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

By email to: taxreport2023@un.org

17 March 2023

Dear Secretariat,

UN – Call for public input – Promotion of inclusive and effective international tax cooperation at the UN

PricewaterhouseCoopers International Limited on behalf of its network of member firms (PwC) welcomes the opportunity to provide input into the Secretary-General's call for feedback into the Resolution for inclusive and effective international tax cooperation at the UN.

Over the past several decades the OECD has been the primary international organization involved in setting the standards and guiding the course of developments in international taxation. The processes and procedures adopted by the OECD relating to tax have gradually been expanded to include more and more non-OECD members over the last ten years, beginning with non-OECD G-20 member countries participating on equal footing during the BEPS project of 2013-15, and progressing to the present Inclusive Framework (IF) comprising 140+ countries that is now tasked with almost the entire work relating to international tax policy and administration. The Global Forum, too, has achieved notable success in the area of tax cooperation, mutual administrative assistance and exchange of tax-related information among its 165 member-jurisdictions.

However, various statements and comments emanating from developing country groupings like the G-24, regional organizations like the African Tax Administrations Forum (ATAF), as well as global non-governmental organizations indicate a growing feeling among developing countries that the governance and processes of the Inclusive Framework, though designed to achieve a significant level of inclusion, do not always achieve that goal. There are also issues that developing countries may want to be discussed but do not fall within the scope of discussions taking place at the Inclusive Framework. Further, the increasing awareness of the importance of tax policy as an instrument for preservation of tax bases and generating optimal and sustainable tax revenues has encouraged several low-income and least developed countries, who may not have the resources to be able to participate in the proceedings (or outcomes) of the IF, to seek alternate forums where they can contribute effectively in the formulation of tax policy. The UN discussions may focus on areas that are higher priority for those countries in a way that the investment of resources can be more easily justified.

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The UN Resolution 77 - 244 that provides for intergovernmental discussions on ways to strengthen the inclusiveness and effectiveness of international tax cooperation represents a welcome initiative of the UN that needs to be taken forward by that body and should inspire an assessment of the effectiveness of the IF's governance and a possible strengthening of the Platform for Collaboration on Tax.

The Resolution appropriately takes note of the substantial body of work already carried out or being carried out in diverse areas of tax cooperation by organizations like the OECD and the Global Forum. Accordingly, while deciding the areas and subjects of tax cooperation that the UN Framework should address, it would be important to ensure that matters already decided are not revisited and that there is no duplication of work that has already seen significant progress in other forums. If the inclusiveness of the IF is not perceived to have been improved (with the interjection of the United Nations perhaps), the resources of the UN could be focused on new, additional and relevant areas of tax cooperation that are of importance to the developing world.

Equally important would be the need to establish a dedicated and well-staffed Secretariat in the UN that could coordinate the work effectively in a focused manner.

The Appendix to this response outlines that, keeping in view the above and considering the objectives mentioned in the Resolution, we suggest various areas of tax cooperation that the intergovernmental forum could address. Nevertheless, we immediately below draw your attention on the main issues which should be considered and which are further elaborated in the Appendix:

- Clarity on tax treatment of digital services
- Consistency and clarity in profit allocation rules
- Interplay between investment treaties and bilateral tax treaties
- Carbon Border Adjustment Mechanisms

For any clarification on this response, please contact the undersigned or any of the individuals below. We look forward to discussing any questions you might have on the points we raise above or on other specific matters raised by other respondents.

Yours faithfully,

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Appendix

A. Clarity on tax treatment of digital services

The Multilateral Convention (MLC) being drafted by the Inclusive Framework to give effect to the Pillar 1 agreement is expected to result in a greater allocation of profits to market jurisdictions, including profits derived from rendering digital services in these jurisdictions. The MLC will also seek to ensure the discontinuance of various digital services taxes (DSTs) and related similar measures and prevent any fresh levy of such taxes. It is to be kept in mind, however, that the MLC will apply to only the largest and highly profitable enterprises and will not affect hundreds of relatively smaller companies that are providing an array of digital services, including cloud services and software, in developing countries. These companies will continue to face the inconsistent and often arbitrary tax treatment in different jurisdictions under regular domestic income tax laws and tax treaty rules, along with the resulting high volume of tax litigation. There is also the issue of lack of clarity on what would be the nature of DSTs and related similar measures that would be dismantled by the MLC. Also, there are reports that indicate that developing countries would not like to give up their sovereign rights to enact a digital services levy in future. We suggest that the proposed intergovernmental framework seek ways to balance the concerns of developing countries and those of MNEs, in ways that provide a widely agreed, stable and sustainable outcome.

B. Consistency and clarity in profit allocation rules

One of the major sources of tax disputes in relation to MNEs is the manner of allocation of profits of the MNE among relevant jurisdictions, both in attributing profits to permanent establishments or fixed bases and in allocating profits to different entities of the group. This is particularly so in cases of MNEs where intangibles are the major drivers of profit. The reports on Actions 8, 9 and 10 of the G20/OECD BEPS project provided significant new guidance on application of the arm's length principle in different circumstances, but could not come up with concrete guidance on the treatment of intangibles, especially hard-to-value intangibles and marketing intangibles. This has been recognized in the Pillar 1 agreement, which superimposes a formulaic approach on to the arm's length standard in order to reallocate profits to market jurisdictions.

This inconsistency in allocation rules is exemplified by the inconsistency in the manner in which different jurisdictions attribute profits to permanent establishments. Most non-OECD countries do not follow the authorized OECD approach of using arm's length transfer pricing to determine such attributions. A large number of treaties, particularly those that are based on the UN Model Convention, allow attribution of profits in accordance with methods customarily employed. All this creates significant difficulties for an MNE in ensuring a consistent manner of allocating profits amongst its different entities and branches and invariably results in tax litigation.

Statements issued by developing country groups such as ATAF and G-24 in the course of the Pillar 1 discussions clearly indicate their preference for a fractional apportionment approach for allocating the entire profits of an MNE. Further, the European Union has been contemplating the merits of applying a formulary apportionment approach on consolidated tax bases of MNEs within the EU, without as yet any clear agreement. All these differing views among different jurisdictions create avoidable uncertainty and increased compliance costs.

Considering the need to bring in greater consistency and clarity in profit allocation rules, the UN intergovernmental forum may explore ways of reconciling the different approaches being adopted by

jurisdictions and engage with other bodies to achieve standards that can be uniformly applied by Member States.

C. Interplay between investment treaties and bilateral tax treaties

The primary objective of an investment treaty is the protection and promotion of bilateral foreign direct investment. The investment treaty seeks to achieve this objective by providing investors with assurances of protection from a discriminatory, unfair, arbitrary or unlawful treatment by the state. These guarantees are enforced through an investor-state dispute settlement mechanism that allows eligible investors to invoke arbitration proceedings against states. The fair and equitable treatment standard is most frequently invoked by investors in investor state dispute settlement cases.

The standard of fair and equitable treatment has been interpreted to cover expectations of regulatory stability, transparency and compliance with legitimate claims of investors. However there is no specific definition available either in the treaties or in jurisprudence that could define the scope of the term in a reasonably comprehensive manner. There is lack of clarity, for instance, as to whether the fair and equitable standard extends even to matters of public policy. Most investment treaties do not exclude taxation from their scope and in recent times, there have been several instances where disputes arising under a tax statute have been brought before a panel constituted to resolve an investment treaty dispute, even though a tax treaty that incorporates a dispute resolution process is in existence.

Arbitration in tax matters is still not a widely adopted mechanism for dispute resolution, as evidenced by the lack of consensus on introduction of mandatory and binding arbitration in tax matters in tax treaties under the G-20/OECD BEPS project. Therefore, attempts to resolve tax related disputes under an alternate framework create an odd situation where investors can opt for a dispute resolution mechanism that is not aligned with the publicly stated position taken by the host government.

It is therefore recommended that the UN intergovernmental framework may examine the interaction between investment treaties and bilateral tax treaties. Since investment treaties protect investors from unfair and discriminatory treatment and actions that can amount to expropriation, which may also apply to tax matters, it is important for countries to fully understand what kind of tax disputes or to what extent matters relating to tax policy could be capable of being considered unfair and inequitable treatment of investors.

D. Carbon Border Adjustment Mechanisms

The EU has proposed the Carbon Border Adjustment Mechanism as a policy to levy a carbon price on imported goods from countries outside the EU that do not have equivalent climate policies. Its objective is to prevent carbon leakage, which happens when businesses move to countries with less stringent climate regulations to avoid the costs of emission reductions. Given the current emphasis on achieving climate-related goals, other countries are also likely to introduce such measures.

It is well known that developing countries tend to have a higher carbon intensity in their production and logistic processes and may be less equipped to comply with the EU's emission standards. As a result, economies of these countries with dependance on the EU market for their exports, will get adversely affected in the short to medium term, until they are adequately prepared in terms of adequate technology, investment, capacity building and policy support.

Considering that most of the countries in the developing world will face severe legislative and compliance pressures, it would be desirable to address the issue of carbon "leakage" at a global level at the UN. This could

include creating a global awareness of the impact of such carbon taxes as well as capacity building for action and discussion at international agencies, alongside the WTO, as this issue also impacts the established principles under the global environmental legislations.

In view of the potential for further such unilateral action being taken by other countries, it would be appropriate that the issue of Carbon Border Adjustment measures be taken up by the UN intergovernmental framework for examination in an objective and comprehensive manner.