

[16] March 2023

Via email

To: taxreport2023@un.org

Re: Comments on Tax Report Regarding “Promotion of Inclusive and Effective Tax Cooperation at the United Nations”

Dear H.E. Secretary-General Guterres,

On behalf of our members, we appreciate the opportunity to provide input on the tax report being prepared in connection with the resolution adopted by the General Assembly on the “Promotion of inclusive and effective tax cooperation at the United Nations.” We would also welcome the opportunity to participate in any forthcoming discussions or consultations on this topic.

We believe that the United Nations has a critical role in building a consensus that genuinely reflects the concerns and circumstances of all stakeholders.

As such, we respectfully ask that the United Nations Secretariat consider the attached comments. Should you have any questions regarding this submission, please contact us.

We appreciate your consideration of our comments and welcome any feedback you may have.

Sincerely,

The Korea Chamber of Commerce & Industry

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Enclosed

Practical Challenges Presented by Implementation of Pillar Two

A. Uncoordinated Implementation of Pillar Two across Participating Countries

We believe that in order to achieve the intended goals of Pillar Two to the full extent, participating countries should implement the GloBE rules on the same timeline to the extent possible. If only certain countries implement the GloBE rules ahead of others, it is likely to result in unfair consequences for countries that do not implement at the same time, which is an issue shared by developing countries without sufficient resources to implement the Pillar Two regimes into their national laws under the OECD's current timeline.

As a global regime, Pillar Two was designed for global adoption and would not function properly and fairly absent coordinated and simultaneous implementation by all participating countries. However, the current implementation status across participating countries casts doubt on whether the current timeline for implementation is appropriate for achieving the intended goals of Pillar Two. Although some countries have made considerable progress in the implementation of Pillar Two, the domestic legislative actions by many participating countries are still under consideration, and some countries have not yet taken any action on the domestic front to implement Pillar Two.

B. Pre-Existing Tax Incentives and Potential Investor-State Disputes

Upon the implementation of Pillar Two, we are likely to see a surge of investor-state disputes challenging Pillar Two legislations and seeking economic compensation from the host country. The anticipated effects of existing tax incentives are at risk of being diminished or neutralized by the application of the GloBE rules, which enables another country to exercise extraterritorial taxing rights over the portion of the tax base that is not taxed by the host country due to its tax incentive program.

Tax incentives often play a decisive role in influencing the decision to undertake a particular overseas investment and capital expenditure. Many countries have successfully attracted foreign direct investment by employing tax incentives as a core feature of their economic policy in order to foster economic development and job creation. Some host country governments, as a way to induce investments, offer investors specific assurances that contractually guarantee the application of tax incentives under contracts with public authorities. In some instances, such contractual guarantees are established through a tax stabilization clause, which essentially freezes the tax law environment as applied to the investor at the time of investment.

Because the current Pillar Two framework fails to include any grandfathering rule or carve-out for the tax incentives guaranteed under pre-existing investor-state contracts, investors that were induced to make substantial investments in reliance on tax incentives contractually guaranteed by the host countries may redress economic loss in various forums to enforce their bargained-

for contractual rights against the host countries. For example, an investor may file a breach of contract claim against the host country through the host country's courts or a commercial arbitration. In cases where an investment treaty is in place between the host country and the investor's country, the investors may also initiate investor-state dispute settlement claims against the host country government through international arbitral tribunals. In such cases, the investors may argue that the host country's failure to fulfill its promise of legitimate returns constitutes a breach of the fair and equitable treatment clause provided under the relevant investment treaties.

We understand that the OECD is cognizant of the issues arising from the tax stabilization clauses as well as investment treaty commitments but has yet to provide any solution that can remedy this issue.¹

As Pillar Two's harmful impact on the investors is expected to give rise to direct claims of redress against the host countries that contractually guaranteed tax incentives, such disputes will undoubtedly burden many developing countries and result in economic loss.

C. Practical Challenges of Timely Compliance and Significant Administrative Burden

Building a Pillar compliant tax regime requires considerable resources. Developing countries may face higher costs associated with implementing the Two Pillar solution, particularly if they lack the resources and administrative capacity to collect and analyze the necessary data.

The GloBE rules are highly complex and diverge greatly from the existing international tax framework in many aspects. Many commentators have already expressed their concerns for the risk of divergent applications and interpretations of the GloBE rules and the lack of a system to ensure consistency and harmonization of local rules.

The complexity of the GloBE rules and the risk of divergence in local laws result in significant administrative burdens for in-scope MNEs. First, the MNEs will need to have sight of full and complete rules enacted to implement Pillar Two in each of the jurisdictions where they operate, which as yet are unavailable and, when available, will not likely be consistent across participating countries. Moreover, the MNEs will have to invest a considerable amount of time and resources to institute new information collection and processing systems in order to comply with the GloBE rules in each country and the reporting requirements. The current implementation timeline does not adequately account for such practical challenges.

¹ OECD (2022), Tax Incentives and the Global Minimum Corporate Tax: Reconsidering Tax Incentives after the GloBE Rules, OECD Publishing, Paris, <https://doi.org/10.1787/25d30b96-en>.