

## GLOBAL TAX GOVERNANCE: LEGITIMACY AND INCLUSIVENESS

### Tax Research Network Cambridge University

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The text of this keynote speech is to some extent based on my inaugural lecture on 30 June 2023, where I accepted my Chair on Tax Governance at Leiden University. In my inaugural lecture, I concluded that international taxation nowadays is not only about the technical rules. The political developments need to be taken into account. In order, to participate in the international tax law making process and to introduce tax rules, countries should not only have technical knowledge, but also resources and political will to change the rules.

In light of the goals of this research network I will be focusing on this speech on my path to research, my research questions and some conclusions of the GLOBTAXGOV research project funded by the European Research Council. With this, I hope I can motivate other scholars to find their own research path.

#### Introduction

Since February 2018 when I started my GLOBTAXGOV Project, I am searching for the conditions under which a model of global tax governance can be feasible and

legitimate for both developed and developing countries. In order to so, I have used theories of international relations and political science to address global tax governance.

To define global Tax Governance, I have used the definition given in 2016 by Thomas Rixen and Peter Dietsch, in their book 'Global Tax Governance: What is Wrong with It and How to Fix It'. They defined global tax governance as *consisting “of the set of institutions governing issues of taxation that involve cross-border transactions or have other international implications. This definition implies that global tax governance need not, but could, involve a **full or partial shift of the power to tax, that is, the right to impose taxes on citizens, to the international level**”*<sup>1</sup>.

As I will further elaborate below, since the 2008 financial crisis, the Organization for Economic Cooperation and Development (OECD) with the political mandate of the G20 have introduced standards, first the standard of exchange of information, thereafter the BEPS Project and the BEPS 4 Minimum Standards to tackle tax avoidance by multinationals, and more recently the proposals to address taxation of highly digitalized business and to introduce a global minimum tax rate to tackle tax competition. These standards are applicable to OECD, G20 and non-OECD, non-G20 countries including developing countries.

In my view, when addressing these international tax developments from the perspective of global tax governance and using the definition of Rixen and Dietsch,

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<sup>1</sup> Dietsch, P., & Rixen, T. (2016). Global tax governance: What it is and why it matters. *Global Tax Governance: What Is Wrong with It and How to Fix It*, p.3.

it means then, that there is a shift of the power to tax from countries to international organizations (the OECD) and political forum (the G20).

Before addressing the international and EU political developments that have brought us to discuss global tax governance, I will be addressing my path to research.

### **1. The research: How did I get here?**

In short, my current research addresses global tax governance using theories of comparative law, political science and taxation. In the following paragraphs I will address how these theories can be useful to study tax governance.

My interest in legal transplants and comparative law theory started while carrying out my PhD at the University of Groningen, under the supervision of Prof. Irene Burgers. In my PhD I relied mainly on Watson's definition of legal transplants - "As the moving of a rule or a system of law from one country to another, of from one people to another"<sup>2</sup>.

In my PhD I investigated how the concept of leasing was transplanted from the United States to France, the Netherlands and Colombia, and whether there were differences in the rules upon transplantation. For this purpose, I used comparative legal theories such as Watson, Sacco, Nelken, among others to understand why countries use legal transplants in taxation. Furthermore, I used legal culture theories to explain the reasons for the differences in the rules. I did this in 4 different branches of law, tax law, private law, accounting law and banking law.<sup>3</sup>

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<sup>2</sup> Watson, A. Legal transplants, 1974, Edinburgh. Scottish Academic Press Ltd. p. 21

<sup>3</sup> See Mosquera Valderrama, I.J. Leasing and Legal Culture - Towards consistent behaviour in tax

In my view, legal rules can be borrowed by countries either from an international organization, or from one country to another, but the legal system and the legal culture may have an influence on the way that these rules change upon transplantation. Using the words of a comparative legal scholar Örüçü, legal culture provides the local fine tuning to explain why rules change upon transplantation.<sup>4</sup> This PhD raised my interest to use legal transplants and legal culture in taxation.<sup>5</sup>

Following the 2008 financial crisis, I decided to study the introduction of the new (at that time) standard of transparency and exchange of information<sup>6</sup>. Since 2012, I am also researching the content of the BEPS Project and the feasibility of this project to tackle aggressive tax planning in developing countries. In my articles, I have argued that one size does not fit all, and that the standards of transparency, exchange of information and the BEPS Project, should take into account the differences among countries (developed vs. developing countries), among regions (Africa with also sub-regions, Latin America, Central America, and Asian), as well as the differences among legal systems and legal cultures.

In my view, more research is needed on how these standards operate within the countries' legal systems, legal cultures and geographical (regions and sub-regions)

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treatment in civil law and common law jurisdictions, dissertation, 2007, at 301.

[https://www.researchgate.net/publication/41937226\\_Leasing\\_and\\_legal\\_culture\\_towards\\_consistent\\_behaviour\\_in\\_tax\\_treatment\\_in\\_civil\\_law\\_and\\_common\\_law\\_jurisdictions](https://www.researchgate.net/publication/41937226_Leasing_and_legal_culture_towards_consistent_behaviour_in_tax_treatment_in_civil_law_and_common_law_jurisdictions) .

<sup>4</sup> This concept is borrowed from comparative law and it is described by Örüçü as follows: "If the old models are abandoned with 'optimistic normativism' while new legal models are looked for, a transplanted legal system not compatible with the culture in the receiving country, without the appropriate transposition and tuning, will create only a virtual reality. In answer to the question, how do legal ideas, institutions and structures find their way from one location to another, it has been aptly put that 'laws do not have wings'. This alone highlights the importance of those who move the law and help in its internalisation, and hence, what I call 'tuning'". E.Örüçü, "Law as a transposition" in International and Comparative Law Quarterly, Number 51, 2002, at 208.

<sup>5</sup> Mosquera Valderrama, I.J. [Interaction of Tax Systems and Tax Cultures in an International Legal Order for Taxation](#) Diritto e Pratica Tributaria Internazionale, CEDAM, Vol. 5, No. 2, pp. 841-867, 2008

<sup>6</sup> Mosquera Valderrama I.J. (2010), EU and OECD Proposals for International Tax Cooperation: A New Road?, Tax Notes International 59(8): 609-622. Available at <https://scholarlypublications.universiteitleiden.nl/handle/1887/62381>

context. I did some of this research in cooperation with other colleagues within the framework of the Project Sustainable Tax Governance in Developing Countries Through Global Tax Transparency (DeSTaT) funded by the government of Norway.<sup>7</sup>

Following these articles and the DeSTaT project, one question that I kept asking myself, is what is the validity of the standards of transparency, exchange of information, and the BEPS Action Plan and Project vis-à-vis developing countries? but then, validity in terms of what?

In order to answer this question, and in the midst of the discussions of the content of the BEPS Project, I started with an article where I analyzed the validity and feasibility of the BEPS Project vis-a-vis developing countries. However, the validity was still a vague concept, so I researched theories in political science to define legitimacy. I used Scharpf and Schmidt<sup>8</sup> concepts of Input/Output (Scharpf) and Throughput (Schmidt) legitimacy which have been used in other areas than tax law. In short legitimacy provides for a framework to evaluate the participation and representation in decision making (i.e. input legitimacy), the outcome being useful for all stakeholders (output legitimacy) and the process being transparent, inclusive, accountable and open (throughput legitimacy).

I have used these concepts when explaining the conditions for international tax law making from the OECD, G20 and the EU to be legitimate (i.e. validity) vis-à-vis non-

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<sup>7</sup> Some articles Mosquera Valderrama I.J., et al. The Rule of Law and the Effective Protection of Taxpayers' Rights in Developing Countries, WU International Taxation Research Paper Series 2017(10)

<https://scholarlypublications.universiteitleiden.nl/handle/1887/62320>

Mosquera Valderrama I.J., Mazz A., Schoueri L.E., Quiñones N., West C., Pistone P. & Zimmer F. (2018), Tools Used by Countries to Counteract Aggressive Tax Planning in Light of Transparency, *Intertax* 46(2): 140-155

<https://scholarlypublications.universiteitleiden.nl/handle/1887/62317> See link to the project

<https://www.jus.uio.no/ior/english/research/projects/global-tax-transparency/>

<sup>8</sup> V. Schmidt, (2012) Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput', 61 *Political Studies*, at 17.

OECD, non-G20/ non-EU countries. By using the concept of legitimacy, I have been able to address some of the GLOBTAXGOV research questions. I have been also able to question the role of the OECD, G20 and the EU in international tax law making in conferences/seminars with different audiences such as academia, civil society, EU Institutions, OECD, World Trade Organization, World Economic Forum, the United Nations, among others.<sup>9</sup> In order to contribute to open science, I have made all publications/ presentations available open access in the blog GLOBTAXGOV.

The following paragraphs will explain the international and EU political developments that have made that nowadays we cannot address taxation without addressing the political dimension of it. Since we are in a tax community, these developments will be explained very shortly. For more on these developments, please see the text of the inaugural lecture available in the blog GLOBTAXGOV.

## **2. International Political developments**

Since the 2008 financial crisis, the Organization of Economic Cooperation and Development (OECD) with the political mandate of the G20 have introduced international tax standards, first standard of exchange of information, thereafter the BEPS Project including 4 Minimum Standards, 10 Best Practices and 1 Multilateral Instrument to tackle aggressive tax planning by multinationals.

As I mentioned before in this speech, in my view, when addressing the introduction of these international tax standards from the perspective of global tax governance

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<sup>9</sup> Presentations available open access at <https://globtaxgov.weblog.leidenuniv.nl/presentations-2/>

and using the definition of Rixen and Dietsch, it means then, that there is a shift of the power to tax from countries to international organizations (the OECD) and political forum (the G20).

The OECD claimed they did so with the political mandate of the G20 and by inviting non-OECD, non-G20 countries to participate in these initiatives, developed and developing countries will benefit since exchange of information and less tax avoidance will raise more revenue by countries. This revenue could be used for public services (health, education, etc.) but also to contribute to fairness of taxation vis-à-vis citizens who were suffering from the consequences of the financial crisis. In short, more transparency meant more money for countries to overcome the problems created by financial crisis.

In both cases, the result is the OECD with the political mandate of the G20 introducing international tax standards that non-OECD, non-G20 countries are implementing throughout their membership to networks or by signing multilateral instruments/conventions. For illustration purposes.

- For the standard of exchange of information, the Global Transparency Forum with 160 tax jurisdictions<sup>10</sup>, the endorsement of the Common Reporting Standards, and the signature of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.
- For the BEPS Project, the BEPS Inclusive Framework with 143 tax jurisdictions (as of September 2023)<sup>11</sup> and the BEPS Multilateral Instrument signed by more than 100 tax jurisdictions.

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<sup>10</sup> <https://www.oecd.org/tax/transparency/who-we-are/members/>

<sup>11</sup> <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>

Countries participating in the Global Transparency Forum and the BEPS Inclusive Framework have also agreed to be reviewed by their peers (peer review) on their commitment to these standards. However, unlike treaties where you sign the treaty and it has an effect for both/or multiple parties, the BEPS 4 Minimum Standards are regarded as soft law since these Standards are not binding for countries. So in principle countries are not required to implement these standards, but they do so, why? These questions has been addressed in several articles published in the framework of the GLOBTAXGOV project, and also it will be addressed in a forthcoming article with a case study.

Due to the increase of digital business prior to the COVID 19 Pandemic, countries decided to address this issue. After several proposals from the OECD Secretariat, OECD countries, non-OECD countries<sup>12</sup>, in 2021, 137 of the 141 countries<sup>13</sup> belonging to the BEPS Inclusive Framework (at that time) reached a political agreement to introduce measures to tax highly digitalized business (Pillar 1) and to introduce a global minimum tax rate of 15% (GloBE Pillar 2). The number has now increased to 139, since the inclusive framework has also increased to 143 countries jurisdictions.<sup>14</sup>

The legitimacy of all of these political developments by the OECD, G20 and the BEPS Inclusive Framework has been (and still is) questioned by scholars, civil society, countries, regional tax organizations and regional organizations.

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<sup>12</sup> See Mosquera Valderrama. I.J. Trade, Digitalization and Taxation. The Elgar Companion to the WTO. Eds. J. Chaisse and C. Rodriguez-Chiffelle. Forthcoming.

<sup>13</sup> Except Nigeria, Sri Lanka, Pakistan and Kenya. <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>

<sup>14</sup> <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>



These questions on feasibility and legitimacy are even more relevant now in the midst of the discussions taking place since November 2022 at the United Nations level. These discussions have been initiated by Nigeria with the support of some African countries. These countries submitted a proposal for a draft resolution at the UN Second Committee on the “Promotion of Inclusive and Effective International Tax Cooperation at the United Nations” by means of developing a framework or instrument. This resolution has been approved by the General Assembly in December 2022. This resolution gives the United Nations, a more important role in the setting of international tax standards.

Following this resolution, input has been sought (i) on the content of this framework or instrument and (ii) on the role of the United Nations to achieve inclusive and effective international tax cooperation.<sup>15</sup> A virtual consultation with UN countries and other stakeholders took place end May 2023. The report addressing this input with 3 proposals has been published in August 2023.

This is not the first time; efforts have been made to give importance to United Nations. It was proposed at the 2015 Addis Tax Initiative (to give to the UN Tax Committee, an intergovernmental body status). The proposal was rejected by some developed countries (at that time) due to the predominant role of the OECD in tax matters.

Given the political developments and the voice raised by scholars, civil society and countries (unilaterally or in regional setting), this new development at the United

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<sup>15</sup> See for instance our input with D. Broekhuijsen and E. Arik <https://globtaxgov.weblog.leidenuniv.nl/2023/03/09/input-to-the-un-public-consultation-on-promotion-of-inclusive-and-effective-tax-cooperation-at-the-united-nations/>

Nations, could shift the decision-making process from the OECD-G20 towards the United Nations. But of course, we will have to wait and see.

Since my inaugural lecture, two developments have taken place which also illustrate the political dimension of international tax law making.

In July 2023, 138 of the 143 jurisdictions have committed to the standstill (freeze) of digital taxes while global agreement is being reached and have agreed on the introduction of an implementation package for Pillar One and Pillar Two.<sup>16</sup> There have been some changes in the countries from the political statement of 2021 to this 2023 political statement. In 2021, the countries that did not support the political statement were Nigeria, Kenya, Pakistan and Sri Lanka. In this 2023 political statement, the countries that did not support the statement are Belarus, Canada, Pakistan, Russia and Sri Lanka. It is not clear the reasons why the countries decided not to support the statement, except Canada which is not in agreement with the standstill of digital taxes.<sup>17</sup> Regarding Belarus and Russia, it could be possible that one of the reasons is the Ukrainian war.

Interesting Kenya and Nigeria have supported the political statement of 2023 even though it did not in the 2021 Political Statement. In 2021, Nigeria expressed that the political outcome was not fair, and therefore, they decided to continue with their own rules (e.g. significant economic presence to tax digital business). Kenya has a digital service tax, so at that moment, it was not considered by policy makers in Kenya that the country should commit to this political statement. However, in

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<sup>16</sup> <https://www.oecd.org/tax/beps/outcome-statement-on-the-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2023.pdf>

<sup>17</sup> <https://www.reuters.com/business/finance/countries-agree-extend-digital-services-tax-freeze-through-2024-2023-07-12/>

the framework of the negotiations of a trade agreement the US has asked Kenya to repeal the digital service tax, and to commit to the political outcome for Pillar One and Pillar Two. Kenya's government has recently expressed that they will follow that path.<sup>18</sup> The reason why Nigeria has changed position is not clear, since Nigeria is also one of the initiators of the UN Tax Resolution.

In August 2023, the final version of the report to promote inclusive and international tax cooperation at the United Nations was published.<sup>19</sup> In addition to a set of 3 proposals, the report addresses the need to make changes in international tax law making. The report states that "it was emphasized in many inputs and the consultations that inclusiveness and effectiveness in international tax cooperation must also be evaluated in terms of the processes by which international tax norms are developed and followed through. The key aspects that emerged were participation, agenda-setting, decision-making and implementation, including the monitoring, avoidance and resolution of tax disputes" (Para. 14)

The UN final report states that " Inclusive and effective international tax cooperation requires legally established and transparent decision-making structures, such that the rules are clear and not adapted to suit the interests of those on one side of the debate or another. Having transparent rules helps to ensure that all participants are on an equal footing procedurally and have the same ability to engage meaningfully in decision-making, whether through consensus-based or voting-based processes, or a combination of the two" (Para. 16).

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<sup>18</sup> <https://www.businessdailyafrica.com.cdn.ampproject.org/c/s/www.businessdailyafrica.com/bd/economy/ruto-drops-digital-service-tax-against-multinationals--4179322?view=htmlamp> accessed 30 July 2023

<sup>19</sup> <https://financing.desa.un.org/tax-report-2023>

In my view, and as I have argued last week at the African Tax Research Network Conference, in the panel “Seizing the opportunity: Africa's path to harnessing and profiting from global tax reforms”, both the OECD, and the UN should give attention to the way that decision making process is legitimate and inclusive for both developed and developing countries. As I have also discussed in my inaugural lecture, the agenda setting and decision-making should be transparent. The body either the OECD or the UN should be held accountable for the decisions taken. The process should be open to all stakeholders and responsive to the needs of all countries. The role of regional organizations is important, and for Africa the role of the African Tax Administration Forum (ATAF) in supporting African interests. The political support is also relevant and to achieve this the African Union has an important role to play. To sum up, not only technical knowledge is needed, but also political will is required.

The following section will shortly address the EU political developments that also influence developing countries in light of the EU Standard of Tax Good Governance.

### **3. EU political developments and the EU Standard of Tax Good Governance**

At EU level, and with the aim to play a more important role in the international tax developments vis-à-vis non-EU countries, the EU Commission has also introduced in 2008 the EU Standard of Tax Good Governance that provided for transparency, exchange of information and fair tax competition. Since 2018, this Standard also includes countries commitment to the BEPS 4 Minimum Standards. This Standard of Tax Good Governance is introduced in economic/trade/partnership agreements

with third (non-EU) countries, as well as one pre-condition to receive EU aid and to be excluded from the blacklist of non-cooperative jurisdictions.<sup>20</sup>

In light of the above, my research in the GLOBTAXGOV research project and my chair on tax governance also investigates (in addition to the role of the OECD and the G20 mentioned above) **under what conditions can the role of the EU in international tax law making be legitimate and feasible vis-à-vis non-OECD, non G20 countries?**

In 2021, I was awarded an EU Jean Monnet Chair (EUTAXGOV) to raise awareness of the use of the Standard of EU Tax Good Governance and the consequences for non-EU countries including developing countries. Receiving this Jean Monnet Chair shows that research can be translated into teaching. The courses that I teach at Leiden Law School also contribute to raise the awareness of the use of this Standard.<sup>21</sup>

This brings me to the title of this keynote speech.

#### **4. Global Tax Governance: Legitimacy and Inclusiveness: Why it matters**

##### *From legitimacy...*

Scholars, civil society and countries have expressed in articles and meetings at international and regional level their concerns regarding the legitimacy of the BEPS

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<sup>20</sup> See Mosquera Valderrama I.J. 'The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries', (2019), 47, Intertax, Issue 5, pp. 454-467

<https://scholarlypublications.universiteitleiden.nl/handle/1887/73433>

<sup>21</sup> For an overview of the courses given in the framework of the EU Jean Monnet Chair see

<https://www.universiteitleiden.nl/en/law/institute-for-tax-law-and-economics/tax-law/eu-tax-governance>

Project vis-à-vis non-OECD, non-G20 countries. Scholars and countries in regional consultations have also addressed issues outside the BEPS Project that are relevant for developing countries such as taxation of informal economy, taxation of capital gains from indirect transfers, among others. Some of these topics are being addressed by international organizations such as the International Monetary Fund, World Bank, and the United Nations either directly or in the framework of cooperation under the Platform for Collaboration on Tax.

In order to address these concerns, the OECD created the BEPS Inclusive Framework where countries were invited to participate as BEPS Associate and to commit to the implementation of the BEPS 4 Minimum Standards. This implementation is on equal footing and subject to the consensus minus one rule. This rule means that upon review of the implementation, the peer review of the country can be adopted even if one country does not agree with it (minus one rule). This country can be most likely the country which is being peer reviewed. The system of peer review and consensus minus one rule was adopted based on the experience of peer review of the standard of transparency and exchange of information. At that time, Uruguay a country with bank secrecy opposed to the peer review report, but the report was adopted based on this rule.

### ***To Inclusiveness***

In addition to legitimacy, there were other concerns from developing countries including the fast pace of the BEPS Project and the lack of resources (personnel/financial) to participate effectively at the discussions by the BEPS Inclusive Framework (either in Paris or online). Furthermore, some scholars, civil

society, and think tanks have highlighted that the main role in international tax policy making should be given to the United Nations.

These concerns have not been addressed with the creation of the BEPS Inclusive Framework, since for the BEPS Project the participation on equal footing was only for the implementation of the BEPS 4 Minimum Standards. Furthermore, it is not clear if all countries can become a member of the BEPS Inclusive Framework, since it needs approval of all of the other countries participating in this Framework. This is the case of Cyprus that has not been able to join the BEPS Inclusive Framework. To still show their commitment to the BEPS Project, Cyprus has decided to sign the BEPS Multilateral Instrument.

Furthermore, at the start of the discussions between 2018-2019 of Pillar 1 (taxation of highly digitalized business), it was clear that there were three positions (i) from OECD countries, (ii) from the United States and (iii) from G24 countries which are developing countries).<sup>22</sup> Because no consensus was reached, the OECD Secretariat submitted a proposal (end of 2019<sup>23</sup>), which was a combination of the OECD and the United States proposal leaving behind the G24 (developing) countries proposal.<sup>24</sup>

In the midst of these discussions, the United States asked countries to refrain from introducing unilateral measures such as digital service tax, and if not, the US will

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<sup>22</sup> OECD (2019), Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, <https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.htm>

<sup>23</sup> Public Consultation Document: Secretariat Proposal for a “Unified Approach” under Pillar One (9 October - 12 November 2019). <https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf>

<sup>24</sup> Comments of the G-24 on the OECD Secretariat Proposal for a Unified Approach to the Nexus and Profit Allocation Challenges Arising from the Digitalisation (Pillar 1)’ (2019) [https://www.g24.org/wp-content/uploads/2019/12/G-24\\_Comments-on-OECD-Secretariat-Proposal-for-a-Unified-Approach.pdf](https://www.g24.org/wp-content/uploads/2019/12/G-24_Comments-on-OECD-Secretariat-Proposal-for-a-Unified-Approach.pdf)

start section 301 US trade investigations which will result in trade retaliation measures.

In 2020, consultations and discussions took place, but without any progress on the adoption of the OECD Secretariat proposal. However, the situation changed in 2021 with the United States Biden's presidency. The United States decided to go forward with the implementation of the GLoBE (Pillar 2) proposal and to endorse the Pillar 1 OECD Secretariat proposal. This proposal was discussed at the G7, G20 and thereafter in the BEPS Inclusive Framework.

The result is the political statement agreed in 2021 and subsequent political statement in 2023. However, as we have explained before, not all countries have endorsed these statements, and also some countries (Canada, Nigeria, Kenya) have changed their endorsement between the 2021 and 2023 statement.

In the following section, I will address the main four questions that I want to highlight in this keynote speech.

***If the decision making took place at the OECD level with the political mandate of the G20, have non-OECD, non G20 countries truly participated in the decision-making process?***

As I have addressed in the political developments above, the decision making of the content of the BEPS Project and its 15 Actions was made by the OECD and G20 countries. In my research, I have addressed that for OECD countries, the BEPS Project was an opportunity to advance in projects that were not broadly implemented e.g., harmful tax competition, and to take the leading role in



international tax matters with the OECD Secretariat, and the Committee of Fiscal Affairs deciding on the agenda/topics to be addressed in the BEPS Project.<sup>25</sup>

Even if countries wanted to participate in this decision-making process, it was not possible. As I argued in 2015, membership of the OECD is on invitation only, and it requires an accession process. Even more difficult is to become member of the G20 which is a political forum, where very few emerging economies participate (e.g., Indonesia, India, China, Brazil, Argentina, etc.). Despite the existence of other political forums with developing countries e.g., G24 and G77, these forums were not invited to take part in the decision-making process of the BEPS Project.

Furthermore, as it has been mentioned above, even in case of a proposal submitted by developing countries e.g., G24 countries in Pillar 1 choosing for significant economic presence; this proposal was left behind in the OECD Secretariat proposal which combined the OECD and the United States approach.

Nevertheless, the significant economic presence has been adopted unilaterally by countries such as Nigeria, Israel, and also Indonesia (G20 country) and in 2022 Colombia (OECD country).<sup>26</sup> This shows that countries have decided to follow unilaterally the rules that they consider are more convenient for their own economy. This is the case of the significant economic presence and the digital service tax (e.g. Kenya) for taxation of highly digitalized business.

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<sup>25</sup> Mosquera Valderrama I.J. Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative, *Bulletin for International Taxation* 72(3) 2018  
<https://scholarlypublications.universiteitleiden.nl/handle/1887/59348>

<sup>26</sup> *Supra* n.8.

*If not, is the creation of networks such as the Global Transparency Forum and BEPS Inclusive Framework enough to justify the legitimacy of the decision-making process?*

Regional Tax organizations i.e. the African Tax Administration Forum (ATAF) and countries in the African, Caribbean, Latin America and Central American region have stated the fast pace of the implementation of the BEPS Project, and the need to provide effective and equitable Pillar 1 and Pillar 2 rules.

Regarding the BEPS Project, some countries have chosen in addition to the BEPS Minimum Standards to implement some of the BEPS Best Practices (Actions 3, 4, 12<sup>27</sup>), but this decision has been a unilateral decision made by each country. However, even if the countries have chosen to implement the BEPS Minimum Standards and some of the BEPS Best Practices, analysis of the peer review reports shows that some countries may choose to do that on paper but not in practice.

Regarding the decision making process, the discussions of Pillar 1 and Pillar 2 within the BEPS Inclusive Framework have also shown that there is a limited participation of non-OECD, non-G20 countries in decision making. This limited participation was addressed by the OECD in the report to the G20 under the 2021 Italian Presidency.<sup>28</sup> In the report, the OECD stated that .

*“Feedback from regional consultation events on practical ways to enhance inclusivity indicated **strong support for greater representation by developing***

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<sup>27</sup> These Actions dealt with Controlled Foreign Company (Action 3), Limitation on Interest Deductions (Action 4), Mandatory Disclosure Rules (Action 12).

<sup>28</sup> See OECD (2021), Developing Countries and the OECD/G20 Inclusive Framework on BEPS: OECD Report for the G20 Finance Ministers and Central Bank Governors, October 2021, Italy, OECD, Paris, <https://www.oecd.org/tax/beps/developing-countries-and-the-oecd-g20-inclusive-framework-on-beps.pdf> at 45.

*countries in the leadership of the Inclusive Framework and its subsidiary bodies. Similar co-chairing arrangements could be considered for the Working Parties and other subsidiary bodies. In addition, consideration could be given to the **revision of the memberships of the bureau or steering groups of the subsidiary bodies, to ensure that they more systemically include representatives from a range of non-OECD economies, including lower-capacity countries***".<sup>29</sup>

In light of the above, one of the recommendations of this report addressed the governance of the inclusive framework stating "*The Inclusive Framework stakeholders should, as a priority, reflect on **governance arrangements to ensure a broad and systematic inclusion of developing countries. This could include consideration of representation in the leadership of the Inclusive Framework and its subsidiary bodies, and updating the mandate of the Advisory Group for Co-operation with Partner Economies***".<sup>30</sup> The result was then, next to the chair from an OECD, country, to introduce a co-chair of the BEPS Inclusive Framework which should be from a non-OECD, non G20 country.

The question is whether the proposed co-chair would be enough to ensure inclusive participation of developing countries in the decision-making process. We will have to wait and see, but the UN developments shows that this is not really the case.

In addition, in the January 2023 meeting of the World Economic Forum, Ocampo, the Minister of Finance of Colombia (at that time), called Latin American and Caribbean ministers to rethink global taxation.<sup>31</sup> For Ocampo, "*the two-pillar solution delivered by the OECD/G20 Inclusive Framework is a step forward, but does*

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> José Antonio Ocampo, 'Calling All Latin American and Caribbean Ministers to Rethink Global Taxation' (*ICTD Blog*, 18 January 2023) <<https://www.ictd.ac/blog/calling-all-ministers-rethink-global-taxation/>>.

*not fully address the concerns developing and emerging countries have raised. Latin American and Caribbean countries face common challenges when it comes to cross-border taxation, from the role of tax havens to taxing the digitalized economy. We share the same problems, but we have not shared our views and technical strengths to come up with common solutions. Therefore, our interests have not been visible enough in the international tax policy debate so far, and this must change”*.<sup>32</sup>

During the conference in May 2023 at Bogota, Colombia, civil society claimed that these discussions were mainly organized by business, and that the civil society was not being heard, respected in their views.<sup>33</sup> These claims show that trying to find a consensus and shared views is more difficult than one can ever imagine.

Following the May conference, in July 2023 in the First Latin American and Caribbean Summit for an Inclusive, Sustainable and Equitable Global Tax Order which has been initiated by Colombia, Chile and Brazil; Finance ministers and high-level officials from 16 of the Latin American and Caribbean countries have approved the creation of a regional tax cooperation platform for Latin American and the Caribbean. This agreement has been supported by the United Nations Economic Commission for Latin America and the Caribbean, known as ECLAC (in Spanish CEPAL) which will act as the “technical secretariat” for this platform.<sup>34</sup>

In the joint declaration the signatory countries *“affirm their commitment to generating knowledge, sharing experiences, contributing to the forging of shared positions and non-binding concrete solutions that would guide ministerial decision-*

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<sup>32</sup> *ibid.*

<sup>33</sup> <https://www.latindadd.org/2023/05/12/el-debate-urgente-por-un-pacto-fiscal-en-america-latina-y-el-caribe/> accessed 30 July 2023

<sup>34</sup> Press Communique 27 July 2023. <https://www.cepal.org/en/pressreleases/authorities-16-countries-approve-creation-regional-tax-cooperation-platform-latin>

*making in addressing the region's tax policy challenges. Furthermore, they seek to build in a participatory way and through consensus a space for integrating Treasury, Economy and Finance ministers to foster dialogue with the aim of ensuring that international and regional tax policies be inclusive, equitable, environmentally and socially sustainable and favorable to growth, the reduction of inequalities and the achievement of the Sustainable Development Goals (SDGs)".<sup>35</sup>*

To sum up, the description above shows that countries in Africa, Central America, the Caribbean and Latin America are questioning the legitimacy, feasibility and inclusiveness of the initiatives to achieve international tax cooperation developed by the OECD and G20 and the need to establish a fair global tax order.<sup>36</sup> In addition, countries such as Colombia under the auspices of the United Nations (CEPAL) are proposing a new regional cooperation framework in Latin American and the Caribbean to address the needs of the region and to agree on common solutions tailored to the region.

***If the BEPS 4 Minimum Standards are regarded as soft law, thus non-binding, why are countries complying with these standards?***

As I have explained above, by using the theories of legal transplants, I can explain why countries may decide to comply with the BEPS 4 Minimum Standards even if soft law.

For instance, there are 3 reasons that I would like to highlight here

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<sup>35</sup> Ibid.

<sup>36</sup> ATAF, 'ATAF Statement on the Success of the Africa Group Resolution for the Creation of a United Nations Convention on International Tax Cooperation' (2022) <<https://www.ataftax.org/ataf-statement-on-the-success-of-the-africa-group-resolution-for-the-creation-of-a-united-nations-convention-on-international-tax-cooperation>> accessed 30 July 2023.

- (i) chance and necessity (technical assistance by developed countries and/or OECD, and twinning projects between developed and developing countries);
- (ii) expected efficacy of the law (access to information by tax administrations on multinationals);
- (iii) political, economical and reputational incentives (commitment to the EU Standard of Tax Good Governance in trade, partnership agreements to receive EU funding and to be excluded of the list of non-cooperative jurisdictions).

The use of legal transplants theories in BEPS has been already addressed in several articles available in the blog [GLOBTAXGOV](#). Further research is being carry out on the reasons for countries to comply with the standards by using a case study. The findings will be addressed in a forthcoming article where I have analyzed the peer review and legitimacy of the BEPS 4 Minimum Standards.

***Despite the work done by the OECD and the G20 in the BEPS Project and Pillar 1 and Pillar 2, should the decision-making take place at the OECD level, or rather at the United Nations level, and if so how?***

In my view this is the most difficult question to answer at this stage, since the United Nations development is recent (since November 2022). It is also difficult to answer taking into account the changes at OECD Secretariat mainly the Director of the OECD's Centre for Tax Policy and Administration. When the BEPS Project started Pascal Saint-Amans was the director, thereafter in 2022, Grace Perez

Navarro had this role (temporary) and was recently replaced by Manal Corwin (former US Tax Advisor and US Tax administration representative) .

At the time that Pascal Saint-Amans was the Director (2012-October 2022), the BEPS Project, BEPS Actions and the proposals for Pillar 1 and Pillar 2 were developed and discussed, including also the Pillar 1 and Pillar 2 Political Outcome. There was a clear movement of the OECD towards inviting countries to participate as BEPS Associate in the BEPS Inclusive Framework as well as to commit to the Pillar 1 and Pillar 2 OECD Secretariat Proposal.

Since then, the OECD has focused on the design of Pillar 2 rules (model rules<sup>37</sup>, safe harbour<sup>38</sup>, technical administrative guidance<sup>39</sup>) as well as to address issues such as compliance and tax certainty.<sup>40</sup> In respect of Pillar 1, the OECD is still in the process of having public consultations on the design of Amount A<sup>41</sup> and B.<sup>42</sup>

During that time, as we have addressed in section 2 above, countries, civil society and some regional tax organizations (ATAF) called for a more decisive role of the United Nations. One of the main reasons, is the broader representation of countries in the United Nations vis-à-vis the limited membership of OECD countries where countries are invited to become members following a accession procedure. Furthermore, as I have argued in section 2 above, the participation at the G20 is

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<sup>37</sup> [Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules \(Pillar Two\) \(oecd.org\)](#)

<sup>38</sup> [Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules \(Pillar Two\) \(oecd.org\)](#)

<sup>39</sup> [Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules \(Pillar Two\) \(oecd.org\)](#)

<sup>40</sup> [Public consultation meeting on compliance and tax certainty aspects of global minimum tax - OECD](#)

<sup>41</sup> [Tax challenges arising from digitalisation: Public comments received on the draft Multilateral Convention provisions on digital services taxes and other relevant similar measures under Amount A of Pillar One - OECD](#)

<sup>42</sup> [Tax challenges arising from digitalisation: Public comments received on the design elements of Amount B under Pillar One relating to the simplification of transfer pricing rules - OECD](#)

even more difficult, since it is a political agreement where only few countries are able to participate.

While the OECD, OECD Accession countries and G20 countries (i.e. BEPS 44 group) have been discussing the content of BEPS Project, BEPS Actions, and Pillar 1 and Pillar 2; the United Nations has presented proposals for some non-BEPS issues (e.g. in the taxation of indirect transfers) and its own alternative proposal to address Pillar 1 i.e. the introduction of Art. 12B 2021 UN Tax Treaty Model. This article 12B provides for withholding tax on automated digital services<sup>43</sup> which is different from the unilateral proposals i.e. the digital service tax and significant economic presence that are currently being introduced by countries.<sup>44</sup>

However, times have changed, as Nigeria with the support of some African countries, and Colombia (currently an OECD member country that took part in the BEPS decision making process as OECD Accession country (at that time)) have also questioned whether there is a global fair tax deal that benefits not only developed but developing countries.

Nevertheless, I am still skeptical about the role of the UN. In my view, for the UN to have a leading role, there should be a coordination between all units (i.e. UNDESA, UNDP, UN Tax Committee). This requires also political will of countries, and of the UN Institutions.

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<sup>43</sup> Automated services are defined as “Any service provided on the Internet or another electronic network, in either case requiring minimal human involvement from the service provider. It includes especially: Online advertising services; Supply of user data; Online search engines; Online intermediation platform services; Social media platforms; Digital content services; Online gaming; Cloud computing services; and Standardized online teaching services”. See Tax Consequences of the Digitalized Economy – Issues of Relevance for Developing Countries’ (Committee of Experts on International Cooperation in Tax Matters 2021) Co-Coordinator’s Report.

<sup>44</sup> Supra n. 12.



For any international tax global body to function either at the UN or as separate international tax body or any international or regional tax organization, it is important to keep in mind that it is not only about the input and output legitimacy, but also about throughput legitimacy (i.e. Accountability, transparency, inclusiveness and openness).<sup>45</sup>

In my view, the OECD, but also any organization/body such as the UN or an independent global tax body, will require these four conditions: transparency, accountability, responsiveness and openness. Agenda setting and decision-making should be transparent. Furthermore, this body should be held accountable for the decisions taken. The process should be open to all stakeholders, and responsive to the needs of all countries.

From observing the process that it has been carried out since November 2022, in my view, the UN and its Institutions mainly UNDESA could be more open and responsive since at this moment, despite the public consultations: One (closed) for countries, and another one (open) for other stakeholders, and the publication of documents in the UN website, there is not clarity who is hiring the experts to present/work in the text of this instrument (either a multilateral convention or a multilateral instrument such as the BEPS MLI) or framework, are all developing countries truly participating? And who will be discussing the content of the 3 proposals presented in August 2023, the country ambassador to the UN with political knowledge, or representative of tax administration of the country with technical tax knowledge.

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<sup>45</sup> *Supra* n. 36.

The choice for one of the options provided in the August 2023 will also need to be carefully evaluated. If the decision is to introduce a Multilateral Convention, we may assume that all countries will be invited to sign this Convention followed by ratifications including constitutional/legislative review at country level which may take a long time. As we know from ratification of tax treaties, as well as from the lengthy process of ratification of the BEPS Multilateral Instrument, the ratification and enter into force process will take time. What would countries do in the meantime? Introduce unilateral measures, re-negotiate tax treaties, conclude tax treaties, or introduce regional tax treaties. The other two choices, either a framework convention on international tax cooperation or framework for international tax cooperation may be easier to implement however, both frameworks will need to engage the regional bodies including not only the Regional Tax Organizations, but also the African Union and the recent created (July 2023) Regional tax cooperation platform for Latin American and the Caribbean.

## 5. What is next?

In 2017, I received the Starting Grant to carry out the Global Tax Governance (GLOBTAXGOV) Research project. I started this research project in 2018 at Leiden University.

When I started to discuss global tax governance, the BEPS Project just started. 5 years later, we also have Pillar 1 and Pillar 2 proposals, as well as the recent developments that have taken place at the UN level.

Moreover, on 15 of June, the EU Parliament in a resolution on lessons learnt from the Pandora papers and other revelations called for “the EU to support the setting

up of a UN framework convention on tax, with the aim of strengthening international cooperation and governance on tax and trade-related illicit financial flows; highlights the need to introduce transparent and inclusive decision-making where all countries can negotiate as equals” (para. 17). But in light of the EU Standard of Tax Governance that I have mentioned above, my question is, is this true?, can developing countries negotiate as equals since non-EU countries including developing countries are required to implement BEPS and receive positive review? I have already addressed my concerns regarding the EU Standard of Tax Governance in my statement at EU Parliament public hearing on 1 December 2020.<sup>46</sup>

Following up the questions addressed in the GLOBTAXGOV Research Project, I will continue addressing these questions (despite the funding ending on July 2023), in my Chair on Tax Governance at Leiden University, and in my EU Jean Monnet Chair on EU Tax Governance. In my work, I aim to expand my research agenda to inquire under what conditions can the role of the United Nations in international tax law making be legitimate and feasible for developed and developing countries?

This shows that still there is work to be done, and that even though we started with global tax governance addressing issues of legitimacy and feasibility, after 5 years, we have more actors (OECD, EU, UN, regional (tax) organizations, countries, civil society, business, think tanks, etc.) and that reconciling these goals so that all countries (developed and developing countries) benefit from these changes is still a difficult task. Therefore, I will continue with this research by using my network of the GLOBTAXGOV and EUTAXGOV and Leiden University to reach out to developing

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<sup>46</sup> <https://globtaxgov weblog.leidenuniv.nl/files/2020/11/Statement-Mosquera-EU-Parliament-FISC-Public-Hearing-2-Dec-2020-FINAL-.pdf>

countries, civil society, regional tax organizations, and scholars in developed and developing countries.

This task is not one person-task, but a multiple stakeholder task. Therefore cooperation, exchange of knowledge/experiences, sharing publications/presentations via open access, is relevant. Coming from Colombia (an emerging country that only recently joined the OECD) in my Chair, I also want to focus on what these changes on international tax law making could mean for developing countries, and for scholars in the global South.

### Conclusion

To conclude, international taxation nowadays is not only about the technical rules. The political developments need to be taken into account. In addition, to participate in international tax law making process and to introduce tax rules, countries should not only have technical knowledge, but also resources, and political will to change the rules.

What I have learned since 2018 when I started with my GLOBTAXGOV Project is that the questions of legitimacy, inclusiveness continue being relevant for all stakeholders, and that any process of international tax law making will need to analyze the conditions under which this process can be legitimate and feasible for developed and developing countries. This is true, in the BEPS Project, but also in the current developments of Pillar 1, Pillar 2 and the UN Tax Resolution. We cannot forget the process, so therefore, more attention should be given to transparency, accountability, responsiveness and openness.