

## Human Rights and the Two-Pillar Solution

We live at a time when we have become accustomed to some quite extraordinary developments in the international tax world. However, even in that context, an exchange of correspondence in March and April this year was unprecedented. Four experts appointed by the United Nations Human Rights Council wrote to the Director of the Centre for Tax Policy and Administration at the OECD raising concerns whether the Two-Pillar Solution to address tax challenges arising from the digitalization of the economy might potentially involve a human rights violation.<sup>1</sup> The Director wrote back a two-page letter denying that possibility and suggesting that the correct forum to discuss the Two-Pillar Solution was among the members of the BEPS Inclusive Framework. So far as the author of this editorial is concerned, such an exchange of correspondence has never previously taken place.<sup>2</sup>

### I THE FOUR EXPERTS OF 2022

The four experts who wrote the letter on 30th March all have mandates relating to the promotion of human rights in relation to aspects which may involve budgetary and fiscal matters.<sup>3</sup> They are: the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human

rights, particularly economic, social and cultural rights (Professor Attiya Waris, who is a professor of tax law at Nairobi University); the Special Rapporteur on the right to development (Mr Saad Alfaragi, a former UN Assistant Secretary General and Assistant Administrator of the United Nations Development Programme); the Independent Expert on the promotion of a democratic and equitable international order (Mr Livingstone Sewanyana, the founder of the Foundation for Human Rights Initiative in Uganda); and the Special Rapporteur on extreme poverty and human rights (Professor Olivier De Schutter, professor of law at UC Louvain and SciencesPo (in Paris)). They are four of the most eminent experts in the field of international human rights law.

In an annex to their letter of 30th March the four experts refer to the human rights instruments and soft law applicable to the issues of fiscal policy and the attainment of human rights. Of those instruments, perhaps the most significant is Article 2 of the International Covenant on Economic, Social and Cultural Rights<sup>4</sup> which imposes on States Parties to the International Covenant an obligation to make use of the maximum available resources in order to progressively realize the rights set out in the Covenant.<sup>5</sup> In recent years, particularly under the UN Programme for Development and the Strategic Development Goals, an

### Notes

<sup>1</sup> For the Two-Pillar Solution see *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 8 October 2021*, available at [Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 8 Oct. 2021 – OECD](#), together with other material available on the OECD website.

<sup>2</sup> The letter from the four experts and the reply of the Director of the CTPA are public documents, available on the UN website, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27165> (accessed 7 Jun. 2022) and <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=36914> (accessed 7 Jun. 2022).

<sup>3</sup> Other UN independent experts have in the recent years raised concerns about taxation and human rights. See e.g., *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, Human Rights Council, Twenty-sixth session, Agenda item 3, A/HRC/26/28 (2014).

<sup>4</sup> Article 2 of the International Covenant on Economic, Social and Cultural Rights provides as follows:  
*Article 2*

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals. (emphasis added).

<sup>5</sup> For a general discussion of the duty to apply maximum resources to attain the human rights objectives, see International Bar Association, Human Rights Institute, *The Obligation to Mobilise Resources: Bridging Human Rights, Sustainable Development Goals, and Economic and Fiscal Policies* (Dec. 2017), available at [The obligation to mobilize resources: Bridging human rights, Sustainable Development Goals, and economic and fiscal policies. | Right to Education Initiative \(right-to-education.org\)](#).

emphasis has been placed on maximizing domestic resources through the tax systems of the countries concerned.<sup>6</sup> Measures that might reduce the available tax resources of developing countries could, in principle, constitute regressive steps which constitute a violation of the obligations undertaken by States to realize economic, social and cultural rights.

The four experts operate under the special procedure system of the United Nations.<sup>7</sup> Under those procedures, the experts may seek clarification on information they have received, and may intervene directly with governments and other stakeholders on allegations of abuses of human rights.

## 2 THE ALLEGED FACTS RELATING TO THE TWO-PILLAR SOLUTION

In their letter, the four experts refer to information they have received in respect of the Two-Pillar Solution. The experts note that the Two-Pillar Solution marks a positive shift to the taxation of multinational enterprises as unitary entities, with a proposal for a minimum tax and the sharing of profits across jurisdictions. However, they point to a number of concerns raised in respect of both Pillar One and Pillar Two. Most of the concerns have been raised by the South Centre,<sup>8</sup> which is an intergovernmental organization of developing countries that helps developing countries combine their efforts to promote their common interests in the international arena. The South Centre was established by an intergovernmental agreement in 1995, and has fifty-four developing countries as members. It is not, therefore, an insignificant body to have raised concerns which have been picked up by the four experts.<sup>9</sup> The four experts also draw upon the State of Tax Justice Report 2021 produced by the Global Alliance for Tax Justice, Public Services International and Tax Justice Network.<sup>10</sup>

The letter from the four experts then sets out the background facts relating to the Two-Pillar Solution as they are understood from the information they have received. As part of the special procedure, they sought observations from the OECD on the accuracy of these facts. With respect to the Two-Pillar Solution, the facts on which they sought clarification include the following statements:

the Two-Pillar-Solution may mainly benefit some high-income countries while lower-income countries will lose important shares of their revenues. Lower levels of revenue collection in developing countries would weaken the States' capacity to fulfil their human rights obligation ...

While the OECD may appear to have sought to provide an inclusive forum for these negotiations, it does not provide equal voice, access to information and participation to all States, which are not its members. Low and middle-income countries, despite having presented observations and raised concerns on a number of issues that directly affect their taxing rights, consider their inputs and preoccupations have not been taken into account in the process and that they did not always have the required information and time to consider the implications of the proposals.

It should be emphasized, that the four experts were, at this stage, seeking observations from the OECD on the accuracy of these allegations.

With regard to Pillar One, the overview of the facts raised some six issues: that the solution will bring only minimal benefits to developing countries; that the division of profits would result in a segmentation of global profits among different business lines which would create complexity and enable multinational enterprises to allocate profits among different jurisdictions and potentially shift profits to tax havens; that the Solution would entail a disproportionately high administrative burden; that there was a lack of transparency with regard to the economic rationale and the empirical assumptions used for the establishment of the Solution; that the reallocation of taxing rights was likely to be of little benefit to non-OECD countries and might reduce revenues for a range of lower-income countries; and that the solution had a strong focus on mandatory binding dispute resolution about which several developing countries had strong concerns.

With respect to Pillar Two, the general overview of facts raised, in particular, the issue that the minimum level of tax at 15% was lower than that advocated for by a number of organizations and stakeholders, and that, given the fiscal competition between States, it in practice might turn into a ceiling rather than a floor. Overall, Pillar Two appeared insufficiently ambitious to put effectively an end to fiscal competition.

### Notes

<sup>6</sup> See e.g., *The Role of Taxation and Domestic Resource Mobilization in the Implementation of the Sustainable Development Goals*, Committee of Experts on International Cooperation in Tax Matters, Seventeenth Session (Document E/C.18/2018/CRP.19).

<sup>7</sup> For further information on the special procedures of the UN Human Rights Council, see Oliver De Schutter, *International Human Rights Law* 970–987 (3d ed., Cambridge 2019).

<sup>8</sup> See Statement by the South Centre on the Two Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (Microsoft Word – SC – Statement on IF Two Pillar Solution – FINAL.docx (southcentre.int)).

<sup>9</sup> Information about the South Centre is available at its website, <https://www.southcentre.int> (accessed 7 Jun. 2022).

<sup>10</sup> The 2021 State of Tax Justice Report can be found at [State\\_of\\_Tax\\_Justice\\_Report\\_2021\\_ENGLISH.pdf](https://www.taxjustice.net) (taxjustice.net) (accessed 7 Jun. 2022).

### 3 CONCERNS OF THE FOUR EXPERTS

On the basis of the initial statement of facts (on which, it should be emphasized, the four experts sought observations from the OECD as to their accuracy), the four experts raised several concerns:

We wish to express our concern that the Two-Pillar Solution, as it stands, would significantly undermine the revenue collection and taxing rights of low and middle-income countries. This in turn will affect the availability of resources to ensure the progressive realisation of all economic, social and cultural rights, as well as the right to development, as expeditiously and effectively as possible. This is more worrisome during times of severe resource constraints caused by accumulative negative impacts of the Covid-19 pandemic, previous fiscal adjustments due to high levels of indebtedness and additional need for public resources to respond to health and social protection requirements of the population.

The four experts then expressed two specific concerns. First, that the Two-Pillar Solution will reduce the tax base and revenue for the realization of human rights:

We are concerned that the Two-Pillar Solution will reduce the ability of low and middle-income countries to mobilise sufficient resources to invest in essential public services and to ensure the realisation of human rights, including the rights to health, social security, and food, all of which are guaranteed under the International Covenant on Economic, Social and Cultural Rights.

They expressed their concern that the implementation of the Two-Pillar Solution might constitute a retrogressive step with regard to the implementation of the Covenant, and that other alternatives were not given serious analysis and consideration, including the G-24 proposal on 'Significant Economic Presence'.<sup>11</sup>

Secondly, they expressed concern about the possibility that Pillar One will facilitate aggressive tax optimization strategies and tax evasion.

### 4 RESPONSES SOUGHT BY THE FOUR EXPERTS

On the basis of the outlined statement of facts and concerns expressed, the four experts sought clarification and observations from the OECD on nine matters. In outline these were as follows. (1) Were the facts accurate? (2) How would the Two-Pillar Solution address tax optimization?

(3) Might compensation for lost revenue be provided, possibly through a supplementary tax? (4) What procedures had been used to reject alternative proposals? (5) What formula was used to establish a 15% tax rate? (6) What are the next steps for the implementation and how will all countries be able to participate on equal footing? (7) Was an estimate of the extraterritorial impact on the resources necessary in developing countries conducted? (8) How does the Inclusive Framework put participation on equal footing and equal influence into practice? (9) What are the OECD's views on the development of a UN Tax Convention and the creation of a Global Tax Body?

On some of those questions, it would, frankly, not have been difficult for an informed observer to determine what the OECD's response would be. Nevertheless, this is a special procedure established by the UN. The four experts have, within the scope of their mandates, brought forward issues raised on the basis of information brought to their attention by an intergovernmental organization and by NGOs, they have set out the facts as they understand them and asked for comments on their accuracy. They have identified relevant international norms and they have proposed to the OECD a request for clarification and observations on a number of particular points.

The four experts, in line with the UN special procedures, indicated that the letter and any response would be made public and that the experts might publicly express concern if the information supplied was sufficiently reliable to indicate a matter warranting immediate attention.

The use of the UN human rights special procedures in the context of international taxation is, so far as the author of this editorial is concerned, unprecedented. However, in the light of their mandates and the specific issues raised by an intergovernmental organization and NGOs, the four experts have acted in accordance with the special procedures established by the United Nations.

### 5 THE OECD RESPONSE

On 27th April the OECD responded to the experts in a two-page letter. Such a short letter could not, clearly, respond to all of the nine matters raised by the four experts, and it represents only a partial response. The letter opens by saying that the OECD fully subscribes to the importance of UN human rights mechanisms, and, in that context, the OECD has been very surprised and strongly disagrees with the overview and concerns as presented in the communication from the four experts.

In terms of specific information, the OECD letter first explains the scope and objective of the Two-Pillar solution in terms of a continuation of the project to prevent base

#### Notes

<sup>11</sup> See *G-24 Working Group on Tax Policy and International Tax Cooperation – Proposal for Addressing Tax Challenges Arising from Digitalisation* (17 Jan. 2019), *G-24\_proposal\_for\_Taxation\_of\_Digital\_Economy\_Jan17\_Special\_Session\_2.pdf* (g24.org) (accessed 7 Jun. 2022). The G-24 (more formally: The Intergovernmental Group of Twenty-Four on International Monetary Affairs and Development) is a group of countries that work together to coordinate the positions of developing countries on international monetary and financial issues.

erosion and profit shifting by introducing a minimum tax rate of 15% to prevent the race to the bottom and to stabilize the international tax environment. The letter also addresses the process for agreeing on the Two-Pillar Solution and reiterates that the jurisdictions participating in the Inclusive Framework did so on an equal footing. As evidence of the response to the concerns of low and middle-income countries, the letter refers to a number of features of the Two-Pillar Solution. Some of the points mentioned are somewhat difficult to reconcile with a response to the concerns of low or middle-income countries: for example, the exclusion of extractive industries from the scope of Amount A of Pillar One, and a carveout for substantial business activity to protect the ability of countries to use tax incentives to attract real investment.

Perhaps most significant in the reply letter is the response in relation to the role of the OECD and the choice of forum. The response letter explains that ‘the OECD provides the forum and technical support for the BEPS IF but the negotiations are in the hands of the member jurisdictions of the BEPS IF’ ... ‘it is not for the OECD to comment on whether it is the appropriate forum for this work: that is the sovereign choice of the 141 jurisdictions that are participating in the discussion’.

One might express some surprise at this description of the role of the OECD in connection with the Two-Pillar Solution. Providing the forum and technical support significantly underestimates the role of the OECD Secretariat in driving forward the Solution. Again, without being flippant, the OECD is doing rather more than providing some meeting rooms at the Chateau, and ensuring that the online meeting arrangements function correctly and that the coffee is warm in the vestibule outside the meeting room. If the OECD is simply providing a forum and technical support, then one might realistically ask whether another organization might equally provide that forum and the technical support (particularly if it had available the resources that have been made available to the OECD).

The letter from the OECD ends by saying:

We cannot agree with the assertion that the discussions taking place amongst BEPS IF members on the Two-Pillar Solution could be considered to be an actual or potential violation of human rights or a retrogressive measure under the International Covenant on Economic, Social and Cultural Rights. The place for discussion of any substantive issues concerning the Two-Pillar Solution is among the members of the BEPS Inclusive Framework.

Perhaps one is reading this too strictly, but the OECD appears to be saying that the only venue in which matters relating to the Two-Pillar Solution can be discussed is the Inclusive Framework, and that the UN human rights special procedures have no possible application to this process. If that is what the letter is saying, then it

certainly goes too far. The Member Countries of the OECD, and the states participating in the Inclusive Framework, have all undertaken human rights commitments, and those commitments extend to their activities in the context of an intergovernmental organization such as the OECD. The four experts were, as explained above, acting within their mandates and following the special procedures of the UN in raising matters of concern that had been brought to their attention based upon evidence presented by an intergovernmental organization. The OECD may not have a specific human rights mandate in the OECD Convention, but that does not mean that it is immune from scrutiny by the UN special procedures.

## 6 SOME COMMENTS ON THE EXCHANGE OF CORRESPONDENCE

Is the Two-Pillar Solution a breach of human rights, or a potential breach of rights, or are aspects of the Solution a potential breach of human rights? It is not really for the author of this editorial to even attempt to give an answer to that question. The four experts – experts in human rights and fiscal matters – have presented evidence that has been put to them, have raised concerns and have asked for observations, and they will have to report on the response they have received. At least *prima facie*, it is a little puzzling to imagine that the Two-Pillar Solution might be a retrogressive measure. The purpose of Pillar One is to allocate a new taxing right to market jurisdictions. The purpose of Pillar Two is to establish a minimum corporate tax rate. It would be necessary to undertake substantial further research to determine whether these two elements will or might, in practice, have the effect of reducing the resources available to developing countries. For example, is it correct to make the assumption that the 15% minimum tax rate will become a ceiling rather than a minimum? Is there any reliable research to substantiate that concern?

Similarly, it is a little difficult to see how the possible frustration of some low-income countries that they are not able to participate in the work of the Inclusive Framework in the same way as some other countries, and that they may be left with the impression that their concerns are being neglected, constitutes either a human rights abuse or, in fact, an issue that falls even within the scope of human right norms.

An important distinction perhaps needs to be made here. A retrogressive measure is one that results in a lower amount of resources available to countries to fulfil their commitments to progressively improve economic, social and cultural rights. That has to be distinguished from a sense of disappointment that more might possibly have been achieved through the process. If the minimum tax rate had been set at 25%, then potentially more resources might have become available, but it is a little hard to see the fixing of 15% as a retrogressive step. At

the end of the day, the Two-Pillar Solution involved an agreement that had to be acceptable to a large number of countries and the compromise will not, necessarily, have satisfied all countries.

Underlying this exchange of correspondence is a fundamental problem with the international tax architecture of institutions from the human rights perspective. The United Nations, on the one hand, has a very clear human rights mandate, and has institutions designed to ensure the implementation of that mandate, including the UN special procedures. On the other hand, the Convention establishing the OECD states that the aims of the organization are:

to promote policies designed ... to achieve the highest economic growth and employment and a rising standard of living in Member countries ... to contribute to sound economic expansion in Member as well as non-member countries ... and ... to contribute to the expansion of world trade on a multilateral, non-discriminatory basis.<sup>12</sup>

No mention of human rights is made in the Convention establishing the Organization. As explained, however, that obviously does not mean that the OECD either does or can ignore human rights obligations of its Members and of countries participating in the Inclusive Framework. However, the absence of a specific human rights mandate and internal institutions and procedures for ensuring observance of human rights standards impacts on the work of the OECD and, consequently, on the development of international tax law.<sup>13</sup> Obvious

solutions to this architectural problem would be for the international tax work to be shifted to the United Nations (which has the human rights mandate and structures), or for the OECD to adopt explicit human rights objectives and structures within the organization, or for a collaborative approach to be adopted between the OECD and the UN human rights organizations. The OECD letter in response to the four experts does not suggest that the third of these options is being pursued.

Where does this go from here? The OECD response is only partial, and leaves a number of the nine matters covered in the letter of the four experts without a response. Presumably the four experts will report the response to the UN Human Rights Council, and further steps may be taken through the UN procedures. If the OECD thought that the letter of 27th April would end the matter, that is extremely unlikely to be the case.

For those who are interested in the history of international taxation, the references to four experts in this editorial will have struck a particular chord. It was four expert economists working under the egis of the League of Nations who established the structure for international tax law 100 years ago. It is quite intriguing that, 100 years later, it is four experts on human rights who are raising concerns over the rewriting of international tax rules through the Two-Pillar Solution.

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## Notes

<sup>12</sup> Convention on the OECD, available at Convention on the Organisation for Economic Co-operation and Development – OECD.

<sup>13</sup> See Philip Baker & Pasquale Pistone, *BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy Under European Law in Cross-Border Situations*, 25 EC Tax Rev. 335–345 (2016).