A New Model of Global Governance in International Tax Law Making: An Introduction to GLOBTAXGOV Research Project

Irma Mosquera

Posted: 9 April 2018

Dr. Irma Johanna Mosquera Valderrama is Associate Professor of Tax Law at the University of Leiden, the Netherlands. Her areas of expertise are international tax law and comparative tax law in developed and developing countries.

In 2013, news media around the world highlighted a growing crisis in many states: a steady decrease in contributions to public finances by many high profile multinational companies and high net worth individuals. This decrease was associated with the ability of sophisticated taxpayers to shift otherwise taxable income and transactions out of the tax base, in a phenomenon that the Organization for Economic Cooperation and Development (OECD) has labelled "Base erosion and profit shifting", or BEPS. BEPS refers to "tax planning strategies that exploit gaps in the architecture of the international tax system to artificially shift profits to places where there is little or no economic activity or taxation". (OECD website). The result of BEPS is less tax revenue for countries and a perceived lack of fairness on the part of public opinion and small companies that multinationals do not pay their fair share.

The BEPS Project aims to provide OECD-, G20 and non-OECD/non-G20 (including developing countries) with tools to tackle tax base erosion and profit shifting by introducing 15 Actions to deal with transfer pricing, hybrid mismatches, harmful tax regimes, tax treaty abuse, among others. In addition, the OECD has included 4 of the 15 Actions as Minimum Standards which are required to be implemented by countries that participate in the BEPS Inclusive Framework. Minimally, the standards that should be implemented are countering of harmful tax practices (Action 5), preventing of treaty abuse (Action 6), re-examining transfer pricing documentation including country by country reporting (Action 13), and enhancing resolution of disputes (Action 14). More than 110 countries including OECD, G20 and developing countries have committed to the implementation of these BEPS 4 Minimum Standards. The countries participating in the BEPS Inclusive Framework have a peer review schedule for the implementation of the BEPS 4 Minimum Standards, and if these Minimum Standards have not been implemented, the OECD will give a negative review which may also have consequences for the country.

Due to the political support of the G20, the OECD has been empowered to develop common responses to international tax challenges reflected in the 15 Actions of the BEPS. The United Nations (UN) has been left outside mainly due to the failure of developing countries and civil society to upgrade the UN Tax Committee to an intergovernmental body at the July 2015 Financing for Development Conference. This situation has generated tensions around three points: on the legitimacy of the decision-making process of BEPS on the fairness of the contents of BEPS with respect to developing countries; and over the different needs of developing countries to deal with base erosion and profit shifting which goes beyond the scope of the BEPS Project.

In order to solve some of these tensions and to assist and coordinate the cooperation regarding international tax issues for low-income countries, in April 2016, the International Monetary Fund, World Bank, the UN and the OECD launched the Platform for Collaboration on Tax. One of the Platform's main tasks is to develop toolkits to assist developing countries in implementing efficiently BEPS Action items and addressing additional specific (non-BEPS) tax issues.

At European Union level one multilateral initiative is the introduction of the EU anti-avoidance package. This package aims to ensure fair competition whereby companies are required to pay tax wherever they make their profits in the EU. This package includes an anti-avoidance Directive (ATAD) based to a great extent on the BEPS Project which has been approved by the Economic and Financial Affairs (ECOFIN) Council in June 2016. In this package, the EU Commission also introduced the 2016 EU Communication on an External Strategy which addresses the EU's approach towards third countries in respect of good governance and fair tax competition (*COM (2016) 24: 5*). The External Strategy has also raised tensions about legitimacy and fairness since third countries are required to adhere to the EU standard of good governance and fair competition as a condition to conclude economic and trade agreements with the EU or with EU countries.

Another development that has created tensions in the EU and with third (non-EU) countries are the investigations by the European Commission of the rulings concluded by Apple, Google, Amazon, Starbucks, Fiat, McDonalds with tax administrations in several European countries (e.g. the Netherlands, Luxembourg, Belgium, Ireland). According to the Commission these rulings resulted in undue tax benefits under the EU state aid rules which affect the level playing field of business in the EU. These investigations have motivated an unprecedented white paper from the US Department of the Treasury which is very critical of the EU Commission approach which departs from prior EU Case Law and Commission Decisions and undermine the principle of legal certainty for companies by seeking retroactive recoveries. (*US Treasury White Paper, August 2016*).

These initiatives of international tax law making and the tensions between countries call for the articulation of a new framework of global tax governance that is legitimate and based on considerations of fairness for all countries participating, including developing countries. In this context, the overall aim of the GLOBTAXGOV research project is to assess the feasibility and legitimacy of the current model of global tax governance and the role of the OECD and EU in international tax lawmaking. This research project has received funding from the European Research Council (ERC starting grant) to investigate the implementation of the international standards developed by the OECD-G20 and by the European Union in 12 countries: The United States, Mexico, Colombia, Ireland, Spain, the Netherlands, India, South Africa, Nigeria, Senegal, Singapore, and Australia.