 appears, to that extent, to be a more inclusive forum than the G7.[633] The two entities, however, have two common features. First, they are both dominated by the same few powerful states. The G7 members are the most powerful states and these states are also members of the G20. To that extent, it may be argued that the G7 is not substantively different from the G20 because the states that wield so many political and economic powers in the world are members of the institution.[634] Second, none of the two entities has an LMIC as a member.[635] The implication of the exclusion of LMICs in the membership is that their interests may not be properly considered in the policymaking process of the G20. The LMIC's participation in the G20's events do not ameliorate the risk of potential sacrifice because their participation does not equate to membership status.

The limited membership structure of the G20, thus, raises concerns on how it can fairly discharge its leadership functions on global tax governance, particularly to the LMIC. The G20

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[632] OECD, *Beating the Crisis: the role of the OECD and G20*, online: <www.oecd.org/corruption/beatingthecrisistheroleoftheoecdandg20.htm>

[633] Allison "Tax in a Time of Crisis, supra note 577 at 20.

[634] Beeson & Bell, "The G-20 and International Economic Governance: Hegemony, Collectivism, or Both, *supra* note 631.

[635] India and Indonesia are the only countries close to low-income countries, but they are classified as lower-medium income countries by the recent classification of the World Bank. See The World Bank, *World Bank Country and Lending Groups* online: <datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> The requirement for membership of the G20 is another critical issue. It is unclear whether the membership is based on region or countries' political and economic advancement. This point is important with respect to the inclusion of South Africa, the only African country in the G20. Was South Africa nominated by the African region to represent it or included at the discretion of the dominant players in the G20? How South Africa got admitted to the G20 determines the interests it represents. The focus on the African region is critical in the G20's leadership role because it has the highest number of low-income countries but with untapped abundant resources.

cannot be compelled to consider or prioritize the interests of non-G20 states. The G20 should have considered this limitation in the course of choosing an appropriate institution to partner with in addressing the global financial crisis. Since the problem to be addressed was global, the G20 should have considered an inclusive forum where the constituents of the global community can effectively and equally participate.

The G20 appears to play a midwifery role in communicating and implementing the G7's interests in the Two-pillar solution. The idea of 15% as the global minimum tax rate in Pillar Two was first endorsed in the G7 meeting and was later adopted by the G20 and the OECD. The G7 finance ministers and central bank governors agreed at its meeting held on 28 May 2021 to commit to a 15% global minimum tax.[636] It was also agreed that market countries should have taxing rights on a fixed percentage of profits of the largest and most profitable multinationals. The G7 also resolved that the scope of the two-pillar solution be extended to the largest and most profitable companies. At the time the G7 communiqué was released, the scope of the two-pillar resolution was limited to automated digital service and consumer-facing businesses. The scope was later extended to the largest and most profitable companies, arguably to defer to the G7's interests.[637] Automatic exchange of information between tax authorities is another project of the G7 that the G20 implemented through the OECD.[638] Though the idea was championed by civil society

[636] G7, *G7 Finance Ministers and Central Bank Governors Communique*, (5 June 2021) online: <home.treasury.gov/news/press-releases/jy0215> The communique is dated 5 June 2021, but the meeting was held on 28 May 2021. Paragraph 16 of the communiqué speaks directly to the Two-pillar solution. The choice of international organizations at the meeting is curious. A more inclusive organization like the UN Tax Committee was not at the meeting where issues that bother what it was simultaneously working on were discussed, while less inclusive organizations like the OECD, IMF, and the World Bank were in attendance. From the communique's wording, it seems like G7 is willing to agree on the global tax deal if the deal accommodates the stated terms – the minimum tax, broader scope of application and the cut-off rate of taxable profits.

[637] International shipping and aviation companies that were previously excluded are now affected by the provisions of the Two-pillar solution. The restrictive provisions in computing profitability margin that triggers the market countries' taxing right and identification of revenues traceable to market countries will result into significant benefits for these multinationals, most of which are domiciled in G7 countries.

[638] G8 Lough Ernes Leaders Communiqué (18 June 2013) online www.g8.utoronto.ca/summit/2013lougherne/lough-erne-communique.html>

activists, it was adopted by the G7 in 2013 and the OECD developed it into a multilateral framework.[639] The revenue threshold for the exchange of information is now being used for Pillar Two.

The task of implementing the G7's interest in the two-pillar solution by the G20 should not be difficult because all the OECD's works on the two-pillar solution are jointly monitored and processed by the G20 and the OECD. The communiqué of the meeting of the G7 finance ministers and central bank governors held on 28 May 2021 indicates that further issues on the two-pillar solution will be addressed and agreed to by the G20 finance ministers and central bank governors that was scheduled for 10 July 2021. The OECD/G20 BEPS released a statement on 1 July 2021 before the scheduled meeting of the G20 finance ministers and central bank governors in a manner that suggests that the statement was prepared for consideration by the G20.[640] The 1 July 2021 statement of the OECD/G20 BEPS is not substantially different from the key issues that were raised in the May meeting of the G7. As suggested by the G7, the minimum tax rate is fixed at 15%, the profitability ratio of eligible multinational companies is pegged at 10%, the proportion of residual profit on which the market countries could have taxing rights was proposed to be between 20% - 30% and removal of digital services taxes are key components of the July statement of the OECD/G20 BEPS.[641]

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[639] Corlin, Hearson & Tovony "At the Table, Off the Menu? Assessing the Participation of Lower-income Countries in Global Tax Negotiations" International Centre for Tax and Development, *supra* note 39.

[640] OECD, OECD/G20 Base Erosion and Profit Shifting, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalised Economy,* (1 July 2021) online: <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>

[641] Except for the quantum of profit allocable to the market jurisdiction, the other key components in the July statement are retained in the October statement of the OECD/G20 BEPS. The quantum is fixed at 25% instead of the range of 20% - 30% stated in the July statement. See OECD, OECD/G20 Base Erosion and Profit Shifting, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalised Economy,* (8 October 2021) online 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

It is not surprising that the G20 endorsed the July statement of the OECD/G20 BEPS at its finance ministers and central bank governors meeting on 10 July 2021.[642] The G7's interests were thus implemented by the G20 at two different levels – first, at the joint forum with the OECD through the 1 July 2021 statement, and second, through its meeting on 10 July 2021. Subsequent works on the two-pillar solution have not changed the key parameters of the regime as set out in the G7's meeting on 28 May 2021.

4.2.3 The OECD

The OECD is the third layer of the membership. Unlike the G7 and the G20, the OECD is an international organization founded and regulated by a charter. It was established by the Convention of December 14, 1960, as an institution to promote sustainable economic growth of its member countries.[643] It currently has thirty-eight member countries, the majority of which are the world's most powerful nations. It is often described as the club of the rich countries (the hegemony) because all its members are developed and influential nations.[644] As explained in the previous chapter, it originally started as a regional institution limited to the European region under the name of Organization for European Economic Co-operation ('OEEC'), but transformed to the OECD when other countries, such as the United States and Canada, joined it and they all signed the 1960 Convention to mark the beginning of the new institution.[645] Its tremendous work on global tax governance makes it a force to reckon with, first among equals and second to none. Its

[642] G20, Communiqué of the Third G20 Finance Ministers and Central Bank Governors, Venice, July 10, 2021, online: <www.g20.utoronto.ca/2021/210710-finance.html>

[643] See Convention on the Organization for Economic Cooperation and Development, online: <www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm>

[644] Judith Clifton & Daniel Díaz-Fuentes, "From 'Club of the Rich' to 'Globalisation à la carte'? Evaluating Reform at the OECD" (2011) 2:3 Global Policy 300; Matthias Schmelzer, "A Club of the Rich to Help the Poor? The OECD, "Development", and the Hegemony of Donor Countries" in Marc Frey, Sönke Kukel & Corinna R. Unger, eds, *International Organizations and Development, 1945–1990* (London: Palgrave Macmillan, 2014) 171 - 195

[645] Klaus Vogel, *Klaus Vogel on Double Taxation Conventions*, *supra* note 485.

emergence to coordinate global tax policies after the exit of the League of Nations put it ahead of its closest rival, the UN, which plays a self-admitted second-fiddle role in global tax issues.

The trio of the G7, the G20, and the OECD countries share similar attributes of having the world's most powerful countries in which most of the multinationals affected by the two-pillar solution are domiciled.[646] These countries also feature in the initial stage when the tax challenges of the digitalized economy were identified and harmonized. It was, therefore, possible to weave these countries' interests into a single strand under the OECD/G20 BEPS project.

The initial countries could not have formed a regime on the digital tax challenges under the G7 because the G7 has limited membership, and the nature of the digital technology problem is wide and requires the participation of many countries. The G20 offers them a better alternative because of its relatively inclusive nature, and the presence of emerging economies in it would not substantially affect the interests of these initial countries. The G20's lack of structure and expertise in international taxation, however, makes it inappropriate for the regime. The OECD appears to be the best option to coordinate the global negotiations.

The OECD became the 'white knight' because of its competencies and susceptibility to influence – it is dominated by the G7 countries and other countries with similar features of the G7 countries. The OECD/G20 joint platform appears to be more inclusive because the emerging countries in the G20 have an opportunity to be part of the process of policy formulation. But the extent to which the emerging countries will be able to undertake a true construction of their identities (to know and achieve what truly suits their economies) is a great concern.[647]

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[646] The Two-pillar solution is designed to apply to the world's largest and most profitable companies. Only large companies can make more than EUR 20 billion in turnover in a year and have a more than 10% profitability ratio. According to the data gathered by Investopedia, an online platform, most of these companies are in the United States, China and the United Kingdom. See Investopedia, 10 Most Profitable Companies in the World, online: https://www.investopedia.com/the-world-s-10-most-profitable-companies-4694526

[647] Allison "Tax in a Time of Crisis", *supra* note 577 at 39-40.

The OECD 1960 Convention is one of the instruments that entrenched the OECD's economic interest since the stabilization phase. The document provides guidance on how the OECD protects its member states' interests. The OECD's priority is to achieve the 'highest sustainable economic growth' in its member states, and by doing so, it thus contributes to the world economy.[648] The member states are required by the Convention to pursue policies, whether at domestic or international levels, that promote this priority objective. The 1960 Convention envisages the need to collaborate with non-members and other organizations in pursuit of these economic objectives.[649] The BEPS Inclusive Framework appears to be one such instance where the OECD states are encouraged by the 1960 Convention to work with non-member states. It is, however, doubtful if the OECD can strike a deal with non-member countries or other organizations that run contrary to its stated economic objectives.

There is the possibility that conflicts of interest may arise when the OECD partners with non-OECD states on common issues that affect both groups. By the 1960 Conventions, the OECD had the obligation to prioritize the economic interests of its member states, but the policy adopted by the OECD may not be suitable for other non-OECD states. In such circumstances, the OECD's policy is expected to prevail, considering its political and economic strengths. A similar conflict happened in the stabilization phase when the OECD tax treaty model was being used to negotiate bilateral tax treaties between OECD and non-OECD states.

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[648] Article 1 of the Convention provides that the objectives of the OECD is to promote policies that are designed to "(a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy; (b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations".

[649] Article 5 of the Convention provides, "In order to achieve its aims, the Organisation may: (a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organizations". (underlined for emphasis),

The OECD's interest is a product of its economies and changing circumstances that date back to the founding philosophy of its establishment after the Marshall Plan. The founding philosophy also impacted its tax treaty model, as earlier argued. Its perspective on international taxation is purely economic. This perception has been in use for many years and gained traction outside the OECD community long before the establishment of the BEPS Inclusive Framework. The long usage of the OECD tax treaty model has made it to be the global standards, whether by imposition or by voluntary compliance. By being described as the global standards, the OECD tax treaty model operates as dominant values to which any opposing ideas may defer. The presence of OECD states alone in a neutral forum will create conflicts of identity construction between them and any non-OECD state in that forum (and the conflict might be resolved in their favour). The BEPS Inclusive Framework is not a neutral forum; it is domiciled within the OECD. It would, therefore, be easy for the OECD states to persuade non-OECD states in the Inclusive Framework to think in a way that accepts the OECD dominant values.

The conflict of interest may be worse under the two-pillar solution. Unlike the OECD tax treaty model, which is designed as a soft law to guide the negotiation of bilateral tax treaties, the two-pillar solution is designed to become a hard law.[650] There is no room for further negotiation of its terms after the participating states have signed the proposed multilateral convention.[651] This is a marked departure from the double taxation model treaty that is still subject to further

[650] Allison Christians "Hard Law, Soft Law and International Institutions" (2007) 25 Wis Int'l L.J. at 330; Lasiński-Sulecki, Krzysztof. "OECD Guidelines. Between Soft-Law and Hard-Law in Transfer Pricing Matters." (2014) 17:1 Comparative L Rev at 79. See Reuven S. Avi-Yonah, *International Tax as International Law: An Analysis of the ITR,* (Cambridge: Cambridge University Press, 2007) at 3-5

[651] The multilateral convention will be drafted based on the Two-pillar solution. The subsequent works on the Two-pillar solution, such as the model rules for revenue sourcing and tax base determination, are integral to the proposed multilateral convention. The endorsement of the Two-pillar solution in October 2021 is a commitment to execute the multilateral convention. It appears the time for further negotiation of the terms of the Two-pillar solution has passed, but aggrieved countries should be able to withdraw their commitment. Upon its signing, the Two-pillar solution/multilateral convention becomes the hard law, just like an executed treaty.

negotiation between treaty partners. Though the double taxation agreements are mostly negotiated based on the OECD model, the actual bilateral tax treaties differ on a country-by-country basis. A country may sometimes adopt differential approaches when negotiating tax treaties with high-income and low-income countries, respectively.[652] This freedom of contract allows states convinced there is some value to negotiating a slightly different allocation of taxation rights, such as Canada, to negotiate different terms with the LMICs. However, Canada and similar countries will not be able to protect LMIC's interests under the two-pillar solution as there is no further level of negotiation.

4.2.4 The Inclusive Framework

The last layer of the membership is the Inclusive Framework. The Inclusive Framework was established in 2016, eight years after the OECD/G20 alliance was established.[653] The 2015 Addis Ababa Action Agenda on inclusive growth and cooperation triggered the establishment of the Inclusive Framework.[654] Further to the Addis Ababa Action Agenda, the G20's finance ministers and central bank governors resolved at its meeting in September 2015 on the establishment of the Inclusive Framework by the OECD.[655] The resolution of September 2015 was reiterated by the G20 leaders at its meeting in November 2015.[656] The implication of this is that

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[652] Kim Brooks, "Canada's Evolving Tax Treaty Policy Towards Low-Income Countries, *supra* note 121 at 189. The author explains Canada's different approaches with the high and low-income countries. Canada maintains the OECD's standards with high-income countries while it uses the UN's standards (the developing country's interest-based model), or measures that are even lower than the UN's standards, for low-income countries. For example, in tax treaties with ten low-income countries, a construction or assembly project will constitute a permanent establishment in a source country if it is carried on within six months. This is contrary to the OECD's standard of twelve months. In some other treaties, Canada agreed to a shorter period of three months.

[653] The OECD/G20 membership is different from the BEPS Project membership. Membership in this context refers to the alliance between the OECD and the G20, which started in 2008 when the G20 assumed leadership in global economic governance. The BEPS Project was established much later to accommodate BEPS Associates and Invitees.

[654] UN, UN Department of Economic and Social Affairs, *Addis Ababa Action Agenda of the Third International Conference on Financing for Development,* (New York: UN, 2015)

[655] G20, *G20 Finance Minister and Central Bank Governors Communiqué, Ankara* (5 September 2015) online: www.g20.utoronto.ca/2015/150905-finance.html

[656] G20, *G20 Leaders' Communiqué, Antalya, Turkey* (16 November 2015) online: www.g20.utoronto.ca/2015/151116-communique.html

the Inclusive Framework might not have been established if there was no such demand from the UN. The Inclusive Framework was established after the OECD/G20 had set the agenda on tax challenges of the digitalized economy and other issues that constituted the BEPS package.

The Inclusive Framework membership depicts inclusivity and fair representation of high-income and low-income countries. It is presently constituted by 147 jurisdictions, most of which are non-OECD/G20 countries. The inclusion of non-OECD/G20 countries in the Inclusive Framework thus gives it, at least to some extent, a much wider scope of coverage and input legitimacy.[657] The number of non-OECD/G20 countries in the Inclusive Framework may be significant, but the increase in number does not translate into substantive strength to advance their priorities.[658] Truly, the door was opened for more members, but the central authority remains unchanged.[659] The first-mover advantage continues to place the OECD/G20 countries above the larger community of the Inclusive Framework and the rest of the world.

The OECD has acknowledged concerns about the inclusivity of developing/low-income countries in the two-pillar solution.[660] The OECD admits it is aware of the concern that the process leading to the establishment of the Inclusive Framework does not include developing countries and reflect their priorities.[661] It asserts that this concern has been addressed by balancing the membership structure of the Inclusive Framework and the Steering Group to reflect regional input

[657] Mason, "The Transformation of International Tax, *supra* note 32 at 368.
[658] Michael Lennard, "Base Erosion and Profit Shifting and Developing Country Tax Administrations" (2016) 44:10 Intertax at 745. The UN Chief of International Tax Cooperation has raised concerns that the BEPS process is not meant to address issues facing developing countries.
[659] Corlin, Hearson & Tovony "At the Table, Off the Menu? Assessing the Participation of Lower-income Countries in Global Tax Negotiations", *supra* note 39. Based on their empirical data from an interview of 48 negotiators, policymakers, and stakeholders in the Inclusive Framework, the authors believe that the expansion of the IF has made little difference, and most of the lower-income countries attending the meeting are silent participants.
[660] OECD, *"Developing Countries and the OECD/G20 Inclusive Framework on BEPS: OECD Report for the G20 Finance Ministers and Central Bank Governors"* (Paris: OECD, 2021) online: <www.oecd.org/tax/beps/developing-countries-and-the-oecd-g20-inclusive-framework-on-beps.htm>
[661] *Ibid.*

and representation.[662] The regional representation has enabled some low-income countries to make successful demands. For example, the African Tax Administration Forum ('ATAF') was allowed to attend the Inclusive Framework meetings as an observer at the request of some African countries in the forum. The admission of the ATAF in the reform has allowed it to make significant contributions to the two-pillar solution with respect to the revenue threshold and expansion of the scope of its application.[663] According to the OECD, the developing countries are given equal opportunity to participate, and their contribution has significantly influenced some aspects of the Two-pillar solution.[664] In furtherance of its position to include more developing countries in the governance process, the OECD appointed Jamaica's female representative as the first person, and interestingly from a developing country, to hold the position of co-chair of the Inclusive Framework on 1 March 2022.[665]

Is the Inclusive Framework independent of the OECD and the G20? Does it have a separate status bonded together by a charter or an instrument that sets out its objectives? The purpose of these questions is to ascertain whether the Inclusive Framework has the capacity to pursue its members' objectives without any influence by the OECD and the G20. Analysis of this question also requires exploring whether the "weaker" actors in the Inclusive Framework can undertake the construction of their identities to know what is suitable for them. The enabling charter or

[662] The developing countries and non-financial centres constitute 34% of the Inclusive Framework; OECD/G20 countries are 33%, and others that do not fall in the previous categories are 33%. Regarding regional representation, Africa has 19%, each of the Western and Eastern Europe has 21%; Asia Pacific has 15% and America (Latin America, North America and Caribbean) has 24%. See page 17. One of the deputy chairs of the Steering Group is from a developing country – Nigeria.

[663] *Ibid* at 17

[664] *Ibid* at 22. According to the OECD's account, some of the matters influenced by the developing countries are the exclusion of extractive industries from the scope of the twin-pillar statement, the broad scope of the application, lowering revenue threshold, lower nexus threshold, mandatory and elective dispute resolution, minimum effective tax rate; and substantive carve-outs.

[665] OECD, Press Release, Jamaica's Marlene Nembhard-Parker appointed Co-chair of OECD/G20 Inclusive Framework on BEPS (2 March 2022) online: https://www.oecd.org/fr/fiscalite/beps/jamaica-s-marlene-nembhard-parker-appointed-co-chair-of-oecd-g20-inclusive-framework-on-beps.htm. It is interesting to have two women at the helm of affairs in the largest international tax organization.

instrument must be of the kind that was designed by the Inclusive Framework members themselves and not by the OECD/G20. The Inclusive Framework members would lose the opportunity to design the agenda that suits their needs if its establishing instrument is designed by an external party. In the absence of such a document, it is hard to justify that the Inclusive Framework has an independent purpose it seeks to establish for its members.

The circumstances around the establishment of the Inclusive Framework indicate that it can best be described as an informal entity or an extended committee of the OECD.[666] It does not have an established charter. It is rather governed by imposed terms of reference to deliberate the agenda designed by the OECD/G20.[667] The OECD and the G20 technical experts designed the architecture of and imposed terms of reference on the Inclusive Framework.[668] The architecture and the terms of reference were approved by the G20 leaders in February 2016 and the Inclusive Framework had its inaugural meeting in June 2016. The key imposed terms of reference are that the Inclusive Framework members would be committed to the implementation of four BEPS minimum standards and that other international organizations could only participate as observers in the Inclusive Framework.[669] Unlike the composition of the BEPS Project, where the non-OECD and non-OECD/G20 countries have statuses of associates and invitees, respectively, members of

[666] By Article 12 of the OECD Convention, the OECD can work with non-members in two instances. First, it can establish relations with non-member states, an organization under Article 12(b). The relationship envisaged under this Article may require some forms of negotiations on the module of that relation. The IF cannot be classified under this category because there are no clear facts on how the relationship was established. Second, the OECD can invite non-member states to participate in its activities. The second category best explains the role of the IF in the Two-pillar solution regime. The Two-pillar solution is an activity that had been started by the OECD/G20, and IF members were invited to participate in the activity. By this participation, the Inclusive Framework cannot assume the status of members whose interests must be protected by the OECD. The IF is, thus, an extended committee of the OECD.

[667] Valderrama "Output Legitimacy", *supra*, note 24.

[668] OECD, *OECD Secretary-General Report to G20 Finance Ministers (26-27 February 2016*) online: <www.oecd.org/g20/summits/hangzhou/oecd-secretary-general-tax-report-g20-finance-ministers-february 2016.PDF>

[669] *Ibid* at 9. The four BEPS minimum standards that Inclusive Framework must commit to implement are harmful tax practices, tax treaty abuse, country-by-country reporting requirements for transfer pricing, and cross-border tax dispute resolution.

the Inclusive Framework are conferred the status of associates, which entitles them to participate on equal footing with the G20/OECD countries.[670]

The implication of the informal status of the Inclusive Framework is that the interest and perception of its members, apart from the OECD/G20 countries, are at the discretion of the OECD/G20. It is, therefore, hard to agree that non-OECD/G20 countries in the Inclusive Framework are members of the two-pillar solution regime. The OECD's account that non-OECD and G20 countries influence some contents in the two-pillar solution assuming this is correct, cannot confirm that these countries are drafters of the two-pillar solution regime. Non-OECD/G20 countries' participation and contribution in the Inclusive Framework could be likened to meaningful contributions made by invitees.[671] Such meaningful contributions may be considered if they do not conflict with the primary objectives of the community that owns the regime. It would be wrong for the invitees to assume they are part of that community merely because that community considers their contributions.

4.3 Complexity in the Structure of the Operation

The OECD is the only entity with a structure among the four groups involved in forming the two-pillar solution regime. The structure makes it attractive to the G20 when a proper forum was being considered for global tax reforms.[672] The G20 might not have involved the OECD if it had a structure that could deliver on the technical demand of the reform process. The OECD leverages on this structure to work with the G20 on some other global issues. The G20 defers to the OECD on technical issues and assures it of the required political support.[673] The relationship

[670] *Ibid*.
[671] Tarcísio Diniz Maghalhães, "What Is Really Wrong With Global Tax Governance and How to Properly Fix It" (2018) 10:4 WTJ 499 at 507
[672] Richard Eccleston, *The Dynamics of Global Governance: The Financial Crisis, the OECD and Politics of International Tax Cooperation*, (United Kingdom: Edward Edgar Publishing, 2012) at 49
[673] *Ibid.*

results in synergies for both actors – the OECD was able to retain its leading role in global tax governance while the G20 was able to deliver on its mandate to restore global financial stability.[674]

Apart from being the central structure for the two-pillar solution, there are principal structures within the OECD that contribute substantial work to the Two-pillar solution. The three structures are the Task Force on Digital Economy (TFDE), the OECD's Secretariat, and the Inclusive Framework's Steering Group. Some of the OECD's Working Parties did considerable work, but they are more of a complementary or assistance role to these principal structures.[675] The OECD's Secretariat can even cover both the TFDE and the Working Parties because of their work relationship.[676] The TFDE is mentioned separately for its early works in developing the raw agenda into workable frameworks.

4.3.1 The Task Force on the Digital Economy

The TFDE was established in September 2013 as a subsidiary of the OECD Committee on Fiscal Affairs ('CFA').[677] It was established as a platform where non-G20/OECD countries can participate in the digital tax challenges since the CFA platform is exclusive to the OECD member states.[678] Its task was guided by the CFA's 1998 report on taxation framework conditions for electronic commerce.[679] The TFDE's task was to identify tax challenges of the digitalized economy and suggest reforms. The outcome of the TFDE's preliminary work is the basis of the

[674] *Ibid*
[675] OECD October Statement, supra note at 7. For example, Working Party 6 and Forum on Tax Administration Mutual Agreement Procedure (FTA MAP) are mandated work on Amount B. This assignment aims to streamline the simplified approach of the transfer pricing rule of Amount B with other works undertaken by Working Party 6 (transfer pricing) and the FTA MAP. The other committees working with the Steering Group are Working Party 1 (tax treaties), Working Party 10 (exchange of information), and Working Party 11 (aggressive tax planning).
[676] Allison "Network", *supra* note 46 at 19. The Centre for Tax Policy and Administration is the department of the Secretariat that deals with tax matters.
[677] OECD 2015, *supra* note 339.
[678] OECD, *On-Line Guide to OECD Intergovernmental Activity, Task Force on the Digital Economy* online: <oecdgroups.oecd.org/Bodies/ShowBodyView.aspx?BodyID=7608&BodyPID=11524&Lang=en&Book=True>
[679] OECD 2015, supra note. The guiding principles as being discussed in the 1998 Ottawa ministers conference on electronic commerce are: neutrality, efficiency, certainty and simplicity, effectiveness and fairness and flexibility.

2015 report Action 1 and the subsequent works that culminated into the two-pillar solution. It had started working before the Inclusive Framework was established in 2016. Upon establishment of the Inclusive Framework, the TFDE became the center of expertise the Inclusive Framework and assisted it in monitoring the development of the digital economy.[680]

The TFDE has been consistent in providing expertise and technical assistance to the Inclusive Framework. The latest of such assistance is the Inclusive Framework's request to the TFDE to develop a multilateral convention on Amount A and model rules for domestic legislation.[681] The Inclusive Framework members that are committed to the two-pillar solution are required to domesticate the model rules for effective implementation of Amount A. The TFDE has subsequently released for public consultation comprehensive model rules on nexus and revenue sourcing and tax base determinations.[682]

The TFDE's status as a subsidiary of the CFA indicates its dependent status. It is not clear if the TFDE can now be described as subsidiary of the Inclusive Framework since the TFDE is expected to assist the Inclusive Framework. The TFDE was designated as subsidiary of the CFA before formation of the Inclusive Framework, and the continued designation as such after the Inclusive Framework has been established is concerning. Irrespective of whether it is designated as a subsidiary of the Inclusive Framework or the CFA, the TFDE's works are subject to greater

[680] OECD Guide, *supra* note. Clause 9 of the TFDE's mandate requires the TFDE to report to the Inclusive Framework and undertake other issues as required by the Inclusive Framework. It is doubtful if this reporting obligation can make the IF and the TFDE independent of the OECD. The TFDE is a subsidiary of the OECD's CFA, and the IF lacks any establishing instruments that affirms its independence. The reporting obligation is nothing short of inert-unit reporting between units supervised by the OECD.

[681] OECD October 2021, *supra* note 33 at 6.

[682] OECD, Public Consultation Document, *Pillar One – Amount A: Draft Model Rules for Nexus and Revenue Sourcing,* (February 2022) online: <www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-nexus-revenue-sourcing.pdf>. See also OECD, Public Consultation Document, *Pillar One – Amount A Draft Model Rules for Tax Base Determinations* (February 2022) online: <www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-tax-base-determinations.pdf>

influence of the CFA and, by implication, the OECD.[683] The participation of non-OECD/G20 countries on its platform cannot limit the extent of the influence. The making of the TFDE as a subsidiary of either the Inclusive Framework or the CFA is a deliberate decision to permanently keep the TFDE's works under the watch of the OECD.

4.3.2 The OECD Secretariat

The OECD Secretariat is another visible structure in the two-pillar solution regime. The Secretariat is the technical base for the OECD's works on both international and domestic tax matters.[684] It is an epistemic community constituted by tax experts who had previously worked as tax professionals and revenue officers in their respective countries.[685] The wealth of experience and expertise accumulated by these experts are brought to the fore while working on the OECD's assignments. This expertise gives its work a presumption of validity and accuracy.

Apart from its contribution to the TFDE's works and relevant Working Groups that are engaged on the two-pillar solution, the OECD Secretariat is the medium of communication to the public.[686] It makes progress reports on the works of the Inclusive Framework and the TFDE. The Secretariat reports usually declare whether the reported document's contents are the views of the Inclusive Framework. The latest such report is the August 2022 progress report, which sets out the development of the October 2021 Statement into proposed model rules.[687]

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[683] The presumption of the OECD's influence on the TFDE's works is hard to be rebuttable whether the TFDE is a subsidiary of the IF or the CFA. It has been argued in the proceeding paragraphs that IF's status can best be described as an extended committee of the OECD or an informal entity. If the IF can be subject to the OECD's influence because of its status, its subsidiaries are equally subject to the same degree of influence. The influence is more direct if the TFDE is a subsidiary of the CFA because the CFA is wholly owned by the OECD.

[684] Allison Network, Norms and National Tax Policy, *supra* note 46 at 19.

[685] *Ibid*.

[686] OECD Blueprint on Pillar One, supra note at 4. The usual declaration confirms the Secretariat as the communication channel. For example, the declaration in the blueprint on Pillar One states as follows: "This report was approved by Inclusive Framework on 8-9 October 2020 and prepared for publication by the OECD Secretariat."

[687] OECD, OECD/G20 Base Erosion and Profit Shifting Project, *Progress Report on Amount A of Pillar One, Two-pillar solution to the Tax Challenges of the Digitalization of the Economy* (Paris: OECD 2022) 7. It states, "(t)he proposal included in this consultation document has been prepared by the OECD Secretariat, and do not represent consensus views of the Inclusive Framework, the Committee on Fiscal Affairs or their subsidiary bodies."

The reporting obligation gives the OECD another advantage in the Two-pillar solution. Assuming the Inclusive Framework has reached a conclusion contrary to the OECD's interest, the Secretariat will address such conflict at the publication stage. The awareness that the negotiation outcome is reported by the OECD's Secretariat and that the outcome may be subject to audit at the publication stage may operate as a psychological constraint to stating opinions that may conflict with the OECD's interests. Reliance on the OECD Secretariat for communication denies the Inclusive Framework freedom of expression. It does not only reiterate the dependence of the Inclusive Framework but also suggests that some of the reports made available to the public might not have been the original position of the Inclusive Framework. The absence of an alternative medium for dissenting members of the Inclusive Framework may mislead the public to believe that every outcome reported is the consensus view of members of the Inclusive Framework.

4.3.3 The Steering Group

The Inclusive Framework's Steering Group cannot be described as a proper structure because it relies on the OECD structure. The Steering Group was established to steer and monitor the Inclusive Framework's activities. It is constituted by Inclusive Framework members, with non-OECD/G20 countries occupying important positions.[688] The OECD countries constituted half of the Steering Group until April 2022, when Jamaica's representative was appointed as a co-chair.[689]

[688] OECD, *Composition of the Steering Group of the OECD/G20 Inclusive Framework on BEPS online*: (April 2022) <www.oecd.org/tax/beps/steering-group-of-the-inclusive-framework-on-beps.pdf >

[689] The Steering Group was solely chaired by Italy's representative until April 2022. The Steering Group was a 24-member group with the OECD countries making its 12 members. It became a 25-member group with the appointment of Jamaica's representative, thereby increasing the number of non-OECD members to 13. The BEPS Associates in the Steering Group are evenly distributed between the G20 and non-G20 countries. Argentina, Brazil, India, Russia, and South Africa represent the G20, while Belize, Mongolia, Senegal, Singapore and Zambia are non-G20 countries. The deputy chairs are equally distributed between G20 and non-G20 countries – China and Nigeria, respectively.

It is presently a 25-member group, with the majority of positions occupied by the OECD/G20 community.[690]

The inclusion of a developing countries member as a co-chair and a deputy chair is commendable. It should ordinarily give these constituents an opportunity to make representations about their needs. The inclusion of the CFA Bureau members in the Steering Group makes it an OECD-like committee. The CFA is a principal organ of the OECD; it coordinates all the OECD's committee works and is answerable to the OECD Council.[691] It is not clear if the idea of establishing the Steering Group was from the Inclusive Framework members or the OECD. It is doubtful if the Inclusive Framework members would have agreed to have CFA Bureau members as part of the Steering Group in view of the OECD Council's control over the CFA. This also indicates that the Inclusive Framework is more like an OECD committee whose works are subject to scrutiny and approval by the OECD.[692]

4.4 Constraints and Complexity in the Agenda Setting of the Two-pillar Solution.

The objective of the two-pillar solution is contained in its agenda. Agenda setting is itself a process and a function of the perception of the actors who set it. It is designed in a way that it

[690] The OECD and the G20 countries collectively occupy eighteen slots – eleven OECD countries as the CFA Bureau members, five G20 countries as the BEPS Associates and one G20 country as the deputy chair. The remaining seven slots are occupied by non-OECD/G20 countries.

[691] Allison "Network, *supra* note 46 at 21-23. Unlike the OECD's Secretariat, whose work is exclusively carried out within the OECD, the CFA operates as a forum where external experts, representatives of the business communities, representatives of the OECD and non-OECD countries converge to discuss tax policies. By Articles 7 and 12 of the OECD 1960 Convention, the activities of the CFA and its relationship with external stakeholders are subject to terms and conditions stipulated by the OECD Council. The presence of the CFA members in the Steering Group is like its relationship with several Working Parties and other forums, which are monitored by and implemented in accordance with the interests of the OECD countries that constitute the OECD Council.

[692] For example, members of the Steering Group are elected by the Inclusive Framework members, but the OECD Secretariat closely monitored the election process. The reason given is that the monitoring will ensure that people with the required capacities are elected to the Steering Group. See Corlin, Hearson & Tovony "At the Table, Off the Menu? Assessing the Participation of Lower-income Countries in Global Tax Negotiations, *supra* note 39S at 11

can actualize and resolve the problem the actor has identified.[693] The two-pillar solution's agenda were set in 2012 by both the G20 and the OECD, with the G20 having a greater influence on the agenda formation. The G20's newly assumed leadership role in the global economic governance impacted on the agenda setting. The OECD needed the G20's political support to retain its relevance in global tax governance after the United States' opposition to its works on tax haven.[694] The need for the political support necessitated the OECD's deference to the G20 on the agenda setting. Having discussed the influence of the early actors in framing the digital tax problems and how the problems were put on the international agenda through the G20, it needs not saying again that the agendas are purely economic and do not embrace the global stability variables.

The two-pillar solution agendas were set together with the other fifteen action plans in the BEPS package. The agenda setting started with the G20's two meetings in 2012, where the OECD was requested to develop for its consideration a proposal on addressing multinationals' tax base eroding behaviours.[695] The OECD responded to the request by its inaugural report on BEPS in February 2013, titled 'Addressing Base Erosion and Profit Shifting'.[696] The OECD's report identifies tax challenges of the digitalized economy as one of the core areas through which countries' tax bases can be protected.[697] The OECD also appreciates the need to work with

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[693] Diane, "Who is Making International Policy?" supra note 230 at 669. The agenda-setting narrows down issues and determines how such issues are discussed. Control of the agenda-setting directly impacts the outcomes. This is why agenda formation is important to key actors in the prenegotiation phase of regime formation.

[694] Büttner, T., & Thiemann, M, "Breaking Regime Stability? The Politicization of Expertise in the OECD/G20 Process on BEPS and the Potential Transformation of International Taxation" (2017) 7:1 Accounting, Economics, L 1 at 10

[695] The first meeting was held in June 2012 at the level of the G20 leaders, while the second meeting was held in November 2012 at its ministers' level; both meetings were held in Mexico. See G20, *Los Cabos Summit Leaders' Declaration*, Los Cabos, Mexico, 19 June 2012 (19 June 2012) online: <www.g20.org>; G20, 'Communique of Finance Ministers and Central Bank Governors; Mexico City, Mexico, 4 November 2012 (4 November 2012) online: <www.g20.org>

[696] OECD, *Addressing Base Erosion and Profit Shifting*, *supra* note 569.

[697] It is arguable that Action 1 on tax challenges of the digitalized economy is perhaps the most important framework in the fifteen action plans. This could probably be the reason for making it the first action plan. Some of the remaining action plans relate to Action 1. For example, the action plans on transfer pricing, dispute resolution, and reporting standards relate to the contents of Action 1.

stakeholders within and outside the OECD community to develop solutions to the tax challenges.[698] While the OECD report may suggest that the action plans were designed by it, the G20's report confirms that the fifteen action plans were jointly designed by it and the OECD. The G20's report states:

> In response to a G20 mandate, the OECD Secretary-General provided a report in February 2013 outlining the issues related to BEPS and has now presented an ambitious and comprehensive Action Plan developed with G20 members aimed at addressing BEPS, with a mechanism to enrich the Plan as appropriate. Countries will need to examine how their domestic tax laws contribute to BEPS and to ensure that international and domestic tax rules do not allow or encourage multinational enterprises to reduce overall taxes paid by artificially shifting profits to low-tax jurisdictions. A G20/OECD BEPS Project has been established through which all non-OECD/G20 countries will participate on an equal footing to develop proposals and recommendations to tackle the 15 issues identified in the Action Plan. G20 Leaders commit themselves to a swift implementation and they also have a vital role to play in urging other countries to join with us and to take the necessary individual and collective actions to implement these proposals and recommendations in a timely manner. G20 Leaders appreciate the swift and effective response by the OECD in advancing the BEPS agenda and urge the OECD to work closely with G20 countries for the proper implementation of this Project.[699]

The G20's 2013 confirmatory report is self-conflicting. It states that '(a) G20/OECD BEPS Project has been established' by both G20 and the OECD and in another breath, it wants non-OECD/G20 countries to 'participate on an equal footing' through this established project.[700] Equal footing in this context should mean that non-OECD/G20 states that are invited or join the process should be able to address the tax problem from their perspectives. The likely questions that could be triggered by this contradictory report are why were non-OECD/G20 countries excluded in the establishment of the project (and agenda setting), and how can the excluded countries participate

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[698] *Ibid*.
[699] G20, *Tax Annex to the St. Petersburg G20 Leaders Declaration, 6 September 2013*, (6 September 2013) online: <www.g20.utoronto.ca> The G20's report does not only state that the fifteen action plans were designed by both entities, but also affirm its influence in the process. The OECD 2013 report (the fifteen action plans) appears to be a report subject to the approval of G20. It is a company-like system where the management prepares a report for the approval of the Board. The report was endorsed by G20 not only because it participated but also because it addresses the needs of G20 states.
[700] *Ibid*.

on an equal footing in the project that they did not establish. This report also indicates the implicit intention to limit the participation of non-OECD/G20 countries in the two-pillar solution. Asking non-OECD/G20 countries to participate through the established BEPS Project invariably sets a bar to what they can get from the deal and how they can undertake their sensemaking.

A tripod of questions should be evaluated in agenda setting. What are the agendas? Who sets the agendas? Are the agendas amendable or reviewable? Analysis of these questions will provide further guidance on how the two-pillar solution agenda setting constitutes constraints to the sensemaking of the LMICs.

4.4.1 What Are the Agendas?

The OECD's 2013 second report, published on 19 July 2013, narrowed the broad agenda set by G20 in its 2012 meetings.[701] The key issues in the second report are the non-taxability of multinationals in source countries under the current framework because of their ability to operate through significant digital presence, attribution of value created in the digitalized economy to relevant jurisdiction, characterization of incomes generated through the digital-enabled businesses; and effective collection of VAT/GST on cross-border supply of digital goods and services.[702] The report states that these issues are open-ended and may thus be reviewed to accommodate future needs as they arise.[703]

Agenda setting is not only about stating the issues to be addressed. It should also include the methods and strategies to develop the raw issues into workable frameworks. The OECD 2013b report is not lacking in this regard. Part of the strategy was to make the implementing process

[701] OECD, *Action Plan on Base Erosion and Profit Shifting*, *supra* note 571.
[702] *Ibid*, at 14-15
[703] *Ibid*. The list of the agenda is not exhaustive. The OECD/G20 community has the exclusive power to incorporate other issues to the agenda or expand the existing agenda.

inclusive, but the definition of that inclusivity does not reflect the real meaning of inclusion.[704] The implementing process is originally limited to the OECD members, but other G20 countries that are not OECD members are invited as Associates while non-G20/OECD countries are invited as Invitees.[705] The participation of non-G20/OECD countries is on an ad hoc basis, which implies that their participation is only when necessary in the estimation of the OECD. The unique challenges that may be faced by the developing countries, particularly those outside the G20/OECD community, are recognized at this stage, but it is expected that the UN's involvement in the OECD's works will provide insights into those challenges on behalf of developing countries.[706]

Another strategy for reshaping the agenda is the establishment of a special-purpose committee that will be committed to these agendas. In September 2013, the Task Force on the Digital Economy ('TFDE') was established as a subsidiary committee of the OECD's Committee on Fiscal Affairs.[707] The TFDE was established to consult with stakeholders and provide reports on options to address the tax challenges. The outcome of the TFDE's work was published as the final report on Action 1 in 2015.[708] The agenda set in 2013 remained the same in the 2015 final

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[704] *Ibid.*

[705] *Ibid*, at 25. The description of G20 states that are not OECD states as Associates underscores the expectation that those countries will associate themselves with the outcome of the BEPS. These countries will also partake in subsidiary levels in the BEPS project. The description of non-G2-/OECD countries as Invitees presupposes that they are invited as onlookers.

[706] *Ibid*, 26. This is an admission that the UN has a better understanding of developing countries' unique tax challenges. It is, therefore, worrisome why such an entity is made an observer in the Two-pillar solution regime process. The role of an observer is not different from the developing countries' role as invitees in the BEPS work, which includes the Two-pillar solution.

[707] OECD, OECD/G20 Base Erosion and Profit Shifting Project, *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report*, (Paris: OECD, 2015) at 17.

[708] *Ibid*, 106-117. With respect to finding an alternative approach to the traditional permanent establishment, the 2015 report suggests a significant economic presence that is based on any of the following: the revenue derived in the source country, the digital factors, such as the use of domain name, payment options, used in the source country or users-based factor such as data collected, online contact conclusion and monthly active users. On attributing profit to the newly defined PEs, the report suggests treating users and customers as representatives of foreign companies, fractional apportionment of global profit, and modified deemed profit. Withholding tax on digital transactions and equalization levy are also suggested as alternatives to taxing multinationals with no physical PE in source countries.

report on Action 1. The 2015 report is a collection of options suggested by various stakeholders, and there was no consensus on these options.

Since the Inclusive Framework is the product of the OECD/G20, it is not expected that the Inclusive Framework would make any changes to the agenda upon its establishment in 2016. The Inclusive Framework's progress report in 2017 is a rehash of the 2015 final report without any additional suggestions.[709] The Inclusive Framework's 2018 interim report also does not depart from the fundamental agenda.[710] The 2018 interim report, however, introduces another dimension to the agenda by considering two options for the scope of the new rule. The first option is to limit the new rule to highly digitalized business models, while the second option is to apply it to a broader category.[711] There is no consensus on either of these options. The TFDE and other relevant Working Parties are requested to advise on the feasibility of these options. Another dimension of the 2018 report was the consideration of interim measures on the digital tax framework, which was a serious concern and point of disagreement among the Inclusive Framework members.[712] These dimensions do not change the parameters of the agenda – they are all premised on the three basic parameters: nexus, data, and characterization.

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[709] OECD, *Inclusive Framework on BEPS: Progress Report July 2016 -June 2017* (21 June 2017) online: <www.oecd.org/tax/beps/inclusive-framework-on-BEPS-progress-report-july-2016-june-2017.pdf> see page 26-28 of the Report.

[710] OECD, OECD/G20 Base Erosion and Profit Shifting Project, *Tax Challenges Arising from Digitalization – Interim Report 2018: Inclusive Framework on BEPS*, (Paris: OECD, 2018) online:< https://doi.org/10.1787/9789264293083-en> See paragraphs 381 – 386 on pages 169 -171.

[711] *Ibid*, paragraph 398 at page 173.

[712] *Ibid*, pages 177- 191. The interim measures are considered in view of the time it will take to finalize works on the new framework. Both supporting and opposing states to the interim measures acknowledge that the interim measures would have some negative impacts, such as a reduction in investment growth and innovation, transfer of the tax cost to consumers, and the possibility of over-taxation and implementation cost. The supporting states, however, believe that the benefits of the interim measure outweigh the negative effects. It is advised that such interim measures consider states' obligations under international agreements, target specific highly digitalized businesses, be temporary and minimize cost and complexity. See paragraphs 405 – 412.

The Inclusive Framework proposed the idea of breaking the agenda down into two-pillar solutions in January 2019.[713] This idea was guided by the fundamental agenda, and some of the options suggested in the 2015 Final Report were used as the basis of the two-pillar solutions.[714] The Inclusive Framework developed the idea of the two-pillar solutions in its May 2019 Programme of Work.[715] It retains the 2015 Final Report's approach to a new definition of nexus but proposes three options for the allocation of taxing rights to market jurisdictions. User participation, marketing intangibles and significant economic presence are suggested, and participating countries are encouraged to adopt a unified approach.[716]

The Inclusive Framework did not enjoy total freedom on this work. The Work of Programme was prepared with the guidance of the OECD and the G20.[717] The Inclusive Framework's steering group was required to work with the TFDE and other Working Parties that are wholly owned by the OECD.[718] It is arguable that the mandated work relationship between the Inclusive Framework and the OECD subsidiary committees was to ensure that the Inclusive Framework did not depart from the fundamental agenda. The OECD/G20's agendas, set in 2012, are still protected at this stage from the Inclusive Framework's activities.

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[713] OECD, OECD/G20, *Addressing the Tax Challenges of the Digitalization of the Economy – Policy Note (23 January 2019*) online:<www.oecd.org/tax/beps/policy-note-beps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf > The idea was subsequently developed into the present two-pillar solutions, where Pillar One creates new taxing rights and the Pillar Two ensures effective taxation by allowing a jurisdiction to impose additional tax where the taxable entity underpays its tax on its subsidiary.

[714] Significant economic presence that was suggested in the 2015 report as an alternative measure to the traditional permanent establishment was reiterated in the January 2019 Policy Note

[715] OECD. OECD/G20 Inclusive Framework on BEPS, *Programme of Work to Develop Consensus Solution to the Tax Challenges Arising from the Digitalizing of the Economy* (28-29 May 2019) online: <www.oecd.org/tax/beps/programme-of -work-to-develop-a-consensus-solution-to-the- tax-challenges-arising-from-the-digitalisation-of -the-economy.htm.>

[716] *Ibid*, at 11. It also considers using modified residual profit split method and fractional apportionment for allocation of the multinational profit among eligible countries.

[717] *Ibid*, at paragraph 12 at page 7. It is stated that the Programme of Work was prepared as a report to G20.

[718] *Ibid*, at 38. The steering group is the operational arm of the IF. TFDE was created before the establishment of the IF and, therefore, cannot be under the IF's control. TFDE and the Working Parties are all OECD's committees. The IF was required to work with the Working Parties 1, 2, 6, and 11.

The OECD's Secretariat refined the Inclusive Framework's proposal on the two-pillar solutions and the three options to allocate taxing rights to market jurisdictions. The Secretariat proposed a unified approach to Pillar One - the pillar that defines new nexus and allocates multinationals' profit to market jurisdictions.[719] The unified approach divides multinationals' profit into Amounts A, B, and C.[720] Under Amount A, a percentage of multinational companies' residual profit is allocated to market jurisdictions that meet the new nexus requirements.[721] Amount B is multinationals' profit on their in-country marketing and distribution activities and that profit will be allocated by a simplified transfer pricing rule.[722] Amount C (but Amount C was later abandoned) relates to effective dispute resolution on the element of the proposal, including other profits that exceed the baseline marketing and distribution activities in the market jurisdictions.[723]

The Inclusive Framework approved the unified approach in its January 2020 report as the basis of negotiation among its members.[724] It also addressed other parameters of Pillar One, such as the determination of tax base to determine the allocable residual profit and the scope of businesses that will fall under the category of Amount A. The Inclusive Framework's position on designing the Global anti-base Erosion (GloBE) rule is not different from its earlier report in 2019.[725] The emphasis is that the trajectory of development of the fundamental agenda is not

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[719] OECD, *Secretariat Proposal for a "Unified Approach" Under Pillar One, (9 October 2019 – 12 November 2019)* online: <www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf>

[720] *Ibid*, at 9. The other issues raised in the unified approach are the definition of activities that will be covered under the Amount, certainty of companies' eligibility, and allocable profit to market jurisdictions. The unified approach was made available for public consultation and review.

[721] *Ibid*

[722] *Ibid*

[723] *Ibid*.

[724] OECD, OECD/G20 Base Erosion and Profit Shifting Project, *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalization of the Economy*, (January 2020) online: www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework- on-beps-january-2020.pdf

[725] *Ibid*, at 27.

materially different from what the initial members have designed before the establishment of the Inclusive Framework. The unified approach that introduces Amounts A, B and C to Pillar One is from the OECD's Secretariat. The Secretariat would not have recommended the approach if it ran contrary to its member states' interests. The Inclusive Framework proposed two-pillar solutions, but the OECD refined Pillar One, which is the main framework that addresses key issues in the tax challenges of the digitalized economy.

The blueprint on both pillars is another milestone in the development of the agenda. The publication of the blueprints also demonstrates the G20's influence on the works of the Inclusive Framework. The blueprints were prepared at the request of the G20 for its consideration at its October 2020 meeting.[726] The blueprint on Pillar One provides more guidance on the work. At this stage, Amount C has been excluded from the work.[727] Pillar One was limited to automated digital services and consumer-facing businesses.[728] Companies operating in the sectors of financial services, natural resources, construction, sale and leasing of residential properties and international air and shipping are excluded from Pillar One.[729] The blueprint for Pillar Two provides more details on the modalities of Pillar Two in a manner that is consistent with the previous works on Pillar Two.[730]

By 8 October 2021, 136 jurisdictions, out of the then 140 members of the Inclusive Framework at that time, agreed on the terms of the two-pillar solution by the statement issued by

[726] OECD, OECD/G20 Base Erosion and Profit Shifting Project, *Tax Challenges Arising From Digitalization -Report on Pillar One Blueprint: Inclusive Framework on BEPS* (Paris: OECD, 2020) at 4
[727] The provisions on tax certainty appear to replace Amount since tax certainty concerns resolving disputes on allocable incomes to market jurisdictions and multinationals' actual tax liability.
[728] *Ibid*, 19 – 21.
[729] *Ibid*, at 22. The blueprint also provides guidance on other issues, such as the revenue threshold test to determine eligible countries and market jurisdictions, the computation of the quantum of profit to be allocated to the market jurisdiction, and revenue sourcing rules.
[730] OECD, OECD/G20 Base Erosion and Profit Shifting Project, *Tax Challenges Arising From Digitalization -Report on Pillar Two Blueprint: Inclusive Framework on BEPS* (Paris: OECD, 2020)

the OECD on 8 October 2021.[731] Nigeria, Kenya, Pakistan and Sri Lanka refused to endorse the two-pillar solution.[732] Nigeria's reason for the refusal is that the new framework does not protect its tax revenue interest.[733] The October 2021 statement introduces new dimensions to the deal that changed the substance of earlier works on the two-pillar solution. It excluded only extractives and regulated financial services.[734] This is different from the blueprint of Pillar One, which excludes five sectors.[735] The October 2021 statement applies Pillar One to large and highly profitable multinationals irrespective of whether the multinationals are either consumer-facing businesses or automated digital services, except the multinationals operate in financial services and extractive sectors.[736]

It is not clear if this statement was approved by the Inclusive Framework as an entity. Previous communications on the two-pillar solution usually contain a declaration that the report was approved by the Inclusive Framework before its publication by the OECD Secretariat.[737] The October 2021 statement does not have such a declaration. The omission of such a declaration could be due to the lack of consensus among all members of the Inclusive Framework. The Inclusive Framework was established to operate on a consensus basis, and the disapproval of the dissenting

[731] OECD, OECD/G20 Base Erosion and Base Profit Shifting Project, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy,* (8 October 2021) online:< www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>

[732] OECD, "International Community Strikes a Ground-breaking Deal for the Digital Age" online: <www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm> (accessed on 14 September 2023)

[733] PWC tax Alert, "FIRS Clarifies Nigeria's refusal to Endorse the OECD 2Pillar Agreement" online: <pwcnigeria.typepad.com/files/tax-alert---firs-clarifies-nigerias-refusal-to-endorse-the-oecd-2-pillar-agreement.pdf> (accessed on 14 September 2023)

[734] *Ibid*.

[735] OECD Blueprint on Pillar One, *supra* note 726.

[736] Multinational companies with turnover above 20 billion Euros and profitability above 10% is now subject to Pilar One. The blueprint on Pillar One that was approved by the IF members does not specify the scope.

[737] For example, the declaration in the blueprint on Pillar One states, "This report was approved by Inclusive Framework on 8-9 October 2020 and prepared for publication by the OECD Secretariat" (OECD Blueprint on Pillar One, supra note 726 at 4).

countries affects the validity of the statement. The October 2021 statement and all other documents premised on it should not be credited to the Inclusive Framework. The dissenting countries must resign or be removed from the Inclusive Framework before the claim on the authorship of the statement is valid.

4.4.2 Who Set the Agenda?

The chronological order of events on the Two-pillar solution affirms that the agendas on this regime were set by the initial community, which first witnessed the tax challenges brought about by the increasingly digitalized economy and attempted to harmonize responses to them. Does the fact that this initial community set the agendas make them unfit for all? The answer to this question is not clear. As earlier argued, agenda setting is about stating the issue to be addressed and developing the issues into workable frameworks. The agenda set by the OECD/G20 community are themselves commendable – they perfectly capture the real challenges of the digitalized economy.[738] Resolution of those challenges should provide mutually beneficial solutions to participating countries. Non-OECD/G20 countries should not have a problem with the agenda since it captures a global phenomenon in ways that help policymakers better understand it. The agenda's alluring outlook fascinated some of these countries to join the regime even after the agenda had been set without their input. The agendas would, however, have been improved if they were tailored to promote and consider the global stability variables. Unfortunately, non-OECD/G20 states do not have any agenda with which we can compare or evaluate the agenda set by the OECD/G20 states.

[738] The approach of the UN, another institution that works on the tax challenges of the digitalized economy, also agrees that the agenda is perfect. The UN's approach is to find a solution to multinationals' non-payment of taxes because of their lack of physical presence.

The second component of 'how to develop the stated issues' is where the problem lies. This is where non-OECD/G20 countries may have concerns with the agenda setting. The Inclusive Framework does not have exclusive authority to develop the agenda into workable frameworks. The G20 and the OECD police activities of the Inclusive Framework. Its proposals are submitted to the G20's meetings for consideration and approval.[739] Its works are carried out through the OECD's structures.[740] These restraining factors do not guarantee original and independent works and thoughts. Considering this limitation, the Inclusive Framework members may be constrained to develop what will be appealing and acceptable to the OECD and the G20. It is hard to agree that the Inclusive Framework developed the agendas. The agenda are both set and developed by the G20 and the OECD. The G7 plays a special role in the process by using the G20 as the medium to realize its objectives.

4.4.3 Are the Agenda Amendable or Reviewable?

This question addresses the possibility of a remedial process to accommodate the exclusion of non-G20/OECD countries in the reform process. The agenda set in the formative stage should not be static. The participating countries may still expand the scope and the parameters of the agenda that were set before joining the process.[741] The economic and political statuses of countries seeking the amendment determine the possibility of such an amendment. It implies that developing countries may find it difficult to realize this unless developed countries support the move. It is argued that these states are excluded from the agenda setting. The exclusion directly affects how the outcome of the reform process will affect their interests. The imminent negative effect of the

[739] The proposal of the Inclusive Framework to divide the work into two-pillar solutions was presented to the G20's consideration and approval. The same also applies to another aspect of the G20.
[740] Most importantly, reporting and engagement with the public are done through the OECD structure. The lack of structure in communication robs the public of the opportunity to verify whether those communications emanated from the Inclusive Framework.
[741] Gross Stein, Getting to the Table: The Process of International Prenegotiation, *supra* note 262.

exclusion can be addressed by amending or reviewing the agenda. Rather than expecting the UN to shed light on the unique challenges of developing countries, the affected countries should be allowed to present their case themselves. They would probably do it better than the UN because the UN may be incapable of providing comprehensive accounts of developing countries' experiences, which may not be exactly alike.

Amending the agenda is a difficult task. It will affect the founding philosophy of the initial actors. Members of the initial community would have to be reconstituted because agenda-setting is closely related to membership. If the Inclusive Framework is adopted as the substituted community because of its large membership and inclusive outlook, there will be a need to consider having an establishing instrument that makes it independent of the G20 and the OECD. The agenda are likely to be reviewed to incorporate the reason why dissenting countries refused to sign the deal. The reality is that it is unlikely that such a review will happen after a decade of concerted efforts on the two-pillar solution. Most public contributions to the two-pillar solution demonstrate satisfaction with and support for the regime.[742] The public support may not motivate the key actors to consider the review of the agenda.

4.5 Consequences of the Constraints to the Sensemaking of the Inclusive Framework

4.5.1 Developing Countries' Contentions about the OECD's Progress Report on Amount A of Pillar One

Some of the responses to the progress report on the two-pillar solution, particularly Amount A of Pillar One, affirm that less influential (often LMIC) actors in the Inclusive Framework could not construct 'who they are' and 'how they do things'. The responses explain how the two-pillar solution does not accommodate the interests of countries that are not part of its formative stage.

[742] The comments of the G24 and the South Centre that are considered in this paper recommends the OECD works on the Two-pillar solution. Considering their strong views against the Two-pillar solution and their demands for the inclusion of certain provisions in the Two-pillar solution, it appears the praises are not genuine.

Four responses from the G24, the South-Centre, Nigeria, and Kenya are considered in this regard. These responses are chosen because they represent non-OECD member actors' position in the Inclusive Framework. There seems to be no better way to know that an actor is not allowed to properly undertake his sensemaking in a process in which he is involved than the complaint of that actor about the outcome of the process. The conventional wisdom is that an actor will not construct his identify in a manner that affects his interests.

The G24 is a group of twenty-four, but not a group of twenty-four countries. Its members are more than twenty-four countries but the members have one common factor – they are all developing/low-income countries from the regions of Africa, Asia, Latin America, and the Caribbean.[743] It is best described as a group of developing countries. Except for Argentina, Brazil, India, Mexico, and South Africa, the remaining 23 members of the G24 are non-OECD/G20 countries.[744] The excluded five countries are members of the G20 but outside the OECD community. The G24's response against some provisions of the Two-pillar solution indicates that some G20 countries may not be satisfied with the outcome, and it may be implied that their consent to the outcome was due to peer pressure. The G24's response should be regarded as the opinion of the developing countries – the most interesting thing about the G24 is all the four dissenting members of the Inclusive Framework are G24 members.[745]

The South Centre shares similar features with the G24 in terms of membership and objectives. They both seek Global South development and involvement in global economic policy formulations.[746] Their members are developing countries across the three regions – Africa, Asia,

[743] See Inter-governmental Group of Twenty-Four Members online: www.g24.org/members/
[744] China is excluded from the list because it is designated as a special invitee to G24.
[745] Kenya states that its response to the OECD's progress report is in addition to the G24's response. This shows that the G24 response also represents Kenya's position.
[746] The South Centre, *About the South Centre,* online: www.southcentre.int/about-the-south-centre/

Latin America and the Caribbean – but the South Centre has a higher number of members than the G24.[747] Nigeria and Kenya are members of the Inclusive Framework, with Nigeria having an additional role as a deputy chair of the Steering Group. What is common in the selected responses is that they are not part of the initial community that formed the regime. Their responses, therefore, are good data to experiment the theory under reference.

4.5.2 Removal and non-enactment of Digital Service Taxes (DSTs)

The G24, the South-Centre, Nigeria, and Kenya frown at the commitment in the proposed multilateral convention designed for Amount A to not enact DST as part of the terms of Amount A.[748] The commitment also extends to any other national measures similar to the DSTs that impose taxes on market-based criteria, are ring-fenced to foreign and foreign-owned businesses and are placed outside the income system, which is outside the treaty obligations.[749] They all believe that this commitment affects their sovereignty, and it may be subject to serious domestic constitutional challenges. They advise the OECD to make such a commitment political, which should be subject to further negotiation at the domestic level.[750]

Removal of existing DST and commitment not to enact any DST is integral to Amount A of Pillar One.[751] The Pillar One will not be meaningful if countries are allowed to enact DSTs. The operation of DST will affect the smooth implementation of Pillar One. DST operates by imposing

[747] *Ibid*. Seventeen of G24 members are members of the South Centre. China, which is designated as the invitee of G24, is a full member of the South Centre. Kenya is the only dissenting member of the Inclusive Framework that is not part of the South Centre.
[748] OECD, *Tax Challenges Arising From Digitalization: Comments Received on the Progress Report on Amount A of Pillar One* (25 August 2022) online: <www.oecd.org/tax/beps/public-comments-received-on-the-progress-report-on-amount-a-of-pillar-one.htm> See the comments of G24, the South-Centre, Nigeria and Kenya in the comment folder. It is a great form of transparency for the OECD to publish these comments even when some of them challenge its works. It is uncertain whether these will impact the further development of the works.
[749] *Ibid.*
[750] *Ibid*.
[751] OECD Progress Report on Amount A, *supra* note 687.

a tax on a gross basis on sales made by multinationals in the market jurisdiction.[752] Amount A is a net basis taxation framework that allows multinationals to deduct all operational expenses before determining whether a tax is payable to market jurisdiction.[753] It is a sound argument to take out DSTs for effective administration of Amount A.

Removal of DSTs will also lay to rest the argument about its discriminatory nature and target of foreign companies. France's DST was criticized for targeting United States' multinationals. United States responded by threatening to impose sanctions on France for its DST.[754] The OECD's intervention to coordinate the Two-pillar solution is described as an attempt to forestall imminent political war that may arise from the United States- France fracas on France's DST.[755] Removal of DST will also realize the interest of the G7 as communicated in its June 2021 meeting.[756] Some of the G7 members who have proposed or enacted DSTs are willing to abandon their DSTs in favour of Amount A.[757]

The question is in whose favour are the implementation of Amount A and removal of DSTs? The answer is not far-fetched. They are in favour of the initial community that formed the two-pillar solution regime. It is correct that DSTs will generate more tax revenue than Amount A for market jurisdictions.[758] This argument appears to only relate to the developing countries. The

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[752] Wei Cui, "The Superiority of the Digital Services Tax Over the Significant Digital Presence Proposal" (2019) 72:4 National & Tax Journal 839 at 849.
[753] OECD Model Rules on Tax Base Determination, *supra* note 620.
[754] Christian & Meghalhaes, Global Tax Deal, *supra* note 585 at 1158.
[755] *Ibid*.
[756] G7 June 2021 Communiqué *supra* note. Paragraph 16 provides, in part, the following: "We will provide for appropriate coordination between the application of the new international tax rules and the removal of all Digital Services Taxes, and other relevant similar measures, on all companies".
[757] PWC, Tax Policy Alert, *US Compromises with the UK, France, Italy, Spain, and Austria on Digital Services Taxes and Trade Actions* (25 October 2021) online: <www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-us-compromises-on-dsts-and-trade-actions.pdf>
[758] Paragraph 6 of G24's response to the OECD's progress report expresses doubt on the OECD's revenue estimation from Pillar One. The OECD has claimed that Pillar One will allocate more than USD 125 billion to market jurisdiction, and developing countries stand to gain more from this allocation. G24 states that developing countries under the proposed rule do not realize this estimation. The G24's doubt is reinforced by the South-Centre data on revenue estimation for some developing countries. The South-Centre undertook an initiative described as Coalition for

initial community will be comfortable with Amount A because some of them can be both residence and market jurisdictions to multinationals. They can regain from their multinationals' foreign operations what seems to have been lost to multinationals operating in their markets. The loss can be set off, and the net balance will eventually result in a positive outcome for them. However, This approach is dangerous to developing countries, the majority of which are market jurisdictions with minimal or no record of home multinational companies affected by the two-pillar solution. There is no foreign operation to compensate for their losses from adopting Amount A.

Amount A's cost and benefit analysis is a clear case of conflict of interest. It is a beggar-thy-neighbour policy that protects developed countries' interests and exacerbates developing countries' poor situations. Enacting DSTs or continued application of existing DST after implementation of Amount A will run contrary to the agenda set a decade ago and affect the regime's objectives. The developing countries' contention on this issue is clear evidence that they were not allowed to bring their sensemaking in providing solutions to the problem.

4.5.3 Inclusion of Withholding Tax to Eliminate Double Taxation Under Amount A

The G24, the South-Centre, Nigeria, and Kenya also observed a disparity between the Inclusive Framework's October 2021 political commitment to the two-pillar solution and the Progress Report. It was observed that withholding tax that was not part of the October statement has now been incorporated in the Progress Report.[759] They also criticized the logic behind the inclusion of withholding tax.[760] Amount A allocates residual profits to market jurisdiction. It is designed to operate as an overlay of the existing principle, which implies that while Amount A

Dialogue on Africa in conjunction with the African Union. The revenue estimates provided by the Coalition shows that developing countries will get two to five times less revenue than what they will get under a gross-basis tax introduced by Article 12B of the UN Model tax Convention. See G24's response online: <www.g24.org/wp-content/uploads/2022/08/Comments-of-the-G-24-on-the-Progress- Report-on-Amount-A-of-Pillar-One.pdf>

[759] OECD August 2022 Comments Received on the Progress Report, *supra* note 748.

[760] *Ibid.*

applies to the residual profit, the routine profit, if any, will be taxed under the existing DTA regime. Therefore, there is no connection between withholding tax and Amount A – Amount A is imposed on residual profit, while withholding tax is majorly imposed on transactional activities that lead to routine profit. It was submitted that the inclusion of the withholding tax would erode the tax bases of developing countries, which have already lost a substantial amount of tax revenue by getting a minuscule of the tax deal.[761]

The proposed framework for the elimination of double taxation works on certain factors which trigger the concerns of these developing countries. Under this framework, a specified jurisdiction has the obligation to eliminate double taxation under Amount A.[762] The extent of double taxation to be eliminated depends on the computation of elimination profit and return on depreciation and payroll.[763] The computation of return on depreciation and payroll is the striking part of the contention. Depreciation is defined to include payments made to third parties for use of eligible assets and the amount attributable to capitalization of payroll expense.[764] Payroll is defined to include amounts paid to employees and independent contractors.[765] The payments made to third parties under the definition of depreciation and the payments made to employees and independent contractors under the definition of payroll attract withholding tax on a gross basis.

Allocation of a percentage of a multinational's residual profit to market jurisdictions under Amount A is based on the presumption that there are no routine activities – core business activities

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[761] *Ibid.*
[762] OECD, *Progress Report on Amount A of Pillar One, supra* note 687. Specified jurisdiction is defined as the smallest group of jurisdictions that has an elimination profit that is not less than 95% of a covered group's total elimination profit, and any other jurisdiction that does not fall within this group but has an elimination profit that is equal to or greater EUR 50 million. Elimination profit is the account profit of a covered group that has been adjusted for items listed in section 2(1) of Schedule I of the Progress Report. Elimination profit of the specified jurisdiction is the sum of all estimation profits of the jurisdictions that constituted the specified jurisdiction.
[763] *Ibid.*
[764] *Ibid*, at 93
[765] *Ibid*, at 94

such as labour and manufacturing – in the market jurisdictions.[766] The depreciation and payroll costs fall under the category of routine profits, which are outside the scope of Amount A. Remittance of withholding taxes on these payments is an obligation under the domestic tax laws or treaty obligations, which are required to co-exist with Amount A. Amount A is an overlay on the existing framework and its provisions should, therefore, not cross the path of the existing framework.

There are two concerns about the inclusion of withholding tax in Amount A, and both concerns are reflections of a conflict of interest between the initial community and those who joined after the regime had been formed. First, the consequence of the failure of the Inclusive Framework to have an independent structure for its communication and technical designs. As earlier noted, the OECD plays an exclusive role in communicating developments on the Two-pillar solution. This confers on it the privilege to audit and scrutinize the works of the Inclusive Framework. The audit may take different forms – it may take the issue beyond what the Inclusive Framework or otherwise conceived. Irrespective of the forms it takes, the primary objective of the audit will be to keep the discussions within the agenda set by the OECD/G20 community.

The claim on the inclusion of withholding tax is an ideal case of the danger of having the OECD's structure as the gatekeeper of the Inclusive Framework communications. The absence of an alternative forum will deny the Inclusive Framework the opportunity to make a disclaimer on the OECD's progress report. The inclusion of the withholding tax changes the parameters of the Inclusive Framework statement. This cast doubt on the validity of the previous communications made on behalf of the Inclusive Framework. Reporting developments on the two-pillar solution by multiple entities within the OECD is disturbing. Some reports are issued by the OECD Secretariat,

[766] Ruud A de Mooij, et al "Exploring Residual Profit Allocation" (February 2020) at 8. IMF Working Paper Series WP/20/49 online: <www.imf.org/-/media/Files/Publications/WP/2020/English/wpiea2020049-print-pdf.ashx>

while the OECD/G20 BEPS publishes some.[767] All these concerns are avoidable by having a separate structure for the Inclusive Framework.

The second concern is the OECD's contradictory positions on Amount A. It states in one breath that residual profits are allocated to market jurisdiction under Amount A and the routine profits are taxed in jurisdictions where core business activities are taking place. Despite this assertion, it is making attempts to extend Amount A to routine profits and by including withholding tax payable on routine transactions in the elimination of double taxation.[768] The probable conclusion is that the OECD wants to 'have its cake and eat it' and is getting more than what is agreed to through the backdoor.

4.5.4 Extending the Scope of the Marketing and Distribution Safe Harbour

The Marketing and Distribution Safe Harbour (MSDH) originally proposed to cap the amount of residual profit allocated to market jurisdictions.[769] MSDH is used where eligible multinationals have in-scope marketing and distribution activities. If the multinationals' marketing and distribution activities already have residual profit sufficient to cover what would have been allocated under Amount A, there is no need to allocate any residual profit under Amount A.[770] The

[767] The 22-page report dated October 2021 on the Two-pillar solution was published under the responsibility of the Secretary General of the OECD, and its contents do not represent views of the Inclusive Framework. The reports on blueprints on Pillar One and Pillar Two were published with the approval of the Inclusive Framework. The GloBE and its Commentary were published with the approval of the Inclusive Framework. The progress report, which is the subject of contention, was published with the responsibility of the Secretary General of the OECD.
[768] It is concerning that the OECD appreciates that some profits should be excluded in the computation of elimination profit because that profit cannot validly fall under Amount A and fails to do so in the computation of return on depreciation and payroll cost. In the computation of the elimination profit of a covered group, the OECD's progress report excludes profits attributable to places of business that are recognized as permanent establishments under treaty obligations or taxable entities under domestic laws, notwithstanding that those entities are part of the covered group. The reason for the exclusion is sound. There is no challenge about the presence of those entities, and their taxation can properly be computed in accordance with the treaty obligation. Therefore, there is no basis to include their profits in the calculation of Amount A, which aims to create a new taxing right on entities that cannot be treated as permanent establishments under the present tax treaty framework.
[769] OECD Pillar One Blueprint, *supra* note 726 at 152.
[770] *Ibid*.

Inclusive Framework October statement confirms that MSDH will apply only to marketing and distribution activities.

The Progress Report extends the MSDH beyond marketing and distribution activities. By the design of the MSDH in Amount A, computation of the MSDH is based on elimination profit, return on depreciation and payroll costs and elimination threshold return on Depreciation and payroll.[771] In the calculation of these metrics – that is, the elimination of profit and other metrics required for computation of the MSDH - activities other than marketing and distribution will be included. These activities other than marketing and distribution are activities that relate to routine profit. For example, payroll costs relate to employee payments, and labour work is part of routine activities. Allowing this computation will amount to capping routine profit as against residual profit which the MSDH is agreed to be by the October statement. The core concern for the developing countries is this computation arrangement is contrary to the October statement and is also a way of tampering with the routine profit, which is out of the scope of Amount A.[772]

4.5 Institutional Disharmony

Another consequence of the constraints in sensemaking is the reaction of some other institutions that are part of the Inclusive Framework. The different reactions of these institutions to the same tax challenges of the digitalized economy are evidence that those institutions were not allowed to participate in the Inclusive Framework independently. There are at least fourteen

[771] OECD Progress Report, *supra* note 687 at 17.

[772] The G24, the South-Centre, Nigeria, and Kenya also raised some other issues in the Progress Report that are in stark contrast with the October statement. These issues include the following: exclusion of reinsurance and asset management from Amount A, policy disallowed expenses, consideration of non-controlling interest, the complexity of the framework, and the rule on loss-carry forward The G24 specifically raises concerns on impartiality and conflict of interest that may arise from engaging independent experts in the tax certainty process and resolution of dispute on the allocation of Amount. The G24's concern applies not only to tax certainty but the entire gamut of the Two-pillar solution regime. All the issues raised by G24 and others, as analyzed in this paper, are reflections of conflict of interests between the OECD community and other countries. Justice can only be done to analysis of these issues in separate papers. They do not only touch on the structural problem, which is the thrust of this paper but also on fairness and equity consideration of the agreement, which is beyond the scope of this paper.

observer organizations in the Inclusive Framework.[773] I only examine the reactions and contributions of two of these observer organizations because they are comparable to the OECD, and one has gone further to provide its approach to the digital tax problems. The two groups are the UN and the International Monetary Fund (IMF). While these institutions remain observer groups in the Inclusive Framework, they are concurrently working on the digital tax challenges in a different manner. Rather than contributing to the debates on the two-pillar solution within the Inclusive Framework, these observer groups chose to communicate their views to the public.

The OECD is not the only institution addressing the digitalized economy's tax challenges. The UN, a comparable and equally competent institution, also addresses the digital tax challenges among other global tax governance matters. The UN participates in international taxation cooperation through its Committee of Experts on International Cooperation in Tax (UN Tax Committee), a UN Economic and Social Council subsidiary.[774] Twenty-five members comprise the UN Tax Committee, appointed by the UN Secretary-General from 50 nominations received from member states.[775] The UN Tax Committee and the Inclusive Framework Steering Group now have equal members, but their objectives and strategies are poles apart.[776]

The IMF also has made some contributions to possible policy solutions to the digital tax challenges but its involvement is not as substantial as that of the OECD and the UN. Its

[773] OECD, What is BEPS, online: https://www.oecd.org/tax/beps/about/>

[774] UN, Press Release, "Economic and Social Council, Appointment of 25 members to the Committee of Experts on International Cooperation in Tax Matters" (2 March 2022) online: <www.un.org/sg/en/content/sg/personnel-appointments/2021-07-21/un-tax-committee-25-members-appointed.> Some members of the UN Tax Committee are also in the OECD's Inclusive Steering Group. For example, both China and Nigeria are co-deputy chairs in the Steering Group and are also appointed to the UN 25-man committee. The same person represents Nigeria in both the OECD and the UN Tax Committee.

[775] The present tenure expires on 30 June 2025.

[776] Corlin, Hearson & Tovony, At the Table, Off the Menu? Assessing the Participation of Lower-income Countries in Global Tax Negotiations, *supra* note 32 at 11. Each is constituted by 25 members. One of the key differences between the two that impacts the level of participation is the voting pattern. The UN Tax Committee operates a majority-based voting that allows a dissenting member to state their opinion and have their opinion recorded. The Streeting Group and the Inclusive Framework operate on consensus. The consensus requirement might be a constraint to participation because a member with a contrary view might not be able to voice its opinion.

involvement is more of making remarks on approaches and policies proposed by the OECD and the UN. For example, the IMF has offered some commentary on the Inclusive Framework's composition and the Two-pillar solution's objectives.[777] The UN's intervention and the IMF's commentary on the reform process show that they would have adopted different approaches to challenges.

The UN intervened in the subject matter in 2017 after the OECD started its process.[778] The UN's work on digital challenges is not, however, greatly influenced by the OECD (unlike its tax treaty model).[779] The clear different approaches adopted by the UN show that developing countries are fully involved in designing the UN's proposal. One such approach is the simplified process of taxation adopted by the UN. Under the UN Article 12B, source countries can impose tax on the gross basis of income arising in their jurisdictions. This is relatively simple compared to the OECD's two-pillar solution, which adopts net basis taxation. The rules and guidelines for the computation of that net profit may be extremely problematic and challenging for developing

[777] IMF, IMF Policy Paper, *Corporate Taxation in the Global Economy*. (March 2019) at 12 online: <www.imf.org/-/media/Files/Publications/PP/2019/PPEA2019007.ashx>. Several objectives and approaches are criticized. The aspect that relates to the argument in this paper is its remark on how the interests of the developing countries are not considered by not proposing a policy that is implementable in those countries. The IMF states: "Progress has been made in areas important for developing countries—but complexity has increased, and profound vulnerabilities remain. The four areas of particular concern identified by IMF (2014) have received attention since but remain far from fully resolved (Appendix VII). Given their vast complexity, however, it can be very hard for many developing countries and small states to implement the new global standards and common approaches of the BEPS package or even to grasp their full implications. This, and dealing with the greater expertise of multi-national enterprises, is a potential drain on scarce talent needed to address what can be more pressing domestic tax issues. Tension arises if countries feel pressured, by the possibility of adverse international "listing," to divert resources to amend practices that likely have little spillover effect or domestic benefit."

[778] The UN intervention started at its 15th session in 2017, where the digital challenges were put on its agenda as a priority debate. Its report encapsulates the challenges of the digital economy and issues to delegate to a special committee. The inaugural report shows its deep understanding of the problem and the need to adopt a cooperative approach toward finding enduring solutions. See Committee of Experts on International Cooperation in Tax Matters, Tax Challenges in the Digitalized Economy: Selected Issue for Possible Committee Consideration (15th Session, 17-20 October 2017) online: <www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-04/15STM_CRP22_-Digital-Economy.pdf>

[779] *Ibid*. The key issues in the OECD 2015 Action 1 final report on the subject matter was considered. It also considered some unilateral responses taken b some countries. Yet, the outcome of the process, which is Article 12B, is a clear departure from the OECD's approach in the Two-pillar solution.

countries because they are complex, and the developing countries do not have the required expertise to administer such a complex framework.

The UN intervention appears to be a responsive action by countries that are not comfortable with the Inclusive Framework and skeptical about the outcome of the OECD process.[780] The OECD's and the UN's approaches may be different; they both seek solutions to tax base eroding consequences of the digitalized economy. The UN is different because of the more fundamentally inclusive outlook (e.g. by virtual membership) and overriding objective of striking a balance between competing interests of the developed and developing countries in the allocation of taxing rights.[781]

The UN Tax Committee's position paper on the work of the Inclusive Framework expresses its great concerns on key components of the draft proposal, which later became the two-pillar solution. The UN Tax Committee's view was influenced by its genuine concern that the reform proposals do not properly protect the interests of developing countries.[782] It expresses concerns that the proposed revenue threshold, as a measure of significant economic presence, will unfairly restrict developing countries' taxing rights.[783] It queries the basis for the computation of multinational global profit and its allocation to market jurisdictions. The Committee suggests a simpler approach of using a withholding tax regime instead of the complex two-pillar solution for developing countries.[784]

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[780] Christensen Rasmus Corlin, supra note 108. Significant number of countries in the Inclusive Framework participate in the UN Tax Committee. The latter provides alternative forum to voice their opinions and influence an outcome that protect their interest.
[781] *Ibid.*
[782] UN Committee of Experts on International Cooperation in Tax Matters, *Tax Consequences of the Digitalized Economy – Issues of Relevance for Developing Countries*, Document E/C.18/2020/CRP.25 (2 March 2022) online: </www.un.org/development/desa/financing/sites//www.un.org.development.desa.financing./files/2020-06/CICTM%2020th_CRP.25%20_%20Digitalized%20Economy.pdf.>
[783] *Ibid* p.6
[784] *Ibid* p. 8

The UN Tax Committee advises the OECD to 'increase its efforts to include developing countries in the decision-making process and to pay full attention to the interest of developing countries, especially low-income countries'.[785] This advice is a subtle way of making a complaint that developing countries' participation in the Inclusive Framework is limited to deliberations, but decisions on those deliberated issues are taken in a forum exclusively reserved for the developed countries. This concern is hard to dismiss for two reasons. First, it is a publicly declared statement by an equally international tax organization and was made directly to the OECD as its response to the ongoing reform process. Second, some members of the UN Tax Committee also participate in the Inclusive Framework and its Steering Group, making it a sort of insider view. The aggrieved developing countries' members in the Inclusive Framework might have conveyed their concerns through the UN Tax Committee probably because the latter is more enabling for such views. These concerns are remarkable even though the UN Tax Committee states the comments do not represent the UN position.[786]

While acknowledging the OECD's leading role in global tax reform, the Staff of the International Monetary Fund ('IMF') published a policy paper in 2014 on a comprehensive macro-economic analysis of the spillover of corporate taxation.[787] The policy paper acknowledges concerns from various communities on some issues that should have rather been addressed by the OECD/G20 BEPS initiatives but does not provide solutions to them.[788] The policy rather admits

[785] *Ibid* p.5
[786] *Ibid* at 4
[787] IMF, *IMF Policy Paper: Spillovers in International Corporate* Taxation (2014) online: <www.imf.org/external/pp/ppindex.aspx> Tax spillovers are the effects of one country's tax practices and rules on other countries. The report focuses on the effect of developed country tax practices and international taxation standards on developing countries. One of the notable issues in the report is that developing countries should exercise restraint on signing tax treaties because there is the possibility of signing away their revenue from these treaties.
[788] The communities are grouped into four: civil societies, developing countries, business community and individual submission. The concerns relevant to this paper are the non-inclusion of some countries in the processes leading to the new international standards, the importance of revision of taxing rights over what the BEPS seeks to achieve, and the development of multilateral tax treaties. See Pp 45 - 47

that the IMF's staff participate in the regional and global events held by the OECD's Centre for tax Policy and Administration on the BEPS issues.[789] The Report further identifies problematic issues associated with the attempt to tax digital transactions but defers to what the OECD/G20 has been doing in that regard.[790]

The 2019 IMF Report points out the resultant effect of the non-inclusion of the developing countries in the OECD/G20 reform process.[791] The Report appreciates the ongoing efforts but admits that there are gaps in the work that require urgent response. According to the IMF Report, the issues that are distinct to developing countries, which would have been included in the primary agenda if they had been included, are tax competition, capacity limitation and complexity of the BEPS rules.[792] The IMF describes the BEPS objective of 'taxing where value is created' as an incomplete standard because there is no consensus on how to determine where value is created.[793]

The takeaway from the remarks of both the UN and the IMF is that the OECD forum is working exclusively for a closed community, as mandated by the G20. The G20's adoption of the OECD as the platform for the reform process is deliberate and purposeful. The UN had gained comparable recognition in global tax governance at the time the G20 adopted the OECD's platform. The UN's tax treaty model was already in use by many countries even though it was not as popular as the OECD treaty model. The G20's attitude of feigning ignorance of the UN's works that make it worthy of consideration together with the OECD is concerning. The UN's self-admission of second fiddle role to the OECD does not make it inferior or incapable of working

[789] The Report states: 'Staff also participated in two consultations held with developing countries by the OECD Centre for Tax Policy and Administration concerning the G20-OECD BEPS project (a regional event in Colombia and a global meeting in Paris). Staff have also been providing input into the OECD's Tax and Development working group report to the G20 development working group on these consultations and related issues. See page 45
[790] *Ibid* at 48-50
[791] *Ibid*.
[792] IMF believes that the BEPS projects on tax evasion are of less concern to developing countries.
[793] *Ibid* at 18

with the OECD as a co-platform and not an observer in the reform process. The OECD is conscious that the UN has a better understanding of the unique challenges of developing countries but prefers to have the UN's input in an observatory role.

It could not have been expected that the OECD would admit the UN as a co-platform. The convention is that both entities pursue different objectives. Bridging the entities does not mean collapsing one into another but deploying resources from both entities to constitute the structure that will design the agenda. The onus of bridging the entities should have been the leadership responsibility of the G20.[794] It is unlikely that the OECD would resist if the G20 had attempted to integrate the UN in the formative stage. The G20's influence was enormous, and that influence should have been exercised to reduce some of the concerns of developing countries. There might have been less contention from developing countries if the UN or a similar forum had been involved since the formative stage.

Rather than working together on the digital tax challenges, another forum was created for tax implementation purposes. The Platform for Tax Cooperation was created in 2016 as a joint initiative of the IMF, the OECD, the UN and the WBG.[795] Apart from the issue of forum rivalry, there could be uncoordinated outcomes if parallel institutions are working on the same subject matter simultaneously. The OECD/G20 was earlier in time, and the PTC would not have been created if the other platform is conducive to entertain and implement dissenting views, such as

[794] The circumstance would have been a perfect time to reconsider the concern raised by Vito Tanzi on the plausibility of establishing an International Tax Organization. The concluding remarks of Tanzi on page 140 of his book, Taxation in an Integrating World, begin another discourse on global tax governance. Tanzi states, "There is no world institution with the responsibility to establish desirable rules for taxation and with enough clout to induce countries to follow those rules. Perhaps the time has come to establish one." The G20 might not have pushed for the establishment of the International Tax Organization but considered some of the arguments in favour of its establishment, the most important of which is the inclusivity of larger countries. Considering the fact that the earlier proposals for the International Tax Organizations failed due to political factors, it would have been a daydream to expect the G20 to reopen the issue. See Vito Tanzi, *Taxation in an Integrating World*, (Washington: the Brookings Institution, 1995)140. For other proposals on the International Tax Organizations and how those proposals failed, see Tarcísio *supra* note 671 at 512-523.

[795] See <www.tax-platform.org/who-we-are>

those recognized by the IMF, or any other suggestion that may better address the digital tax challenges.

The PTC has two major limitation issues in terms of what it can do and whether its report can represent the positions of its four partners. First, it cannot decide or set the agenda for reform of international taxation standards. It is established to 'support country efforts through policy dialogue, technical assistance and capacity building, knowledge creation and dissemination, and input into the design and implementation of standards for international tax matters'.[796] In this regard, it has published three complementary toolkits as guidance to assist countries in their domestic resources' mobilization strategies.[797]

The second limitation is the representative capacity of the platform. The PTC does not represent the shared views of the four partners. It allows the partners to hold on to the mandate of their establishments and the priorities of their members.[798] It is, therefore, possible for the partners to subscribe to some views that are contrary to those jointly issued in the name of the PTC. This explains the reasons for divergent views of the IMF, the OECD, and the UN on digital tax challenges despite the existence of the PTC. The regular disclaimer in all the three toolkits is 'this toolkit should not be regarded as the officially endorsed views of those organizations, their member countries, or the donors of the PCT Secretariat'.[799]

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[796] *Ibid.*

[797] The three toolkits are on: tax treaty negotiations, transfer pricing documentation, and taxation of offshore indirect transfers. I describe the toolkits as complementary because they are built on the existing frameworks established by some of the partners, and they were issued at the request of the G20. The toolkit on treaty negotiation is built on the UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries. The toolkit only provides tax officials 'who have little or no experience in tax treaty negotiation with the tools they need to implement some of the guidance in the UN Manual'. The toolkit on transfer pricing documentation is built on Action 13 of the OECD/G20 BEPS on a standardized approach to transfer pricing documentation. The toolkit on taxation of offshore indirect transfer is built on Article 13.4 of both OECD and the UN Models on double taxation treaties.

[798] *Ibid*

[799] PTC, (2020) 'The Taxation of Offshore Indirect Transfers – a Toolkit', Washington, p.1; PTC, (2021) 'Transfer Pricing Documentation, Washington p. 2; PTC (2021) Toolkit on tax Treaty Negotiation', Washington p. 2; and PCT (2021), PCT Progress Report 2021, Washington, p. 3

4.6 Conclusion

The contemporary phase is an extension of the stabilization phase. The successful stabilization of the ITR on the OECD's pure economic biases enables the OECD to diffuse its standards and make them dominant values till the contemporary phase. When there was time to address the tax challenges of the digitalized economy through the Inclusive Framework, the dominant values and the organizational powers of the OECD constrain the sensemaking of developing countries in the Inclusive Framework. The OECD was able to entrench the constraints in four ways: consolidation of interest in the formative years of the Two-pillar solution, complexity in the constitution of members in the Inclusive Framework, complexity in the operational structures, and the agenda-setting process.

The reactions by the developing countries, represented by the G24, the South Centre, Nigeria, and Kenya, show that these actors could not properly identify themselves in the Inclusive Framework. Identity construction involves how actors ask themselves, 'Who are we?' and how we do things when confronted with a non-routine problem. In doing this, the CSM theory argues that the actors may have different options or 'cues' to address the non-routine problem. The theory also appreciates that certain factors may influence the actors to focus on certain cues or options that may not really protect that actor's interests. The situation of developing countries in the Inclusive Framework is a perfect case study to explain the influence on the identity construction of these often-excluded parties.

Chapter Five: Conclusion

Towards an Ideal International Tax Regime

5.0 Introduction

This chapter proposes a network of actors with the appropriate knowledge, competence and capacity to assess and apply the global stability variables in international tax policymaking. Therefore, the proposed network of actors is ideally suited to design the next phase of the evolution of the ITR. Given that the network of actors will apply the global stability variables to the next phase of ITR, the next phase of international tax will presumably be ideal. Describing the proposed system as an ideal does not mean the current ITR is entirely flawed.[800] The developed states may not have any substantive concerns about the current system, as many of them were actively involved in its design. The current system is, therefore, fit for their peculiar economies.[801] The 'ideal' in this context rather means that the proposed system and the governance structure will reflect the interests of both developed and developing states. By protecting the interests of both developed and developing states, the proposed system will prevent a beggar-thy-neighbour policy,[802] which Christine Lagarde, the former managing director of the IMF, describes as the resultant effects of 'overly aggressive tax competition among countries'.[803]

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[800] Sol Picciotto, "Is the International Tax System Fit for the Purpose, Especially for Developing countries?" (2013) ICTD Working Paper 13.

[801] Loraine Eden & Robert Kudrle, "Tax Havens: Renegade States in the International Tax Regime" (2005) 27:1 Law & Policy 100.

[802] On the meaning of the economic term beggar-thy-neighbour-policy and how its relationship with the global financial crisis, see the guest lecture of Joseph E. Stiglitz of the World Bank, which was delivered at the 1998 annual meeting of the Southern Economics Association in Baltimore, Maryland. Joseph E. Stigilitz, 'Beggar Thyself Versus Beggar-Thy-Neighbour Policies: the Dangers of Intellectual Incoherence in Addressing the Global Financial Crisis' (1999) 66:1 Southern Economics J 1

[803] Christine Lagarde, 'Revenue Mobilization and International Taxation: Key Ingredients of 21st Century Economies' (22 February 2016) International Monetary Fund online: www.imf.org/external/np/speeches/2016/022216.htm?hootPostID=8a5988c76392966a2b340c6805734828 (accessed on 5 December 2023). Lagarde argues that the beggar-thy-neighbour strategy hurts everybody, and there is a need to develop a system that protects all interests. Lagarde acknowledges that the OECD's works on BEPS issues are making some notable progress in addressing the challenges of the 21st century, but these works have not substantially

One may think that the proposed system is a duplication of the UN framework because the UN's approach to international tax also balances the competing interests between developed and developing states.[804] The proposed ideal ITR is different from the UN tax system because it focuses more on integrating the global stability variables into international tax policymaking, which has not been core to the work undertaken by the UN. The proposed ideal system is also different from the current system in the sense that rather than focusing on the stipulation of rules and standards, It only considers who should be the rightful actors and the relationship among these actors.

The emphasis on the rightful actors is premised on the underpinning of the CSM theory that actors' approaches to a non-routine problem are a function of their identity construction.[805] States[806] can achieve the ideal ITR when we have the rightful actors at the negotiating table. This chapter broadly divides the rightful actors into state actors and non-state actors and examines how the two broad categories can function together in the ecosystem of international tax. The chapter emphasizes the primary role to be played by the forum of state actors at the international level and how the regional institutions can partner in the international forum. It sets out the minimum criteria for the forum of state actors – which are inclusivity, capacity and competence - and how the weaker actors can be protected from the possible dominance of the stronger states. With respect to non-state actors, this chapter analyzes how the business community and the public interest groups can complement state actors' efforts in ensuring that the global stability variables are considered and prioritized in international tax policymaking.

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addressed the concerns of the developing states. This thesis provides solutions to the kind of structure envisaged by Lagarde.

[804] Stanley S. Surrey, "United Nations Group of Experts and the Guidelines for Tax Treaties Between Developed and Developing Countries, *supra* note 23; Michael Lennard, "The Purpose and Current Status of the United Nations Tax Work, supra note 433.

[805] Mills, Thurlow & Mills, "Making Sense of Sensemaking: The Critical Sense-Making Approach, *supra* note 155.

[806] States in this context refer to all taxing jurisdictions.

Before analyzing how the rightful actors should be constituted, the state actors (I provide in section 5.3.1 of this thesis the detail of who should represent states in international tax cooperation) and the other stakeholders need to have a moment of truth and reconciliation to reflect on why the current ITR departed from the broad mandate of its enabling institution and the springboard for its crystallization. Based on the arguments in the previous chapters, the state actors and the other stakeholders should also acknowledge that the departure from the ought-to-be-goals started at the inception of the ITR and continues now. If they can agree in principle on these issues, the actors suggested in this chapter will be well-placed to design an ITR that is fit for all.

5.1 Moment of Truth, Reflection and Reconciliation

This thesis has established at least three points of truth that call for reflection and, possibly, reconciliation among stakeholders – state and non-state actors. The first point of truth is that there is a stark contrast between the international tax system we had before the League and the ITR established through the League. As comprehensively explained in Chapter Two, the international tax system in the pre-League era was driven by unilateral approaches by developed states, such as the United Kingdom, the United States and Germany.[807] The concerns of these states about international tax problems were about maximization of tax revenues from international investments. Even in instances where states, such as the United States, offered foreign tax credits, the fundamental objective was still to maximize tax revenues and achieve other economic considerations.[808] Unlike the unilateral approaches by these states, the League provides an enabling environment where multiple states worked together to address the 'common evil' of double taxation. Bringing states together on global tax issues is the first success story of the

[807] Reuven S. Avi-Yonah, "Who Invented the Single Tax Principle: An Essay on the History of U.S. Treaty Policy" (2014) 59:2 NY L Sch L Rev 305 at 309
[808] Graetz & O'Hear, "The Original Intent of U.S. International Taxation, *supra* note 53.

League. The handful of tax treaties executed by a cluster of countries before the League and the 1921 Rome Convention cannot claim the achievement of harmonization of global tax problems.[809] Those bilateral tax treaties were limited to their treaty partners, and the 1921 Rome Convention was limited to the succession states of Austria and Hungary.[810] Neither those bilateral tax treaties nor the 1921 Rome Convention had wider participation like that of the tax treaty model designed through the platform of the League.[811]

The second point of truth is that the approaches to international tax problems before the intervention of the League were not optimally productive. I examine this point in chapter two using the case study of the United States. The foreign tax credit method under the 1919 Revenue Act was to provide credits to Americans doing business abroad.[812] The underlying objective of the foreign tax credit was to subject the Americans doing business abroad and the Americans doing business locally to the same tax liabilities.[813] There was the need for the United States to revisit its foreign tax credit method a few years after its enactment when it appeared that the system was no longer achieving its objective.[814] The foreign tax credits claimed by Americans were becoming higher than what they would have paid domestically if they had not done business abroad.[815] This is the reason why the 1919 Revenue Act was amended in 1921 to limit the foreign tax credit claimable by Americans.[816]

Despite the tax relief provided by states to ameliorate the effect of double taxation during the pre-League era – whether in the form of the tax credit method of the United States or the tax

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[809] Crobaugh, "International Comity in Taxation" *supra* note 9 at 265.
[810] *Ibid*
[811] Ibid
[812] Graetz & O'Hear, "The Original Intent of U.S. International Taxation, supra note 53.
[813] *Ibid*
[814] Ibid
[815] *Ibid*
[816] *Ibid* at 1054

exemption method of the United Kingdom - the problem of double taxation was not properly addressed because significant issues were left out by these tax relief methods. Diane Ring identifies four issues which limited the efficiency of the states' unilateral responses to the international tax problems before the establishment of the League.[817] First, there is an absence of agreed provisions of what should be the source and the categorization of incomes that are subject to tax.[818] Second, how should the framework balance the competing interests of debtor and creditor states with respect to the taxation of interests and dividends?[819] Third, how might permanent establishment be standardized to determine the extent of taxing rights of source countries on foreign incomes sourced within their jurisdictions?[820] Fourth, how could (or should) states' domestic tax systems be harmonized?.[821] States were able to address all these issues to a greater extent through the platform provided by the League.

The third point of truth is that there is a marked departure between the broad mandate of the League and the discussions of the state actors appointed by the League to design solutions to international tax problems. The League was primarily established to maintain and promote global peace[822] but there are no traces that the state actors considered this broad mandate of promotion of global peace and how it is connected to the international tax problems. The departure from the broad mandate of the League started from the beginning stage of intervention of the League. As explained in Chapter Two, the departure started with the Financial Committee created by the League to specifically work on the fiscal crisis, which includes international taxation problems.

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[817] Diane Ring, "International Tax Relations: Theory and Implications" *supra* note 105 at 119.
[818] *Ibid*
[819] *Ibid*
[820] *Ibid*
[821] *Ibid.*
[822] See Ruth Henig, *The Peace That Never Was: A History of the League of Nations* London: Haus Publishing, 2019); Ruth B. Henig, *The League of Nations* (USA: Harper & Row Publishers, 1973); Susan Pedersen, "Back to the League of Nations" (2007) 112:4 American Historical Rev 1091 at 1093; See also Felipe R. R. Matsushima, "The Fall of the League of Nations" (2022) 9:1 J Innovation & Soc Science Research 96 at 98-101.

The Financial Committee conceptualized international tax problems as purely economic problems. This conceptualization influenced their decision to bring together the initial four economists and later the technical experts to provide academic and technical economic solutions. Apart from leaving out the mandate of the League, the Financial Committee also neglected the report of the International Financial Conference, which was held in Brussels in 1920 by the League to provide insights and guidance on the general economic problems.[823] The International Financial Conference emphasizes the importance of working on conditions that promote peace – 'conditions which allay social arrest…'[824]. The Conference states as follows:

> First and foremost, the world needs peace. The Conference affirms most emphatically that the first condition for the world's recovery is the restoration of real peace, the conclusion of the war which are still being waged and the assured maintenance of peace for the future. The continuance of the atmosphere of war and of preparation for war is fatal to the development of that mutual trust which is essential to the resumption of normal trading relations. The world must resolve the rivalries and animosities which have been the inevitable legacy of the struggle by which Europe has been torn…
>
> If the first condition of recovery is peace between the countries of the world, the next is peace between each of them and the establishment of conditions which will allay the social arrest that is at present impeding and reducing production and which will restore social content and with it the will and the desire to work.[825] (emphasis supplied)

The basic question we need to reflect on is why the Financial Committee ignored the broad mandate of the League and the guidance of the International Financial Conference on conditions that 'allay social arrest' while they were constituting the forum of the four economists and the technical experts.[826] The approach, the process and the outcomes of the Financial Committee would have been different if this question had been considered. In terms of reference to the four economists, the first paragraph would have included an additional question on the link between

[823] H.A. Stemann, 'The International Financial Conference at Brussel' (1920) 30:120 Economic J 436
[824] League of Nations, International Financial Conference, *Report of the Conference*, (London: League, 1920) 26.
[825] *Ibid*.
[826] W.H. Coates, 'League of Nations Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp' (1924) 87:1 J Royal Statistical Society 99.

the economic consequences of double taxation and the promotion of global peace. The first paragraph would have been couched as the following: what are the economic consequences of double taxation from the point of view: (*a*) of the equitable distribution of burdens; (*b*) of interference with economic intercourse and with the free flow of capital;[827] and (c) how the economic consequences can either promote or hinder global peace? (emphasis added)[828]

As previously argued in Chapter One, consideration of the mandate of the League will necessarily consider the other two issues connected to the League's mandate. The first issue is sustainability and the continued existence of states. Promoting global peace is not realizable when the constituents of the global community face existential threats. I have analyzed in Chapter One how the literature on climate change and environmental laws has proved that environmental hazards can consume geographical land, lead to the displacement of communities, and result in loss of identity.[829] I refer to some data on how some developing countries are gradually losing their lands to these hazards, and if this continues, there is an imminent danger that some parts of the world may go into extinction.[830] We, therefore, need to guarantee the continued existence of various states, which are the constituents of the global community. The second issue is the functionality of the states to their citizenry – which I refer to as the human rights of the people. To attain global peace, global wealth should be redistributed in a way that puts each state in a position to provide the basic needs of its people under the social contract it has with its citizenry. The relative peace of each state will collectively amount to global peace. Consideration of global peace,

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[827] *Ibid*.
[828] Paragraphs c is underlined because it is not in the original terms of reference to the economists.
[829] See Camile Parmesan et al., "Terrestrial Freshwater Ecosystems and Their Services" in H.O. Portner et al, eds, *Climate Change 2022: Impacts, Adaptation and Vulnerability Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, *supra* note 108. See also Gueladio Cissé et al., "Health, Wellbeing, and the Changing Structure of Communities" in H.-O. Pörtner et al., eds, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, *supra* note 108.
[830] *Ibid*

being the mandate of the League, will necessarily extend to the sustainability of states and guarantee the human rights of people living in states that participate in international tax cooperation. I describe these three objectives as the global stability variables throughout this thesis.

The CSM theory yields explanations on why the Financial Committee left out the League's mandate and ignored the International Financial Conference report in their deliberations. It is true that the instrument of appointment of the Financial Committee does not state that the Committee should consider this mandate of the League in its deliberations.[831] This may not be necessary in view of the report of the International Financial Conference, which requires every relevant actor – including the Financial Committee - to restore peace to consider other conditions that guarantee peace. The approach of the actors in the Financial Committee was influenced by their identities – 'who they were' and 'how they had addressed double taxation problems in their countries'.[832]

Interestingly, the majority of the actors in the Financial Committee came from states that had intervened in international tax problems through their domestic legislation before the creation of the League. Mr. Avenol and Mr. Blackett, who were instructed by the Financial Committee to write a report on the history of double taxation of their respective states and recommend solutions to the Financial Committee, came from France and Great Britain, respectively.[833] Mr. Avenol was a financial inspector of the French Government while Mr. Blackett was working with the H.M Treasury, the official revenue collection agency of Great Britain.[834] I have explained in chapter two how each of these states addressed international tax problems and their underlying economic objectives. Mr. Avenol and Mr. Blackett could not have considered non-economic factors, such as conditions that enable peace, when they were requested to recommend possible ways to deal with

831 Reginald Berkeley, "The Work of the League" (1921-1922) 2 Brit YB Int'l L 150 at 160.
832 Mills, Thurlow & Mills, "Making Sense of Sensemaking: The Critical Sense Making Approach', *supra* note 155.
833 Sunita Jogarajan, *Double Taxation and the League*, *supra* note 10.
834 *Ibid*

double taxation. Even if there were other options they could consider, only their countries' domestic approaches to double taxation would make sense to them. The same Mr. Avenol and Mr. Blackett were further instructed by the Financial Committee to draft terms of reference for the economists.[835] Mr. Avenol, Mr. Hawtrey (who replaced Mr. Blackett) and Mr. Bianchini (from France) constituted the sub-committee created by the Financial Committee to work on double taxation specifically.[836]

The CSM theory further enables us to make sense of how the policymakers responsible for international tax in each of the three phases of the ITR have failed to consider the global stability variables in policymaking. In the crystallization phase, the key actors in international tax policymaking were members of the Financial Committee, the Technical Experts and the business actors who operated through the International Chamber of Commerce.[837] As explained in the previous paragraph, the sensemaking of members of the Financial Committee influenced their engagement with the great four economists and crafting of their terms of reference. The conceptualization of international tax problems as simply economic problems also influenced the Financial Committee in their appointment of the Technical Experts in 1922.[838]

These experts were drawn from the pool of civil servants from seven countries - Great Britain, France, Belgium, Italy, Netherlands and Switzerland.[839] While relaying the instructions of the Financial Committee to the Technical Experts, Mr. Léon-Dufour, the secretary of the Financial Committee, emphasized that the Financial Committee's expectation was that the Technical Experts' suggestion must be on how to increase states' tax revenue generation.[840] Most of the Technical

[835] *Ibid*
[836] *Ibid.*
[837] *Ibid*
[838] *Ibid*
[839] *Ibid*
[840] *Ibid.*

Experts members were revenue officers of their respective countries. Their appointment was based on their economic expertise and not because of their knowledge about state stability and peacemaking. Even if the Financial Committee had not instructed them to work towards the increase in state tax revenues, the identities of the Technical Experts as economic experts would have made them think exclusively about revenue generation. These experts could not have considered the global stability variables because of their background, work experience and understanding of tax problems.

In Chapter Three, the CSM theory also explains the failure of the international tax policymakers in the stabilization phase to consider the global stability variables in policymaking. The OECD became the epicentre of global tax governance after the exit of the League.[841] The OECD's sensemaking of international tax problems was a function of the nature of its institution.[842] It is a closed economic institution whose objective is to maximize the economic welfare of its member states.[843] Notwithstanding its institutional objectives, the OECD was supposed to consider the global stability variables in its policymaking because its work on international tax was based on the legacy of the League.[844] However, considering the global stability variables would be contrary to the instrument that established the OECD. The OECD started as an institution to implement the economic recovery program for Europe in 1948 and later

841 John F. Avery Jones, "Understanding the OECD Model Tax Convention: The Lesson of History" (2009) 10:1 Fla Tax Rev 1.
842 Robert T. Kurdle, 'The OECD and the International Tax Regime: Persistence Pays Off' (2014) 16:3 J Comparative Policy Analysis 201.
843 Matthieu Leimgruber & Matthias Schmelzer, "Introduction: Writing Histories of the OECD" in Matthieu Leimgruber & Matthias Schmelzer, eds, *The OECD and the International Political Economy Since 1948* supra note 441; Lincoln Gordon, "The Organization for European Economic Cooperation, *supra* note 443. See also Robert Wolfe, "From Reconstructing Europe to Constructing Globalization: The OECD in Historical Perspective" in Mahon Rianne & McBride Stephen, eds, *The OECD and Transnational Governance*, *supra* note 443.
844 Reuven S. Avi-Yonah & Gianluca Mazonni, 'Review of Double Taxation and the League of Nations' (2018) 46:12 Intertax 1027.

extended its fold beyond Europe in 1961 to accommodate the United States and Canada.[845] I argue in chapter three that the OECD tax treaty model designed in this phase is fit for the purpose of economic advancement of the OECD states. Therefore, the use of the OECD tax treaty should have been limited to the OECD states – to explore further and advance the OECD's economic interests.

The UN also intervened in international tax during this phase, particularly in 1967, but its intervention came much after the OECD had covered the field.[846] The OECD had issued its original tax treaty model in 1963 before the UN created its group of Experts on Tax between Developed and Developing Countries.[847] The OECD had also revised the 1963 model in 1977 before the United Nations released its first model tax treaty in 1980[848]. The UN's work was even premised on the OECD's works,[849] and as such, there is not much difference between the two models with regards to restriction on taxing rights of source countries (the majority of which are developing countries).[850] The consequence of premising the UN's work on the OECD tax treaty model is that the United Nations does not also consider the global stability variables in its policymaking.

The combined political and economic strengths of the OECD states enable them to advocate for the adoption of the OECD model when negotiating tax treaties with non-OECD states. The political economy of the OECD states, among other factors, led to the proliferation of the OECD model in existing bilateral tax treaties. The proliferation of the OECD model makes the OECD's approach to international tax values dominant, while the UN, by its self-admission,

[845] Robert Wolfe, "From Reconstructing Europe to Constructing Globalization: The OECD in Historical Perspective" in Mahon Rianne & McBride Stephen, eds, *The OECD and Transnational Governance*, *supra* note 443.
[846] Stanley S. Surrey, "United Nations Group of Experts and the Guidelines for Tax Treaties between Developed and Developing Countries, *supra* not 23.
[847] *Ibid*
[848] *Ibid.*
[849] *Ibid*
[850] Oladiwura Ayeyemi Eyitayo-Oyesode, 'Source-Based Taxing Rights from the OECD to the UN Models: Unavailing Efforts and an Argument for Reform'' (2020) 13:1 L & Dev Rev 193.

occupies a second-fiddle role.[851] These dominant values are purely economic and contrary to the global stability variables.

What the OECD has done in the contemporary phase of the ITR is to protect these values and legacies from being eroded by non-OECD state actors, which have been included in the new forum of global tax governance, known as the BEPS Inclusive Framework.[852] This is also explained by the CSM theory, which allows us to see that in some instances, weaker actors may not properly and independently undertake the true identity constructions because of constraints set by stronger actors in the same environment.[853] The CSM theory alludes to how the formative context, the social environment where the actors operate, and the organizational power can constitute constraints to the sensemaking process of the weaker actors.[854] I examine these constraints in chapter four and explain how non-OECD states in the BEPS Inclusive Framework were unable to undertake and apply their true identities to the design of the two-pillar solution. So, the OECD legacy created in the stabilization phase was further protected in the contemporary phase. Since the OECD legacies and values about international tax are contrary to the global stability variables, the international tax policymakers in both the stabilization and the contemporary phases did not consider the global stability variables in the policymaking.

The common thread in all the phases of international tax is that actors' sensemaking plays an influential role in addressing international tax problems. Based on my analysis in the moment of truth, reflection and reconciliation, policymakers and stakeholders should be able to acknowledge that international tax actors should consider the global stability variables in

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851 Elliott Ash & Omri Marian, "The Making of International Tax Law: Empirical Evidence from Tax Treaties Text" (2020) 24:1 Fla Tax Rev 151.

852 Shu-Yi Oei, "World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership" *supra* note 568.

853 Mills, Thurlow & Mills, "Making Sense of Sensemaking: The Critical Sense-Making Approach, *supra* note 155.

854 *Ibid*.

policymaking to realize true international tax reforms. To achieve this purpose, there is a need to have a new forum of actors, whose collective sensemaking will enable them to consider the global stability variables in international tax policymaking. Considering the wide scope of the global stability variables – covering both economic and non-economic considerations – the forum of actors suggested by this thesis includes a wide range of actors, from state actors to non-state actors. I strongly believe that international tax actors will not consider the global stability variables until the forum of international tax actors is restructured in line with the proposed framework suggested by this chapter. I identify these actors and the structure of their relationship to one another in the ITR.

5.2 The State-led Forum

A state-led forum should primarily handle international tax cooperation matters. States are the most important of all the actors I identify in this proposed framework considering the fact they are the primary beneficiaries and victims of any international tax framework.[855] The case study of Starbucks,[856] which I examine in chapter one, demonstrates how states can jealously protect their tax bases and how civil society can respond when states' tax revenue potential is undermined. States are in the best position to consider issues affecting their existence and functionality, as a popular Yoruba African proverb says that 'you cannot shave a man's head in his absence'. The dire consequence of entrusting states' issues with a non-state-led forum is that the forum can treat

[855] This is true irrespective of the applicable state theory in force in the taxing jurisdictions. Jeffrey explains three competing theories of state: autonomous state, captured state and fiscal contract-based state. In the autonomous state, the state is independent and can use force to enforce compliance with tax obligations. The captured state theory explains how the instrumentality of the government is used to protect and promote the interests of certain people in the society, usually described as the dominant class. The dominant class then determines the tax policy – which involves the spending pattern and the collection mechanism The fiscal contract state theory is a mutually beneficial relationship between the state and its citizenry where the state trades services for tax revenue. The state's commitment to its citizenry encourages voluntary compliance with tax obligations, and the tax revenues are spent on people-oriented projects. The common argument in all these theories is that states derive enormous benefits from tax revenues. For further reading on these theories and their connection to tax policy and collection, see Jeffrey F. Timmons, "The Fiscal Contract: States, Taxes, and Public Services" (2005) 57:4 World Pol 530.

[856] Ruth Mason, 'Transformation of International Tax' supra note 32.

as trivial what is otherwise critical to the states. As taxation is also considered to be an inherent part of states' sovereignty,[857] matters that directly touch on their sovereignty and interests should be decided by the state-led forum. Every other category of actor should provide complementary support only in terms of technical analysis, implementation, evaluation and monitoring.

The speech delivered by Mike Moore, the former secretary general of the World Trade Organization (WTO), after the crisis faced by the WTO in Seattle, aptly summarized the ideal state-led forum, where the primary decision-making is vested in the states:

> The WTO is a powerful force for good in the world. Yet we are too often mis- understood, sometimes genuinely, often willfully. We are not a world government in any shape or form. People do not want a world government, and we do not aspire to be one. At the WTO, governments decide, not us.
>
> But people do want global rules. If the WTO did not exist, people would be crying out for a forum where governments could negotiate rules ratified by national parliaments that promote freer trade and provide a transparent and predictable framework for business. And they would be crying out for a mechanism that helps governments avoid coming to blows over trade disputes. That is what the WTO is. We do not lay down the law. We uphold the rule of law. The alternative is the law of the jungle, where might makes right and the little guy doesn't get a look in.[858]

This approach should not be problematic because it is not novel – it is similar to the structure of the League. The Council and the Assembly, which were the instrumentalities through which the works of the League on international taxation and other issues were carried out, were constituted by the states.[859] In October 1920, the Council created the Financial Committee

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[857] Diane Ring, "Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation" (2009) 9:5 Fla Tax Rev 555.

[858] Mike Moore, "The Backlash Against Globalization" (26 October 2000) online: https://www.wto.org/english/news_e/spmm_e/spmm39_e.htm

[859] See Articles 2 and 3 of the Covenant of the League of Nations. The Assembly established under Article 2 was constituted by all members of the League. The Council was constituted by the smaller number of members of the League. The Council has permanent members and non-permanent members elected by the Assembly. See Klass Dykmann, "How International Was the Secretariat of the League of Nations" (2015) 37:4 Intl History Rev 721 at 722; Henry R. Winkler, "The Development of the League of Nations Ideas in Great Britain, 1914-1919" (1948) 22:2 J Modern History 95

following the Brussels Conference of 1920.[860] The Financial Committee was the League's liaison entity and supervising authority on different tasks assigned to various committees.[861] The reports of the four economists and the technical experts were submitted to the Financial Committee for onward submission to the Council, which could either approve or reject them.[862] The Financial Committee was constituted by nominees of states. At both the levels of the Council and the Financial Committee, the states were involved and had the opportunity to determine issues that affect their existence and functionality.

The importance of having the state-led forum was apparent in the decision of the League to appoint another committee of technical experts in 1923 to provide practical inputs to the report of the four economists.[863] The League was not in doubt about the competencies of the four economists but considering their academic background, the economists might not appreciate the practical realities of the states as the technical experts would do in that circumstance. The decision to appoint the technical experts was even taken before the submission of the economists' reports.[864] The states were careful in their nomination of members to the committee of technical experts –

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[860] Sunita Jogarajan, *Double Taxation and the League of Nations supra* note 10 at 16-17. The Financial Committee was part of the larger Provisional Economic and Financial Committee (PEFC). The PEFC was later split into the Economic Committee and the Financial Committee.

[861] As an example, the specification of tasks to the four economists was drafted and communicated by the Financial Committee to the economist. Dealing with the Financial Committee was akin to dealing with the Council, and by extension the League, itself.

[862] W.H. Coates, 'League of Nations Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp', (1924) 87:1 J Royal Statistical Society 99 – 102

[863] The preliminary note in the 1925 report of the technical committee alludes to the notion that the 'real' contribution could only be made by the officials of the participating states. It also emphasizes that there might not be any solution to double taxation without a forum of government officials. The note states as follows:

> (i)n order to arrive at any real solution of these two important questions, It was essential to obtain the opinion of the representatives of certain Governments. Still, better results might be anticipated if a meeting of these representatives were convened in order to discuss the possibility of an agreement to enable common action to be taken upon certain points and to permit the drawing up of schemes, bilateral agreements and other arrangements concerning double taxation and the evasion of taxation.

See League of Nations, Technical Experts, *Double Taxation and Tax Evasion: Report and Solutions*, UN Doc F. 212 (1925) at 3

[864] *Ibid*. The four economists were appointed in 1921, and their report was published in March 1923. The committee of technical experts was appointed in June 1922, and its first report was published in 1925.

except the representatives of Venezuela and Poland, all members of the 1927 experts were either civil servants or advisers to the governments of their respective states.[865]

A similar state-led forum, known as the Conference of Parties (CoP), was established in the international climate change regime. The mutual understanding of all states that climate issues are global issues and are central to their sustainability facilitated the international cooperation to establish the state-led forum.[866] The CoP was established under the 1992 UN Framework Convention on Climate Change as the 'supreme body' to protect the present climate system and preserve it for future generations.[867] Though the CoP interacts with other institutions, such as the Intergovernmental Panel on Climate Change, which serves as the main source of its technical advice, the power to make decisions on all climate issues is vested in the CoP.[868] The fact that the CoP has been in existence for over two decades is a strong point that such a forum can be replicated

[865] The 1925 technical experts were all civil servants. When the committee of technical experts was expanded in 1927, non-civil servants were included in the committee. The representatives of Venezuela and Poland were professors. TS Adams who represented the United States in 1927 was both professor and economic adviser to the US Treasury.

[866] Rosemary Lyster, *Climate Justice and Disaster Law* (United Kingdom: Cambridge University Press, 2015) at 49. The journey leading to the establishment of the CoP started in 1972 when the world leaders met in Stockholm to address global environmental issues. The Stockholm conference was followed by the 1987 Report of the World Commission on Environment and Development (popularly known as the Brundtland Report). CoP was thereafter established under the UNFCCC in 1992. See also Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials,* 3rd ed (United States: Thomas Reuters, 2019) at 864.

[867] See Article 7 of the United Nations Framework Convention on Climate Change, 9 May 1992, FCCC/INFORMAL/84

[868] Daniel Bodansky, Jutta Brunnée & Lavanya Rajamani, *International Climate Change Law* (United Kingdom: Oxford, 2017) at 18 – 20. Whether the decisions of the CoP will be binding or not depends on the explicit authorization in the treaty. In the absence of such explicit authorization from the treaty, the decisions of the CoP are not formally binding. The decisions, however, provide guidance on the implementation and compliance with the treaty. In the process of making such a decision, the CoP may refer to the IPCC's reports, but it is not mandated to adopt the recommendation of the report. The CoP reserves the right to make a final decision in all circumstances. For example, in arriving at the decision to establish the Glasgow Dialogue to discuss funding arrangements on adaption, mitigation and loss and damage arising from the adverse impact of climate impact, the CoP considered the Sixth Assessment Report of the Working Group 1 of the IPCC on the increasing level of adverse impact of extreme weather. The CoP also invites the IPCC Working Group II to assess adaptation needs. The CoP does not limit itself to the report of the IPCC. The combined reading of the decision on the Glasgow Dialogue clearly demonstrates that the CoP consulter other entities, such as the World Meteorological Organization. See Conference of the Parties, *Report of the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement on its third session Held in Glasgow*, FCCC/PA/CMA/2021/10/Add.1, 3rd Session 1 at 8.

in the international tax community, especially if the state actors' perspectives are moving towards consideration of the global stability variables in policymaking.

5.2.1 Essential Features of the State-led Forum

The state-led forum should have at least three qualities to attract actors whose perspectives can construe international tax problems broadly and consider the global stability variables. The qualities are inclusivity, capacity, and competence. The instrument establishing the state forum must be clear that these qualities must be part of the conditions to form a quorum where decisions are taken. It is, therefore, not enough that a state is represented in the forum; the competence and capacity of that representative must meet the minimum threshold in the instrument that establishes the forum.

5.2.1.1 Inclusivity

The forum should be open to all taxing jurisdictions without any structural restraints to the admission and participation of those jurisdictions. Considering the fluid nature of the digitalized economy, the forum should be constituted by all taxing jurisdictions. It should not be the case that some states can have an alternative option to not join the forum in the name of exercising sovereignty or advancing tax competition.[869] I explain in Chapter One that increasing integration

[869] States will decide to exit or refuse to join a forum if the project does not protect their interests and they are better off in their competition behaviours. States will be willing to embrace the kind of forum proposed here because its decisions will focus on the global stability variables. Hirschman's analysis of exit, loyalty and voice explains how unsatisfied members of an organization can demonstrate their dissatisfaction. Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge: Harvard University Press, 1970). See also Albert O Hirschman, "'Exit, Voice, and Loyalty': Further Reflections and a Survey of Recent Contributions" in *Essays in Trespassing: Economics to Politics and Beyond* (Cambridge: Cambridge University Press, 1981). Putting the theory in the context of international tax, aggrieved members can be loyal and continue to participate in the organization with the hope of positive changes. Another option is for the aggrieved members to express their grievances - voice out – against a specific issue while they are still participating in the organization. The third option is to exit the organization by taking measures incompatible with the organization's approach. Within the context of the ongoing work on the Two Pillar, members of the Inclusive Framework have demonstrated these three options. Some members exhibit loyalty by not complaining and not taking alternative approaches. Some members, such as Nigeria, Kenya, and other developing countries, voice their grievances, while some members, such as France, enacted the Digital Service Tax Act, which is incompatible with the works of the Inclusive framework. See Yariv Brauner, "Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument" (2022) 25: Florida Tax R 489 at

under the digitalized economy has made tax cooperation inevitable. Therefore, The forum should include all taxing jurisdictions or, in the worst-case scenario, the super majority of taxing jurisdictions (consisting more of than three-quarters of the world's taxing jurisdictions). The danger of having states that elect not to be part of the forum or refuse to comply with recommendations of the forum is that the forum can be used as a tax haven to undermine the objectives of the cooperative efforts of the state forum.[870]

The kind of inclusive framework proposed here can address concerns around the 'constitutionalism' of global governance if the participating states adopt the global stability variables as their guiding framework for policymaking. John Jackson, a professor of international trade law, defines the term 'constitutionalism' as a very complex mix of economic and governmental policies, political constraints' designed by an international institution in a manner that 'imposes different levels of constraint on the policy options available to public or private leaders.'[871] This implies that the rules made by the institution might limit and constrain the states' rights to explore options outside the so-called 'constitution',[872] Sol Picciotto, an emeritus professor with influential scholarship in international tax, argues that it is dangerous for such institutional rules to constrain states' behaviour as that will entrench the dominance of the institutions.[873] He suggests democratic constitutionalism with the underlying goal of common goals and coherence. He is, however, uncertain whether democratic constitutionalism is realizable with the level of

543-544; Tarcísio Diniz Megalhäz, "International Tax Law Between Loyalty, Exit and Voice" () Dalhousie LJ 50 at 555.

[870] Steven A. Dean & Attiya Waris, "Ten Truths about Tax Havens: Inclusion and the "Liberia" Problem" (2021) 70:7 Emory LJ 1659 at 1683-1684.

[871] John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 1989) 299.

[872] Ibid.

[873] Sol Picciotto, Constitutionalizing Multilevel Governance (2008) 6:3 I.CON 457 at 471. Also, see Stephen Gill, *Power And Resistance In The New World Order* (Palgrave Macmillan 2003) 132

integration in the global world.[874] Picciotto's recommendation, stated below, is feasible if the state actors subscribe to the global stability variables:

> (a) democratic constitutionalism must also provide appropriate procedures and institutions for the formulation of collective preferences to guide the actions of states and of all public bodies. The difficulties of doing so in a world that remains culturally and politically diverse and where economic inequalities and social divisions have increased pose probably the greatest challenge for democracy in the twenty-first century.[875]

The inclusion level should be measured by the number of taxing jurisdictions and not by their economic measures, such as the Gross Domestic Product (GDP). The GDP measure can be misleading – it can lead to the erroneous conclusion that the forum has attracted the largest part of the global community. For example, the GDP of the G20 alone is 80% of the world GDP.[876] A statement that asserts that jurisdictions making up 80% of the world GDP have joined a forum can be mistaken to mean that the largest parts of the world have subscribed to the ideal of the forum. The danger in this representation is that it may depict that the remaining parts are negligible. The GDP of the African region, a region with 54 countries, is less than 3% of the world's GDP.[877] Thus, GDP-based inclusivity will consider the exclusion of the 54 African states negligible, but such exclusion has an enduring impact on the region in real terms.

The language of communication and deliberation in the forum should also reflect inclusivity. The forum should adopt more than one language as its official language. The forum can consider the popularity and acceptability of languages in choosing its preferred official languages.[878] When there is a need to adopt one of these languages as the language for its

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[874] *Ibid*.
[875] *Ibid* at 479.
[876] See Canada and the G20 online: <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/g20/index.aspx?lang=eng>
[877] See https://statisticstimes.com/economy/africa-gdp.php
[878] Although it is used in the context of an individual who is searching for a group he can identify with, the social identity theory can also explain how groups of countries can feel comfortable or otherwise in an organization whose cultures and practices are similar to their cultures. The social identity theory argues that an individual's decision to

proceedings for administrative purposes, English may be chosen because of its highest number of speakers. In that circumstance, the forum must provide adequate means of real-time translation to languages of non-English speakers.[879]

The forum may need to establish a smaller forum for efficiency purposes or engagement with external stakeholders and public relations. The smaller forum may also be for the management of the internal affairs of the larger forum. It could also be used as the secretariat of the forum. In that circumstance, the smaller forum must also reflect inclusivity. The case study of the BEPS Inclusive Framework and the BEPS Steering Group is an example of how a smaller forum may be created for specific reasons. The Inclusive Framework is the larger group, constituted by 145 taxing jurisdictions, while the Steering Group is a 25-member entity that steers the activities of the Inclusive Framework.[880] Inclusivity in the smaller group can be realized by spreading the election into the smaller forum across the regions. This is another instance where the regional forum can be of great importance. The regional group can undertake internal democracy to choose a member that can properly represent the region's interest in the smaller forum.[881]

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join a social group is influenced by attributes of that group. When the attributes of that group are similar or acceptable, the individual will be pleased to join the social group. It has been established that language is one of the key attributes the individual will look out for. It is, therefore, unlikely, that the individual will join a social group which does not speak his language. Putting this in the context of international forum, the forum should adopt languages that are similar or acceptable to its members. Adoption of more than one language will be ideal. For more reading on social identity theory, see Elizabeth Bouchien de Groot, "Personal Preference or Policy? Language Choice in a European-based International Organization" (2012) 17:3 Corporate Communications: An International J 255 at 258.

[879] Emma Wagner, "Why International Organizations Need Translation Theory" in Luis Pérez González, ed, *Speaking in Tongues: Language Across Contexts and Users* (Spain: Guada Impressors, 2003) 91 at 92-93.

[880] Allison Christians & Laurens van Apeldoorn, "The OECD Inclusive Framework" supra note 566; Shu-Yi Oei, "World Tax Policy in World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership" supra note 568; Mosquera Valderrama, I. J. "Output legitimacy deficits and the inclusive framework of the OECD/G20 base erosion and profit shifting initiative, supra note 566. See also Composition of the Steering Group of the OECD/G20 Inclusive Framework on BEPS (January 2023) online: <www.oecd.org/tax/beps/steering-group-of-the-inclusive-framework-on-beps.pdf>

[881] The regional forum should be strictly limited to geographical locations, not economic communities. Economic communities are groups of countries that are not necessarily in the same location but collectively promote common economic goals. The reason for this is to avoid a situation where a country can fall into two categories of regional forum through either its geographic location or economic interests. This can result in a conflict of interest, and either of the conflicting groups will suffer. The case of the African region is a good example. By geographical location, South Africa is an African country. But the same country is a member of the G20, which is an influential entity after

Membership of the smaller forum should be for a specific term. The membership should also be rotated in a way that all members of the larger forum will be part of the smaller forum at different times. For example, if two slots are allotted to the African region and the region elects countries A and B to take up the slots for the first period. A set of countries other than A and B should take the slots in the subsequent period. This is to avoid a situation where some members will hold permanent seats and others will be regarded as temporary members, like the case of the Council and the Assembly of the League.[882] The designation of some members as permanent members creates systemic discrimination that suggests that some members are more equal than others. The equality of members is an integral part of the required inclusivity.[883] The equality extends to their views and opinions. Since the forum is adopting the consensus-based approach, there is no need to consider whether the developed states will have more weight than the developing states. All views are given equal consideration, but in the course of ranking and comparing the available choices, according to the pluralists, the actors can consider the economic levels of respective countries in the design of tax instruments.

Rotational meetings and conferences of the larger forum can also give a sense of inclusivity. Members will feel they are substantially part of the forum if they also have the right to host periodic meetings and conferences. The G7 and the CoP are examples of state-led fora that

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the G7. If the regional forum is not strictly limited to the geographical location, South Africa can be elected to the smaller forum by both groups and conflict of interest may arise from that joint representation.

[882] This is where the state-led forum in this thesis departs from the kind of state-led forum established by the League. By Article 4 of the Covenant of the League, the representatives of the principal allied and associated powers were the only permanent members of the Council while the other four members were temporary. The Assembly selects the four temporary members among its members. The Council reserves the right to increase the number of temporary members of the Council with the approval of the majority of the Assembly.

[883] Equality does not mean that participating states are equal to one another in all respects. It is undeniable that the level of resources and economic growth of all states cannot be equal. Equality in this context rather means that a state should not be made subservient to another state because of the former's apparent weakness or low-income status. See Diane Ring, 'Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation, supra note at 557.

rotate their presidency among their members.[884] The rotation can also be spread across the region and the region can then decide which among its sub-members will host it. The rotation should not be based on the financial capacity to host the meeting as that may tactically exclude some LMICs from the privilege of being the hosts of the meetings because of their insufficient resources. The larger and the regional forums should rather harness resources to support a particular state that they think is due to host the meeting.

Lastly, the inclusivity of the forum should be sensitive to gender equality. The participating states should be conscious of the need also to appoint women as their representatives in the forum to create a level-playing field among people irrespective of their sexual orientation.[885] Gender equality and inclusion in forums are so important that, as part of the social development goals, the UN seeks to '(e) ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life'.[886] The OECD has recently appointed a female as the co-chair of the BEPS inclusive Framework and the Steering Group. The emphasis on gender in this context does not suggest what should be the proportion of females in the forum. Having a specific proportion of females in the forum is also a good idea, but that should be part of the internal procedures of the forum. The gender inclusion in this context rather connotes that a potential female representative of a country, who has the other requirements of competency and capacity, should not be excluded on the ground of her gender.[887]

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[884] The CoP conferences are rotated among the five United Nations regional groups. See United Nations Climate Change, *What Are United Nations Climate Change Conference*, online;< https://unfccc.int/process-and-meetings/what-are-united-nations-climate-change-conferences>. For rotational conferences in the G7 see <http://www.g7.utoronto.ca/>

[885] Nüket Kardam, "The Emerging Global Gender Equality Regime for Neoliberal and Constructivist Perspectives in International Relations" (2004) 6:1 Int'l Feminist J Politics 85 at 91.

[886] See Goal 5.5 of the United Nations Sustainable Development Goals.

[887] See also the United Nations Human Rights Convention on the Elimination of All Forms of Discrimination Against Women (entered into force on 3 September 1981). Under Article 7(b), states have an obligation to ensure that women have equal rights with men with respect to participation in the 'formulation of government policy and implementation thereof and to hold public office and perform all public functions at all levels of government.' See also Andrew Byrnes,

5.2.1.2 Capacity

The capacity focuses on the decision-making power of the states' representatives in the state-led forum. The representative must have the power to make decisions or commitments on behalf of his state. The efforts of the state-led forum may be counterproductive if the state's representative's action will still need to be validated by a superior public official in his home country. Such a representative may not effectively contribute to the deliberations and the negotiations as he may be in a quandary of whether the required approval will be granted. The proper representative should be a person who does not only have knowledge about issues affecting the existence and the functionality of his state but also the power to make decisions on them.

The required capacity is of such kind that is required to execute international agreements, such as treaties. Any person who has the capacity to execute international agreements should be the representative in the forum. The representative will not lose his required capacity just because there are other conditions that must be complied with for the domestication and operationalization of international agreements in his home country. In many jurisdictions with a dualist system of international agreements, such as Canada and Nigeria, any international agreement must be ratified and domesticated through an enabling act of the parliament before it can become enforceable in that country.[888] In such instances, the parliament's approval must be obtained to effect the treaty. The capacity required of the representative in this context is not evaluated by whether the treaty will have to be approved by the parliament for enforcement purposes. The capacity requirement is

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"The Implementation of the CEDAW in Australia: Success, Trials, Tribulation, and Continuing Struggle" in Anne Hellum Henriette Sindig Aasen, eds, *Women's' Human Rights: CEDW in International, Regional and National Law* (Cambridge: Cambridge University Press, 2013) & 323 at 353.

[888] Chilenye Nwapi, "International Treaties in Nigerian and Canadian Courts" (2011) 19:1Afr J Int'l & Comp L 38 at 39 - 43; Chinenyendo Nriezedi-Anejionu, "Could the Non-Domestication of Nigerian Treaties Affect International Energy Investment Attraction into the Country?" (2020) 28:1 AfrJ Int'l & Comp L 122 at 123; Edwin Egede, "Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria" (2007) 51:2 J Afr L 249 at 250-251.

satisfied if the representative's action can bind the government of his country and he can sign a treaty or other diplomatic documents for his home country.

The heads of the executive branch of government appear to be the appropriate persons with such decision-making power under the power derived from the constitution as representatives of their people.[889] In the event that the power needs to be delegated for good reason, the power should be delegated to top-level ministers who are familiar with international agreements or who have perhaps previously attended international meetings. The instrument of delegation must be clear that the delegated minister can make decisions at the meetings within the limits available by the domestic law of the affected state.[890] It is advisable that the heads of government should attend the forum's meetings in the company of their top ministers, who can collectively assist the heads of government with the administrative and technical assistance of issues arising from the meetings. Apart from aiding the heads of government, one of the top officials can represent the head of government if there is a need for the head of government to delegate his decision-making power.

Should the parliamentarians be included?

[889] Canada's approach is a perfect case study. The executive branch of the government has the power to negotiate and sign treaties while the parliament enacts the treaties into laws to make them enforceable in Canada. The relevant units in the executive branch act on behalf of the government in the negotiations. For example, if the treaty involves tax, the Canada Revenue Authority takes a leading role in the negotiation with the support of other relevant units. The cabinet gives approval after the negotiation has been completed, and any high-ranking minister can be assigned to sign the treaty on behalf of the government. See Laura Barnett, *Canada's Approach to The Treaty Making Process* (Ottawa: Library of Parliament, 2021) 2 -3. The United States has a similar approach with respect to the point that the executive coordinates the negotiation process. See Harlan Grant Cohen, "The Death of Deference and the Domestication of Treaty Law"[2015] 2015:6 BYU L Rev 1467. The author examines some of the reasons why the United States courts defer to the executive's interpretation of treaties in acknowledgment of the role played by the president in negotiating the treaties. There is a presumption that the executive, led by the president, has a better understanding of the underlying objectives of the treaties because he has the exclusive authority to negotiate the treaties.

[890] The government should consider whether there is any statutory barrier to the extent of the head of government's delegation of authority. Delegation of authority that violates the domestic statutory requirement may affect the local implementation of the international agreement that arises from that delegation. The parliament can refuse to ratify the international agreement if the minister cannot exercise such decision-making power, notwithstanding the delegation instrument.

The ongoing discussions about the failure of the United States President to obtain the approval of Congress before giving his support to the OECD's pillar two on global minimum tax are an opportunity to rethink the need to expand the scope of state representatives in the forum. On 19 July 2023, a network of international tax experts appeared before the House Ways and Means Tax Subcommittee to explain the negative impacts of the proposed global minimum tax on the United States economy.[891] The interesting arguments of how the United States economy may be negatively impacted by the global minimum tax are not relevant here.[892] The statement of David M. Schizer, the Dean Emeritus and Professor of Law and Economics at the Colombia Law School, to the Subcommittee on the neglect of the power of Congress by President Joe Biden requires deep reflection.[893] Schizer argues two fundamental principles of taxation before the Subcommittee. First, the power to make tax law is vested in Congress by the United States Constitution, and second, any tax policy affecting Americans can only be decided by the United States and not a foreign entity like the OECD.[894]

Schizer's argument technically advises Congress to reject the global minimum tax as it contradicts the United States' fundamental tax and Constitutional principles.[895] The remarks of the Subcommittee chairman, Mike Kelly, also show that Congress may not be inclined to support the

[891] Tax Subcommittee Hearing: Biden's Global tax Surrender Harms American Workers and our Economy, online: https://gop-waysandmeans.house.gov/event/39854592/#:~:text=Biden%20Impeachment%20Inquiry-,Tax%20Subcommittee%20Hearing%3A%20Biden's%20Global%20Tax%20Surrender,American%20Workers%20and%20Our%20Economy&text=Wednesday%2C%20July%2019%2C%202023%2C,the%20Longworth%20House%20Office%20Building. (accessed on 12 December 2023) The experts invited include Mindy Herzfeld, professor of tax practice from University of Florida and Adam Michel, Director of Tax Policy Studies of CATO Institute.

[892] It is estimated that the United States risks losing $120 billion in tax revenues. The link provided above has a video containing the submissions of all the experts.

[893] *Ibid*. Tax Notes International published the physical copy of the statement. See Statement of David M Schizer before the House Ways and Means Committee Subcommittee on Tac, Document Service Doc 2023-20886.

[894] Ibid

[895] Schizer concludes his arguments: '(t)he better course is to respect Congress's constitutional role. If Congress won't adopt the Administration's proposals, the President should seek recourse from voters. This approach— "taxation with representation"—is the way our democracy is supposed to work.

global minimum tax.[896] Mike Kelly said the OECD's proposed global minimum tax does not recognize the pioneering work of Congress, which is similar to and predates the OECD's work on minimum tax, and that the global minimum tax is inconsistent with the United States tax laws.[897] Jason Smith, the Chairman of the House Ways and Means Committee (the main committee to which the tax subcommittee reports), expressly told the OECD that the Congress would reject the global minimum tax for all the reasons stated by the experts who appeared before the tax subcommittee.[898] Interestingly, the House Ways and Means Committee has the sole jurisdiction of originating federal tax legislation in the United States.[899] If the OECD global minimum tax is to be domesticated in the United States, it will certainly go through the House Ways and Means Committee. It is self-evident that the Committee will reject the bill to domesticate the OECD global minimum tax without a second glance or reconsideration.

The global minimum tax is designed in a way that each state can domesticate it without any further alteration.[900] States are not obligated to adopt the proposed framework but any state

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[896] Jeff Carlson, 'International Tax Experts Pan Biden's Pillar Two Plan,' supra note 162. Mike Kelly states: "With active encouragement from the Biden Treasury Department, the OECD in its Pillar Two agreement failed to recognize our pioneering global minimum tax as a qualifying tax," he said. "Instead, the agreement they came back with is so inconsistent with our tax laws that it would tilt the playing field in favour of foreign firms."

[897] The pioneering works Mike Kelly refers to are the US's several attempts to legislate on minimum tax. These legislation include Global Intangible Low-Taxed Income (GILTI), Base Erosion and Anti-Abuse Tax (BEAT) and Corporate Alternative Minimum Tax.

[898] At OECD, Chairman Smith Warns that Congress Will Reject New Job-Killing Global Tax Surrender (1 September 2023), online: https://waysandmeans.house.gov/at-oecd-chairman-smith-warns-that-congress-will-reject-new-job-killing-global-tax-surrender/. The Chairman states:

> The deal negotiated by the Biden Administration, without consulting Congress, surrenders America's sovereignty over our tax laws, gives foreign competitors like China an economic advantage, and would cause the United States to forfeit over $120 billions of tax revenue over the next decade. The Biden Administration has no constitutional authority to write U.S. tax laws, and their negotiations at the OECD would permit foreign countries to impose unfair taxes on American workers and make the United States less competitive in the global economy.

[899] Thomas B. Curtis, "The House Committee on Ways and Means: Congress Seen through a Key Committee" (1966) 1966:1 Wis L Rev 121 at 124

[900] OECD, OECD/G20 Base Erosion and Profit Shifting Project, *Minimum Tax Implementation Handbook Pillar Two* (Paris: OECD, 2023) 10

that chooses to adopt it must adopt the exact model designed by the OECD.[901] The domestication process requires that domestic legislatures of respective states enact the model as domestic laws, just like how tax treaties are domesticated through the parliament. This is where the United States Congress will be involved in the implementation of the global minimum tax. President Joe Biden has given support to the global minimum tax, but it does not end with his approval. If Congress refuses to enact it into law, the global minimum tax becomes a pyrrhic victory – without achieving its intended result of reforming international taxation.

Schizer's arguments on the United States fundamental principles of tax are also true of other states. The significant role of Congress in realizing the objective of the global minimum tax is equally true of parliaments of all other states. We, therefore, need to look beyond states' executive approval of such an important international tax framework. To address this issue, I suggest we expand the scope of the state's representatives in the forum to include representatives of their parliaments. The inclusion of the parliamentarians does not imply that the parliamentarians have the right of audience in the forum. It is just a way of engaging with them from the beginning of the process so they can express their concerns to their executives at the earliest opportunity. Alternatively, the forum should ensure that participating states are working with their respective parliaments in making commitments to the global tax deals if the parliamentarians cannot be included. This can be achieved by states' formal declaration that their commitment to the global tax arrangement enjoys the support of the parliament. This proposal aims to achieve a smooth implementation of international tax arrangements from their design at the international level of the forum and their implementation at the respective national levels of the participating states.

[901] Ibid

I do not see any reason why states cannot include their parliamentarians to play a passive role in their negotiation teams. The passive role would just be to have first-hand information on how and why other states are moving in a particular direction. Their inclusion does not affect the principle of separation of power[902] – the parliamentarians cannot leverage their inclusion to usurp the Constitutional role assigned to the executives (in most of the states) to negotiate and discuss international agreements. For example, the Federal executive can negotiate international agreements under Canada's Constitutional system.[903] Notwithstanding this exclusive role,[904] Canada adopts a 'whole state' approach to international discussions on climate change by extending its representatives' scope to the other government branches (the parliament). Canada's delegates to the 27th Conference of the Conference of Parties, the main and largest international forum on climate change, held in Egypt from 6 - 18, 2022, included parliamentarians from both the House of Commons and the Senate.[905] Canada is not standing alone in this kind of whole-state approach. The United States officials who attended the same CoP 27 under reference included 24 members of Congress (including the famous and influential Speaker Nancy Pelosi of the House of Representatives).[906]

Benefits of having Heads of Government as States' Representatives

[902] Separation of power is a Constitutional doctrine that prevents the consolidation of governmental powers in a single entity. Learning from the experience of King George III, the political philosophers argue that consolidating power in a single person is the definition of tyranny. To prevent tyranny and [promote efficiency in government, the powers are shared among the legislatures, executive and judiciary. For further reading on this principle, see Josephine Spencer, ed. *Separation of Powers in the Federal Government: Overview and Perspectives* (New York: Nova Science Publishers, 2016).

[903] Armand de Mestral Hugo Cyr, 'International Treaty-making and Treaty Implementation' in Peter Oliver, Patrick Macklem & Nathalie Des Rosiersl, eds, The Oxford Handbook and the Canada Constitution (Online: Oxford University Press, 2017) 595 at 599.

[904] *Ibid*. Some scholars argued that the role is not exclusive – and that provinces have limited role in treaty negotiations.

[905] UN Conference on Climate Change: COP 27 in Egypt, online: https://www.canada.ca/en/services/environment/weather/climatechange/canada-international-action/un-climate-change-conference/cop27-summit.html#wb-auto-4 (accessed on 13 December 2023).

[906] Savannah Bertrand, U.S. Leaders at COP 27: Members of Congress and other U.S. Officials at the 2022 U.N. Climate Summit, online: https://www.eesi.org/articles/view/congress-at-cop27-tracker-members-of-congress-and-other-u.s-officials-at-the-2022-u.n-climate-summit (accessed on 13 December 2023).

The rise of the G20 from its ministerial level to the leaders' level in 2008 explains how matters affecting the existence and the functionality of states could be effectively decided by only heads of government or their representatives. The G20 was established in December 1999 to involve key emerging economies apart from the G7 countries in global economic governance and particularly to address the Asia and Latin American financial crises, but the G20 was operating at that time at the ministerial level.[907] In 2008 – 2009, when the global financial crisis hit, the G20 changed its structure to the leaders' level apparently because the global financial crisis of 2008 – 2009 was more globally impactful than the Asia and Latin American financial crises in the 1990s.[908] The decision-making power of the leaders enabled the G20, using the OECD structure, to advance policy and structural changes, among which was the establishment of the large forum of 145 taxing jurisdictions under the BEPS Inclusive Framework to address emerging issues in international taxation.

If the G20 were still operating at the ministers' level, there would be a delay in obtaining required approvals from respective heads of government, and the delay would affect the progress of the work.[909] With the G20 operating as a key institutional actor in the BEPS works, there was a considerable level of comfort that the BEPS would effectively address issues since the G20 is now operating at the leaders' level. For example, the United States and France reached a compromise

[907] Gordon Smith, "G7 To G8 To G20: Evolution in Global Governance" (2011) GIGI G20 Papers No 6

[908] Kirton, John, *G20 Governance for a Globalized World*, (Burlington: Ashgate Publishing Company, 2013) at 25 – 40; Rasmus Corlin Christensen & Martin Hearson, "The New Politics of Global Tax Governance: Taking a Stock a Decade after the Financial Crisis" (2019) 26:5 Rev Intl Political Economy 1068 – 1088; Richard Eccleston, *The Dynamics of Global Governance: The Financial Crisis, the OECD and Politics of International Tax Cooperation*, supra, note 672.

[909] By paragraph 10 of the G20's declaration of its inaugural meeting held in Washington on 15 November 2008, the leaders demonstrate their high decision-making power by giving instructions to their finance ministers. Rather than waiting for approvals to the finance ministers' resolution =, as it used to be before 2008, the finance ministers are being instructed directly. The leaders set action plans and give their respective finance ministers a timeline. See G20, *Declaration of the Summit on Financial Markets and the World Economy*, 2008, online: <http://www.g20.utoronto.ca/2008/2008declaration1115.html>

on the imminent trade war arising from France's Digital Service Tax because of their belief that the OECD's pillar one would effectively address the tax consequences of the digitalized economy.[910]

With the new status of the G20 as the forum of leaders, the G20 became a 'supreme body', which gives direction and instructions to its sub-level of finance ministers, central bank governors, and other external international institutions such as the OECD.[911] The OECD 2013 report on BEPS confirms that its drafting of the comprehensive fifteen action plans was at the behest of, or request of, to put it in a milder way, the G20.[912] The OECD's subsequent works on the fifteen action plans are regularly reported to the G20, suggesting that the G20's endorsement is needed to legitimize the OECD's work.[913] The decision-making power vested in the G20 leaders will enable the state-led forum proposed by this thesis to pursue the realization of the global stability variables effectively.

5.2.1.3 Competence

International taxation is a technical field in terms of its design and administration. It is also complex because it seeks to achieve considerable 'coherence' or standardization of rules that apply

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[910] See U.S. Department of the Treasury, Press Release, "Joint Statement from the United States, Austria, France, Italy, Spain, and the United Kingdom, Regarding a Compromise on a Transitional Approach to Existing Unilateral Measure During the Interim Period Before Pillar 1 is in Effect" (21 October 2021) online: <https://home.treasury.gov/news/press-releases/jy0419>

[911] *Ibid*.

[912] OECD, *Addressing Base Erosion and Profit Shifting* (Paris: OECD, 2013) at 5, 11, online: <https://read.oecd-ilibrary.org/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#page4> OECD, *Action Plan on Base Erosion and Profit Shifting* (Paris: OECD, 2013) at 11, online: <https://www.oecd.org/ctp/BEPSActionPlan.pdf>

[913] For example, the OECD's inaugural comprehensive action plans were submitted to the G20 leaders and the leaders endorsed the work at its meeting in St. Petersburg, Russia, held on September 6, 2013. See paragraphs 50 – 52 of the communique of the meeting. In a demonstration of its supremacy, the G20 leaders requested the OECD to send them the progress works on BEPS and recommendations. Paragraph 50 of the report states, in part, as follows: '(w)e look forward to regular reporting on the development of proposals and recommendations to tackle the 15 issues identified in the Action Plan and commit to taking the necessary individual and collective action with the paradigm of sovereignty taken into consideration'. See G20, G20 Leaders' St Petersburg Declaration, 2013, online: <www.g20.utoronto.ca/2013/2013-0906-declaration.html>

in different countries' tax systems through the mechanism of the network of bilateral tax treaties.[914] In acknowledgement of the technical nature of international taxation, the League deferred to the experts' recommendations – the academic experts, the four economists engaged in 1922, and the technical experts engaged in 1925 and 1927. The shared belief about the technicality of international taxation continues to the present period and is evident in the G20's decision to use the OECD platform to address emerging issues in international taxation when the global economic governance leadership shifted to the G20.[915]

The HICs leveraged their early intervention in designing ITR generally, and recently on BEPS issues, to politicize their expertise.[916] Their expertise enables them to have competitive advantages over the LMICs in negotiating bilateral tax treaties.[917] Significant numbers of tax treaties between the HICs and the LMICs are more beneficial to the HICs than the LMICs. Some of the LMICs, such as Zambia, make policy decisions that might not help them advance their revenue goals to seek admission to the global policy forum or facilitate unlikely foreign direct investment.[918] With the power of expertise, the HICs diffuse their standards to the LMICs through the OECD, which is constituted by them, to create global standards.[919]

Rasmus Corlin Christensen and his colleagues report how expertise, the complexity of international taxation, and limited resources limit the effective participation of some LMICs in the

[914] Steven A. Dean, "Neither Rules Nor Standards" (2011) 87:2 Notre Dame L Rev 537 at 542.
[915] Allison Christians, "Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20" *supra* note 577 19 at 26.
[916] Tim Bürtner & Mathias Thiemann, "Breaking Regime Stability: The Politicization of Expertise in the OECD/G20 Process on BEPS and Potential Transformation of International Taxation" supra note 694.
[917] Martin Hearson, "Transnational Expertise and Expansion of ITR: Imposing 'Acceptable' Standards (2018) 25:5 Review Political Economy 647
[918] Hearson imposing Standards, *supra* note at 122 – 125.
[919] On how expertise can be used to promote ideas, see Leonard Seabroke & Duncan Wigan "Powering ideas Through Expertise: Professional Global Tax Battles (2016) 23:3 J European Public Policy 357 at 359 – 360.

BEPS Inclusive Framework.[920] Many of the people Christensen and his colleagues interviewed complained that they could not move with the pace of the discussions in the Inclusive Framework. One interviewee described the plenary session of the Inclusive Framework as 'a room of approval where everything has been well prepared and orchestrated (…) the sauce has been made and the dish is served'.[921] Where it even seems that the negotiators from the LMICs have the required expertise, they face another challenge from the political actors of their home countries, who push them into negotiation without careful consideration of the impact of that negotiated framework on their economies.[922]

To address the issues around the expertise and complexity of the work, states' representatives in the state-led forum should have the expertise that is required to negotiate international taxation. In addition to this, the representatives should understand the relationship between international taxation and the global stability variables, as explained in Chapter One. The policy approaches, processes and outcomes would presumably be different if the experts understood the relationship between international taxation and the global stability variables. States' representatives should, therefore, comprise tax experts and other experts from related disciplines who can add value to the negotiation. Using Canada's treaty making process as an example, Laura Barnet states that the Canada Revenue Authority ('CRA') takes the leading role in negotiating tax treaties.[923] The deference to the CRA is obviously because of its expertise, but the CRA alone cannot properly participate under the state-led forum proposed in this thesis. While the CRA may take the lead role, Environmental and Climate Change Canada, for example, should

[920] Christensen, Hearson & Randriamanalina, "At the table Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations' *supra* note 33.
[921] *Ibid* at 11.
[922] *Ibid* at 13.
[923] Laura Barnett, *Canada's Approach to The Treaty Making Process* (Ottawa: Library of Parliament, 2021) 2 -3

also be in the forum to assist the CRA on how a proposed framework can impact Canada's climate financing needs.

The expertise of the LMICs in international tax has been growing at a considerable level, but they need to do more to compete effectively with the HICs. The LMICs can take advantage of several efforts put together by the OECD, the UN, the WBG and the IMF under the PCT.[924] The PCT has published five toolkits to enhance the LMICs' capacity to negotiate treaties and implement other international tax frameworks.[925] The UN also published a special purpose manual that can serve as a reference and guidance for the LMICs when negotiating treaties with the HICs.[926] The UN manual is an excellent resource material for both experts and non-experts.[927] It is more comprehensive than the toolkits published by the PCT. It explains – in a simplified manner – the technical provisions and fundamental principles of international tax and provides guidance on how to conduct negotiations of tax treaties.[928] The part of the manual that focuses on negotiation is relevant to this discourse. It advises a state not to negotiate tax treaties unless the state has a tax treaty policy, which documents the objectives of the state.[929] It recommends a wide scope of actors to be included in the negotiation team – the scope of the actors includes actors from the business

[924] See Platform for Collaboration on Tax, Who We Are online: <https://www.tax-platform.org/who-we-are> . The PCT was established in April 2016 as a platform where the four partner organizations can collectively strengthen domestic resource mobilization, especially for developing countries.
[925] *Ibid*. The PCT has published the following: a Toolkit on Tax Treaty Negotiation, Transfer Pricing Documentation, Taxation of Offshore Indirect Transfer Toolkit, a Toolkit for Addressing Difficulties in Accessing Comparable Data for Transfer Pricing Analyses, and Tools for the Assessment of Tax Incentives for Investments.
[926] United Nations, Manual for the Negotiation of Bilateral Tax Treaties Between Developed and Developing Countries 2019 (New York: United Nations, 2019).
[927] *Ibid*. The experts can use the manual as guide to refresh their knowledge while the non-experts can learn fundamental principles of international tax. It compares both the OECD and the UN provisions and suggests what the developing countries should opt for in differing cases.
[928] *Ibid*. It breaks down the negotiation process into three stages. The first stage is pre-negotiation, which entails, among other things, preparing draft treaties, understanding the economies and cultures of both countries, understanding their domestic tax legislation, and determining how both can work together. The second stage is the actual negotiation, and this includes recommended negotiation strategies that can be adopted. The last stage is post-negotiations, which explains what is to be done after the conclusion of the treaty negotiation.
[929] *Ibid* at 14. The objectives could be economic (growth of outbound and inbound investments) and non-economic (social and political ties).

community.[930] The LMICs can gain substantial knowledge from this manual to enhance their forum participation. In addition to the UN manual and other toolkits, the LMICs can also invest substantially in formal training of their public officials and expose them to the tax practices of the Global North. The LMICs' objective of enhancing expertise must be strategically designed to cover all issues under the global stability variables.

The LMICs' regional grouping can add value to the LMIC's expertise and how the expertise can be employed for negotiation purposes. Experts in a particular region can develop shared beliefs and understandings on a particular issue and they can jointly present the common view in the technical forum. Just like solidarity-like support given to the African region's proposal for the adoption of the UN as the coordinating institution for international tax cooperation, the collective view of a group of experts from a specific region may sway the minds of other members to accept that view.

Martin Hearson and his colleagues describe this form of social alliance among experts as 'socio-technical resources'.[931] Hearson and his colleagues argue that the African experts utilized the socio-technical resources through the African Tax Administrators Forum (ATAF) platform to include their opinion in the review of the Authorised OECD Approach (AOA).[932] AOA was published in 2010 by the OECD to provide guidance on how to attribute profit between the parent company and its PE in host countries.[933] The African experts contend that the design of the AOA shifts tax revenues away from their jurisdictions, but this contention was not taken seriously when the OECD's working party started reviewing the AOA in 2016.[934] The African experts in the

[930] *Ibid* at 20 – 25.
[931] Martin Hearson, Rasmus Corlin Christensen & Tovony Randriamanalina, "Developing Influence: The Power of 'the Rest' in Global Tax Governance' (2022) Review of International Political Economy 1 at 2.
[932] Ibid
[933] OECD, *2010 Report on the Attribution of Profits to Permanent Establishment* (Paris: OECD, 2010)
[934] Martin Hearson, Rasmus Corlin Christensen & Tovony Randriamanalina, "Developing Influence: The Power of 'the Rest' in Global Tax Governance' supra note 932.

working group collectively withheld their consent to the review of the AOA until their view was included in the review.[935] They succeeded in ensuring that the updated guideline states that it does not 'extend the application of the 'Authorised OECD Approach 'to countries that have not adopted that approach in their treaties or domestic legislation'.[936]

5.2.2 Relationship Between the Central and the Regional Forums of State Actors

The state-led forum that can consider the global stability variables in international tax policymaking should be an international forum. This does not, however, displace the need to have a similar forum at the regional level, provided the regional forum does not compete with the international forum. There should be a working relationship between the two forums in a way that the international forum can delegate to the regional forum the deliberation of issues that are more specific to that region. The outcomes of such regional deliberation will be reported to the international forum where all the parties can make decisions on them. I explain the decision-making of the international forum in detail in the next section. The regional forum can also initiate deliberation of their specific issues and later present them on the international agenda. The common attribute of these forums is that deliberation can take place in either of the forums, but the international forum should reserve the right to make decisions.

The regional state-led forum can be used by the low-and-middle-income countries (LMICs) to form a strong bloc to negotiate and advance their interests in the international forum.[937] The LMICs in a vulnerable region, like the African region, can set up their regional tax forum focusing on the African challenges. The African forum can initiate talks with other similar LMICs in other

[935] *Ibid*.
[936] *Ibid*.
[937] For further readings on the potentials of forming strong blocs in multilateral negotiations, see Jonathan R Strand & David P Rapkin, "Regionalizing Multilateralism: Estimating the Power of Potential Regional Voting Blocs in the IMF." (2005) 31:1 International interactions 15 and Amrita Narlikar, *International Trade and Developing Countries: Bargaining Coalitions in GATT and WTO*, 1st ed. (Florence, Routledge, 2003).

regions like Asia and Latin America on how to collectively form a strong voice that will be respected by and appealing to high-income countries (HICs). A combination of the LMICs' respective bargaining strengths can result in a synergized position that is acceptable to the HICs.[938] The strength of the LMICs' proposals, in terms of a network of intelligence and popularity, may encourage the HICs to consider the unique challenges of those regions and work together with the LMICs on addressing those challenges.

The LMICs should, however, be mindful that advancing broad objectives without any detail can affect the strength of the coalition. The broad objectives may be for the purpose of satisfying the diverse interests of the coalition members. Peter Drahos, a professor of international business regulation at the Australian University, argues that the adoption of broad objectives, lacking in detail, of the coalition of developing countries, known as the G77, in the context of trade negotiations is one of the reasons that affect the strength of that coalition in the United Nations Conference on Trade and Development.[939]

It appears the African Group in the UN had employed this strategy to achieve consensus in November 2022 on its resolution to adopt the UN as the main coordinating body of international tax cooperation.[940] The resolution of the African Group was premised on its conviction that the OECD, being an exclusive community, is unable to design an international tax framework that can

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[938] There are four sources of states' bargaining strengths in international negotiations. First, large domestic market power can even result in economic dominance of that state beyond its territory. Second, the commercial intelligence networks distribute and analyze the state's trade policy and performance. Third is the state's capacity to form a coalition between its state and non-state actors. Lastly, strong domestic institutions. See Peter Drahos, 'When the Weak Bargains with the Strong: Negotiations in the World Trade Organizations' (2003) 8 International Negotiation 79 at 82 – 84. There is the possibility that a single LMIC will not have all these powers. An LMIC can leverage the strength of the other states while providing its strength to the coalition.

[939] *Ibid* at 86 – 87.

[940] See Nigeria's revised draft resolution on the promotion of inclusive and effective international cooperation at the United Nations, Un Doc A/C.2/77/L.11/Rev.1. United Nations, General Assembly, 77th Session, 2nd Meeting, UN Doc A/C.2/77/L.11/Rev. 1; Mark Bou Mansour, "Live Blog: UN Vote On New Tax Leadership Role" Tax Justice Network (22 November 2022) online: <https://taxjustice.net/2022/11/22/-live-blog-un-vote-on-new-tax-leadership-role/>. Though the OECD states that were present at the United Nations expressed reservations about the workability of the African region's proposal, the proposal was consensually approved by all members.

provide their desired solutions.[941] The African Group adopted this resolution while the OECD had reached an advanced stage on its ground-breaking international tax design on tax consequences of the digitalized economy through the BEPS Inclusive Framework, of which the majority of the African states are members.[942] Despite their membership of the BEPS Inclusive Framework, the African Group pursued the option of this UN resolution – an indication that suggests that their membership of the BEPS Inclusive Framework does not yield any benefits for them.[943] The HICs, also the OECD member states in the UN, expressed their reservations about the resolution. The HICs contended that what the African Group requested of the UN was similar to what the OECD was doing and adopting the UN as the main coordinating might be counterproductive to the OECD's works on international tax reforms.[944] The LMICs in regions other than Africa supported the resolution, and consequently, the HICs also supported the resolution, making the resolution achieve a historic consensus.[945] The African region would have sought the understanding and the consent of similar LMICs in the other regions before presenting the proposal to the UN.[946]

The overwhelming support enjoyed by the resolution of the African Group might be the reason for the HICs' eventual support for the resolution. The HICs in the proposed international forum may need a relatively considerable degree of support and acceptability to be convinced that the proposal's subject matter was needed and better than the present situation. There are two case studies that show that the HICs may be willing to defer to the LMICs if the LMICs collectively

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[941] *Ibid*
[942] *Ibid*
[943] *Ibid*
[944] *Ibid*
[945] *Ibid*
[946] The statement of Alex Cobham, the Chief Executive of the Tax Justice Network, indicates that similar LMICs like the Latin American countries were motivated by the proposal of the African region to launch a similar regional consensus for effective international tax cooperation. See Nosmot Gbadamosi, "Will the U.N. Tax Convention Empower Africa?" The Africa Brief (30 November 2022) online: <https://foreignpolicy.com/2022/11/30/united-nations-tax-convention-africa-nigeria-oecd/>

work together to form a strong voice. The first case study is the negotiation of UN Article 12A on taxation of technical fees. The HICs in the subcommittee on Article 12A initially objected to the inclusion of this Article in the tax treaty model but they later deferred to the LMICs when the LMICs in the subcommittee collectively argued for the inclusion of the Article.[947] The second case study is the inclusion of Article 12B - which provides for taxation of incomes arising from the digitalized economy – in the UN tax treaty model. The LMICs' collective struggle is the pathway for the eventual inclusion of the Article, even when the HICs voted against the Article.[948]

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[947] Rasmus Corlin Christensen, Martin Hearson & Tovony Randriamanalina "At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations, *supra* note 33. Christensen and his colleagues examine how the LMICs' preference for taxation of technical fees was incorporated into the 2017 UN model tax treaty as Article 12A with the support of the HICs who coordinated the activities of the subcommittee assigned to draft Article 12A. Before 2017, Article 12 in the UN tax treaty model only covered taxation of royalty payments made by a resident of a source country to another person residing in the other contracting state (the residence country). See Carlo Gabarino, 'The Tax Treaty Implications of the Remuneration as Royalties of Intellectual Property and Intangibles' (2018) 29:3 European Bus L Rev. 345. Article 12 does not expressly cover payment arising from technical services. However, some countries interpreted "information concerning industrial, commercial or scientific experience" in the definition paragraph of Article 12 (that is, Article 12(3)) to include specific technical fees. See the Commentary on the United Nations Model Double Taxation Convention between Developed and Developing Countries (New York: United Nations, 2017) at pp 318 – 320. The implication of the argument that Article 12 does not include technical fees is that the LMICs will not be able to tax these incomes in the current digitalized economy because the technical fees will be taxed as business profit under Article 7. Taxation of business profit under Article 7 requires a permanent establishment (a physical presence in the source countries). The current digitalized economy enables multinationals to operate in source countries without having a physical presence. The subcommittee on Article 12A had both the HICs and the LMICs, but it was headed by a HIC (specifically, an OECD member). The interview conducted by Christensen and his colleagues established that some of the LMICs had been used to include the taxation of technical fees in their tax treaties before the negotiation of Article 12A even started in the UN. The LMICs vehemently and collectively argued for the inclusion of Article 12A. Still, the HICs in the UN Tax Committee and the subcommittee opposed the inclusion of Article 12A for being too broad. The conflict between these competing interests was resolved in favour of the LMICs mainly because of the willingness of the OECD member, who led the subcommittee, and the other HICs in the UN Tax Committee to accommodate the interests of the LMICs. The lesson here is that the HICs might not have deferred to the LMICs if there was no robust and collective voice from the LMICs.

[948] Bruno Peeters & Sharon Waeytens, 'The United Nations' Response to the Digitalization of the Economy: The Introduction of Article 12B into the UN Model Tax Convention' in Liber Amicorum & Korving J, eds, *Taxes Crossing Border (and Tax Professors too*) (Maastricht: Maastricht University Press, 2022) 249. Article 12B, which is an alternative approach to the taxation of incomes arising from the digitalized economy, adopts the withholding mechanism, which allows source countries to tax incomes on automated digital services on a gross basis. Andres Baez Moreno, 'Because Not Always B Comes after A: Critical Reflections on the New Article 12b of the UN Model on Automated Digital Services' (2021) 13:4 World Tax Journal 501. The LMICs' struggle for negotiation of this Article became evident with the proposal of Ranjat Bansal, India's representative in the UN Tax Committee as of 2020. The summary of Ranjat Bansal is that the OECD's works on tax consequences of a digitalized economy do not protect the interests of developing countries. See United Nations Economic and Social Council, the United Nations Committee of Experts on International Cooperation in Tax Matters Report of the Twentieth Session, Document Number E/2021/45 – E/C18/2020/3 (New York: United Nations, 2021) at 18. Read from paragraph 102. Ranjat Bansal's proposal for simplification (the use of a withholding mechanism) of the digital tax framework was supported by Jose Troyal, the representative of Ecuador, a similar developing country like India. Ranjat Bansal's proposal shares the

5.2.3 Decision-making Procedure

Decision-making is important for at least two reasons. First, the decision represents the method of communication to the public about the position – and the timing of that position - of the state-led forum.[949] Since taxation has multilateral effects affecting broad categories of stakeholders, the decision becomes the method through which the public becomes aware of how their interests may be affected by the collective decision of the forum. Second, the decision is an efficient tool for the evaluation and implementation of the targets of the forum. Stakeholders can use the decision as the basis on which states' performance can be evaluated. Assuming the forum decided that by 2030, the PE threshold in all tax treaties will be reduced to cede greater taxing rights to source countries. The stakeholders can measure states' performance level towards achieving the PE threshold reduction target by using the decision as the yardstick for comparison.[950] The more important question is what the best approach to decision-making in this kind of international organization is.

The two possible methods of decision-making are majority-based and consensus-based approaches.[951] The majority-based approach is a procedure that uses the democratic principle of

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same view with the UN Tax Committee's comments on the OECD's proposed two-pillar solution to the tax challenges of the digitalized economy. See the United Nations Committee of Experts on International Cooperation in Tax Matters, 'Tax Consequences of the Digitalized Economy – Issues of Relevance for Developing Countries' Document Number E/C 18/2020/CRP. 25. the UN Tax Committee at its 20th session virtually held between 22 June and 31 July 2020 set up a drafting committee headed by Ranjat Bansal and Carlos Protto, the Argentina's representative. The commentary on Article 12B and the report of the UN Tax Committee show that the large minority of the Committee disagreed with Article 12B.

[949] Steven R. Grenadier, Andrey Malenko & Nadya Malenko, 'Timing Decisions in Organizations: Communication and Authority in a Dynamic Environment' (2016) 106:9 American Economic Rev 2552.

[950] The periodic peer review of BEPS Action 13 on Country-by-Country reporting standards is an example of how stakeholders can use the decision to measure the implementation progress of an agreed position. For further reading on how the peer review is being used by the OECD, see OECD, County-by-country Reporting – Compilation of 2023 Peer Review Reports: Inclusive Framework on BEPS: Action 13, online: https://www.oecd-ilibrary.org/sites/21bd1938-en/1/1/1/index.html?itemId=/content/publication/21bd1938-en&_csp_=1e19bd9ad913569a39523b3bf891b991&itemIGO=oecd&itemContentType=book (accessed on 15 December 2023)

[951] Santoso Wibowo & Hepu Deng, 'Consensus-based Decision Support for Multicriteria Group Decision Making' (2013) 66 Computers & Industrial Engineering 625

the majority – where the majority views are adopted by the organization but the minority are also allowed to express their views - to determine the outcome of the organization.[952] The majority could be a simple majority (a percentage above half) or a super majority (starting from three-quarters of the votes).[953] The voting system is the salient feature of the majority-based approach – whether simple or super majority -.[954] The votes may be of equal weight, or some votes may have more weight than other votes. The consensus-based approach provides an alternative to the voting system. It involves consensus building, negotiation and compromises among members to reach an agreement on common issues.[955]

Given the overriding objective of this thesis – consideration of the global stability variables in international tax policymaking by policymakers – it is recommended that the state-led forum adopt a consensus-based approach for its decision-making. The consensus-based approach will provide equal opportunity to all states in the forum to participate in making decisions that affect their interests – and to that extent, the approach encourages inclusivity and voice recognition.[956] Allowing states to express their views on issues in the forum does not necessarily mean that their views must be adopted by the forum: acceptance of those views is subject to how appealing they are to other members.[957] The consensus-based approach thrives on negotiation, which requires some degree of flexibility, compromise and concession.[958] Each state will have to launch a strong

[952] *Ibid*.
[953] I am not making a case for adopting a voting system where the principles of majority are applicable. For further reading on the historical development of rules of majority, see Melissa Schwartzberg, *Counting the Many: The Origins and Limits of Supermajority Rule* (New York: Cambridge University Press, 2014)
[954] *Ibid*
[955] Santoso Wibowo & Hepu Deng, 'Consensus-based Decision Support for Multicriteria Group Decision Making, supra note 951.
[956] Darcy K. Leach, 'When Freedom is not an Endless Meeting: A New Look at Efficiency in Consensus-based Decision Making' (2016) 57 Sociological Quarterly 36
[957] *Ibid.*
[958] Suren Movsisyan, 'Decision Making by Consensus in International Organizations as a form of Negotiation' (2008) 1:3 21st Century 77

advocacy for its view and make it appealing to other states. The LMICs in a particular region can further employ the regional group to lobby other comparable states and the HICs to accept their positions. The LMICs must be ready to compromise on some of their positions to get the support of other states on other issues that are more important to them than the foregone positions.

I do not feign ignorance that a consensus-based approach may generate conflicting views, and resolving the conflict between competing interests can limit the efficiency of the approach. Pluralism theory provides useful guidance on how conflicting values can be understood and addressed.[959] John Kekes, professor emeritus of political philosophy, provides some insights on the six theses of the pluralism theory in his famous and influential 1993 book titled 'The Morality of Pluralism'.[960] Though Kekes' analysis of the theory is within the context of ethics and morality, the pluralism theory's significant arguments apply to other areas of study, including the study under reference.[961]

First, the pluralism theory argues that there is a plurality (multiplicity) of values (or views), and these values may sometimes be mutually exclusive – acceptance of one leads to rejection of the other.[962] Pluralists believe that none of the conflicting values is overriding. The central question they ask is how to find a reasonable way to resolve the conflict among the competing values.[963] This is what the pluralists describe as plurality and conditionality of values. The second thesis of

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[959] J. Donald Moon, *Constructing Community: Moral Pluralism and Tragic Conflict* (Princeton: Princeton University Press, 1993)

[960] John Kekes, *The Morality of Pluralism*, (Princeton: Princeton University Press, 1993)

[961] The pluralism theory is used to evaluate different stakeholders' perspectives in environmental impact assessment, see Lydia Cape et at, 'Exploring Pluralism – Different Stakeholders Views of the Expected and Realised Value of Strategic Environmental Assessment' (2018) 69 Environmental Impact Assessment Rev 32. Robert F. Garnett and his colleagues edit collection of articles that rely on the pluralism theory to undertake an extensive inquiry into global economies, see Robert F. Garnett Jr, Erik Olsen & Martha Starr, eds, *Economic Pluralism* (New York: Routledge, 2010)

[962] John Kekes, *The Morality of Pluralism*, supra note 960.

[963] *Ibid*. This is where the pluralists disagreed with the monists. The monists also believe in a plurality of values that may be in conflict with one another, but they argue that one of the conflicts will be overriding. This implies that the overriding value will take precedence over other values. Identifying overriding value is the approach adopted by the monists to resolve conflict in the competing values.

the pluralism theory is the unavoidability of conflicts. This means that there is a greater likelihood that the values will often be incompatible and incommensurable.[964] For this reason, there will always be conflict among the values since they cannot co-exist. The third thesis provides a reasonable way of resolving conflicts. The pluralists argue that parties may have some shared values which are more important to them than the values that divide them.[965] The parties will need to reflect on those shared values and the effect the conflict may have on those values. Reflection on shared values will change the perspectives of the parties. The need to sustain the shared values will guide the parties on the best approach to adopt in resolving the conflict.[966] Kekes cautions that this approach only 'gives a manner of thinking, not conclusions reached by means of it'.[967]

The fourth thesis of the pluralism theory is that as plural as values are so also the possibilities (choices) the parties can compare and rank to resolve the conflict.[968] Comparing these possibilities requires three conjunctive conditions: a. the tradition of the society in which the parties live must provide many possibilities they can choose from, b. the parties should develop great imagination to understand these possibilities, and c. enlargement of freedom that enables parties to deploy their imagination in appreciating the possibilities and how reasonable the possibilities can be realized.[969] The fifth thesis is to draw limits on the importance attributable to a value or combination of values.[970] Pluralists draw this limit by arguing that there is no higher value that can override or defeat other values.[971] The pluralists believe that some values may be more important than others but that will not justify their override over other values.[972] The last

[964] *Ibid* at 21.
[965] *Ibid* at 25
[966] *Ibid*
[967] *Ibid*
[968] *Ibid* at 27 - 30
[969] *Ibid*.
[970] *Ibid* at 31 – 34.
[971] *Ibid*
[972] *Ibid*

thesis of the theory is that parties should construct a reasonable hierarchy for the possibilities which society has provided for them.[973] Construction of the hierarchy should be based on the kind of society they want to continue to live in – and this means that the shared interests determine the hierarchy of possibilities.[974] The hierarchy ultimately determines which among the several possibilities should be pursued.

The summary of Kekes' analysis is that conflicting values can be mutually resolved where shared values are more important to the parties than those in conflict. The shared values will help the parties to construct a hierarchy of choices (possibilities) and choose the value that most aligns with the shared values. This can perfectly apply to the decision-making in the stated-led forum. It is envisaged that states will have different perspectives on addressing international tax problems. As argued by the pluralists, the forum should first accept that there is no overriding perspective. This preliminary point gives all states, particularly the weaker states, a sense of belonging and knowledge that their views will be considered in the same manner as the views of the stronger states. Drawing from the CSM theory, the views and values of each state are reflections of its identity construction, which may be incompatible with the identity construction of other states.

The resolution of the conflict between these identities' construction will be different from how the conflicting views of the developed and the developing states were resolved at the 1946 London conference.[975] As explained in Chapter One, the developing states drafted at the 1943 Mexico conference a tax treaty model that gave stronger taxing rights to source countries (the major provision through which ceding greater taxing rights to source countries was achieved was the removal of the PE clause).[976] They were able to achieve this feat because of the absence of the

[973] *Ibid* at 36.
[974] *Ibid*
[975] Doron Narotzki, "Tax Treaty Models - Past, Present, and a Suggested Future" (2016) 50:3 Akron L Rev 383 at 385
[976] *Ibid*

developed countries, which were engaged in the Second World War. The developed states attended the 1946 London conference, which was held after the war, and replaced the 1943 model (known as the Mexico model) with another model (popularly known as the London model), which gave stronger taxing rights to the developed states.[977] This approach is in stark contrast with the pluralism theory as it suggests that the developed states' view had a higher value and could override the developing states' views.

To prevent a similar propensity of treating a position as superior to other positions, the state-led forum should admit, as its shared values, that international tax actors must consider global stability variables in policymaking. This shared value fits into the framework of the pluralism theory as the shared value does not dictate what the actors should do but what they should think of when negotiating tax instruments. Kekes points out that shared value only 'gives a manner of thinking, not conclusions reached by means of it'.[978] Let us assume that the following two conflicting proposals are before the forum: a. the UN-like simplified approach to taxation of incomes arising from the digitalized economy that is based on withholding tax on a gross basis and which does not require significant economic presence and b. the OECD-like complex approach that requires meeting a high threshold of significant economic presence to tax incomes on net basis. The actors' consideration of the global stability variables as the shared value will inform them to construct a hierarchy of possibilities (choices) and their effects on the global stability variables.[979] There is a greater probability that the actor will settle for the choice that has positive impacts on the peace and sustainability of states and the human rights of people living in those states.

[977] *Ibid*
[978] John Kekes, *The Morality of Pluralism*, supra note 960.
[979] Ibid

The last point to note about consensus-based decision-making is that it protects and preserves the underlying objective of the ITR. The normative underlying objective of international tax cooperation should be designing tax instruments mutually beneficial to both the HICs and the LMICs. Considering the global stability variables in policymaking will help policymakers think along this line and work towards achieving the objective. The ITR may, however, fail to achieve this objective if it considers another option of decision-making, such as the voting procedure. Since, under the voting procedure, the majority votes determine the outcome of the proceeding; the minority may feel aggrieved or unwelcome. The consequence of the grievances may be insignificant in the case of the LMICs, as they have little power to determine the contour of the regime. However, it is of great consequence if the developed states belong to the minority group. The minority group can frustrate the realization of the objective.

5.3 The State Actors and the Critical Sensemaking Theory

This thesis' argument is that the fundamental problem of international taxation is how the actors construe the international taxation problem – is the problem construed strictly as an economic problem, or are other variables taken into consideration? It is argued in Chapter One that international tax actors should construe international taxation problems beyond tax and economic issues, considering the context in which the international taxation regime was formed. It suggests that in the course of finding solutions to the tax problems, the actors should consider issues that affect the functionality and the existence of participating states. To achieve this, the actors' perspectives of international tax should be broad to include the global stability variables in policymaking. I argue in this chapter that state actors should constitute the supreme forum for international tax cooperation. In that case, the requirement of a broad perspective applies to the state actors. This is the reason why the competence requirement for state actors is not limited to

tax issues – it is extended to other relevant areas, such as the illustration given that Canada's environmental agency should complement the CRA's role in negotiating tax treaties.

According to Jean Helms Mills and his colleagues, the summary of the CSM theory is that the identity of an actor or group of actors influences their sensemaking and approach to addressing problems.[980] The actors ask the question of 'who we are' and 'how we do things', and they get directions from answers to those questions.[981] Since the actors' response to the problem is a reflection of the answer to the preliminary question, we need to work on the identity of international tax actors to achieve the global stability variables. It will be impossible for the actors to tailor their perspectives towards global stability variables in an exclusive forum, and if perhaps they do so, the consideration will be limited to the actors in that forum. This is why this chapter argues for a truly inclusive forum that is not measured in economic terms but by geographic locations of the participating states.

When the time to ask the question of 'who we are' and 'how we do things' arises, the response will reflect the identities of state actors in the forum. The state actors will be guided by the global stability variable framework in answering the question of 'how we do things'. The focus will be more on how to fairly distribute the global pie to guarantee the continued existence of participating states, particularly the LMICs. With a shared understanding of the global stability variables, there will be a seamless process to achieving a consensus-based compromise. The tax framework will be drafted in a way that enables a state to earn its legitimate tax claim, no matter how insignificant it may seem to be to some other states, on activities within its jurisdiction. When there are concerns from the LMICs about restrictive provisions in tax instruments that constrain their economic development, the shared understanding that tax instruments must align towards the

[980] Mills, Thurlow & Mills, "Making Sense of Sensemaking: The Critical Sense-Making Approach, *supra note 155.*
[981] *Ibid*

global stability variables will persuade the HICs to consider how to address the concerns mutually beneficially. The LMICs should also appreciate that they will need to make compromises by foregoing some of their claims for the most important ones. The shared understanding will persuade both the LMICs and the HICs to shift ground in their claims during negotiation.

The design of the global stability variable framework is to prevent a situation where the powerful actors might want to influence the sensemaking process of the weaker actors. The critical component of the CSM theory recognizes that organizational rules or formative contexts tend to dominate or dictate the meaning of self-identity to the actors.[982] The HICs may want to use either diplomatic pressure or ideational power to push their standards as the best response to 'how we do things'. Under the second property of the CSM – the retrospective[983] - which enables us to understand better how actors rely on past events to address present problems, the state-led forum can choose from the previous DTA system whatever aligns with the global stability variables. Another component of the CSM is 'focus on cues', which explains how stronger actors can influence weaker actors to focus on specific options even when those options are not in the interests of the weaker actors.[984] The state-led forum will also resist any attempt by the stronger actors to influence it or the weaker parties to focus on cues (options) that do not support the global stability variables.

The CSM theory also states the identity construction of actors can be influenced by the enactive environment, where the actors operate, and the social construction, which is the rules, routine, symbol and language of the actors' society.[985] Jean Helms Mills and his colleagues give an example of how the rules of the British House of Commons use of 'honourable' shapes the

[982] *Ibid*
[983] *Ibid*
[984] *Ibid*
[985] *Ibid*

conduct and sensemaking process of members of the House of Commons.[986] Just like the example of the British House of Commons, the global stability variables framework will constitute the 'rules, routine, symbol and language' of the state-led forum. When these rules are integrated into the state-led forum, the forum becomes the ideal 'enactive environment' that will shape the state actors' perspectives towards the existence and functionality of states. The last property of the CSM theory – ongoing – creates a precedent or a past event from which the actors can draw cues to address present problems.[987] If the state-led forum is guided by the global stability variables in negotiating a framework, there will be a certainty that its subsequent work on international tax will not derail from the ought-to-be goals because future actors will take cues from the previous work.

The propensity of the HICs to influence or determine the paradigm of the sensemaking process as powerful actors is probable, considering the historical bipolar division and the longstanding tension between the HICs and the LIMCs in international rule-making. While delivering his speech at the 1982 Third World Lecture in New Delhi, India, the former president of Tanzania and famous anti-colonial activist, Julius Nyerere, described the Third World as recipients but not participants in international rule-making.[988] Nyere's definition of the Third World as being synonymous with 'underdevelopment, technical backwardness…and poverty' clearly depicts the economic situations of the LMICs.[989] The common features in the categories of states self-identified or described as Third World and the LMICs, which are the subjects of this thesis, are two. First, both categories relatively have lower income and economic developments when compared to the developed states. Second, the majority of these states are former colonies

[986] *Ibid*
[987] *Ibid*
[988] See President Julius Nyere's Address when receiving the Third World Prize in H.E Shridath S. Ramphal & Indira Gandhi "Third World Lectures 1982: South-South Option" (1982) 4:3 Third World Quarterly 433 at 434
[989] *Ibid*.

of the developed states, and whose economic interaction with the international norms have been impacted by the colonialism.[990] With these striking similarities, the relevant part of TWAIL theory offers interesting contributions to safeguard the sensemaking process from being hijacked by the HICs.

TWAIL is a conscious movement that contests the generalization of international norms under the guise of promoting global order without incorporating the unique values of the Third World because the generalization is regarded as the consequence of imperial expansion.[991] Originating from the 1955 Bandung conference, the TWAIL theory has developed to become a decentralized network of thought with no precise and dominant framework but the theories share common concerns and interests.[992] The common thread in TWAIL work is how the relevant perspectives of the Third World can be incorporated into or complement the international economic order.[993] The theory does not seek abandonment of the existing international economic legal order or its substitution with the approaches of the Third World. As rightly stated by James Thuo Gathi, a professor of international commercial law and one of the conveners of the contemporary TWAIL, the theory rather seeks, among other objectives, to 'combine egalitarian values of Third World and Western international legal, ethical and political norms rather than relying on dominant narratives that reinforce the hierarchical or narrow aims of either'.[994]

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[990] *Ibid*.

[991] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) at 32; Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective" (2005) 43:1 & 2 Osgoode Hall LJ 171.

[992] Makau Mutua, "What is TWAIL" [2000] 94 Am Soc'y Int'l L Proc 31. Makau Mutua argues that TWAIL seeks to achieve three objectives. First, understanding of how international law is used to create international norms and international institutions to subordinate non-Europeans. Second, to present an alternative approach that will complement the present international law system. Third, to eradicate the conditions of underdevelopment in the Third World.

[993] *Ibid* at 36.

[994] James Thuo Gathi, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography" (2011) 3:1 Trade L & Dev 26 at 40.

Two of the TWAIL's central themes are relevant to the participation of the LMICs in the state-led forum. First, TWAIL urges the resistance of the universalization of rules that are exclusively made by the European states.[995] TWAIL challenges the rules defining sovereignty and what states should be included as part of the 'family of nations' just like the critical race theory challenges the rules excluding racialized peoples from the group of 'family of man'.[996] TWAIL contends that those rules are an extension of colonial confrontation between European and non-European states, under which the European states are regarded as the only sovereign states.[997] On account of the colonial confrontation, only the sovereign states can make the rules, and the rules should be adopted by non-sovereign states as universal norms.[998] TWAIL sees international law as a medium through which the rules made by the European states are adopted as the guiding framework for the participation of European and non-European states in the international community.[999] TWAIL, therefore, contends that the Third World must participate in the rule-making process.[1000] The implication of involving the Third World is that the process will not retain the rules exclusively made by the European states.[1001]

As earlier argued, this thesis does not propose how the taxing rights should be allocated to source and residence countries. It focuses instead on the actors' perspective and understanding of international tax problems. A state-led forum in which actors' perspectives are tailored towards the global stability variables cannot address issues affecting the existence and the functionality of

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[995] *Ibid*

[996] E. Tendayi Achiume & Devon W. Carbado, "Critical Race Theory Meets Third World Approaches to International Law" (2021) 67:6 UCLA L Rev 1462 at 1466.

[997] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law supra* note 991.

[998] *Ibid*.

[999] Bhupinder Chimini, "Third World Approach to International Law: A Manifesto" in Antony Anghie et al, eds, *The Third World and International Order: Law, Politics and Globalization* (Leiden: Brill Academic Publishers, Martinus Nijhoff, 2003) 47.

[1000] *Ibid*

[1001] *Ibid*

participating states without allowing the affected states to participate in defining the guiding rules. The powerful actors in that forum cannot not also interfere with or influence the sensemaking process of the LMICs, by any attempt to generalize their previous approaches of addressing the double taxation problem under the guise of promoting global order. As TWAIL scholars are not condemning the Western approach or substituting it for another one, the state-led forum can borrow from the HICs' previous experience to the extent that it is informed by the global stability variables.[1002]

The second way in which TWAIL's themes are relevant to the state-led forum is the issue of effective inclusivity without any institutional or structural constraints.[1003] TWAIL condemns what I describe as 'hierarchical inclusivity' where a group of a few states are ranked higher than other participating states in a single forum.[1004] The structure of the UN is used as an example to explain how the institutional structure can privilege the powerful actors above others.[1005] The Security Council arm of the UN is an exclusive forum of five permanent members and ten non-permanent members who are elected from the General Assembly.[1006] The Security Council has the primary responsibility of carrying out the main objective of the UN charter in maintaining international peace and security and acts on behalf of the General Assembly, which is constituted by 193 participating states.[1007] The designation of five countries as permanent members of the Security Council creates a hierarchy of class that ranks above the non-permanent members of the

[1002] James Thuo Gathi, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography" *supra* note 994.
[1003] E. Tendayi Achiume & Devon W. Carbado, "Critical Race Theory Meets Third World Approaches to International Law" supra note 996 at 1471.
[1004] Makau Mutua, "What is TWAIL, supra note 992 at 37.
[1005] *Ibid*
[1006] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7. Article 7 creates the General Assembly and the Security Council among other organs. The permanent members of the Security Council are China, France, Russia, United Kingdom and United States. See Article 23.
[1007] *Ibid*. See Article 24.

Council in the first case and the remaining members of the General Assembly.[1008] It is interesting to note that members of the Security Council are also members of the General Assembly, and that gives the permanent members a 'double-decker' opportunity to participate in matters before the UN at two levels.[1009]

This thesis advocates for effective inclusivity, where the state-led forum is constituted by all the participating states and regarded as the supreme body.[1010] Inclusivity extends to the right to host periodic meetings, the means of communication, and representation in the smaller group that might be created for administrative purposes. In addition to inclusivity, the thesis argues that states' representatives should have the necessary capacity and competence to participate in the forum.[1011] The creation of the Conference of Parties as the supreme body to address climate change issues through the UN legal framework signals that a similar forum, such as the kind this thesis advocates, can also be established in a manner that hierarchical issues between the General Assembly and the Security Council will not affect it. The description of the Conference of Parties as the supreme body implies that matters on climate change end with it. In that case, the Security Council cannot interfere with its process. Modelling the state-led forum after the Conference of Parties, together with the qualities addressed in this thesis, takes care of the major argument of the TWAIL on effective inclusivity of the Third World countries in international law.

[1008] *Ibid*. The permanent role also confers on them the privilege to continually be in charge of the specific matters assigned to the Security Council. The Security Council has specific powers to address issues on pacific settlement of disputes under Chapter VI, actions to threats to the peace, peace breaches, acts of aggression under Chapter VII, a regional arrangement under Chapter VIII, and an international trusteeship system under Chapter XII.

[1009] By Article 24(3), the Security Council shall send annual and special reports to the General Assembly for consideration. In that instance, the Security Council will be participating in evaluating its works, a situation similar to acting as a judge in one's case.

[1010] The inclusivity also takes care of concerns on the legitimization and legalization of the institution. See Sol Picciotto, "Constitutionalizing Multilevel Governance?" (2008) 6:457 Oxford J 457

[1011] President Nyerere's address also reiterates the need for the Third World to properly develop its competencies to participate in the international community. See H.E Shridath S. Ramphal & Indira Gandhi "Third World Lectures 1982: South-South Option" supra note 988.

5.4 Non-State Actors

The business community and the non-governmental organizations will constitute the group of non-state actors. These actors have had significant impacts on global economic and tax governance over the years, and those impacts have led to reforms that are still helpful. The contribution of these actors will greatly complement the state actors' work on the global stability variables. The non-state actors will act as observers in the state-led forum – and in some cases, they may have direct intervention in the proposed works, particularly when the works are published for public comment. The remaining part of this section discusses what should be the interplay between these non-state actors and the state actors.

5.4.1 The Business Community

I address the business community's involvement in the state-led forum under three subsections. This sub-section provides a general overview of the business community's contribution to international taxation, using the ICC as a case study. I take this further in the next sub-section to provide justification from different literature for the inclusion of the business actors in the state-led forum. The last subsection explains how the business actors, particularly those from the LMICs, should undertake their sensemaking process to assist their state actors and the debate on the global stability variables.

The business community is an organized group of multinationals and private sectors whose activities continue to affect the paradigm of global economic governance. Since its establishment in 1919, the International Chambers of Commerce (ICC) remains the largest business community in the world. The neoliberal paradigm does not discount the value of the business community as an influential actor in world affairs.[1012] The business community is one of the major drivers of

[1012] Helen V. Milner, "Power, Interdependence, and Nonstate Actors in World Politics in Helen V. Milner & Andrew Moravcsik, eds, *Power, Interdependence, and Nonstate Actors in World Politics* (Princeton: Princeton University, Publishers 2009) 3

globalization.[1013] It has an interest in policies and laws affecting globalization because businesses are directly impacted by those policies.[1014] In some cases, its interests may have a direct impact on the policies of the host countries, especially if the host countries are poor.[1015]

Steven Hymer's criticism in 1972 of the multinationals' behaviour and motivation in developing countries remains a good reference in this discourse.[1016] Hymer argues that MNC activities in foreign countries promote the interests of the advanced countries at the expense of the developing countries, and thus led to the 'Law of Uneven Development'.[1017] The MNCs were seen by developing states as agents of advanced economies to promote imperialism.[1018] This perception, however, changed in the 1970s when the MNCs started investing in foreign countries under the pressure of increasing international cooperation and disintegration of the value chain into separable entities across international borders for efficient manufacturing, transfer pricing and international competition purposes.[1019] Developing countries then began to compete for inward foreign direct investment for sustainable development and transfer of technical knowledge.[1020] Notwithstanding the change in the perception of the MNCs' purpose in host states, the MNCs' allegiance to their home countries will always be stronger than the allegiance to the host state. The MNCs' shift to business purpose aligns with the tax policies of the MNCs' home states. It enables the home states to impose tax on the global income of their MNCs irrespective of where the incomes are made.

[1013] *Ibid*
[1014] Alan M. Rugman & Jonathan P. Doh, *Multinationals and Development* (London: Yale University Press, 2008) 2
[1015] *Ibid*
[1016] Hymer, S., "The Multinational Enterprise and the Law of Uneven Development" in J. Bhagwati, ed, *Economics and the World Order* (London: Macmillan, 1972)
[1017] *Ibid*.
[1018] *Ibid*.
[1019] John B. Davis, "Transnational Corporations: Dynamic Structures, Strategies and Processes" in O'Hara, ed, *Global Political Economy and the Wealth of Nations: Performance, Institutions, Problems, and Policies* (London: Routledge, 2004); 57) 140
[1020] *Ibid*

The MNCs have a substantial influence on the tax policies of their home countries, as is in the case of the conclusion of tax treaties of developed countries with developing countries.[1021] Some of the signed tax treaties with developing countries were initiated by the MNCs, and some of the requests for tax treaties by the developing countries that were either rejected or put in abeyance by the developed countries have been abandoned because their MNCs were not convinced that the proposed treaties would advance their business goals.[1022] The business community can directly be involved in international tax policymaking, as it was in the era of the League.[1023] The League admitted it received generous assistance from the business community in drafting rules of methods of allocation of income to a permanent establishment.[1024]

The ICC has been a significant stakeholder in all the processes leading to the design of international taxation policies from the formative period when the idea of tax cooperation began at a global level. The ICC's midwife role in the design of the 1920s deliberations did not go unnoticed.[1025] The lofty idea of elimination of double taxation was birthed, nurtured, processed and sold to the League by the ICC.[1026] The ICC maintained a close relationship with the League and appointed delegates to meetings of the League's Committee of Experts on Double Taxation and Tax Evasion. The relationship was well noticed to the extent that some people believed that the ICC's visible presence would have influenced the deliberations.[1027]

[1021] Hearson Imposing *Standards: The North-South Dimension to Global Tax Politics*, supra note 16 at 59 -63
[1022] *Ibid*.
[1023] Mitchell B. Carroll, *Taxation of Foreign and National Enterprises: Methods of Allocating Taxable Income* (Geneva: League of Nations, 1933) 9
[1024] *Ibid*
[1025] Sol Picciotto, "The Construction of International Taxation" In Dezalay, Y., & Sugarman, D., eds, *Professional Competition and Professional Power* (London, Routledge, 1995) 25 at 32-33.
[1026] Sunita Double Taxation and the League, *supra* note 10 at 85. ICC was not the only organization concerned with double taxation's effects at that time. The International Intermediary Institute and the Committee for the Advancement of International Law made some efforts to address it, but the ICC's role was more prominent.
[1027] *Ibid*.

Jogarajan dismisses the view that the ICC influenced the works of the League's Technical Experts.[1028] Relying on the League's archival materials, the ICC's resolutions and the Technical Experts' resolution, she concludes that that there was no principle that was influenced by the ICC. She, however, acknowledges the ICC's roles and contribution of practical advice and experience on double taxation but qualifies those roles as limited, non-influential and not automatic.[1029] According to her, the ICC's involvement in the League's work only contributed to broad acceptance of the work.

It may be true that no single reference in the League's archives suggests or affirms that the ICC imposes or influences a particular principle on the League; the absence of such evidence cannot also be a conclusion that there was no influence whatsoever. The work might have been influenced by other means than written resolutions and proposals. The singular act that the ICC had started the work on double taxation before the League and collapsed its structure to work with the League confers a first-mover advantage on the ICC.[1030] The broad acceptance of the League's work because of the ICC's involvement and endorsement implies that the public would have been skeptical about the credibility of the work if the ICC had not been involved. This already gives the ICC a position advantage that could have been used to achieve parts of their agenda, which was

[1028] *Ibid* at 95.
[1029] *Ibid*. She argues that the ICC's recommendation for special treatment of taxation of shipping and airline companies and exclusive residence taxation for these companies was accepted by the Technical Experts because it was also proposed by the Technical Experts. It is, therefore, a case of coincidence and not influence.
[1030] *Ibid* at 85 -90. A year after its formation in 1919 by the efforts of industrialists, financiers, and traders from the United States, Belgium, France, Italy and Britain, the ICC passed a resolution in Paris in 1920 requesting Governments to address issues and effects of double taxation on cross border businesses. The ICC did not wait for the Government to heed the request; it took further steps a year after the request to provide some guiding principles toward eliminating double taxation. By the 1921 London resolution, the ICC recommended four principles: a. equal treatment of residence income of all taxpayers irrespective of their origin and nationality; b. exemption of foreign income from tax, if this is impossible, a substantial rebate should be granted to the foreign income; c. foreigner should be exempted from super tax on incomes earned abroad; and d. the above principles should equally apply to companies, partnerships and individuals. Several efforts were made by the ICC on double taxation in 1923 (Rome Congress) and 1924 before the League agreed to coordinate the Governments' intervention in 1925. All the ICC's resolutions were forwarded to the League.

not necessarily reduced into writing or registered in the record of the League. The concluding remarks of the League's Financial Committee president, referenced by Jogarajan in her book, speak volumes about the ICC's impact on the work. The president stated that "we have here …. a text which may be considered to be the coordinated results of investigations simultaneously undertaken by the revenue authorities and by the representatives of the great commercial associations of the whole world".[1031]

The business community is also part of the epistemic community that prides itself on its expertise in coordinating global tax governance.[1032] People who are saddled with the responsibility of designing ITRs are one time or the other decision makers in the ICC or advisers to the multinationals. The multiple roles of these personnel integrate the business community into international institutions and create opportunities for the MNCs to influence a policy in one way or another.

The differing interests of the ICC and the League are understandable and should not be used to underestimate the ICC's influential role. The ICC's interest in double taxation and the League's interest in tax evasion were both considered in the League's work. The ICC's motive was to reduce unfair business costs that may arise from paying double tax on the same income, while the states' motive was to generate more tax revenue by curbing tax evasion practices. Double taxation increases MNC business costs and, consequently, reduces profit. The bottom line is the profit, which is the only motive for a capitalism-centric MNC. The primary motive was not for

[1031] *Ibid* at 97

[1032] Martin Hearson, "Transnational Expertise and the Expansion of the International Tax Regime: Imposing 'Acceptable' Standards (2018) 25:5 Rev Intl Political Economy at 647-671. The two US representatives at the League exemplify the dual role in the business community and the international institution. First, Thomas Adams was a chairman of a committee of the US Chambers of Commerce and worked with the International Chambers of Commerce. Second, his successor, Mitchell Carroll, was a tax lawyer for multinational firms.

states' sustainable development through tax revenue but to protect the agenda of increasing marginal returns. The competing interests were jointly considered and balanced by the League.[1033]

5.4.1.1 The State-led Forum and the Business Community

Drawing from several scholarly arguments, I first provide in this subsection legal justification for the business community's involvement as part of the state-led forum to support the state actors. In the next sub-section (5.5.1.2) I take this analysis further to explain how the business community can ensure that the global stability variables are considered in international tax policymaking. The UN manual on negotiating bilateral tax treaties supports my argument for including the business community in policymaking.[1034] The manual advises states to consult with their business community before undertaking negotiation of tax treaties.[1035]

Considering the economic consequences of any international tax framework, the state actors must be conscious that any proposed framework should neither hinder global economic growth nor erode states' tax bases. To achieve this balanced framework, multinationals should be given the opportunity to give practical insights on the feasibility of the proposal. Involvement of the business community can facilitate shared meaning and understanding between that community and the states, and this may consequently promote self-compliance by the MNCs.[1036] International business is most understood by the multinationals – as they are the major architects of that terrain. They are in the best position to evaluate the feasibility and economic consequences of the state actors' work. The multinationals had explored the contours of the global trade long before

[1033] Sunita Double Taxation and the League *supra* note 10 at 31.
[1034] United Nations, Manual for the Negotiation of Bilateral tax Treaties Between Developed and Developing Countries, *supra* note 926.
[1035] *Ibid.*
[1036] Sol Picciotto, "Constructing Compliance: Game Playing Tax Law and the Regulatory State" (2007) 29:1 Law & Policy 11 at 12.

international tax was birthed. The state actors can learn or partner with the organized private sectors on what will enhance their regulation over the activities of the multinationals.

In acknowledging the irresistible force of economic integration, Sol Picciotto argues that a public-private partnership between the state actors and the organized private sectors is needed to govern international transactions.[1037] Picciotto gives examples of some areas of international business, such as the financial market and the internet, where the international governing codes were initially designed by private actors but later supervised by public institutions.[1038] Picciotto's recommendation of public-private partnership can be implemented in international tax but with a consideration that the private sector may skew the framework to suit their interests if the framework is originally drafted by them. Unlike the example given by Picciotto, tax issues go directly to the root of states' sovereignty and there are competing interests between states, as tax collectors, and the business community, as taxpayers. The state actors can, however, work with this community to better understand the feasibility of the proposed framework.

George Ball, the US former under-secretary of state and UN representative had suggested internationalization or 'denationalization' of the business community to address the relationship between multinational companies and individual states effectively.[1039] Ball suggests that there should be a treaty that will recognize multinationals as international legal entities. The treaty will be signed by states where the multinationals operate.[1040] The treaty will be managed by a

[1037] Sol Picciotto, "International Transformations of the Capitalist State" (2011) 43:1 Antipode 87 at 93.
[1038] *Ibid* at 94 – 95. The capital adequacy standards developed by the Basel Committee on Banking and Supervision were a product of public-private regulatory arrangements. The Internet technical standards were designed by a group of specialists bonded together by principles under the Internet Engineering Task Force (IETF) platform. The Internet Corporation For Assigned Names and Numbers (ICANN), which took over from the IETF, was originally set up as a private entity.
[1039] George W. Ball, "Cosmocorp: the Importance of Being Stateless" (2001) 2:6 Columbia Journal of World Business 25 at 29.
[1040] *Ibid.* See also Sol Picciotto, "Rights, Responsibilities and Regulation of International Business" (2003) 42:1 Colum J Transnat'l L 131 at 133-134.

supranational body constituted of representatives from affected states, and the supranational body will be vested with the power to enforce agreed international codes that can even restrict states' unilateral actions on those businesses.[1041] Internationalization will help all the concerned states to have a cordial relationship with and adopt common measures in dealing with the multinational companies operating in those states.[1042] According to Bali, this will presumably produce a more efficient outcome than the present framework, where companies are recognized as legal entities under national laws.[1043]

The takeaway from Ball's argument is that effective governance of world economic resources can better be achieved by forming a relationship between the business community and the state actors. Similar to domestic company law, the multinationals will be recognized as artificial persons under the treaty and consequently be bound by the provision of the treaty. International legal personality is not necessary for international tax, but a framework should connect the state actors and the business community. Such a framework is being proposed by this thesis where the state-led forum works with the business community not as regulators but as strategic partners. The state-led forum can achieve two things by asking the multinationals to give input into the proposed framework. First, the state actors get practical insights into the framework, and second, the business community's participation is an indirect notice of the expected compliance level. The approach can even facilitate self-compliance – as it will be a moral wrong for the multinationals to violate laws that they participated in making. In reality, we should expect

[1041] *Ibid*. Ball argues as follows:

> 'An international companies law could place limitations, for example, on the restriction of nations states might be permitted to impose on companies established under its sanction. The operative standard defining those limitations might be the quantity of freedom needed to preserve the central principle of assuring the most economical and sufficient use of world resources'.

[1042] *Ibid.*
[1043] *Ibid.*

some deviant multinationals that will choose the path of non-compliance with a law they deliberated upon to create. In that circumstance, there should be stiffer penalties for such non-compliance.

In their influential book on responsive regulation, distinguished emeritus professors Ian Ayres and John Braithwaite offer another approach to understanding the public-private relationship in economic governance.[1044] Ayres and Braithwaite, both of whom have written extensively on the regulation of public and economic actors, argue that state actors must understand the relationship between private and public regulation before they can make sound policies on regulating economic activities.[1045] Understanding the relationship between these two divides depends on involving the private sector in the policy-making process or perhaps delegating to the private sector some duties that are subject to oversight control by the public bodies.[1046] The authors argue as follows:

> Good policy is not about choosing between the free market and government regulation. Nor is it simply deciding what the law should proscribe. If we accept that sound policy analysis is about understanding private regulation – by industry association, by firms, by peers, and by individual consciences – and how it is interdependent with state regulation, then interesting possibilities open up to steer the mix of private and public regulation. It is this mix, this interplay, that works to assist or impede solution of the policy problem.[1047]

It seems that Ayres and Braithwaite affirm that state actors cannot know the nitty gritty of industries they seek to regulate, and in that situation, it will be effective for the state actors to give the business industry the opportunity to regulate itself. The scholars further argue that state actors can delegate regulation to the firm's competitors or public interest groups.[1048] Considering the

[1044] Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) at 3.
[1045] *Ibid*. Also, see Sol Picciotto, "Reconceptualizing Regulation in the Era of Globalization" (2002) 29:1 JL & Soc'y 1 at 3- 4.
[1046] *Ibid*
[1047] *Ibid*.
[1048] *Ibid* at 158.

tendency that the privilege of self-regulation may be abused by the business community, the professors argue that state actors can intervene when self-regulation fails.[1049] The state actors can then impose regulation or command regulation like 'big gun' regulators, which may speak softly but have enormous powers to sanction non-compliant forms.[1050] Ayres and Braithwaite are basically advising state actors to reserve their right of regulation and see whether the industry can regulate itself. To achieve this, the industry actors must be involved in the democratic process of policymaking.

Though the analyses of Ayres and Braithwaite are in the context of state regulation of the business community within its national boundary, some of their arguments are applicable to international tax. Their argument can be reduced to two: first, the state can delegate some regulatory functions to firms, which are supposed to be the subjects of the regulation, and second, the state should invoke its intervention and command powers when the delegation to the firm fails. The first fold of the argument – delegation of regulation to the firms – is similar to the functions that are delegated to the multinationals to provide annual business and financial information under the country-by-country reporting, which is contained in the OECD BEPS Action 13.[1051] Under this framework, multinationals are required to provide data on their allocation of income, profits, taxes paid and economic activities in the jurisdictions where they operate.[1052] The reported information

[1049] *Ibid* at 35 – 40.
[1050] *Ibid*. The authors suggest an enforcement pyramid or a pyramid for regulatory strategy. The enforcement pyramid is designed for individual firms, while the other pyramid is for the industry. The baseline for the enforcement pyramid is persuasion – where firms are encouraged to comply – and in the event of non-compliance, the state can proceed from persuasion to issuing a warning and then to revocation of the trading license. The bottom line for the pyramid of regulatory strategy is self-regulation. If self-regulation fails, the state can invoke its power to enforce regulation or command regulation.
[1051] Arthur J. Cockfield & Carl D. MacArthur, "Country-by-Country Reporting and Commercial Confidentiality" (2015) 63:3 Can Tax J 627. At 632 – 633. Alex Cobham et al "A Practical Proposal to End Corporate Tax Abuse: METR a Minimum Effective Tax Rate for Multinationals" (2022) 13 Global Policy 18. Richard Murphy claims he first proposed the idea of country-by-country reporting in 2003. See Richard Murphy, "Country-by-Country Reporting" in Thomas Pogge & Kirishen Mehta, eds, Global tax Fairness (United Kingdom: Oxford University Press, 2016) 96.
[1052] *Ibid*.

is shared with tax administration in these jurisdictions, and the information can be used for transfer pricing analysis or another administration purpose.[1053]

The functions performed by the multinationals in providing the required business and financial information can also be sourced by the states. It should even be the primary obligation of the states since they are the beneficiaries of the reported information – the information helps the states to know if the multinationals are paying the correct taxes to the host countries. In what appears to be the argument of Ayres and Braithwaite, the states, acting through its organized community of the OECD, delegate that duty to the multinationals. The second fold of the argument applies when the multinationals fail to provide the data or provide incorrect data - the states can then intervene to enforce the law. States can use the benefit of the exchange of information to obtain the necessary information from the other tax treaty partners. In that circumstance, the other treaty partner can use its regulatory power under the national law to obtain necessary information about the multinational through its audit power or engagement of third parties or competitors and then share it under its obligation in bilateral tax treaties.

State actors should, however, be careful when engaging multinationals in rulemaking. As profit-driven entities, multinational companies tend to resort to tax avoidance activities, even if that requires concealing trade-sensitive information. The solution to this challenge is for state actors not to limit their source of information to one source. State actors may consult with several business groups or any other non-governmental organization that specializes in the transparency of multinationals' behaviours.

Engagement of the business community should not be limited to the Global North under the guise that the majority of the world multinationals are residents in that region. Organized

[1053] *Ibid*.

indigenous business communities in all regions should be involved as that will enable the forum to get a first-hand report on the unique characteristics of each region's business environment. The use of the word 'indigenous' is deliberately used to dispel a false notion that a single institution can represent the interest of the global business community. As an example, the ICC has a presence in more than 130 countries, but its submission may not be a true reflection of the unique features of the LMICs, even if the ICC has a presence in those states.[1054] Any other organized private sector in Africa, for example, should also be involved in complementing the efforts of the ICC. Indigenous multinationals of each region can also participate directly.

5.4.1.2 The State-led Forum, the Business Community and the Critical Sensemaking Theory

This thesis requires the LMICs' business communities to play more visible and efficient roles in operationalizing the CSM theory to support their state actors. Their support for the state actors directly impacts their survival and ability to remain competitive in an international business environment. The HICs' business communities are already active in international tax negotiations, even though their roles are business-oriented and meant to achieve some business gains over their competitors. Another reason why I focus less on the HICs' business communities is that the majority of them are considerably large and, as such, do not require the protection I envisage in this thesis as much as their counterparts in the LMICs.[1055]

The main claim of this thesis is that consideration of the global stability variables in international tax policymaking will presumably result in a different outcome that is mutually beneficial to all states. Specifically, the LMICs will get guarantees that the new tax instruments

[1054] See ICC Become a Member <https://iccwbo.org/become-a-member/>

[1055] Some of them have even larger revenue than some developing countries. As an example, the revenue for Microsoft company for the year ended 30 June 2023 was $211.9 billion. This revenue far exceeds revenues recorded by each of the African states. For Microsoft financials, see Microsoft Press release & Webcast: Earnings Release FY2023 Q4, online: https://www.microsoft.com/en-us/Investor/earnings/FY-2023-Q4/press-release-webcast. For revenue of African states, see OECD/AUC/ATAF, *Revenue Statistics in Africa* (Paris: OECD, 2023).

will prioritize their peace, sustainability and ability to provide public goods (which I describe as human rights in chapter one) to their citizens. The CSM theory helps the LMICs to be able to undertake their true identities without any restriction or influence on what suits their unique environments. The LMICs will be able to resist the imposition of standards that do not balance the competing interests between the LMICs and the HICs.

The LMIC business communities are well-positioned to contribute to all three global stability variables. The business communities can only play support roles, which implies that they can only submit their recommendations to the state actors. When the time to undertake identity construction arises, the business communities will respond that 'we are business entities and our ability to explore our business goals depends on sustainability and peaceful existence of our home states'. This response will shape the recommendations of the business community. For example, if the Starbucks case had escalated beyond control and the aggrieved people proceeded to destroy all Starbucks branches, Starbucks would not be the only victim of the destruction. There is a greater possibility that other domestic business properties mistakenly believed to be owned by Starbucks – as people are usually unreasonable in mob attacks – will suffer from the dastardly attack. Assuming that no domestic businesses are attacked, the destruction of Starbucks' business can affect other businesses in Starbucks' chain supply. Starbucks' suppliers could be domestic companies whose survival depends on Starbucks. So, the LMICs' business communities' contribution to the peacemaking component should be broad to consider how internal peace and sustainability of their home states guarantee business continuity.

Concerning the last component of the provision of public goods, the response to the identity construction question will inform the LMICs' business communities to reflect on how foreign direct investments will not impede the growth of domestic businesses. The response to the identity

construction should be adjusted to read as this: 'We are business entities, and our ability to explore our business goals depends on sustainability and peaceful existence of our home states, and we are also entitled to the protection of our business environment against foreign competitors'. Evidence shows that MNCs in the HICs lobby their home states to negotiate tax treaties with strategic LMICs where they operate. The purpose of this lobby is to secure some competitive advantages for these MNCs, and these competitive advantages may have an unfair effect on domestic businesses. Suppose the HICs' business communities put similar recommendations to the state-led forum. In that case, the LMICs' business communities can identify these issues and advise their home states to renegotiate the recommendations.

The LMICs should carefully and narrowly identify their business communities. These communities should only include entities that are owned by Indigenous people or entities with greater allegiance to the LMICs. Mere registration of an entity as a subsidiary in the LMICs should not justify the inclusion of that subsidiary in the business communities. The subsidiary is presumably more committed to its parent company, which may be domiciled in the HICs.[1056] By including such subsidiaries in the business communities, the LMICs stand the risk of divulging its confidential information to the parent company. The recent scandal of PWC Australia, one of the big four accounting firms, is proof of how a subsidiary of a foreign company can work against the LMICs.[1057] A partner in PWC Australia had access to confidential tax information containing the proposed tax system while working as an external consultant for the Australian government.[1058] It is alleged that the partner disclosed the confidential information to some other branches of

[1056] Yvez L. Doz & C.K. Prahalad, "Headquarter Influence and Strategic Control in MNCs" (1981) 23:1 Sloan Management Review 15; Ayse Olcay Costello & Thomas G. Costello "Aligning the interest of Subsidiaries and Headquarters in Multinational Corporations: Empirical Evidence (2009) 17:4 Multinational Business Rev 163.
[1057] Henry Belot, PWC Tax Leaks scandal Not Isolated to Australia, Senator Claim, The Guardian, 28 September 2023 online: https://www.theguardian.com/australia-news/2023/sep/29/pwc-tax-leak-government-secrets-scandal-not-isolated-to-australia (accessed on 14 December 2023)
[1058] *Ibid*

PWC.[1059] It is believed that the disclosed information might be used by the partners in those other branches for their clients, who may be operating businesses in Australia and consequently use the confidential information against the Australian government.[1060]

5.4.2 Public Interest Organizations

This category includes non-state actors with no direct interest in international tax other than transparency, tax justice, sustainability and research-based activism. This includes but is not limited to civil society, independent investigative journalism, non-governmental organizations, and communities of experts. Since the global stability variables focus on different but related issues, this category of actors should not be limited to international tax. Other bodies, such as those working on climate sustainability, promoting global peace, and political and international relations, should be involved to facilitate well-balanced discussions that guarantee the realization of global stability variables. The public interest organizations should focus on three interrelated activities: exposing tax abuses, advocacy and engagement of state actors on compliance with agreed international tax standards and providing technical reports to guide discussion of state actors.

The influential reports by the International Consortium of Investigative Journalists on Mauritius leaks demonstrate the significant role of the public interest organization.[1061] The eye-opening reports exposed the grand scale of tax treaty abuses by multinationals and the considerable impact of the tax abuse on the revenue growth of host states. On account of the report, the tax treaty structure of Mauritius made it a 'new bride' to multinationals as the treaty enables them to

[1059] *Ibid*
[1060] *Ibid.*
[1061] International Consortium of Investigative Journalists, Treasure Island: Leak Reveals How Mauritius Siphons tax From Poor nations to benefit Elites, online: www.icij.org/investigations/mauritius-leaks/treasure-island-leak-reveals-how-mauritius-siphons-tax-from-poor-nations-to-benefit-elites/?utm_content=buffer8297e&utm_medium=social&utm_source=twitter.com&utm_campaign=Buffer+-+Twitter.

keep their money away from high tax jurisdictions. Companies registered in Mauritius were subject to a 3% effective tax rate and could also benefit from tax benefits in tax treaties between Mauritius and other countries.[1062] For example, under the tax treaty between Mauritius and India, the right to tax capital gain on the disposal of shares is given to the jurisdiction where the investor is located.[1063] So, capital gains arising from the sale of shares to residents of Mauritius on investments in India are supposed to be taxed in Mauritius. But Mauritius does not tax capital gain. This implies that capital gain is not taxed on both sides.[1064] This accounted for the shocking data that almost half of foreign investments in India as of 2013 were from Mauritius.[1065]

The shocking reports provide state actors with information beyond what can be achieved by exchanging information clauses in a bilateral tax treaty. The state actors became more informed on the consequences of the design of tax treaties and how multinationals can exploit any mismatch in them for tax benefits.[1066] This led to informed decisions taken by the affected states to either renegotiate or terminate tax treaties with Mauritius.[1067] The public interest can only play this significant role because it has no direct interest in international other than achieving a working, efficient system. The public interest is constituted by people who may be members of affected countries, and that thus makes them stakeholders whose voices must be heard loud and clear.

[1062] *Ibid*. The report states that Mauritius had more than fifteen tax treaties with African countries. Sustainable Luxury Mauritius Ltd is one of the companies registered in Mauritius for this purpose. The company is owned by a British Virgin Islands company, which is owned by Craig Cogut, an American philanthropist. So, Cogut indirectly owned Sustainable Luxury Mauritius Ltd. Cogut and his equity firm, Pegasus Capital Advisors, bought Six Senses, a very large luxury spa with more than 30 operations in four continents. Cogut registered Sustainable Luxury Mauritius Ltd in 2012 to provide management services to all the operations of the Six Senses. However, Sustainable Luxury Mauritius Ltd did not have any employees – nor any active business – yet it received management fees from all operations of Six Senses. Since Mauritius had a low tax rate – 3% effective tax rate – and had tax treaties with some jurisdictions where Six Senses was operating, Cogut had effectively moved his fund to the Mauritius tax haven.

[1063] *Ibid*.

[1064] *Ibid*

[1065] *Ibid*.

[1066] *Ibid*. It is stated that 28 tax treaties signed by Netherland with poor countries cost the latter at least $1 billion or more every year.

[1067] *Ibid*. The treaty between India and Mauritius was renegotiated to remove the abusive provision. Senegal contemplated termination of tax treaties with Mauritius, while Kenya terminated its treaty with Mauritius.

Global Alliance For Tax Justice (GATJ) is another public interest group that justifies including this group as non-state actors in the rule-making process. The GATJ was created in 2013 as a conglomerate of different civil societies bonded together by the common interest of pursuing tax justice.[1068] It comprises tax justice networks in Asia, Africa, Latin America, Europe and North America.[1069] The organization was established to realize the following five goals: exposing and curbing tax abuse; ensuring that progressive, redistributive and gender-equal tax work in every country; ensuring global tax rules work for all countries, people and the planet; transparency; and empowering citizens to hold national government accountable.[1070]

As one of its goals, the GATJ had written to member states of the UN to implement the resolution for more inclusive international tax cooperation consensually adopted by the UN in November 2022.[1071] Interestingly, the GATJ jointly wrote the letter with other civil society organizations, numbering more than eight, under the Civil Society Financing for Development Mechanisms platform. The advocacy on implementing the UN resolution will spread more due to the number and influential roles of the civil societies that jointly executed the letter. The wide spread of participants can put member states under pressure to implement the resolution out of fear that the civil societies can launch another advocacy campaign against them and tag them as non-compliant states.

While an entity similar to the International Consortium of Investigative Journalists can first expose tax abuses through investigative journalism, another institution identical to the GATJ can engage state actors in advocacy and implementation. The last part of the function of the public

[1068] See About GATJ <https://globaltaxjustice.org/about-gatj/>
[1069] *Ibid*
[1070] *Ibid*.
[1071] See Letter to Member States: Implementation of UN Resolution on International Tax Cooperation <https://globaltaxjustice.org/news/letter-to-member-states-implementation-of-un-resolution-on-international-tax-cooperation/> The letter was jointly written by other similar civil societies under a bigger platform of the Civil Society Financing for Development mechanism.

interest group – the provision of the technical framework – can be undertaken by a group of experts like the BEPS Monitoring Group. There may be an overlap in all these functions as one entity can discharge more than one or undertake all the activities – or perhaps have a direct relationship with entities that provide other activities. For example, the GATJ is part of the civil societies that established the BEPS Monitoring Group.[1072] The relationship will not affect the quality and independence of the work but rather create synergy among all the public interest groups.

The composition, the spread and the calibre of experts in the BEPS Monitoring Group can guide the kind of experts to work with the state actors on global stability variables. The BEPS Monitoring Group has 55 expert members and is coordinated by Sol Picciotto, an emeritus professor with significant scholarship in international tax and regulation of global governance. The other members include Reuven Avi-Yonah, a professor of international tax; Richard Murphy, a professor of political economy; Martin Hearson, a great researcher and author of several articles and books on international tax, and Alex Cobham, the chief executive of Tax Justice Network. This structure can be adopted, but with the caveat that membership of this group should be more comprehensive than that of tax experts. Experts in areas related to the global stability variables should be included in the group to have broader discussions on international tax problems. The membership should also include experts from all taxing jurisdictions substantially.

5.5 Conclusion

This thesis establishes that the problems of the LMICs in international tax cooperation are beyond the issues of non-inclusion, competencies and power imbalance. The existing legal scholarship has sufficiently addressed these issues. The thesis instead argues a novel point that the significant problem of the LMICs is that there is a disconnect between international tax

[1072] Sol Picciotto, "The G20 and the "Base Erosion and Profit Shifting (BEPS) Project" Discussion Paper No 18/2017 Deutsches Institut Für Entwicklungspolitik

cooperation and its ought-to-be goals. Relying on historical development and contextual intricacies, the thesis provides a new normative analysis that suggests that the goals of ITR should align with the broad objective of peacemaking of the League. This new position is justified because the ITR was created through the enabling institution of the League, a peacemaking institution. The League would not have embraced the creation of the ITR through its institution if the tax regime was not related to its objectives. To further bolster this position, the thesis relies on the report of the International Financial Conference, which advises the Financial Committee and the other committees created by the League to consider matters that could promote peace in their deliberations.

By necessity, consideration of global peace in international tax policymaking will extend to other factors that affect the existence (stability) and the functionality of participating states that constitute the global community. Under the stability component, the thesis argues that ITR should be designed to enable the participating states to legitimately earn tax revenues from cross-border transactions sufficient to protect their territories from climate hazards. It further argues that, under the functionality, the participating states should also be able to appropriate legitimate tax revenues to provide public amenities to their citizenry. These three interrelated objectives – peacemaking, stability and functionality – are global stability variables. The thesis thus concludes that international tax actors should consider the global stability variables in policymaking. The thesis concludes further that the LMICs will get more favourable outcomes – without affecting the legitimate benefits of the HICs - when international tax actors consider the global stability variables in policymaking.

The thesis argues that the global stability variables have never been considered in ITR. To undertake this historical analysis, the thesis divides the historical development of ITR into three

phases – the crystallization, the stabilization and the contemporary phases. It relies on the CSM theory to find that the identities of the relevant actors in each of these three phases are the main reasons why the global stability variables are not considered in the ITR. Chapters two, three and four of this thesis comprehensively examine how the background and the understanding of the relevant actors in each of these three phases did not enable them to consider and apply the global stability variables.

Given the impact of actors' identities on the design of ITR, the last chapter of this thesis proposes a network of new actors that can understand and apply the global stability variables to international tax policymaking. These actors are divided into two broad categories – state and non-state actors. The state actors are all jurisdictions with a legitimate claim to impose tax. The thesis argues that economic indicators, such as the GDP of the participating states, should not be used to assess the level of inclusivity as that approach may be misleading. Using the economic indicators to measure the inclusivity level may suggest that the exclusion of some LMICs is insignificant to the regime. As an example, if all the African states (that collectively have less than 3% of the world GDP) are the only excluded state actors from the international tax forum, the economic-based inclusivity measure will read that cooperation of states with over 97% GDP have agreed to work together on international tax reforms. Instead, the inclusivity should be measured by state count, ensuring that the LMICs are sufficiently included irrespective of their economic levels and developments.

The thesis lists three essential features – inclusivity, capacity and competence – that state actors must have to realize their desired goals. The scope of the state actors goes beyond the traditional tax revenues officials to include other government departments that can significantly contribute to the deliberations. The scope of the state actors includes actors from both the executive

and the legislative arms of the governments. The thesis argues that there should be one international forum where these state actors assemble to deliberate on tax policies. It also suggests that regions can have regional forums, but decisions should only be made at the international forum. The thesis advises how the LMICs can employ the regional forum to weave their interests and forge alliances with other comparable LMICs to make their regional proposals acceptable to the HICs.

The non-state actors are divided into the business community and the public interest organizations. The thesis examines and advises how the LMICs' business communities can support their state actors in the reform struggle. The public interest organizations are suited for whistle-blowing purposes. They measure states' compliance with the agreed framework and expose non-compliant states. The fear of exposure to backlash may compel states to comply with the ideal tax system proposed by this thesis. The combination of state and non-state actors should create an 'ecosystem' of international tax actors to ensure that the global stability variables are considered in international tax policymaking.

Policymakers are proposing several pillars (from the OECD and the UN) to reform international tax. The thesis advises policymakers to pause on these pillars and reflect on the pillar that has been abandoned for a long time. The long-forgotten pillar in ITR is the global stability variables. Consideration of this pillar will presumably lead to a new dawn—a new mutually beneficial regime for both the LMICs and the HICs.

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