

**Response to the UN Resolution A/RES/77/244 on Promotion of Inclusive and Effective
Tax Cooperation at the United Nations**

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List of Abbreviations

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| BEPS | Base Erosion and Profit Shifting |
| CFC | Controlled Foreign Corporations |
| FDI | Foreign Direct Investment |
| ETR | Effective Tax Rate |
| G20 | Group of 20 |
| IF | Inclusive Framework |
| IMF | International Monetary Fund |
| MNE | Multinational |
| MLC | Multilateral Convention |
| MLI | Multilateral Instrument |
| NGO | Non-Governmental Organisations |
| OECD | Organisation for Economic Cooperation and Development |
| PCT | Platform for Collaboration on Tax |
| QDMTT | Qualified Domestic Minimum Top Up Tax |
| UN | United Nations |
| VAT | Value Added Tax |

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1. Introduction

In a recent resolution adopted by the United Nations (UN) on 30 December 2022 (hereinafter, the “UN December 2022 resolution”), the international organisation recognises both the importance and compromise from Member States to increase and enhance international tax cooperation that may ultimately serve of assistance for all countries, particularly developing countries.ⁱ

This resolution has been welcomed for several reasons. First, it confirms the path already undertaken by the UN in previous resolutions, such as the resolution 69/313 of 27 July 2015 on the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, which committed Member States to consider fairness, transparency, effectiveness, and efficiency within their tax systems.ⁱⁱ Second, it recognises the important contributions that other international actors, such as the Platform for Collaboration on Tax (PCT),ⁱⁱⁱ the G20 Ministerial Tax Symposium on Taxation and Development in Indonesia,^{iv} and the Organisation for Economic Co-operation and Development (OECD), have made in this regard. Third, and more importantly, it opens an important door for further debates in times of fundamental changes in the international tax law scene, most of them very challenging for developing countries around the world.

Although the report commissioned to the UN Secretary General through the UN December 2022 resolution emphasises several relevant policy issues related to international tax cooperation — including, among others, recommendations on the avoidance of double tax treaties; tax in exchange of information agreements; mutual administrative assistance conventions; multilateral legal instruments; and the OECD work on Base Erosion and Profit Shifting (BEPS) — this response will focus on the role of the OECD and the Inclusive Framework (IF) post-BEPS, namely the effect of the OECD two-pillars approach, as well as other interconnected policy issues in the context of global tax cooperation.^v

It is also important to note that nothing in this response aimed to constitute a technical analysis of specific measures discussed currently in the international context, but rather to contribute

with some high-level policy recommendations that can enrich the future debate on these matters.

2. Global tax cooperation: the current scenario

The debate on global tax cooperation has suffered a turning point in the last decade. This is particularly visible in the work led by the OECD to tackle base erosion and profit shifting, first;^{vi} and second, in the recent approach to address matters related to the challenge derived from the digitalisation of the economy with a two-pillars approach.^{vii}

Whilst the OECD BEPS project aimed to address a series of specific issues related to the avoidance of double taxation and non-taxation, providing specific recommendations to address these issues — including, for example, Controlled Foreign Corporation rules (CFC);^{viii} anti-hybrid mismatches;^{ix} tax treaty abuse,^x etc. — the two-pillars approach focused on what was denominated by the OECD as “other BEPS issues”.^{xi} Most notably, the problems carried by the everyday more digitalised economy and the lack of nexus to trigger taxation.

Putting aside the technical analysis of both the BEPS report and the two-pillars approach, the valuable contribution made by the OECD allowed to pave some basis towards global tax cooperation. First, the BEPS report creates a Multilateral instrument (MLI), which although limited in scope to simplify the amendment of bilateral tax treaties, represents a step forward in the capacity of countries to work together.^{xii} Second, the two-pillars approach, and particularly, the creation of the Inclusive Framework (IF), demonstrates the global willingness to work together towards a more inclusive international tax forum.

Nevertheless, and despite the positive steps taken by the OECD thus far, it is recognised by the international community that the process of global tax cooperation is not exempt of policy concerns, especially related to transparency, simplicity, and inclusivity, affecting mostly the interest of developing countries or emerging economies.

The foregoing can be noticed, for example, in the amount of available information regarding the economic impact assessments of the two-pillars approach, as well as in the data used to obtain their final numbers.^{xiii} Similarly, as recognised by an important part of the international community as well, the whole process has turned very technical and complex, creating challenges especially for developing countries,^{xiv} which must deal with a lower technical

capacity to absorb the true consequences of most of these recommendations. This ultimately raises questions regarding participation and inclusion, which need to be addressed in a global cooperative approach.^{xv}

3. Policy Recommendations

Agreeing with most of the international community regarding the general concerns of transparency, simplicity, and inclusivity that the current process of global tax cooperation possess, but also recognising the important role of the OECD and other international actors have played in thus process thus far, the following general measures may contribute to address together these concerns and pave a more solid path towards global tax cooperation in the future.

3.1. More flexible global tax coordination

Flexibility is a factor that has been largely omitted in the current debate of global tax cooperation, although it is very much connected with the idea of inclusivity.

An inclusive global tax cooperation is impossible without recognising the inherent differences among countries, both between developed and developing countries, as well as among developing countries themselves. In this regard, a more flexible debate will provide the opportunity for countries to address global tax concerns, but without renouncing entirely to the economic reality of their own territories.

Let's take the example of the implementation of a global minimum effective corporate income tax rate. In the current debate, very little has been said regarding the impact that such a measure will have on the foreign direct investment (FDI) of 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 interest.^{xvi}

Therefore, global tax measures towards cooperation, such as a global minimum tax, or the like, should be addressed with an important caveat of flexibility. This could be translated, for example, in either more and effective carve-outs or in further reviewing processes to re-determine the global minimum tax rate.

Similarly, flexibility should be reflected in the fact that countries may opt for other policies that may accomplish a similar aim. An example of this may be seen notably in the context of Article 12B UN Model or online VAT on digital services, which may serve as suitable alternatives to the OECD Pillar one approach.^{xvii}

Giving countries, especially developing countries, a higher scope of flexibility, may invite further and more fruitful cooperation in tax matters in the future.

3.2. More transparent drafting and decision-making processes

Overcoming the issues of transparency in the decision-making process that is present in current international tax reforms is also a challenge because it increases administrative costs for countries around world, especially for developing countries.

In this context, the process of drafting and decision-making should be transparent from the very beginning. This is particularly important when it comes, for example, to economic impact analyses and the disclosure of other relevant information that countries may use to endorse a particular international tax matter.

Most notably, whatever is the organisation leading the future international debate, a common database should be created and made available to all countries equally. In this regard, countries could access it regularly to gather valuable information regarding some fundamental decisions, such as data related to revenue thresholds to determine the scope of some rules, calculation of effective minimum rates, profitability margins, etc. Such a small step may hugely contribute to improve the reasonable concerns that the international community has regarding the transparency in the current international tax debate.

Similarly, transparency is also required in the process of nominations and election of tax committees of experts in different organisations, contributing to the general accountability. In this regard, a public list of nominations should be made accessible to the public *ex-ante*, i.e., before the election, and that a further disclosure should be implemented once the election has taken place, especially regarding procedures, including, e.g., panel composition; factors considered, periods; fees, etc. All these tax committees in the future should provide more transparent information regarding gender composition, geographical representation, and varied

experience of the committee members. All this information shall be published and made available to all countries through an online database that can be easily accessible to all.

These small steps towards transparency in the drafting and decision-making processes in the international tax law context may positively contribute to solidify a stronger level of trust and a further willingness for cooperation among countries worldwide.

3.3. Aiming for a simpler international tax system

Simplicity is another very important policy aim in the current path toward global tax cooperation. In this regard, an important part of the international tax community agrees that the levels of complexity in the current design of the international tax debate have increased, affecting mostly, but not exclusively, developing countries.^{xviii}

For this purpose, and to contribute to the development of a simpler international tax system, particularly in the context of the OECD two-pillars approach, some specific measures should be discussed within the UN to achieve or enhance this important policy goal.

As for Pillar One and issues related to the lack of nexus and the allocation of profits worldwide, the introduction of a semi-formulaic approach, *per se* could be considered as a contribution to a simpler global tax system. However, a further step may be considered to move from this semi-formulaic approach to a fully formulaic one, benefiting the simplicity of the whole system. This can be particularly important in the context of Amount A under Pillar One, which represents the new nexus rule to tax business profits in absence of a physical presence. The UN could take the lead and open a discussion regarding the attribution of all profits among multinationals (and not only excess profits) using a commonly agreed formula. The scope and details of this proposal shall be a matter of further debate.^{xix} However, such a proposal may be an important step forward towards simplicity and ease of administration in corporate income tax matters, which may truly prevent the proliferation of further unilateral measures around the world.^{xx}

As for Pillar Two, the OECD explored specific guidance that help countries design domestic minimum taxes as closely as possible to the global minimum tax rules (Pillar Two), reducing the uncertainty of introducing domestic minimum taxes and their resemblance to the OECD minimum tax rules to be considered as Qualified Domestic Minimum Taxes (QDMTT).^{xxi}

However, a second avenue of improvement could come from what has already been explored in the international tax literature as a “pre-emptive approach” in the context of global minimum tax compliance.^{xxii}

The main idea of this proposal is to have a two-level control that operates as an *ex-ante* test to determine whether full compliance under the new global minimum tax rules is required, preventing developing countries to go into the complexities of Pillar Two calculations. For this purpose, a *country-level test* would determine first whether a country is either low or high-risk for purposes of the global minimum tax compliance, taking into consideration the domestic tax rates, tax base, and deviations of it.^{xxiii} In other words, this first test would be a filter to determine whether Effective Tax Rates (ETR) calculations are required, not required, or simply whether a further MNE-level test is necessary. Secondly, there would be an *MNE-level test*, which is triggered only if the previous country-test identified some risky features denominated “red flags”, requiring therefore an MNE-ETR calculation.^{xxiv} This *MNE-level test* calculation aims to be simpler since it would only use the national tax law for the purpose of determining the compliance with the global rules. If the simplified calculation shows that a MNE benefits from the specific red flag, a full Pillar Two calculation will be required.^{xxv}

This approach could avoid burdensome ETR calculations under Pillar Two, which can be particularly important for developing countries with high nominal corporate income tax rates as well as small deviations between their domestic tax base and the tax base calculated under the global minimum tax rules.^{xxvi} Similarly, transaction costs for taxpayers may substantially be reduced since a multinational (MNE) operating in a specific developing country will be subject to the full global minimum tax compliance only to the extent that some of the red flags appearing under the first test bring to the conclusion that the MNE was subject to an effective rate below the global minimum.^{xxvii}

Finally, the UN should lead a process to support developing countries in the monitoring of tax incentives. This could include the elaboration of an automated and centralised data collection systems accessible for all countries as well as technical support related to the extraction of their own domestic data.^{xxviii} This can be very important for developing countries because it is evident that the new rules on minimum corporate income taxation under Pillar Two will not affect all tax incentives equally.^{xxix} Therefore, supporting developing countries in collecting and maintaining data may improve the policy decisions in these countries, both regarding the

compliance with the OECD Pillar Two as well as regarding the potential transition from tax to non-tax incentives to attract FDI.^{xxx}

3.4. Transition to a more inclusive global tax forum

Achieving a truly inclusive global tax forum is not an easy task. However, countries should be offered all the available alternatives to move towards this end. In this context, all stakeholders should open a discussion regarding the need to decentralise the international tax policy debate, moving slowly towards a more participative and inclusive space.

This process could start with a transitional period in which an *International Tax Cooperation Committee*, which includes members, among others, from the OECD, UN, regional tax organisations, tax academia, tax practitioners, and NGOs, can sit down and design the prospective framework for such a new global tax forum. The committee could also slowly take the lead on the monitoring and implementation of some current international measures with the aim that future global tax policy decisions are both designed and taken within the new global tax forum.

Decentralising the policy debate can provide a strong signal for countries to endorse a more active global tax cooperation. However, using well-settled international organisations for this purpose may generate a nil impact and be seen as a simple swap in the current hegemony of the international tax debate from one single actor to another. It is the role of the whole international tax community to achieve 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.

4. Conclusion

The opportunity provided by the UN opening to debate on the promotion of an inclusive and effective tax cooperation worldwide has to be welcomed. In this regard, the positive work of the OECD and other international actors to achieve some minimum standards of international tax governance also needs to be recognized. However, as agreed by an important part of the international community, policy concerns such as transparency, simplicity, and inclusivity must be addressed promptly and that this must be done with a global cooperative approach. In

this context, the international community should consider a more flexible global tax cooperation system in which the individual interests of countries are considered as much as the global aims, and where transparency in the drafting and decision-making processes becomes a priority. In addition, the international community should also promote a simpler international tax system, especially in the context of the OECD two-pillars approach, encouraging the UN to open the debate for a fully formulaic approach in the allocation of profits among MNEs worldwide, as well as to work towards specific measures to simplify the compliance with a global minimum tax. All these measures may ultimately reduce administrative costs for all the actors involved.

In the long-term, a transition towards a more decentralised international tax debate, will enhance tax cooperation worldwide. These small steps may pave the general route for a simpler, more inclusive and transparent tax cooperation worldwide.

Endnotes

- i 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.
- ii Resolution adopted by the General Assembly on 27 July 2015, A/RES/69/313, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), Distr.: General, 17 August 2015.
- iii This a joint effort launched in 2016, and which puts together the efforts of the UN, the International Monetary Fund (IMF), the World Bank Group, and the OECD. See more at The Platform for Collaboration on Tax, PCT Progress Report 2021, available at <https://www.tax-platform.org/sites/pct/files/publications/PCT%20Progress%20Report%202021.pdf>
- iv The symposium brought together ministerial-level policy makers to discuss international tax challenges and the role of the G20 in supporting taxation and development in developing countries, and it was held on 14 July 2022 in Bali, Indonesia.
- v OECD, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (OECD Publishing, 8 October 2021). See also, OECD, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (OECD Publishing, 1 July 2021).
- vi OECD, Addressing Base Erosion and Profit Shifting (OECD Publishing, 2013). See also OECD, Action Plan on Base Erosion and Profit Shifting (OECD Publishing, 2013).
- vii OECD, supra endnote v.

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- viii OECD, *Designing Effective Controlled Foreign Company Rules, Action 3 - 2015 Final Report* (OECD Publishing, 2015).
- ix OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements – Action 2: 2015 Final Report* (OECD Publishing, 2015).
- x Id.
- xi Manel Bondi, *Digital Taxation: A Comparative Study between the OECD & UN Proposals* (DCO, 2022), p. 4.
- xii OECD, *Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS* (OECD Publishing, 2015).
- xiii The OECD organised a webinar to update everybody regarding the economic assessment on 18 January 2023. See more here: <https://www.oecd.org/tax/beps/webinar-economic-impact-assessment-two-pillar-solution.htm>
- xiv L. Parada, *Global Minimum Taxation: A Strategic Approach for Developing Countries* (Paper under review, 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4280669
- xv See, e.g., A. Christians and L. van Apeldoorn, *The OECD Inclusive Framework*, *Bulletin for International Taxation*, April/May 2018 (on the elusive idea of inclusivity projected by the IF).
- xvi See, e.g., Parada, *supra* endnote xiv, at 13. See also, e.g., R. de la Feria and G. Maffini, *The Impact of Digitalisation on Personal Income Taxes*, *British Tax Review* 2, (2021).
- xvii For example, some Latin American countries, such as Chile and Uruguay, impose already a VAT on some digital services. See, e.g., EY Tax Alert, *Chile: VAT on digital services enters into force* (3 June 2020), available at https://www.ey.com/en_gl/tax-alerts/chile--vat-on-digital-services-enters-into-force. See also, Fiscal Solutions, *Uruguay imposes retrospective VAT on the supply of e-services* (30 July 2018), available at <https://fiscalsolutions.co.uk/news/uruguay-imposes-retrospective-vat-on-the-supply-of-e-services/>. More recently, see, e.g., Emilio Parodi, *Italy pursues Facebook-owner Meta for \$925 million in sales taxes*, *Reuters News*, 22 February 2023.
- xviii See, e.g., J. Englisch, *GloBE Rules and Tax Competition*, *Intertax* 48(12) (2022), draft available online at SSRN (warning about the “inherently complex GloBE rules”). See also the opinion of Leopoldo Parada in the media article by Dylan Morores, *US' Shunning of Top- Up Tax Could Unwind Global Deal*, *Law360*, Lexis Nexis, 26 August 2022.
- xix Further analysis could be produced in this regard.
- xx Regarding the proliferation of unilateral measures, see, e.g., D. Bunn, *Digital Services Taxes: Is there an end in sight?* (Tax Foundation, 21 December 2022), available at <https://taxfoundation.org/digital-services-taxes-pillar-one/>
- xxi Article 10.1.1 of the OECD Model Rules defines a qualified domestic minimum top-up tax [QDMTT] as “a minimum tax that is included in the domestic law of a jurisdiction and that: (a) determines the Excess Profits of the Constituent Entities located in the jurisdiction (domestic Excess Profits) in a manner that is equivalent to the GloBE Rules; (b) operates to increase domestic tax liability with respect to domestic Excess Profits to the Minimum Rate for the jurisdiction and Constituent Entities for a Fiscal Year; and (c) is implemented and administered in a way that is consistent with the outcomes provided for under the GloBE Rules and the Commentary, provided that such jurisdiction does not provide any benefits that are related to such rules”. OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base*

Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS (OECD Publishing 2021), p. 64. See also, Parada, at Section 2.1.

xxii C. Döllefeld, J. Englisch, S. Harst, D. Schanz, and F. Siegel, *Tax Administration Guidance: A Proposal for Simplifying Pillar Two*, TRR 266 Accounting for Transparency Working Paper Series No. 70 (2022), available at SSRN, at 5-6.

xxiii Id.

xxiv Id.

xxv Id.

xxvi Parada, supra endnote xiv, at 27.

xxvii Id.

xxviii Parada, supra endnote xiv, at 24 (proposing this measure in the tax literature).

xxix See, for example, B. Ferreira Liotti et al, *The Treatment of Tax Incentives under Pillar Two, Transnational Corporations* 29(2) (2022), at 30-31.

xxx Parada, supra endnote xiv, at 24