

2021

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Source Publication:

Nordic Journal on Law and Society Vol. 4, no. 1 (2021), pp. 1-31 <https://doi.org/10.36368/njolas.v4.i01.190>

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Repository Citation

Magalhaes, Tarcisio and Ozai, Ivan, "A Different Unified Approach to Global Tax Policy: Addressing the Challenges of Underdevelopment" (2021). *Articles & Book Chapters*. 3076.
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A Different Unified Approach to Global Tax Policy: Addressing the Challenges of Underdevelopment

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Experts from the North have long tried to teach countries in the South how to tax. For decades, they assumed the main challenges were domestic and there was a right answer to be found somewhere in the developed world that could be replicated everywhere else. Only more recently have they dedicated more attention to the international realm, yet their solutions remain tied to technical rules designed by a few specialists, as exemplified by the OECD Secretariat’s “Unified Approach” for the taxation of the digital economy. From a critical and historical socio-legal perspective, this Article argues that such technocratic approaches are set to fail less-developed nations for as long as we continue to overlook the background causes of weak taxation at both the national and international levels. These involve difficulties in applying complex rule sets, but also the very way in which global tax policy is developed, who influences the process, and the resulting distributive consequences.

Keywords: Tax policy; OECD; BEPS; digital economy; developing countries.

Introduction

At the beginning of the 1960s, the Cambridge economist Nicholas Kaldor (1963) raised the provocative question of whether “underdeveloped

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countries” would ever “learn to tax”. In posing this question, Kaldor was implicitly adhering to a particular view of economic progress often associated with age-old theories of convergence or modernization (Peet and Hartwick 2015; Reyes 2001). The view is premised on the assumption that less-developed states can “catch up” by emulating “best practices” adopted by their peers in the wealthiest parts of the world (Wallerstein 2012, 516). For Kaldor, this translated into developing countries designing tax systems similar to those of developed countries, namely centred on progressive direct forms of taxation (Genschel and Seelkopf 2016a).

With the rise of neoliberal globalization, rich nations reversed course and started to forget what they had learned—and tried to teach others—about what it means to have a “good” tax system. They gradually moved away from the taxation of capital income to more immobile factors such as labour and consumption (Avi-Yonah 2000). In response, the Organization for Economic Cooperation and Development (OECD) took up the responsibility to save the income tax, ostensibly for the benefit of both developed and developing states alike. Against a background of tightened public budgets following the world financial crisis of 2008-9 (Christians 2010b; Lesage and Vermeiren 2011; Eccleston 2012; Lesage, Vermeiren and Dierckx 2014; Christensen and Hearson 2019), the OECD proposed the Base Erosion and Profit Shifting (BEPS) project (OECD 2013a; OECD 2013b).³ Now, in what has been called its second phase, the BEPS project focuses on the challenges arising from the digitalized economy with two basic pillars: a proposal on how to tax digital firms under a so-called “Unified Approach”, wholly designed by the OECD Secretariat (OECD 2019c),⁴ complemented by a global minimum tax (“GloBE” proposal) whose rate is yet to be negotiated among governments (OECD 2019d).

In the midst of all of this new transnational round of technical consensus building, it is crucial to ask whether the OECD’s previous and current approaches are suitable for less-developed nations. As even Kaldor came to acknowledge almost sixty years ago, designing tax policies is never only about expertise (Kaldor 1963, 418). This Article takes Kaldor’s critique further by considering not only internal but also external challenges faced

³ For critical assessments, see Christians (2016); Brauner (2014); Avi-Yonah and Haiyan Xu (2016). But see Mason (2020), for a more optimistic view.

⁴ For a discussion, see Christians and Magalhães (2019).

by developing countries. To this end, it draws from critical and transdisciplinary socio-legal methods to investigate the development of tax institutions throughout history.⁵

The driving argument is that the “link between tax and sustainable development” (Bird and Martinez-Vazquez 2014) cannot be strengthened by insisting on having groups of specialists mostly coming from wealthier countries put their heads together in the search for rule-based solutions to be implemented worldwide (Easterly 2016). The BEPS Action Plan, with its emphasis on “deliverables” via the monitored implementation of “packages”, and more recently the OECD Secretariat’s Unified Approach demonstrate that global tax policymaking continues to pay insufficient attention to structural problems at both the domestic and international levels that affect revenue raising.⁶ This can be partially credited to a technocratic mentality inherent in many conceptions of development adopted by Global North experts and institutions (Easterly 2013). Alternatively, we submit that international coordinative efforts should be refocused towards addressing the procedural and substantive sources of weak taxation stemming from underdevelopment.

Part I briefly recounts the history of tax policy advice, viewed from the North’s perspective: how developed countries went from being the world’s role models in designing tax systems to flouting their own prescriptions in more recent years. Part II turns to the socio-political context in the South, mapping the many regulatory constraints faced by less-developed states, in order to show how today’s focus on international corporate tax avoidance and the digitalization of the economy is detached from the underlying and structural problems that explain why these countries struggle so much to tax.⁷ Concluding that current global taxation trends, much like those of the

⁵ Critical tax theory departs from the basic assumption that tax laws, policies and rules produce observable impacts in different social realities and contexts, thus affecting groups of individuals differently. The analysis consists of applying transdisciplinary methods to interpret social, political and economic phenomena in connection with taxation (for an introduction, see Infanti and Crawford 2009). Here, the approach is extended to evaluate global tax issues and frameworks, taking a historical and macro-perspective. For a comparable methodology that has been explored by anthropologists, archaeologists, ecologists, economists, geographers, historians, and political scientists, see Babones and Chase-Dunn (2012).

⁶ The economics literature has explored some of these problems at the national level (see, e.g., Besley and Torsten 2014, 99-100), but still missing is a comprehensive analysis that also considers international factors, as developed in this Article.

⁷ The separation of the OECD’s most recent plan into two pillars further illustrates how global tax policy has been approached in a non-holistic manner. See Part III *infra*.

past, continue a historical trajectory of neglecting the most pressing issues of the Global South, Part III calls for a different “unified approach”: one that explicitly unifies global tax policy and sustainable development.

A Global North History of Tax Policy

This part divides the history of tax policy advice into two periods, both seen from the point of view of relatively affluent states and international institutions largely under their control. From the end of World War II until the 1980s, developed country experts travelled around the world advising other governments on what they had learned back home, specifically that an ideal tax system requires comprehensive and progressive income taxes. Then, from the 1980s onward, when the world entered the second phase of economic globalization, developed country experts focused instead on broad-based income taxes with low rates as well as consumption taxes; at the same time, their home governments began to use their tax systems as a competitive device to capture global market share (Christians and Garofalo 2020).

Teaching to Tax

The influence of developed country governments in the design of tax systems for less wealthy nations is well documented in the literature, having its roots in colonial times (Stewart 2003; Gardner 2012; Dick 2015). For decades, the primary concern lay with the income tax, as this was seen as a successful tool to build welfare states. In 1922, for example, a London interdepartmental committee developed an income tax model that was imposed in many British, as well as French, colonies around the world (Bird 2014, 105). But it was after the end of the Second World War that experts were systematically sent to developing countries, usually under the auspices of post-war international organizations, namely the International Monetary Fund (IMF), the World Bank, and the United Nations (UN).

In their tax policy advice programs, these expert missions adopted a deliberate “teacher-student” approach in their interactions with other governments (Bird 2014, 133). This phase is what economist Richard Bird calls the “Development Tax Model 1.0”, which lasted from the 1960s until the 1980s. The main features of this model were: increased levels of taxation; increased progressivity; comprehensive personal income taxes as ideal; consumption taxes as a “necessary evil”; and disregard for sub- and

supranational aspects of taxation. As Bird (2014, 106) summarized this period, “it was all about the income tax”.

Unlearning to Tax

Tax policy ideas dramatically changed around the 1980s, when the world entered the second globalization phase. This change came to reflect a global paradigm shift on economic, development and growth policies that emerged from financial institutions located in Washington D.C, namely the IMF, the World Bank, and the U.S. Treasury. For this reason, this model became widely known as the “Washington Consensus” for state reform.

According to economist John Williamson (1990; 2004), one of the first critics of the Washington Consensus, ten were the policies most recommended by those institutions: fiscal discipline; reordering of public expenditure priorities; tax reform; liberalization of interest rates; institution of competitive exchange rates; trade liberalization; liberalization of inward foreign direct investment; privatization; deregulation; and enforcement of property rights. With respect to tax reform in particular, it also included the idea that “taxing some factors or sectors (such as international trade) can cause more economic distortion than taxing others (such as income from labour)” (Christians 2010a, 244; see also Avi-Yonah and Margalioth 2007; Ates 2012; Gashaw 2015; Oliveira and Magalhães 2020). As Williamson (2009, 9) puts it, “[t]he aim was a tax system that would combine a broad tax base with moderate marginal tax rates”.

Despite decades of tax policy advice flowing from developed to developing countries recommending that tax systems should be grounded on robust income taxes, in the 1980s, capital-exporting countries (largely developed ones, where most cross-border investors reside) started to systematically reduce their personal and corporate income tax rates, provide tax incentives for foreign companies and residents, and create all sorts of opportunities for aggressive tax planning (Seelkopf and Lierse 2016). Ultimately, this “tax-cut-cum-base broadening movement” (Rixen 2011a, 451) led to a global scenario of intensified tax competition also involving developing (source) states.

Tax competition is problematic because it thwarts countries’ capacity to impose income taxes, thus fundamentally altering the structure of their tax systems. Although a few commentators have argued for potential benefits related to global locational efficiency (Weiss 2001; Elkins 2016), most of the

literature suggests that the overall consequences are disastrous. First, by turning countries into competitive players, tax competition undermines their ability to set their taxes optimally to promote normative goals (Dietsch 2015; Dagan 2018; Ozai 2018). Second, tax competition is not just about governments competing to attract direct investment and jobs; it is essentially about the possibility of firms assigning paper profits irrespective of where real economic activity takes place (Rixen 2011a). Third, tax competition negatively affects both the provision of public goods and the idea of equity, embodied in the ability-to-pay principle (Sinn 2003, 56; Seelkopf and Lierse 2016, 96-97).

Tax competition negatively affects tax equity on its vertical dimension because the ability to relocate income is mostly enjoyed by the rich (Infanti 2008, 2000). It also affects equity's horizontal dimension because as the tax burden shifts from capital to labour, taxpayers with the same level of income—one from capital and the other from labour—are taxed differently (Seelkopf and Lierse 2016, 92-93). Finally, given countries' distinct comparative advantages in competing for global capital, tax competition changes not only the income distribution within countries (thus jeopardizing inter-individual equity) but also between countries (thus jeopardizing inter-nation equity).

Taxation in the South

Explanations for the persistent challenges developing countries face in implementing tax rules are not much different than those encountered in other regulatory areas (Besley and Persson 2014, 100). Obstacles to state regulation, which includes the power to tax, result from a combination of both internal and external factors. In identifying the main policy constraints on developing country governments at both the national and international levels, this part shows that, contrary to global expert discourse, even the most technically sophisticated answers to base erosion and profit shifting, including those applicable to the digital economy, are no guarantee that these nations will be able to generate the revenues they need to promote their national development projects and achieve basic welfare.

Developing Country Challenges

Numerous impediments to the design of a well-functioning tax system arise in developing countries. This section concentrates on the three most

relevant of these issues: lack of resources, diversity of taxes, and diverging policy priorities. We argue that none of these three core issues have been taken seriously enough in OECD-built initiatives like the BEPS project (either in its first or second versions). Unaddressed, these challenges have the potential to undermine the benefits that developing countries could gain from international tax cooperation.

Lack of Resources, Not Expertise

Undoubtedly, a major challenge to the success of any tax system refers to the capacity of local institutions and actors to effectuate tax rules (Besley and Persson 2014, 99). Poor institutional capacity on the part of lawmakers and law-enforcers (including administrators, competent authorities and judges) undermines the exercise of an effective authority, with negative consequences for revenue raising. The issue, however, has been frequently treated as resulting from a lack of expertise, such that global resources are allocated to technical assistance and capacity-building programs based on toolkits and instruments (Durst 2017).

For example, capacity constraints are often mentioned as the main reason why developing countries struggle to follow the OECD transfer pricing guidelines for the taxation of multinational enterprises (Hofmann and Riedel 2018). To help implement the arm's length standard, a series of transparency mechanisms were developed in the last years, such as disclosure of corporate information and cross-country exchange of collected and aggregated data. Tax transparency is indeed vital for effective corporate income taxation in a globalized economy, and some argue that it is also a requirement of sustainability because it allows societies where multinationals do business to have the full picture of how much profits the group generates worldwide, in which countries it pays taxes, and how much (Cabezas 2014).

This was obvious to developing country governments as early as the 1970s, when the UN proposed for the first time in history country-by-country reporting (CbCR) (Ylönen 2016). This standard, which was intended to be public, failed in the face of opposition from lobbying groups of multinationals, compounded by developed countries' desire to keep tax discussions at the OECD (Oguttu 2020). Only after the 2008 financial crisis would the idea of CbCR return, when civil society members and their populaces pressured OECD members to take affirmative action against

aggressive tax planning in the name of tax justice (Christians 2013; Cobham, Jansky and Meinzer 2018).

To provide jurisdictions with tools to stop corporate profits from shifting out of their territories and eroding tax bases, the BEPS Action Plan included CbCR, along with master and local file requirements, in its action item 13—one of the four minimum standards to which every member of the Inclusive Framework had to agree (OECD 2015a). Unlike the 1970s UN-led discussions, this time developing countries had little to say in the development of CbCR (Huang 2017). Contemporary international tax justice advocacy groups were equally displeased, as the OECD imposed strict confidentiality restrictions to the use of CbC data, available only to governments (Cockfield and MacArthur 2015). The result was the development of extremely complex instruments (OECD 2017a; OECD, BEPS 2017b; OECD 2017c; OECD 2017d; OECD 2019a), which have proven to be a challenge even for sophisticated and well-trained tax administrations (Dubut et al. 2018; Wahyuni, Anggoro and Sirait 2019; Meijer, Kerkvliet and van Stigt 2017).

Diverse Tax Mix

The second core challenge for developing countries concerns the fact that their tax mix considerably differs from what is found among developed countries. This becomes a problem because the international community has repeatedly refused to discuss specific issues related to some types of taxes that are relevant outside the rich world. Even when those issues are addressed at the international level, the amount of effort and resources is not the same employed to solve the revenue concerns of wealthier nations. This is evidenced by the exclusive focus of “BEPS 1.0 and 2.0” on the corporate income tax.

As discussed in Part I, affluent states have historically relied more on direct forms of taxation such as personal and corporate income-based taxes, which formed the central piece in the tax policy packages that they tried to export to the rest of the world during the post-war period. Yet after the neoliberal turn in the 1980s, Global North experts, notably those affiliated with the IMF and the World Bank, began to recommend that developing country governments focused more on indirect consumption-based taxes such as the value-added tax (VAT) or the goods and services tax (GST) (Stewart and Jogarajan 2004; James 2015). The upshot has been that, for countries outside the OECD, the VAT became “the fastest growing revenue

source and currently constitutes the most important tax” (Genschel and Seelkopf 2016a, 325).

Other forms of taxation, such as trade taxes, excise taxes, and resource rent taxes, albeit relevant revenue sources for developing countries (Rosenblatt 2015, 14-15), have been side-lined in global tax reform efforts. Taxes on international trade actually started to decline around the 1980s, again under recommendations of the IMF and World Bank, together with the General Agreement on Trades and Tariffs/World Trade Organization (GATT/WTO) (Seelkopf, Lierse and Schmitt 2016). Special taxes levied on natural resource extraction remain to this day an important but still neglected matter of concern for developing countries. But as we will see below, even when it regards the application of the traditional corporate income tax to the extractive industries, the international community has not made this policy area one of its priorities (Durst 2017b).

Other Policy Priorities

Finally, the third core challenge for building sustainable tax systems in the South refers to the existence of diverging policy priorities among states at different stages of development. Developing countries struggle with a series of internal issues that affect not only their tax collecting capacities but also how they approach tax policy. These issues include corruption, poverty and high levels of inequality, as well as the instability of political and economic institutions. Naturally, these countries will tend to prioritize other matters that do not usually concern wealthier nations.

For example, in the 2017 International Fiscal Association (IFA)’s conference regarding the BEPS initiative, at least one of the consulted developing countries reported a preference “to focus on domestic tax evasion as a more important source of base erosion and revenue loss” (Christians and Shay 2017, 50). This is different from the OECD’s emphasis on curbing multinationals’ ability to legally avoid taxes. In fact, illicit financial flows have been identified as the primary source of capital flight in places like Africa (Oguttu 2015, 656; Forstater 2018). Some claim that illegal outflows of capital constitute the principal and most worrying threat to the already fragile economies of developing countries (Global Financial Integrity 2015). We have seen that a critical concern for many less-developed countries (especially those rich in natural resources but poor in economic terms) is the taxation of the extractive industries, or even

environmental taxes more generally. Yet this sector has not received the same level of attention within OECD-guided negotiations, as compared to other segments of greater interest to developed countries such as the digital technology industries.

The BEPS project, which has consumed the attention of the international community for almost a decade, only marginally touched upon concerns of the resource industry. The Final Reports on Actions 8, 9 and 10 reserved only five of 186 pages to transactions involving commodities, and only a few new paragraphs were added to chapter II of the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD 2015b; OECD 2017e). This is surprising because there has been an observable growing trend among resource-holding countries towards greater reliance on income-based natural resource taxes (instead of royalties, for example). Such a change in approach ultimately exposes those countries to administrative difficulties and aggressive tax planning schemes that can lead to serious extractive revenue losses from international base erosion and profit shifting (Durst 2017a).

It is true that some tax problems affecting natural resource extraction have been discussed at the Platform for Cooperation on Tax, a forum that brings together the OECD with the World Bank Group, the International Monetary Fund (IMF), and the UN (The Platform for Cooperation on Tax 2017a; The Platform for Cooperation on Tax 2017b). However, due to the insufficiency of this work, resource-rich developing countries had to resort directly to the UN (Falcão 2018), which then elaborated the “Handbook on Selected Issues for the Taxation of the Extractive Industries by Developing Countries” (UN 2018). As much as the UN work might provide helpful guidance on the technical aspects that emerge in the extractives area, the United Nations is not the main institution coordinating tax policies at the international level. As a consequence, issues surrounding natural resource taxation remain relegated to an underprioritized position.

International Challenges

In the previous section, we identified issues specific to the socio-political reality of developing countries that work as obstacles for building sustainable tax systems. These same issues also make it difficult for them to follow what is prescribed by international organizations like the OECD, affecting in turn how much they can benefit from global tax reform

programs. Even if the domestic challenges were to be overcome, the way the international tax system was designed and how it functions in practice also deprive developing countries of important revenue sources.

Developed Country Spill-overs

Arguably, the most deleterious spill-over produced by developed countries was the intensification of international tax competition. As noted in Part I, tax competition poses revenue and fairness issues that widely plague countries due to a race-to-the-bottom effect, but poorer ones are comparatively more affected. Economic models suggest that larger economies have more to lose from tax competition, mostly because the benefits from capital inflows (that is, the tax base effect) in proportion to the revenue lost from the lower taxation of domestic capital (that is, the tax rate effect) are higher in smaller economies (Bucovetsky 1991; Wilson 1999; Keen and Konrad 2013). Yet, in relative terms, tax competition appears to generate more severe effects on the world's poorest nations for three main reasons.

First, economists have long observed the dependence of poorer nations on the corporate income tax as a share of all revenues. In developed countries, personal income tax revenues are often three to four times the corporate income tax revenues, whereas personal income tax revenues are often lower than corporate income revenues in the developing world (Bird and Zolt 2005, 1656). The corporate income tax provides a larger contribution to overall revenue in developing countries compared to its much smaller relative contribution to overall revenue in developed countries (Carnahan 2015, 176). As tax competition is primarily driven by corporate tax cuts, fiscal performance in developing countries is much more vulnerable (International Monetary Fund 2014, 7). Most estimates of the revenue losses suffered by developing countries due to tax avoidance and tax competition exceed by some distance the amount these countries receive in development aid (OECD 2010).

Second, developing countries are also more exposed to tax competition because of the tax-sensitivity of firms. Some studies indicate that multinationals' investment and profit levels in these nations are more sensitive to tax than in the developed world, making developing countries more vulnerable to capital mobility (Fuest and Riedel 2009). While the global decrease of corporate tax rates has not significantly affected

corporate tax revenues in developed countries—whether as a share of GDP or as a share of total tax revenues—it has considerably reduced corporate tax revenues in some of the poorest countries (Keen and Simone 2004).

Third, in the tax competition scenario, some types of tax incentives are likely to be more successful than others in attracting investments and generating benefits for the host country. Since designing effective tax incentives is already a challenge for well-resourced tax administrations, the risks of severe revenue leakages and negative consequences in developing countries are likely more significant (Carnahan 2015, 177).

Global North institutions such as the OECD and the European Union (EU) have historically blamed tax competition on low-tax countries by grey- and blacklisting them as “non-cooperative tax jurisdictions” (OECD 2000; EU no date). Yet, international tax competition is in significant part a by-product of tax policy choices put in place by developed country governments.

First, tax competition was made possible by the way the current international tax system was established in the 1920s, when the League of Nations commissioned a group of experts all coming from developed countries to evaluate how to avoid the problem of double taxation in cross-border transactions (Jogarajan 2018). The outcome was the system that we have today, a web of inconsistent rules frequently exploited by multinationals from those same countries. Tax policy leaders at that time did foresee that the regime would allow taxpayers to more easily engage in tax avoidance and evasion (Rixen 2011b, 212). But they were more concerned with liberalizing trade and investment, in order to export the North’s vast accumulated capital.

Second, low-income countries have oftentimes been explicitly encouraged by international organizations controlled by developed countries, like the IMF or the World Bank, to pursue policies of low taxation of capital (Genschel and Seelkopf 2016b, 69). In fact, the tax systems of many so-called “tax havens” are hardly the result of an expression of their own will, as these are “often holdovers from the colonial era” (Dean 2007). Recent changes in global tax policy condemn these jurisdictions for doing exactly what they were taught to do, in complete disregard to the social and cultural legacy of previous policy advice.

Third, some of the domestic policies advanced by wealthier countries such as the United States exacerbated the incentives for lower-income

countries to act as low-tax jurisdictions. The U.S. adoption of specific domestic policies focused on minimizing tax burdens on cross-border investment ultimately created the conditions and incentives for other countries to engage in tax competition (Christians 2010a, 265-66; Rosenzweig 2011). Once a scenario of tax competition is established, policy alternatives of less-developed countries are significantly constrained. Given the need to attract capital, these countries are left with little choice but to grant tax incentives in response to the existing competitive scene (Avi-Yonah 2001, 63). The resulting revenue losses are aggravated by the fact that the institutional design of the global tax system tends to allocate fewer taxing rights to those countries, as explained in what follows.

Misallocation of Tax Jurisdiction

The present international tax system consists of a network of bilateral tax treaties that are mostly based on the OECD Model Tax Convention. The OECD departs from the assumption that treaties are necessary to reduce or eliminate double taxation, proposing a division of taxing rights between residence (mostly developed) or source (mostly developing) countries.

Yet a residence country can mitigate double taxation by providing its residents with relief for taxes levied at source. This is why many commentators have noted that tax treaties' primary role, rather than address double taxation, is to reallocate taxing rights from source (which in the absence of a treaty would enjoy primary tax jurisdiction) to residence countries (Dagan 2000). Critics have also pointed out how treaty-based allocation rules shift tax revenues to wealthier countries with often no equivalent benefit (such as increased level of foreign investment) to poorer ones (Brooks and Krever 2015, 166; but see Zolt 2018). This has led to a change in positions among some Global North institutions, with the IMF and the World Bank now strongly advising developing countries to reconsider the advantages of entering into tax accords with developed countries (Herzfeld 2016).

On the one hand, this could be seen as an important gradual shift in global tax policy advise towards considering the revenue interests of developing countries, even if resisted by the OECD. On the other hand, it stresses the significance of the issue of lack of meaningful representation of these countries in international fora.

Underrepresentation in Global Tax Platforms

Global tax policymaking has been mainly coordinated by the OECD, under a narrow mandate (Brauner 2003; Cockfield 2006; Christians 2007; Diniz Magalhães 2018; Brosens and Bossuyt 2020). Besides its model treaty (OECD 2017f)—used in negotiations not only between its member states, but also between a member and a non-member or even between non-members—the OECD’s influence includes guidelines, recommendations, and specific tax policy reviews, ranging from transfer pricing to tax administration, from consumption taxes to exchange of information. Competing institutions have recently emerged in the tax policy landscape, such as the EU (Christensen 2019), but the OECD still enjoys a central position (Christians 2010b).

Despite so much influence, the OECD’s decision-making process has been exclusionary and opaque. Even as it seeks to include non-member in some discussions, the reasons seem to have less to do with increasing their actual participation in setting the rules than securing their engagement and fostering a public perception of inclusivity (Christians and van Apeldoorn 2018b). Participation of developing countries in global tax policymaking is mostly circumscribed to the endorsement stage, with virtually no real involvement in idea conception and negotiation.

A vivid example is the OECD’s (2019e) proposal to reallocate taxing rights to so-called “market jurisdictions”. Although this could have some positive impacts on large developing countries with a big consumer market, any gains will be more of a consequence of some economic interests aligning with those of key players than with a meaningful influence in the decision-making process. For poorer states with a small economy, lack of representation would mean that they will not be able to change the final distributive outcome. Moreover, any change in the existing rules will likely come with substantial costs for most low-income countries, such as having to agree to mandatory and binding dispute settlement procedures (Hearson 2019).

In February 2020, the OECD released some findings from an economic analysis and impact assessment, concluding that its two-pillar approach would bring greater tax revenue gains to low- and middle-income countries than to high-income countries (OECD 2020a). However, the information provided in these analyses was only partial—a webcast (OECD 2020b) and a few slides (OECD 2020c) outlining its findings—and the underlying data that

led to these results was not made publicly available. This raises questions about transparency as well as the methodology used (Christians 2020b), thus reinforcing the idea that real participation is key for global tax policies to benefit all countries.

Structural Power Imbalances

Provided that many global tax norms often harm developing countries, one could ask why developing countries enter into tax treaties in the first place (van Apeldoorn 2019). The main reason lies in the structural legitimacy deficit that pervades the transnational tax law order as a result of power asymmetries (Diniz Magalhães 2018; Ozai 2020a). Background inequalities in bargaining positions prevent less powerful countries from participating on a genuinely equal footing. At the same time, not participating is hardly a serious option for many countries. Concluding treaties and adopting OECD recommendations creates positive market expectations over other alternatives available to low-income countries. These countries are left with few options when confronted with the fear of driving foreign investments away to competing jurisdictions (Dagan 2016).

But entering into tax treaties also brings significant costs. Negotiating and administering tax treaties involve opportunity costs in terms of human resources and expenses (Thuronyi 2010, 442-43). As negotiation, interpretation, and administration is resource-intensive, tax treaty networks require highly skilled staff, which for developing countries means diverting scarce resources away from other important tax priorities (Pickering 2014, 26).

Another power-based structural issue relates to sanctions. Although many theories of international tax cooperation and competition assume a lack of hierarchy among countries, some analysts have noted that a credible threat by a great power significantly constrains competitive states (Hakelberg 2016). The somewhat arbitrary and obscure way in which sanctions and blacklists are put together in today's international tax policy landscape poses a serious problem in terms of normative legitimacy. The fact that these sanctions are the primary mechanism in place to compel compliance with global tax norms raises an additional issue as to how the powers to impose sanctions are unequal among jurisdictions. Whereas the United States, for example, might be reasonably free to ignore the power of peer pressure exerted by international organizations if threatened with

blacklisting and defensive measures, most countries are much more susceptible to these forms of sanction (Fung 2017).

A Unified Approach Between Global Tax Policy & Sustainable Development

A central piece of the new global tax policy consensus building for the digital economy is the OECD's Secretariat Unified Approach (OECD 2019c). The plan's name tries to convey the idea of a middle ground between the positions of three different groups of countries: Europe, the United States, and non-OECD members, specifically a coalition of developing countries known as the Group of Twenty-Four (G24). Despite its name, the OECD Secretariat's Unified Approach bears similarities only with the two proposals that came from OECD members, but not with the one from the G24 (Christians 2019; Gupta 2019). Furthermore, even though it was approved by Inclusive Framework members, the technical proposal was spearheaded by a tax expert from the United Kingdom (OECD 2019f).

For an approach to global tax policy to serve the interests of both developed and developing countries, it cannot be restricted to a plan designed by one single person, let alone an expert from a developed country. Nor should it include only elements of previous proposals from developed countries. Instead, it requires establishing a clear and ex-ante link between taxation and development objectives. This means creating the conditions for developing countries to be able to tax domestically, while correcting age-old flaws in the international tax system. This final section provides a roadmap for changes at both levels.

Developing Developing-Country Tax Systems

From the perspective of developing countries, global resources have to be allocated for the purposes of capacitating local tax authorities and institutions in those countries to be able to implement tax reform programs, including international standard prescriptions. Albeit incipient, the IMF, the OECD, the UN and the World Bank have started to think of ways to enhance the tax capacity of developing country governments (IMF et al. 2016). This is a laudable initiative, but it is being carried out as a parallel program via the Platform for Collaboration in Tax. Capacity-building is indeed a precondition for the effectiveness of any tax policy plan, but it requires substantive public investment. To avoid the same old approach of

having Global North experts teaching developing countries how to tax, resources that have been used in technical assistance programs would be better spent if they were allocated to fund these countries' tax administrations, so that they can build their own capacity.

Furthermore, initiatives aimed at both developed and developing countries, as the BEPS project purports to be, cannot be limited to one single tax (namely, the corporate income tax). A crucial tax topic that has not received sufficient attention is environmental taxation and, in particular, the taxation of the extractive industries. Worldwide demand for petroleum, gas and mineral resources provides a unique opportunity for resource-rich, revenue-poor countries to achieve sustainable development. Yet many of these governments struggle to tax natural resource exploitation effectively due to weak tax administrations, aggressive tax avoidance and fierce corporate lobbying. Some solutions, such as greater use of royalties (Lassourd and Manley 2015) and more appropriate transfer pricing methods (Readhead 2018), again require capacity building. Whatever the best solution, there is no justifiable reason to leave the extractive sector outside the scope of the main global tax policy discussions today.

To make things worse, the current COVID-19-driven global health and economic crisis has had disastrous impacts, especially among developing and poorer countries. As a response some scholars and experts have recently suggested reviving wartime excess profit and windfall taxes (Christians and Diniz Magalhães 2020a). But for such taxes to benefit the countries most affected by the pandemic, they will have to be coordinated under an international framework that allocates more taxing rights to those countries, lest most taxable excess profits accrue, according to current rules, to residence (developed) states. As part of a reformed international tax system—as advocated below—a Global Excess Profits (GEP) Tax would have better chances of meeting the pressing needs of less affluent nations in countering the socioeconomic effects of the coronavirus pandemic (Diniz Magalhães and Christians forthcoming).

Fixing the International Tax System

At the international level, the first step is to reckon with the fact that developed countries' practices can work as either facilitators or obstacles to taxation in other states. The responsibility of developed countries to fix the international tax system is justified for two reasons: they are the ones that

most benefit from it, and they are also better positioned to promote meaningful changes. Experts from the Global North should pay careful attention to the negative spill-overs of their countries' own domestic tax rules, especially in fuelling source-based tax competition. In this sense, they should direct their efforts towards advocating for reforms that reduce, instead of augmenting, pressures put by developed countries' tax policies on developing countries for the latter to lower their income tax rates.

Moreover, a needs-based allocation of taxing rights should be at the centre of any global tax reform project (Christians and van Apeldoorn forthcoming). Taxing rights distribution is the core issue affecting international equity as it fundamentally determines how the cooperative surplus created by numerous countries is divided among them (Christians and Magalhães 2020b). In "BEPS 1.0" and "BEPS 2.0", this issue was isolated as a stand-alone matter—respectively, in Action 1 and Pillar 1. Allocating the jurisdiction to tax (the question of "where") is not only equally relevant as solving base erosion and profit shifting (the problem of "under-taxation"), but these two issues are, in fact, co-dependent (Ozai 2020c). This has been insistently articulated by China and other emerging countries in their criticisms of the international tax system (Diniz Magalhães forthcoming).

Existing rules also fail to account for market price distortions that characteristically take place in developing countries because of development deficits in terms of proper regulation and lack of resources. These rules end up assigning most profits to either low-tax jurisdictions (favouring developed country companies) or to high-income jurisdictions (favouring developed country governments) (Christians and van Apeldoorn 2018a). A promising way to bring more revenue to developing countries would be to make the rules reflect the unaccounted value of exploitation of low-cost labour and rare natural resources and the consequent production of social risks and environmental degradation (Christians forthcoming). On top of that, the growing disagreement between governments about which economic factors should be considered relevant for sharing the international tax base requires a more fundamental consideration of the normative underpinnings of the prevailing economic rationale (Ozai forthcoming). Limitations of the current legal framework to provide satisfactory normative support for allocating taxing rights warrant the

development of alternative standards that give greater consideration to distributive justice and the development needs of less affluent nations.

Given that institutional structures for decision-making are charged with the fundamental task of defining both the problems to be addressed and the corresponding solutions, promoting effective participation is key. This could be accomplished by changing the existing processes in global tax platforms to allow adequate access to non-OECD and non-Group of Twenty (G20) experts (not only in tax but also in governance and institutional design), as well as civil society members and the public at large (Christians 2020b; Christians 2020c). It also requires eliminating “gag rules” in the agenda-setting process, opening up discussions to items that concern developing countries (Horner 2001). Finally, and perhaps more ambitiously, extra efforts are necessary to reduce the power gap that separates developed from developing countries, since otherwise, the latter will hardly be able to engage in global tax policy negotiations on a truly equal footing.

Conclusion

A critical analysis of the century-old world history of tax and development reveals that building sustainable tax systems is not about “teaching” governments how to tax, nor is it about simply designing rule-based international standards for ex-post monitored implementation. Rather, it is much more about taking seriously the underlying causes of underdevelopment arising from national and international factors, which are ultimately responsible for affecting revenue raising where revenue is most needed.

If Global North experts and institutions are genuinely committed to helping developing countries, the place to start is by undertaking a self-critique of their own countries’ practices, raising issues with how their tax systems continuously hamper the prospects for achieving sustainable development in other parts of the world. Specifically, attention ought to be refocused at the international level towards correcting historical systemic flaws, in terms of both substance and process, that ultimately impact how tax revenues are distributed among countries. At a more local level, global resources should be allocated to improve technical-administrative conditions that are essential for developing country governments to be able to effectively exercise the power to tax, without imposing on them a specific

tax model or program and with due regard to the existence of diverging tax bases and national policy priorities. Either way, without an explicit and ex-ante connection between tax policy and sustainable development goals, the chances of global tax reform projects to benefit developing nations will remain marginal.

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