INTERNATIONAL COOPERATION ON TAX MATTERS AT THE UN

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On 15 November 2023, the United Nations General Assembly decided to establish a member-state-led, open-ended and ad hoc intergovernmental committee for the purpose of drafting the general terms of a UN Framework Convention on international tax cooperation (hereinafter, the "2023 UN resolution").[1] This decision followed the UN Secretary General Report of 26 August 2023,[2] which outlined three options to address a more inclusive and effective international tax cooperation at the UN in response to the previous UN General Assembly Resolution 77/244 that in turn recognised the importance to increase and enhance international tax cooperation worldwide, especially for developing countries.[3]

The reactions to the UN 2023 resolution were to some extent predictable. On one side, there was evident scepticism, possibly influenced by the dominant narrative —supported by those who subscribe to it— that has attributed control to the OECD over the developments of international tax standards for decades, or simply by the fact that swapping roles regarding who governs the making of international tax law is simply not enough.[4] On the other side, there was optimism, especially from those who perceive the 2023 UN resolution as turning point in the history of international tax policy, capable of shooting down the OECD's historical dominance of the international tax agenda, which has disregarded in many occasions the genuine interests of developing nations.[5]

This article adopts a moderated stance, suggesting that whilst it is still premature to speak of a turning point in history, the 2023 UN resolution represents an extremely important recognition of the need of counterbalances in the dynamics of powers in international taxation. It also highlights the significance of flexibility as a policy strategy that may foster a more inclusive international tax cooperation in the future.

CENTRALISED TAX POLICY DEBATE AND THE NEED FOR COUNTERBALANCES

The centralisation of the international tax debate in the hands of the OECD is not a secret to anybody. Indeed, for decades the OECD has been moving towards a more active role in the drafting and enforcing of what we could denominate “international tax standards”. However, this movement has been exponentially incremented during the last decade.

Let me take the example of the ambitious Base Erosion and Profit Shifting Project (BEPS) launched in 2013. The BEPS project, unlike previous OECD work, was not only characterised by best practices and general recommendations for countries. Indeed, it showed two very distinctive features. First, the inclusion of the so-called “minimum standards”. That is, among the fifteen different actions proposed in the BEPS project, the OECD included a baseline for countries adhering to it, giving them no choice but to implement these measures as a sunk cost (or perhaps benefit from the OECD perspective) to cooperate internationally. Second, the invite for countries to adhere to a new international convention (so-called “multilateral instrument or MLI”) to address similar matters that countries would historically address with the use of double tax conventions (DTCs), although now from a multilateral perspective.

The BEPS minimum standards as well as the MLI did not only set up the agenda of the international tax debate for the next years, but also, they were a perfect laboratory for testing the dynamics of powers at the international level. In other words, they served to determine the level of country adherence to the OECD narrative in tax matters, paving the way to something bigger. In fact, only a few years after the launch of the OECD BEPS project, the OECD was announcing an even more ambitious aim, namely the two-pillars project to address the taxation of business profits in cases of absence of physical presence in a determined country (Pillar 1), and the establishment of a minimum effective corporate income tax rate of 15% to address global corporate income tax competition (Pillar 2). However, the difference between the two-pillars approach and its predecessor (BEPS) is radical, because the two-pillars approach does not appear as a set of generic standards for countries to decide about their implementation but rather as a carefully designed narrative for countries to adopt, regardless of the costs associated to it.

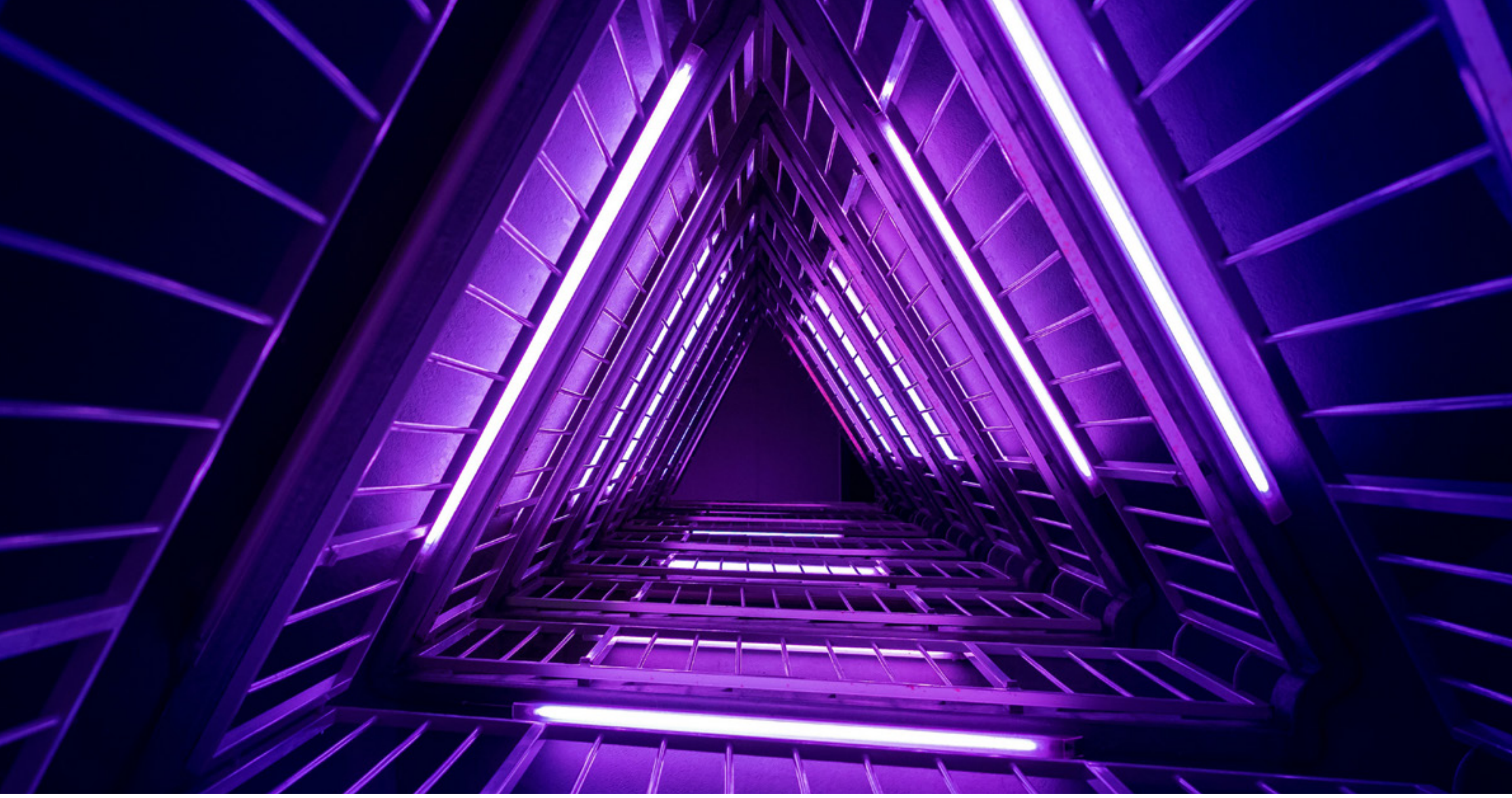
Let me use the OECD Pillar 2 to illustrate the above. Pillar 2 is presented as an altruistic measure aimed to eliminate the negative effects of corporate income tax competition through a set of domestic rules that countries are supposed to decide implementing (or not) but with a special caveat: If they do not do it, there is a chance of losing revenues or “leaving money on the table”, as constantly repeated in the international fora. This is at least how the OECD has promoted the “revenue narrative” of Pillar 2 among countries. However, and beyond the technicalities of the rules and the valid criticism that this author and others have posed on the different arguments regarding the implementation of a minimum corporate tax globally, the important question here is simpler: How did the OECD move from recommending standards to setting up policies for countries around the world? What did really change in the decision-making process of international taxation? Probably nothing, except for one small thing, that is, the existence of alternatives or counterbalances in the dynamics of power at the international tax level. In other words, the OECD monopolistic position was simply reinforced during the last decade —from BEPS to the two-pillars approach— with almost no friction or counterbalances. Put simply, suddenly the OECD became an international tax rule maker simply because the rest of the world allowed it.

Bearing this in mind, therefore, the fact that United Nations General Assembly has decided to establish a member-state-led, open-ended and ad hoc intergovernmental committee for the purpose of drafting the general terms of a UN Framework Convention on international tax cooperation is not a simple anecdote, but rather an expected reaction to a much-needed decentralisation in the current international tax policy debate. This does not mean that a UN Framework Convention will solve all the issues that countries face when dealing with cross-border issues — far from it— but it provides a strong signal for countries to endorse a more active and fruitful global tax cooperation.

Some may validly argue that using well-settled international organisation such as the UN for this purpose may generate a nil impact and be seen as a simple swap in the current hegemony of the international tax debate in the hands of the OECD. To certain extent, this is true. However, it is the role of the whole international tax community to create the space for an independent, more democratic and participative forum for global tax cooperation, and that should start from renouncing the temptation to monopolise the international tax debate, offering the international community a new, more transparent, and truly inclusive tax governance. In other words, although the establishment of a member-state-led, open-ended and ad hoc intergovernmental committee may not satisfy all tastes right now, it is a necessary step to avoid a tax world dominated by acronyms and policies created in a room in Paris, and legitimised in a forum where all countries are invited to listen (i.e., the so-called "Inclusive Framework").

FLEXIBILITY: THE MISSING CORNERSTONE IN INTERNATIONAL COOPERATION

Perhaps one of the forgotten —although most important— aspect when discussing international cooperation is the concept of flexibility. That is, the idea that countries may have the possibility to accommodate the so-called "international standards" to their own social, political, and economic realities. In other words, offering countries the opportunity to address global tax concerns and to cooperate, but without renouncing entirely to their own sovereign interest.



Let me take again the example of the implementation of a global minimum effective corporate income tax rate to illustrate the forgotten flexibility in the current debate. If we consider the domestic implementation of the OECD Pillar 2 among countries, very little has been said regarding the impact that such a measure will have on the foreign direct investment (FDI) in some developing countries, or on the pressure that some of these countries will face when switching from corporate income tax competition to other forms of tax competition, or even non-tax competition, opting for the wrong policies that end up affecting their own sovereign interest6. On the contrary, everything seems to be designed in such a way that countries have no other option than to accept it as it is, after all "Paris made it for you". For example, let me assume a developing country that currently discusses the strategic implementation of the OECD Pillar 2 in its domestic legislation, particularly the so-called "QDMTT or Qualified Domestic Minimum Top-Up Tax". It would not be surprising to me that, from a strict policy perspective, this hypothetical jurisdiction may want to add some flexibility to the implementation of a QDMTT, for instance, making the QDMTT contingent to the application of an IIR in the country of the Ultimate Parent Entity (UPE) or Intermediary Parent Entity (IPE). This may benefit the international position of this country since the QDMTT will be part of its legislation making it compliant, although it will not be triggered when investment comes from countries without an IIR. In simple words, that hypothetical country may remain attractive from a pure investment perspective, while proving to be compliant with the new international standard. Nevertheless, implementing such a "targeted" or "flexible" QDMTT might prove to be risky since the OECD has repeatedly sustained that a domestic minimum tax must be "qualified", and so far, we do not know neither whether such level of flexibility might amount to disqualify this valid policy strategy nor who will ultimately assess this (i.e., the "Q" in the acronym QDMTT).

One can go even further and think: What if a given developing country does not want to implement any of the proposed OECD rules, but rather simply modify its domestic laws to ensure that all companies in that country pay a 15% ETR of Corporate Income Tax? Simple logic should support this. After all, the original aim of the OECD Pillar 2 rules was to push countries to increase their ETR domestically. Therefore, if they do it through a set of complex rules or just modifying slightly its own Corporate Income Tax system should be indifferent. However, that hypothetical country, even though willing to accommodate its domestic law to the new standard of minimum corporate income taxation —although without the complexities added by an IIR, UTPR, or QDMTT— may face pressure from its own stakeholders who will have to incur any way into the ETR calculations under the OECD rules in that given country to avoid the OECD rules in others. In simple words, flexibility has been restricted since the moment the OECD Pillar 2 rules were presented not as voluntary standards but rather as pre-drafted legislation for countries to implement.

It is therefore extremely important that the UN does not disregard the current and past OECD mistakes and addresses international cooperation with a level of flexibility that recognises the inherent differences among countries, both between developed and developing countries, as well as among developing countries themselves. After all, a truly inclusive global tax cooperation is impossible with a policy of impositions that leave no scope for adaptability.

LOWERING EXPECTATIONS BUT REMAINING OPTIMISTIC

It is difficult not to be overly optimistic when the international community seems to have —finally— reacted to the OECD decades of a self-attributed mandate to design the international tax system as we know it. However, it is important to remain realistic and keep expectations low since nobody can guarantee that simply swapping roles from the OECD to the UN will become the holy grail. Yet, two key factors can ensure success in the long-term. First, understanding the momentum. That means, both the UN and the newly formed member-state-led, open-ended and ad hoc intergovernmental committee for the purpose of drafting the general terms of a UN Framework Convention on international tax cooperation should bear in mind that if the process fails, there will not be a second chance. Therefore, undertaking a serious work — with the commitment of countries worldwide— is fundamental. Second, promoting flexibility as a core to achieve inclusivity in this process. Indeed, as noted in this article already, a truly inclusive global tax cooperation is impossible without recognising the inherent differences among countries, including their own sovereign interests. Therefore, learning from the current developments on international taxation can serve a crucial guidance to avoid similar mistakes that end up deterring countries from cooperation. The initial step has been made, now it is time to permanently join the show.

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[1] UN General Assembly, 78th Session, Second Committee, Macroeconomic policy questions: promotion of inclusive and effective international cooperation on tax matters at the United Nations/ Nigeria: Revised Draft Resolution, A/C.2/78/L.18/Rev.1, 15 November 2023.
[2] Report of the Secretary-General on the Promotion of inclusive and effective international tax cooperation at the United Nation, General Assembly, Distr.: General, A/78/235, 26 August 2023.
[3] Resolution adopted by the General Assembly on 30 December 2022, A/RES/77/244, Promotion of inclusive and effective international tax cooperation at the United Nations, Distr.: General, 9 January 2023. See also, L. Parada, Response to the UN Resolution on A/RES/77/244 on Promotion of inclusive and effective international tax cooperation at the United Nations, available at https://financing.desa.un.org/inputs and https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4452268
[4] See, e.g., R. Christensen, UN-doing the OECD's Global Tax Dominance, Personal Blog, 25 November 2023, available at https://phdskat.org/2021/11/25/un-doing-the-oecds-global-tax-dominance/ See also, e.g., R. Murphy, Would the UN do a better job on international tax than the OECD, Funding the Future, Blog, 26 November 2023, available at https://www.taxresearch.org.uk/Blog/2021/11/26/would-the-un-do-a-better-job-on-international-tax-than-the-oecd/
[5] See, e.g., M. Hearson, A New UN Tax Convention—How will it change Global Tax Governance, ICTD Blog, 1 December 2023 (speaking of a "historic resolution"), available at https://www.ictd.ac/blog/the-new-un-tax-convention-a-critical-juncture-for-global-tax-governance/#:~:text=Last%20week%2C%20the%20United%20Nations,supported%20by%20civil%20society%20activists; see also, T. Ryding, Historic tax vote paves the way for a UN Tax Convention, Press release, EURORAD, 22 November 2023, available at https://www.eurodad.org/historic_tax_vote_paves_the_way_for_a_un_tax_convention
[6] See L. Parada, Global Minimum Taxation: A Strategic Approach for Developing Countries, Columbia Journal of Tax Law (2024, forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4280669 See also, e.g., R. de la Feria and G. Maffini, The Impact of Digitalisation on Personal Income Taxes, British Tax Review 2, (2021).