UNDERSTANDING THE BEPS PROJECT AND OTHER OECD TAX INITIATIVES INCLUDING THE INCLUSIVE FRAMEWORK IN THE CONTEXT OF TREATIES AND STATE INEQUALITY

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Abstract

In this article, the author seeks to establish a functioning, non-context-specific definition of an "unequal treaty" that takes into account underlying principles of state equality, the concept of treaties, and non-coercion, whilst sitting outside of any single historical moment, by reference to international customary law, the United Nations (UNs)' resolutions of the General Assembly, and normative or moral concepts of coercion. Having established a definition, the author goes on to apply that definition to a number of developments and provisions that were put in place in the last decade, such as the Foreign Account Tax Compliance Act (FATCA), the Common Reporting Standard (CRS) and the outflows of the Organisation for Economic Co-operation and Development (OECD)'s Base Erosion and Profit Shifting (BEPS) project, setting these provisions within their political and procedural contexts so as to place them within the historical tradition of treaties between large and small powers. By applying this definition, the author concludes that some, but not all, of the recent tax-related provisions amount to "unequal treaties".

In establishing a methodology with which to assess the inequality of treaties and applying that to the current tax relevant provisions, the author hopes to allow an informed discussion based not only on the objectives of large powers but also on an assessment of the characteristics of the methods by which the community of developed nations, as represented by the OECD, achieves its goals in the tax context.

Keywords: Unequal Treaty, CRS, FATCA, GLoBE Rules, Sovereignty, Equality.

1. INTRODUCTION

The concept of "unequal treaties" is a political, moral, and legal one. When considering the literature, the author encountered papers considering the Chinese "Unequal Treaties" and the position of the Ottoman Empire in relation to the European powers and the United States (US) in the nineteenth century.

However, to understand unequal treaties only in the context of the past would be an error—forms of interaction between states develop and do not simply disappear. Having said that, much of the groundwork for this paper comes from papers drafted in the early to mid-twentieth century by necessity, as that was the period in which many unequal treaties were unwound and there was much discussion of such things.

It is axiomatic that unequalness is not all that is required for a treaty to be either void or voidable. Many writers have given examples of enforceable treaties made from a position of

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inequality, such as the Treaty of Versailles (see, for example, Buell in Putney and Buell, 1927), which can plausibly be described as a treaty made under a threat of force, but which remained enforceable despite this (see, for example, Detter, 1966). Any discussion of whether a treaty is voidable or not betrays the contractual theory basis of international treaties, as Fleming (2020) points out: "International law relies on the private contract theory of treaties, or the idea that a treaty is 'essentially a contract between governments'—or, more precisely, a contract between states" (p. 6).

The aim of this paper is to argue that the international agreements that have followed the Group of 20 (G20)'s request to the Organisation for Economic Co-operation and Development (OECD, 2015) to deal with aggressive tax avoidance and evasion by way of the Base Erosion and Profit Shifting (BEPS) project should be understood not only from the perspective of whether or not they eliminate BEPS but also from the perspective of whether or not the implementation of such a project fits within the moral international framework established in the twentieth century. The literature has considered the "fairness" of the BEPS project. de la Feria (2022) provides a comprehensive judgement when she states that "the prevailing narrative of an inclusive process is open to challenge as constructed more upon the self-interest of the more powerful global tax players than altruism and also characterised by paternalistic coercion" (p. 61).

de la Feria goes on to delineate two methods for measuring the "fairness" of the relevant treaties (she focusses on the global minimum tax rate proposal or Pillar 2 [OECD, 2025(a)], but the author sees no reason to discard her method when assessing any other international tax proposal), that is by the fairness of their outcomes and by their procedural fairness. Much has been written about the legitimacy of international bodies, such as the OECD, and the requirement that they are legitimate in their own right. Ring (2008) states that "essentially, if real power is being transferred to another level of decision making beyond the state, that body must itself earn democratic legitimacy and cannot rely on the pre-existing legitimacy of the nation-states" (p. 171).

The processes of the organisation must be legitimate in order to legitimise its outputs. Relying on the fact that the governments of the United Kingdom (UK) or the US etc. are legitimate in the hope that such legitimacy will "rub off" onto the OECD or the United Nations (UN) is not sufficient for Ring and should not be sufficient for others. This paper seeks to go beyond Ring's (2008) definition of legitimacy. Ring (2008) emphasises the legitimacy question of the international organisations in question because, if those organisations are legitimate, it should follow that the jurisdictions that participate are correctly bound by the communal decisions of those organisations.

However, in many cases, the treaty-making process is two-sided and Ring's (2008) discussion of legitimacy is limited to the legitimacy of one of those sides, that is the international organisation. Nations in the core group of OECD members perform dual roles as both members and signatories of the treaties in question, while the input levels of those who are simply members of the Inclusive Framework (see below at 3.6) are minimal; they simply enter into agreements presented to them. This paper seeks to measure the output of the arrangements that have been, or are being, implemented by applying a measure of equality, rather than discussing whether or not the OECD, or other international body, is legitimate. It is obvious to all those who have a historical understanding that even legitimate bodies can act in a way that is morally reprehensible. Legitimacy is no cover for wrongdoing, though it may legitimate the act in

question as, flowing properly from the relevant *demos*, it does not mean that the act itself or the outcome of that act is morally sustainable.

One of the criticisms that could be levied at this paper is that it ignores or rejects the concept of sovereignty as responsibility, as described by Dietsch (2015), and instead applies a form of Westphalian sovereignty, i.e. that the sovereign entity lives free of interference from others. Dietsch (2015) states:

> International tax theory should follow the lead of other domains of international law in replacing the antiquated notion of Westphalian sovereignty with a concept of sovereignty that acknowledges both obligations and rights of states in their conduct towards other countries. One candidate is the notion defended above, labelled *sovereignty as responsibility*. (p. 186)

The author would reject this criticism; the description of sovereignty as responsibility does not eliminate the requirement for equality. In fact, the requirement to abide by the principle of equality demands that the nations seeking to alter the international tax system should do so within a framework that properly respects the concept of equality. Simply deploying their international position to ensure that a new international tax order is established would be a breach of their responsibility to abide by the sovereignty as responsibility model.

Dietsch may well respond to that by arguing that his concept of sovereignty as responsibility generates more demanding requirements of justice than simply respect for sovereignty and a need for equality in treaties. The author would agree that a responsible member of the community of nations is subject to a number of rules which go beyond that. However, the existence of a wide-ranging responsibility for all members of the international community does not eliminate the requirement for equality in dealings. Dietsch (2015) poses the following question "*What are the duties that states have towards other states in their fiscal policies*?" and answers it as follows: "Any country's autonomy prerogative comes with the obligation of respecting the same prerogative in others" (p. 181).

The author would argue that this cuts both ways and that the autonomy prerogative of smaller states should be respected as much as that of larger states (which Dietsch, 2015, argues is undermined by the loss of tax base of the larger state). If the above comment is an adequate summary of sovereignty as responsibility, it would appear to the author that this is not as greatly divergent from the Westphalian conceptualisation of sovereignty as freedom from intervention as it may at first seem. If a country may live free of intervention, the other members of the system must respect its autonomy.

In this paper, the author does not seek to discuss the minutiae of the procedural fairness of a given process. Instead, the aim is to identify the characteristics that are rejected in the colonial era's unequal treaties and to frame them as an objective test that can be applied to treaties from all periods.

The literature relating to unequal treaties is mostly concerned with the colonial era treaties between colonial or neocolonial powers and those powers that were in decline or were disadvantaged at that time (such as China and the Ottoman Empire). The discussions of such treaties, therefore, were written in the early to mid-twentieth century and much of the UN's work in the mid-twentieth century was designed to eliminate such treaties, which arose from power imbalances. This paper seeks to examine whether those treaties exhibit similar

characteristics to the modern tax-based provisions being introduced by the OECD and similar bodies. It will necessarily require a review of the landmark papers discussing such treaties, such as Detter (1966) and Putney and Buell (1927), although it will avoid a discussion as to the validity of such treaties. These texts argue that such treaties are valid and that the international order could not withstand their voiding on grounds of inequality. However, in this paper, it is argued that although new unequal treaties agreed amidst the framework of declarations and rules promulgated since World War II are not invalid, entering into them breaks a moral rule, if not a legal one.

The author seeks to set those provisions in a moral context that reflects the reality of their conclusion in a more accurate way than is normally presented in the media of the larger nations.[2] This will allow the reader to understand these provisions within a moral context informed by historical events considering the two sides of the process of their establishment. The author believes that this historical context has been neglected by the literature, which seeks to either legitimatise or delegitimise the process in isolation from it.

To be clear, the author does not seek the overturning of the treaties and arrangements that he concludes amount to unequal treaties; that would be a matter of law and, whilst morality often informs law, law is not morality. However, a consideration of the morality of the methods by which treaties are included should be part of how states regulate their own behaviour, and future behaviour can be informed by a conversation about morality. Citizens of a state should have an understanding of the moral nature of that state's behaviour. Once they have that information, they can call their state to account for the morality of its behaviour.

As the author shows below, it is the method of conclusion and the process of negotiation that make a treaty unequal. A treaty with identical provisions could be entered into by a state without the features of the conclusion process detailed below and it would not be unequal.

The paper proceeds as follows. In section two, the author discusses the concept of equality, what a treaty is (and, by necessity, what is a state is), and what makes treaties unequal. The author argues that equality between parties is a fundamental principle of the post-World War II era and that it is reinforced by a number of declarations and inclusion in the UN Charter (1945). As to what a treaty is, the author takes an expansive approach to the definition of what a state is and seeks to include a number of non-governing jurisdictions that negotiate independently in the OECD framework and that are represented as separate to their "mother" countries. Section three applies the definition arrived at in section two to a number of treaties and arrangements entered into in the last 25 years, measuring them against such definition. He argues that a number of those provisions amount to unequal treaties for the definition contained in section two. In section three, the author draws conclusions as to the effect of whether or not a treaty is unequal and calls for a truly inclusive approach to be taken in future.

[2] Media coverage of such developments is almost universally positive in the G20 nations. The following examples are reasonably representative: "G20: World leaders agree to historic corporate tax deal" (2021), and Milliken and Holton (2021).

2. WHAT IS AN UNEQUAL TREATY?

In this section, the author examines the ideas that come together to make up the concept of an unequal treaty. First, he discusses the concept of equality and the obligation on states to treat each other as equals, how that concept has been developed over the last 100 years, and what foundational articulations of the concept of equality can tell us about how it should be applied. The author then lays the groundwork for his definition of unequal treaties by discussing what a treaty is and, as a consequence of that, what a state is. In the final part of this section, he proposes a functioning definition of an unequal treaty.

2.1. The Concept of Equality

The concept of equality among states is vital to the functioning of the international community. It has long been a bedrock of international relations, as is stated by Ansong (2016): "prior to the establishment of the United Nations, sovereign equality of states already formed the philosophical and normative foundation of the international law that was to be constructed in the post-World War II era" (p. 14).

It sits at the heart of the UN Charter (1945), which states at Article 2(1) that "[t]he Organization is based on the principle of the sovereign equality of all its Members".

To understand what that means, we need to take a closer look at what sovereignty is and what equality is. The UN's Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (UN General Assembly, 1970) (the "Declaration") states:

> All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.
>
> In particular, sovereign equality includes the following elements:
>
> (a) States are judicially equal;
> (b) Each State enjoys the rights inherent in full sovereignty;
> (c) Each State has the duty to respect the personality of other States;
> (d) The territorial integrity and political independence of the State are inviolable;
> (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
> (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

The Declaration is a resolution of the General Assembly. There was some debate as to whether or not a UN General Assembly Resolution was binding in international law but, at the date of writing, the UN states that the General Assembly resolutions are not binding. Aside from those lengthy debates on international law, the author thinks it useful to consider that the Declaration occupies a position of guidance. Using that analogy, Article 2(1) of the UN Charter (1945) is the base legislation, which is binding on the Member States, and the Declaration amounts to guidance issued by the authority as to what the scant words of the legislation mean. It is an internationally recognised guide to the law.

Together, Article 2(1) of the UN Charter (1945) and the Declaration set the boundaries of what a state can do when it interacts with another state. According to the Declaration, a state should not impose itself on the "personality" of another state, nor undermine the "territorial integrity" nor the "political independence" of another state, as to do so would be a violation of the principle of equality. However, these documents do not mandate that a state may not use a strong negotiating position to the detriment of another state. The freedom to contract in a way which favours your own state is not eliminated by them, but they do limit the power of states to do anything which violates the Declaration's exhortation to "live in peace with other States".

This is a paper in a tax journal discussing tax-related international developments and, as such, we should focus on those elements of an economic nature. Section (e) of the section of the Declaration cited above states that a state "has the right to freely choose and develop its political, social, economic and cultural systems". This is a limited statement which is developed under the UN General Assembly (1975), Chapter 2, Article 1 of which states:

> Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.

The aim of this paper is not to conduct an examination of the proceedings of the UN in this field, nor to provide commentary on all the resolutions cited. It is important to establish that the concept of equality does not simply stop at the threat of violence or the forcing of treaties that allow for foreign forces in a state's territory. Instead, the equality of states is understood to apply to all spheres of interaction; this rests on an understanding, expressed in the quotation above, that one state cannot coerce another state into taking an action.

2.2. What is a Treaty?

Much of the literature that deals with unequal treaties comes from, or concerns, states entering into such treaties in the nineteenth century, such as China and the Ottoman Empire. As such, it focusses on a historical analysis of the concept that may well provide a solid ground from which we can build, but which cannot deal with the concept of unequal treaties in the modern context. International norms have changed to such an extent that, for example, the imposition of an extraterritorial system such as that imposed by the capitulation treaties in China (Detter, 1966) would be unthinkable (and unworkable)[3] in today's world. If the phrase "unequal treaty" is to have continuing moral and political significance, a non-context-specific definition, which can be applied to treaties throughout history, is required. The author does not believe that unequal treaties must be grounded in the naked imperial aggression of the nineteenth century; it is conceptually possible for a state to impose such a treaty today and, without a functioning definition that is free of historical assumptions, one would be unable to identify it as unequal. To fail to do so would be to fail to see the similarities of treaties throughout history and, therefore, be unable to identify new forms of "unequal treaty"; in other words, we must be able to name new treaties as part of a historical tradition.

[3] The author believes that the changes in information availability and the lack of public support for the open humiliation of foreign powers based on a better understanding of the equality of all humans driven by various conventions and organisations in the post-war world means that such openly aggressive and imperialist agreements would not be publicly sustainable in the modern era. However, it is also noted that such agreements were almost universally predicated on some loss or slight against the more powerful state, which may be mirrored in the campaigns around 'tax havens' 'eroding' tax bases.

Therefore, we must arrive at a settled definition of "treaty" before we can conclude what makes such an agreement "unequal".

Article 1(A) of the Vienna Convention on the Law of Treaties (1969; "the Vienna Convention") defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

This is simple enough in its language. To qualify as a treaty, the document in question must be:

a) "international"
b) concluded by States
c) written
d) "governed by international law".

The author believes there is little profit in considering the word "international", which, in this context, is synonymous with "between states"; the ordinary language meaning of nation and international (as in "between nations", such as between England and Wales) is lost in this usage.[4]

The second requirement is that, in order for something to be a treaty, it must be concluded between "States". As Castellino (1997) states, "[i]nherent contradictions are unavoidably part of international law since no two situations are exactly similar and each case must be treated on its own merit" (p. 90).

However, the Montevideo Convention on the Rights and Duties of States (1933; the "Montevideo Convention") lays out a generally accepted basic description of statehood. Despite being a Pan-American document, the Montevideo Convention is generally accepted as representing a codification of the customary law position in international law as it was when the convention was entered into. The Montevideo Convention is a starting point from which factual deviations may occur and a convenient codification of international customary law in 1933. While the Montevideo Convention is not binding outside of the Americas, it summarises the provisions that are.

Article 1 of the Montevideo Convention (1933) states that "[t]he state as a person of international law should possess the following qualifications: *(a)* a permanent population; *(b)* a defined territory; *(c)* government; and *(d)* capacity to enter into relations with other States". For the purposes of this article, the author will deem 1(a)–(c) to be uncontroversial.[5]

However, the final limb does throw some practical issues into the light. A number of territories in the world are what is described as "non-self-governing";[6] they do not possess functioning

[4] Perhaps this sentence informs the reader that the author originates from a state that is made up of nations that cannot act independently.
[5] This does not mean that none of these territories have disputed territorial extent. For example, Gibraltar, is subject to a territorial claim from Spain and an element of its territory (the Isthmus) is contested under separate grounds than the remainder of the territory. However, that is not to say that the territory of Gibraltar practically extends to the border with Spain and that border can be defined. The existence of a dispute does not undermine the ability to define a territory's boundaries.
[6] As defined by Chapter XI, Article 73 of the UN Charter (UN, 1945).

foreign services and are not eligible for membership of the UN. However, it would be too quick to conclude that a "State" must have a fully functioning diplomatic apparatus to qualify as having the "capacity to enter into relations with other states". Frederick Tse-shyang Chen (2001) states that:

> [a]n entity may appear to fall short of statehood in one or another important respect yet be held a state eligible for membership. Conversely, an entity may appear to be well-qualified as a state yet be refused the status of statehood remaining ineligible for membership. Under this practice, states can mean a full-fledged independent sovereign entity, a political subdivision, an overseas possession of a state, a mandated territory, an entity with a dubious degree of independence, an entity with a government controlled in varying degrees by another government, an entity without a government, an entity with a disputed territory, and so on. (p. 26).

We can take from this that the UN deviates from the apparent plain English meaning of the Vienna Convention (1969) whenever it feels it necessary, and that the term "state" can mean any political organisation with a defined territory even if it does not have a developed method of interacting with other states.

From this, it must be concluded that, at least in some circumstances, for the purposes of executing agreements between jurisdictional powers, a state is a state when other states require it to be a state. It would seem odd that the Vienna Convention (1969), if applied retrospectively, would have the effect of negating the accession of the Philippines to the UN or the effect of denying the right of non-self-governing territories to be acceded in exactly the same manner if approved by the General Assembly. The boundary of statehood becomes blurred in arenas such as the OECD/G20's Inclusive Framework on BEPS ("the Inclusive Framework"), where there is a requirement for jurisdictions that are not "states" in the restrictive sense to participate as if they were states.

It is, for example, important to include the 14 British Overseas Territories[7] in OECD initiatives given the preponderance of low tax jurisdictions. They may well not have a formal "capacity to enter into relations with other States" (Montevideo Convention, 1933, Article 1[d]) but they do informally negotiate through their governments and competent authorities.[8] Tax information exchange agreements (TIEAs) are negotiated by British Overseas Territories and signed under Letters of Entrustment, issued by the UK, which empower the competent authority to enter into such arrangements.

If substance over form is paramount, then whilst the British Overseas Territories do not have full capacity to enter into relationships with other states, they do, on occasion, do so in a limited way. It would seem unfair that they should not be considered states in those circumstances.[9] Given that this is as much a moral assessment as a legal one, it would be wrong to state that treaties/agreements do not fall into the category of "unequal" because one territory entering

[7] That is, the Falkland Islands; Gibraltar; the Pitcairn Islands; the Cayman Islands; Montserrat; the British Indian Ocean Territory; South Georgia and the South Sandwich Islands; the Sovereign Base Areas of Akrotiri and Dhekelia; the Turks and Caicos Islands; Anguilla; British Antarctic Territory; Saint Helena, Ascension and Tristan da Cunha; Bermuda; and the British Virgin Islands.

[8] It is now common for the UK to provide its Overseas Territories with letters of authority granting them the power to negotiate their own tax treaties.

[9] See below for a further discussion of the position of overseas territories in a British context.

into them did not have full capacity under international law.[10] Thus, for the purposes of this paper, and following on from the practical reality of interjurisdictional relationships that a state is a state when it is treated as such and the fact that the OECD does treat non-self-governing territories as if they were states, a wider interpretation of "state" should be taken and a formalistic approach resisted.

Therefore, any agreement entered into by, and binding on, a government whether by a formal set of relations or through relations of some other, but equivalent and effective form, is considered a "treaty" for our purposes.

2.3. When are Treaties "Unequal"?

The term "unequal treaty" has historical and moral weight that cannot simply be ignored when adopting a definition. It is a powerful designation and should be acknowledged as that. One seeks to define "unequal treaty" so that a rational tool can be applied to agreements and treaties, both modern and historic, that will ascribe a moral judgement to them. Unequal treaties are understood to be morally wrong because they arise from the assertion of power and coercion by one party on another. It is the process of conclusion that contains the morally reprehensible act, not the treaty itself.

This is explicit in the UN Conference on the Law of Treaties' "Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties" (UN, 1971), which;

> [s]olemnly condemns the threat or the use of pressure in any form, whether military, political or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of equality of States and freedom of consent. (p. 285).

This declaration is not binding law, but it does seek to condemn coercion whether by economic means or otherwise. This condemnation has a moral weight if not a legal one.

To arrive at a measure of what is unequal, one must identify the similar characteristic exhibited by treaties that have generally been considered unequal. There is a risk of circularity arising from drawing conclusions about unequalness simply from those things that are called unequal, but the author believes this not to be the case here. The literature clearly identifies a class of treaties from the nineteenth century and dating back beyond that period, which were commonly known as "Unequal Treaties" (Nozari, 1971), which includes treaties across all major continents. In China, the phrase "Unequal Treaties" has such common currency that it has become somewhat of a slogan (Wang, 2005, pp. 1–2). The literature often names treaties with China or the Ottoman Empire as examples of "unequal treaties" (Detter, 1966), and it is clear that a class of historical documents exists that can be considered to be the product of unjust imposition by a stronger party. The author's aim is to arrive at a functioning understanding of the characteristics that make those treaties unequal and to apply that as a yardstick to measure current arrangements. If unequal treaties are considered to be "bad", identifying their characteristics so that the actors on the international stage can avoid the pitfalls which led to the moral wrong that these treaties represent is surely a worthy effort.

[10] In fact, a lack of independence may always indicate an inequality, at least of expertise.

As a follow-on from this position, the relationship between the legal position detailed in section 2.1 and the moral position detailed here in section 2.3 should be considered. If we are discussing morals, what is the relevance of the legal position?

The UN Charter (1945) is a unique document. Its preamble speaks, in moral terms, of "dignity and worth", "justice and respect", and "tolerance" (UN, 1945). The mission of the UN is, therefore, framed as a moral one. As a result, the inclusion, at Article 2(1), of the following language—"[t]he Organization is based on the principle of the sovereign equality of all its Members" (UN Charter, 1945)—makes sovereign equality not just a legal provision but also a moral one. It is the basis of the UN and the UN is a moral project, and that project cannot achieve its objectives without a respect for sovereign equality (and, therefore, sovereign equality is itself a moral good). The fact that the UN issues declarations, such as UN (1971), which issue moral condemnations but which are non-binding, would seem to cement the moral nature of the organisation. Therefore, respect for sovereign equality is itself a moral imperative.

One objection to an appeal to the UN as a guide to the "wrongness" of the practice of imposing unequal treaties is that the UN deals with matters of law, not morality. The author hopes that he has gone some way to describing a hybrid role for the UN, such that it is not only a lawgiver but also frames the scope of morally acceptable behaviour within the law with its gamut of moral statements, such as the above declaration.

However, if this position is rejected by the reader, one could consider the moral rule "unequal treaties are wrong" to be emergent from the practice of social interaction between states and, in fact, "practice dependent". Practice dependence theory, put simply, states that "the content, scope, and justification of a conception of justice depends on the structure and form of the practices that the conception is intended to govern" (Sangiovanni, 2008, p. 138). The injustice of unequal treaties emerges from the social practice of entering into treaties and, therefore, the position of the UN and the international practice of entering into treaties are relevant to the conception of what a "just" treaty is that emerges from this.

The author believes that the two arguments above—(i) that the UN is itself a moral body which not only makes "law" but also sets the boundaries of moral discussion, and its pronouncements are therefore relevant to the moral discussions; and (ii) that a practice dependence position that the conception of justice applicable to treaties places unequal treaties beyond the pale—have, as part of their source, the practice of treaty conclusion. If so, a discussion of the legal position of state equality informs the moral conversation, which is not only interesting but necessary. There is no simple answer to what is considered "unequal" in terms of a moral assessment of a treaty and the circumstances that give rise to it. One should consider the unequal treaties of the past, identify their common characteristics, and refine these into a test which can be applied moving forwards. The only method that the author views as being well constructed is to take a two-tiered approach to the definition of "unequal".

2.3.1. Inequality of outcomes

By inequality of outcomes, we mean that a treaty results in outcomes that are unequal between the two parties, such as in the case of the capitulation treaties entered into by China. This requires a consideration of the text and the practical effects of the treaty itself. Historically, this can be seen in the outcomes of the treaties of the Ottoman Empire discussed by Detter (1996). She details how these treaties were initially based on a footing of equality but, as the power imbalances changed over time, they became onerous and invasive to the sovereignty of the

Ottoman Empire, and what began as gracious permissions became burdensome (Detter, 1996, pp.1069–1089). Thus, we must consider practical outcomes rather than legalistic forms if we are to understand the legal and moral position of a treaty.

2.3.2. Exercised inequality of power

It is, of course, conceptually possible for a state to enter into a treaty that is detrimental to its interests by accident, through a lack of understanding, or from altruism. Imagine, for instance, a scenario in which a leading Western power wrote off debts in return for the reopening of diplomatic relations, or surrendered a military base in return for a promise of non-aggression on the part of the (much smaller) country in which the military base was located. These treaties are not rendered unequal by the fact that the larger state gives something freely, yet, despite their equality, they have unequal outcomes. There must be a second quality that a treaty exhibits that makes it "unequal". The author would contend that this second quality would be that it is entered into by two parties who have unequal power, whether that be economic, military, or diplomatic power. However, simple inequality of power is insufficient (or any treaty entered into by the US would be an unequal treaty if it resulted in an inequality of outcomes, no matter how restrained the US was in its negotiating technique). In addition to that objective inequality, the power inherent in that or some other inequality must be exercised or threatened to be exercised to the potential detriment of the weaker party in relation to the matter at hand. It is possible to interpret this requirement for the use of power inequality to boil down to nothing more than saying that a state should not violate the sovereign equality of other states. However, this would be inadequately narrow; any state, whether more or less powerful than another, can attempt to violate the sovereign equality of another but, in this case, sovereign equality must be violated by the use of a power inequality and it must be in relation to the treaty in question.

It is tempting to simply say that one state must coerce another to enter into a treaty for that treaty to be unequal. This is very similar to the position that the author has taken above, and he is tempted to adopt Nozick's (1969) description of coercion, which can be summarised as P coerces Q if:

1. *P* aims to keep *Q* from choosing to perform action *A*;
2. *P* communicates a claim to *Q*;
3. *P*'s claim indicates that if *Q* performs *A*, then *P* will bring about some consequence that would make *Q*'s *A*-ing less desirable to *Q* than *Q*'s not *A*-ing;
4. *P*'s claim is credible to *Q*;
5. *Q* does not do *A*;
6. Part of *Q*'s reason for not doing *A* is to lessen the likelihood that *P* will bring about the consequence announced in (3).

The author believes that this adequately describes the mechanism by which the inequality of power is exercised to the potential detriment of the smaller state, but it does not adequately describe a power imbalance of the type that the author seeks to capture. A small state willing to fight to the death may well be able to coerce a larger state which is unwilling to fight (such as in the case of the contest between North Vietnam and the US), but one would not describe a treaty in such a situation as an "unequal treaty". As a result, the two-stage approach that the author has taken, i.e. that a state must have a power inequality in its favour and that inequality must be deployed to the potential detriment of another less powerful state, is his preferred route to this second limb.

It is also tempting to include a requirement for the detriment to the smaller state to be material in the test for inequality of outcomes. To do so would be to look for some form of legalistic invalidity. This is not the aim of this paper; instead, the author is seeking to characterise treaties as unequal or not, and the second limb requirement for a form of coercion to be involved seems sufficient to eliminate the danger of treaties with unequal outcomes being classed as "unequal" simply because the benefits of the promises in the treaty were more in favour of one jurisdiction than another.

Detter (1996) seems to describe the international community (or at least the communist states of the time) reaching for some sort of analogous articulation of this two-tier approach:

> Apart from the objective condition "unequal" the communist States sometimes appear to introduce another prerequisite for the invalidity of such treaties: the treaties should have been "forced" upon one of the parties. Other delegates from the communist States have stressed that the coercion is the cause of invalidity even if they, also, pointed out that the unequal treaties ought to lose validity for "international sociological reasons". (p. 1083)

Detter (1996) then makes the point that "perhaps the real cause of invalidity is coercion rather than the inequality itself" (p. 1083).

This is a perfectly valid point, but this paper is not about the invalidity or otherwise of unequal treaties, but simply about arriving at a practical definition and then applying such definition to the agreements in the BEPS project.

In response to Detter (1996)'s point, one could conceptually construct a treaty that would not meet this paper's definition of an unequal treaty, but that would be invalid by virtue of Article 52 ("Coercion of a State by the use or threat of force") or Article 51 ("Coercion of a representative of a State") of the Vienna Convention (1969). Imagine a treaty in which State A is suffering an epidemic and State B has the means, by use of its military, to distribute a vaccine to save lives. In the negotiating process for a treaty for State B's military to access to State A, the representative of State A refuses access on some socio-cultural grounds. In desperation, the representatives of State B threaten to simply push their military into State A if State A refuses to sign the treaty. In this case, the treaty is clearly invalid under Article 52 of the Vienna Convention (1969), but it would not be considered an unequal treaty under this paper's definition, as it would fail the "inequality of outcomes" limb. It may well be that, practically, there is little to no difference but, conceptually, the difference remains.

The fact of the necessity of a power imbalance is made clear by Albert H. Putney, in Putney and Buell (1927), when he states:

> It is also apparent that no unequal treaty can permanently continue to exist against a large country. A small country may continually have to keep to a treaty in force which imposes not only inequality but injustice upon it, but in the case of a large country it is quite certain, whatever basis you may place it upon, that a large country will only consent to any unequal treaty…so long as she is unable and does not have the strength to abrogate it. (p. 90)

Thus, the author comes to the conclusion that, to be unequal, a treaty must be made between two or more governments, be binding on all (whether directly through formal diplomatic

procedures or through some other effective arrangement), and must first have unequal outcomes, and secondly have been entered into as a result of a more powerful party or parties potentially exercising that power to the detriment of one or more of the other parties in connection with the process that the weaker party negotiates or accedes[11] to the treaty.

2.3.3. When is coercion coercion?

One potential weakness in the author's approach is that he has not delineated what amounts to coercion. He is comfortable with Nozsick (1969)'s definition above, although it does not provide details of the boundaries of what is and what is not acceptable behaviour. As with so many of these matters, an attempt at coercion must be effective for it to be coercion in a real sense. Therefore, the author cannot lay out a boundary that, for example, a withholding tax of 10% is acceptable but one of 35% is not. Whether a threat amounts to coercion or not is dictated not by the contents of the threat but by the effect of the threat. For example, the imposition of a ban in Australia on the import of bananas would have little to no effect on Russia, but it would, conversely, have a large effect on the government of Norfolk Island, which exports substantial numbers of bananas to Australia (The Parliament of the Commonwealth of Australia, Joint Standing Committee on the National Capital and External Territories, 2005). It is for this reason that the author shies away from drawing sharp lines. Instead, the conclusion should be drawn that a measure is coercive when it has the effect of coercing in terms of Nozick (1969)'s definition above.

3. PRACTICAL APPLICATION OF THE DEFINITION

In this section, the author will draw upon the conclusions of section two and apply the definition of "unequal treaty" to the current international agreements that have arisen since 1999 to tackle international tax avoidance. The author will apply the definition firstly to TIEAs drawing on the factual background which led to the conclusion of the "Taxation: Information exchange: Agreement between the United States of America and Gibraltar" (2009) ("US–Gibraltar TIEA"), as an example. Following on from that, he will apply the same methodology to the Foreign Account Tax Compliance Act (FATCA) intergovernmental agreements (IGAs) entered into by the US with many jurisdictions around the world, and then to the Common Reporting Standard (CRS) and the Global Anti-Base Erosion Model (GloBE) Rules (or global minimum tax rate). At the same time, he will review the mechanisms by which non-compliant jurisdictions are listed or suffer other "defensive measures". His conclusion will be that some of the provisions under consideration will amount to unequal treaties.

3.1. Current International Agreements and Actions

In order for the definition of "unequal treaties" to be meaningful, one must apply it to real-world cases in which large and powerful states with agendas interact with small and less powerful states. Much of the world's activity on a multilateral level in recent years has been concerned with climate change, and in relation to taxation and the limitation of possibilities for internationally mobile individuals and multinational enterprises to arrange their affairs in such a way as to limit the taxation due to be paid. Much of the compliance-related behaviour[12]

[11] This particular wording is included here to ensure that it is clear that the author includes those agreements whereby a party may accede at a later date to a pre-made agreement and that accession to that agreement is made under pain of some exercise of a power inequality.

[12] The author has chosen the phrase "compliance-related behaviour" as it lacks the linguistic baggage of "avoidance" or "evasion" but covers both of the types of behaviour that reduce tax liabilities.

targeted is legal and works within the rules of international taxation. The reform of the international tax framework has been one of the G20's objectives since 1998. The ministers of the G20 instructed the OECD to have as its goal to:

> secure the integrity of tax systems by addressing the issues raised by practices with respect to mobile activities that unfairly erode the tax bases of other countries and distort the location of capital and services. Such practices can also cause undesired shifts of part of the tax burden to less mobile tax bases, such as labour, property, and consumption, and increase administrative costs and compliance burdens on tax authorities and taxpayers. (OECD, 2001, p. 5)

3.2. TIEAs

The first attempts to take steps to reshape the tax landscape occurred in 1999 and 2002. In its report to the 2000 Ministerial Council Meeting (OECD, 2001; "the June 2000 report"), the OECD instructed the Committee on Fiscal Affairs to publish "an OECD List of Uncooperative Tax Havens, by 31 July 2001" (p. 30). The OECD published this list ("the OECD list") on 18 April 2002 and the jurisdictions in question were told that if they did not make the relevant commitment to tax transparency and, by extension, implement such commitment, they would be subject to "defensive measures" (OECD, 2002, p. 1)—an, as yet, undefined threat.

The message to these uncooperative tax havens from the Chair of the OECD's Committee on Fiscal Affairs, Gabriel Makhlouf, was loud and clear. Makhlouf stated that "OECD member countries will use the list as a basis for the framework of co-ordinated defensive measures now being developed" (OECD, 2002, p. 1) and that the OECD's "aim is that the framework of co-ordinated defensive measures applying to uncooperative financial centres prevents them from gaining an economic advantage" (OECD, 2002, p. 2).

In understanding whether the outcomes of this threat mean that the instruments and agreements that implement those outcomes amount to unequal treaties, we must understand what was expected of the jurisdictions in question if they wished to be removed from this list. First, they were required to commit to a taking number of actions, such as those detailed in the letter from the Chief Minister of Gibraltar, Sir Peter Caruana, of 27th February 2002 to the Secretariat of the OECD, which included commitments:

> i) to allow information to be exchanged with OECD Members on specific request, by 31 December 2003 for criminal tax matters and by 31 December 2005 for civil tax matters;
> ii) not to introduce bank secrecy laws;
> iii) to negotiate TIEAs;
> iv) to introduce laws that enable government access to the beneficial ownership of companies or other entities;
> v) to introduce laws that enable government access to information about the settlors and beneficiaries of trusts established in Gibraltar;
> vi) to introduce laws that enable government access to bank information;
> vii) to abolish "designer" rates for tax; and
> viii) to abolish bearer shares. (Caruana, 2002)

In this paper, we are only concerned with treaties and this letter is not a treaty in any meaningful sense: it is a simple response to a threat. Instead, we should concern ourselves only with point

(iii) of Sir Peter Caruana's letter, that is, that Gibraltar (and all those other jurisdictions that gave similar commitments) would negotiate TIEAs with a number of other states and jurisdictions. It was this commitment that led to the meeting between Sir Peter Caruana and the US Treasury Secretary, Tim Geithner, in London on 31st March 2009, and the signing of the US–Gibraltar TIEA (Government of Gibraltar, 2009).

First, we should consider limb one of the author's two-limbed definition of "unequal treaties", i.e. that there is an inequality of outcomes between the two parties to the agreement. The US Treasury Secretary of the time, Tim Geithner, stated:

> The President's budget makes a commitment to reduce international tax avoidance. As part of this commitment, the Treasury Department is embarking on an ambitious effort to deal with offshore compliance as evidenced by today's agreement with Gibraltar…I will continue to demand transparency from countries on behalf of American taxpayers. I look forward to Gibraltar's cooperation with the United States and to this agreement serving as an example for other financial centers around the world. (Government of Gibraltar, 2009, p. 1)

In contrast to this assurance that the US–Gibraltar TIEA would produce a variety of beneficial outcomes for the US stands the likelihood of there being a practical effect to the benefit of Gibraltar. The Gibraltarian tax base is much more limited than the US tax base. The now repealed Income Tax Act 1952 (Gibraltar)—which was in force in 2002 when Sir Peter Caruana sent his letter and agreed to enter into a number of agreements, and was still in force in 2009 when he entered into the US–Gibraltar TIEA—exempted a large number of the kinds of income which are the focus for international tax avoidance:

> (a) dividends paid or payable by a company ordinarily resident in Gibraltar to a company;
> (b) dividends paid or payable to a person who for the purposes of this Act is neither ordinarily resident in Gibraltar nor a permitted individual;
> (c) dividends paid or payable by a company the shares of which are quoted on a Recognised Stock Exchange;
> (d) interest paid or payable by a bank, building society or other financial services institution licensed to take deposits under the Financial Services (Banking) Act or equivalent legislation in any other jurisdiction;
> (e) interest paid or payable by the Gibraltar Government Savings Bank;
> (f) income from debentures issued by a company the shares of which are quoted on a Recognised Stock Exchange, including debenture stock, loan stock, bonds, certificates of deposit and any other instruments creating or acknowledging indebtedness including bills of exchange accepted by a banker other than instruments included in (g) below;
> (g) income from loan stock, bonds, and other instruments creating or acknowledging indebtedness issued by or on behalf of a government, a local or public authority;
> (h) income from units in a collective investment scheme which is marketed and available to the general public, including shares in or securities of an open-ended investment company;
> (i) income from rights to and interests in anything falling within (a) to (h) above; and

> (j) a dividend paid or payable out of the profits or gains of a company which has profits or gains on which the company is not liable to pay tax by virtue of (a) to (i) above to the extent of the amount of the dividend represented by the proportion which the amount of the income not liable to tax by virtue of (a) to (i) above bears to the entire income of the company for the year of assessment. (Income Tax Act 1952 (Gibraltar), Part II, s. 6[1][8])

A Gibraltarian would not pay tax on income from shares quoted in the US, interest received from a bank in the US, income from US treasury bonds etc., or dividend income from companies that earned their income in the US but not in Gibraltar.

Once one understands the domestic effect of the legislation in place when the US–Gibraltar TIEA was signed,[13] it is difficult to imagine a scenario in which Gibraltar would have any cause to seek information under the US–Gibraltar TIEA; the US–Gibraltar TIEA would, at least, be of much less use to Gibraltar than to the US. It is clear to this author that, due to the nature of the Gibraltar tax base, the US–Gibraltar TIEA has an unequal outcome.

However, an unequal outcome is not sufficient for a treaty to be considered, by our definition, an "unequal treaty". For that, the second limb must apply: there must be an inequality of power that is deployed to the potential detriment of the weaker party in relation to the matter at hand.

The US is an OECD Member State and, as such, had been party to all of the decisions and processes that had culminated in the June 2000 report (OECD, 2001) and the threat that "defensive measures" would be taken against uncooperative tax havens (OECD, 2002, p. 1). For a small jurisdiction such as Gibraltar, the unspecified threat of "defensive measures" (OECD, 2002, p. 1) that would impact its financial sector was intolerable, as Sir Peter Caruana said in his New Year's message of 1 January 2001: "No one in Gibraltar…should underestimate how important the finance centre is to the economic, and therefore to the social and political prosperity of Gibraltar" (Government of Gibraltar, 2001). He stated that: "Government will be obliged to take certain measures, especially changes to our tax system, to enable the finance centre to continue to flourish" (Government of Gibraltar, 2001).

The message was as clear as the threat from Gabriel Makhlouf (OECD, 2002); Sir Peter Caruana felt that the survival of his jurisdiction was at stake.[14] The power of the US and its partners in the OECD, which then accounted for more than 90% of the global economy, had been levied at Gibraltar and its fellow "tax havens". Sir Peter Caruana understood that and, as a result, was willing to enter into TIEAs which provided little to no benefit to the Gibraltarian state.

As a result, one is obliged to acknowledge that the US–Gibraltar TIEA amounts to an "unequal treaty".

[13] Current legislation, to a large degree, mirrors the Income Tax 1952 Act (Gibraltar) in this regard.

[14] The historical and geopolitical context in which Gibraltar sits means that this statement by Sir Peter Caruana was more than political hyperbole. It had long been the policy of the Government of Gibraltar to ensure that Gibraltar was not a drag on the British Exchequer, because a Britain that was suffering loss in its relationship with Gibraltar would be less likely to robustly defend Gibraltar against the territorial claim from Spain.

3.3. FATCA IGAs

The history of FATCA and the beginnings of true international automatic information sharing by previously secret jurisdictions is a complex one and is beyond the scope of this paper. Suffice to say that, in its initial form, FATCA was aimed not at international agreements but instead directly at financial institutions that refused to share data with the US authorities. Originally, those financial institutions that refused to cooperate with FATCA would be subject to a withholding tax of 30% on any payment made to them. This was, and was designed to be, of course, intolerable to the financial institutions. By 2010, the global financial system had become so interconnected that no bank could withstand the threat of being effectively locked out of the US dollar banking system. However, a number of jurisdictions had either data protection laws or specific banking secrecy laws that disallowed the passing of information envisaged by FATCA.

The solution to this was that the US government would enter into IGAs to ensure that local governments would remove barriers, introduce regulations, and either make reports to the US Treasury themselves or instruct relevant financial institutions to do so. Both the Model 1A IGA and the Model 2 IGA contain an element of reciprocity, while the Model 1B is wholly one-sided with no room for reciprocity.[15] For example, Article 2(1) of the Agreement between the Government of the United States of America and the Government of Ireland to Improve International Tax Compliance and to Implement FATCA (2012; "US–Ireland IGA"), a Model 1A IGA, states:

> Subject to the provisions of Article 3, each Party shall obtain the information specified in paragraph 2 of this Article with respect to all Reportable Accounts and shall annually exchange this information with the other Party on an automatic basis pursuant to the provisions of Article 27 of the Convention.

This can be contrasted with Article 2(1) of the Agreement between the Government of the United States of America and the Government of Ireland to Improve International Tax Compliance and to Implement FATCA (2014), a Model 1B IGA, which states:

> Subject to the provisions of Article 3 of this Agreement, the British Virgin Islands shall obtain the information specified in paragraph 2 of this Article with respect to all U.S. Reportable Accounts and shall annually exchange this information with the United States on an automatic basis.

Even in the case of Model 1A and Model 2 agreements, it is commonly accepted that the US has not played fair in this area and that FATCA is not a properly reciprocal arrangement. In his evidence to the Senate Finance Committee in 2022, Charles Rettig, the then US Commissioner of the IRS, stated that:

[15] The Model 1A and 1B IGAs are designed to permit the financial institutions of the non-US Party to report to the central authorities in their home countries, which will then pass that information on the US. The Model 2 IGA permits financial institutions to report directly to the US (thus lightening the burden for small administrations). The Model 1A permits reciprocity and the Model 1B does not; therefore, the Model 1B is more often used by those jurisdictions that have no use for income-related information, as they do not have the relevant tax base. For more information, see IRS (2025).

> Over time, the U.S. has established a broad network of information exchange relationships with other jurisdictions based on established international standards. The information obtained through those relationships has been central to the recent successful IRS enforcement efforts against offshore tax evasion…Currently, however, the U.S. provides less information to foreign governments than we receive from them. (IRS, 2002)

Prior to this, and in relation to the implementation of the Common Reporting Standard (CRS), which mirrors FATCA in almost all respects save that it is truly reciprocal in the data exchanged (see below for a discussion of the position around CRS), the US Government Accountability Office (2019) stated that:

> While having the United States adopt the CRS reporting system in lieu of FATCA could benefit FFIs [foreign financial institutions] that may otherwise have to operate two overlapping reporting systems, it would result in no additional benefit to IRS in terms of obtaining information on U.S. accounts. Additionally, it could generate additional costs and reporting burdens to U.S. financial institutions that would need to implement systems to meet CRS requirements. (pp. 33–34)

As the CRS requirements are almost identical to those of the FATCA from the perspective of a financial institution,[16] it is clear from this that the lack of reciprocity is more than simply a mismatch in terms of volumes.

The author would contend that this lack of functioning reciprocity is sufficient to meet the first limb of the test for unequal treaties, i.e. unequal outcomes, especially in cases of IGAs, which envisage reciprocal exchanges, such as the US–Ireland IGA.

The second limb (that there must be an inequality of power that is deployed to the potential detriment of the weaker party in relation to the matter at hand) is equally met. The threat of the economic damage that would be done to a jurisdiction by its financial institutions having to either detach themselves from the US dollar banking system or suffer the pain caused by a 30% withholding tax if they abided by their local banking privacy laws would be very real for a highly integrated, open economy, such as Jersey. In effect, the major "offshore" jurisdictions were given no choice.

FATCA is a good example of coercion being a matter for case-by-case analysis; the same threat may have different outcomes when made to different parties. For example, Afghanistan does not participate in FATCA. However, FATCA is highly unlikely to be relevant to Afghanistan and the effect of implementation of a 30% withholding tax on payments from the US system to Afghanistan's very limited financial institutions is of a different order of magnitude than the effect of the implementation of a similar levy on all US dollar payments made to financial institutions in finance centres.

In conclusion, the author is of the opinion that, in the cases of those jurisdictions with highly open economies that interact regularly with the US banking system and have well-developed financial services industries, FATCA IGAs amount to unequal treaties. This is particularly true of Model 1B IGAs but also (given the lack of practical reciprocity) true of Model 1A and Model 2 IGAs.

[16] For a broader discussion of FATCA and CRS, see Brown and Jackson (2021).

3.4. The Mechanisms of Coercion

At this stage, it has become convenient and necessary to understand the mechanisms and frameworks that have been built by the international community to institutionalise the threat that was made by Makhlouf of "defensive measures" being taken against those jurisdictions that refuse to cooperate (OECD, 2002, p. 1).

The provisions that the author will consider will be the OECD list (see OECD, 2002) and the European Union list of non-cooperative jurisdictions for tax purposes (European Council, 2024; "the EU list").

3.4.1. The OECD list

The OECD list was developed in response to the June 2000 Report, which identified a number of uncooperative tax havens. The method by which an uncooperative tax haven could remove itself from the OECD list was to make a commitment to the principles of transparency (including TIEAs) and, consequently, to implement a number of TIEAs.

By 2009, the OECD list was empty and it has remained so. This means that, in its own limited terms, the OECD list must have been successful. No identified tax haven remains uncooperative.

However, the list remains, as does the unspecified threat that "defensive measures" will be taken against any jurisdiction which becomes uncooperative (OECD, 2002, p. 1).

3.4.2. The EU list

The OECD list sits alongside a list prepared by another multi-jurisdictional organisation: the EU. The EU introduced its list in 2016 and published a number of criteria for inclusion. These criteria are listed in General Secretariat of the Council of the European Union (2016, pp. 4–7).

The full text of the requirements is long and involved, though it may be summarised as saying that the jurisdiction in question must engage with the OECD project to eliminate BEPS (including entering into any agreements that are necessary), and must correctly implement and receive high ratings from the review process.

It is noteworthy that, on 8th November 2022, the EU widened the criteria for inclusion on the list to include "'tax features of general application'" (European Council, 2022). These, however, are not relevant to our discussion here, as none of those matters relate to international agreements. It is however, mentioned for completeness.

3.4.3. What happens to jurisdictions on the EU list?

Unlike the OECD list, the EU list has a number of practical effects. For example, Hallmark C of the provisions set out in Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (Directive 2018/822; "the DAC 6 provisions") states that an intermediary must report:

Specific hallmarks related to cross-border transactions

1. An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs…

(b) although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either:

(i) does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; or

(ii) is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the OECD as being non-cooperative…

At this point, it is worth pausing. The format of Hallmark C(1)(b) of the DAC provisions is that it specifically states that the residence of a jurisdiction is relevant. For Hallmark C(1)(b) to be engaged, the entity must be properly resident in a jurisdiction. This is the building block of international taxation and would permit exclusive taxing rights under Article 2 of the OECD's Model Tax Convention on Income and on Capital 2017 (OECD, 2017). However, in the case of those jurisdictions that meet the criteria (that either the recipient jurisdiction has 0% tax, or is on the OECD list or the EU list), their tax residence, rather than simply being a marker of belonging to another territory, means that they become objects of suspicion and causes those dealing with them to be subject to reporting. One would assume that the scrutiny that such reporting attracts will result in challenges to residence that would not be forthcoming if there was no such reporting. It would seem that the perfectly permissible exercise of the sovereign right to either tax or not tax affects whether the EU respects the test of belonging, which is corporate residence.

In addition to this, the individual Member States have, within their domestic law, anti-avoidance rules which are triggered if a country is on the EU list. These rules were introduced as a result of the recommendations of the Code of Conduct Group and include:

a) Non-deductibility of costs;
b) Controlled foreign company rules;
c) Withholding tax measures;
d) Limitation of participation exemption (General Secretariat of the Council of the European Union, 2017, Annex III Part B)

In other words, if a jurisdiction will not comply with the OECD and the EU requirements, its residents will be "punished". Of course, this is not the language used by the large jurisdictions. Instead, they speak of "cooperation" instead of "compliance", and "defensive measures" instead of "punishment". However, it is unclear what comfort these kindly words give to a company properly resident in a listed jurisdiction following the transfer pricing guidelines in accordance with best practice and compliant with EU economic substance rules (i.e. it is a real business generating the income in its jurisdiction of residence) when a penal 35% withholding tax applied to dividends, interest or bank deposit income earned in Portugal (PwC, 2025).

It would be remiss of a disinterested observer to state that the threat of being included on the EU list does not amount to a form of "coercion", and that the power imbalance between the EU as a trading bloc and a single small island jurisdiction is not real.

It is clear that the mandating of automatic exchange of information and of implementation of the anti-BEPS proposals must throw into question the status of any agreement arising out of those frameworks that an EU Member State or the EU itself enters into for our definition of "unequal treaties".

3.5. The CRS

With this in mind, we should consider the CRS. The CRS is a regime that is related to but distinct from FATCA. It builds upon FATCA conceptually but implements those concepts in a truly global way. At the time of writing, the OECD lists 178 countries as having implemented CRS legislation. That is not to say that all countries exchange information with each other; instead, exchanges are not carried out until an activated exchange relationship exists between jurisdictions in a bilateral manner. This leads to a patchwork of exchanges and to each jurisdiction producing a list of other jurisdictions with which they will exchange information.[17] As an example, Gibraltar does not exchange information with the British Virgin Islands.

The CRS is thus a framework that is backed by bilateral agreements to exchange information. It is these bilateral agreements that we should consider when applying our test for an unequal treaty.

One would not claim that an activated exchange relationship between, for example, Jersey and Greenland, would be an unequal treaty. There is no imbalance of power between these jurisdictions and there is unlikely to be a materially unequal outcome.

In the case of an EU jurisdiction that enters into an activated exchange relationship with a small, low tax jurisdiction, such as Jersey, the Isle of Man, Vanuatu or any number of similar jurisdictions, there is a distinct imbalance of power between a Member State of the EU (whose international tax relations must be understood in the context of the EU's frameworks) and a small nation or Crown Dependency.

In addition, those smaller jurisdictions are faced with the issue that non-automatic exchange of information (effectively through CRS) is one of the criteria considered when assessing a jurisdiction for inclusion in the EU list. Refusal to exchange information leaves a jurisdiction open to economic "punishment"—or, alternatively, "defensive measures" (OECD, 2002, p. 1). That is a form of coercion, and an imposition of the sovereignty of less powerful nations because it means that the EU will only accept a legitimate exercise of the sovereignty of a jurisdiction if it is exercised in a manner of which the EU approves.

As to outcomes regarding an EU–Non-EU activated exchange relationship, the author takes much the same position as he does with TIEAs; it is unlikely, and in some cases impossible, that a jurisdiction such as those targeted by the EU list would benefit from an exchange agreement with a large EU jurisdiction, despite the obvious gains for the EU jurisdiction. Therefore, the author opines that there is an unequal outcome in such a case.

In respect of developed economies outside of the EU, there is a requirement for a case-by-case analysis, which is not suitable in a paper of this length. However, I would suggest that a number of criteria should be considered when assessing whether or not an activated exchange

[17] For an example of such a list, see HM Government of Gibraltar, Income Tax Office (2023).

relationship should be entered into between a non-EU developed economy and a low tax jurisdiction:

i) Does the developed economy have domestic "defensive measures" (OECD, 2002, p. 1), the use of which are framed by reference to information exchange or some related criteria (such as inclusion on the OECD list)?

ii) Would the exercise of those "defensive measures" (OECD, 2002, p. 1) plausibly damage the economy of the low tax jurisdiction?

iii) Does the taxation system of low tax jurisdiction feature characteristics such as taxation of interest and other passive income that would mean that the information exchanged under the CRS would be of use to the low tax jurisdiction?

By answering these three questions, the criteria of unequal power, the deployment of that inequality, and the inequality of outcomes are fulfilled, and thus by the definition detailed above, the CRS agreements, when entered into between a small jurisdiction for which the threat of "defensive measures" (OECD, 2002, p. 1) is material and the EU is an "unequal treaty".

3.6. The GLoBE Rules

On 8th October 2021, the 138 members of the Inclusive Framework agreed to a permit the implementation of what are known as the GLoBE Rules (OECD, 2021). This article is not the place to discuss the inequities of the Inclusive Framework, save to say that it has been accused of being a legitimising forum designed to assist in the implementation of its agenda rather than one that includes its non-core members in the decision-making process. This is highlighted by Fung (2017), who states that "only at the implementation stage of the BEPS Package are all countries treated as 'horizontal equals' in order to ensure its proper execution" (p. 54).

This lack of inclusivity seems to continue until the present day, as de la Feria (2024) notes, covering not only the earlier projects but also the process of development of the GLoBE Rules.

> Indeed whilst the stated aim of the Inclusive Framework was to engage all participating States – at present 135 – in "an inclusive dialogue on an equal footing to shape standards", in the context of the power asymmetry between developed and developing countries one does not necessarily follow the other, i.e., inclusion does not necessarily mean equal footing (p. 72).

In other words, the Inclusive Framework is only inclusive to the extent that it is necessary to include jurisdictions in order to get them to do what is required in respect of implementing the proposals drafted by the OECD Secretariat, who answer not to the members of the Inclusive Framework, but instead to the OECD Members themselves who, in turn, are mandated by the G20. The issues relating to the lack of creditability in the mechanisms of the Inclusive Framework that were highlighted by Fung (2015) still exist.

Rather like the dictated terms of the capitulation treaties highlighted by Detter (1966), the treaties or agreements around BEPs and GLoBE are presented fully formed for "approval". There is no fundamental negotiation of the objectives; details are set out by one side and the others simply assent. The OECD's mechanism may not be as crude as that of a nineteenth century colonial representative seeking a treaty with an indigenous ruler, but they are difficult

for the weaker party all the same, no matter how many grand ceremonies declaring that the agreements represent "inclusion" the representatives of smaller states are invited to. As with all projects, the Inclusive Framework can be expected to grow over time, and one must expect different levels of encouragement to participate to be applied to different jurisdictions. It is worthy of note that all major international "finance centres" of any repute are members of the Inclusive Framework. This may well account for the fact that some jurisdictions are not members. Many of these jurisdictions may not be relevant but, as they become relevant, we should expect international pressure to join the International Framework to be applied to them.

Finally, one must apply the definition of "unequal treaties" developed above. The GLoBE Rules qualify as a treaty in the eyes of the author because they contain an element of agreement, not only on form, but also on how to proceed. The 8th October statement (OECD, 2021) contained an agreement that, whilst no party to the statement was obliged to implement the rules either in full or in part, they were obliged not to impede the implementation of the rules by others in any way. There are several mechanisms by which it may be possible to block the GLoBE Rules from being implemented, depending on the particular elements of the rules being implemented by a party or the defensive steps that a jurisdiction could take to object to the implementation of the rules by another jurisdiction.[18]

As to whether the GLoBE Rules are unequal, we should consider the definition of "unequal treaties" developed above:

i) At this stage, it is unclear whether outcomes will be unequal. The implementation of the Qualified Domestic Minimum Top Up Tax (QDMTT)[19] could provide a significant boost to the exchequers of small, currently low tax jurisdictions, but it could also see a flight of capital that leaves these jurisdictions impoverished. The overriding nature of the QMDTT means that a low tax jurisdiction can tax a multinational enterprise (MNE) based in its jurisdiction and keep the tax that would otherwise be taken by other jurisdictions under other limbs of the GLoBE Rules. Alternatively, and in the case of MNEs that are headquartered in developed countries and have subsidiaries in low tax jurisdictions, the Income Inclusion Rule (IIR)[20] or UTPR may well mean that those subsidiaries cease to be viable and will need to be closed, impacting the economies of the low tax jurisdictions. Which of these effects has the greatest impact is yet to be seen, but the author believes it to be most likely that the economies of the low tax jurisdictions will suffer as a result of the GLoBE Rules. If this is the case, the outcome of the GLoBE Rules will be unequal.

ii) There is an inequality of power between the OECD and the jurisdictions in question. The OECD represents over 90% of the world economy. The Member States sponsoring the GLoBE Rules wield huge economic power when compared to the low tax jurisdictions and can act in concert. The past 20 years in international taxation have told the story of an ever-increasing pressure being placed on the low tax jurisdictions to end their model of low tax, low presence, corporate residence. One of the manifestations of that pressure has been the construction of an

[18] For example, a jurisdiction could suspend double taxation treaties in protest or could refuse to renegotiate treaties which have clauses that do not permit the application of the Under Taxed Payment Rule (UTPR; OECD, 2021), although the compatibility of the UTPR with existing treaties is a matter of ongoing debate.

[19] A QDMTT is a domestic minimum tax rule that applies to those MNE constituent entities that are in scope of Pillar 2 imposing a minimum tax of 15% in a manner that is consistent with the GloBE Rules; see OECD (2025b).

[20] The Income Inclusion Rule (IIR) is one of the three interlocking rules which make up the GLoBE Pillar 2 regime. In essence, it is similar to a traditional controlled foreign company rule and ensures that, where a MNE has subsidiaries that pay less than the 15% minimum rate, the parent in a relevant Pillar 2 jurisdiction will pay a tax equal to the amount below the 15% effective tax rate of the subsidiary (OECD 2021).

infrastructure for international tax compliance; and the creation of lists and detailing of consequences for nations that do not cooperate. There is now an implicit threat built into the system that any low tax jurisdiction that refuses to cooperate with the OECD will suffer economic consequences. However, implicit is not explicit (such as with the earlier threats that "defensive measures" would be taken [OECD, 2002, p. 1] detailed above in the earlier arrangements). The only extant method by which the OECD can explicitly take action against a state is to include it on the OECD list. Numerous jurisdictions have failed to sign up to the GLoBE Rules and none have been included in the OECD list as a result of this. For now, at least, there seems to be no direct consequences for non-cooperation, despite the fact that there is a general atmosphere of demands for participation. However, one must question what a more active organisation, such as the EU, may do in future to "encourage" participation.

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With regard to the GloBE Rules, the situation is, as yet, unclear. No threats have been made and the question of equality of outcomes remains unresolved.

Given the consensus that several elements of the GLoBE Rules can be implemented unilaterally (the IIR and the UTPR), it seems that the Inclusive Framework may be no more than a forum of unnecessary consensus. This may well undermine any conclusion as to the inequality of the GLoBE Rules if low tax jurisdictions' only obligation is mere acquiescence to actions within the sovereign discretion of other parties.

The author is forced to conclude that either the GLoBE Rules do not amount to an unequal treaty, as the obligations contained therein do not amount to matters of sufficient substance, or there is insufficient data as to the process of conclusion or the equality of the outcomes to make a judgment.

4. CONCLUSION

At the beginning of this paper, the author set out to develop a modern test for an unequal treaty. He has not taken a position on whether such a treaty should be void or voidable. Instead, he aimed to identify the undercurrents of power in the relationships between the Western countries pushing for tax reform and those low tax jurisdictions being pressured to comply.

Nothing in this paper is meant to diminish the pain and humiliation experienced by those nations that suffered under unequal treaties in the nineteenth century, and there is a material difference in the effects of those cruder, more violating treaties, and the effects of today's modern equivalents. After all, the OECD would not go to such lengths and create such a fanfare when states join the Inclusive Framework if they did not feel that such outward shows of respect were useful. That is not to say that we cannot find some underlying characteristics that run through both the unequal treaties of the nineteenth century and those of the present international tax reform; we can, as the author hopes that he has shown. Without undertaking a search for such underlying principles and relying on a narrower definition of "unequal treaties", the larger powers will simply ensure that they stand one inch to the side of legality when they exercise their power over smaller nations. In other words, they will indulge in avoidance of the rules and the dressing up of the Inclusive Framework. The use of language of inclusion when no meaningful inclusion is present does, to those who work in international tax, look strikingly similar to the lack of substance that so exercises the OECD when put in place by taxpayers. If the lack of substance present in the Inclusive Framework was present in the affairs of a company, one wonders whether it would amount to avoidance.

Once the relevant agreements have been identified as unequal treaties, the reader should ask themselves whether there is a moral argument that is strong enough to defend the deviation from the doctrine of sovereign equality that is implied in the imposition of an unequal treaty. Some will argue that the low tax jurisdictions were abusing the international taxation system in a way that, whilst not against the rules of international taxation, was certainly not in the spirit of those rules, and that their manipulation of the rules had long since bent the international system so out of shape that it had become dysfunctional. There is a strong case to be made that this position is correct, although the inhabitants and citizens of low tax jurisdictions are unlikely to agree. It is beyond the boundaries of this research to answer the question "in which position would the imposition of unequal treaties be morally permissible?" Dietsch (2015) makes a strong case that the use of abusive tax competition undermines the tax bases of the larger nation by limiting the resources of wealth that they have available for taxation and that, in the case of a system strategically designed to exploit the weaknesses of the international taxation system and the mobility of capital, those choices are illegitimate. It is perfectly understandable that, in those cases, a state would wish to "defend" its tax base (Dietsch, 2015, p.186).[21] It is not for this article to discuss whether this moral justification is sufficient to excuse the moral issues intrinsic in the imposition of an unequal treaty, nor to establish a complete theory of international justice. The aim of this article is, instead, to highlight the methods by which what many may perceive to be a moral good is being implemented, and to explain that the imposition of these arrangements on smaller states is not a "morality free zone" whereby entirely justified "good guys" simply right the wrongs perpetrated by "evil" tax evaders. Too often the public debate is framed in these terms and, if a complete theory of international justice is to be developed over time, it must acknowledge that, on occasion, large states impose unequal treaties on small states. It cannot do that without identifying characteristics that make those treaties "unequal". Once that has been achieved, a secondary process of developing a series of rules as to when (if ever) such treaties can justifiably be imposed should be carried out and that is a matter for further research. The author hopes that this research will be undertaken and that, as a result, the larger states will have moral boundaries set for them with regard to their behaviour.

Regardless of the moral justification for the actions of the OECD and other large and wealthy states in the establishment of these agreements, we should name them for what they are: agreements imposed by those jurisdictions with power and economic strength upon jurisdictions with less power and economic strength under a threat, explicit or implicit, of economic consequences. In other words, unequal treaties.

The OECD may not know this, but it certainly intuits it. It is for that reason that it expends so much energy on the Inclusive Framework. It seems to seek to establish the Inclusive Framework as an international tax organisation (ITO), such as the one described by Dietsch (2015): "An ITO with inclusive membership would provide the ideal forum" (p. 106).

[21] This is a space in which much work can be done. A substantial attempt is made by Dietsch (2015) in Chapter 2, in which he describes a difference in legitimacy between a state that strategically positions itself to carry out tax competition and has a detrimental effect on others, and a state that, for legitimate reasons, takes a different approach to balancing budget and redistribution, and, as a consequence, has an attractive taxation system. His proposal is a mixed constraint on the fiscal sovereignty of a state, i.e. a mix of both intention and outcome. This is a wholly reasonable approach, but it is one from which the EU seems to be deviating the EU's Economic and Financial Affairs Council (ECOFIN)'s amendment to the gateway criteria for consideration by the Code of Conduct (Business Taxation) Group to add a specific criterion for tax features of general application (October 2022) (European Council, 2022), which focusses entirely on outcomes. Further research could assess whether or not this is justified, but one must question whether or not the EU is attempting to impose a uniform tax system on the world.

The aim of an ITO with inclusive membership is to legitimise the decision-making process and ensure that the members accept implementation as a responsibility flowing from sovereignty as responsibility. For those with understanding of the Inclusive Framework, it seems that the OECD has read the words but not really understood them.

In conclusion, without being a truly legitimate body in which all members have equal voices and their views are given equal weight, the OECD and its organs are window dressing, and the treaties and provisions that they impose upon the members of the Inclusive Framework or the international community remain unequal and exhibit similar characteristics at their core as the unequal treaties of the nineteenth century.

BIBLIOGRAPHY

Agreement between the Government of the United States of America and the Government of Ireland to Improve International Tax Compliance and to Implement FATCA, 2012.

Agreement between the Government of the United States of America and the Government of Ireland to Improve International Tax Compliance and to Implement FATCA, 2014.

Ansong, A. (2016). The concept of sovereign equality of states in international law. *GIMPA Law Review*, *II*(1), 13–32.

Brown, H., & Jackson, G. (2021). *A practitioner's guide to international tax information exchange regimes: DAC6, TIEAs, MDR, CRS, and FATCA*. Spiramus Press.

Caruana, P. (2002, February 27). Letter to Donald Johnston Esq, the Secretariat of the OECD regarding the OECD initiative on 'harmful tax competition'. https://web-archive.oecd.org/2012-06-15/165687-2074763.pdf

Castellino, J. (1997). The secession of Bangladesh international law: Setting new standards? In Ko Swan Sik, M. C. W. Pinto, & S. P. Subedi (Eds.), *Asian Yearbook of International Law* (Vol. 7, pp. 83–104). Kluwer Law International.

Castellino, J. (2000). *International law and self-determination: The interplay of the politics of territorial possession with formulations of post-colonial national identity* (Development in International Law, Vol. 38). Martinus Nijhoff Publishers.

de la Feria, R. (2024). The perceived (un)fairness of the global minimum corporate tax rate. In W. Haslehner, Georg Kofler, Katerina Pantazatou, & Alexander Rust (Eds.), *The 'pillar two' global minimum tax* (pp. 58–83). Edgar Elgar Publishing Limited.

Detter, I. (1996). The problem of unequal treaties. *The International and Comparative Law Quarterly*, *15*(4), 1069–1089.

Dietsch, P. (2015). *Catching capital: The ethics of tax competition*. Oxford University Press.

Directive 2018/822. *Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements*. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018L0822

European Council. (2022, November 8). *Taxation: Finance ministers agree to strengthen the code of conduct used to identify and curb harmful tax measures of member states* [Press release]. https://www.consilium.europa.eu/en/press/press-releases/2022/11/08/taxation-finance-ministers-agree-to-strengthen-the-code-of-conduct-used-to-identify-and-curb-harmful-tax-measures-of-member-states/

European Council. (2024, October 8). *Eu list of non-cooperative jurisdictions for tax purposes*. European Council. https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/

Fleming, S. (2020). A political theory of treaty repudiation. *Journal of Political Philosophy, 28*(1), 3–26. https://doi.org/10.1111/jopp.12195

Fung, S. (2017). The questionable legitimacy of the OECD/G20 BEPS project. *Erasmus Law Review, 10*(2), 76–88. https://doi.org/10.5553/ELR.000085

General Secretariat of the Council of the European Union. (2016, November 8). *Outcome of proceedings: Criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes − Council conclusions* (8 November 2016) 14166/16; FISC 187; ECOFIN 1014. Council of the European Union. https://data.consilium.europa.eu/doc/document/ST-14166-2016-INIT/en/pdf

General Secretariat of the Council of the European Union. (2017, December 5). *Outcome of proceedings: The EU list of non-cooperative jurisdictions for tax purposes − Council conclusions* (adopted on 5 December 2017) 15429/17; FISC 345; ECOFIN 1088. Council of the European Union. https://data.consilium.europa.eu/doc/document/ST-15429-2017-INIT/en/pdf

Government of Gibraltar. (2009, January 8). Extract from the Chief Minister's New Year's message. *Mondaq.com*. https://www.mondaq.com/gibraltar/offshore-financial-centres/9589/extract-from-the-chief-ministers-new-year-message

Government of Gibraltar Press Office. (2009, March 31). *U.S., Gibraltar sign tax information exchange agreement* [Press release]. Government of Gibraltar. https://www.gibraltar.gov.gi/new/sites/default/files/Press%20archives/Press%20Releases/2009/61.1-2009.pdf

G20: World leaders agree to historic corporate tax deal. (2021, 30 October). *BBC News*. https://www.bbc.co.uk/news/world-59101218

HM Government of Gibraltar, Income Tax Office. (2023). *Gibraltar – Exchange of information relationships*. HM Government of Gibraltar. https://www.gibraltar.gov.gi/uploads/Income%20Tax%20Office/docs/Gibraltar%20-%20Exchange%20of%20Information%20Relationships.pdf

HM Revenue & Customs. (2024, October 31). *Multinational top-up tax — undertaxed profits rule*. HMRC. https://www.gov.uk/government/publications/pillar-2-adoption-of-the-undertaxed-profits-rule/multinational-top-up-tax-undertaxed-profits-rule

Internal Revenue Service. (2002, May 3). *Written testimony of Charles P. Rettig Commissioner Internal Revenue Service before the Senate Appropriations Committee Subcommittee on Financial Services and General Government on the filing season and the IRS budget*. IRS. https://www.irs.gov/newsroom/written-testimony-of-charles-p-rettig-commissioner-internal-revenue-service-before-the-senate-appropriations-committee-subcommittee-on-financial-services-and-general-government-on-the-filing-season

Internal Revenue Service. (2025, February 20). *FATCA information for governments*. IRS.gov. https://www.irs.gov/businesses/corporations/fatca-governments

Jackson, G. (2022). The utility of tax residence tests beyond taxing rights and the concept of "tests of belonging" given the growing number of multilateral provisions in the context of territorial tax regimes with special reference to Gibraltar and Hong Kong. *Bulletin for International Taxation*, *76*(2). https://doi.org/10.59403/rtez9f

Milliken, D., & Holton. K. (2021, June 5). Tech giants and tax havens targeted by historic G7 deal. *Reuters*. https://www.reuters.com/business/g7-nations-near-historic-deal-taxing-multinationals-2021-06-05/

The Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19, U.S.T. 881.

Nozari, F. (1971). *Unequal treaties in international law* [Doctoral dissertation]. University of Stockholm].

Nozick, R. (1969). Coercion. In S. Morgenbesser, P. Suppes, & M. White (Eds.), *Philosophy, science, and method: Essays in honor of Ernest Nagel* (pp. 440–472). St. Martin's Press.

Organisation for Economic Co-operation and Development. (2001). *Towards global tax co-operation: Progress in identifying and eliminating harmful practices*. OECD Publishing. https://doi.org/10.1787/9789264184541-en

Organisation for Economic Co-operation and Development. (2002, 18 April). *The OECD list of unco-operative tax havens: A statement by the chair of the OECD's Committee on Fiscal Affairs, Gabriel Makhlouf* (PAC/COM/NEWS(2002)51) [Press release]. OECD.

Organisation for Economic Co-operation and Development. (2015). *OECD/G20 base erosion and profit shifting project: BEPS project explanatory statement: 2015 final reports*. OECD Publishing. https://doi.org/10.1787/9789264263437-en

Organisation for Economic Co-operation and Development. (2017). *Model tax convention on income and on capital (Full version). OECD Publishing*. https://doi.org/10.1787/g2g972ee-en

Organisation for Economic Co-operation and Development. (2021, October 8). *OECD/G20 base erosion and profit shifting project: Statement on a two-pillar solution to address the tax challenges arising from the digitalisation of the economy*. OECD. https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf

Organisation for Economic Co-operation and Development. (2025a). *Global anti-base erosion model rules (Pillar two)*. OECD. https://www.oecd.org/en/topics/sub-issues/global-minimum-tax/global-anti-base-erosion-model-rules-pillar-two.html

Organisation for Economic Co-operation and Development. (2025b). *Global anti-base erosion model rules (Pillar two): Frequently asked questions*. OECD. https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/global-minimum-tax/faqs-on-model-globe-rules.pdf

The Parliament of the Commonwealth of Australia, Joint Standing Committee on the National Capital and External Territories. (2005). *Norfolk Island financial sustainability: The challenge – Sink or swim*. Commonwealth of Australia.

Putney, A. H., & Buell, R. L. (1927). The termination of unequal treaties. *Proceedings of the American Society of International Law at its Annual Meeting (1921–1969), April 28–30, 1927* (Vol 1.), pp. 87–100.

PwC. (2025, 9 July). *World tax summaries: Portugal*. https://taxsummaries.pwc.com/portugal/corporate/withholding-taxes

Ring, D. M. (2008). What's at stake in the sovereignty debate?: International tax and the nation-state. *Virginia Journal of International Law*, *49*(1), 155–233.

Sangiovanni, A. (2007). Justice and the priority of politics to morality. *The Journal of Political Philosophy*, *16*(2), 137–164. https://doi-org.uoelibrary.idm.oclc.org/10.1111/j.1467-9760.2007.00291.x

Taxation: Information exchange: Agreement between the United States of America and Gibraltar, 31 March 2009.

Tse-shyang Chen, F. (2001). The meaning of "states" in the membership provisions of the United Nations charter. *Indiana International and Comparative Law Review*, *12*(1), 25–51. https://doi.org/10.18060/17740

United Nations. (1945). *United Nations charter*. United Nations.

United Nations. (1971). *United Nations conference on the law of treaties: First and second sessions: Vienna, 26 March – 24 May 1968 and 9 April – 22 May 1969: Official records: Documents of the conference*. United Nations.

United Nations General Assembly. (1970, October 24). *Declaration on the principles of international law concerning friendly relations and cooperation among states in accordance with the charter of the United Nations* (A/RES/2625[XXV]). United Nations.

United Nations General Assembly. (1975). *General assembly resolution 3281 (XXIX): Charter of economic rights and duties of states, official records of the general Assembly: Twenty-ninth session, Supplement No. 31 (A/9631)*. United Nations.

United States Government Accountability Office. (2019). *Foreign asset reporting: Actions needed to enhance compliance efforts, eliminate overlapping requirements, and mitigate burdens on U.S. persons abroad: Report to the congressional committees*. United States Government Accountability Office.

The Vienna Convention on the Law of Treaties, 23 May, 1969.

Wang, D. (2005). *China's unequal treaties: Narrating national history*. Lexington Books.