THE UNITED NATION'S RESPONSE TO THE DIGITALISATION OF THE ECONOMY: THE INTRODUCTION OF ARTICLE 12B INTO THE UN MODEL TAX CONVENTION

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1. Introduction

It is no longer disputable that the digitalisation and globalisation of the economy raises challenges for the current international tax framework. One of these tax challenges is that multinationals no longer require physical presence in a country to earn revenues, while physical presence is precisely what the current rules regarding the allocation of taxing powers are based on (i.e., the permanent establishment (PE) threshold as established in Article 5 of [model] tax treaties).[647] The allocation of taxing powers between countries with respect to profits earned by companies providing services in a cross-border context, is regulated via the provisions of a double tax treaty. These bilateral tax treaties aim to avoid double taxation and are generally based on model tax conventions. The two most widely used model tax conventions are those drafted by the Organisation for Economic Co-Operation and Development (OECD) and the United Nations (UN). Both conventions have great similarity but also diverge from one another as both organisations (i.e., the OECD and the UN) act with different interests. The OECD Model Tax Convention (MTC) tends to favour developed countries, whilst the UN MTC aims to protect developing countries. One example is the broader PE concept in the UN MTC compared to the PE treaty provision in the OECD MTC.[648] By broadening the PE scope, more taxing rights are allocated to source states (which are often developing countries[649]).[650] In any case, the treaty provisions of both MTCs that define a

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[647] United Nations, 'Tax Issues Related to the Digitalization of the Economy', E/C.18/2019/CRP.12 (UN Publishing 2019), p.2.

[648] United Nations, E/C.18/2019/CRP.12 (supra n. 3), p.3-4.

[649] A developed country will typically export capital (as the residence state of the investor), while the developing country will import capital (as the source state of the investment). See N. Bammens,

permanent establishment, are based on the same basic principle that taxing rights are allocated to the country where companies physically operate. This fundamental rule is based on the characteristics of the economy at that time. Today, many businesses no longer require physical presence to generate income.[651] Therefore, OECD countries expressed their dissatisfaction with the current allocation rules as they claim that such rules do not allow them to collect a 'fair share' of tax on the profits earned by (highly) digitalised businesses. As a response, the OECD/G20 launched the Pillar One proposal which includes the potential to achieve a fairer and more efficient allocation of taxing rights.[652] However, whether a system with a 'fairer allocation of taxing rights' will truly be achieved for all stakeholders is questionable. Scholars have indeed been arguing that the concerns of developing countries have not (sufficiently) been taken into account.[653] This is in line with the view of the UN Tax Committee of Experts on International Cooperation in Tax Matters (UN Tax Committee). For this purpose, the UN Tax Committee founded the so-called 'Subcommittee on Tax Challenges Related to the Digitalization of the Economy' at its 15th assembly, to capture the tax challenges arising from the digitalisation of the economy, and with special attention for the interests of developing countries.[654] At its 20th assembly, the UN Tax Committee decided to establish a 'Drafting Group' to draft a new treaty provision to tackle the tax challenges of a digitalised economy. Their proposal eventually led to the inclusion of Article 12B into the UN MTC, entitled 'Income from Automated Digital Services'.[655] The introduction of Article 12B in the UN MTC was heavily critised, one scholar

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Dubbelbelastingverdragen en fiscaal relevante investeringsverdragen met ontwikkelingslanden, Larcier 2016, p. 7 and 9.

[650] Article 5 UN MTC also considers a service PE while a service PE is not recognised in the OECD MTC, see United Nations, Model Double Taxation Convention between Developed and Developing Countries (UN Publishing 2017); N. Bammens, Dubbelbelastingverdragen en fiscaal relevante investeringsverdragen met ontwikkelingslanden, Larcier 2016, p. 16.

[651] J.W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 4-6.

[652] OECD, Tax Challenges Arising from Digitalisation - Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD Publishing 2020, 228 p.; M.P. Devereux and others, Taxing Profit in a Global Economy. A Report of the Oxford International Tax Group, Oxford University Press 2021, 400 p..

[653] I. Burgers and I. Mosquera, Corporate Taxation and BEPS: A Fair Slice for Developing Countries?, Erasmus Law Review, 2017, p. 37-38 (http://www.erasmuslawreview.nl/tijdschrift/ELR/2017/1/ELR_2017_10_01_004.pdf); M. Victor, Addressing Developing Countries' Tax Challenges of the Digitalization of the Economy, Tax Cooperation Policy Brief, 2019, No 10, p. 6; <https://www.southcentre.int/wp-content/uploads/2019/11/TCPB10_Addressing-Developing-Countries-Tax-Challenges-of-the-Digitalization-of-the-Economy_EN.pdf> (accessed 31 December 2021).

[654] United Nations, E/C.18/2019/CRP.12 (supra n. 3), p.2.; United Nations, Tax Consequences of the Digitalized Economy - Issues of Relevance for Developing Countries, E/C.18/2021/CRP.1, UN Publishing 2021, p. 2 and p. 8.

[655] United Nations, Tax Consequences of the Digitalized Economy—Issues of Relevance for Developing Countries, E/C.18/2020/CRP.41, UN Publishing 2020, p. 5.

even questioned the raison d'être of the new treaty provision.[656] In this article, we will briefly touch upon the Two-Pillar solution (in particular Pillar One) and the criticism of the UN that eventually led to the introduction of Article 12B into the UN MTC. Afterwards, we will discuss Article 12B UN MTC in more detail and compare the OECD's and UN's approaches, and finally we will discuss whether and how both approaches could be aligned.

2. OECD's response to the digitalisation of the economy[657]

In 2013, OECD and G20 countries adopted a 15-Action Plan to address base erosion and profit shifting (BEPS) actions. To ensure that all interested countries and jurisdictions, *including developing economies*, could participate on an *equal footing* in the development of standards on BEPS related issues, the OECD/G20 countries established the Inclusive Framework on BEPS in 2016.[658] As the digitalisation and globalisation of the economy exacerbated BEPS opportunities, the IF has launched a Two-Pillar plan.[659] Pillar One intends to revisit the existing allocation of taxing rights for the benefit of market jurisdictions, while Pillar Two aims to combat tax competition by introducing a global minimum corporate tax rate of 15%, which will become effective as of 2023 for companies with revenues exceeding 750 million euro.[660] Finally, after years of negotiations, on 8 October 2021, 137 (out of 140) OECD/G20 Inclusive Framework (IF) members on BEPS have joined the Two-Pillar plan.[661]

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[656] For more information please see: A. Báez Moreno, Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services (2021) WTJ, p. 501-532.

[656] The commentary states that (i) the non-resident service provider could pass on the extra cost c.q. WHT to the consumer, (ii) a higher WHT rate than the foreign tax credit

[657] The focus of this article is Pillar One of the Two-Pillar plan considering Article 12B of the UN MTC aims to be an alternative solution for Pillar One . Pillar Two of the Two-Pillar plan will not be discussed.

[658] OECD, *Overview of the Inclusive Framework on BEPS*, <https://www.oecd.org/tax/beps/about/#:~:text=The%20OECD%2FG20%20Inclusive%20Framework,needed%20to%20tackle%20tax%20avoidance> (accessed 31 December 2021), OECD, OECD/G20 Base Erosion and Profit Shifting Project, <https://www.oecd-ilibrary.org/taxation/oecd-g20-base-erosion-and-profit-shifting-project_23132612> (accessed 31 December 2021); OECD, *Inclusive Framework on BEPS: A global answer to a global issue*, <https://www.un.org/esa/ffd/wp-content/uploads/sites/3/2017/05/flyer-implementing-the-beps-package-building-an-inclusive-framework.pdf accessed> 31 December 2021.

[659] OECD, Tax Challenges Arising from Digitalisation - Economic Impact Assessment: Inclusive Framework on BEPS, OECD Publishing 2020, p. 12.

[660] United Nations, Tax consequences of the digitalized economy—issues of relevance for developing countries, E/C.18/2019/CRP.16, UN Publishing 2019, p. 8.

[661] OECD/G20 Base Erosion and Profit Shifting Project, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. October 2021, OECD Publishing 2021, p. 3 (https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm (accessed 31 December 2021); OECD, International Community Strikes a Ground-breaking Tax Deal for the Digital Age, OECD Publishing 2021 (https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm) (accessed 31 December 2021).

The Two-Pillar solution is indeed a response to the dissatisfaction of OECD countries regarding the existing rules on the allocation of taxing rights and aims to create a fairer distribution of the rights to tax the profits of the largest (digitalised) companies.[662] Pillar One will re-allocate taxing rights to market jurisdictions, regardless whether the companies have a physical presence in those countries and targets multinational enterprises with global sales exceeding 20 billion euro and a profitability rate of more than 10%, with 25% of profit above the 10% threshold to be re-allocated to market jurisdictions.[663] Pillar One intends to give more taxing rights to countries where a multinational corporation has customers or users (so-called 'market countries'), even if the corporation does not have a physical presence there, but does have a sufficient nexus.[664] Pillar One will also include a standstill and removal of Digital Services Taxes and similar unilateral measures.[665] The profit allocation method foreseen in Pillar One is based on a formulary approach to determine and allocate non-routine profits to market jurisdictions (called amount A). Amount A now seems to refer to the turnover in the market jurisdiction.[666] Moreover, the so-called amount B of Pillar One contemplates to simplify the current arm's length principle for routine profits earned by marketing and distribution activities (without threshold).[667]

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[662] OECD/G20 Base Erosion and Profit Shifting Project, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. October 2021, OECD Publishing 2021, p. 4.

[663] OECD, International Community Strikes a Ground-breaking Tax Deal for the Digital Age, OECD Publishing 2021, (https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm) (accessed 31 December 2021); OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 6.

[664] A sufficient nexus exists if a company realises at least € 1 million turnover in a country. For small economies this threshold is lowered to € 250,000. These are jurisdictions with a GDP below € 40 billion.

[665] OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 4.

[666] OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 6; B. Peeters, M. Otto and M. Geeroms, De (voorgestelde) digitaledienstbelasting fiscaal-juridisch gewikt en gewogen, (2021) 603 TFR, p. 539-540.

[667] The proposal for a 'Unified Approach' under Pillar One of November 2019 also included an amount C. Amount C was intended to cover any additional profit where in-country functions exceed the baseline activity compensated under amount B. Another aspect of amount C was the dispute prevention and resolution mechanisms. At the moment of releasing the blueprint on Pillar One in October 2020, amount C was no longer included in the proposal. Dispute prevention and resolution mechanisms were, however, still foreseen in relation to amount A. Agreement on the scope of mandatory binding dispute resolution beyond amount A had not been reached at that time. In the 2021 statement only the dispute and resolution mechanisms relating to amount A were included. See OECD/G20, Secretariat Proposal for a "Unified Approach" under Pillar One. 9 October 2019 – 12 November 2019, OECD Publishing 2019, p. 16 and 21; OECD/G20, Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy. As approved by the OECD/G20 Inclusive Framework on BEPS on 29-30 January 2020, OECD Publishing 2020, p. 8; OECD/G20, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint, OECD Publishing 2020, p. 15-17; OECD/G20, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 2.

3. UN's criticism on Pillar One and the path towards a new treaty provision

In preparation of the 20th assembly of the UN Tax Committee, in which the tax challenges of the digitalisation of the economy were discussed, two documents were disclosed. The first document captures the comments submitted by the UN Tax Committee to the OECD Secretariat on the Two-Pillar plan with special attention for developing countries. The second document is an alternative proposal to tackle the tax challenges arising from the digitalisation of the economy, which was drafted by UN Tax Committee member Rajat Bansal (in his personal capacity).[668]

The UN Tax Committee's commentary on the OECD's approach is twofold: general and specific. In general, the UN Tax Committee requests the OECD to consider the interests of developing countries more (e.g. in the discussions through regional workshops and in the decision-making process).[669] Although the OECD claims that they have taken the needs of developing countries into account,[670] a majority of the UN Tax Committee members was of the opinion that as of the beginning of the OECD discussions the developing countries have had too little input.[671] In particular, the UN Tax Committee is concerned about the complexity of the Two-Pillar solution, which could give rise to implementation and administration issues, such as the inability to collect the required information to enforce the Two-Pillar plan. For those reasons, the UN Tax Committee inquired with the OECD Secretariat whether the Two-Pillar solution could be remodelled into a simpler approach, such as the use of withholding taxes.[672] In the statement of October 2021, the OECD/G20 have declared that they will provide technical assistance to support the implementation of the Two-Pillar solution by developing countries.[673] However, it remains to be seen how this will be implemented in practice.

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[668] United Nations, Tax consequences of the digitalized economy – issues of relevance for developing countries, E/C.18/2020/CRP.25, UN Publishing 2020, p. 3-4.

[669] United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 5-8.

[670] Amongst others by providing more mechanical, predictable rules, a redistribution of taxing rights to market jurisdictions, by introducing a global minimum tax, which lessens the incentive for MNEs to shift profits out of developing countries and provide support with respect to the implementation of the Two-Pillar solution by developing countries. For more information on the OECD's view how the Two-Pillar Solution will benefit developing countries, see: OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 19.

[671] A. Roelofsen, UN Tax Committee neemt artikel over Automated Digital Services op in Model. En doet nog veel meer, *Weekblad Fiscaal Recht* 2021/115, p. 2.

[672] United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 8.

[673] This support will be provided with close co-operation with regional tax organisations. See OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 5 and p. 19.

The specific comments on the Two-Pillar plan relate to the scope, the nexus, the calculation of amount A respectively amount B, and the mechanisms to avoid double taxation. Regarding the scope of Pillar One, the UN Tax Committee is not in favour of targeting the consumer-facing businesses. Pillar One indeed covers both the Automated Digital Services ("ADS") and consumer-facing businesses ("CFB") [674], while Article 12B UN MTC only targets ADS. The UN Committee states that including CFB in the scope of amount A does not appear to be in line with the original objective, i.e., to tackle the tax challenges related to digital companies that are able to provide services without requiring physical presence, considering the nature of the CFB and the proposed thresholds to create a nexus.[675]

With respect to the nexus rules, the UN Tax Committee is of the opinion that developing countries would be prevented from taxing substantial profits attributable to their markets if the thresholds are set too high, and propose to opt for country-specific thresholds that take the size of the respective economy into consideration. With respect to amount A, the main concern is the exclusion of the routine profits. According to Rajat Bansal, there is even no ground to distinguish routine from non-routine profits. He argues that it is impossible to conceptually distinguish between routine and residual profits of a multinational enterprise, considering all profits are essentially the result of global activities of an enterprise. Furthermore, he stresses that the Unified Approach does neither present a robust methodology for separating the two or the theoretical foundation on which such distinction should be based, nor the data with which this could effectively be done.[676] On amount B, the UN Tax Committee stresses the need for a clear definition of 'marketing and

[674] OECD/G20, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint, OECD Publishing 2020, p. 11.

[675] In this regard, the UN Committee stated that: "The policy justification is that these businesses are the ones that can, with or without the benefit of local physical operations, participate in a sustained and significant manner in economic life of a jurisdiction. The businesses in first category are stated to be providing digital services remotely to customers in markets using little or no local infrastructure but at the same time benefitting from exploiting powerful customer or user network effects, thereby generating substantial value from interaction with users and customers. For the second category of businesses, it is stated that though they continue to sell through physical distribution channels and support sales through television and banner advertising, there is an increasing use of digital technologies to more heavily interact and engage with customer base. While sales revenues is the only criteria for first category of business to create nexus, plus factors such as existence of physical presence of MNE in market jurisdiction or targeted advertising directed at marketing jurisdiction are required, in addition to sales threshold, for second category of businesses to create a nexus. The policy rationale for Scope for the second category is not transparent i.e. it does not answer questions on picking up the chosen streams of businesses only while leaving out rest from ambit of Amount A." See United Nations, E/C.18/2020/CRP.25 (n21), p. 10.

[676] United Nations, E/C.18/2020/CRP.25 (n21), p. 5-9; A. Chawla, Recent International Tax Policy Developments at the United Nations (https://www.ibanet.org/article/870EACF7-93E6-435B-990B-24BD77F6F1DB) (accessed 31 December 2021).

distribution' activities and to clarify that this is a minimum compensation and not an elective safe harbour for taxpayers.[677]
In its proposal, Rajat Bansal recapitulates and elaborates on these comments and proposes an alternative approach (i.e., a new treaty provision) to mitigate the tax challenges resulting from the digitalisation of the economy, taking into account the concerns and needs of developing countries. It can be observed that Article 12B UN MTC is very much inspired on Rajat Bansal's proposal.[678] As already mentioned, those two documents (i.e., the UN Tax Committee commentary on the Two-Pillar plan and Rajat Bansal's proposal) have been discussed at the 20th assembly of the UN Tax Committee. During this assembly, it was decided that a 'Drafting Group', coordinated by Carlos Protto and Rajat Bansal, would be established consisting of 13 (and later 14) UN Tax Committee members to draft a new treaty provision.[679] During the 21st assembly, the UN Tax Committee approved the inclusion of Article 12B into the MTC and in the follow-up meeting, the text and commentaries of Article 12B UN MTC were finalised and adopted.[680]

4. UN's approach to mitigate tax challenges of the digitalisation of the economy

4.1 Introduction

The new treaty provision (Article 12B UN MTC) allocates taxing rights with respect to the income generated from automated digital services (ADS) to source states (allegedly mainly developing countries[681]). Therefore, Article 12B UN MTC introduces a withholding tax (WHT) on the gross income whenever a payment is made to a non-resident for ADS. The rate of the withholding tax should be determined based on bilateral negotiations. However, the withholding tax will not apply to the extent that the service provider (i.e., the beneficial owner of the income arising from ADS) has opted to be taxed on its qualified profits. In that case, the qualified profits will be taxed at the domestic rate of the country where the payment is made. [682]

[677] United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 7.
[678] United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 9-12; A. Chawla (supra n. 29).
[679] United Nations, E/C.18/2019/CRP.12 (supra n. 3), p.2.; United Nations, E/C.18/2020/CRP.41 (n10), p. 5; United Nations, E/C.18/2021/CRP.1 (supra n. 9), p.4.
[680] United Nations, Report on the twenty-first session, E/2021/45/Add.1-E/C.18/2020/4, UN Publishing 2020, p. 18-21.
[681] N. Bammens, Dubbelbelastingverdragen en fiscaal relevante investeringsverdragen met ontwikkelingslanden, Larcier 2016, p. 7 and 9.
[682] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p.6.

4.2 Rationale for the approach

One of the main disadvantages of the Pillar One proposal which is repeatedly pointed out by the UN Tax Committee is that it would be too complex for developing countries to implement this system, considering their limited administrative capacity in terms of infrastructure and qualified people.[683] This was one of the major issues that the UN Tax Committee wanted to address in their proposal and, therefore, they proposed to work with a WHT mechanism.[684] A WHT is indeed a well-known and simple mechanism to tax income from non-residents, which has proven to be a reliable, efficient and effective method to collect taxes imposed on non-residents.[685]

4.3 Article 12B of the UN Model Tax Convention[686]

4.3.1 Overview

Article 12B UN MTC grants source states the right to tax income originating from automated digital services. The term 'automated digital services' is considered as any service provided on the internet or another electronic network, requiring minimal human involvement from the service provider. Taxation on ADS income will be levied through a WHT on the payment and is deemed to arise in the residence state of the payer.[687] Alternatively, the service provider (being the beneficial owner of ADS income) can request the source state to be taxed on its net qualified profits for the whole taxable year.[688]

It is argued that the introduction of Article 12B UN MTC was unnecessary[689] because of a restrictive and incorrect reading of Article 12A UN MTC. According to this view, ADS income should fall within the scope of Article 12A UN MTC, although the Commentaries on the UN MTC mention that ADS cannot qualify as

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[683] I. Burgers and I. Mosquera, Corporate Taxation and BEPS: A Fair Slice for Developing Countries, (2017) 10 Erasmus L Rev 29, p. 35; P. Martínez Mahu, Distribute Profit Allocation Rules: A New Approach for an Old Problem, (2021) 49 Intertax 144; United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 8-11.

[684] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p.8.

[685]United Nations, E/C.18/2021/CRP.1 (supra n. 9), p.9.

[686] See text and commentary on Article 12B UN MTC: (https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session) (accessed 31 December 2021). In its 23rd assembly, the UN Tax Committee identified a number of outstanding issues in relation to the update of the UN MTC which they aim to resolve by 2023. Although such issues are mainly related to payments of computer software, these changes could impact the scope of Article 12B UN MTC. Therefore the current text and commentary of Article 12B UN MTC should be considered as a draft version. See United Nations, E/C.18/2021.CRP.22, p. 5.

[687] Where the payer has its residency, PE or a fixed base in connection with which the obligation to make the payment was incurred, and such payments are borne by the PE or fixed base.

[688] https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session (accessed 31 December 2021).

[689] L.T. Pignatari, 'The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention' (2021) Intertax 49, p. 684 and 687.

technical, managerial and consultancy services. It is contended that the Commentaries to the UN MTC are not binding for interpretation and that the restrictive interpretation of Article 12A UN MTC lacks legal support and technical foundations, so ADS income should be covered by Article 12A UN MTC. [690]

Even assuming that ADS income would fall within the scope of Article 12A UN MTC, it is argued that Article 12B UN MTC would not be completely redundant in the scenario where a state wishes to retain its withholding tax rights on ADS income, and there is no prior tax treaty that includes Article 12A UN MTC, and the other contracting state is only willing to include Article 12B UN MTC in the bilateral tax treaty.[691]

It is true that the Commentaries on the UN MTC are not binding. However, the mere fact that the UN Tax Committee approved the introduction of Article 12B UN MTC seems to confirm the restrictive interpretation of Article 12A UN MTC.[692] Furthermore, interpreting a treaty in good faith with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose[693] also means that different treaty provisions should be read together. Indeed, the latin maxim *ut res magis valeat quam pereat*, expressing good faith and the principle of effectiveness, requires that preference should be given to that interpretation that gives a term some meaning rather than none. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[694] Accordingly, if the scope of Article 12A UN MTC would be interpreted so that ADS income would fall within its scope, article 12B UN MTC would indeed have limited meaning. For these reasons, we believe that by introducing article 12B UN MTC, the UN Tax Committee has implicitly confirmed the restrictive interpretation of article 12A UN MTC as put forward by the Commentaries of that provision and therefore article 12B UN MTC does not exist without purpose.

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[690] A. Báez Moreno, 'Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services' (2021) WTJ, p. 501, 503, 505, 508.

[691] A. Báez Moreno, 'Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services' (2021) WTJ, p. 530.

[692] A. Báez Moreno, 'Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services' (2021) WTJ, p. 515.

[693] Article 31, §1 of the Vienna Convention on the Law of Treaties.

[694] R. Gardiner, Part II : Interpretation Applying the Vienna Convention on the Law of Treaties, A The General Rule, 5 The General Rule: (1) The Treaty, its Terms, and Their Ordinary Meaning, (2015) Oxford Public International Law Library, p. 12-13, https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2018_04585.PDF.

4.3.2 Taxable event

The sourcing rule of Article 12B UN MTC is based on the *payment* resulting from the ADS and not linked to the location of users. Taxation of income earned by non-residents providing automated digital services will indeed be triggered by the transfer of the underlying payment for ADS and is deemed to arise in the state where the payer has its residency or has a permanent establishment or fixed base in connection with which the obligation to make the payment was incurred, and such payments are borne by the PE or fixed base.[695] Therefore, it is not necessary that the automated digital services are provided in the state where the payer has its residency, permanent establishment or fixed base. In fact, the place where the services are provided is irrelevant, the nexus is connected with the payment (i.e., the state where the payer of a contracting state or third country has its residency, PE or fixed base). In the commentary of Article 12B, paragraph 1 UN MTC, the term 'payment' is defined as the fulfilment of the obligation to put funds at the disposal of the service provider in the manner required by contract or custom.[696]

Some UN Tax Committee members have expressed the view that Article 12B UN MTC not fully addresses the digital economy considering that taxation is triggered by the payment and, therefore, free digital services (e.g., search engines and social media platforms) fall out of scope.[697] Furthermore, it was contended by these UN Tax Committee members that for online advertising services (which is one of the biggest sources of income in ADS) the entity paying the advertisement and the user could be located in different states and as a result of Article 12B UN MTC not the market jurisdiction, but the residence country of the paying entity would receive taxing rights. Moreover, multinational enterprises could easily structure their business models in such a way that the paying entity is located in a source country imposing no or limited withholding taxes on the payments related to ADS (especially considering that the inclusion of the treaty provision is a bilateral negotiation and thus not a

[695] For the purpose of Article12B UN MTC, the residency of the payer will be determined in accordance with the provisions of Article 4 of the same MTC, see United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 13 and p. 28.

[696] The commentary on the article specifically mentions that the term 'payment' is consistently used as the term 'paid' in Article 10 and 11 UN MTC and in line with the commentary of Article 10 and 11 OECD MTC. See: United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 7, p. 12 and p. 28-29.

[697] In this respect, the scope of the digital service tax foreseen in the proposal for a Council Directive is wider as the latter targets services whereby the user of a digital activity constitutes a substantial input for the company performing that activity, allowing that company to derive revenue from the activity. While Article 12B UN MTC requires a payment. See Proposal for a Council Directive of 18 March 2018on the common system of a digital services tax on revenue from the supply of certain digital services, COM(2018)148, https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:52018PC0148&from=EN (accessed 31 December 2021).

multilateral initiative).[698] As an exception to the above source rule, the payment for automated digital services made by a resident is not deemed to arise in its residence state to the extent the payer carries on business through a PE or performs independent personal services through a fixed base in the other state and the underlying payments are borne by that PE or fixed base.[699] Some UN Tax Committee members expressed the concern that this paragraph could result in abuse, as companies could opt to establish a PE with limited resources for the sole purpose of being excluded from the application of Article 12B UN MTC and being subject to Article 7 UN MTC. According to the Drafting Group, this loophole should be closed by anti-abuse rules.[700] This source rule and its deviation differs from the OECD approach which aims to establish a nexus based on 'a sustained and significant involvement in the economy of the market jurisdiction'. The latter approach will mainly be determined based on the revenues generated in that market jurisdiction, while the source of the payment is irrelevant.[701]

Next to the allocation of taxing rights amongst the two treaty countries, an alternative treatment is defined in the article in case the payer and the beneficial owner of the income[702] have a 'special relationship' and the amount of the payment for the ADS exceeds the amount that would have been determined without such a special relationship.[703] In the latter case, Article 12B UN MTC will only be applied on the amount that would have been determined in absence of such special relationship, i.e., at arm's length. The amount in excess will be taxable in accordance with the laws of each treaty country, taking into account the other provisions of the tax treaty. A special relationship includes: (i) an individual or legal person who (in)directly controls the payer, (ii) or who is (in)directly controlled by the individual, or (iii) subordinate to a group having common interest with the individual, or (iv) has a relationship by blood, marriage, or any community of interest as distinct from the legal relationships giving rise to the payments in consideration for the automated digital services.[704] It should be noted that the application of this clause could be very complicated in practice, as the nature of these transactions may make it difficult to determine the amount that corresponds to the arm's length principle.

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[698] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 10.

[699] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 29.

[700] United Nations, E/2021/45/Add.1-E/C.18/2020/4 (supra n. 33), p. 21.

[701] A. Roelofsen, (supra n. 24) p. 4-5. ; B. Peeters, M. Otto and M. Geeroms (supra n. 19), p. 539.

[702] The same applies when a special relationship exists between the payer and the beneficial owner on the one hand and a third party on the other hand.

[703] The commentary specifies that a 'special relationship' should be considered as similar or analogous to the cases contemplated in Article 9 MTC. See: United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 31.

[704] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 31.

4.3.3 Taxable transactions

The WHT will be levied on payments to non-resident companies for automated digital services. Alternatively, the service provider will be taxed on its qualified profits generated in the source country.[705] ADS has been defined as any service provided on the internet or another electronic network, requiring minimal human involvement from the service provider. A service is automated when the user can make use of the service because of the equipment and systems that are in place, rather than having interactions with the supplier. Automated services should thus be considered as the ability to scale up and provide the same type of services to new users with minimal human involvement from the service provider, where the threshold of minimal human involvement would not be crossed if there would be very limited human response in case of new users or more complex problems.[706] Furthermore, the minimal human involvement is only considered in relation to the provision of services, which means that it does not include the human involvement required for the creation, support or maintenance of the system to provide the services, maintaining and updating the system's environment, dealing with system errors, or making other generic, non-specific adjustments unrelated to individual user requests. [707] It was however not mentioned how this degree of human involvement would be measured.[708]

The treaty provision specifically foresees a list of examples that could generally be considered as automated digital services: (i) online advertising services, (ii) supply of user data, (iii) online search engines, (iv) online intermediation platform services, (v) social media platforms, (vi) digital content services, (vii) online gaming, (viii) cloud computing services, and (ix) standardized online teaching services.[709] However, the commentary stresses the fact that, in any case, the service should meet the standards provided by the definition (i.e., a service provided on the internet or another electronic network, requiring minimal human involvement from the service provider).

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[705] United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 9.

[706] The Committee of Experts gave the following example: In other words, once the service offering of an automated digital business is developed (such as a music catalogue or a social media platform), then the business can provide that service to one user, or to many more, on an automated basis with the same basic business processes. On the other hand, a non-automated digital business would see a proportionate increase in per unit costs in connection with providing the services to new customers. United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 20.

[707] United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 7 and p. 20.

[708] L.T. Pignatari, 'The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention' (2021) Intertax 49, p. 684.

[709] The commentary also provides a detailed description of these services. See United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 21-24.

As such, the list of examples of ADS services is indicative and not self-standing, meaning that each individual case should be assessed against the standards of an automated digital service. To capture all services in scope of the treaty objective, the list cannot be too restrictive. A highly changing economy needs a treaty provision that evaluates each situation on a case-by-case basis. However, the absence of such a list also creates uncertainty for taxpayers.[710] This was also pointed out by the OECD that rejected the WHT system given the fact that a complex and unclear scope could give rise to unnecessary complexity and classification disputes, uncertainty and at the same time tax avoidance to the extent similar types of transactions would not be taxed similarly.[711]Additionally, the UN Tax Committee sets forth five examples of services that are generally not considered as automated digital services: (i) customized professional services, (ii) customized online teaching services, (iii) services providing access to the internet or to another electronic network, (iv) online sale of goods and services other than automated digital services, and (v) revenue from the sale of a physical good, irrespective of network connectivity ("'internet of things'").[712] A large minority group of the UN Tax Committee[713] were concerned that the term income from automated digital services is not clear. Furthermore, it is alleged that ADS services should or at least could fall within the scope of article 12A MTC[714] which could lead to disputes and discrepancies in characterisation and by consequence to situations of double taxation and non-taxation.[715]

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[710]https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session (accessed 31 December 2021), p.15; A. Roelofsen, (supra n. 24), p. 4-5.

[711] It can be noted that some of the comments made by the large minority group of the UN Tax Committee members on the use of a WHT mechanism to tax the digital economy is aligned with the view of the OECD/G20 Inclusive Framework (e.g., in relation to the scope of transactions covered and the ability to collect the tax). Please see: OECD, *Addressing the Tax Challenges of the Digital Economy. Action 1: 2015 Final Report*, OECD Publishing 2015, p. 113.

[712] For a more detailed description of the services that are generally (not) considered as automated digital services, see: United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 22-24; and, <https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session> (accessed 30 December 2021), p. 18-20.

[713] The UN Tax Committee considers a group to be a large minority group if the position is taken by at least 10 to 12 members or 35% or more, but less than 50% of the members present and voting at the meeting held the view. Please see: United Nations, E/2021/45/Add.2/E/C.18/2021/2, p.9.

[714] L.T. Pignatari, 'The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention' (2021) Intertax 49, p. 687.

[715] A. Báez Moreno, 'Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services' (2021) WTJ, p. 517-518.

4.3.4 Taxable base and tax rate

4.3.4.1 The withholding tax mechanism

Article 12B UN MTC foresees in two different taxation mechanisms. Without any action from the taxpayer, a WHT will be levied on the gross amount of the payment underlying the income from automated digital services. The UN Tax Committee does not foresee in a WHT percentage and thus the *maximum* WHT rate should be determined based on bilateral negotiations of the contracting states. However, the UN Tax Committee conceived that, taking into account the possibility of double or excessive taxation, 3-4% would be a modest rate. In addition, the commentary provides certain criteria that should be taken into account when determining the maximum withholding tax rate.[716] It is striking that the UN Tax Committee did not provide a default or a *minimum* WHT percentage, especially when considering the fact that this percentage could be significantly reduced at the expense of source states, due to their limited capabilities and experience when it comes to effectively negotiating tax treaties.[717]

4.3.4.2 Net base taxation

The beneficial owner of the income originating from ADS can also request the source country (i.e., the country where the income arises) to be taxed on its net profits for the whole taxable year. In that case, the service provider (i.e., the beneficial owner of the income) of the automated digital services will be taxed on its qualified profits in the source country at the domestic tax rate of that country. This option could be beneficial in case the taxpayer has a loss in the ADS business segment during that taxable year.[718]

For the purpose of this treaty provision, qualified profits are considered to be 30% of the amount calculated by applying the profitability ratio[719] of the

[716] The commentary states that (i) the non-resident service provider could pass on the extra cost c.q. WHT to the consumer, (ii) a higher WHT rate than the foreign tax credit could deter cross border services, (iii) a high WHT could lead to excessive taxation in the hands of the non-resident service provider, (iv) have revenue and foreign exchange consequences in the source country, and (v) relative flows of payments e.g. from developing to developed countries. See: United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 11, 13, 35; and, https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session (accessed 31 December 2021), p. 9.

[717] The fact that developing countries do not have adequate skills and experience to effectively negotiate tax treaties is in this treaty provision not considered by the UN Tax Committee although the latter recognises this in their Manual for the negotiation of bilateral tax treaties, see UN, Manual for the negotiation of bilateral tax treaties, UN Publishing 2019.

[718] United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 16.

[719] The profitability ratio is considered as the annual profits divided by the annual revenue as expressed in the consolidated financial statements. Unless bilaterally agreed otherwise, the profit to be used for

beneficial owner's overall ADS segment to the gross annual revenue from ADS derived in the source state.
The UN Tax Committee clarified that there is no real scientific research to sustain the fixed percentage of 30%. It is a policy decision based on a reasonable estimate to balance the allocation of taxing rights between the residence state and the source state. This reasonable estimate is set based on the experience of various tax authorities with the attribution of profits to PEs where no separate financial accounts are available. [720] This could result in overtaxation or undertaxation in a jurisdiction where the profits derived from ADS income are not equal to 30%.[721]
In case the beneficial owner does not maintain the segmented financial accounts, the overall profitability ratio will be applied to determine the qualified profits. If the beneficial owner belongs to a multinational group, the profitability ratio of the group's business segment or, in case no segmented accounts are available, the overall profitability ratio will be applied, provided that the profitability ratio of the multinational group is higher than the profitability ratio of the beneficial owner at entity level.[722] In case neither the segmental profitability ratio nor the group's overall profitability ratio are available for the country in which the income arises, the beneficial owner of the automated digital services will not have the choice to be taxed on its qualified profits. As a result, the WHT will be levied on the gross amount of the payment underlying the income from automated digital services.
A minority group of the UN Tax Committee members expressed concerns around potential double taxation of routine functions if the source state would tax routine profits that have already been taxed by other states where the routine functions are performed or in case the routine functions would be performed in the source state via a PE. Therefore, they advocated for a carve-out for routine profits.[723] A model provision is included in the commentary for

calculating the profitability ratio will be the profit before tax as per the (consolidated) accounts of the beneficial owner (or the multinational group) with adjustments (e.g., the exclusion of income tax expenses, exclusion of dividend income, and gains or losses in connection with shares, adding back expenses not deductible for CIT purposes due to public policy reasons, etc.) United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 17.

[720] United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 38; A. Roelofsen (supra n. 24), p. 3.

[721] W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 8.

[722] The provision stating that: 'profitability ratio of the group can only be applied if the latter is greater than the profitability ratio of the beneficial owner of the income at entity level', is established to neutralize any tax-driven related party transactions to reduce the profitability ratio. UN Tax Committee members can also opt to solely apply the profitability ratio of the beneficial owner at entity level and include an anti-abuse rule. See: United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 17.

[723] Note that this vision is aligned with the OECD's approach that carved-out the routine profits from Pillar One.

those member states that want to carve-out routine profits.[724] Furthermore, a large minority group of the UN Tax Committee has stated that several concepts such as "'automated digital services business segment'", "'segmental accounts'", "'segmental profitability ratio'", etc. require further guidance, as these concepts are insufficiently defined. Because of this, too much flexibility is left for the jurisdictions, which could increase uncertainty, the risk of inconsistent treatment and lead to lengthy disputes between taxpayers and tax authorities. Moreover, the information required for the profitability ratio could not be in the possession or control of the taxpayer, which may render this option too complex or administratively burdensome. As a result, it may not be applied in practice or even denied by tax administrations.[725]

4.3.5 Taxpayer

The income of non-resident service providers, the beneficial owner of the payment that originates from automated digital services, is targeted. A beneficial owner should be considered in relation to a payment to a resident. The beneficial owner concept does not refer to any definition under the domestic law of the countries involved, but should be interpreted in light of the object and purpose of the treaty, including the avoidance of double taxation and prevention of tax evasion and avoidance. Therefore, the UN Tax Committee considers an agent, nominee, or a conduit company acting as a fiduciary or administrator not as a beneficial owner, as these do not have the right to use and enjoy the income because of their contractual or legal obligations to pass on the income to another person.[726]

In principle, the source state will levy a WHT on the gross payments that are related to automated digital services. The service provider, and hence beneficial owner of the income generated from ADS, can also opt to be taxed on its net profits. This option is only available to the extent the profitability ratio of the business segment of the service provider or the multinational enterprise group is available for the source country. For the purpose of this treaty provision, a 'group' is defined as a collection of enterprises related through ownership or control so that it is required to prepare consolidated financial statements, because the equity interests of the company are traded on a public stock exchange or based on the applicable accounting principles. A

[724] https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session (accessed 31 December 2021), p. 13-14.

[725] https://www.un.org/development/desa/financing/document/article-12b-un-model-tax-convention-agreed-committee-its-22nd-session (accessed 31 December 2021), p. 5-6.

[726] Therefore, the concept 'beneficial owner' should, in view of Article 12B UN MTC, not be considered as individuals exercising ultimate effective control over a legal person or arrangement. See: United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 15 and 16; A. Roelofsen (supra n. 24), p. 3.

'multinational enterprise group' is determined as any group that includes two or more enterprises that have a tax residence in different jurisdictions.[727]

4.3.6 Debtor of the withholding tax

As mentioned, the WHT is triggered by the payment for ADS. The text and commentary of Article 12B UN MTC do not foresee in a restriction with respect to the payer/user.[728] Therefore, the debtor of the WHT can be an individual or a legal person. Thus, Article 12B UN MTC will apply in both a B2C as a B2B context.[729]

4.3.7 Double or excessive taxation

Double or excessive taxation resulting from Article 12B UN MTC is reduced or eliminated under Article 23 UN MTC (i.e., methods for the elimination of double taxation). The residence country has the obligation to grant relief, either by exempting the income from automated digital services (Article 23A) or, by granting a credit against the tax payable in the residence state (Article 23B).[730] Also in this case, the UN Tax Committee opts for a well-established technique that is already used by developing countries.

4.3.8 Interaction with other treaty provisions and other treaties

If payments underlying the income from automated digital services qualify as royalties or technical service fees under Article 12A UN MTC, this Article will prevail over Article 12B UN MTC.[731] With respect to mixed contracts, the UN Tax Committee recommends, on the basis of the information contained in the contract or by means of a reasonable apportionment, to break down the different parts of what is provided under the contract and then apply the respective tax treatment to each part.[732] It is argued that no criteria were presented to make this break down nor examples were given.[733] Taxing a part of the contract under Article 12A UN MTC and the other part on the basis of Article 12B UN MTC would lead to a combination of net and gross taxation,

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[727] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 7.

[728] Except for the fact the residence state of the payer or where the latter holds a PE or fixed base in connection with which the obligation to make the payment was incurred is a Contracting State (and not a Third State). See United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 28.

[729] The commentary explicitly states that individuals paying for ADS with respect to their personal use are included in the scope of Article 12B UN MTC whereas payments for personal use are excluded in Article 12A UN MTC. See United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 27.

[730] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 9 and p. 14.

[731] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 7.

[732] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 27.

[733] L.T. Pignatari, 'The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention' (2021) Intertax 49, p. 686.

which introduces substantial complexity.[734] Furthermore, it is contended that the restrictive interpretation of Article 12A UN MTC lacks legal support and that the scope of that provision should therefore be interpreted more broadly, so that ADS income would fall within the scope of Article 12A UN MTC and article 12B UN MTC would no longer serve any purpose.[735]
In case income from automated digital services falls within the scope of both Article 12B and Article 7 UN MTC, Article 12B UN MTC will prevail. Similarly, if income from automated digital services would be captured by both Article 12B and Article 14 UN MTC, Article 12B UN MTC will apply. If, however, the income from automated digital services is generated by the service provider through a PE in the source country or via independent personal services from a fixed base in that country, Article 7 or 14 UN MTC will prevail over Article 12B UN MTC.[736]
However, the above priority rules do not regulate the interaction between Pillar One and Article 12B UN MTC. Assuming that a country would adopt Pillar One and Article 12B UN MTC, it is recommended that a treaty provision specifies which treaty provision should take precedence over the other.

5. Differences between the OECD's approach and the UN's approach

5.1 Consensus-based vs bilateral negotiations

On 8 October 2021, the majority of the OECD/G20 IF on BEPS member countries finally agreed on a statement regarding the Two-Pillar solution to address the tax challenges arising from the digitalisation of the economy, with the aim to sign a multilateral convention in the course of 2022 - to implement amount A with respect to Pillar One - and effective implementation in 2023.[737]
The advantage of the OECD's approach is the fact that it is based on a consensus amongst the OECD/G20 IF on BEPS members, and implemented via a multilateral instrument (MLI)[738] . Therefore, it will be applied in the 137

[734] L.T. Pignatari, 'The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention' (2021) Intertax 49, p. 686.
[735] Báez Moreno, 'Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services' (2021) WTJ, p. 501 and 507.
[736] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 7 and p. 12.
[737] OECD, International Community Strikes a Ground-breaking Tax Deal for the Digital Age, https://www.oecd.org/tax/beps/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm (accessed 31 December 2021).
[738] The Multilateral Instrument to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting introduced by the OECD. See: OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (accessed 31 December 2021).

countries that have joined the Two-Pillar plan. The disadvantage is that such a consensus-based approach is more complicated and takes more time.
According to the UN Tax Committee members, the Two-Pillar plan does not sufficiently cover the interests and needs of developing countries. The main concern for developing countries is the complexity of the OECD's approach and, therefore, the UN Tax Committee opted to apply a well-known and simple WHT mechanism.[739] Consequently, the UN has chosen to introduce a new treaty provision into the UN MTC. Despite the use of the WHT system, it could be questioned whether the UN approach is that simple. Although the scope and formula appear less complex compared to Pillar One and a WHT system would be easier to add to the existing international tax framework than the OECD proposal, in particular the lack of thresholds seems problematic from a simplicity point of view.[740] The UN Tax Committee members have reached an agreement more quickly than the OECD, but this should not be surprising as the agreement process is not consensus-based. In fact, a large minority group of the UN Tax Committee members have expressed their concerns, especially regarding the bilateral nature, its scope, and potential situations of non-taxation or double and excessive taxation. Some UN Tax Committee members have indeed stated that the tax challenges arising from the digitalisation of the economy should be addressed multilaterally, given that this is a worldwide problem. This was also anticipated by Rajat Bansal who proposed to introduce a treaty provision in the UN Model Tax Convention for bilateral tax treaties, and at the same time, initiate a multilateral convention at the level of the UN that is open for signature for all countries.[741] Such a multilateral convention could operate like the MLI[742], giving the flexibility to countries to opt in as countries may need to adapt their domestic laws to have a similar taxing right in place. A multilateral convention is indeed effective even if not all countries agree to participate.[743] Nevertheless, the Drafting Group was not in favour of a

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739 J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p.9.

740 A. Chawla (supra n. 29); D. Mehboob, ITR Global Tax 50 2020-21: The UN Committee of Experts on International Cooperation in Tax Matters, 2021, p. 1; J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p.9. .

741 Rajat Bansal United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 12

742 For more information on the MLI see a.o. R. Prokisch, Die Auslegung von DBA im Lichte des Multilateralen Abkommens, in: R. Ismer and others (eds), Territorialität und Personalität - Festschrift für Moris Lehner, Verlag Dr. Otto Schmidt 2019, p. 195-208; R. Prokisch and F. Souza De Man, Multilateralism and International Tax Law: The Interpretation of Tax Treaties in the Light of the Multilateral Instrument, in: A.P. Dourado, (ed), International and EU Tax Multilateralism: Challenges Raised by the MLI, IBFD 2020, p. 199-225.

743 United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 12.

multilateral convention as they perceived this as complex, especially in terms of tax disputes and the avoidance of double taxation.[744]

In practice, the impact of Article 12B UN MTC could be limited, because the inclusion of the treaty provision does not result in the automatic adoption in tax treaties. The effective implementation of Article 12B UN MTC could also take a long time, as bilateral negotiations between contracting parties are often time-consuming, especially in developing countries, which are unlikely to have the competent staff to negotiate tax treaties.[745] Furthermore, it is doubtful that the treaty provision would apply to the largest tech companies, since the majority of them are located in the United States (US)[746], a jurisdiction that most likely would not agree to include Article 12B in its tax treaties.[747] The negotiated WHT could be very low reducing significantly the scope of the provision. On top of that, many developing countries do not have a(n) (extensive) treaty network.[748] According to the UN Drafting Group, the fact that many developing countries have no tax treaties in place should not be an issue, as Article 12B UN MTC is a bilateral solution for a bilateral problem, namely the fact that jurisdictions are under the current allocation rules of tax treaties unable to tax digital companies that have no physical presence in the market jurisdiction. The Drafting Group is furthermore of the opinion that the introduction of Article 12B into the UN MTC could act as a wake-up call for developing countries and could stimulate them to introduce similar regulations in their domestic legislation.[749] This is also the reason why some believe that Article 12B UN MTC could undermine the OECD's Two-Pillar plan that foresees the elimination of digital services taxes and other unilateral measures, at least in the countries that have joined the Two-Pillar plan.[750] This could also lead to double taxation as the current design of digital service taxes fall out of scope of

[744] United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 7-10.

[745] J. VanderWolk, Sideshow: The UN Committee of Experts and Digital Services Taxes, https://news.bloombergtax.com/daily-tax-report/sideshow-the-un-committee-of-experts-and-digital-services-taxes (accessed 31 December 2021).

[746] Although it is argued that OECD members might be willing to include Article 12B in their tax treaties as some countries have also introduced a digital service tax. See L.T. Pignatari, 'The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention' (2021) Intertax 49, p. 689.

[747] J. VanderWolk, Sideshow: The UN Committee of Experts and Digital Services Taxes, https://news.bloombergtax.com/daily-tax-report/sideshow-the-un-committee-of-experts-and-digital-services-taxes (accessed 31 December 2021).

748 J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 12.

[749] United Nations, E/C.18/2020/CRP.41 (supra n. 10), p. 7; United Nations, E/2021/45/Add.1-E/C.18/2020/4 (supra n. 33), p. 19.

[750] OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 4.

taxes covered under Article 2 of tax treaties based on the OECD and UN Model.[751]

5.2 Thresholds as a condition to tax digitalised companies

The rules under Pillar One are not imposed on all MNEs, whilst Article 12B UN MTC does not require any threshold (in terms of a PE, a fixed base, a minimum period of presence, global revenues or revenues related to digital services). Pillar One sets forth a global revenue test and a *de minimis* foreign in-scope revenue test, as it considers that in such cases the additional compliance and administrative costs would not outweigh the benefits.[752] The fact that the UN does not foresee a threshold for the taxation of income originating from automated digital services goes against the simplicity that they wanted to provide by introducing a WHT mechanism. Indeed, some UN Tax Committee members have argued that applying the WHT on small payments and payments by individuals acquiring services for personal use significantly increases the complexity and administrative burden, whilst developing countries only have limited administrative capacity, while there is no clear indication that revenues would be sufficiently increased by having no threshold in place to outweigh the costs. [753] Based on those concerns, the commentary on Article 12B UN MTC provides a default paragraph for countries that would like to include a threshold (based on the size of the taxpayer or revenues generated in the source country) and to exclude payments by individuals for personal use (similar to the exclusion of individuals acquiring services for personal use from the application of Article 12A UN MTC).[754]

751 J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 10.

752 OECD, Tax Challenges Arising From Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD Publishing 2020, p. 58; United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 9.

753 United Nations, E/2021/45/Add.1-E/C.18/2020/4 (supra n. 33), p. 19-20; United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 11 and p. 13; J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 12.

754 United Nations, E/2021/45/Add.1-E/C.18/2020/4 (supra n. 33), p. 19-20; United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 11 and p. 13.

5.3 Scope

Article 12B UN MTC covers both routine and non-routine profits, while Pillar One solely targets non-routine profits. Some UN Tax Committee members indeed believe that routine functions could be taxed double in certain situations and therefore emphasised the need for an option to carve out routine profits.[755]

The UN Tax Committee also has, in contrast to the OECD, explicitly chosen to exclude the consumer-facing businesses from the scope of application. According to the UN Tax Committee, including consumer-facing businesses is not aligned with the basic principle underlying the need to revisit the allocation of taxing rights as a result of the digitalisation of the economy.[756]

Pillar One will apply in situations where taxpayers have a PE in the market jurisdiction. This will not be the case under Article 12B UN MTC. [757] In fact, Article 7 UN MTC will prevail over Article 12B UN MTC when the service provider of the automated digital services generates its income through a PE in the market jurisdiction or via independent personal services from a fixed base in that country. [758]

6. An alternative approach?

The OECD and the UN foresee a different approach to tackle the same tax challenges that are caused by the digitalisation and globalisation of the economy. This should not be encouraged nor approved. It is well known that a non-coherent international tax framework on the one hand facilitates multinational enterprises to engage in tax optimalisation schemes or even tax evasion and tax fraud, and on the other hand could lead to double or excessive taxation.[759] In this sense, the fact that Pillar One will probably end the various unilateral measures (such as digital services taxes, equalisation levies, etc.) taken by countries is a most welcome development. However, such unilateral measures will only be abolished in those countries that have joined the Pillar-Two plan. Digital service taxes in developing countries that have not joined the Pillar-Two plan will remain in effect. On top of that, by introducing Article 12B

[755] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 18-19.

[756] Considering that consumer-facing business will continue to sell through physical distribution channels and make an increasing use of digital technologies, companies providing the latter services will have (limited) physical presence in the market jurisdictions. See: United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 10.

[757] B. Peeters, M. Otto and M. Geeroms (supra n. 19), p. 539.

[758] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 7 and p. 12.

[759] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p.11.

into the UN MTC, the UN Tax Committee wants to encourage and provide guidance for developing countries to implement digital services taxes into their domestic legislations. In this regard, it is claimed that WHT on ADS services could most probably not be considered as a measure similar to digital services taxes because WHT on ADS services should be qualified as income taxes which in principle will be creditable in the residence state and therefore these unilateral measures should not be abolished under Pillar One.[760] In addition, the absence of tax treaties between developed and developing countries could increase double or excessive taxation, even more so considering that developing countries will introduce digital services taxes into their domestic laws and no relief will be available based on tax treaties.[761] Even if tax treaties would be in place, it is argued that based on the current design of digital service taxes, these fall out of scope of taxes covered under Article 2 of tax treaties based on the OECD and UN Model. [762] It should be noted that Pillar One aims exclusively at abolishing *unilateral* measures, and therefore only digital service taxes and similar provisions that only find their legal basis in domestic legislation, but are not included in a treaty provision will be abolished. This means that countries that have agreed on Pillar One can still include Article 12A in their tax treaties. [763]

The fact that both organisations propose different solutions to today's tax challenges is not surprising, as they strive to protect different interests and stakeholders. Developing countries have indeed claimed that the Two-Pillar plan is mainly focused on the interests of developed countries.[764] Furthermore, developing countries have argued that the Two-Pillar plan is too complex for developing countries with limited administrative capacity and, therefore, proposed to tackle the tax challenges arising from the digitalisation of the economy based on a simple and established manner (i.e., by a WHT mechanism). [765] The advantage of this approach is that an agreement was reached quite swiftly amongst the UN Tax Committee members, considering that the effective implementation of the treaty provision will be based on bilateral negotiations and that the agreement process was not consensus-

[760] A. Báez Moreno, Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services (2021) WTJ, p. 532.
[761] H. Ali, UN Effort to Help Developing Countries Tax Big Tech Moves Ahead, https://news.bloombergtax.com/daily-tax-report/un-effort-to-help-developing-countries-tax-big-tech-moves-ahead?context=article-related (accessed 31 December 2021).
[762]. J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 10.
[763] A. Báez Moreno, Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services (2021) WTJ, p. 532.
[764] A. Roelofsen (supra n. 24), p. 2; United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 5; H. Ali, (supra n. 96).
[765] United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 9.

based. The negotiations of the OECD's approach lasted for many years, because they aimed to reach a global consensus and were of the opinion that the digitalisation of the economy cannot be ring-fenced. Therefore, their proposal was also designed to solve other tax challenges, such as the elimination of tax competition under Pillar Two.[766] Consequently, the proposal of the OECD is broader in scope (compare the Two-Pillar plan to Article 12B UN MTC) and able to reach further, because a global consensus was reached and, as a result, all 137 jurisdictions will implement these rules. Article 12B UN MTC will only be included in existing and future tax treaties to the extent that contracting parties have agreed to include the treaty provision, which will require (lengthy) bilateral negotiations to be kicked off.[767] Also, the OECD explicitly rejected a WHT mechanism in this context because they consider this unilateral, uncoordinated with major technical issues in terms of scope of transactions covered and the collection of the tax liability. In addition, the OECD believe that the application of a standalone WHT would raise challenges with respect to trade obligations and EU law assuming that domestic suppliers are subject to net-basis taxation.[768] Moreover, a large minority of the UN Tax Committee members did not agree to the inclusion of Article 12B into the UN MTC, because they are of the opinion that the tax challenges resulting from the digitalisation of the economy are a multilateral issue that should be mitigated by a multilateral solution, and not through a bilateral approach. Furthermore, these UN Tax Committee members did not agree that the digitalisation of the economy on its own justifies the re-allocation of taxing rights to the market jurisdictions.[769] Furthermore, the fundamental challenge of the nexus issue has not been addressed as the rules in article 5 (PE) and article 7 (business profits) continue to apply.[770] This last argument supports the authors' view that the current allocation rules of taxing rights should be revisited in a more fundamental way than the current proposals of the UN and the OECD[771]. The introduction of different approaches by two organisations (the UN and the OECD) that act with different interests could be avoided by a more elaborate

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766 OECD, Addressing the Tax Challenges of the Digital Economy. Action 1: 2015 Final Report, OECD Publishing 2015, p. 11; A. Harpaz, Taxation of the Digital Economy: Adapting a Twentieth-Century Tax System to a Twenty-First-Century Economy, (2021) 46 Yale J Int'L 7, p. 70-71.

767 United Nations, E/2021/45/Add.1-E/C.18/2020/4 (supra n. 33), p. 19.

768 A. Báez Moreno, Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services (2021) WTJ, p. 517-518; OECD, Addressing the Tax Challenges of the Digital Economy. Action 1: 2015 Final Report, OECD Publishing 2015, p. 113-115.

769 United Nations, E/C.18/2021/CRP.1 (supra n. 9), p. 10.

770 J. W. Mpoha, 'Article 12B of the UN Model (2021): A Simplified Solution for Developing Countries to Tax Income from the Digital Economy?', (2022) 26 BFIT, p. 12.

771 See also A. Harpaz (supra n. 99), p.68.

dialogue or collaboration between both organisations (or at least between the tax committees of both organisations).[772]

7. Conclusion

There is no doubt that the current international tax framework, and especially the rules for the allocation of taxing powers in tax treaties, is outdated and cannot meet today's digitalised and globalised economy. How to solve this is still open for debate.[773] The UN has criticised the OECD's approach considering the interests of developing countries. In this respect, Pillar One is considered as complex and not sufficiently taking into account the needs of developing countries. However, the approach of the UN is only partially solving the challenges that arise from the current rules for the allocation of taxing powers in tax treaties. It allows market jurisdictions to tax companies providing ADS, yet it does not solve other tax challenges that are tackled through Pillar Two and the BEPS-actions, nor does it create a fairer allocation of taxing powers in general. A fairer distribution of taxing rights is, however, also not completely captured in Pillar One, as only the largest and most profitable multinationals (approximately only 100 companies) are covered.[774]

Both the OECD and the UN have revisited the current international tax framework in light of the digitalisation and globalisation of the economy, based on the interests of their stakeholders. As mentioned, both approaches have advantages and disadvantages, but the fact that the OECD and the UN have launched two different proposals cannot be endorsed (although understandable). In fact, it is widely recognised that different tax rules create loopholes and opportunities for companies to avoid taxes or, alternatively, lead to double or excessive taxation. Both the UN as well as the OECD have made significant progress to adapt the international tax framework to a changing economy, but there is still a long way to go. If the OECD and the UN want to succeed in avoiding double taxation or non-taxation, or if they want to establish a fairer allocation of taxing rights between all stakeholders, it will be essential to agree on a streamlined and coherent proposal that meets the interests of both developed and developing countries. A first step to align the interests of both organisations could be to set-up regional workshops, participate in each other's decision-making process, operate more closely and set up other

[772] [772] A. Roelofsen (supra n. 24), p. 2; United Nations, E/C.18/2020/CRP.25 (supra n. 21), p. 5.
[773] See also A. Harpaz (supra n. 99), p. 67-68.
[774] The OECD proposal however foresees a provision to expand the scope after 7 years (once there is experience with the implementation). See: OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD Publishing 2021, p. 18.

initatives to enhance the coherence and interplay between the tax policies of the tax committees of the OECD and the UN.