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CHAPTER 4

THE PERCEIVED (UN)FAIRNESS OF THE GLOBAL MINIMUM CORPORATE TAX RATE

*Rita de la Feria**

Abstract

The global agreement to introduce a minimum corporate income tax rate is arguably one of the most important tax policy developments of the last decades. Yet, there are growing concerns over its fairness. The aim of this chapter is to consider the impact of process on fairness perceptions, informed by public economics, political science, legal philosophy, behavioural science, and criminal justice literatures. It first argues that, whilst the agreement may yield some positive outcomes for all, particularly in terms of tax sovereignty and tax morale, any assessment of the fairness of these outcomes should be dependent upon their benchmarking. It then considers the procedural elements of the deal, arguing that increased inclusiveness does not necessarily result in a fair process, most specifically where the process does not ensure adequate voice and respect for all parties. It concludes that, given the significance of procedural justice for perceptions of unfairness, the agreement is likely to be perceived as unfair, regardless of potential gains.

A. Introduction.....	2
B. Benchmarking GloBE's Outcomes.....	4
1. Fair Tax Outcomes?.....	6
2. Unfair Overall Outcomes.....	11
C. Framing GloBE's Process.....	13
1. Reframing Self-Interest as Altruism.....	15
2. Paternalistic Coercion and Biases.....	17
D. Conclusion.....	21

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INTRODUCTION

In the autumn of 2021, the excitement was palpable. The OECD announced in October that the international community had struck a ‘ground-breaking tax deal for the digital age’, which would ensure that Multinational Enterprises (MNEs) would be subject to a minimum 15 percent corporate tax rate.¹ After years in the making, and much human and political capital invested, it looked like it was finally happening: a game-changing deal on corporate taxation that would herald a new era of global tax cooperation, to the benefit of all. Whilst there has been some noticeable rhetorical changes as to the agreement’s ultimate rationale – namely whether its main objective is to limit tax competition *per se*, or just to prevent profit shifting –² the agreement establishes a *de facto* minimum level of corporate taxation, which if indeed implemented will have a significant impact on global tax competition.³

- 4.2 Under the agreement, foreign-sourced profits whose effective tax rate is below 15 percent will be (generally) subject to a top-up tax. This top-up is achieved through the introduction of two key rules, namely an income inclusion rule (IIR), and an undertaxed payments rule (UTPR). The operation of the IIR is broadly based on traditional controlled foreign company (CFC) rules, and triggers an inclusion at the level of the shareholder, where the income of a controlled foreign entity is taxed at below the effective minimum tax rate; the UTPR acts as a back stop to the IIR rule, and will only apply where the parent jurisdiction did not implement the IIR.⁴ The priority given in the agreement’s blueprint to the IIR rule has clear implications for the allocation of taxing rights, as any potential revenue gains are most likely to accrue to developed countries. In order to address the concerns raised by developing countries, therefore, two additional measures were introduced,⁵ namely: (i) a withholding tax on certain outgoing payments to related companies, which will take precedent over the IIR, now designated as the subject-

¹ Organisation for Economic Co-operation and Development (‘OECD’), ‘International community strikes a ground-breaking tax deal for the digital age’ (Press Release 8 October 2022), available at <https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm> (last accessed 13 September 2022).

² These tensions at the heart of the project are explored further in, as follows: Michael Devereux et al., ‘The OECD Global Anti-Base Erosion Proposal’, (Oxford University Centre for Business Taxation 2020), available at <https://oxfordtax.sbs.ox.ac.uk/files/oecdglobeproposalreportpdf> (last accessed 13 September 2022); Joachim Englisch, ‘International Effective Minimum Taxation – analysis of GloBE (Pillar Two)’ in Haase/Kofler (eds), *OUP Handbook of International Tax Law* (Oxford University Press 2021); and Richard Collier & John Vella, ‘Politics and Policies of Pillar II’, Chapter X in this compilation.

³ At the time of writing, implementation in the US is not yet guaranteed, see, Alan Rappeport & Jim Tankersley, ‘How Joe Manchin Left a Global Tax Deal in Limbo’, *New York Times* (18 July 2022). Within the EU, however, final agreement was reached in December 2022, despite initial resistance from some Member States, see: Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ L 328, 22.12.2022, p. 1–58; and Reuters, ‘Hungary blocks EU clearance of minimum corporate tax’ (16 June 2022).

⁴ OECD, OECD/G20 Base Erosion and Profit Shifting Project, *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS* (OECD Publishing 2020), available at www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-two-blueprint-abb4c3d1-en.htm (last accessed 15 August 2022).

⁵ For a detailed analysis of the various stages of the negotiations, see Englisch, *supra* n. 2.

to-tax rule;⁶ and (ii) a substance carve-out, which excludes from the scope of the rules returns on investment in tangible fixed assets and jobs, now designated as the substance-based income exclusion rule.⁷ The first measure allows developing countries to collect some additional revenue; the second, allows developing countries to continue to engage in corporate tax competition, to the extent that it is designed to attract substantive (tangible) FDI. In addition to these two measures, a further one has been developed by the OECD throughout 2023 so as to address the concerns of developing countries, namely the introduction of a Qualified Domestic Minimum Top-up Tax (QDMTT). The measure allows source countries to collect the GloBE top-up tax themselves, so whilst it does not per se turn off the application of the international top-up rules, it effectively prioritises the collection by source countries, thus taking precedent over the IIR.⁸

- 4.3 Following on from these concessions, the OECD has been keen to emphasise the inclusiveness of the deal, and thus its legitimacy as a multilateral instrument, hailing it as “*a landmark deal, agreed by 136 countries and jurisdictions representing more than 90% of global GDP*”, “*supported by all OECD and G20 countries*”, to which “*developing countries, as members of the Inclusive Framework on an equal footing, have played an active role*”.⁹ Yet, these statements come amidst growing concerns over the deal’s fairness.¹⁰ Not only did four developing countries – Kenya, Nigeria, Pakistan and Sri Lanka – initially failed to endorse the agreement, but probably more significantly, many more expressed concerns over it, despite formal endorsement.¹¹
- 4.4 Against this background, the aim of this paper is to consider the impact of process on fairness perceptions. Its central assertion is that, given the significance of procedural justice for perceptions of fairness,¹² the process to achieve agreement for the global minimum corporate tax rate should be considered, not merely from a legitimacy perspective – as has often been the case – but also as a fundamental element for the development of global fairness perceptions, on a par with the deal’s outcomes. Indeed, whilst fairness is often associated with outcomes – who gains, who loses? – there is now extensive and robust evidence in social psychology, going back decades, which indicates that

⁶ The design and operation of QDMTT rules is far from clear, and is at the forefront of the recently released OECD’s Pillar Two administrative guidance, see OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two)*, July 2023, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, www.oecd.org/tax/beps/administrative-guidance-global-anti-base-erosionrules-pillar-two-july-2023.pdf (last accessed on 26 October 2023).

⁷ On the practical difficulties created by the interaction of these various rules, see, Ana Paula Dourado, ‘Pillar Two Model Rules: Inequalities Raised by the GloBE Rules, the Scope and Carve-Outs’ (2022) 50 *Intertax* 1-4.

⁸ Joachim Englisch, ‘GloBE Rules and Tax Competition’ (2022) 50 *Intertax* 859.

⁹ OECD, ‘International community strikes a ground-breaking tax deal for the digital age’ (Press Release 8 October 2022), available at <https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm> (last accessed 13 September 2022).

¹⁰ Yariv Brauner, ‘Agreement? What Agreement? The 8 October 2021, OECD Statement in Perspective’ (2022) 50 *Intertax* 3-6.

¹¹ See, for example: Chris Giles et al., ‘Global tax deal backers battle to win over holdout countries’, *Financial Times* (29 June 2021); and Liz Alderman, ‘Ireland’s Days as a Tax Haven May Be Ending, but Not Without a Fight’, *New York Times* (8 July 2021).

¹² On the impact of procedural justice on tax matters, see Steven Sheffrin, *Tax Fairness and Folk Justice* (Cambridge University Press 2013).

overall feelings of fairness and social satisfaction are not just based on outcomes, but also on the process or procedures through which these outcomes are derived.¹³ Form matters as much – and depending upon circumstances, sometimes more – than substance. In particular, procedural justice tends to matter most when outcomes are perceived as unfavourable in relative terms. These findings have considerable implications for the global minimum corporate tax rate deal, which have so far been unexplored by the literature.

- 4.5 The chapter proceeds as follows. Section II considers the fairness of the agreement from the perspective of outcomes, arguing that whether those outcomes can be characterised as fair is fundamentally dependent upon benchmarking. Thus, whilst the agreement may yield some positive outcomes for all, particularly in terms of tax sovereignty, it cannot be characterised as necessarily welfare enhancing or fair, when various other inequalities and distortions to global allocation of FDI choices are considered. Section III focusses on the process of reaching the agreement on the global minimum corporate tax rate, arguing that increased inclusion does not necessarily result in fair process. Also, that the prevailing narrative of an inclusive process is open to challenge as constructed more upon the self-interest of the more powerful global tax players than altruism and also characterised by paternalistic coercion. In essence, inclusion of developing countries in the process is not enough if the key elements of procedural justice are lacking, namely voice and respect. Section IV concludes therefore that, despite its potential gains, the agreement is likely to be regarded as flawed as a result of its procedural shortcomings; conversely, ensuring a fair process would likely increase overall perceptions of fairness – even where the main outcomes remain the same.

BENCHMARKING GLOBE'S OUTCOMES

- 4.6 Whether the introduction of a global minimum corporate tax rate will give rise to fair outcomes depends fundamentally on benchmarking, i.e. fair in relation to what? What is the most appropriate comparator? If the benchmark for assessment is broad, namely fair global competition for FDI, then the question is whether the minimum corporate tax rate will place countries in an equal playing field when competing for investment. If, on the contrary, the benchmark for assessment is much narrower, namely corporate tax competition, then the question is whether the minimum corporate tax rate will place countries in an equal playing field as regards corporate taxation, i.e. whether countries will benefit from the removal of corporate taxation from the list of factors that determine investment decisions. The answer to both questions is not necessarily the same. The minimum corporate tax rate may result in fair outcomes if the benchmark is narrow, but unfair if the benchmark is broad. On the contrary, although less probable, the opposite situation is also conceivable, whereby the results are unfair from a narrower benchmarking

¹³ Starting with the landmark work of Lind and Tyler, see Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Springer New York 1988).

perspective – perhaps less corporate tax revenues or sovereignty than currently – but fair from a broader one, because overall it increases the level playing field for global investment competition. Before answering questions over appropriate fairness comparators, however, it is necessary to first establish the likely impact of the introduction of the global minimum rate on corporate tax competition, and that is, at present at least, not fully straightforward.

- 4.7 Overall, the agreement is arguably the culmination of a long process, started nearly three decades ago, not one of necessarily ending tax competition, but of managing it.¹⁴ Indeed, the GloBE agreement will not eliminate global corporate tax competition, but by establishing a global minimum corporate tax rate, it will (almost certainly) curtail it. The extent to which it will do so, however, is not yet fully clear, and it will depend to a large extent on countries' behavioural response to the implementation and design of specific rules. Generally, however, eliminating competition insofar as the rate is concerned tends to increase competition on the base, so in light of the substance carve-outs, it is likely that tax competition will continue, particularly in terms of tax incentives that attract substantive investment.¹⁵
- 4.8 On this regard, the fact that there is often a tax-rate bias in FDI decision-making may help limit tax competition –¹⁶ shifting attention to the statutory rate, rather than the effective one. Yet, it is worth noting, that the elasticity of corporate income with respect to corporate income tax seems to be increasing, so this may counteract the effect of a tax-rate bias.¹⁷ General substance carve-outs – or substance-based income exclusions – will not only limit the impact of the agreement in curbing corporate tax competition, but they may actually exacerbate competition for real investment. This was already the case with the adoption of the substance / nexus approach to define harmful tax competition,¹⁸ but will likely to be even more so now, as in the presence of a minimum level of corporate taxation, the value of real investment increases.¹⁹ The OECD argues that this will achieve the best of two worlds, as 'where investment tax incentives achieve their policy goals by attracting investment and jobs, the substance-based income exclusion reduces the impact of the minimum tax while maintaining the positive effects of the incentive', whilst where tax incentives do not attract investment 'the minimum

¹⁴ This process is analysed further in Rita de la Feria, 'Rigging the Global Tax Competition Game: Process, Framing and Motivated Altruism', *forthcoming*.

¹⁵ As expressly acknowledged by the OECD, see Grace Perez-Navarro, 'What does Pillar Two's Global Minimum Tax Mean for Tax Incentives?' (2023) 51 *Intertax* 100.

¹⁶ Generally, taxpayers display a strong tax-rate bias, but what is perhaps more surprising is that under time constraints, so do tax professionals, see, Kay Blaufus et al., 'Decision Heuristics and Tax Perception – An Analysis of a Tax-Cut-Cum-Base-Broadening Policy' (2013) 35 *Journal of Economic Psychology* 1-16.

¹⁷ Sebastian Beer, Ruud de Mooij & Li Liu, 'International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots' (2020) 34 *Journal of Economic Surveys* 660-688.

¹⁸ Shafik Hebous, 'Has Tax Competition Become Less Harmful?' in Mooij/Klemm/Perry (eds), *Corporate Income Taxes Under Pressure: Why Reform Is Needed and How It Could Be Designed* (Washington DC: IMF 2021) Chapter 6.

¹⁹ There is an ongoing academic debate on the consequences of the proposed rules, see *inter alia* Michael Devereux et al., 'What is the Substance Based Carve-Out under Pillar 2? And how Will it Affect Tax Competition?' (2021) 39 *EconPol Policy Brief*; Eckhard Janeba & Guttorm Schjelderup, 'The Global Minimum Tax Raises More Revenues than You Think, or Much Less' (2022) CESifo Working Paper 9623, available at https://www.cesifo.org/DocDL/cesifo1_wp9623.pdf (last accessed 13 September 2022); and Michael Devereux, John Vella & Heydon Wardell-Burrows, 'Pillar 2: Rule Order, Incentives, and Tax Competition' (2022) Oxford University Centre for Business Taxation Policy Brief, 14 January 2022

tax will do its work'.²⁰ Others, however, are less convinced and have argued that the new features will significantly compromise the effectiveness of the global minimum tax.²¹

- 4.9 Assuming therefore that global corporate tax competition will not be eliminated but it will be curtailed, resulting from the establishing of a 'floor on tax competition' and a substantial tax incentives reform envisaged – and indeed encouraged – by the OECD,²² the question is then whether this will result in fair outcomes. The short answer is, not necessarily.

1. Fair Tax Outcomes?

- 4.10 Whether likely outcomes can be characterised as fair will depend fundamentally on two questions interlinked questions: what is fair and fair as compared to what? From an economics perspective, there is now a broad consensus – tested across various theoretical set-ups – that corporate tax competition under a Nash equilibrium will not be welfare enhancing: global tax competition leads to Pareto inefficient low rates,²³ and it creates cross-border negative spillovers, which tend to be larger for developing countries.²⁴ Therefore, if the benchmark for assessment of the agreement is the current global corporate tax system, limiting global tax competition would in principle be welfare enhancing, not least due to the expected revenue gains, but perhaps less intuitively, also due to potential gains in tax sovereignty and morale.
- 4.11 In terms of *revenue*, the OECD frequently cited general estimate is of worldwide tax revenue gains of US150 billion annually, updated in early 2023 to US220 billion – approximately a 9 percent increase – reportedly based on newer data and taking into account new agreed design features.²⁵ Aside from data-based, criticisms,²⁶ there are two significant caveats to these estimates. First, these are (broadly) static. Whilst the OECD did take into account some possible reactions, as itself recognises, their estimates do not try to – nor realistically could they – model all potential reactions by MNEs and governments. In particular, they do not model for changes in MNEs investment decisions and Governments' policy reactions and, according to the OECD, should therefore be interpreted as merely illustrating the broad

²⁰ Perez-Navarro, *supra* n. 15.

²¹ Englisch, *supra* n. 8.

²² '[T]ax incentive reform should be a priority' in Perez-Navarro, *supra* n. 15.

²³ Michael Keen & Kai Konrad, 'The Theory of International Tax Competition and Coordination' in Auerbach et al. (eds), *Handbook of Public Economics* (Amsterdam: Elsevier 2013), Vol 5.

²⁴ Ernesto Crivelli, Ruud de Mooij & Michael Keen, 'Base Erosion, Profit Shifting and Developing Countries' (2016) 72 *FinanzArchiv: Public Finance Analysis* 268.

²⁵ OECD, Revenue impact of international tax reform better than expected (age) (Press Release 8 January 2023), available at: <https://www.oecd.org/tax/beps/revenue-impact-of-international-tax-reform-better-than-expected.htm> (last accessed 20 October 2023). See also Thomas Tørsløv, Ludvig Wier & Gabriel Zucman, 'The Missing Profits of Nations' (2022) *The Review of Economic Studies*.

²⁶ It has been said that the data used is both outdated, and at times double-counted, see Daniel Bunn, 'What the OECD's Pillar Two Impact Assessment Misses', Tax Foundation Blog (January 23, 2023), available at: <https://taxfoundation.org/blog/global-minimum-tax-revenue-impact-assessment/> (last accessed on 26 October 2023).

revenue impact of the introduction of the minimum corporate tax rate, rather than precise estimates.²⁷ Second, they hide considerable cross-country asymmetry. The fact that, under the GloBE agreement, the IIR takes priority over the UTPR has significant implications in terms of allocation of potential revenue gains. Indeed, all other factors remaining equal, this hierarchy of rules will tend to favour developed, high-income countries, to the detriment of mid and low-income developing countries. The possibility of introducing a QDMTT is an implicit acknowledgment of these asymmetries, and its aim is clearly to soften the distributional impact of the GloBE rules, allowing source countries to have priority over additional revenues, and thus ensuring that mid and low-income countries get much of that revenue.

- 4.12 These asymmetries are explored further by the EU Tax Observatory, which based also on static models, estimates that – in the absence of carve-outs – EU Member States as a whole would increase revenues by more than €80 billion a year, whilst the US would gain about €57 billion a year. On the contrary, rather unsurprisingly revenue gains would be substantially smaller in other countries: €6 billion for China, €4 billion for South Africa, €1.5 billion for Brazil, €0 for Chile and Korea.²⁸ Estimates for low-income countries are largely absent. Some individual – largely high-income – countries have also produced their own revenue estimates. Perhaps surprisingly, considering that these countries are precisely those most likely to benefit from the GloBE rules, these estimates are significantly lower than the ones officially produced by the OECD. Of those publishing their own estimates, the UK is the country likely to benefit the most, with an increase of USD 2.7 billion, or 4 percent of average corporate tax revenues, whilst Australia is likely to benefit the least, with an increase of USD 0.25 billion, or 0.8 percent of average revenues.²⁹ Such disparities between the OECD estimates and those produced by (largely) richer countries, gives rise to further concern about how much revenue lower income countries are actually likely to collect.
- 4.13 In any event, both these caveats – the primarily static nature of the model, and the cross-country asymmetry – have significant implications. On the one hand, a static model is unlikely to reflect reality – even when using a narrow benchmark of only corporate income tax competition. Not only are countries and businesses likely to react to the introduction of a minimum corporate tax rate, but the reactions are likely to be highly heterogeneous. For example, a recent attempt to model countries’

²⁷ OECD, ‘Tax revenue effects of Pillar Two’, *Tax Challenges Arising from Digitalisation – Economic Impact Assessment, Inclusive Framework on BEPS* (OECD Publishing 2020) 77, available at <https://www.oecd-ilibrary.org/docserver/0e3cc2d4-en.pdf?expires=1664147312&id=id&accname=guest&checksum=3E4D2049700151E908A8843CFDBDE923> (last accessed 13 September 2022).

²⁸ Mona Barake et al., ‘Revenue Effects of the Global Minimum Tax: Country-By-Country Estimates’ (2021) EU Tax Observatory, Note 2, available at <https://www.taxobservatory.eu/wp-content/uploads/2021/10/Note-2-Revenue-Effects-of-the-Global-Minimum-Tax-October-2021.pdf> (last accessed 13 September 2022).

²⁹ A review of countries own estimates is provided by Daniel Bunn & Cecilia Perez Weigel, ‘Select Country-Level Revenue Estimates for Pillar Two’, Tax Foundation Blog (October 10, 2023), available at: <https://taxfoundation.org/blog/pillar-two-corporate-tax-revenue-estimate-by-country/#:~:text=The%20United%20Kingdom%20in%20its,in%20annual%20corporate%20tax%20revenue> (last accessed on 26 October 2023).

corporate tax rate adjustments following the introduction of the minimum rate found that the revenue impact would depend crucially on whether competition shifts to other tax incentives, but assumes firm location decisions are endogenous.³⁰ Indeed, given the multitude of possible variables, designing a dynamic model that would accurately estimate the revenue impact of a global minimum corporate tax rate would constitute a considerable – perhaps unsurmountable – challenge.

- 4.14 On the other hand, the profound asymmetries found at the heard of revenue gain estimates also give rise to equity concerns. These concerns were reportedly at the heart of the decision to include new rules in the agreement allowing the introduction of: (i) a treaty-based subject-to-tax rule (STTR), which would apply a 9 percent withholding tax to interest, royalties, and other payments to related companies;³¹ and (ii) the QDMTT, which would give priority to source countries on the collection of any additional revenue. It has been argued that the QDMTT in particular could significantly alter the distributional impact of Pillar 2, and that given source countries strong incentive to introduce the QDMTT, the assumption should be that they all will.³² Yet, whilst it is true that the introduction of a QDMTT in particular could alter the distributional impact of GloBE, in practice the new rules are unlikely to address the existing asymmetry, not least because their introduction is far from straightforward, and it will be dependent on various factors, including the capacity of tax administrations in developing countries to implement them.³³ Perhaps still more importantly, the introduction of a QDMTT would entail the substitution of the regular corporate income tax, which for a variety of technical, political and, for some countries, even constitutional constraints, seems unlikely in the large majority of countries.³⁴ Overall, therefore, whilst it is impossible to know at present, what would be the exact revenue implications of the agreement, it is reasonable to assume, given existing rules and estimates that (a) there will be some revenue gains, although perhaps not as large as OECD estimates would indicate, and (b) they will be primarily concentrated on high-income countries, despite the introduction of concessions, namely the STTR and the QDMTT.
- 4.15 Beyond the revenue effects, the agreement is also likely to have effects on tax sovereignty and morale, which albeit comparatively harder to quantify, can nevertheless also have a positive effect on welfare. Insofar as *tax sovereignty* is concerned, there is now a growing literature on how countries give away their corporate tax base in tax treaty negotiations, due to the power asymmetry between signatory countries, and the lack of bargaining power of developing countries.³⁵ There is also a well-established

³⁰ Janeba & Schjelderup, *supra* n. 19.

³¹ Englisch, *supra* n. 2.

³² Michael Devereux, John Vella and Heydon Wardell-Burrows, 'Pillar 2: Rule Order, Incentives, and Tax Competition' (2022) Oxford University Centre for Business Taxation Policy Brief, 14 January 2022.

³³ Dourado, *supra* n. 7.

³⁴ Englisch, *supra* n. 8.

³⁵ Tsilly Dagan, 'The Tax Treaties Myth' (2000) 92 *International Law and Politics* 939; Kim Brooks & Richard Krever, 'The Troubling Role of Tax Treaties' in Michielse/Thuronyi (eds), *Tax Design Issues Worldwide* (Kluwer Law International 2015) 159; and Martin Hearson, 'When do developing countries negotiate away their corporate tax base?' (2018) 30 *Journal of International Development* 233-255.

literature, going back decades, on the many types of tax incentives for investment.³⁶ Comparatively less attention, however, has been given to the extent to which countries give away their corporate tax base in prospective FDI negotiations, due to the power asymmetry between them and potential investors. In reality, however, in an (unlimited) global tax competition setting, countries' tax sovereignty is significantly impacted by their bargaining power: the lower the bargaining power, the more tax sovereignty is *de facto* limited.

- 4.16 Indeed, how much of their tax base countries are willing to give away is primarily dependent on bargaining power: their other comparative advantages (governance, labour skills, infrastructure, regulatory environment, market size), and the characteristics and likelihood of the investment in question (level of likely revenue and non-revenue benefits, possible competing countries). Generally, those with less comparative advantages, and more dependent on FDI, will tend to be willing to abdicate more of their taxing rights, by offering lower rates, narrower tax bases, preferential tax regimes, or tax holidays; those with more comparative advantages, and less dependent on individual FDI, will tend to abdicate less. For countries with less comparative advantages, therefore, tax sovereignty is often little more than illusory: big multinationals can demand corporate tax concessions in exchange for FDI, countries with less competitive advantages, typically developing countries, will feel pressured to concede.
- 4.17 In this context, whilst some have argued that a global minimum corporate tax rate – as with any tax coordination measure – will result in a loss of tax sovereignty,³⁷ it can be equally argued that by effectively decreasing the bargaining power of investors insofar as corporate taxation is concerned, the agreement actually increases tax sovereignty vis-à-vis MNEs.³⁸ Of course, the substance-carve out means that bargaining for corporate tax concessions in exchange for real investment is not only likely to continue but may indeed increase as a result of the agreement.³⁹ There is a high likelihood that domestic corporate tax incentives will now be redrafted with specifically those considerations in mind —⁴⁰ there is indeed an expectation on the part of the OECD that this will be the case —⁴¹ but there are now limits to how many concessions can be made.

³⁶ For an overview, see Alexander Klemm, 'Causes, benefits and risks of tax incentives' (2010) 17 International Tax and Public Finance 315–336.

³⁷ Suranjali Tandon, 'Assessing the Impact of Pillar Two on Developing Countries' (2022) 50 Intertax 923-935; and Afton Titus, 'Global Minimum Corporate Tax: A Death Knell for African Country Tax Policies' (2022) 50 Intertax; Luis Schoueri, 'Some Considerations on the Limitation of Substance-Based Carve-Out in the Income Inclusion Rule of Pillar Two' (2021) 75 Bulletin on International Taxation 544; Belisa Ferreira Liotti, 'Limits to International Cooperation: The Concept of 'Jurisdiction not to Tax'' (2022) 76 Bulletin on International Taxation 75.

³⁸ Similarly, arguing that some forms of tax cooperation protect sovereignty see Peter Dietsch, *Catching Capital. The Ethics of Tax Competition* (Oxford University Press, 2015)

³⁹ Dourado, *supra* n. 7.

⁴⁰ Leopoldo Parada, 'Global Minimum Taxation: A Strategic Approach for Developing Countries' (2024) 15 Columbia Journal of Tax Law; and Niels Bammens & Dieter Bettens, 'The Potential Impact of Pillar Two on Tax Incentives' (2023) 51 Intertax 155-169.

⁴¹ Perez-Navarro, *supra* n. 15.

- 4.18 The introduction of a minimum corporate tax rate is also likely to have positive effects on *tax morale*. One of the key elements on perceptions of tax fairness is taxation of the wealthiest,⁴² which from the public's perspective includes big corporations.⁴³ The global decrease in effective corporate tax rates, and a succession of corporate tax scandals with high political salience,⁴⁴ has therefore eroded public trust in the fairness of the tax system, with significant consequences for overall compliance and morale.⁴⁵ Indeed, there is now strong evidence that perceptions of tax equity impact upon compliance levels,⁴⁶ in particular by undermining tax morale: taxpayers' self-regulatory mechanism that cognitively frames paying taxes as doing 'the right thing'.⁴⁷ Where there is perceived tax inequity, taxpayers are less likely to think morally, and more likely to respond to taxation through defiance and non-compliance.⁴⁸ Moreover, there is now evidence that non-evading taxpayers derive direct utility from tax enforcement on evaders, regardless of any monetary returns.⁴⁹ It is therefore reasonable to assume that, by increasing taxpayers' perceptions of tax fairness, the introduction of a minimum corporate tax rate will boost tax morale, increase tax compliance, and generally enhance compliant taxpayers' welfare. It is noteworthy that, some have alerted to the risk that the constraints imposed by the global minimum corporate tax rate may lead to an increase in competition through the adoption of a loser approach to enforcement, particularly insofar as tax audits are concerned.⁵⁰ However, whilst this may in the long-run impact negatively on tax morale, it is unlikely to fully counteract the boost granted by the imposition of the global minimum rate.
- 4.19 Overall, therefore, against the narrow benchmark of the current corporate tax competition, the global minimum corporate tax rate is likely to result in welfare enhancing outcomes – but is that enough to regard them as fair? Unless you adopt a strictly utilitarian view of fairness,⁵¹ enhanced welfare does not necessarily equate to fairness, but they are arguably interlinked. Even accepting this perspective,

⁴² Jonathan Farrar et al., 'Tax Fairness: Conceptual Foundations and Empirical Measurement' (2020) 162 *Journal of Business Ethics* 487.

⁴³ Steven Sheffrin & Rujun Zhao, 'Public perceptions of the tax avoidance of corporations and the wealthy' (2021) 61 *Empirical Economics* 259.

⁴⁴ Aanor Roland & Indra Römgens, 'Policy Change in Times of Politicization: The Case of Corporate Taxation in the European Union' (2022) 60 *Journal of Common Market Studies* 355.

⁴⁵ Miloš Fišar et al., 'Media negativity bias and tax compliance: experimental evidence' (2021) *International Tax and Public Finance*.

⁴⁶ Joel Slemrod, 'Cheating Ourselves: The Economics of Tax Evasion' (2007) 21 *Journal of Economic Perspectives* 25 at 38 et seq; and Diana Onu & Lynne Oats, 'The Role of Social Norms in Tax Compliance: Theoretical Overview and Practical Implications' (2015) 1 *Journal of Tax Administration* 113.

⁴⁷ Valerie Braithwaite, 'Approaching defiance through threat and coping', *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (Edward Elgar Publishing 2009) 137 at 148–158.

⁴⁸ Valerie Braithwaite, 'Tax Evasion' in Tonry (ed.), *Handbook on Crime and Public Policy* (OUP 2009) 381, at 384; Lorenzo Casaburi & Ugo Troiano, 'Ghost-House Busters: The Electoral Response to a Large Anti-Evasion Program' (2016) 131 *Quarterly Journal of Economics* 309.

⁴⁹ Lorenzo Casaburi & Ugo Troiano, 'Ghost-House Busters: The Electoral Response to a Large Anti-Evasion Program' (2016) 131 *Quarterly Journal of Economics* 273; David Halpern, *Inside the Nudge Unit: How Small Changes Can Make a Big Difference* (WH Allen 2015) at 112–115; and Michael Hallsworth et al., 'The Behavioralist as Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance' (2017) 148 *Journal of Public Economics* 14.

⁵⁰ Peter Denk, 'Tax Competition and the EU Anti-money Laundering Regime' (2022) 50 *Intertax* 803–812.

⁵¹ Louis Kaplow & Steven Shavell, 'Fairness versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice' (2003) 32 *The Journal of Legal Studies* 331.

however, it is nevertheless significant that whilst the global minimum rate will bring welfare enhancements for all, these will not be evenly distributed. Indeed, the welfare gains will not only be significantly bigger in some countries than in others, but the countries that are set to make biggest gains are precisely those where welfare is already comparatively higher. From an equalitarian perspective, therefore, it could be argued that the agreement increases inequality, by giving richer countries further rewards for luck or arbitrariness in endowments and existing advantages, and its outcomes are therefore unfair. On the other hand, to the extent that the global minimum rate will put countries on a higher-level playing field insofar as corporate taxation is concerned, it can also be reasonably contested that its introduction will decrease unfairness – not only by limiting discrepancy levels, and thus tax distortions to investment allocation, but by rewarding effort, or good option luck.⁵²

- 4.20 In sum, depending on what global theory of justice is favoured, it can be reasonably argued that against the narrow benchmark of the current corporate tax competition, the agreement gives rise to fair outcomes. The question, however, is whether that narrow benchmark is adequate to assess global fairness outcomes, or whether a broader benchmark would be more appropriate.

2. Unfair Overall Outcomes

- 4.21 Whilst there is a tendency to discuss the impact of a global minimum rate solely in the context of its effect on corporate tax competition, in reality corporate tax competition is only one element of the global competition for FDI. Indeed, many factors influence the global allocation of FDI, including: *natural factors*, such as geography; *structural factors*, such as governance levels; and *designed factors*, such as labour or environmental regulations.⁵³ The tax system is therefore only one elements of this equation, falling under the broader category of designed factors, and corporate tax law is, in turn, just a sub-element of that broader tax system element. Arguably, therefore, global allocation of FDI is a more appropriate benchmark to assess the outcomes of the agreement, than the global corporate tax system.
- 4.22 If the wider benchmark of global allocation of FDI is adopted, however, curtailing global corporate tax competition will no longer necessarily be welfare enhancing – and thus, fair. Removing, or restricting the use of, only one of the elements from the mix of factors likely to influence FDI decisions, namely corporate tax competition, is likely to impact the relative importance of other factors. Global competition for FDI is unlikely to disappear, or even decrease, as a result of the GloBE agreement; instead, the most likely outcome is a competition displacement, away from corporate tax, and into other tax and non-tax factors known to influence FDI decisions. Natural or structural factors may become

⁵² For a luck egalitarian perspective see, Ronald Dworkin, 'Equality, Luck and Hierarchy' (2003) 31 *Philosophy and Public Affairs* 190–198, although egalitarianism refers primarily to individuals, as opposed to states.

⁵³ Proof that these elements are all inter-related is the fact that they also influence country's individual choices as regards corporate tax rates and regimes, see, Dhammika Dharmapala & James Hines, 'Which Countries Become Tax Havens?' (2009) 93 *Journal of Public Economics* 1210, and Joel Slemrod, 'Are Corporate Tax Rates or Countries, Converging?' (2004) 88 *Journal of Public Economics* 1169.

more important; countries may choose to enhance their competitive position through designed factors, for example by lowering environmental or labour standards, or introducing preferential personal income tax regimes;⁵⁴ some countries are reportedly already considering direct tax and non-tax subsidies to counter the effect of minimum corporate tax rate.⁵⁵

- 4.23 These behavioural responses to the GloBE agreement – from either countries trying to enhance or maintain their competitive position, or businesses re-evaluating their FDI choices in light of the new context – may result in outcomes that will decrease welfare.⁵⁶ Indeed, although perhaps counter-intuitive, this outcome would be in line with economic theory predictions: under the theory of the second best,⁵⁷ in the presence of other distortions, removing one distortion is not necessarily welfare enhancing, in essence, because the relative significance of the other distortions increases.⁵⁸ In this situation, revenue gains – however sparse – may not materialise or even if they do, they may not be enough to compensate loss of revenue in other areas; and (corporate) tax sovereignty may increase, but perhaps at the expense of less sovereignty in other areas where FDI bargain will concentrate henceforth. Arguably, therefore, only the increase in tax morale will materialise, and even then, the effect may decrease overtime, for example, if a negative impact on FDI becomes evident, or if competition shifts to personal income taxes or (visibly) to corporate tax enforcement.
- 4.24 In this context, even assuming a strictly utilitarian perspective, therefore, in which fairness does not function as a stand-alone criterion but is instead subsumed into individual welfare, curtailing corporate tax competition would not necessarily result in fair outcomes when assessed against the broader benchmark of global FDI allocation. Unsurprisingly, this conclusion would be even more pronounced were an egalitarian perspective to be adopted, regardless of which theory within egalitarianism is favoured. Indeed, from an egalitarian perspective, in the presence of various inequalities fairness within the tax system cannot be equated to overall fairness,⁵⁹ and the removal of one inequality cannot, by nature, be regarded as fair.⁶⁰
- 4.25 In sum, the global minimum corporate tax rate agreement can only be considered fair in its outcomes, if (a) seen against the narrow benchmark of global corporate tax competition, not against the benchmark of global FDI competition, and (b) some theories of global justice are adopted, but not others. Yet, the unfairness of the agreement is arguably even more evident if assessed from the perspective of process, rather than outcomes.

⁵⁴ Indeed, personal income tax competition is already on the increase, see, Rita de la Feria & Giorgia Maffini, 'The Impact of Digitalisation on Personal Income Taxes' (2021) 2 *British Tax Review* 154-168.

⁵⁵ Janeba & Schjelderup, *supra* n. 19.

⁵⁶ Niels Johannesen, 'The Global Minimum Tax' (2022) CEBI Working Paper 01/22, available at https://www.econ.ku.dk/cebi/publikationer/working-papers/CEBI_WP_01-22.pdf (last accessed 13 September 2022).

⁵⁷ Richard G. Lipsey & Kelvin Lancaster, 'The General Theory of Second Best' (1956) 24 *Review of Economic Studies* 11.

⁵⁸ On the application of this theory to removal of corporate tax distortions, see, Rita de la Feria & Clemens Fuest, 'The Economic Effects of EU Tax Jurisprudence' (2016) 41 *European Law Review* 44.

⁵⁹ Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press 2002).

⁶⁰ John Rawls, *A Theory of Justice* (Harvard University Press 1971), although the authors refers primarily to individuals, as opposed to countries.

FRAMING GLOBE'S PROCESS

4.26 There is now a substantial – and growing – literature on the inequalities at the heart of global tax negotiations. Much of this literature has traditionally focussed on either the legitimacy of global tax policymakers, particularly the OECD,⁶¹ and/or the lack of inclusiveness in global tax initiatives.⁶² The presumption, supported by political science literature,⁶³ was that increased inclusiveness would result in a stronger voice, which in turn would lead to a higher level-playing field in global tax negotiations, and tax cooperation agreements that better reflect global distributive justice and higher self-determination.⁶⁴ The creation of the OECD/G20 Inclusive Framework on BEPS – reportedly announced soon after the OECD rejected calls for the UN to take the lead role on international policy making – arguably reflected both an acknowledgment of the validity of these concerns, and an attempt to address them.⁶⁵ Yet, in recent years, the traditional assumption that inclusion would lead to higher level-playing field has been challenged. Indeed, whilst the stated aim of the Inclusive Framework was to engage all participating states – at present 135 – in “an inclusive dialogue on an equal footing to shape standards”, in the context of the power asymmetry between developed and developing countries one does not necessarily follow the other, i.e. inclusion does not necessarily mean equal footing.

4.27 Indeed, more recent work has emphasised that, generally, ensuring that formally all countries have an equal say does not necessarily guarantee fair outcomes when background inequalities, technical knowledge and general bargaining position are taken into account.⁶⁶ From a global tax policy perspective, therefore, the creation of the Inclusive Framework might constitute significant progress in addressing the OECD's institutional legitimacy deficit, but it does not necessarily ensure fair process given that the underlying structural legitimacy deficit remains unchanged.⁶⁷ As recent empirical work highlights, developing countries are well aware of the underlying power hierarchies at the heart of the Inclusive Framework: “lower-income countries’ interventions are politely listened to but not taken onboard if they differ from the existing consensus”; “everybody knows that developing countries can say their position, but proposals are put by the developed countries”; and “they say it is on an equal

⁶¹ Diane Ring, ‘What’s at Stake in the Sovereignty Debate? International Tax and the Nation-State’ (2008) 49 *Virginia Journal of International Law* 67; Irma Mosquera, ‘Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism’ (2015) 7 *World Tax Journal*.

⁶² Allison Christians, ‘Taxation in a Time of Crisis: Policy Leadership from the OECD to the G-20’ (2010) 5 *Northwestern Journal of Law and Social Policy*.

⁶³ Simon Caney, ‘Cosmopolitan Justice and Institutional Design: An Equalitarian Liberal Conception of Global Governance’ (2006) 32 *Social Theory and Practice* 745.

⁶⁴ Allison Christians & Laurens van Apeldoorn, ‘The OECD Inclusive Framework’ (2018) 3 *Bulletin for International Taxation* 226-233.

⁶⁵ *Ibid.*

⁶⁶ Allen Buchanan and Robert Keohane, ‘The Legitimacy of Global Governance Institutions’ (2006) 20 *Ethics: International Affairs* 414; and Steven Wall, ‘Democracy and Equality’ (2007) 57 *Philosophical Quarterly* 416.

⁶⁷ Ivan Ozai, ‘Institutional and Structural Legitimacy Deficits in International Tax Regime’ (2020) 12 *World Tax Journal* 53.

footing, but that is not true”.⁶⁸ This is not surprising – as discussed above, in the presence of various inequalities removing one is not necessarily fair. So, just like, from a substantive perspective, limiting corporate tax competition does not ensure a fair allocation of investment decisions overall, from a procedural one, ensuring inclusion and equal opportunities of participation does not result in equal participation opportunities either.

- 4.28 Although these significant shortcomings are not evident in the public rhetoric regarding the GloBE agreement,⁶⁹ growing awareness of these *de facto* procedural inequalities, despite formal inclusion, has given rise to substantial criticism, on the basis that they undermine the legitimacy of the agreement, and result in unfair outcomes for developing countries.⁷⁰ Yet, there has been surprisingly little attention given to the impact of these procedural elements on perceptions of fairness. Indeed, whilst fairness is often associated with outcomes – who gains, who loses? – there is now extensive and robust evidence in social psychology, going back decades, which indicates that overall feelings of fairness and social satisfaction are not just based on outcomes, but also on the process or procedures through which outcomes are derived.⁷¹ Form matters as much – and depending on circumstances, sometimes more – than substance.⁷² In this regard, two elements of procedure have been found to be particularly salient, namely: *voice*, the ability to express or convey own views; and *respect* and dignified treatment in interactions. Various explanations have been offered as to why this is the case, but it appears to be not simply a matter of creating the opportunity to improve outcomes, but rather a matter of status validation linked to notions of self-worth, which are independent of outcomes.⁷³
- 4.29 Furthermore, empirical evidence also indicates that these elements of procedural justice tend to matter most when outcomes are perceived as unfavourable in relative terms, i.e. highly favourable outcomes can potentially compensate for unfair processes, but individuals become more sensitive to processes when they are dissatisfied with the outcomes. In essence, procedure “cushions” the dissatisfaction that might result from unfavourable outcomes.⁷⁴ Thus, the fact that the outcomes of the introduction of global minimum corporate tax rate are not outright fair – but rather heavily dependent on benchmarking –

⁶⁸ Martin Hearson, *Imposing Standards: The North-South Dimension of Global Tax Politics* (Cornell University Press 2021) at 158.

⁶⁹ The rationale, key characteristics, and procedural fairness consequences of the public rhetoric concerning the deal are analysed below.

⁷⁰ Brauner, *supra* n. 10; Natalia Pushkareva, ‘Reforming International Taxation: Participation and Collaboration of Developing Countries’ in Alepin/Latulippe/Otis (eds) *Coordination and Cooperation – Tax Policy in the 21st Century* (Wolters Kluwer 2022), 107-120; Allison Christians, ‘A Wish for the Future of International Tax Cooperation’ (3 January 2022) 105 *Tax Notes International* 61; and Cees Peter, ‘The Legitimacy of the OECD’s Work on Pillar Two: An Analysis of the Overconfidence in a ‘Devilish Logic’ (2023) 51 *Intertax* 554-571.

⁷¹ For a survey, highlighting the robustness of the findings across empirical methodologies, cultures and social settings, see, Robert MacCoun, ‘Voice, Control, and Belonging: The Double-Edge Sword for Procedural Fairness’ (2005) 1 *Annual Review of Law and Social Science* 171.

⁷² For a recent example, see Xuan Zhao & Nicholas Epley, ‘Insufficiently Complimentary?: Underestimating the Positive Impact of Compliments Creates a Barrier to Expressing Them’ (2021) 121 *Journal of Personality and Social Psychology* 239.

⁷³ David de Cremer & Alain van Hiel, ‘Procedural justice effects on self-esteem under certainty versus uncertainty emotions’ (2008) 32 *Motivation and Emotion* 278-287.

⁷⁴ Joel Brockner & Batia Wiesenfeld, ‘An Integrative Framework for Explaining Reactions to Decisions: Interactive Effects of Outcomes and Procedures’ (1996) 120 *Psychological Bulletin* 189.

makes overall perceptions of fairness particularly sensitive to an unfair process. It is therefore particularly unfortunate that the key elements of procedural justice, namely voice and respect, are lacking in the process of reaching a deal on the global minimum corporate rate.

1. Reframing Self-Interest as Altruism

- 4.30 Tax cooperation is often presented as the solution to the significant downsides of unconstrained tax competition, in particular the decrease in welfare that results from a race-to-the-bottom, and the opportunities it creates for tax arbitrage.⁷⁵ The traditional approach to the tax cooperation / tax competition dichotomy suggests that if national policymakers put their self-interests aside and cooperated towards a multilateral regime, everyone would be better off, and justice would prevail.⁷⁶ This traditional view, however, fails to acknowledge the significant trade-offs that any move towards tax cooperation entails: tax revenues may increase and tax arbitrage decreased; but, given existing inequalities between countries, it will also tend to advance the interests of the most developed countries, at the expense of others.⁷⁷ Indeed, whilst tax reforms are not necessarily zero-sum games, generally large countries have an interest in international tax coordination, whereas smaller countries prefer tax competition.⁷⁸
- 4.31 These dynamics are present in any tax cooperation agreement – as recent empirical work on the revenue effects of the global tax transparency initiatives clearly demonstrates –⁷⁹ but probably even more so in GloBE. As discussed above, even in a static model, the revenue gains are likely to accrue primarily to richer, capital exporting, countries; in (a dynamic) reality, this is likely to be even more the case, as any competition displacement effect will most probably benefit those countries with existing comparative advantages. The deal may also result in smaller revenue gains in developing countries, tax sovereignty or tax morale gains for all – but these spillovers are incidental to its main aim. In this context, as opposed to the traditional wisdom on tax cooperation, promotion of an agreement on a global minimum corporate tax is not evidence of developed countries putting their interests aside for the benefit of all. It is rather an indication of the opposite: a self-interested pursuit by powerful countries, which may have the added advantage of resulting in a few spillover gains for others.

⁷⁵ Reuven Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State' (2000) 113 *Harvard Law Review* 1573; Yariv Brauner, 'An International Tax Regime in Crystallization – Realities, Experiences and Opportunities' (2003) 56 *Tax Law Review* 259; Christians, *supra* n. 62.

⁷⁶ Tsilly Dagan, *International Tax Policy: Between Competition and Cooperation* (Cambridge University Press 2018) at 140.

⁷⁷ *Ibid.*

⁷⁸ John Wilson, 'Theories of Tax Competition' (1999) 52 *National Tax Journal*, 269; Philipp Genschel & Peter Schwarz, 'Tax Competition: A Literature Review' (2011) 9 *Socio-Economic Review* 339; Thomas Rixen, *The Political Economy of International Tax Governance* (Palgrave Macmillan, 2008)

⁷⁹ The imposition by the US of automatic exchange of information, without itself participation, resulted in a strongly redistributive regime from poorer tax havens to the US, see, Lukas Hakelberg & Max Schaub, 'The redistributive impact of hypocrisy in international taxation' (2018) 12 *Regulation and Governance* 353.

4.32 These self-interest dynamics are not, however, evident in the public rhetoric. On the contrary, in line with recent research on international organisations' legitimisation strategies, there has been a consistent effort to construct a narrative of inclusiveness, an agreement altruistically built to the benefit of all. Based on extensive analysis of global and regional international organisations (IO), socio-legal scholars have identified key elements of rhetorical legitimisation. They, (a) propagate their legitimisation strengths, (b) compensate for legitimisation weaknesses; and (c) express rhetorical repertoires that convey their own intrinsic merits; they also have their own formal and substantive properties, which are crafted to persuade domestic lawmakers.⁸⁰ The public rhetoric on the global minimum corporate tax rate agreement – emerging primarily from the OECD, but also from EU institutions, and powerful countries such as the US – often displays these characteristics, as set out in Table 1.

Table 1: International Organisations Rhetorical Legitimation Strategies

Key Characteristics	Rhetoric on GloBE Agreement
Propagate IO legitimisation strengths	Emphasise the wide membership of the Inclusive Framework Highlight number of countries who have signed-in to the deal, and contrast to small number of countries who have not (yet) signed
Compensate for IO legitimisation weaknesses	Downplay first-mover advantage, and origin of proposal Downplay size and economic significance of countries who have not signed to the deal Emphasise “equal footing” participation of all countries in the Inclusive Framework Emphasise contribution of /concessions to developing countries in deal
Express rhetorical repertoires that convey their own intrinsic merits	Emphasise previous achievements on tax cooperation Emphasise uniqueness / ground-breaking nature of the deal
Formal and substantive elements crafted to persuade domestic lawmakers	Emphasise macro revenue gains (rather than micro, divided by country) Emphasise gains for all, and the non-zero-sum nature of the deal Correlate tax policy aims to the proposed tax policy instrument by (i) emphasising the significance and impact of the profit shifting problem, and (ii) present the global minimum corporate tax rate as the solution Use easily recognisable terms designed to elicit public recognition and moral aversion (tax avoidance, tax havens)

4.33 Yet, in the context of the substantive power asymmetries, the public rhetoric – and to some extent the formal inclusiveness itself – is primarily a legitimisation instrument. Or, said in a different way, the formal inclusion of developing countries in the negotiation process through their participation in the

⁸⁰ Terence Halliday et al., ‘Rhetorical legitimisation: global scripts as strategic devices of international organizations’ (2010) 8 Socio-Economic Review 77.

Inclusive Framework, enables a public rhetoric that helps hide the substantive inequalities and power hierarchies that lie at the heart of both the process, and the deal itself.

- 4.34 That the GloBE agreement reflects the self-interest of the most powerful countries promoting it is, to a large extent, both natural and unsurprising – it merely reflects a combination of power asymmetries, and political economy dynamics. Voters generally expect their governments to prioritise their own interests – including by maximising the country’s share of global tax revenues – so in the absence of a strong centralised authority, powerful countries will pursue those interests unbound by existing or future norms, even when set by them.⁸¹ Of course, it could be (reasonably and successfully) argued that a more equitable global distribution of tax revenues would be, in the long-term, in everyone’s interest, but present bias – the tendency in a trade-off situation to settle for a smaller present reward, than to wait for a larger reward in the future – makes this a political difficult argument to make.⁸² Overall, therefore, it seems improbable that powerful countries would easily accept a deal whose outcomes would be primarily beneficial to developing countries.⁸³
- 4.35 Yet, it is the altruism reframing rhetoric that decreases developing countries, or mid and low-income countries, both voice and respect. Indeed, whilst the altruism and inclusiveness-focussed rhetoric regarding the deal may successfully frame public discourse –⁸⁴ particularly in developed countries – developing countries are unlikely to be deceived; on the contrary, most are likely to know that the proposed global minimum corporate tax rate – as other global tax cooperation initiatives – is self-interested, and done primarily for the benefit of richer, powerful, countries.⁸⁵ The question is then, not why a few developing countries refused to sign-up to it, but rather why have most of them, knowingly, done it anyway.

2. Paternalistic Coercion and Biases

- 4.36 In political science literature, the role of coercion in global policy generally, and global tax policy in particular, has long been acknowledged. Powerful countries, with large enough internal markets, can issue credible threats to exclude from access to their market firms based in countries that do not comply with their international tax policy demands; smaller countries have to play along, since their firms earn a substantial share of their profits in those markets, and therefore depend on access to them.⁸⁶ Generally,

⁸¹ Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) at 24.

⁸² See generally on present bias, Ted O’Donoghue & Matthew Rabin, ‘Present Bias: Lessons Learned and to be Learned’ (2015) 105 *American Economic Review* 273-279.

⁸³ In the same vein, see, Cees Peters, ‘Global Tax Justice: Who’s Involved?’ in Brederode (ed.) *Ethics and Taxation* (Springer Nature 2020) 165.

⁸⁴ On the impact of framing in swaying public opinion see, Rune Slothuus & Claes de Vreese, ‘Motivated Reasoning, and Issue Framing Effects’ (2010) 72 *The Journal of Politics* 630-645, and bibliography cited therein.

⁸⁵ As recent empirical work, based on interviews to tax officials, clearly demonstrates, see, Hearnson, *supra* n. 68.

⁸⁶ Lukas Hakelberg, *The Hypocritical Hegemon: How the United States Shapes Global Rules Against Tax Evasion and Avoidance* (Cornell University Press 2020).

the literature identifies three main pathways for policy diffusion and isomorphism, namely: *normative* (countries may become socialised into accepting agreed-upon norms); *coercive*; or *mimetic* (countries may just imitate others).⁸⁷ In global tax policy all these pathways are likely to play a part, not least coercion.⁸⁸ Indeed, recent work found that coercion played a key role in the decision to join the OECD/G20 Inclusive Framework on BEPS: inclusion in the EU tax haven (various stages) listings, which were designed to shame countries under credible threat of sanctions,⁸⁹ were significantly and positively correlated with the hazard of joining the Inclusive Framework.⁹⁰

- 4.37 Yet, coercion cannot fully explain why developing countries acquiesce to international tax instruments that are not fair, as they will often give in, even when there is no obvious credible threat. The reality is therefore likely to be more complex than pure coercion, and a full explanation rather more likely to be found in a conjugation of factors that reflects developing countries' agency. It is possible, for example, that developing countries merely weigh-up the signing of the deal against what they can obtain in exchange outside the (corporate) tax area: perhaps additional foreign aid, new trade deals, or training and technical assistance, will accrue if they are seen as good global tax citizens. Yet, in this regard, in a highly technical area such as tax policy, the role of expertise and regulatory capacity, long acknowledged in international relations literature, is also likely to be particularly relevant.⁹¹
- 4.38 Like in most other areas,⁹² in global cooperation platforms setting the global tax policy agenda, such as the Inclusive Framework, capacity asymmetries result in power asymmetries.⁹³ In order to exert influence in highly technical global policy-making contexts, a combination of social-constructed expertise and professional networks (socio-technical resources) that enable the recognition of authoritative expertise, is necessary.⁹⁴ Yet, most developing countries have only a few officials working

⁸⁷ This literature goes back to the landmark article by DiMaggio and Powell, see, Paul DiMaggio & Walter Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 *American Sociological Review* 147-160.

⁸⁸ For example, recent research indicates that the global spread of General Anti-Avoidance Rules (GAARs) owes significantly to mimetic pathways, see, Iva Guterres, 'The EU GAAR: Minimising Risk Through Mimicking Behaviour', *forthcoming*.

⁸⁹ There is now a growing literature on the reputational and financial impact of inclusion in the EU list of non-cooperative jurisdictions, see, Aija Rusina, 'Name and Shame? Evidence from the European Union tax haven blacklist' (2020) 27 *International Tax and Public Finance* 1364; Katrin Eggenberger, 'When is Blacklisting Effective? Stigma, Sanctions and Legitimacy: The Reputational and Financial Costs of Being Blacklisted' (2018) 25 *Review of International Political Economy* 483; and Jason Sharman, 'The Bark is the Bite: International Organizations and Blacklisting' (2009) 16 *Review of International Political Economy* 573.

⁹⁰ Shu-Yi Oei, 'World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership' (2021-22) 47 *Yale Journal of International Law*. See also, Matthew Collin, 'Does the Threat of Being Blacklisted Change Behavior? Regression discontinuity evidence from the EU's tax haven listing process' (2020) *Brookings Global Economy & Development Working Paper* 139, available at https://www.brookings.edu/wp-content/uploads/2020/06/EU_working_paper_139_mcollin.pdf (last accessed 13 September 2022).

⁹¹ Abraham Newman & Elliot Posner, 'Putting the EU in its place: policy strategies and the global regulatory context' (2015) 22 *Journal of European Policy* 1316; Michael Barnett & Raymond Duvall, 'Power in international politics' (2005) 59 *International Organization* 39; Nico Krisch, 'Liquid authority in global governance' (2017) 9 *International Theory* 237.

⁹² *Scientia potential est* is a sentence first attributed to Thomas Hobbes, in *Leviathan* (1668), but later conceptualised by sociologists and philosophers, see in particular, Michel Foucault, *Power/Knowledge: Selected Interview and Other Writings, 1972-1977* (Random House 1980).

⁹³ Tim Büttner & Matthias Thiemann, 'Breaking Regime Stability? The Politicization of Expertise in the OECD/G20 Process on BEPS and the Potential Transformation of International Taxation' (2017) 7 *Accounting, Economics and Law*.

⁹⁴ Martin Hearson et al., 'Developing influence: the power of 'the rest' in global tax governance' (2022) *Review of International Political Economy*, *forthcoming*.

on international tax matters, often seized with other domestic priorities, who struggle to keep pace with not only the meetings often held in Europe, but volume of paperwork they involve;⁹⁵ low-income delegates attend are fewer and attend less meetings a year, act with less familiarity.⁹⁶ They are, therefore, often intimidated by the negotiation process, and would rather not make any interventions due to fear of being contradicted.⁹⁷ Indeed, whilst recent empirical evidence indicates developing countries socio-technical resources are increasing, capacity remains a challenge.⁹⁸ Smaller countries may be able to influence narrow – even if meaningful – points in the global tax policy agenda, but the broad agenda continues to be set by first-movers: powerful countries involved in setting the foundational institutional agendas.⁹⁹ In addition to economic and reputational reasons (coercion), therefore, capacity reasons are also likely to play a role on why developing countries join tax initiatives, such as the agreement on the global minimum corporate tax rate, where outcomes are not necessarily fair. The first two reasons can be broadly characterised as *fear of saying no*; whilst the third reason can be characterised as *fear of being wrong*. As the inclusion of the new rules – first the STTR) and later the QDMTT – demonstrates, developing countries may be able to influence narrow points in the GloBE agreement, but not sufficiently so to enable fair outcomes.

- 4.39 In the case of the GloBE agreement, it should also be acknowledge that its so-called ‘devilish logic’ played a significant role in developing countries’ buy-in. The intelligent design of the global minimum global corporate tax rate, which ensures the mutual dependency of the different constituent parts, and includes a set of interconnected fail-safe rules, means in practice that non-cooperation is self-defeating: it will not give any given country a competitive edge, rather just mean that another country will collect the revenue on their behalf. Non-cooperation therefore, means losing out on revenue with no foreseeable benefits. This factor, perhaps than more than any other, has been critical in ensuring agreement on GloBE.¹⁰⁰
- 4.40 Finally, it is also noteworthy that involvement in prior OECD tax cooperation initiatives – particularly the OECD Global Forum on Transparency – has been found to increase the hazard of subsequently joining the Inclusive Framework. This positive correlation has been interpreted (positively) as evidence of a normative pathway to isomorphism, i.e. countries become exposed to the global tax norms, and thus integrated into the world of tax cooperation;¹⁰¹ participation on prior initiatives would also enable a progressive increase in social-technical resources. However, it can also be interpreted in a different way, namely that by participating in those initiatives, countries become more aware of capacity and

⁹⁵ Irene Burges & Irma Mosquera, ‘Corporate Taxation and BEPS: A Fair Slice for Developing Countries?’ (2017) 10 Erasmus Law Review 38.

⁹⁶ Hearson, *supra* n. 68.

⁹⁷ Pushkareva, *supra* n. 70.

⁹⁸ Hearson et al., *supra* n. 94.

⁹⁹ Elliot Posner, ‘Sequence as Explanation: The International Politics of Accounting Standards’ (2010) 17 Review of International Politics and Economics 650; Henry Farrel & Abraham Newman, ‘Making Global Markets: Historical Institutionalism in International Political Economy’ (2010) 17 Review of International Political Economy.

¹⁰⁰ Peters *supra* n. 72; and Ruth Mason, ‘A Wrench in GloBE’s Diabolic Machinery’ (2022) 107 Tax Notes International 1391-1395.

¹⁰¹ Oei, *supra* n. 90.

socio-technical resources asymmetries, and thus less confident and more likely to give-in on other tax initiatives. These two interpretations are not mutually exclusive, i.e. it is possible that prior participation in tax cooperation initiatives enabled both an increase in socio-technical resources, *and* a growing awareness of capacity asymmetries. On this regard, the public rhetoric around the global tax initiatives generally, and the global minimum corporate tax rate in particular, are unlikely to help.

- 4.41 Public rhetoric often plays on both fear of the consequences, and fear of being wrong / lack of confidence, through what can be designated as paternalistic coercion: coercion, coated in paternalism. Indeed, beyond the altruistic framing, another key characteristic of the public rhetoric on the global minimum corporate tax rate – as with other previous tax cooperation initiatives – is the paternalistic tone often deployed to quiet dissent. Responses to fairness concerns or hesitations over joining the deal tend to focus on a reinstatement of absolute gains for all countries,¹⁰² and a lack of acknowledgement of relative fairness outcomes,¹⁰³ which may in turn raise concerns over possible implicit biases (racial, class/poverty).¹⁰⁴ It is possible that this paternalistic tone is solely and cynically designed to quiet dissent, but also possible that it owes at least partially to a process of self-legitimation and motivated reasoning.
- 4.42 First identified in 1990, motivated reasoning – the notion that motives affect reasoning, and that whilst individuals are likely to arrive at conclusions that they want to arrive, their ability to do so is dependent on constructing seemingly reasonable justifications for these conclusions –¹⁰⁵ is now regarded as pervasive in politics.¹⁰⁶ One of the key triggers for motivated reasoning is protection of self-esteem: limiting acknowledgement of the negative outcomes of one's personal actions, protects the self from the threat of negative feelings;¹⁰⁷ on the other hand, mood-elevating behaviour, such as altruism, reduces negative moods, as it is usually paired with positive values such as smiles and thank you.¹⁰⁸ Said in a simpler way, an altruism framing and a paternalistic tone allows us to feel better about ourselves, regardless of outcomes; or at least, it allows us to feel less bad.
- 4.43 Whatever the rationale, however, from a procedural justice perspective the paternalistic tone adds to perceptions of unfairness. Coercion – whether explicit or implicit though the devilish logic – decreases

¹⁰² See, for example, comments on Kenya and Nigeria's refusal to sign-up to the deal, reported in Carlos Mureithi, 'Why Kenya and Nigeria haven't agreed to a historic global corporate tax deal', Quartz Africa (2 November 2021), available at <https://qz.com/africa/2082754/why-kenya-and-nigeria-havent-agreed-to-global-corporate-tax-deal/> (last accessed 13 September 2022).

¹⁰³ Asked about countries' refusing to sign-up to the deal, a senior OECD official reportedly replied: 'We don't care, actually... we don't need them', see, Doug Connolly, 'Global minimum tax will work, if implemented, OECD's Saint-Amans says', MNE Tax (4 November 2021), available at <https://mnetax.com/global-minimum-tax-will-work-if-implemented-oecd-s-saint-amans-says-46122> (last accessed 13 September 2022).

¹⁰⁴ For a recent analysis of the role of implicit racial bias in previous international tax cooperation initiatives, see, Steven Dean & Attiya Waris, 'Ten Truths About Tax Havens: Inclusion and the "Liberia" Problem' (2021) 70 Emory Law Journal 1659.

¹⁰⁵ Ziva Kunda, 'The Case for Motivated Reasoning' (1990) 208 Psychological Bulletin, 480-498.

¹⁰⁶ Toby Bolsen & Risa Palm, 'Motivated Reasoning and Political Decision Making' in *Oxford Research Encyclopaedia of Politics* (Oxford University Press 2019).

¹⁰⁷ Kunda, *supra* n. 105.

¹⁰⁸ The negative state relief model, first developed by Cialdini et al., is now subject of extensive literature, see Robert Cialdini et al., 'Empathy-based helping: Is it selflessly or selfishly motivated?' (1987) 52 Journal of Personality and Social Psychology 749-758.

developing countries, or mid and low-income countries, voice, but the paternalistic coating denies them respect.

CONCLUSION

- 4.44 “Fair is what you can get away with”, reportedly remarked an American tax practitioner referring to recent global tax developments.¹⁰⁹ It is true that the agreement on the introduction of a minimum corporate tax rate has undeniable advantages. Limiting corporate tax competition will likely result in higher revenues for some, higher tax sovereignty for most, and possibly higher tax morale for all. Saying that it brings advantages, however, is not the same as saying that the agreement is fair – even if you got away with it. There is a fundamental paradox at the heart of global tax cooperation, namely that progress cannot be achieved without the support of powerful countries – the US in particular – but powerful countries will only support measures that primarily benefit them – as in much of global politics generally.¹¹⁰ The agreement on a minimum corporate tax rate is symptomatic of this paradox. It is true that the agreement is not a zero-sum game – there can be some gains for all – but perceptions of (global) fairness and justice are dependent on both relative outcomes and process, and from both perspectives the agreement benefits primarily richer, developed, capital exporting, countries.
- 4.45 From the perspective of outcomes, whether the agreement’s advantages can be characterised as fair depends fundamentally on benchmarking. If the benchmark is narrowly framed, so as to consider only corporate taxation, then the deal can – perhaps – be regarded as fair, insofar as the resulting corporate tax system is likely to result in higher individual welfare than the status quo. If the benchmark is broadly framed, however, so as to consider FDI decisions, the deal can no longer be regarded as fair. Minimising tax competition will likely result in a competition displacement, whereby countries will compete for investment on the basis of other comparative advantages – either natural, structural or purposively designed – which will tend to benefit countries in an already privileged position. In terms of process, despite the attempts the clear advances in improving inclusion, the agreement is the result of a process instigated and conducted primarily by a small group of rich countries, principally for their own benefit. Responses to concerns raised by other countries outside this select group too often try to compensate for legitimacy weaknesses by focusing on a altruism framing, and a coercive paternalistic tone. Ironically, whilst this public rhetoric is probably designed – at least partially – to convince the audience, namely national policy makers, it has another (unforeseen) effect: it may convince countries to sign-up to the deal, but it will also increase their perceptions of unfairness.

¹⁰⁹ Hakelberg, *supra* n. 86 at 6.

¹¹⁰ As reportedly acknowledged by the OECD: ‘what the deal needed to succeed was the big countries, and they got agreement from the critical mass of such countries’, see, Connolly, *supra* n. 105.

4.46 In this context, responses to those perceptions of unfairness that concentrate primarily on absolute outcomes – small gains on tax revenues, sovereignty or morale – fail to acknowledge, not only global distributional and comparative fairness considerations, but critically, also the role that process plays on perceptions of fairness. They are therefore likely to succeed in ensuring immediate buy-in, but unsuccessful in building a genuine long-term consensus. Conversely, departing from a narrowly framed benchmark of assessment, acknowledging relative fairness outcomes, and ensuring a procedural justice, are likely to increase overall perceptions of fairness – even where the main outcomes remain the same. Given the imbalance of power, and the paradox at the heart of global tax negotiations, outcomes of global tax cooperation agreements such as GloBE are unlikely to substantially change in the immediate future– but procedural justice deficiencies just add salt to the wound. Departing from the current narrative is hard: not only there would be a fear that it would decrease immediate buy-in, but importantly it would also likely impact negatively on self-esteem and self-perception. In the long-term, however, it may well pay-off: developed countries are already getting most of the benefits of the agreement, there should be no need to be the heroes of the stories we tell, not only others, but ourselves.