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Developing Countries and the Contemporary International Tax System: BEPS and other issues*

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1. Introduction

This policy brief addresses international tax cooperation in an interdependent world, the issues that are present in the Base Erosion and Profit Shifting (BEPS) Project, and those that, in my perspective, are the most important for developing countries[1]. Following that, the brief considers the Brazilian approach to those issues. It will also verify the issue of regional cooperation *vis-à-vis* international organizations.

2. The Contemporary International Tax System[2]

It is important to look at the structure of the contemporary international tax system from the perspective of developing countries, through a critical approach. Because of sovereignty, each country has its own tax system, and most of them are designed considering the three classical bases of taxation: income, consumption, and property.

As the extreme process of globalization in the last decades of the 20th century expanded towards the 21st century, the development of the international market, and the enormous ease and increase of international financial transactions led to an unprecedented interconnection of tax systems. In this context, along with the historical approach of the model conventions on double taxation, some international organizations, such as the Organisation for Economic Co-operation and Development (OECD) and the United Nations (UN), stepped up by installing working groups on tax matters. But such organizations are not always concerned about the issues of developing countries. The OECD, for instance, is controlled by rich and developed countries and comes naturally with the intent to preserve their tax bases, according to their interests. Which is quite natural, that is to say, no one can expect it to be different.

The design of the contemporary international tax system facilitates wealth concentration, as has been extensively discussed by economists and non-governmental organizations (NGOs). This aspect has, as its consequence, the increase in global inequality. Such massive wealth concentration triggers other crucial issues as political and social problems, compromising the international equilibrium and it is now putting at risk even the most stable democracies, as has been pointed out by Joseph Stiglitz[3]. Moreover, organized civil society, through several non-governmental organizations, has been trying to help to address these issues on international taxation. For instance, the Tax Justice Network, OXFAM, and Christian Aid, which aim to promote a fairer tax system, focus their efforts on the issues of developing countries.

Another problem is the "big players", which are huge transnational companies and high net-worth individuals, who take advantage, many times aggressively, of the loopholes of tax systems and the benefits offered by many countries around the globe to attract investments to their jurisdictions. This results in the reduction of companies' tax burden while eroding the countries' tax bases. This scenario called the attention of all countries. The OECD thus started initiatives such as the harmful tax competition report, the tax transparency forum, and more recently, jointly with the Group of Twenty (G20), the Base Erosion and Profit Shifting (BEPS) project.

All this considered, in the context of the contemporary international tax system, there are some problems affecting developing countries more severely, such as international harmful tax competition, tax havens, transfer pricing, tax deferral by controlled foreign corporations (CFCs), treaty shopping, thin capitalization, digital transactions (digital economy), and capital gains in indirect participation trans-

Abstract

This policy brief addresses the design of international taxation and tax cooperation in the context of issues presented in the Organisation of Economic Co-operation and Development (OECD)/Group of Twenty (G20) Base Erosion and Profit Shifting (BEPS) Project. It further considers their significance for developing countries and provides the Brazilian approach to those issues. The brief concludes by exploring the importance of regional cooperation *vis-à-vis* international organizations and highlights relevant considerations for developing countries engaging with the contemporary international tax system.

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fer.

Looking towards building a better society, governments need enough revenue to implement public and social programs, to improve their Human Development Index and wealth redistribution. Thus, it is important to analyse these international tax-related problems in the perspective of developing countries, which have their specific needs, and specific problems.

The characteristics of developing countries, and not just those of developed countries, must be considered when creating and implementing international instruments. To promote the desired economic and social development, countries need to design and maintain efficient tax systems. In line with that, one aspect that must be highly considered is foreign investment. In this case, tax benefits have a major role. It is important to highlight that attention must be directed to the destination of this revenue (for example, investments should be directed to activities that may result in more efficient and measurable results, such as infrastructure and innovation). This is a crucial aspect that is also related to an important problem of the contemporary international tax system, that is harmful competition and the so-called "race to the bottom," which must be properly addressed.

The relation between the tax system and development has been on the agenda for a long time. However, there are some countries which have an insufficient tax base with very few alternatives and therefore must choose wisely on how to finance their development in a sustainable way. Furthermore, when analysing the tax systems of developing countries, it is important to look at the tax system and the fiscal benefits in general; how they impact the economic and social development and how they interact with the contemporary international tax system.

The interaction between countries' tax systems and the contemporary international tax system results in positive and negative effects, depending on the way each system is designed. It is essential to a country's tax system to be organized in a way that allows it to be inserted in the international market and interact positively with the contemporary international tax system. But having it clear that the mainstream of the contemporary international tax system is controlled by interests that are not necessarily in line with developing countries´ needs, one must also consider other factors, such as institutional stability, and predictability.

On the downside, it is notable that not all developing countries have administrative structure or technical expertise to deal with complex subjects involving international taxation matters, resulting in tax base erosion and profit shifting. And because of their poorly designed tax systems (i.e. deficient tax laws, lack of staff and expertise to deal with complex matters), developing countries might be more exposed to the issues that surround the contemporary international tax system, sometimes described in the literature as "tax termites". In this context, other problems arise, such as the inefficient monitoring of illicit money flows and transnational crimes. Again, it is not only a question of the normative system, meaning the tax law system itself.

3. BEPS and Developing Countries, and Some Aspects of Brazilian Practices[4]

The importance of the BEPS project, which in fact should be called 'anti-BEPS' project, is so noted that some people are splitting the history of modern international taxation in a pre-BEPS era and the post-BEPS era.

From the beginning of this century, one very important issue which has been raised in importance and became a sort of consensus is that of tax transparency; in the sense of access to information on taxpayers' operations and the beneficial owner of such operations. In the last century there was a perception regarding harmful tax competition related to "harmful tax practices" (a non-precise concept) being linked to tax transparency; also in the sense of access to information.

However, for several factors, such as global exposure to terrorism, human trafficking, drug trafficking and similar illegal actions, the issue of tax transparency became very strong. As a consequence the 'Global Forum on Tax Transparency' became the 'Global Forum on Transparency and Exchange of Information for Tax Purposes' - an important multilateral international agency dealing with these issues, which became more and more important, especially after the world financial crises of 2007-2008. All governments needed to know the beneficial owners of the deposits and other financial assets. The Global Forum, despite the fact that it was born under the OECD structure, was transformed into an "equal footing" forum, with strong participation of developing countries, including low-tax small jurisdictions. One can say that the need for information exchange and tax transparency became a consensus, maybe the only one in the contemporary international tax system. Indeed, in the BEPS Project, Action 13 (information exchange regarding transfer pricing) is part of the so called minimum standard of BEPS.

The BEPS project comprises 15 Actions, which are briefly addressed below, along with how they relate to the Brazilian experience when appropriate, and other global aspects.

Action 1 - Addressing the tax challenges of the digital economy.

This is an issue that has been postponed since the 1990s. The issues that surround the digital economy are important to all countries, but the outcome of the BEPS report is disappointing. The rich countries, where the high-tech companies are located, do not want to touch this issue in depth. Now we have the cryptocurrencies issue becoming more and more important. The problem with digital economy goes a little beyond the mere allocation of taxing rights, because we are starting to face situations such as wealth in the cloud, that is to say wealth with no relation to any country. But we must keep in mind that at

the end of the ownership chain there will always be a human being, who is a citizen of a given country, and that unilateral solutions will always be full of loopholes. When the transaction involves tangible property, the issues can be addressed through traditional tax tools. Now, however, the valuable transactions increasingly involve more and more intangibles. The only solution to tackle the hard issues of the digital economy is a multilateral convention, and maybe a tax on international transactions, under an international tax authority, which should be shared among the countries. This a very complex issue, and developing countries must be involved in the discussions of this issue to not be left behind in the final solution (or solutions).

Action 2 - Neutralizing the Effects of Hybrid Mismatch Arrangements.

This type of arrangements, or tax planning, results in double non-taxation or double tax deductions. The problem is magnified when country legislation allows for transparent ("pass-through") entities, because it eases tax treaty abuse. In this case the general guidance of the Report on Action 2 and the measures proposed in the multilateral convention (Action 15) are a reasonable solution for the case of treaty abuse.

While not suggesting that the Multilateral Convention as a whole is a good option, each country must look at its own tax system and how this issue affects it, in order to propose changes in legislation. Brazil does not face considerable problems with this aspect, mainly because Brazilian legislation does not allow transparent entities.

Action 3 - Designing of Effective Controlled Foreign Company Rules.

While this is a very well-known issue, if a country does not have resident multinational companies doing business abroad or adopts territorial taxation, it is not that important. However, most countries have companies operating abroad through subsidiaries, associated enterprises or branches, which trigger the issues. While Brazilian CFC legislation used to be very strict (for example, there was no distinction between active and passive income), it was changed in 2014. Before that, any profit made abroad would be taxed in Brazil. The legal definition of controlled and associated enterprise was very well delineated (and still is). The changes in 2014 made it more flexible as the Brazilian Supreme Court decided that the law could not tax the profits of associated enterprises attributable to a Brazilian associated company (unless the foreign company is resident in a tax haven or is a controlling company). Brazilian legislation goes beyond BEPS recommendations, and is being criticized for its negative impact on the competitive advantage of Brazilian companies operating abroad.

Action 4 - Limiting Base Erosion via Interest Deductions and Other Financial Payments.

This is a very important aspect for developing countries that are subject to foreign capital allocation and the interest payment, instead of dividends after tax, which may drain the tax base. The report of this Action gives information on how to address the problem limiting the deductions. Brazil's approach to this problem is also very tough. Interests are subject to 15% withholding taxation which is raised to 25% on any interest payments to residents in tax havens; interests are subject to transfer pricing rules based on an interest rate related to the money market (a sort of sixth method for loans and financial instruments). In addition, any payment of interest to a resident in a tax haven (or entity under a preferential tax regime) will also be subject to transfer pricing rules and application of thin capitalization rules, which are stricter if the lender is located in a tax haven. Deduction of interest payments to tax havens are submitted to strict scrutiny to allow deduction. The Brazilian approach is quite interesting and efficient, and restrictive of profit shifting.

Action 5 - Countering Harmful Tax Practices More Effectively, Considering Transparency and Substance.

This issue is controversial as the recommendations to tackle the problem (which may lead to the so-called "race to bottom") are controversial in some respects. One practice is to decrease the tax rate in general; another is to promote actions to attract capital by implementing special tax regimes. Many developed countries use this strategy. The problem is when the beneficial regime is used only to shift profit, with no economic improvement. The Brazilian tax system adopted a list of tax havens and preferential tax regimes of other jurisdictions that triggers special tax treatment, such as higher withholding rates and transfer pricing rules.

Action 6 - Preventing the Granting of Treaty Benefits in Inappropriate Circumstances.

This is an issue that affects more those countries with an extensive net of treaties. However, most countries, even developing countries, have at least a bunch of tax treaties. The report and suggestions from Action 6 are fine in terms of proposals (especially the principal purposes test (PPT) and limitation-on-benefits clauses), because they effectively make it more difficult for taxpayers to take advantage of treaty shopping schemes. However, the use of a PPT clause may pose some difficulties in practice because of its subjectivity; the same that one finds when applying General Anti Abuse Rules. The aim of double taxation avoidance agreements is to grant relief from double taxation but not to induce double non-taxation. This issue is important, but it does not represent a challenge for developing countries in particular, except for the subjectivity of PPT.

Action 7 - Preventing the Artificial Avoidance of Permanent Establishment Status.

This is also an important issue because the artificial avoidance of permanent establishment (PE) status without appropriate taxation at source will result in profit shifting. When it comes to tax treaties, the issue is still important, and the proposals of Action 7 may improve tax base pro-

tection. However, when taxation at source is strong and extends to all type of payments this issue tends to be less important. In Brazil this issue is not a source of dispute. However, e-commerce and the digital economy will bring new issues regarding the concept of PEs.

Actions 8, 9, and 10 - Transfer Pricing (the three actions considered together as related to Intangibles, Risks, Capital High-Risk Transactions); and Action 13 - Transfer Pricing Documentation and Country-by-Country Reporting.

These Actions relate to the most important issue of the contemporary international tax system. Transfer pricing (TP) is very important to developing countries because it is the easy way to transfer profits from one jurisdiction to another, although it is subject to complex discussions.

The rules are complex, with the prevailing methods coming from the OECD, the so-called Guidelines, and more recently the UN Transfer Pricing Manual for developing countries, which is an initiative aimed to help developing countries to apply such methodologies. However, the UN Manual also brings some different country practices, especially Brazilian methodology regarding the use of fixed margins, which is discussed here. The BEPS project also resulted in an update of the OECD Guidelines.

The value formation issue involves the world of transfer pricing and there are many ongoing discussions regarding aspects which are more related to developing countries, such as saving location and market value. Traditional tools of transfer pricing need to be updated to address intangibles and other transactions (such as low value intra-group services and capital cost allowance), and the BEPS action dealt with that under the OECD approach (arm´s length principle). A different result was the acceptance of the sixth method which was not developed under the OECD approach, but by non-OECD countries, such as Argentina and Brazil.

Action 13 is very important because information is necessary to look at the transactions as a whole and identify the related parties, as well as where the profits arise in and where they go to. It is also under the consensus of the need for information exchange.

As for the Brazilian approach to transfer pricing, one can say that the BEPS would not affect the Brazilian approach too much. Some aspects of the Brazilian approach on transfer pricing are as follows:

- TP Regulations in Brazil apply to juridical persons (companies) and individuals when performing international transactions. Transactions with royalties and the remuneration for the transfer of technological know-how are not subject to TP Regulations in imports – this is very important because Brazil does not face the challenge of intangibles. However these operations are subject to limited deduction. Transactions that are subject to TP adjustments include: (1) imports and exports of goods, services, and rights with related parties; (2) payments or credits for interest paid or received on international loans. The definition of related parties is very broad. Brazilian TP regulations also apply to operations performed by individuals and legal entities in Brazil with any individual or legal entity, residing or domiciled in a low tax jurisdiction, and operations performed with persons entitled to privileged tax regimes in a foreign jurisdiction, regardless of whether the latter is a related part. In addition, this rule also applies to non-transparent jurisdictions. Brazilian legislation seeks to adopt the arm's length principle. The methods are traditional transaction methods - comparable uncontrolled price method (CUP), cost plus method (CPM) and resale price method (RSP) (with different margins for different economic sectors). The transactional profit methods (the profit split method and the transactional net margin method (TNMM), both present in the OECD TP Guidelines) or formulary apportionment are not allowed. Regarding the CUP, goods that are considered commodities are subject to the sixth method based in market prices as a comparable. About the cost plus and resale price methods, instead of making use of comparable transactions, the law established fixed margins for gross profits and markups. This aspect is very important because it means simplification and predictability.

- It is also important to point out that those margins may be modified by an Act of the Minister of Finance, *ex officio*, or under a request presented by the taxpayer or taxpayer association.

- On the other hand, taxpayers may use the method that better fits (or works) for the operations (best method approach does not apply), except for operations with commodities where it is mandatory to use the sixth method. There are special rules for loans, for which basic rates are determined by the London Inter-bank Offered Rate (LIBOR) in US dollars and Brazilian bonds have fixed rate depending on the situation.

- Considering the simplicity of the Brazilian methodology, and by weighing all aspects, the conclusion is that for developing countries the methodology adopted by Brazil is highly effective and efficient. Two aspects that demonstrate the efficiency of the methodology: the low cost it poses to tax administration and taxpayers, if other countries are considered; and the low number of tax disputes involving transfer pricing disputes, considering other tax issues.

Action 11: Measuring and Monitoring BEPS.

It is a procedural issue, as tools to take decisions. It is important to all countries in general. Everybody needs data. We are going to see if it is consistent or not.

Action 12: Mandatory Disclosure Rules.

It is an interesting approach which may be useful to all countries. However, its implementation may face difficulties related to the law system of each country and cultural aspects. In Brazil, a provisional measure (a sort of bill of

law with application upon edition) regulating the mandatory disclosure procedure was rejected by the Congress.

Action 14: Making Dispute Resolution Mechanisms More Effective.

This action is an action under the perspective of the taxpayer. Of course, the taxpayer has the right to have the disputes timely resolved. However, this action brings an important aspect, that is the recommendation on arbitration. The problem of arbitration or mandatory arbitration is that the arbitrators will have the tax culture of developed countries (taxation at residence) and it will result in a bias in the arbitral decisions. Brazil has not adopted tax arbitration.

Action 15: Developing a Multilateral Instrument to Modify Bilateral Tax Treaties.

This instrument brings some of the preceding discussions. However, the instrument itself is problematic. It is an innovation in terms of a multilateral treaty, but maybe the best way to implement some of the BEPS achievements is by means of renegotiating the double taxation avoidance agreements (DTAAs). It is because the way the Multilateral Instrument is applied may generate lots of doubts on what is in force in relation to each country and other issues; thus it will trigger interpretation disputes. Brazil has not signed it yet.

4. Other Aspects

Initiatives such as the Annual Forum on Developing Country Tax Policies and Cooperation and the South Centre Tax Initiative, under the leadership of the South Centre, are very important, because it brings the perception that countries, especially developing countries, have different needs, different cultural backgrounds, different tax regimes and tax laws. These differences reflect in the tax system and how it interacts with the contemporary international tax system. In other words, there is no one-size-fits-all solution. One thing is harmonization and implementation of some measures related to some consensual issues. Another very different thing is the uniformization of tax systems and legislation; and how they interact with the contemporary international tax system. Even the most powerful economy of the world, the United States of America, recently changed its tax system, not to make it closer to the "consensus", but to perceive economic goals that are in line with their economic interests, which are not necessarily in line with other countries' interests.

Developing countries thus must rely on other successful developing countries' practices and be cautious when demanded to reform their tax system to be more aligned to what developed countries do.

Another important thing is the role of international organizations and associations. We have the UN Committee, OECD (Center for Tax Policy and Administration), regional tax organizations such as the Inter-American Center of Tax Administrations (CIAT) and the African Tax Administration Forum (ATAF), and the NGOs; sometimes with the same focus on specific issues of developing countries but acting separately, which is a waste of scarce resources. The South Centre could work as a hub for such initiatives, or at least some of them which are more in line with the Centre's institutional targets.

On transfer pricing, developing countries must focus on simpler methodologies and consider adopting the "sixth method" (based on the prices of commodities in the international stock markets), which is also applied to commodity imports. In respect of controlled foreign corporations it is recommended that developing countries have an effective CFC rule, even when not having many multinational companies installed in their jurisdictions. Another important point is the negotiation of treaties for the avoidance of double taxation, which must be concluded with countries with investment potential and having specific and general anti-abuse clauses. Concerning thin capitalization, the adoption of rules based on the percentage of the debt related to net worth is more efficient. Besides, it is necessary to control the rate of interest paid through transfer pricing rules. About the digital economy's transactions of intangibles, the best possibility to diminish its negative impact would be a multilateral international agreement imposing taxation at the place of consumption. Regarding capital gains in indirect participation transfers (c*apital gains* arising from *indirect transfers* of *participating* interests arising abroad but related to assets located in the country), it is important that developing countries' legislation addresses the taxation of these operations adequately. Transactions with tax havens must always be treated as being performed between related parties, and in this situation, withholding tax rates may be increased. Low-tax jurisdictions must receive specific treatment to avoid tax base erosion, observing the use of several different measures.

Finally, other important considerations: (i) taxation over consumption is regressive, resulting in wealth concentration, and is a problem that must be addressed; (ii) adopting a value-added tax (VAT) for taxing consumption is recommended; (iii) tax benefits offered to multinational enterprises must be avoided if not extended to local companies; (iv) profit taxation of the extractive industry may be problematic, needing special attention; and (v) developing and developed countries must align their efforts to address the excessive global wealth concentration, which might result in an international tax over assets and internet financial transactions, and the establishment of an international tax authority.

5. Final Remarks

There is an urgent need for international coordination of tax policies, but close attention must be paid to the differences between developed and developing countries. The adoption of these recommendations could lead developing countries to a fairer relationship with the contemporary international tax system. Additionally, developing countries must focus their efforts on contemporary international tax system problems, having practicality and predictability as goals. This is important because any conflict between developing coun-

tries' normative tax system and the norms used by rich and developed countries is more likely to be resolved from the point of view of the taxpayer of the rich countries (countries from which the contemporary international tax system rules come from).

For these reasons and amongst others, initiatives such as the Annual Forum on Developing Country Tax Policies and Cooperation and the South Centre Tax Initiative under the leadership of the South Centre, are very important.

Endnotes:

[1] When mentioning developing countries, the text also refers, in general, to less and least developed countries.

[2] This section of the paper is based on the article: Marcos Aurelio Pereira Valadao, "O Sistema Tributário Internacional Contemporâneo sob a Perspectiva dos Países em Desenvolvimento: Análise Crítica," *Nomos (Law Review)*, vol. 37, no. 1 (2017), pp. 147-198. Available from www.periodicos.ufc.br/nomos/article/view/20101/30830 (text in Portuguese, English title: The Contemporary International Tax System from the Perspective of Developing Countries: A Critical Analysis).

[3] Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (New York, W. W. Norton & Company, 2013), pp. 148-182.

[4] This section of the paper is based on the book chapter: Marcos Aurelio Pereira Valadao, "O Brasil e a iniciativa BEPS", in *Desafíos y Primeros Avances del Proyecto BEPS en Latinoamérica*, 1st ed., vol. 1, Gemma Patón García, ed., (Lima, Peru, Thomson Reuters, 2016), pp. 93-118 (text in Portuguese, title in English: Brazil and the BEPS Initiative), and on the paper: Marcos Aurelio Pereira Valadao, "The Relationship Between Transfer Pricing Law in Brazil and BEPS Actions 8, 9, 10 and 13", *Bulletin for International Taxation*, vol. 70 (2016), pp. 36-59.

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