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Who is really at the table when global tax rules get decided?

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In 2016, the Organisation for Economic Co-operation and Development (OECD) established a so-called Inclusive Framework, which was mooted as a place where all countries could join discussions on international tax rules. This was to spearhead the implementation of the package on Base Erosion and Profit Shifting (BEPS), which had just been agreed by the OECD and the Group of 20 (G20), and it was to be the forum where any further changes to global tax rules would be negotiated.[1] This forum is now a central part of the discussion about rules in response to the digitalised economy. However, there are reasons to question whether the forum is as inclusive as the name suggests, and whether the forum really is the place where the rules are being negotiated.

Inclusive Framework?

The Inclusive Framework allows interested countries to become members, but not without conditions. In particular, the countries have to commit to following the OECD/G20 BEPS agreements from 2015.[2] This package of agreements, which runs to almost 2000 pages, was negotiated through a process from which over 100 developing countries were excluded.[3] Each member of the Inclusive Framework must also commit to paying a yearly membership fee of around 20,000 euros to the OECD secretariat, which leads the process.[4] The OECD, which is also known as the "rich countries' club" has a membership of 38 primarily developed countries[5], and it is not uncontroversial that it is this body that hosts the Inclusive Framework.

As of October 2021, 123 countries have chosen to become members of the Inclusive Framework.[6] In comparison, the United Nations (UN), which is considered a near-universal body, has a membership of 193 countries as well as two permanent observers.[7] In other words, more than one third of the world's countries are not at the table in the Inclusive Framework.[8]

The differences become more extreme when looking at specific subgroupings of countries. For example, out of the 54 countries in Africa, less than half are members of the Inclusive Framework.[9] For the group of Least Developed Countries (LDCs), 35 out of 46, meaning over 75 per cent, are not members.[10] Meanwhile, for both of these groups, 100 per cent are members of the UN. Furthermore, through their many years of engagement with the UN, they are now established with permanent representatives, and organised in their respective negotiating groups – the African Group[11] and the LDC Group.[12] These groups play a key role in strengthening the capacity and collective impact of their members in UN intergovernmental negotiations.

While the number of countries that are members of the Inclusive Framework is 123, the total number of members is 140.[13] The explanation for this difference is that over 10 per cent of the Inclusive Framework members are jurisdictions rather than countries.[14] This includes, for example, 10 overseas territories and crown dependencies of the United Kingdom, such as the Cayman Islands, Bermuda, Jersey and the British Virgin Islands.

Global agreement?

In the discussion about the inclusiveness of global tax decision-making, it is vital to not only consider how many countries have agreed to a specific decision, but also how many have not. In this context, the fact that the Inclusive Framework membership includes jurisdictions that are not countries gives rise to some confusion. In July 2021, following the issuance of an Inclusive Framework statement regarding the future of the global tax system, the Secretary of the Treasury of the United States (US), Janet Yellen, sent out an announcement stressing that the Inclusive Framework statement was an "agreement by 130 countries".[15] However, while still a significant number, the agreement was in fact by less than 120 countries, since out of the 122 countries that were members of the Inclusive Framework at the time, several, including large African countries such as Kenya and Nigeria, chose not to support the agreement.[16]

Even in the case where all Inclusive Framework members do reach an agreement, and despite the fact that the framework includes a high number of countries, it is important to keep bearing in mind that over one third of the world's countries are not participating in the negotiations. It is also vital to note that developing countries are strongly overrepresented among the countries that are absent from the Inclusive Framework negotiations, and that half of the absent countries fall in the category of least developed countries.[17] Therefore, it would be incorrect to consider decisions by the Inclusive Framework "global agreements", as for example the countries in the Group of 7 (G7) seem to do.[18]

Rule makers and rule takers

In 2016, when the Inclusive Framework was set up by the G20 and OECD, it was stressed that all members should be participating "on an equal footing".[19] The reality of this was questionable from the onset, since no country would be able to become a member unless they signed up to implementing the OECD/G20 BEPS package.[20] Since this package was so central to the overall agenda and outline for the Inclusive Framework,[21] it could be argued that the members were – from the very beginning – divided into those that had made the rules, and those that had accepted to take the rules as they were.

In the negotiation about new global tax rules in response to the digitalised economy, inequalities in the roles of countries have also appeared. Firstly, the entire negotiating process was, as in the case of the BEPS negotiation, mandated by the G20 and led by the secretariat of the OECD.[22] While all members of the framework are, at least on paper, equal, this puts more political power in the hands of the members of those two bodies. Especially in first half of 2021, the G7 also emerged as a forum where a small group of rich countries can make decisions ahead of the Inclusive Framework meetings, which then seem to be passed on to be tweaked and slightly adjusted, but not fundamentally altered. The key example of this is the decisions that were made by G7 finance ministers and leaders in June 2021,[23] which seemed to have put a strong steer on the outcome of the Inclusive Framework meeting in July 2021.[24]

Ninety per cent of the world's countries are not members of the G20, and even fewer are members of the G7. Therefore, the vast majority of the world's countries are not at the table when these bodies make decisions. Within the G7, it is also clear that the US has a very powerful role, and the G7 outcome from June 2021 had a very significant overlap with the proposals launched by the US government in Spring 2021.[25]

In theory, the Inclusive Framework operates with consensus, and each member should therefore be able to reject a proposal for a decision. This was, however, brought into question when Pascal Saint-Amans, Director of the OECD's Center for Tax Policy and Administration, gave an interview where, among other things, he described the decision-making process at the Inclusive Framework in the following way: *"Now, we are pragmatic. If you have all the big guys and a significant chunk of the small guys saying 'yes we [should] do it,' then the thing happens. Everyone must be involved, though"*.[26] In this context, it is also worth noting again that the July 2021 statement by the Inclusive Framework was not agreed to by all members.[27]

An approach where smaller clubs of rich and powerful countries steer the outcome of Inclusive Framework negotiations raises some specific concerns. Especially for smaller and less rich and powerful countries that are members of the Inclusive Framework, but not of the powerful decision-making clubs, it brings the risk that they will be pressured into agreements that do not reflect their views and interests. It also brings the risk of generating outcomes of the Inclusive Framework negotiations that are biased in favor of a particular group of countries. Civil society organisations (CSOs) have previously raised concerns that inputs from developing countries were not given proper consideration nor reflected in the negotiating texts developed by the OECD secretariat as inputs to the Inclusive Framework.[28] At the same time, CSOs have flagged that when it comes to the question of which countries will have to right to tax the profits of multinational corporations, the new rules that are being sketched out by the G7 and the Inclusive Framework include biases that favor the interests of richer and larger countries, whereas in particular smaller developing countries will be disadvantaged by these biases.[29] This has led to several civil society coalitions raising strong concerns, and some, especially from the Global South, calling for a rejection of the proposals put forward by the G7, OECD and its Inclusive Framework.[30]

The alternative – a UN-led intergovernmental process and convention

There is an obvious alternative to the current international governance on global tax issues, and that is to let the UN be the forum where global tax standards are set. Leading intergovernmental negotiations on global issues is a key part of the UN mandate,[31] and is the role that the body plays on numerous other issues, including on climate change, human rights, gender equality and sustainable development goals.

For over a decade, the Group of 77 (G77), which is a coalition of over 130 developing countries[32], have raised concerns about the lack of an inclusive intergovernmental forum for tax cooperation and called for an intergovernmental UN tax body to be established.[33]

In 2011, the Secretary-General of the UN published a report outlining options for strengthening international tax cooperation. This included several proposals for how an intergovernmental UN tax body could be designed with the aim of creating a "*global, all-inclusive body for international tax cooperation, which would further this cooperation in a fair and balanced way by offering the developing countries a full "seat at the table", and working with others active in this area*.". The report also stressed that "*Because of its universal membership and legitimacy, the United Nations is the most appropriate forum to host this body.*"[34] In 2015, as part of his Synthesis Report on the Post-2015 Agenda, the Secretary-General stressed that: "*Member States should consider (…) the establishment of an intergovernmental committee on tax cooperation, under the auspices of the United Nations.*"[35]

The key reason why such a body has not yet been established is due to resistance from OECD countries. During the Financing for Development Summit in Addis Ababa in 2015, the G77 made the call for a UN intergovernmental tax body a key demand, but it was once again rejected by OECD countries.[36]

The resistance from some OECD countries has, however, not made the discussion go away, and in fact, some countries have expanded the proposal to include a UN Convention on Tax. During a UN high-level meeting on combating illicit financial flows in May 2019, Senegal, speaking on behalf of the African Group, also called for "*the upgrading of the existing committee of experts in tax matters to a universal intergovernmental body under the auspices of the UN with a mandate to deal with all aspects of [illicit financial flows].*" In the statement, Senegal also highlighted that the African Group believes existing UN tools do "*not sufficiently cover illicit flows emanating from tax avoidance, trade misinvoicing, profit shifting and other illegal commercial activities, especially those by multinational enterprises,*" and added, "*We therefore call for a separate international convention on tax. We believe that such a convention will serve as the backbone for our envisioned upgraded international tax committee, and will assist in tackling all aspects of [illicit financial flows].*"[37]

In 2020, the African Group reiterated this call on several occasions, and in September 2020, the idea of setting up an intergovernmental UN tax body and negotiating a UN tax convention was included in a "Menu of Options" produced under the leadership of the UN to consider how the international community could respond to the Covid-19 crisis.[38]

In February 2021, the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (the FACTI Panel), which had been set up by the Presidents of the UN General Assembly (at the time Nigeria) and the President of the UN Economic and Social Council (at the time Norway) issued its final report.[39]

Among its key recommendations were:

- Recommendation 2 (on Legitimacy): International tax norms, particularly tax-transparency standards, should be established through an open and inclusive legal instrument with universal participation; to that end, the international community should initiate a process for a UN Tax Convention.
- Recommendation 4A (on Fairness): Taxpayers, especially multinational corporations, should pay their fair share of taxes. The UN Tax Convention should provide for effective capital gains taxation. Taxation must be equitably applied on services delivered digitally. This requires taxing multinational corporations based on group global profit.

The FACTI Panel's report also stressed that "*The international community must ensure that the norms they develop have broad legitimacy by making sure that they are framed and negotiated in an inclusive manner. That has not been the case for international tax norms*" and that "*Proposed new rules on digital economy taxation at the OECD are excessively complex and not adapted to developing countries' needs.*".

Conclusion

Non-inclusiveness and illegitimacy continue to be key concerns in relation to the negotiation of global tax rules. Despite the name of the forum, over one third of the world's countries are not members of the OECD-led Inclusive Framework. Developing countries are strongly overrepresented among the countries that are not at the table, and approximately half of those that are absent fall in the category of least developed countries. Meanwhile, the role of G7 in global decision-making has become prominent, and there are strong concerns about the fact that the new global tax rules, which are currently being negotiated at the Inclusive Framework, seem to be biased towards the interest of the richest and most powerful countries.

The issue of lack of legitimacy and biases in international tax rule making is a very central part of the crisis of the global tax system. Global standards written by clubs with limited membership face great challenges when it comes to global implementation, and face a higher risk of individual countries, or groups of countries, introducing rules that are not in line with the standards. This undermines the chances of achieving a stable, effective and coherent global tax system. Furthermore, global tax rules that are primarily designed by, and in the interest of, the richest countries will fail to deliver on the demand for a fair global tax system, and thus continue to be subject to instability and calls for fundamental reforms.

Endnotes

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