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Sent by email: taxreport2023@un.org

Department of Economic and Social Affairs
Financing for Sustainable Development Office
Two United Nations Plaza
Room DC2-2306
New York, NY 10017

17 March 2023

Re: Promotion of inclusive and effective international tax cooperation at the United Nations

Dear Sir / Madam,

The Taxes Committee of the International Bar Association would like to take this opportunity to provide inputs on tax issues addressed in General Assembly resolution 77/244, adopted on 30 December 2022 (the “**Resolution**”).

The International Bar Association (IBA), the global voice of the legal profession, includes over 45,000 of the world’s top lawyers and 197 Bar Associations and Law Societies worldwide. Since 1947, the IBA has held ECOSOC Special Consultative Status with United Nations.

We are submitting our inputs on behalf of the IBA Taxes Committee which has 1,037 members from around the world. This committee formed a Working Group to respond to the request for inputs on the Resolution.

The inputs provided in this report are the personal opinions of the Working Group participants and should not be taken as representing the views of their firms, employers or any other person or body of persons apart from the IBA Taxes Committee of which they are members.

The inputs are enclosed with this letter.

Sincerely yours,

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1. Introduction

- 1.1 We welcome the opportunity to provide our inputs on the United Nations (“UN”) General Assembly Resolution 77/244, titled “Promotion of inclusive and effective tax cooperation at the United Nations.” The Resolution requests that the Secretary-General prepare a report analysing relevant international legal instruments and efforts at international tax cooperation, and recommend potential next steps for strengthening the inclusiveness and effectiveness of international tax cooperation. Our inputs respond to the Secretary-General’s request for written input from stakeholders that may aid in the preparation of this report.
- 1.2 The request solicits broad feedback on the range of issues addressed in the Resolution. Among other things, the Resolution (1) noted the harmful effects of aggressive tax avoidance and evasion, (2) encouraged a “scaling up” of tax cooperation, including by adopting policies that are universal in approach and scope and take into account the different needs and capacities of all countries, (3) recognized that effective tax policy should result in the payment of taxes in countries where “economic activity occurs and value is created, in accordance with national and international laws and policies,” (4) noted the work of the OECD/G20 on Base Erosion and Profit Shifting, and (5) committed countries to discuss the development of an international tax cooperation framework or instrument that is developed and agreed upon through a United Nations intergovernmental process.
- 1.3 This project comes at a time of heightened multilateralism in international tax policy. In particular, the OECD’s Base Erosion and Profit Shifting (“BEPS”) project has advanced significantly in recent years, resulting in the October 2021 publication of a statement (the “October Statement”) among states participating in the BEPS process to adopt a two-pillar solution to address international tax challenges, and the subsequent announcement of many jurisdictions of plans to adopt the “GloBE” rules under the second pillar of that solution. These rules relate to the adoption of a 15% global minimum tax.
- 1.4 In our view, the United Nations has an important role to play in this process. The U.N. is a truly global organization with significant influence in international affairs, and has legitimacy and authority through its vast membership of nearly all the world’s sovereign states. The U.N. is respected both in generating rules and guidance and in norm- and standard-setting, including with respect to human rights, environmental, and trade issues. The U.N.’s efforts in these areas encourage compliance and cooperation among member states. In particular, the U.N. has established “sustainable development goals,” which are intended as a call to action to end poverty, protect the planet, and ensure that all people enjoy peace and prosperity.¹ Achieving these goals requires adequate funding, including through sufficient tax revenues.
- 1.5 Through the U.N. Committee of Experts on International Cooperation in Tax Matters (the “Tax Committee”), the U.N. has a broad tax mandate that includes promoting cooperation between tax authorities, with special attention to the needs of developing countries and countries with economies in transition.² The Tax Committee also generates practical guidance for

¹ United Nations Department of Economic and Social Affairs, Sustainable Development, “The 17 Goals,” <<https://sdgs.un.org/goals>>

² United Nations Department of Economic and Social Affairs, Financing, <<https://www.un.org/development/desa/financing/what-we-do/ECOSOC/tax-committee/about>>



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governments, tax administrators, and taxpayers to help strengthen tax systems, with a focus on promoting sustainable development, reducing inequality, promoting inclusive growth, and protecting the environment. Thus, especially given the U.N.'s important broader mandate and global credibility, the Tax Committee is essential to ongoing multilateral efforts to improve the global tax system and implement the OECD BEPS project.

- 1.6 Our inputs primarily focus on the role that U.N. may play in helping implement the OECD's BEPS project, particularly by ensuring that the project adequately protects the interests of developing nations and promotes sustainable development. We also comment briefly on other areas in which U.N. guidance would aid in the development of an international tax cooperation framework. In general, our comments support the U.N.-led development of a multilateral instrument that would aid developing nations in implementing portions of the BEPS two-pillar solution and would address key areas of uncertainty of likely relevance to developing jurisdictions. We also discuss the development of improved transfer pricing documentation requirements and the creation of a U.N.-facilitated tax tribunal in the final sections of our comments.

2. **Advancing and Protecting the BEPS Effort**

- 2.1 The OECD's Base Erosion and Profit Shifting ("BEPS") project has progressed rapidly. In particular, components of the project's "two-pillar" solution, mainly relating to the "Global Anti-Base Erosion" ("GloBE") rules that form part of the second pillar of that project, appear likely to go into effect in many jurisdictions over the next several years. The 15% global minimum tax that these rules implement would constitute a fundamental change in international tax policy and longstanding norms. Many such changes are positive developments, and we support the OECD's work in this area.
- 2.2 Yet the rapid pace with which the rules have been negotiated has meant that the interests of many jurisdictions – including developing countries – may not be adequately represented in the current package of GloBE reforms that are set to be implemented.³ Indeed, it was Nigeria, on behalf of U.N. member states that comprise the Group of African States, that originally proposed the Resolution, and more than a half of the African countries have not participated in the OECD's Inclusive Framework. Similarly, Colombia has criticized the OECD agreement and its "limitations" for developing countries, and the Colombian finance minister has invited all Latin American finance ministers to discuss tax policies and standards in the region, with a goal to form a decisionmaking body for tax in Latin America.⁴ Likewise, Argentina has raised concerns about developing countries' commitments under the GloBE rules in comparison to expected benefits from those rules.⁵ In contrast to the U.N.'s 196 members and its goal of promoting sustainable development and inclusive growth, the OECD's

³ See Global Alliance for Tax Justice, "The "deal of the rich" will not benefit developing countries," <https://globaltaxjustice.org/?jet_download=8883>

⁴ International Centre for Tax & Development, "Calling all Latin American and Caribbean Ministers to rethink global taxation," <<https://www.ictd.ac/blog/calling-all-ministers-rethink-global-taxation/>>

⁵ See remarks of Martin Guzman, Independent Commission for the Reform of International Corporate Taxation, "A global tax deal: a victory for whom?" <<https://www.youtube.com/watch?v=0FFI4aPpydw&t=2s>>



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membership and mandate are more limited, and the OECD is perceived by many as focusing on the interests of large, developed countries.⁶

- 2.3 A review of the current path of the BEPS project suggests that this perception is not misplaced. As reflected in the October Statement, the two-pillar solution was a compromise that included at least three substantive rules, each favoured by separate groups of jurisdictions. First, Pillar 1 was intended to allow “market” jurisdictions to collect additional tax on end sales or products or services within their jurisdictions and has the support of both taxpayers seeking to avoid multiple conflicting digital services taxes and tax authorities in market jurisdictions. In addition, the subject to tax rule (“STTR”) was designed to address low-tax outcomes under bilateral income tax treaties and was included to promote the interests of developing nations. Finally, the GloBE rules formed the bulk of the Pillar 2 regime, and were favoured by large, developed jurisdictions who would stand to benefit both from collecting additional top-up tax on entities located in foreign countries and from reducing the incentive for multinationals to locate operations in other, often less developed, jurisdictions. Under the GloBE rules, many developing countries will lose the benefits of adopting business tax incentives, while incurring large compliance costs to collect any tax revenue that results from effectively rescinding those incentives.
- 2.4 Only the GloBE rules have made progress. Both Pillar 1 and the STTR face considerable practical obstacles to adoption, and their rules remain underdeveloped. In particular, the OECD has released no further guidance or information on the STTR since it published “Blueprint” documents on Pillars 1 and 2 in 2020. Analysts suggest that, as drafted in the Blueprint, the STTR would rarely apply and would raise little revenue.⁷ The Tax Committee could facilitate discussions that would help progress negotiations on Pillar 1 and further develop the STTR for eventual adoption.
- 2.5 The implementation of the BEPS and GloBE projects requires an active approach by all countries. The United Nations can play a crucial role by allowing the involvement of developing countries and securing policy results that serve the interests of all. If developing countries’ interests are not addressed in the international financial and tax system, there is a risk that these countries could resort to financing alternatives that may enable tax avoidance and evasion, including those that the U.N. has identified as undermining domestic resource mobilization in developing countries.⁸ And while the OECD has been instrumental in developing the BEPS framework and promoting tax transparency and cooperation among its member countries, the UN is better equipped to address the needs and concerns of the global community as a whole, including developing countries, as that framework is implemented into law.
- 2.6 We agree with the suggestion in the Resolution to develop a multilateral instrument to aid in tax cooperation and in the implementation of the OECD BEPS project. As noted above, while

⁶ See, e.g., The Economist, “What is the OECD?”, (July 6, 2017), <<https://www.economist.com/the-economist-explains/2017/07/05/what-is-the-oecd>> (referring to the OECD as a “club of mostly rich countries”)

⁷ International Monetary Fund, “International Corporate Tax Reform”, (February 2023) <<https://www.imf.org/en/Publications/Policy-Papers/Issues/2023/02/06/International-Corporate-Tax-Reform-529240>>

⁸ See, e.g., United Nations Conference on Trade and Development, Policy Brief No. 102 (July 2022) <<https://unctad.org/publication/cost-doing-too-little-too-late-how-cryptocurrencies-can-undermine-domestic-resource>> (concerning cryptocurrencies).



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the OECD has been instrumental in advancing the BEPS process more generally, the U.N. is the appropriate forum for its implementation given its broad membership and important focus on developing countries and sustainable development. In particular, the U.N. could facilitate the negotiation of a multilateral instrument (or instruments) that would aid in development and easier adoption of the STTR and other BEPS rules, including portions of the model rules that commentators have noted are controversial and may lead to significant legal disputes. By facilitating a multilateral agreement on these items, the U.N. could promote the interests of developing countries both by making implementation of the STTR easier and removing other obstacles to the GloBE rules, including the risk of legal challenge to certain of those rules.

- 2.7 In addition, developing countries may lack the capacity to fully participate in the implementation of Pillar 1. Therefore, the UN can provide technical assistance and capacity-building support to help these countries understand and implement the new rules effectively. The UN can advocate for the inclusion of developing countries in the negotiation and implementation of Pillar 1. This can include advocating for the participation of developing countries in relevant multilateral forums and discussions, as well as advocating for the recognition of their specific concerns and interests. The UN can monitor and evaluate the implementation of Pillar 1 in developing countries to ensure that the rules are being implemented effectively and that their impact is being assessed.
 - 2.8 The UN Committee on Digital Taxation was proposed in a report by the UN Secretary-General's High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (FACTI Panel). The committee would be responsible for developing a global framework for digital taxation and would bring together policymakers, tax authorities, and industry stakeholders to share best practices and coordinate efforts to implement the new rules. The proposed committee would have a broad mandate to consider issues related to digital taxation, including the allocation of taxing rights in the digital economy, the tax treatment of digital transactions, and the development of a global minimum tax rate while taking into consideration the needs of developing countries. The committee could also provide guidance and support to countries in implementing Pillar 1.
 - 2.9 In addition, the U.N. could facilitate the drafting of a model convention that would form a standardized template for negotiating bilateral agreements related to digital taxation. The model convention would establish a set of rules for the allocation of taxing rights in the digital economy and provide guidance on the tax treatment of digital transactions. The U.N. is well positioned to lead this process, since the UN Model Convention on Double Taxation has been in use for over 40 years and provides a common framework for the negotiation of bilateral tax treaties between countries. A model convention on digital taxation could serve a similar purpose by providing a common set of rules for the taxation of digital transactions.
3. **Harmonizing BITs and Stabilization Mechanisms with Pillar 2**
 - 3.1 Developing countries use a variety of means to encourage foreign direct investment. These include various fiscal stabilization mechanisms and investor protections included in bilateral investment treaties (BITs). While significant analysis and commentary has been directed at the relationship between Pillar 2 and tax credits and similar incentives, BITs and fiscal stabilization mechanisms present challenging issues on which developing countries need assistance if they are able to share in the benefits of the global minimum tax. The UN is



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uniquely positioned to provide leadership in this area.

- 3.2 BITs provide foreign direct investors with various protections with respect to the state of law in the host country. A developing country seeking to implement a Qualified Domestic Minimum Top-Up Tax (“QDMTT”) or other aspects of Pillar 2 will expose itself to investor-state claims that the change violates one or more of the protections provided by a BIT. Under a QDMTT, a jurisdiction in which a low-tax entity is resident gains the right to collect any top-up tax calculated with respect to that entity, before other jurisdictions may do so.
- 3.3 Similar to our discussion above regarding the STTR, a country could undertake the laborious process of renegotiating its existing BITs to accommodate changes of law required under Pillar 2. That process would take considerable time and would likely result in inconsistencies. We recommend that the UN include in its workplan the sponsorship and negotiation of a multilateral amendment to all existing BITs to permit a host country to enact a QDMTT or other Pillar 2 legislation without being considered a violation of any BIT protections.
- 3.4 Fiscal stabilization mechanisms also present challenges for developing countries seeking to implement Pillar 2 legislation. Whether the fiscal stabilization method is enacted as part of domestic law or reflected in a bilateral agreement with a foreign direct investor, it can be expected that investors will argue that enactment of a QDMTT or other Pillar 2 legislation violates investor protections.
- 3.5 In principle, enactment of a QDMTT should not violate a fiscal stabilization agreement because any profits taxed under a QDMTT would otherwise be taxed by another country under the other Pillar 2 operating rules, and thus it is arguable that there would be no economic damages to support a claim under domestic legislation or a fiscal stabilization agreement with respect to the imposition of a QDMTT. In this regard, a foreign direct investor could be encouraged to waive certain protections under a fiscal stabilization mechanism to the extent the amount of tax paid under a QDMTT would otherwise be paid to another jurisdiction under the Pillar 2 rules.
- 3.6 Finally, to the extent a developing country is considering future fiscal stabilization either as part of domestic law or in a bilateral agreement, the country should be encouraged to provide that Pillar 2 legislation is not covered by any fiscal stabilization protections.
- 3.7 Accordingly, we recommend that the UN include in its workplan a declaration that would include the following:
 - (A) A statement of the UN position that a QDMTT does not violate fiscal stabilization mechanisms because there are no economic damages to support a claim;
 - (B) A statement encouraging foreign direct investors to waive provisions under fiscal stabilization mechanisms; and
 - (C) A statement that the UN encourages developing countries to exclude Pillar 2 taxes from future stabilization mechanisms.



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4. **Implementation of effective transfer pricing documentation requirements**

- 4.1 The Resolution recognizes, among the various points, the importance of strengthening international tax cooperation to make it fully inclusive and more effective; the relevance of transfer pricing to developing countries, together with the challenges faced by low-capacity or inexperienced tax administrations, has been high on the global agenda in the last several years.
- 4.2 In establishing the prices and other conditions for transactions between associated enterprises and assessing whether such prices and conditions are consistent with the arm's length principle, it is necessary for enterprises and tax administrations to conduct what is generally called a "transfer pricing analysis". This analysis requires taxpayers and/or tax administrations to identify and understand the key features of a transaction between related parties, and analyse the functions performed, risks assumed and assets used by those parties in order to determine and apply the most appropriate transfer pricing method. In some cases, and not only in developing countries, this analysis involves a complex examination of a large amount of information.
- 4.3 Robust transfer pricing documentation rules are a prerequisite in most countries (developed and developing) for the effective implementation of transfer prices. The requirement to prepare, keep or submit information enhances compliance and enables tax administrations to access the information necessary to enforce their transfer pricing regulations. The access to such information also allows tax administrations to focus their efforts and to deploy their limited resources on taxpayers and transactions that pose the greatest risk of base erosion and profit shifting.
- 4.4 Our firms-level information and selected country experiences evidence that the introduction of effective documentation obligations is a critical component of compliance management to address transfer mispricing.
- 4.5 The number of countries, including developing countries, with transfer pricing documentation requirements has increased more than tenfold in the last 30 years. However, there is no single approach to transfer pricing documentation requirements, or combination of approaches, that is universally adopted. What is sure is that – where effectively adopted - this has been linked globally to a reduction in observable indicators of profit shifting, possibly related to better-targeted enforcement activities and self-compliance induced by the obligations to revisit the related party dealings more systematically.
- 4.6 This being stated, our suggestion is to strengthen the effectiveness of transfer pricing documentation requirements in developing countries relying on the standards set forth by the UN Practical Manual on Transfer Pricing for Developing Countries (2021, chapter 12 "Documentation"), recently updated with the outcome of the Action 13 of the OECD/G20 BEPS initiative, simplifying the approach (considering that the international standards are not self-executing) as follows:
- (A) providing that not all transactions that occur between associated enterprises are sufficiently material to require full documentation in the transfer pricing documentation;



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- (B) examining these guidelines from the perspective of how they may work in practice in a developing country context, bearing in mind the administrative constraints that may exist in the tax administration and the MNE;
- (C) considering that the obligation for transfer pricing documentation in developing countries shall require modernization of tax environment and no marginal compliance burden, introduction of *ad-hoc* tax incentives for compliant companies.

5. **Difficulties in accessing comparables data for transfer pricing analyses in developing countries**

- 5.1 To date, the arm's length principle has been widely adopted by all countries (developed and developing) that have introduced specific legislation concerning transfer pricing for income tax purposes. The arm's length principle can be expressed in different ways and although definitions in countries' domestic tax law differs, the most commonly referred to and internationally accepted expression is found in Article 9 "Associated Enterprises" of both the OECD Model Tax Convention (2017) and the UN Model Tax Convention (2021).
- 5.2 The arm's length principle is generally based on a comparison of the conditions in the controlled transaction with the conditions in comparable transactions between independent enterprises. There is an international consistency concerning the standard of comparability adopted for such purposes as the majority of countries (developed and developing) have adopted a standard similar to that found in OECD Transfer Pricing Guidelines (2022).
- 5.3 There is also an international consistency as to the factors taken into account when assessing comparability, with most countries referring in their legislation or administrative guidance to the factors specified in both the OECD and Transfer Pricing Guidelines (2022) and the UN Practical Manual on Transfer Pricing for Developing Countries (2021). These are: the characteristics of the property or services, the functions performed by the parties (taking into account assets used and risks assumed), contractual terms, economic circumstances and business strategies.
- 5.4 The arm's length principle applied on the basis described above requires that comparable transactions between independent parties: (a) exist, (b) can be identified by the taxpayer and the tax administration, and (c) the sufficient information is available to them to assess comparability and apply the appropriate transfer pricing method.
- 5.5 The difficulties faced in obtaining comparables data necessary to apply the arm's length principle has been recognized an area of significant concern by developing country policy makers, tax administrations and taxpayers. Where data is scarce in the country where the tested party is located, this poses difficulties in applying the arm's length principle not only for the local tax administration and taxpayer, but also for the foreign tax administration and the taxpayer on the other side of the controlled transaction. Both OECD and non-OECD countries frequently express concerns about the availability and quality of financial data on transactions between independent parties that can be used for comparison, as well as the availability and quality of information necessary to interpret such data when available.
- 5.6 These difficulties are recognized as being particularly acute in developing countries, where access to data sources is typically limited and less (or no) local data often exist or is publicly



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available. In particular: the information relevant to a jurisdiction can generally be accessed through the purchase of a licence from database providers. However, even putting aside the financial cost of acquiring access to such databases, challenges for developing country tax administrations often remain, particularly in cases where little relevant information relating to a specific jurisdiction or even region exists. Where the information does exist, it may exhibit differences compared to transactions under review.

- 5.7 Typically, in such cases, transfer pricing practitioners need to consider using imperfect data, including the use of data from foreign markets. However, the effectiveness of such approaches has not been studied sufficiently to enable definitive conclusions to be drawn about when they are reliable or how any adjustments to account for such differences should apply.
- 5.8 This being stated, we acknowledge that (i) transfer pricing is not an exact science and that, by their nature, transfer pricing analyses typically provide an indication of the arm's length position and an estimate of the arm's length price (e.g. a range), rather than a definitive answer, and (ii) the issue of difficulties in accessing comparables data is complex and needs to be approached from several practical as well as policy angles. In any case, although with these comments we do not intend to provide a comprehensive solution, we suggest a number of possible options that may be considered for developing countries to mitigate the problems caused therein by poor availability of or access to relevant data.
- 5.9 In particular, drawing inspiration from what has already been discussed at the international and regional levels (including at the OECD, IMF, and World Bank), the following improvements may be considered:
- (A) Use of carefully constructed safe harbours aligned with the arm's length principle. Safe harbours indeed have the potential to provide increased certainty and simplicity for business and tax administrations alike, and can be particularly advantageous in developing countries due to the ease of administration and lower litigation risk. Positive features can be achieved by setting a safe harbour price or margin in line with the arm's length measure and ensuring that transactions conducted under a safe harbour are within the scope of treaties, including relief from double taxation under the mutual agreement procedure;
 - (B) Use of information already in the hands of tax administrations to inform about arm's length safe harbour margins. Such information, not being in the public domain, is typically not used by tax administrations as comparables data, thus it could be presented publicly in aggregated format to ensure taxpayers confidentiality;
 - (C) Introduction of a simplified approach for the selection and application of the most appropriate transfer pricing method, in particular for those transactions (e.g. sale of commodities) in which reference can be made to a quoted price (e.g. on a commodity exchange), where available. Carefully constructed safe harbours could be additionally implemented for common types of transaction where comparables information is unavailable or unreliable. For transactions in which the analysis concludes that a profit split approach is most appropriate to the tested transaction, direct benchmarking data may not be required;



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- (D) Use of anti-avoidance rules where appropriate. Where there is a significant and systemic risk of base erosion or profit shifting due to transfer pricing, and data is not available, or capacity is insufficient to effectively apply one of the above, anti-avoidance approaches could be considered.

6. **Increasing Tax Certainty through a U.N. Tax Tribunal**

- 6.1 Certainty about taxes is generally desirable for taxpayers. Paying potentially low taxes, but having uncertainties about reliance on the taxes remaining low or unforeseen risks of double taxation or other additional costs (for example, due to a long MAP process) are often not worth the low taxes. Further, having the same income taxed in two (or more) countries, for example, because a permanent establishment is seen by one country, but not by others, or because transfer pricing methods are not applied in the same manner in a number of countries, could lead to serious liquidity problems that may even threaten the existence of businesses.
- 6.2 Therefore, an effective ruling procedure for questions that arise between two (or more) countries which clarifies the legal situation before facts are implemented and, once implemented, a fast dispute resolution mechanism if countries do not agree on how to tax certain situations could be the key to promoting the payment of taxes without using structures that may lead to lower taxes, but do not give certainty. Also, countries that adopt a cross-border ruling procedure and a fast dispute resolution mechanism would clearly have a competitive advantage over countries that do not provide the same certainty for businesses.
- 6.3 International tax law questions or disputes require specialized expertise and a fair and impartial resolution mechanism. As a solution, the establishment of an International Tax Tribunal by the United Nations could provide the means of resolving such questions and disputes. Such a Tribunal could serve as an arbitration instance which is called upon by countries if they mutually agree to do so, particularly for disputes that cannot be resolved through a MAP. The judges of the arbitration court called upon could be composed of five distinguished tax experts, with two nominated by the highest tax courts of the countries involved and three nominated by the permanent International Tax Tribunal whereas at least one of the three is from an OECD country and one is from a country that is not a member of the OECD. The three judges who are not from the involved countries shall not have any jurisdictional conflicts of interest and shall be selected randomly to ensure impartiality. If more than two countries are involved in the proceeding, the number of judges nominated by the International Tax Tribunal shall lead to an uneven number of judges. In the context of a joint ruling to be issued by two (or more) countries, the arbitration shall decide on the question of the ruling.
- 6.4 In our view, establishment of a global tribunal by the U.N. would contribute substantially to the international tax cooperation framework referenced in the Resolution.