UN MTC Article 26: Inequitable Exchange of Information Regime—Questionable Efficacy in Asymmetrical Bilateral Settings

Muhammad Ashfaq Ahmed

Abstract: The United Nations Model Tax Convention between Developed and Developing Countries (UN MTC) Article 26 charts out an exchange of information (EOI) regime “between developed and developing countries”, feigning that it is more favorable to the latter set of nations. Contrarily, the Organization for Economic Cooperation and Development (OECD) MTC Article 26, is professedly geared to protect and promote interests of OECD members—“the club of the rich”. Even a cursory comparative look at the two MTCs intriguingly reveals a lack of dissimilarities, and irresistibly leads to the conclusion that, materially, both provisions are identical. The situation gives rise to a paradox, whereby developing countries that are completely at different levels of development have broken governance structures, convoluted fiscal and criminal justice systems, and struggling tax administrations, and have been yoked into a multilayered EOI regime, which stemmed from an intra-OECD statecraft imperative, and is pre-dominantly beneficial to developed countries. The new normal contributes towards enhancement and deepening of the embedded inequities in the neocolonial economic order. The paper seminally dissects the strains generated by absence of dissimilarities between the two MTCs vis-à-vis Article 26, and posits that, in fact, this fundamentally being a developed country project, developing countries have been exploited as ‘beasts of burden’ merely to promote the economic interests of dominant partners in the relationship, and by doing so, sheds light on and galvanizes the unjustness latent in the international taxes system—an inherently unequal and lopsided affair. It also delves deeper into an axiological normative evaluation of the extant EOI regime, and finding it untenable, urges a larger paradigm shift. In fact, the UN’s meek convergence with the OECD on EOI regime, ditching developing countries and leaving them to fend for themselves in this critical area of international taxation, is the scarlet thread of the paper.

Keywords: EOI; Article 26; information exchange; tax transparency; UN model

1. Introduction

The UN MTC Article 26 entitled “Exchange of Information”, lays down an EOI regime between tax administrations of developed and developing countries. The intent of the UN MTC Article 26 is “to facilitate the proper application of the treaty and to assist the Contracting States in the enforcement of their domestic tax laws” (UN 2021, p. 752). It has further been posited that from the lens of “developing countries, Article 26 is particularly important not only for curtailing cross-border tax evasion and avoidance, but also to abate capital flight that is often accompanied through such evasion and avoidance” (UN 2021, p. 752). Thus, UN MTC Article 26 has a twin-objective: one, to checkmate international tax evasion; and two, to curtail capital flight from developing to developed countries and to

1 The reference, throughout the article, is to United Nations Model Tax Convention between Developed and Developing Countries, 2021, unless otherwise specified.
2 Emphasis supplied by the author.
3 Emphasis supplied.
their protectorates—dubbed as “tax havens”. Historically, to what extent the EOI regime has achieved its intended purpose, remains a question.

It is also accentuated that digitalization of economy and spur in electronic commerce have “significantly increased cross-border commercial and financial activity, converting the private sector into largely a world without borders” (Passalacqua et al. 2018), correspondingly giving rise to tax avoision,⁴ and resulting in a rather disproportionate increase in capital flight from developing countries. Since most of those mega corporations, which operate in digital space, happen to be based in developed countries, international cooperation in tax affairs via exchange of information has been touted as essential for tax administrations dealing with the challenges arising from globalization, and to achieve tax transparency (UN 2021). In fact, apart from rolling out an EOI regime, the UN has barely done anything for developing countries—its very constituency. To what extent the EOI regime as currently in vogue is suitably fit to the developing country needs in an unequal and fast-digitalizing world, remains a formidable question.

On the contrary, the OECD MTC Article 26 contemplates a wide-going, all-encompassing EOI regime, which consists of a whole gambit of international conventions, models, frameworks, templates, schema, and administrative setups manned with quality professionals, carefully contrived, and systematically sustained (Passalacqua et al. 2018). The UN MTC Article 26 koshers the OECD-sponsored EOI regime rather indifferently. The paper argues that the EOI regime, essentially being an OECD-enterprise professedly devised to protect developed countries’ economic interests, is inherently lopsided and purposely engineered to camouflage and perpetuate—and not abate—unjustness and inequities primordially embedded in the extant international taxes system, in a neocolonial economic order. From a developing country lens, this leads to a paradoxical situation whereby, on one hand, the UN MTC claiming to be promoter and protector of developing country rights, and on the other, spinelessly abdicating its avowed high position and converging with the OECD, ends up digging ditches and laying traps for developing countries, leaving them to fend for themselves in a hostile and anarchic world where economic power still ruled the roost. It is contended that under the OECD-contrived multilaterally sponsored and bilaterally enforced EOI regime, maximum benefits accrue to developed countries, and developing countries end up holding the dirty end of the stick.

The quandary of developing countries vis-à-vis the EOI regime manifests itself in the following ways: their inability to procure information domestically for sharing with partner jurisdictions; request actionable tax information from partner states to build significant revenue-bearing cases by their tax administrations; and their capacity to convert tax information received from other jurisdictions into revenue numbers for their people. It is added that developing countries, notwithstanding the reinforced EOI regime, continue to be robbed and plundered. The annual revenue-tag to the world on poached capital of US$860 billion, with a corresponding revenue loss of US$255 billion, is “equal to the annual funds needed to reach the UN’s Millennium Development Goals” (MDGs) by developing countries (Spencer 2006). Likewise, it was reported that “the amount of funds held by individuals in offshore and onshore tax havens, and undeclared in the country of residence, is about US$11.5 trillion” (Spencer 2006). Is it a question of below par implementation of the EOI regime, or a question of fit? The paper subscribes to and engages with the latter proposition. When analyzing the EOI regime, the paper takes “a developing country” as the unit of analysis making a significant departure from the traditional “a country”, subsuming that both developed and developing countries have different economic objectives, strategies, and capacity to pursue them. Shorn of all additives, it is a twin-player scenario with competing interests—pretty much a zero-sum game.

The present EOI regime, conceived by the League of Nations and reared by the UN, could be interpreted differently by different academic and intellectual schools of

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⁴ Collins dictionary defines “avoision” as “the non-payment of tax which cannot be classified as either “avoidance” or “evasion”; the term, in fact, signifies fast-shrinking space for legal avoidance.
thought of political economy and philosophy. Liberals would propagate it as a shot in
the arm of international cooperation, leading to and resulting in all that globalization
stands for and implies (Ahmed 2020a). A constructivist would equate it with a system of
capitalist interaction, in which concepts are developed, meanings are created, and norms
are generated to facilitate real world transactions. A post-colonial thinker could contend
that the way the EOI regime has frantically panned out over the past couple of decades,
it takes neo-colonialism to a next level, for want of a better word, neo-neocolonialism
(Ahmed 2020a). A structuralist would view the EOI regime, and all that it means to
developing nations, as a set of building blocks perfectly reflecting the international system
in its compositional formation. Neo-Marxists would prop the instrumentalist perspective
to point out the state capture of developed western economies by the MNC, resulting in
a muffled internationalization of capitalism into developing countries via sundry means
(Özsu 2019). The realist, on the other hand, would argue that the system reflects naked
power politics in the international fiscal domain, in its brute and raw form. This paper
is geared to lay bare different dimensions of the EOI regime from realist and neocolonial
angles, bringing out its implications for developing countries.

The paper consists of seven sections. After Section 1 has set the context, Section 2
briefly traces the roots of UN MTC Article 26 during pre- and interwar periods, from a
nuanced structuralist perspective. Section 3 builds on the previous section and covers
the transition and postwar periods up to the current day. Section 4 critically appraises
the EOI regime’s conceptual constraints in a developed-developing country asymmetrical
setting. While Section 5 does the same at a practical level, Section 6 undertakes normative
evaluation of the EOI regime in unequal economic and bilateral situations in a realist
world by bringing in Rawls-Sen framework of niti and naya, with a view to triggering a
fundamental shift in the way the world has so far been looking at the international taxes
system. The paper concludes the debate in Section 7, with forebodings for the future, and
by putting alternatives on the table.

2. EOI Regime—Historical Grounding

At this point, it would be illuminating to track the development of the UN-sponsored
EOI regime for developing countries. Intriguingly, the symptoms of it being essentially an
intra-developed countries affair can be spotted through most phases of its evolution.

2.1. Pre-LN Period

The EOI regime, as in vogue currently, traces its origins to the 19th century in Europe.
An agreement for the EOI, concerning immovable property possessed in one of the con-
tracting countries by inhabitants of the other, was signed between Belgium and France in
1843 (League-of-Nations 1925). An identical framework was entered into by Belgium and
the Netherlands in 1845. In 1907, France finalized an agreement with Great Britain “under
which the taxing authorities of the two countries would exchange certain information with
a view to counteracting the evasion of death duties” (League-of-Nations 1925). At the turn
of the century, Germany and Czechoslovakia agreed upon comprehensive “arrangements
for administrative and judicial assistance in taxation questions” (League-of-Nations 1925).
Soon afterwards, Germany and Austria also struck a similar deal for exchange of tax in-
formation. It has been posited that “the system of exchanging information now in force”
would “be a generalization and extension” of the French-Germany Treaty of 1907 (League-
of-Nations 1925). It is apparent that European powers of the time were either equal or
near-equal in their administrative capacity to seek and use tax information. Similarities in
their legal regimes, tax systems, and judicial procedures, would also make an EOI mutually
beneficial to all states.

2.2. Interwar Period

In the aftermath of WWI, on 10 January 1920, the League of Nations (LN) was estab-
lished, in consequence to the Paris Peace Conference that brought an end to hostilities.
The LN Covenant\textsuperscript{5} was signed by 42 founding member countries.\textsuperscript{6} As early as February 1918, the LN had passed a resolution to “convene an international conference to study the financial crisis and look for the means ofremedying and mitigating the dangerous consequences arising from it” (League-of-Nations 1920). The ensuing International Financial Conference, that convened in Brussels between 24 September and 8 October 1920, espoused unto itself, inter alia, international taxation, and professed to make progress on “an international understanding, which, while ensuring the due payment by everyone of his full share of taxation, would simultaneously encourage placing of investments abroad” (League-of-Nations 1920, p. 26). It is through the lens of the LN’s various outputs that one can trace the erratic and subdued evolution of the EOI regime during the inter-war period.

2.3. LN Report 1923

The Financial Committee, in September 1921, “decided to engage four well-known experts later known as “the Four Economists””,\textsuperscript{7} for their professional input and resolved to explore the “possibility of an international convention regulating the matter”.\textsuperscript{8} The Four Economists submitted their complex theory-charged report on 3 April 1923 (Bruins 1923), which, inter alia, did touch upon the EOI for tax purposes. The report averred "that provision should be made for an interchange of information among the respective countries involved” (League-of-Nations 1923, p. 50). It went on to explicate that if “conventions are made between two countries, it would be comparatively simple to provide for this interchange of information” (League-of-Nations 1923, p. 50). But, in the event of a convention being “made among several countries” an intriguingly innovative idea was advanced by suggesting that “the possibility might well be considered of establishing some central agency to which all the relevant facts should be reported” (League-of-Nations 1923, p. 50). This powerful idea of “establishing some central agency” strangely got lost, probably because, even in the case of a multilateral convention, it would have been an affair amongst equals or near-equals, which would have made little sense. The idea is relevantly resurfacing after a century, as now a lot many more developing countries have entered the arena.

2.4. LN Report 1925

The LN Report 1925, while proposing “a conference of government officials to reach practical solutions on the more pressing double taxation issues”\textsuperscript{9}, also ended up expressing its serious concerns about capital flight. The report suggested “to examine measures to address tax evasion to prevent capital flight” (Jogaranjan 2015). British records indicate that tax evasion was brought in by the French at the tax experts meeting in an effort to discover hidden German wealth, but the British did not want it and, therefore, the issue was referred

\textsuperscript{5} The Covenant establishing the League of Nations was included in the Treaty of Versailles, which was signed on 28 June 1919.

\textsuperscript{6} The League’s highest ever membership at 58 was from 28 September 1934 till 23 February 1935, which included Argentina, Australia, Belgium, Bolivia, Great Britain, Canada, Chile, China, Columbia, Cuba, Czechoslovakia, Denmark, El Salvador, France, Greece, Guatemala, Haiti, Honduras, India, Italy, Liberia, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Iran, Peru, Poland, Portugal, Romania, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay, Venezuela, Yugoslavia, Austria, Bulgaria, Finland, Luxembourg, Albania, Estonia, Latvia, Lithuania, Hungary, Ireland, Ethiopia, Dominican Republic, Mexico, Turkey, Iraq, Soviet Union, Afghanistan, and Ecuador. At this time, Costa Rica, Brazil, Japan and Germany had already left, whereas Egypt was yet to join the League. The League was eventually dissolved in 1946.

\textsuperscript{7} The Four Economists were Prof. Bruins of Commercial University, Rotterdam, Prof. Senator Einaudi of Turin University; Prof. Seligman of Columbia University, and Sir Josiah Stamp of London University.

\textsuperscript{8} Provisional Economic and Financial Committee—Report to the Council upon the Session held at Geneva, August–September, 1921 Communicated to the Assembly in Accordance with the Council’s Resolution of 19 September 1921 (A.95.1921.II) P6. See, for further details (Jogaranjan 2013).

\textsuperscript{9} Minutes of the First Meeting of the Sixth Session fo the Financial Committee of the Provisional Economic and Financial Committee held at 11 a.m. on 23 February 1922, in Geneva—League of Nations Archives; Box R 333.F/FinanceVI/P.VI. United Nations, Geneva—as cited by (Jogaranjan 2018a).
to the League. In fact, the only country at the conference table due to double taxation was Czechoslovakia. Jogaranjan affirms that “the impetus for the conference of government officials was in fact tax evasion and not double taxation as commonly thought”, and that the “countries represented at the conference were chosen due to their interest in tax evasion and not for political reasons, as previously assumed” (Jogaranjan 2018a).

However, to attack tax evasion, international cooperation impinging on EOI had to be developed, but banking secrecy came in its way. In fact, the bogey of banking secrecy has been leveraged since LN days to justify plunder in other countries. While attending to “the inviolability of banking secrecy”, it was emphatically stated “that public opinion in many European countries does not accept the idea that public officials should have power to require information from a third party concerning a taxpayer’s personal estate, and that these officials should transmit such information to another State” (League-of-Nations 1925). This position was further fortified with reference to the Genoa Conference, 1922, where the League was requested to “study the question of measures for international co-operation to prevent tax evasion”, with a powerful reservation that “any proposal to interfere with the freedom of the market for exchange or to violate the secrecy of bankers’ relations with their customers is to be condemned” (League-of-Nations 1925). It was finally resolved that “the exchange of information should actually be limited to that in the possession of States or which they can obtain in the course of their administrations” (League-of-Nations 1925). This was reckoned to be “the first step in the struggle against tax evasion” (League-of-Nations 1925). It was also stipulated that “a country will only be entitled to demand information of a kind which it is itself in a position to supply” (League-of-Nations 1925), and to give effect to this proposition model Articles 1 and 2 were also drafted for consideration.

2.5. LN Report 1927

The seeds for yet another effort under the LN framework had been sown in the LN Report, 1925. It had been proposed that “the League convene an expanded conference of government officials to develop draft international treaties” (Jogaranjan 2018a). The Financial Committee promptly moved to institute a Committee on Double Taxation and Tax Evasion. The International Chamber of Commerce (ICC), which was present at the big table throughout the proceedings, emphasized to ensure that the measures aimed at

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10 Letter from O.E.N. to the Chancellor of the Exchequer dated 7 November 1922—UK National Archives—IR-40/3419—Part-3—United Kingdom cited in (Jogaranjan 2015).

11 In fact, the Czechoslovakian Foreing Minister wrote the Secretary General and asked that their treaty negotiator, who had already concluded several DTAs, be allowed to attend the conference; the request was acceded to by the Council.

12 The Genoa Economic & Financial Conference was a formal conclave of 34 nations held in Genoa, Italy, from 10 April to 19 May 1922, to resolve major political and economic issues confronting Europe—including pariah states of Germany and Russia.

13 Article 1 reads: “With a view to obtaining a better apportionment of fiscal burdens in the interest both of Government of taxpayers, the Contracting States undertake, subject to reciprocity, to give such other administrative assistance in regard to all matters required for the purpose of tax assessment. Such assistance may consist in: (a) The exchange of fiscal information available in either of the contracting states. The exchange will take place following a request concerning concrete cases, or, without any special request, for the classes of particulars defined in Article 2; (b) Co-operation between the administrative authorities in carrying out certain measures of procedure.” Article 2 reads: “The exchange of information as contemplated in paragraph (a) of Article 1 shall relate to natural or juristic persons taxable in one of the contracting countries. The particulars given shall include the names, surnames and domicile or residence of the persons concerned, and their responsibilities, if any, and shall have reference to: (1) Immovable property (capital value or income, rights in rem, charges by way of mortgage or otherwise); (2) Mortgages or other similar claims (description of the mortgaged property, amount and rate of interest); (3) Industrial, commercial or agricultural undertakings (actual or conventional profits, business turnover, or other factors on which taxation is based); (4) Earned income and director’s fees; (5) Transferable securities, claims deposits and current accounts accounts (capital value and income); any information collected by an administration, more especially in connection with exemption or relief granted by that authority by reason of the taxpayers’s domicile or nationality.”

14 The Committee consisted of Salvador Oria, Argentina; M. Clavier, Belgium; Valdimir Valnicek, Czechoslovakia; M. Borduge, France; Herbert Dorn, Germany; Pasquale D’Aroma, Italy; Kengo Mori, Japan; J. Sinninghe Damsete, Netherlands; Stefan Salsker, Poland; Haus Blau, Switzerland; Thomas Adams, USA; and Frederico Feo, Venezuela.
curbing tax evasion did not hamper free movement of capital (Jogaranjan 2018b). The ICC did receive ready support from the UK, Belgium, and other capitalist economies. It is, however, not clear as to how efforts aimed at curbing tax evasion could, in any manner, hamper the movement of capital.

2.6. LN MTC 1928

The decade-long spadework done under the LN umbrella, which was published as the Financial Committee’s Reports of 1923, 1925, and 1927, culminated in four MTCs released by the Tax Experts Committee on 16 October 1928. However, “despite extensive exchange of views on the types of incomes to be subjected to exchange of information (EOI), potential violation of banking secrecy, and if EOI would be automatic or on-request in relation to specific taxpayers” (Jogaranjan 2018b), a corresponding provision could not make way into the LN MTC 1928. It was remarked that Switzerland opposed bilateral EOI “agreements on the basis that capital would simply flow to those countries which did not conclude such treaties” (Jogaranjan 2018b). Somehow, the concerns for tax evasion and capital flight appeared to be fading amongst the LN member states.

2.7. LN MTC 1935

In view of the feedback received from various governments and cross-sections of the international community, the LN MTC 1928 was put through deliberations and “revised by the Fiscal Committee in June 1935” (Carroll 1978). However, a provision pertaining to EOI again could not be included in the LN MTC 1935 for lack of broader support and consensus. It was a bit astonishing that the LN member states, which had gathered under the LN framework to address the issues of double taxation, tax evasion, and capital flight, mainly ended up focusing on distribution of taxing rights among states.

2.8. LN MTC 1943

The primary purpose of the Regional Tax Conference (RTC), held in June 1940 in Mexico City, was to reappraise the LN MTC 1935, and the principles of taxation underlying it (Ahmed 2020a). While deliberations continued to be held in the intervening period, the RTC was reconvened in Mexico City, in July 1943. It was in the RTC 1943 that the LN MTC 1943, along with a protocol, was unveiled. The LN MTC 1943, inter alia, put in place an elaborate system of exchange of information by devising and rolling out a comprehensive Model Bilateral Convention for the Establishment of Reciprocal Administrative Assistance for Assessment and Collection of Direct Taxes. It has been remarked that LN MTC 1943 “with its clear bias towards taxing rights for capital importing nations, won little support amongst high-income countries” (Daurer and Krever 2014).

The LN MTC 1943 Article I, inter alia, ordained that “to furnish on special request such information in matters of taxation as the competent authorities of each State have at their disposal or are in a position to obtain under their own laws . . . “. Article II thereof obligated each contracting state “to obtain through direct correspondence, from the . . . other contracting State, information concerning particular cases that is necessary for the assessment of the taxes to which the present Convention relates”. However, a requested state could decline a ‘special request’ if it involved “the obligation to obtain or supply information which is not procurable under the legislation of the State applied to or that of the applying State”, or “administrative or judicial action incompatible with the legislation and practice of either contracting State, . . . violation of a professional, industrial or trade secret”, if it related “to a taxpayer who is a national of the State applied to”, or

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15 These MTCs were entitled (i) “Draft Bilateral Convention for the Prevention of Double Taxation”; (ii) “Draft Bilateral Convention for the Prevention of Double Taxation in the Special Matters of Succession Duties”; (iii) “Draft Bilateral Convention on Administrative Assistance in Matters of Taxation; & (iv) “Draft Bilateral Convention on Judicial Assistance in Collection of Taxes”.
16 The RTC was attended by Argentina, Bolivia, Canada, Chile, Colombia, Ecuador, Mexico, Peru, USA, Uruguay, and Venezuela.
it compromised “its security or sovereign rights” (League-of-Nations 1946a). Although visibly the approach was constrictive, the framework pertaining to the EOI was successfully incorporated into the LN MTC 1943 for the first time.

2.9. LN MTC 1946

No sooner key European powers were done with WWII, they scrambled back to stock-take developments that had taken place on the fiscal front, particularly those at the RTCs in early 1940s. Accordingly, a Fiscal Committee was convened in London for its 10th session to come up with MTC 1946 (League-of-Nations 1946b). It was observed that the structure of the MTC 1943, and MTC 1946 remained identical, except for certain editorial modifications in the latter MTC, pertaining to the EOI regime. However, the LN MTC 1946 expanded the scope of the EOI regime devised by the MTC 1943 by expressly covering “Property, Estates, and Succession”. Moreover, liability of the requested state to explain and satisfy the requesting state in certain situations was also waived. Jogaranjan, highlighting politics of the EOI regime in asymmetrical bilateral settings, observes that “it was thought to be completely unacceptable that residence-countries would provide information regarding their residents to enable them to be taxed in another (the source) country” (Jogaranjan 2018a). Likewise, in 1944, at the time of raising of the IMF, both M. Keynes and H. White urged an EOI regime “between governments about capital flight”, but the “proposal was allegedly opposed by the US financial community which had benefited from capital flight” (Spencer 2006). This anti-developing country bias in the EOI regime from its formative years, as would be seen, were to continue.

3. EOI Regime—Transition and Postwar Period

While handing over the baton of international taxes work stream from the LN to the UN, it was hoped that “the work done both in Mexico and in London could be usefully reviewed and developed by a balanced group of tax administrators and experts from both capital-importing and capital-exporting countries and from economically-advanced and less-advanced countries” when the League work on international problems is taken over by the United Nations” (League-of-Nations 1946b). Astonishingly, the UN did not rush in to assume the responsibility and take over the LN’s work on international taxes in any meaningful manner for almost two decades, so as to make an attempt to create a balance between “economically advanced and less-advanced countries”, which also co-incidentally happened to be “capital-exporting” and “capital-importing” countries, respectively. This historical wrong is also reflected in the EOI regime as it evolved over the coming decades.

3.1. Transition

Contrarily, the Organization of European Economic Cooperation (OEEC), which had been created in 1948, immediately started to fiddle with the LN’s legacy work on international taxes, and ended up establishing a Fiscal Committee in March 1956, tasking it to draft an MTC along with a comprehensive set of proposals for its implementation (Ahmed 2020b). In September 1961, the OEEC transmuted into the OECD and within two years the OECD MTC 1963 was successfully published. The OECD MTC 1963 did carry an Article 26, which, pari materia, was the provision contained in the LN MTC 1943. The OECD MTC 1963 was revised in 1977, and then in 1992, when it was decided to adopt an ambulatory approach to update the OECD MTC as and when warranted, rather than having to issue completely revised new versions every now and then. The OECD MTC has been updated

17 The waiver was extended vide Articles XIV which reads: “If a request cannot be complied with, the competent authorities of the State applied to shall advise the competent authorities of the applicant State of the reasons which prevent complying with the request, and shall transit to such authorities all information which may have a bearing on the case.” Article XX, in the same vein, reads: “Over and above the measures of assistance for which the Convention provides, the competent revenue authorities of the two contracting States may concert together for the exchange of information other than that for which provision is made and also for the purpose of the assessment of the taxes to which the Convention relate”.

18 Emphasis added by the author.
in 1994, 1995, 1997, 2000, 2002, 2005, 2008, 2010, 2014, and then finally in 2017, Article 26 included.

It has been averred that the true heir of the LN’s extensive work on international taxation was the OECD, and not the UN, as is generally believed (Ahmed 2020b). It has further been posited that, given the higher stakes involved, the developed countries heavily invested in the OECD to marshal the international taxes domain and capacitated it to the kill to churn out dominant ideas, which could, overtime, capture almost entire epistemological space in the arena (Ahmed 2020a). At this stage, it merits mention that since the work on international taxes was deftly inherited by “economically advanced countries”, the EOI regime developed over the next few decades had inevitably to reflect their economic interests being oblivious of, and at the expense of, the developing countries’ economic imperatives.

3.2. UN Pedestrian Pursuit

Once the dye had been cast and the OECD was already well on its way, the UN began its pedestrian pursuit by creating the “Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries” in 1967. The very nomenclature of the group betrays an urge and a standpoint to rectify fiscal inequities extant in international taxes regime between developed and developing UN member states. The 1st UN MTC was rolled out in 1981, which, in fact, is a facsimile of the OECD MTC in all essentials and most non-essentials. The UN MTC has gone through modification in 1999, 2001, 2007, 2011, 2017, and then finally in 2021. In fact, the most significant changes made to the UN MTC Article 26 have been the consequence of changes made to the OECD MTC Article 26, at different occasions.

3.3. UN MTC Article 26

The UN MTC Article 26 prescribes an EOI regime purportedly for developing countries to adopt, while negotiating double taxation agreements (DTAs) with developed countries. The UN MTC Article 26 looking to frame “rules under which information may be exchanged to the widest possible extent” (UN 2021, p. 752), obtains six separate provisions mirror-imaging the OECD MTC Article 26 in such entirety that it appears a false-flag operation by the latter. Paragraph 1 conceptualizes fundamental responsibility of Contracting States to bilaterally engage in an EOI as is “foreseeably relevant” for the implementation of the provisions of the convention and administration of their respective taxes, imposed at national and sub-national levels. The expression “necessary” was replaced with “foreseeably relevant” in pursuance to changes in the OECD MTC Article 26 in 2005, with the underlying stated objective to expand the scope and the nexus of the provision. The stated objectives were that all tax information, which could be helpful to prevent avoidance and evasion of taxes, should be exchanged.

Paragraph 2, in turn, mandates that the information exchanged shall be confidential and would be accessible only to persons concerned with assessment, adjudication, and collection of taxes, as under domestic tax laws. The information exchanged could also be used for “other purposes” if it could be used for those other purposes in both states, and the supplying state also agrees to the proposition. Paragraph 3 lays out three scenarios in which the information cannot be exchanged; namely, if (a) the requested state has to carry out measures to collect the requested information that are markedly different from its own routine administrative procedures; (b) the requested tax information is not obtainable in the normal course of tax administration; and (c) the information could be likely to “disclose any trade, business, industrial, commercial or professional secret or trade process”. Paragraph 4, subject to the stipulated conditions, reinforces the requested state’s responsibility to exchange the required tax information. While paragraph 5 debunks banking secrecy as an

19 The Ad-Hoc Group of Experts was established under ECOSOC Resolution 1273 (XVIII) adopted on 4 August 1967.
excuse to avoid supplying the requested information, paragraph 6 suggests developing “appropriate methods and techniques” for the purpose through mutual consultations.

3.4. OECD’s Incursion

Towards the end of 20th century, not that the UN was into any creative thinking previously, its work in the international taxes arena in general, and that pertaining to an EOI in particular, started to get submerged under the OECD’s mighty effort. Although, roots of the EOI regime, as in vogue, could be traced back hundreds of years in the LN work, yet it owed its current vitality to the Harmful Tax Competition Report 1998, prepared under the OECD's auspices. Albeit all accepted modes of exchange of tax information—on-request, automatic, spontaneous, and simultaneous tax examinations, have always been read into the UN MTC Article 26, yet they got galvanized, shaped up, and crystalized by the OECD over the past couple of decades. Understandably, the OECD being a multilateral bastion of developed countries, and was looking to carve out a self-sustaining EOI regime which promoted its members’ economic interests. A brief run-down of key nodes of the OECD-sponsored EOI regime would be useful.

The Global Forum on Transparency and Exchange of Information for Tax Purposes (GF), which was originally established in 2000, attained its current configuration in 2009. Operating mainly under the OECD, the GF currently has 165 members including many developing nations, and most of the tax havens. The GF is responsible for working with member jurisdictions and helping them implement the OECD-driven EOI regime in tax matters. The GF’s operations are financed through member jurisdictions’ contributions. One of the GF’s important outputs is the Model Tax Information Exchange Agreement (TIEA), the purpose of which is to enhance and improve the EOI regime in tax matters. The origins of TIEA are also anchored in the OECD’s Harmful Tax Competition Report, 1998. In 2015, the scope of TIEA was expanded to expressly cover an automatic and spontaneous EOI if jurisdictions bilaterally so desired. The GF, through elaborate peer-reviews and follow-ups, continually tries to ensure that all member jurisdictions implement the international standards in EOI in right earnest. It has been averred that at the GF, all members participate on an equal footing (Falcao 2011).

In parallel, more at a unilateral level, one OECD member—the US—passed the Foreign Account Tax Compliance Act 2010 (FATCA) “to raise revenues from taxing undisclosed off-shore incomes generated by US citizens and others” (Cockfield 2017, p. 1103). The FATCA innovatively ordained foreign banks and non-banking financial institutions to provide financial information (under an intergovernmental agreement, or without it) concerning any account-holding US person—including citizens and residents living abroad—directly to US Internal Revenue Service (Cockfield 2017, p. 1103). All non-cooperating banking and non-banking financial institutions were to suffer a confiscatory at-source tax, at the rate of 30% of transaction value.

The Convention on Mutual Administrative Assistance in Tax Matters (MC), which was originally developed by Council of Europe and the OECD, and enforced in 1995, was opened to all states through a protocol in 2010. The purpose of the MC is to facilitate member states in an effective EOI through multiple modes. Under the MC, two important information channels have been pursued over the past few years, that is, the Common Reporting Standard (CRS) and Country-by-Country Reporting (CbCR). The CRS denotes the standardization of automatic exchange of bank account and other financial information between tax authorities. The CRS has been modelled on the US FATCA 2010. The 1st CRS-propelled automatic transmission of bank account information took place in 2018. The GF claims that information regarding overseas financial assets worth €9 trillion was exchanged in 2020. The CbCR, in turn, obligates the MNCs to report their worldwide financials on a country-wide basis, to help tax administrations to tax them per law. It has been argued that CbCR is “mainly directed at helping governments audit aggressive international tax avoidance to reduce revenue losses in high tax countries” (Cockfield 2017, p. 1107). There is little doubt that all of these EOI mechanisms in an intra-OECD
environment would be symbiotically beneficial, but the same conclusion cannot be drawn in respect of asymmetrical bilateral settings.

3.5. UN’s Role—Capitulation

Tax administrations of developing countries have been in a difficult state over the past five decades as they kept recklessly signing DTAs—including the EOI regime. This is primarily due to developing countries’ blind belief in the UN MTC fundamentally being beneficial and supportive to their cause. Since developing countries are generally operating under serious capacity constraints, such an assumption becomes a convenient and complacent policy choice—sans due diligence and a rigorous cost-benefit analysis (Ahmed 2020b). It is not surprising that “the OECD Model is the dominant model and preferred by developed countries since it better serves the interests of their multinational corporations” (Abebe et al. 2012). Likewise, “developing countries favour the UN Model, which better protects their interests” (Abebe et al. 2012). But unfortunately not only that the language of UN MTC Article 26 is comparable to the OECD MTC Article 26, but also that the Commentary to the latter also “generally is relevant in interpreting” the former (UN 2021, p. 752). Now, what if both the OECD MTC and the UN MTC turn out to be substantively one and the same thing? This ironic situation pushes developing countries into a state of double jeopardy. Rohatgi believes that the UN MTC has been a target of censure due to its failure to make any sizable impact on the way developing countries have negotiated and signed DTAs, for which one of the important reasons could be that it has trailed the OECD MTC, rather subserviently (Rohatgi 2002, p. 60).

Thus, how come the UN MTC, which essentially toes the line of the OECD, could be expected to be favorable to the developing countries and fit their fiscal imperatives. In developing countries, the UN MTC was raised to the mantle of a hallowed object to be followed religiously. Although, a model should only be a model—a template—and not a quasi-convention (Rohatgi 2005). The UN MTC enjoys a quasi-cult status in capacity-sapped developing countries, and one knows the fate of cult-followers. It has been posited that while the UN assigned unfunded mandates to ensure good governance, reduce poverty, improve health, increase literacy, and ensure sustainable development of their peoples, were assigned to developing country governments, it practically turned a blind eye to their being coerced and yoked into unequal and administratively lopsided international commitments (Ahmed 2020a).

4. EOI Regime—Developing Country Perspective

All international cooperation—both bilateral and multilateral—is always couched in, and influenced, by history. Most developing countries, if not all, have been under colonial subjugation and this fact is not only a significant part of their national consciousness, but also weighs on their outlook to the world and impacts their critical decision-making. During centuries of direct colonial rule, most developing nations’ resources and capital were pillaged and shipped back to the colonial heartland—Europe; they are understandably apprehensive and xenophobic. In the post-WWII period, when colonization was coming to an end, the colonial powers made deft moves for a seismic shift to graduate from direct colonization to indirect colonization, broadly dubbed as neo-colonialism. Neo-colonialism implied the use of economic, political, cultural, and sundry soft tools, to control or influence weaker nations—particularly past colonies—by stronger nations, for the maximization of economic and political gains. It is posited that the international taxes system as rolled out over the past hundred years, through instrumentalization of the LN, UN, OEEC, and the OECD, and by marshalling international hulks like WB, IMF, and ADB, into rallying support, connotes neo-colonial infrastructure and needs to be interpreted accordingly—particularly the EOI regime. In view of these neocolonial underpinnings and cognition, a peculiar developing country perspective on the EOI regime has started to shape, straddling on several critical aspects.
4.1. Neocolonial Infrastructure

The neocolonial infrastructural toolkit, comprising brute banking secrecy (even for non-citizens), ever-expanding tax havens, beneficial ownership legislations, citizenship-by-investment schemes, residence-by-investment plans, and complex corporate and ownership structures etc., were leveraged for as long as possible into ruthlessly poaching revenues and capital from post-colonial developing countries. However, when the MNC and high net worth individuals (HNWIs)—two of capitalism’s favorite offspring—having sated on eating into developing countries’ economies, turned back on the developed capitalist state to return the favor, the latter were under duress to find a new solution for new times—the EOI regime being one such solution. The neo-colonial mindset is that developed countries’ economic problems are the world’s problems, but developing countries’ economic problems are their own.

4.2. Lack of Symbiosis

The EOI regime, howsoever, brandished to look “inclusive”, in fact, lacks semblance of symbiosis. Given the fact that the EOI regime emanates from developed countries’ own problems heightened by the MNC and HNWIs’ libertarian overtures to outgrow the capitalist state, it lacks convergence with developing countries. This is even though they confront identical challenges of tax base erosion and illicit financial flows, the solution toolkit does not have the right fit in view of their weak administrative and judicial structures, and the additional costs associated. Falco has authoritatively observed that “it is clear that an effective exchange of information between countries likely to benefit developed nations more than developing nations, at least, for the time being” (Falcao 2011, p. 612). Moreover, the EOI regime does only cure symptoms, and not the malignancy itself. The developed countries undoubtedly have their 

4.3. Evolving Tax Evasion Ploys

The MNC and HNWI, in combination with big-time tax consultants, are constantly looking to outmaneuver the EOI regime, and at the expense of developing countries being most ill-equipped for the challenge. Cockfield remarks that: “Tax havens, even if they are forced into binding agreements such as TIEAs, have incentives to subvert the system (e.g., by developing new business and legal entities that may fall outside of current disclosure obligations) and shirk responsibility (e.g., by not meaningfully enforcing EOI agreements by ensuring they do not maintain necessary records subject to a transfer request)” (Cockfield 2017). It has been posited that “Concealed money is an important issue in countries with high levels of bank confidentiality because the countries that provide this service benefit from it in various ways”, and it would, therefore, “be costly to these countries if they were not able to provide the service anymore” (Rønfeldt 2015). There is little doubt that the beneficiary developed nations protect and optimize on the existing evasion apertures. Developed countries also egg on their non-state operators to poach in developing countries by establishing collusive arrangements with corrupt developing country elites. “Elites within low and middle income (often nondemocratic) countries use international financial secrecy as an exit strategy that allows them to move and hide monies offshore (to preserve their family wealth and security)” (Cockfield 2017). It is contended that due to misaligned and, at times, conflicting objectives, international cooperation in tax matters—contextually, the EOI regime—is confronted with challenges, and its efficacy is compromised for weaker partners in the equation.

4.4. Marriage of Unequals

It is an on-going perception that developed countries treat their equal or near-equal DTC partners differently, and the unequal ones markedly differently, while negotiating or
even discharging their EOI commitments. Falco believes that many developing countries have been wary of including “exchange of information clauses under the fear that they would be compelled to eventually live up to that obligation and provide information regarding their nationals” (Falcao 2011). On the contrary, stronger partners in the equation always could leverage confidentiality doctrine to refuse information. Even under the UN MTC Article 26 a “State may continue to refuse to supply such information if that refusal is based on substantial reasons unrelated to the status of the holder of the requested information as a bank, financial institution, agent, fiduciary or nominee, or to the fact that the information relates to ownership interests” (UN 2021, p. 782). It has been averred that Switzerland has been “pressing for lower withholding tax rates on flows from developing countries in return for information exchange on request”, regarding capital illicitly remitted out of developing countries and parked in the clandestine Swiss banking industry (Urino 2015). This blatantly happened while re-negotiating the Pakistan-Switzerland tax treaty in 2014. Likewise, the US rejected calls from Argentina for a TIEA “instead insisting on a double tax agreement that would require Argentina to surrender some of its taxing rights” (Urino 2015). The arbitrary and selective application of rules is also evident from the OECD not applying “to itself the requirements for information exchange and overriding bank secrecy rules that it has imposed on designated tax havens” (Spencer 2006). Likewise, the EU directive on the taxation of savings did not apply to interest paid by EU countries to residents of non-EU countries, and in the process encouraging capital flight from non-EU countries into EU financial centers (Spencer 2006).

4.5. Economics of EOI Regime

It is a widespread perception in developing countries that their ruling elites find it fashionable to get entangled into EOI frameworks to gain political mileage, without conducting cost-benefit analysis. The membership of the GF, CRS, CbCR, BEPS-Inclusive Framework, and other institutions, all carry an annual membership fee, which for some developing countries could be sizeable. Likewise, the cost of expensive hardware and software needed to operate CbCR and CRS mechanisms ran into millions of dollars—simply unaffordable for many developing countries. Cockfield observes that a complex network of tax treaties, TIEAs, IGAs, CRS and CbCR, raise “transaction costs for all parties” (Cockfield 2017, p. 1108). Interestingly, most developing countries end up releasing more foreign exchange than what they get in additional revenues from the EOI regime.

4.6. Utilization Capacity Deficiencies

In a developing country context, being able to receive actionable tax information is one thing, and then to be able to convert it into revenue numbers is entirely another. It has correctly been remarked that low-income countries might not have the requisite human resources and physical infrastructure “to enforce their own domestic tax laws, let alone engage in effective EOI” (Cockfield 2017, p. 1121). Falco avers that “developing countries suffer with lack of personnel, training, and resources, and therefore exchanging information has historically represented too large a burden to be upheld” (Falcao 2011). Although, “better cross-border tax information will allow governments to pursue criminal investigations into offshore tax evasion and international money laundering in circumstances where taxpayers use business entities to mask criminal activities”, yet in reality, delinquents find newer ways to bypass developing countries’ weak tax systems—mostly in collusion with new-look secrecy jurisdictions. Resultantly, developing countries now keep supporting information transmission without being able to use it for their own purposes. In fact, “authorities may be overwhelmed with data and may not have the resources to parse through it to identify helpful leads” (Cockfield 2017, p. 1109). Ring encapsulates developing country tax administrations’ limitations in terms of unavailability of quality

20 Author led Pakistan delegation in the negotiations in 2014 wherein the Swiss delegation, in return for access to bank account in formation, dug their heels on reducing tax rate on taxation of dividends.
auditors, lack of training, poor understanding of international tax concepts, attrition of 
trained staff, technological limitations as regards receiving, managing, storing and working 
with the information exchanged, inability of matching taxpayers, and the “existing culture 
of limited tax compliance” (Ring 2017, p. 578).

4.7. Complexity of EOI Regulations

It is, of course, not surprising that most rules and regulations forming the EOI regime 
arquitecture are complex, convoluted, complicated, and cumbersome to implement. The 
CbCR data exchanged cannot be utilized directly. Instead, algorithms need to run on 
those data, which makes it extremely difficult for most developing countries to utilize it 
purposefully. The GF proclaims that information exchanged was able to generate revenue 
worth €1.16 billion last year, but it does not show how much of it was generated in 
developing countries (OECD 2022). Cockfield pertinently believes:

All of this hedging takes place in an environment of highly complex technical 
rules, making it difficult . . . to predict how domestic tax laws and tax treaties 
will mesh with foreign tax laws. In particular, many governments now deploy 
increasingly technical rules—Specific Anti-Avoidance Rules (SAARs), General 
Anti-Avoidance Rules (GAARs), judicially promoted anti-avoidance rules, and so 
on—to thwart aggressive tax avoidance strategies . . . Many taxpayers with the 
resources to engage in cross-border tax planning are actually financially better off 
under this regime as long as their transaction costs are outweighed by global tax 
savings” (Cockfield 2017, p. 1097).

It has been extensively observed that in the post-CRS and CbCR period, the beneficiary 
have not been the developing countries’ exchequers, but developed countries and their tax 
consulting community. The collusion between non-state operators and beneficiary states 
has their own agenda to bug, rig, and subvert the international financial system including 
the EOI regime, at the expense of developing nations in most situations.

4.8. Non-Obligatory EOI Commitments

The UN stipulation that a state may not avoid its obligations under the EOI regime 
“through unreasonable time delays, by imposing unreasonable or burdensome procedural 
barriers, or by intentionally taking steps that prevent it” (UN 2021), makes the entire 
EOI arrangement non-obligatory in nature, rendering it essentially optional. The morally 
persuasive nature of the obligation has again been reinforced by haranguing that “the 
obligation to exchange information . . . should be interpreted broadly, and the limitation on 
that obligation should not be extended by analogy beyond their specific meaning” (UN 2021, 
p. 752). In the absence of a central authority vested with requisite power sinews to enforce 
breaches, it is essentially a moral obligation which a state might be motivated to honor, or 
not honor; the latter scenario being more likely where the bilateral relationship is manifestly 
equal or of an existentialist nature for the requested jurisdiction—tax havens. It is the 
developing countries’ common experience that most developed countries do not honor 
their EOI commitments when it comes to material matters; capital siphoned off and held in 
offshore real estate, money laundering, and sundry vital economic interests. Illustratively, 
China has been found extremely hesitant to share CbCR data with countries where it has a 
substantial MNC footprint—even after the fulfillment of all codal formalities. Switzerland 
and secrecy jurisdictions filibuster EOI requests through administrative slow-downs and 
rasing flimsy procedural objections.

4.9. Non-Inclusive Inclusivity

Of late, developing countries have been getting a feeling of shallow inclusivity. Con-
idering that it might not be any more possible to keep the developing countries on the 
fence and continue framing international tax rules, developed countries started to adopt a

21 See, for a detailed account of difficulties (Ring 2017, p. 578).
condescending approach and started involving developing countries in the international taxes debate. It has been observed that due to “the rise of Consumer market in developing economies and their growing significance, it has become hard . . . to ignore their want and will in international relations” (Falcao 2011, p. 611). However, this inclusion into the process has been rather superficial. While redefining the international taxes system during 2010s: “the OECD did only consult with developing countries after the major decisions were made and failed to ask about preferences of developing countries beyond capacity building” (Meinzer 2018).

True, there is an ever-increasing policy and academic support for EOI initiatives that promote global financial transparency, but “the current international tax regime, with its high transaction costs for taxpayers and tax authorities, does not seem particularly amenable to producing optimal outcomes” (Cockfield 2017, p. 1108), particularly for developing countries.

5. EOI Regime—Developing Country Constraints

While the previous section brought out the EOI-related developing country constraints at the conceptual level, this section does the same at the practical level, in respect of all five established EOI modes.

5.1. EOI Regime—Request Mode

In fact, request-based EOI is the oldest and most-widely used EOI mode at the international level. Its concept was laid in the LN Report 1923, crystalized via the LN Report 1928, but failed to make way into the LN MTC 1928 and the LN MTC 1935. It was formally incorporated into the LN MTC 1943. The OECD MTC 1963 carried it, and was reproduced into the UN MTC 1981 almost in its entirety. Although, the UN MTC Article 26 and the OECD MTC Article 26 have always been construed to cover all modes of EOI, until around the turn of the century it was synonymized with request-based mode. This mode implies that a contracting state may lodge a formal request to its counterpart state seeking actionable tax information. Albeit substantial literature has been created on the topic, regrettably, its critical appraisal from a developing country perspective has not taken place. Developing countries have almost involuntarily been committing themselves into previously bilateral and now multilateral EOI frameworks sans any meaningful cost-benefit analysis, at country level or group level, and then struggling to serve their obligations. Empirically intractable, but it is no secret that developing countries—barring few—have rarely been able to raise assessments based on exchanged tax information, and then carry them through at appellate forums. There has, however, been sparse negotiated settlements and a negligible increase in deterrence, which, of course, do not outweigh the costs involved. Innuendos, the UN itself legitimizes the lopsided arrangement:

In freely adopting a convention, the Contracting States presumably have concluded that the convention, viewed as a whole, provides each of them with reciprocal benefits. There is no necessary presumption that each of the articles, or each paragraph of each article, provides a reciprocal benefit. On the contrary, it is commonplace for a Contracting State to give up some benefit in one Article in order to obtain a benefit in another Article (UN 2021, p. 774).

This may be true of an agreement between two equals, but not between two unequal partners—a developed and a developing country—where the latter would always be at a disadvantage; firstly, at the state-to-state negotiations stage, and then when the former’s MNCs and HNWIs optimize on the negotiated provisions by engaging with the latter’s tax administration. The lopsidedness in the EOI regime pans out at five distinct levels. Firstly, when it comes to providing information in response to request—mostly from developed countries since majorly it is their MNCs and HNWIs that are operating in developing countries—the latter must deploy significant resources to serve their commitments, and resources with developing countries’ tax administrations are always in short supply. An empirical evaluation is likely to reveal that the cost of the relationship borne by developing
countries far outweigh the benefits that they derive, which, of course, is not the case with developed countries.

Secondly, when it comes to obtaining actionable tax information, quite a few hurdles kick in the way. Since offshore monies are mostly held in anonymized accounts, developing country tax authorities lack basic information to populate requests for information in the first place (Cockfield 2017, p. 1104). Thirdly, the real ordeal of developing countries starts after receiving the information, as they mostly cannot convert actionable tax information into revenue numbers due to lack of refined administrative capacity. It is obvious that the MNCs can hire top-notch tax consultants to prepare their cases well in advance, keeping in view all legal options. Even when an assessment gets framed based on exchanged information, it faces challenges at tax judicial forums. Cockfield has pertinently observed that the EOI regime has “. . . largely failed to reduce offshore tax evasion or aggressive international tax planning” (Cockfield 2017, p. 1105), majorly for these very reasons.

Fourthly, no doubt third party reporting and tax-withholding disclosures “can provide information to tax authorities to allow them to better gauge risks of offshore tax evasion and aggressive international tax planning” (Cockfield 2017, p. 1110). However, the MNCs have always been found a step ahead of developing countries tax administrations in tax planning, particularly when the international tax infrastructure is completely loaded in their favor, and against the source state. This puts the developing countries’ tax administrations at a significant handicap. Lastly, most developing countries have evolving tax systems and, since their counterpart fiscal justice systems are not developed enough, it becomes extremely difficult to carry through the cases built based on tax information exchanged across the full spectrum of taxpayers’ right to appeal.

Moreover, in an unequal bilateral relationship, the stronger partner has endless excuses to turn down a request from a weaker partner, including but not limited to, “insufficient confidentiality levels in the requesting state”, requirement of giving a notice to taxpayer before supplying the requested information, identification of sources of information in requested state, inability to provide information in requested format, lack of sufficient capacity with requested state tax administration, the alibi of fishing expeditions, questionable foreseeable relevance, client-attorney privilege, jeopardy of disclosure of “trade secret”, and “vital state interests”, time limitations with respect to past periods, dual criminality doctrine, group requests, and permission to use the information for other purposes (Durado 2013). Mostly, when these alibis are raised to frustrate an EOI request, it is in an asymmetrical bilateral setting.

5.2. EOI Regime—Automatic Mode

The OECD-sponsored BEPS project has been touted as a major milestone in recent economic history. The BEPS project was set up to develop an international framework to combat tax avoidance by the MNCs using tax base erosion and profit shifting tools. From a developing country lens, the BEPS project suffers from two fundamental flaws, namely, that: (a) it professedly concerns itself with tax avoidance, that is, legal reduction in tax liability; and (b) it is only bothered by the profits that get shifted to tax havens, and not from developing to developed countries or to their tax havens. To backstop the BEPS, inter alia, the MC was rolled out under which the CRS-based system of automatic exchange of bank account information was put in place. Infrastructural support was provided by the OECD and the GF in most respects. All participating jurisdictions were to sign a CRS Competent Authority Agreement, to be able to receive and transmit information. Expensive hardware and software were needed to be put in place at the administrative level to operationalize the CRS regime.

The CRS framework, from a developing country perspective, exhibits significant downsides. Firstly, several developing countries ended up extending amnesties in the run-up to first CRS transmissions in 2018. This is true of Pakistan, India, Indonesia, Malaysia, and other countries where ruling elites had benefited from offshore banking secrecy (Ahmed 2019). Secondly, developing countries have not been able to match data
with offshore account holders. This might not be a major problem for developed countries, but for developing ones it is a major migraine. Pakistan’s matching rate for first, second and third transmissions remained at around 30 percent.

Thirdly, offshore bank accounts that have been maintained, either in name-lenders or anonymized titles, do not get reported. Fourthly, past periods have not been covered by CRS transmissions, and only bank-balance of a cut-off date are supplied, which is tantamount to amnestying past felonious conduct. Fifthly, the CBI- and RBI-based illicit financial flows are not shared with developing countries—a major bug in the system. Sixthly, follow-up requests are not responded to by stolen wealth beneficiary jurisdictions by raising objections of all kinds that are spun around to frustrate and filibuster the engagement.

Seventhly, the CRS regime does not cover real estates, which harbor the bulk of illicit financial flows from developing nations. At times, internal laws and procedures are brought in as excuses to avoid transmitting actionable tax information. According to the GF, bank account information amounting to €9 trillion was exchanged in 2020. It would be interesting to know how much wealth belonging to developing countries has left them, and how much revenue they were able to generate with the help of transmitted information. Lastly, since tax havens are operated, directly or indirectly, by various developed countries that are the ultimate beneficiary of the illicit financial flows, the information required is checkered and incomplete in most significant cases. Cockfield asserts “... many countries, especially tax havens simply do not track these tax information sources so that they are unable to exchange this information when called upon to do so” (Cockfield 2017). In fact, it is a tax havens’ marketing pitch; they even don’t want this information to be collected on a reciprocal basis, so that their existing and potential clients do not get alerted and scared away.

In fact, it is feared that the CRS may even be exacerbating the situation in that it may be encouraging conversion of liquidity into real estate to avoid reporting (Ahmed 2021). Noked argues that possibly some tax evaders emptied their offshore financial accounts before the start of automatic exchange of information (AEOI) by buying real estate or other non-financial assets (Noked 2018). He further apprehends that since “the direct ownership of non-financial assets, such as real property, precious metals, artwork, and collectibles, is not reported to foreign tax authorities under ... CRS”, some “tax evaders may invest in offshore non-financial assets” (Noked 2018). In fact, many tax evaders may have “shifted their undeclared offshore financial assets to other tax evasion channels” to steer clear of CRS nexus (De Simone et al. 2020).

5.3. EOI Regime—Spontaneous Mode

Spontaneous EOI, though purportedly always covered under the UN MTC Article 26, has never yet been an influential mode. It has its inherent coincidence of wants and design problems. Developing countries’ tax administrations have mostly kept it on the backburner for obvious reasons, and to avoid allocation of scarce resources. One of its universal downsides is the onus to decide purely unilaterally that a particular piece of information would be useful for a counterpart jurisdiction. In a developed-developing country strain, the developed countries’ demand that the spontaneous EOI must be a reciprocal one, has rather kept it a low-performing EOI mode. Given the developing countries’ administrative capacity constraints, since the spontaneous mode of the EOI has not been fully geared up, the developing countries end up losing out on critical actionable tax information regarding revenue collection, in general, and capital flight, in particular. Ahmed contends that spontaneous EOI mode’s “efficacy is being tested in connection with RBI/CBI programs despite OECD’s advice to all states harboring such initiatives to share the particulars of their buyers enabling parent states to enforce laws”, and that while “OECD may be working on it, the countries sponsoring such programs are resisting sharing EOI under the framework on various excuses” (Ahmed 2021).

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22 www.oecd.org/taxtransparency/ (accessed on 1 June 2022).
5.4. EOI Regime—CbCR Mode

The policy push for the CbCR to kick in was provided, to a large extent, by the Extractive Industries Transparency Initiative (EITI) in 2002 (Vellar 2020). The CbCR mode obligated the MNCs to disclose to their home and foreign tax administrations complete financials, and business accounts for all countries on the OECD-devised template (Cockfield 2017, p. 1107). The unequal nature of the relationship between developed and developing countries particularly gets galvanized when it comes to the CbCR mode. Keeping in view the fact that infrastructural lay out involves investment amounting to a couple of million dollars to operationalize CbCR, for some countries it may be too expensive an affair. Even the countries that have made this investment, are significantly skeptical about its efficacy and the revenue returns. Developing countries have also expressed their reservations that stronger partners in the equation do not pass on the information as per commitment. Moreover, the data exchanged under the CbCR cannot be used directly; rather, algorithms need to be run on them, which is a challenge for most developing countries. In some developing country tax systems, the assessments framed based on the CbCR got quashed, as their judicial systems were neither tuned to nor were they ready to adapt and adjust to such neo-neocolonial infrastructures. Developed countries are into it by adopting a whole-of-government approach to being in the EU, OECD, or Council of Europe, which, of course, is not the case with developing countries as there is no political compact to underpin the tax compact. The developing country tax administrations’ commitments to an international EOI regime, sans any overlying political commitments, create complex problems of statecraft for them.

5.5. EOI Regime—Tax Examinations

Although coverage-wise simultaneous tax examination (STE) has never been considered outside the scope of the UN MTC Article 26, it has primarily remained a developed country fad. Under the STE mode, tax auditors of one jurisdiction travel to the other to undertake a simultaneous tax audit of the taxpayer, in which both “have a common or complementary interest” (Trepelkov et al. 2013). It has been averred that STE “may reduce the compliance burden for taxpayers by coordinating enquiries from different States’ tax authorities and avoiding duplication” (OECD 2017). It has also been posited that in the past, auditors could not go to other countries to obtain evidence; the principle of reciprocity and sovereignty made it impossible (Irnowo 2020). Falco opines that a “country might have to open its territory to foreign tax officials on every circumstance where there is a request for exchange of information”, and that this “might give rise to a sovereignty issue” (Falcao 2011, p. 610). This is a serious downside of the STE that makes developing countries wary of adopting it—apart from, of course, the cost considerations and the skepticism surrounding actual revenue generation.

6. EOI Regime—Normative Appraisal

The EOI regime was critically appraised at the conceptual and practical levels in the preceding two sections from an underlying neocolonial perspective. In fact, a wide-going skepticism has recently gripped the entire MTC-based and DTC-sustained international taxes system—the EOI regime being its integral part (Rocha 2017; Ahmed 2020a, 2020b, 2021; McGauran 2013; TJN 2016; Daurer and Krever 2014; Valderrama 2015; Byrne 1996; Hearson 2016; Eyitayo-Oyesode 2020; Abebe et al. 2012; Leduc and Michielse 2021). This cynicism has mostly been general in nature, not really delving deeper into and dissecting the issue into its elements, and appraising it on some normative principles (Ahmed 2021). It follows that the legitimacy or validity of a principle of law can be analyzed in terms of general canons of justice, equity, and fairness (Ahmed 2021). Similarly, the efficacy of a principle of law can be gauged from its outcomes for its potential affecters—individuals, groups, organizations, and nations. The legitimacy and efficacy of the EOI regime under UN MTC Article 26 can also be appraised on these very principles.
6.1. Normative Evaluation

To appraise legitimacy of the EOI regime from a developing country perspective, Rawlsian theory of justice can be inducted into the analysis. Rawls believes that “All social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage” (Rawls 2009). In the Rawlsian framework, with perfect equality absenting, the standpoint of justice is the standpoint of the least advantaged. Rawls asserts that all inequalities stem from an inequality anchored in pre-existing “legal regime” or “birth status”. Contextually, any system that breeds inequality due to one or both reasons, is, essentially, an unfair system and cannot, under any circumstances, be justified. Rawls holds that the only justifiable reason for inequality is the difference in “talent and effort”. He zeros in his attention on the government as a moderator to minimize all inequality, by putting in place institutional frameworks—rules, regulations, and institutions. Rawls argues that for justice to creep in, the institutional infrastructure of the government should step in as a leveler by differentiating those who need most from those who need less, with maximum resources being allocated to those who possess the minimum—the maximin principle. Amartya Sen comes up with a formidable critique of Rawls’ theory. Sen contends that the Rawlsian notion of institutional fairness is elusive in that people in adverse situations may not be able to convert legal principles into delivery of justice on the ground. He equates legal or institutional justice with niti and actual delivery of justice on ground with naya, which perfectly fits the underlying tone and argument of this study, that is, the UN MTC Article 26—howsoever good or bad it might be—has done neither any good to developing countries, nor to their efforts to mobilize sufficient funds domestically to lift their people out of poverty.

Frank Garcia, appraising fairness of the world economic order undergird by the prevailing international economic law from a Rawlsian prism, posits that “justification of international trade law is to see the disparities in market power and expertise between states as manifestations of the problem of inequality” (Garcia 2000, p. 1048). He goes on to stipulate that cross-border “Investment touches so many core social issues and host country responsibilities that it simply cannot be managed from the perspective of capital alone” (Garcia 2016). However, since the “key elements of the international economic law system favor the intensification of inequality at national and global levels” (Garcia 2017), the same “must therefore be structured so as to put the power of the developed country markets and knowledge at the service of the least developed countries” (Garcia 2000, p. 1048). Likewise, it was argued that “both exploitation within a country and unequal exchange between countries are caused by differential ownership of productive assets” (Ferguson and Veneziani 2020). Roemer reinforces the point by contending that if “the initial distribution is highly unequal because some agents robbed and plundered, then clearly there are grounds for viewing the ensuing exploitation as a bad” (Roemer 1988).

Contextually, when individual and government in Rawlsian framework are replaced with a developing country and the UN, respectively, one may be able to take a position that the niti part is there though not in perfect shape. However, Sen’s the naya part is almost completely missing from the EOI regime. Thus, the current EOI regime may not come up to Rawlsian standards of justice. Moreover, Sen’s critique of Rawls, when applied to the EOI regime, appears to capture only half of the problem. What it implies is that not only that the rules of engagement are manipulated at the formulation stage by developed countries, but also that those are continually being maneuvered, twisted, and optimized, at the expense of the weaker partners in the relationship. Simply put, the Rawlsian justice, as amplified by Sen and Garcia, is manifestly the missing component from the prevailing EOI regime—begging for correction by placing the maximin principle in the saddle.

23 In Sanskrit “niti” means “intent” and “naya” means “justice”.

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6.2. Structuralist Evaluation

The structuralist perspective implies that the EOI regime is the product of structural composition, and configuration of the prevailing international economic order. Since the international economic system is dominated by developed countries, which operate self-interestedly while dealing with counterpart developing nations, there ought to be no objections to the extant EOI framework with all its lopsidedness. Thus, for the EOI regime to be equitable, first, the underlying structural formation of the international system has to change and become equitable. True, but then either the UN should shun its egalitarian posturing, or be able to break the operating barriers—short of that, developing nations would continue to be trapped and plundered.

6.3. Axiological Evaluation

The EOI regime, and its potential fallouts for the developing countries, can also be evaluated from the Kantian lens of justice and axiology—the branch of philosophy which deals with adequacy and propriety of human action, and which has two competing sub-components. One, deontology, which judges moral validity of an action on the basis of its adherence to a principle, rule or duty. Two, consequentialism, which implies that the morality of an action ought to be judged with reference to its consequences and outcomes. In this connection, Kamm’s *Doctrine of Productive Purity*, provides a deontological prescription for delimiting the boundaries in which people could be allowed to act in a way that could harm others (Kamm 2007). In the same vein, her *Principle of Permissible Harm* stipulating that one may harm in order to save more if, and only if, the harm is an effect or an aspect of the greater good itself, provides another yardstick for the purpose (Kamm 2007).

Now, under none of these doctrines the EOI regime put in place by developed countries and koshered by the UN MTC Article 26 for harvesting useful tax information from developing countries, and in fact, at the latter’s expense, can justify itself. The wrong gets compounded because then developing countries are neither in a position to harvest actionable tax information with matching power (as they have none), nor can they utilize it to their own benefit. This makes the EOI regime brazenly selective and deviating from the principles of fairness, and miserably failing on the standard of consequentialism, as it is both intrinsically and instrumentally caused economic injustice and disparity—great affluence for a few in the developed world, and abject poverty for the denizens of developing world.

6.4. Constructivist Evaluation

The international taxes regime, as woven around the EOI regime, was inevitably cast in developed-developing country binary, which typically reflected the control of the lexicon, in which the latter could conceptually approach the matter and enter deliberations with the former in the critical area of international cooperation in tax matters. The capitalist state, capitalist, and capitalist non-state operator—the MNC and the ICC—systematically helped develop a complete system of language straddling on law, tax, accounting, trade, investment, and diplomacy, from the spell of which developing countries could never really come out (Ahmed 2020a). There has always been a meekly debate going on as to what to include in the EOI regime, and what to exclude from it at the UN level, but the real issue of its being essentially an intra-developed country affair was never allowed to be on the table as an agenda item; nor the fact that it was unilaterally beneficial to developed countries in terms of costs shifted and revenue generated. Bachrach et al. correctly suggest that the dominant actor in the relationship would prefer confining “the scope of decision-making to relatively ‘safe’ issues”, and that being logical and rational, would attempt to keep the real important issues off the agenda (Baratz and Bachrach 1962, p. 950). There appears little doubt now that agenda setting at the UN is done in a loaded meticulous manner.

Even at the UN, the developing countries squabbled and fought for the fringes and never for the core. The very title “Double Taxation Agreement”, which koshers the EOI regime, has an Orwellian tinge about it—it never was about double taxation; it always was about taxation rights on international business operations, and coercing weaker partners
in the relationship into accepting the terms and conditions that were not defendable on the canons of law, justice, and fair play. In the not too distant past, the EOI regime was abhorred by developed countries since it did not suit them. Afterall, the EOI’s inclusion in the LN MTC 1928 and the LN MTC 1935 was doggedly blocked and could only make its way into the LN MTC 1943, which majorly was the initiative of South American nations. Now it suits them, and systematically developing countries are made to look in greater demand for it (OECD 2014). At some level, the UN becomes the Ministry of Truth and the EOI regime a perfect Newspeak—making a fascinating read.

In fact, the developed world, by pitching up the UN MTC as a counter to the OECD MTC, practically monopolized the entire epistemological space for any independent, alternative thinking by developing countries—a false-flag operation of sorts. With this dimension of the matter in view, one is not sure of any benefits accrued to, but one is more likely to be certain of the costs inflicted by it on the developing countries. The brutal control and domination of one by the other is the control of ideas, concepts, and semantics.

6.5. Realist Evaluation

Arguably, the best analytical framework to interpret the prevailing EOI regime is the realist framework. Realism implies that all states, institutions, and individuals, being rational actors, pursue their interests without any moral compunctions. Contextually, it implies that the international system reflects naked power politics, also in the fiscal domain in its brute and raw form. It has been opined that the “extant international EOI regime exhibits strains and structurally-oriented undercurrents between developing and developed countries”, and that the “realist pro-developed country bias in the international taxes’ cooperation framework is historically embedded” (Ahmed 2021). D’Amato, critically dissecting the international treaty network, and weighing it on the Rawlsian principles (D’Amato 1975), pertinently questions: “Are all treaties to be kept? What about ‘unequal’ treaties—those imposed by the larger power upon the smaller? Does this deprive the citizens of the smaller power of their just share or equal liberties, all in the name of a concept that sanctifies treaties?” (D’Amato 1975). All these questions elicit a negative response with reference to the extant EOI regime. It has even been authoritatively asserted that “prevention of tax evasion and avoidance and of double non-taxation”, which is touted as “an important operational objective of tax treaties”, have in reality “been more likely to create—rather than eliminate—opportunities for tax avoidance” (Klemm and Liu 2021, p. 141).

Justice at international level is as important as at any other level. Contextually important, the UN SDG 16 pertaining to “peace, justice and strong institutions”, looks to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.” In turn, the SDG has 12 targets dispersed over 23 indicators for measurement by 2030. In the absence of corresponding measures being rolled out, enabling developing countries to finance these initiatives, the global goals would remain elusive. Albeit a dominating realist measure of the extant international EOI regime, there is no denial that for the international cooperation frameworks to be sustainable over a longer period, those must be just, equitable, and symbiotic—not only in appearance as is the current situation, but in reality, too.

7. Conclusions

The paper puts the UN MTC stand in the dock. In fact, by replacing a “country” as the unit of analysis with a “developing country”, it adds a new dimension to the appraisal toolkit of the EOI regime, in particular, and international taxes, in general. Upfront, it was premised that the OECD MTC-contrived, and the UN MTC-koshered EOI regime, was not efficacious enough to achieve the intended purpose for developing countries in asymmetrical bilateral settings. It was also asserted that the extant EOI regime was essentially a developed country imperative, and developing countries were yoked into it as
beasts of burden, making it a key pillar of the neo-neocolonial infrastructure. The roots of these stipulated phenomena are traced in time from the 1840s onwards, and in the process peeling off international political economy layers wrapped all over it. The UN’s going into withdrawal, and strategic scramble by the OEEC and OECD to take control of the LN work on international taxes, are brought out to reinforce the premise that throughout the past one hundred years, the EOI has been a developed country preoccupation.

The developing countries’ difficulties were brought out to hammer home the point that since their tax administrations were not adequately equipped to receive and purposely utilize the information exchanged, they are the reluctant partners in the relationship, “which was voluntary in appearance but compulsive in essence” (Ahmed 2021). The Rawlsian framework of justice is inducted into the analysis to evaluate the current EOI regime on high moral deontological, and consequentialist canons and political philosophy yardsticks, to conclude that it was an unjust and lopsided regime not tenable on any moral principles. It has been established that in unequal bilateral settings, the EOI regime’s efficacy becomes doubly questionable since it must operate in an anarchic world, where there is no supra-authority to act as final arbiter of disputes—mainly emanating from unilateral non-compliances by stronger partners in the equation.

Does it automatically flow from here that developing countries do not need an EOI regime? No: they do. They do realize that the EOI is an important aspect of cooperation on tax matters, particularly for combatting tax evasion and capital flight (UN 2021, p. 755). However, they are now attaining cognition of operating coercive reality and looking to demand a seismic shift in the EOI regime to make it symbiotic, equitable, and egalitarian—not merely inclusive. How? This is the time to agree on a common taxpayer identification number, which could be matched against the unique one provided by each government in a big database, that could readily identify whether the taxpayer had disclosed all of his or her sources of foreign income (Cockfield 2017, p. 1111). Going forward, the repository could be expanded to include a: (i) global incorporation number for all corporate entities; (ii) global tax identification number; (iii) global trust registry; (iv) global bank account number; (v) global beneficial ownership registry; (vi) global offshore intermediaries’ registry; and (vii) global registry of offshore financial service providers.

Likewise, an international repository needs to be created and maintained of the MNCs that tend to be more mobile internationally, and engage in aggressive tax planning (Cockfield 2017, p. 1112). The fact that several governments “have also expanded information reporting for entities owned by these individuals along with broader disclosures of foreign assets and transactions” (Cockfield 2017, p. 1112), would come in handy. It is also the time to devise an international withholding tax system mandating at source deduction of collection by the source state, and transfer and remittal of the collected tax amounts to the residence states, or the ones which are rightfully entitled to receive them. Similarly, the UN may look to evolve consensus for an early finalization of International Tax Convention, duly enforced by an Intergovernmental Tax Organization under the UN framework. The UN’s penchant to blindly validate and baptize, if not all, most of what developed countries churn out unilaterally or multilaterally, needs abatement and reversal. These measures, if agreed upon and rolled out soon, would help establish a factually equitable international taxes system capable of placing adequate resources at the disposal of developing countries for achieving the SDGs in the absence of which these continue to remain unfunded mandates.

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