Anand Desai's comments (only for myself) responding to the U.S. Treasury's October 11, 2023 input request on the draft OECD/G20 Inclusive Framework Pillar One Amount A Multilateral Convention

Thank you for soliciting public input and providing that all comments received will be made public. This "sunlight is the best disinfectant" policy furthers the public-participation goal of the Administration's "equity" executive order and hopefully will lead to more public confidence in the tax system, broader input from people assured their ideas will have a fair chance with you and others who may take an interest, and the best possible outcome.[1]

Please consider:

1) Is the Convention consistent with Code and familiar income-tax treaty provisions regarding creditability of foreign taxes?

    a) Including any provision for "excess profits taxes".

    b) Does creditability under the Code and current treaties depend on transfer-pricing principles? See CCA 201349015.

        1) If so, are the pricing and creditability principles required by the Code and/or treaties, or something Treasury can change?

    c) Are the Convention's provision for and "relief" for foreign taxes together a "soak-up tax"?

        1) Is IRS Notice 2023-80's treatment of foreign taxes keyed to U.S. liability relevant?

2) Is Pillar One a trade for removal of potentially discriminatory foreign taxes that is much more generous than established response models? Compare section 891 and WTO countermeasures.

3) Which branches of government should participate in decisions about the Pillar One convention?

    a) Does the Administration plan for the House to participate? Compare the United States-Taiwan Expedited Double-Tax Relief Act, H.R. 5988, S. 3084, regarding a foreign tax relations matter that may not quite fit the typical treaty mold.

    b) Would the Convention require the United States to impose a tax beyond what is due absent the convention? Consider its "relief" and "amounts arising" articles. If so, how does that relate to the Constitution's "Taxing" and "Origination" clauses? Compare "On the Constitutionality of Tax Treaties", Kysar, 2012.

        1) Presently taxpayers can require a trial in court in many cases, and by jury in some cases. Would U.S. exactions due to the convention be subject to a right to trial by jury and the constitutional provisions regarding courts and the other branches' relationship to them?[2]

        2) And, as with each separation-of-powers point, related "nondelegation" considerations?

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1 I found the Convention very dense and had difficulty finding it at all initially. I also found a relatively easy to understand "overview" and "factsheet" at the OECD web site. The Convention and request appear to focus on "Amount A" of Pillar One of a larger project and therefore so does my response. Providing a proposed rule more directly and accompanying it with an explanation like with regulations would make the process even more accessible.

2 If dispute resolution under existing treaties is more administrative, would it be relevant whether those treaties' invocation is elective? See 2006 U.S. Model Technical Explanation to Article 1, Paragraph 2.

c) If the Convention subordinates U.S. taxes to foreign taxes more (whether definitionally or substantially in dollar volume) than the Code envisions and/or Congress considered in enacting and maintaining the Code in light of the practice of tax treaties, would that leave the Code as more of a starting point as to taxes, and stand in tension with the Constitution's taxing or origination clauses?

d) If the Convention provides for a soak-up tax, or even increases domestic tax collection to provide for a foreign tax, does that turn from exceptions to a tax, toward taxing and spending from the United States' perspective? If spending, would that relate to the "Spending" and "Appropriations" clauses?

4) Logic and fairness of Convention's scope

Pillar One's revenue threshold seems far beyond familiar progressive rate structures' familiar concessions to moderate standards of living and small-business growing pains or administrability concerns. And its industry exclusions and net margin threshold (which could be at least as much about industry and business model as about success and advantage, perhaps better defined as enduring rates of return to capital) further narrow its coverage. So a stock screener might enable a good guess at who and where would be covered, a government might make a very good guess, and the scope would likely persist. Moreover, though OECD materials have mentioned "user contributions" and "marketing intangibles", it's not obvious to me that simply high demand for wholly US-developed technology—or a business such as healthcare whose profitability is largely US-environment driven—wouldn't fall under the definitional umbrella, while other businesses aligning with cited economic issues might be excluded.

a) Does the Pillar One convention, and/or any parallel domestic Pillar One tax contemplated, satisfy the "Uniformity" clause?

b) How about equal protection principles under the Fifth Amendment? See Wal-Mart Puerto Rico, Inc. v. Zaragoza-Gomez, 174 F. Supp. 3d. 585, 645-647 (D.P.R. 2016).

5) Permissibility of Convention's regime

a) Do the sourcing and nexus articles authorize a jurisdiction to claim revenue under the Convention without the taxpayer having substantial, commensurate, or even voluntary involvement with that jurisdiction? See "Initial Perspectives on Wayfair," The Tax Adviser, Spiegel, 2018 ("purposeful availment," due process, and nexus, including cases in the international context); Income Tax Nexus Limitations in a Post-*Wayfair* World, Garrett, Rutherford, Schulte, and Coles-Williams, 100 Tax Notes State 727, May 24, 2021; cf. Commissioner v. Piedas Negras Broadcasting Co., 127 F.2d 260 (5th Cir. 1942).

b) Could Pillar One tax apply in the absence of net income to the activity as defined under the Code? On a basis that differs substantially from income? And/or the absence of net income in any broader sense (while still triggering the financial-accounting thresholds, as there are various book-tax differences and also changes in book treatment over time to refine investors' understanding)? If so, would that constrain qualification as an "income tax" (if that is necessary)?

c) Particularly if the US does not impose its own Pillar One tax, and/or if Pillar One would result in incremental tax on behalf of foreign jurisdictions, would the convention stand in

tension with the Exports Clause? See United States Shoe Corp., 523 U.S. 360 (1998) (involving an ad valorem "Harbor Maintenance Tax").

6) Do the Convention's provisions for "segments" draw in complex judgment calls about transfer pricing and securities-law disclosure principles? Cf. Exxon Corp. v. Dept. of Rev. of Wisconsin, 447 U.S. 207 (1980) (state apportionment versus separate-accounting considerations).

   a) Could they influence decisions about how to provide disclosures to investors?

   b) Would blending what might otherwise be segments sometimes eliminate Pillar One tax or decrease it, and sometimes increase it?

7) What is the likely U.S. net tax revenue impact, net taxpayer burden, and benefit to each foreign country of Pillar One, both with and without any related legislation the Convention may implicate (see Article 4)?

   Allegedly U.S. companies make up 58 percent of the roughly $100 billion in "profits available for redistribution" under the Convention's Amount A. "The Long Road to Pillar One Implementation," Borders, Le Pouhaër, and Parrinello, HAL OpenScience, 2023, cited in testimony to Congress by Adam N. Michel. Tens of billions of dollars per year is material to our national budget, international competitiveness, and numerous robustly debated domestic, international, and tax-relief proposals. The IRS, the Treasury Tax Expenditures Budget, and the Joint Committee on Taxation estimate the impact of many, and considerably smaller, proposals.

   a) Would agreeing to the Convention without approval of parallel domestic legislation unilaterally give up valuable taxing rights and put the House in a bind?

8) Easier steps toward international tax efficiency, fairness, and potentially more revenue for countries where businesses operate might include:

   a) Increase transparency, at least in anonymized and aggregated ways, about transfer pricing reporting bases, administrative resolution practices, and patterns of large, repeated, and systemic attribution of extremely large amounts and rates of profits to jurisdictions where securities disclosures of material value drivers and risks, economic news, and sometimes sheer small populations indicate employee and asset productivity many times America's is unlikely and minimal taxation is common. Again, "sunlight is the best disinfectant." Especially backed up with a sizable enforcement budget. And with confidence money the public helps collect will be responsibly spent and help reduce the collective tax burden.

   b) Set an example for simple, reliable and transparent relationships by making Section 934 principles more comprehensive. This would reduce incentives to shrink or misallocate a pool of profit under existing law, while preserving incentives for taxpayers to expect accurately applied laws and cost-effective government.

   c) Make similar expectations a baseline for maintaining comprehensive income tax treaties.

/s/ Anand Desai
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